Issues Paper No. 2 of 2023

WILLS, PROBATE AND ADMINISTRATION ACT REVIEW IN VANUATU

(A Law Reform Commission Initiative)

About the Vanuatu Law Reform Commission

The Vanuatu Law Reform Commission was established on 30 July 1980 by the *Law Commission Act* [CAP 115] and was finally constituted in 2009. The office is currently located at the Law Reform House, Edmond Colardeau Avenue, Independence Park, Port Vila.

Address:	Vanuatu Law Reform Commission PO Box 3380, Law Reform House, Edmond Colardeau Avenue, Independence Park, Port Vila, Vanuatu
Telephone:	(+678) 33620 or (+678) 5333160
Email:	lawcommission@vanuatu.gov.vu

Making a submission

Any public contribution to an inquiry is called a submission. The Vanuatu Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The purpose of this Issues Paper is to ask for your views on the issues with the current laws on Wills, Probate and Administration and what changes are needed. You can respond to this Issues Paper by:

Letter Address to: The Secretary
Vanuatu Law Reform Commission
PO Box 3380, Law Reform House
Independence Park
Port Vila, Vanuatu

Email: lawcommission@vanuatu.gov.vu

Phone: (+678) 33620 or (+678) 5333160

Visiting us: Vanuatu Law Reform Commission, Law Reform House, Edmond Colardeau Avenue, Independence Park, Port Vila, Vanuatu.

Contents

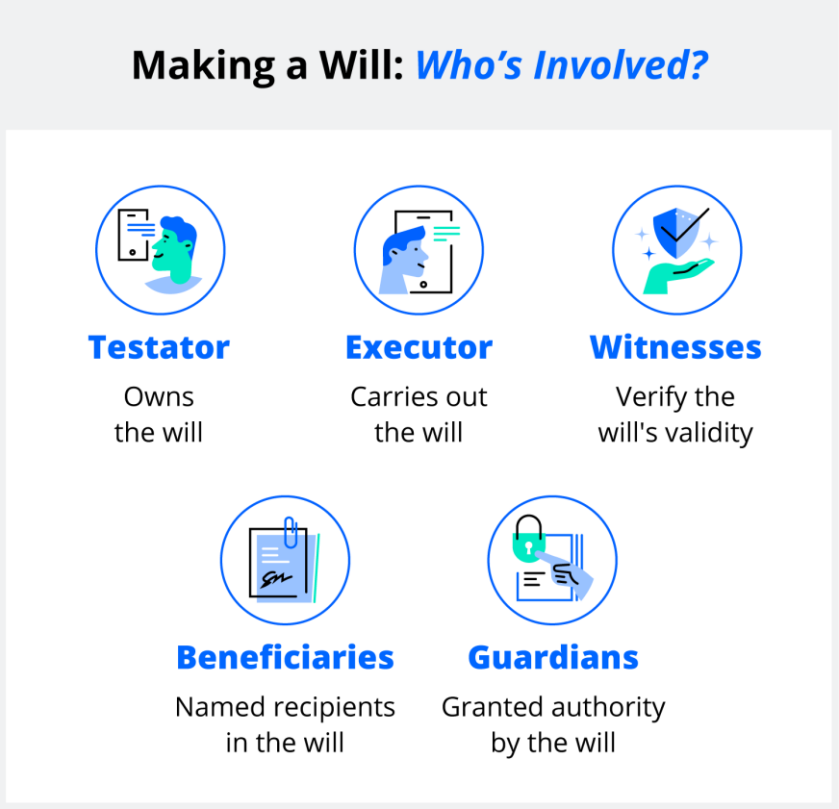
BACKGROUND AND OUTLINE OF ISSUES PAPER

1. This Issues Paper considers the current legal framework for the distribution of a person's estate upon death—known as the **law of succession** or **succession law**.

2. **Succession law** is the law that determines what happens to a person's property when they die. Different legal systems around the world handle succession issues in a variety of ways.

3. The traditional English law approach is to grant rights to an individual to dispose of their property how he or she thinks fit on the event of their death, by making a will.

4. Under English succession law, the most common means of succeeding to (or inheriting) the property of a deceased person is by being named a beneficiary of the deceased person's will. **A will** is a legal document that sets out an individual's wishes regarding the distribution of their estate after they die. Where a person dies leaving a valid will, the person is said to be '**testate**', and the method of distribution is referred to as '**testate succession**'. The persons who are entitled under a will are called '**beneficiaries.**' The person who administers a testate estate is called an '**executor**'.



5. French succession law operates differently to English succession law. Under French law, the Civil Code imposes limits upon how much may be left by will to a particular person. In

other words, a person is not free to dispose of their estate as they wish on the event of their death.

6. There will be cases where the deceased person has not executed a will or has failed to execute a will that disposes of some or all of his or her property effectively. The property that has not been dealt with effectively by will is usually distributed according to a regime established by law. This method of distribution is referred to as '**intestate succession**'.

History of succession law in Vanuatu

7. On death, there is national legislation which covers testate succession—the *Wills Act* [Cap 55]—but there is no national legislation enacted by the Parliament of Vanuatu which deals with intestate succession.[1]

8. This means it is necessary to consider which laws are in effect to govern intestate succession. The Constitution provides that, after Independence, British and French laws that were in force at Independence were continued in force '*to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom*'.[2]

9. Article 95 of the Constitution was considered in the Court of Appeal judgement of *Banga v Waiwo*, where the court held that:

> '*under Article 95 of the Constitution, the French and English laws that applied on the day before the Day of Independence applied to everyone in Vanuatu, irrespective of Nationality and irrespective as to whether they were indigenous ni-Vanuatu or not*'.[3]

10. The recent Court of Appeal case, *Li Ya Huang v Russet* [2022] VUCA 32[4] considered which laws applied to an intestacy case:

> *95. As the Parliament has not yet enacted any laws concerning intestacy, the Queen's Regulation and Articles 731 and 767 of the French Civil Code are each laws to which Article 95(2) applies and, by force of that Article, have effect as laws of Vanuatu. However, this is subject to the important qualification explained by d'Imecourt J in Banga v Waiwo. That is that all the laws promulgated under the Constitution are laws of Vanuatu which are to be applied to everyone in Vanuatu equally. This has the consequence that all the French and English laws which were in effect in Vanuatu immediately before Independence and which have not been repealed or superseded by*

---

1 In many cases custom will govern this, especially in the case of customary land, which cannot be alienated.
2 Article 95, Constitution
3 *Banga v Waiwo* [1996] VUSC 5.
4 Civil Appeal Case 1964 of 2022 (18 November 2022).

legislation of the Parliament, continue to form part of the law of Vanuatu and apply to everyone irrespective of (relevantly) their nationality. Using the language of Harrop J in In re MM, Adoption Application by SAT [2014] VUSC 78 at [26], there is but one law of Vanuatu, albeit derived in some instances from both the French and English laws which were in force at Independence.

11. The court in *Li Ya Huang v Russet* noted that this 'creates the potential for there to be a conflict in the law of Vanuatu between a prescription derived from pre-Independence British law and a prescription derived from pre-Independence French law.'

12. There is no law specifying the manner in which the conflict is to be resolved. That is accordingly a matter to be determined by the Court.

13. Different methods have been proposed in case law. Some are based on Article 47(1) of the Constitution which provides:

> *"The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law.* ***If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice*** *and whenever possible in conformity with custom."* (**Emphasis added**)

14. In *Banga v Waiwo*, d'Imecourt J noted that, in cases of conflict between laws derived from the British and the French, the courts have a duty to resolve "the matter" (i.e. the issue in the parties' litigation) according to "substantial justice".

15. In *Montgolfier v Gaillande* [2013] VUSC 39, Sey J thought it appropriate to achieve substantial justice by adopting a "pluralistic approach", that is, by applying aspects of both the common law and the French Civil Code.

16. *In re MM*, in which conflicting English and French laws concerning the adoption of children were applicable, Harrop J considered it appropriate to give effect to the principle that there is only one Vanuatu law by requiring the applicant for adoption to satisfy the criteria in both laws.[5] The Court of Appeal considered that 'a number of matters may determine a principled approach to the resolution of a conflict between two applicable laws of Vanuatu. These include the nature of the legislation in question and the nature of the conflict between the two laws. In some cases, it may be possible for a litigant or the parties to comply with both laws, so that it can be said that there is in truth no consistency. Re MM appears to be such a case. But in other cases, there will be true inconsistency in that

[5] In re MM, Adoption Application by SAT [2014] VUSC 78 at [37].

both laws cannot be applied simultaneously or application of both laws will produce inconsistent results.'

17. The Court of Appeal found that 'Fortunately, cases of conflict between two applicable laws are infrequent. When they do arise, the Court must do its duty pursuant to Article 47(1), even if this does involve giving one law priority over another. Generally, we expect that the Court will be cautious about creating a law for the resolution of the conflict, as opposed to making a principled choice of the law to be applied.[6]

18. The Court of Appeal applied the test of whether substantial justice will be achieved by the Court in applying the Queen's Regulation or Articles 731 and 767 of the French Civil Code, ultimately finding that the Queen's Regulations applied and in doing so, noting that:

> *d'Imecourt J noted in Banga v Waiwo, "after so many years of independence we have become, by the passage of time and the way we have applied our laws since independence, a common law jurisdiction"*

19. Counsel for the appellant submitted, and counsel for Mr Russet did not dispute, that, so far as can be ascertained, the French Civil Code has not been applied to the administration of any estate in Vanuatu since Independence, but, conversely, the Queen's Regulation has been applied many times.

20. Counsel for the appellant also submitted that if Articles 731 and 767 in the French Civil Code as in force at Independence apply, the administrator will be required to apply rules which France recognised in 2001 were no longer appropriate because of their inconsistency with contemporary values. In this respect, we note that Article 767 was amended by the French Parliament in 2001 because, as the Senator introducing the amendments to the Senate said, "our inheritance law is particularly unfavourable to two categories of people: on the one hand, the surviving spouse, on the other hand, natural children, known as "adulterines"". The Senator continued by saying "consideration must be given to protecting surviving spouses for whom no testamentary provision was made by the deceased, through lack of precaution or – quite simply – through ignorance".

21. Accordingly, Vanuatu's succession laws are found in:
    - the *Wills Act* [Cap 55] and associated case law on the construction and validity of wills;
    - the *Succession, Probate and Administration Regulation 1972* (The Queen's Regulation) and associated case law dealing with the administration and distribution of assets;
    - *Probate and Administration Rules* which sets out the procedure in probate and administration matters;

---

6 At [103] to [104]

- the French Civil Code as in effect at the time of Independence; and
- customary law.

22. Succession law in Vanuatu has not been reviewed or amended for over 40 years. Intestate succession remains subject to the laws in force at Independence which can create confusion as to which laws are applicable (as detailed in the case law described above). It is therefore timely to review the current legislative framework to see whether it works well in today's society and consider a legislative framework for both testate and intestate succession that is appropriate for Vanuatu.

23. In considering the law on succession, important questions arise, such as:
    - to what extent should a person be able to dispose of their property as they choose?
    - should family members have rights to protect them against disinheritance?
    - how should the law provide for diversity of family arrangements and values across Vanuatu?

24. Accordingly, this Issues Paper considers the following areas:
    - customary law and succession;
    - freedom of testation and limitations on freedom of testation;
    - execution formalities and requirements;
    - custody of a will;
    - revocation and amendment of wills;
    - the role of executors;
    - family provision in testate succession;
    - the offence framework;
    - intestate succession;
    - grants of representation; and
    - other matters.

CUSTOMARY LAW AND SUCCESSION

25. Legal hybridity generally means where different types of laws are 'mixed' together within the same system. In Vanuatu, this occurs both within the State system, where common law and civil law are still in force; and in the customary system, where customary laws differ from place to place.

26. There is no doubt that custom is a source of law in Vanuatu. Article 95(3) of the Constitution provides for instance that 'Customary law shall continue to have effect as part of the law of the Republic of Vanuatu'[7]. Article 47(1) of the Constitution recognises

[7] Article 95(3), *Constitution of the Republic of Vanuatu 1980*.

that custom is a source of law in dispute resolution[8]. Further, Article 95(2) provides that the application of colonial laws should, wherever possible, take into account custom[9].

27. With regard to land transactions, Article 74 of the Constitution provides that rules of custom form the basis of ownership and use of land in Vanuatu[10]. It should be noted that due to significant problems related, among other things, to the failure by the Government to protect the interests of customary land owners, the Constitution was amended in 2014 to pass jurisdiction to customary institutions, termed 'nakamals', to resolve land ownership and disputes over custom land[11].

28. There are some examples of where legislation and case law have tested customary law as a source of law. For example, section 10 of the *Island Courts Act* [Cap 167] provides that Island courts will not apply customs if they are inconsistent with written law or with the principles of justice, morality and good order.[12] The case law has also developed the same reasoning in many cases where rules of custom contrary to written law or human rights were held to be invalid.[13] In *Noel v Toto* Vanuatu Supreme Court Civil Case 18 of 1994; USP Law School Internet Reports No. 6; evidence of customary succession examined and disallowed on the ground that a custom rule that favoured males was unconstitutional. This decision established the principle that in Vanuatu the equality provisions of the Constitution take precedence over customary law, if the two systems are in conflict. Custom that discriminates against women cannot be enforced. The equal rights provision of Article 5 of the Constitution was held to have precedence over the custom that women lose their inherited land rights on marriage even although the Constitution also protects customary law.

29. Article 95 of the Constitution provides that, British and French laws that were in force at Independence were continued in force 'to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom'. The provisions of the *Wills Act*, *New Hebrides Queen's Regulation* and the *Succession, Probate and Administration* 1972 (Vanuatu) fails to cater for

---

8 It provides: *'The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom'*.

9 It states: *'Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom'*.

10 It states: *'The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu'*.

11 Morsen Mosses, Custom as a source of Law in Vanuatu: A critical Analysis, 2022

12 *Island Courts Act 1983* [Cap 167], s.10 provides: '*Subject to the provisions of this Act an island court shall administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order*'. Also see Miranda Forsyth, A Bird that Flies with Two Wings, p.427.

13 See for example *Public Prosecutor v Walter Kota and Ten Others* [1993] VUSC 8; *Public Prosecutor v George Lingbu* (SCCrAppC) [1983] 3 (Unreported).

customary distribution. Similarly, in Fiji, its *Succession, Probate and Administration, Revised Ed.* 1985 is silent on the issue of distribution according to Fijian custom.[14]

30. However, in Solomon Islands, the *Wills, Probate and Administration Act, Revise Ed.* 1996 is not explicit although there is space for customary intestate distribution. There is a general exception that customary land and any matter "regulated by current customary usage" is excluded from the *Wills, Probate and Administration Act.* There is provision for the Minister to "make provision out of such residuary estate for the dependants and kindred of the deceased… for whom the deceased might reasonably have been expected to provide. There is provision for circumstances where due to custom the deceased has multiple wives. Also, there is provision for customarily adopted children.[15]

31. In PNG, its *Wills, Probate and Succession Act* 1966 (PNG) is also not explicit although the Act sets up a system of customary intestate succession. Part II, Division 5 of the Act establishes a system whereby a District Officer can certify customary entitlements to the estate of an intestate person. This Division also enables a Distributor to administer the estate.[16]

32. In New Zealand, the *Te Ture Whenua Maori Act 1993* (NZ) and *Administration Act 1969* (NZ) states that there are particular intestacy provisions for distribution of Maori freehold land under the *Te Ture Whenua Maori Act* 1993. There is also no explicit provision for intestate distribution of estate of Maori person under *Administration Act*, 1969 although other laws which do apply to Maori succession are carved out of this Act.[17]

33. The *Succession Act 2006* of NSW Australia allows for indigenous person to apply to the court for an order for distribution of the intestate estate. Application must be accompanied by a scheme for distribution in accordance with laws, customs, traditions and practices of the community or group to which the intestate belonged. Court must have regard to the scheme for distribution submitted by the applicant and laws, customs, traditions and practices of the intestate's first national community, but may not make an order unless it is satisfied that the terms of the order are just and equitable. Order operates to exclusion of all other provisions in the Act re distribution of intestate estate.[18]

34. The challenge for the Commission is to understand customary practice across Vanuatu with respect to succession and make recommendations from a place of understanding.

---

14 *Succession, Probate and Administration, Revised Ed.* 1985 (Fiji).
15 *Wills, Probate and Administration Act, Revise Ed.* 1996.
16 *Wills, Probate and Succession Act* 1966 (PNG).
17 *Te Ture Whenua Maori Act 1993* and *Administration Act 1969* (NZ).
18 *Succession Act 2006* (NSW, Australia).

35. This raises questions about the relationship between customary law and state law and would require clarification around several matters:

36. First, there would need to be an understanding of who would be subject to customary law, including the appropriate role of an individual and the community in that decision. For example, is it the individual's choice or the choice of the custom area that determines how property is succeeded to?

37. Second, there would be practical questions about the understanding of customary law and its application, together with how disputes might be resolved.

38. Third, there would need to be a system of dealing with conflicts between customary and state law when one party to a dispute considered themselves governed by state law rather than custom.

39. Finally, the complexity of codifying customary law should also be considered. If customary rules are set in a formal legislative framework, it runs the risk of inaccurately reflecting the diversity of customary law and no longer reflecting the reality of contemporary society. In Australia, for example, the Australian Law Reform Commission advised against the codification of customary laws on the grounds that 'There would be a danger of imposing uniformity where none exists and of freezing aboriginal practice at an arbitrary date'.[19]

Q1: On a day-to-day basis, how is succession governed in your community? For example, do people know how to make a will and rely upon the will upon death; or is a person's estate distributed according to customary rules? What property or properties are appropriate to be distributed according to custom?

Q2: Other jurisdictions recognise custom in their legislation for succession. For example:

- In Australia, the NSW *Succession Act* allows for indigenous person to apply to the court for an order for distribution in accordance with laws, customs, traditions and practices of the community or group to which the intestate belongs.
- In PNG, the law establishes a system whereby a District Officer can certify customary entitlements to the estate of an intestate person
- In Solomon Islands, there is a general exception that customary land and any matter "regulated by current customary usage" is excluded from the Wills, Probate and Administration Act.

[19] A. Gupta (ed.), Human Rights of Indigenous Peoples (Delhi: Isha Books, 2005), p. 128.

Should any proposed new succession law for Vanuatu recognise custom in terms of distribution of the property of the person dying intestate? If yes, how should custom deal with distribution in this matter?

Q3: Should a uniform custom law be created to deal with the distribution of the intestate property throughout Vanuatu or should it be a good idea for each island to deal with the issue of distribution according to their own custom?

Q4: Would it be appropriate to say that the Village Court is to deal with any arising disputes in the process of distribution according to custom? In the absence of a Village Court, should the matter be dealt with in the Island Court or Magistrate Court?

TESTATE SUCCESSION

40. The Wills Act [Cap 55] governs testate succession in Vanuatu. It provides the legal framework for an individual to enact a will to determine how they would like their property to be distributed upon their death.

Freedom of testation

41. Freedom of testation is a central principle of succession law. **Testamentary freedom** is being free to dispose of your property how and to whom you wish. This is enshrined in section 2 of the *Wills Act* which provides that:

> *Any person not being an infant and being of sound mind, memory and understanding may make provision by will for the disposal of the whole or any part of his property, of which he is the sole and total owner, after his death, in accordance with and subject to the provisions of this Act.*

42. The Wills Act provides some limitations on testamentary freedom in terms of age, capacity and family provision.

Limitations on testamentary freedom: age

43. The Wills Act prescribes that an individual must not be an infant at the time of making their will. Infant is defined as "a person under the age of 21 provided that for the purposes of section 22 of this Act no person who is legally married shall be regarded as an infant."[20]

44. It is worth considering whether a person who is 18 years or older be able to make a will.[21] The definition of 'infant' should align with the Convention on the Rights of the Child which

[20] *Wills Act* [Cap 55] s.1.

[21] In Fiji and the Solomon Islands, the age of majority for the purpose of will-making is 18: *Wills Act* [Cap 59] (Fiji) s 4; *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands) s 4.

defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[22]

45. Other jurisdictions allow persons 18 or over to be able to make a will.[23]

Q5: Should a person who is 18 years or older be able to make a will or should it be limited to someone aged 21 or over?

Exceptions to the age requirement

46. Some jurisdictions provide an exception for the age requirement where the person is:
    - serving in military, naval or air service during war or other armed conflict, or that person is a mariner or seaman serving at sea;[24]
    - in or has been in a marriage, civil union or de facto relationship;[25] or
    - permitted to do so by the Family Court.[26]

Q6: Should there be any exceptions to the age limit for a person who is able to make a will?

Limitations on testamentary freedom: capacity

47. The *Wills Act* prescribes that an individual must be of sound mind, memory and understanding at the time of making their will.[27] The distribution of a person's assets is a significant decision. Therefore, the law considers that in order to be able to make a will, a person must have the necessary capacity to make such a decision about who inherits their estate.

48. In some jurisdictions, legislation or common law principles limit testamentary freedom to those who have testamentary capacity. This means that an eligible person could challenge a will if there are any doubts about a testator's mental fitness to make decisions about their estate. If the court finds that the testator does not have testamentary capacity, then intestate succession will dictate the distribution of the estate.

49. In some jurisdictions, the courts can also choose to overlook a testator's instructions in a will if the testator was unduly influenced or coerced into making certain decisions. Undue

---

22 *Convention on the rights of the child* (1989) Treaty no. 27531. United Nations Treaty Series, 1577, pp. 3-178. Available at: https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf (Accessed: 17 February 2023), Article 1.

23 See, for example, *Wills Act* [Cap 59] (Fiji) s.4; *Wills Act* [Cap 33] (Solomon Islands) s.4; *Succession Act* (2006) NSW, ss.5(1) & 21(1); *Wills Act* 2007 (NZ) s.9(1).

24 *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands) s.5(3); *Wills Act* 2007 (NZ) s.9(2).

25 *Succession Act* (2006) NSW, s.5(2); *Wills Act* 2007 (NZ) s.9(2).

26 *Wills Act* 2007 (NZ) s.9(2).

27 This is provided for in other jurisdictions too: *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands)

influence can be difficult to substantiate, but common law principles state that a will composed under duress cannot properly reflect the testator's testamentary intentions.

Q7: Are there any issues with the requirement for the person making the will to be of 'sound mind, memory and understanding'?

Limitations on testamentary freedom: family provision

50. Laws affecting testation must accommodate two competing policies. One policy is freedom of testation; the other is enforcement of the support obligations the testator assumed in marriage and parenthood. If there are no limitations on testamentary freedom, a testator may disinherit his dependents and ignore his support obligations. On the other hand, requiring an estate to provide support for a decedent's dependents restricts testamentary freedom. Neither policy must totally eclipse the other. This tension can be resolved through a sufficiently flexible statutory scheme that accommodates both policies and emphasises one or the other according to the circumstances of each case.

51. The law recognises that on occasions persons who would ordinarily be a beneficiary under a Will or recipient and recipients of the property of the deceased testator may either not be provided for or may be inadequately provided for. In recognition of this, the law provides a mechanism by which certain family members can receive part of the estate where this has not been provided for in the will – this is known as 'family provision'. Family provision law developed in recognition that, although people are free to give away their property by will after they die, they also have a responsibility to provide for certain people.

52. Any family provision enactment is an interference with the freedom of disposition – that is, the freedom of the will-maker to decide who receives their estate upon death.

53. Section 13(2) of the Wills Act provides:

    The court shall not issue a document of authority until it is satisfied that adequate provision has been made for the maintenance of the deceased's spouse, and children under the age of 18. Where the court considers that adequate provision has not been made it shall vest such part of the property of the deceased as it thinks fit, in the said spouse and children.

54. This means that the court may adjust the distribution of an estate to make adequate provision for the maintenance of the deceased's spouse and children. As such, the beneficiaries of the will receive a reduced inheritance.

Process

55. Generally, most family provision regimes are reactive. In other words, a dependent is required to make an application to a court to make a determination as to whether part of the deceased person's estate should be distributed to family. For example, in the Solomon Islands, an application for family provision is made by application to the court.[28]

56. The current model in the Wills Act is however auto-proactive in that the court must satisfy itself that ***adequate provision*** has been made – there is no requirement for a family member to make an application to the court. If the will has not made 'adequate provision', the court may order that such provision be made.

57. In comparison, other jurisdictions required 'adequate provision for the 'proper maintenance' of certain family members. For example, in the Solomon Islands, the court must be satisfied that 'adequate provision for the proper maintenance and support of his spouse or children.'[29]

Guidance

58. The Wills Act does not provide any guidance to the court as to the circumstances in which family provision should be made. It appears that the court has full discretion, without any legislated guidelines. Further, the Wills Act is silent on whether account should be taken of any reasons that may have been given by the testator for failing to make provision for certain family members.

Scope

59. The scope of family provision in the Wills Act extends to the 'deceased's spouse, and children under the age of 18.' Both the terms 'spouse' and 'children' are undefined in the Act. It is unclear whether a spouse only includes a spouse through marriage, or whether it would extend to long-term de facto relationships too.

60. Similarly, it is unclear whether the term children means only a person's biological children, or whether a child of the deceased would include children for whom the deceased had assumed, in an enduring way, the responsibilities of a parent (for example, through formal or customary adoptive processes).

61. In this respect, it is important to note that article 2(1) of the Convention on the Rights of the Child requires States Parties to respect and ensure the rights set out in the Convention without discrimination on the basis of 'birth or other status'. While the CRC contains no right to inheritance, article 2(2) directs States Parties to take appropriate measures to

---

[28] *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands) s 91.

[29] *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands) s 91.

ensure that children are protected against discrimination based on the status of their parents and presents cogent grounds for maintaining that the fact the parents are unmarried does not allow for discrimination against their children.

Q8: Is the *process* for family provision in the Wills Act sufficient? Should the process require an application to court, or the court to determine whether adequate family provision has been made? Should there be a list of guiding factors? Should it refer to 'adequate' and 'proper'?

Q9: Is the *scope* of persons who can apply for family provision sufficient? Should there be any others beyond the spouse and children of the deceased?

Limitations on testamentary freedom: kastom property

62. Freedom of testation in the Wills Act is limited to property 'of which he is the sole and total owner'.[30] The inclusion of these words restricts the freedom of disposition by a will of kastom property, as kastom property would not be individually owned. In doing so, it recognises article 74 of the Constitution which endorses the pre-independence stance on customary land that 'The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.'

63. Items that from a kastom perspective are of particular concern to a community could be excluded from the application of general succession law.

Q10: Are there any other aspects of customary property that should be excluded from the general law of succession? For example, customary land ownership in Vanuatu should be excluded from the general succession law because customary land in Vanuatu is governed by the custom law.

Formalities for wills

64. The formalities for wills, including the requirement of witnessing, serve a number of purposes, one of which is to protect a testator from being forced to sign a document they do not wish to sign. The law attempts to balance appropriate safeguards against undue influence, without being overly burdensome so as to render the process inaccessible. For example, overly restrictive requirements for witnesses may mean that individuals outside of urban centres would not be able to execute a will. Formalities should not prevent people making a will due to disability, literacy, linguistic diversity or other factors.

30 *Wills Act* [Cap 55] s 2.

65. If the formalities for making a will are not complied with, the will may not be valid.[31] If there is no valid will, the deceased's estate will be dealt with as an intestate estate.

66. The Wills Act provides that, for a will to be validly executed, it must comply with the following formalities:
    - *The will must be in writing*.[32] The will can be in any form or language.
    - *It must be signed or thumb printed at the foot of every page of the will and at the end of the will*.[33]
    - It must be signed or thumb printed by the testator *in the presence of at least two witnesses present at the same time*.[34]

67. There is no guidance as to what is meant by a person's 'signature'. In some jurisdictions, a signature includes a mark in the case of a blind or an illiterate person. It also includes, in exceptional circumstances, the signature of some other person at the direction of and in the presence of the person making the will (the testator).[35]

68. There is currently no requirement in the Wills Act for the will to be dated. However, as discussed further below, section 7 of the Act provides that a testator may revoke a will by making a new document executed in accordance with the provisions of the Wills Act. Without a requirement for the will to be dated, there may be scenarios in which two wills are validly executed, but no way in which to be able to determine the most recent.

Witness requirements

69. Witnessing a will is known as 'attestation'. The requirements for witnessing wills are intended to provide some protection from undue influence, forgery and fraud.

70. Under the Wills Act, a will is not validly executed unless it is witnessed by two people. Every witness to a will must not be an infant (that is under the age of 21); not be of unsound mind; not knowingly be a beneficiary under such will; and be able to sign his name.[36]

71. Other jurisdictions expressly state that a person who cannot see and attest that a testator has signed a document may not act as a witness to a will.[37]

---

31 See *Wills Act* [Cap 55] s 17.
32 *Wills Act* [Cap 55] s 4(a).
33 *Wills Act* [Cap 55] s 4(b).
34 *Wills Act* [Cap 55] s 4(b).
35 See, for example, Queensland.
36 *Wills Act* [Cap 55] s 6.
37 See, for example, *Succession Act 1981* (Qld) s 10(10); *Succession Act 2006* (NSW) s 9.

72. The usual legal position in most jurisdictions is that anyone likely to receive a gift under the will, an inheritance, should not act as a witness to that will to reduce the potential for influence over the will-maker, their testamentary intentions and what they wanted in their will.

73. Both must witness the signing by the will-maker, in the presence of the will-maker and each other.[38] Each witness is required to witness the signature or thumb print of the testator by affixing his signature at the foot of every page and at the end of the will. The address or place of origin of each witness is required to be written immediately opposite to his signature.[39]

74. It is not necessary for a witness to know the contents of the will, but they must know that they are witnessing a will.[40] They do not need to form a view as to the will-maker's capacity to make a will. Jurisdictions differ in their requirement as to whether a witness should know that the document they are signing is a will.[41]

Q11: Should a person who is aged 18 or over be able to witness a will or is it appropriate that a witness be limited to someone who is aged 21 or over?

Q12: Do the current witness provisions present a barrier to people who wish to make a will? If so, please explain how.

Q13: Are there any issues with the current formalities required for a valid will? Should there be a requirement for a will to be dated in order to be validly executed?

Q14: Do the current requirements work well in protecting against undue influence? Do the requirements need to be strengthened? If so, how? Should there be any other requirements for witnesses, for example, can a person who is married to a person mentioned in the will as a beneficiary be a witness? If a person married to a witness cannot be a beneficiary, should there be exceptions to this, for example when all of the other beneficiaries under the Will give their consent? Should the Court decide whether it is appropriate for a witness or their spouse to be a beneficiary under the Will?

Q15: Should there be a provision that allows another person to sign the will on behalf of the testator, for example if the testator has a physical disability which prevents him or her from signing or placing their thumb print on the will? If so, what additional requirements should be required, for example, requiring a witness to sign a certificate stating that the testator understood the will and gave consent for the other person to sign on their behalf?

38 *Wills Act* [Cap 55] s 5(2).

39 *Wills Act* [Cap 55] s 5(1).

40 *Wills Act* [Cap 55] s 5.

41 See, for example, *Succession Act 1981* (Qld) s 10(5) – none of the witnesses need to know that the document attested and signed is a will.

Q16: Should there be a provision that requires a will to be read out to an illiterate testator and a certificate signed by witnesses to attest that this has occurred prior to signing the will?

Q17: Should witnesses need to know that they are witnessing a will when they sign?

Custody of a will

75. A will is a very important document and should be kept in a safe place.

76. The Wills Act provides that 'a testator may forward his will to the Registrar of the Supreme Court for safe keeping or through the District Commissioner in the area wherein the testator resides. Any District Commissioner who receives a will as aforesaid shall forthwith forward it to the Registrar of the Supreme Court.'[42]

Q18: Are there any issues with the safekeeping and custody of wills?

Q19: Is it necessary for the will to be forwarded to the Registrar of the Supreme Court or should it be kept by the lawyer of the testator?

Revocation and amendment of wills

77. The Wills Act provides for circumstances in which a will is revoked, however there are no provisions for amending or altering a will.

Revocation

78. When a will ceases to have legal effect, it is said to have been revoked. Under the Wills Act, a will may be revoked upon the creation of a new valid will, or by its destruction.[43] As discussed above, there is currently no requirement in the Wills Act to require the will to be dated. Without a requirement for the will to be dated, there may be scenarios in which two wills are validly executed, but no way in which to be able to determine the most recent and which one has been revoked.

79. The Wills Act also does not contemplate that for a will to be revoked it must have been intentionally destroyed. As currently worded, if a person's will is accidentally destroyed, the will is revoked.

80. The Wills Act also provides that a will is revoked upon marriage.[44] This presumes that a marriage is such a significant event in a person's life that any prior will they had must no longer reflect their testamentary intentions and is therefore revoked. Some jurisdictions provide that a will made in contemplation of a marriage, whether or not that

42 *Wills Act* [Cap 55] s 10.
43 *Wills Act* [Cap 55] s 7.
44 *Wills Act* [Cap 55] s 8.

contemplation is stated in the will, is not revoked by the solemnisation of the marriage contemplated.[45]

81. The Wills Act only contemplates the revocation of a will upon marriage – it does not cater for a situation where a person enters into a long-term de facto relationship or civil partnership.

82. Revocation of a will (whether upon marriage or destruction) will mean that the intestacy rules apply until a new will is made.[46] It therefore assumes that the intestacy rules more closely reflect how the will-maker would wish their estate to be distributed.

83. Currently, the Wills Act does not provide that a will is revoked upon divorce or annulment of marriage.

Alteration

84. The Wills Act does not currently have any provisions for the alteration of a will. This means that even if a minor amendment to a will is required, the old will needs to be revoked either by its destruction or the creation of a new one. In other jurisdictions, revocation by destruction required intent on the part of the testator to revoke the will.[47] It is possible to think of circumstances where a person's will is destroyed through accident, and there was no intention on the part of the will-maker to destroy or revoke the will.

85. Other jurisdictions provide that a will may be altered if the alteration 'is executed in like manner to that required to execute the will.'[48]

Q20: Should there be a requirement that the testator intended to revoke the will if the will is destroyed?

Q21: Should a will be automatically revoked upon marriage? What about long-term de facto relationships/civil partnerships?

Q22: Should there be provision within the Act for what is to occur to a will upon a period of time after divorce or annulment of a marriage?

Q23: Should there be provision for alteration of a will? If so, what should be the requirements for an amendment to a will?

45 See, for example, *Succession Act 1981* (Qld) s 14(3).

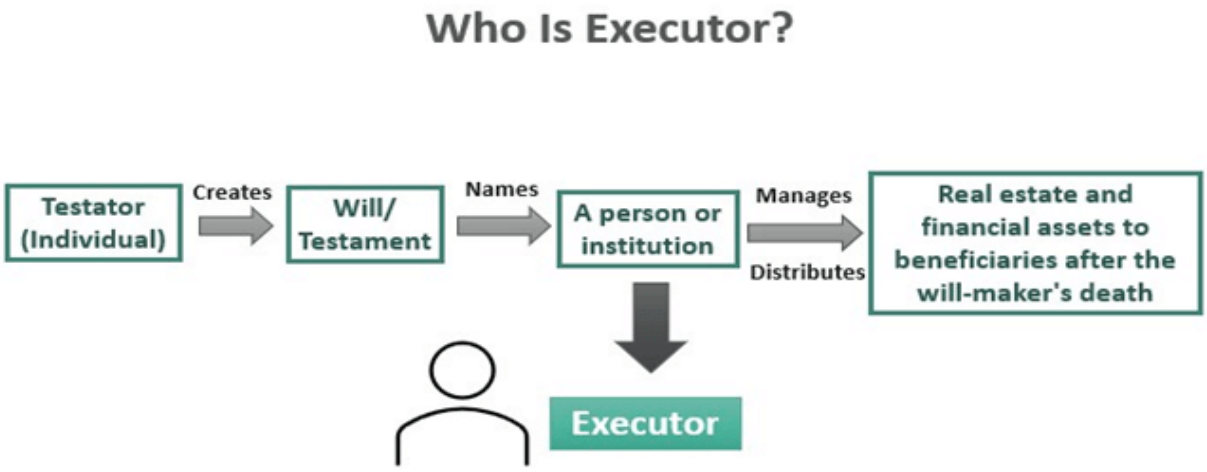
46 Intestacy rules are discussed further, below.

47 See, for example, Fiji, PNG and Solomon Islands.

48 See, for example, *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands) s 7(1); *Succession Act 2006* (NSW) s 14(1)(a); *Wills Act* [Cap 59] (Fiji) s 12 – the alteration must be duly executed in the manner required by section 6 by the signatures of the testator and the witnesses.

Executors

86. When someone dies, an executor is the person appointed by the will to administer the estate. Put simply, this involves making sure their debts are paid and that their assets and possessions go where the deceased person wanted them to. Executors are chosen by the will-maker and appointed by the will.



Appointment

87. Section 9(1) of the Wills Act provides that a testator may appoint up to a maximum of four persons to be an executor. An executor cannot be an infant (defined as a person under the age of 21); or a person of unsound mind.[49]

Executors' duties

88. Section 14 of the Wills Act provides for the duties of the executors:

> '*On the issue of the document of authority the executors shall proceed to ascertain and collect all the property of the deceased and shall discharge thereout all his debts and obligations; thereafter they shall proceed to carry out the directions of the deceased*.'

Removal

89. Upon the application of any person interested in the estate, or of the court's own volition, the court may at any time, on being satisfied that it is desirable to do so, remove an executor, and should the court think fit, appoint another executor in his place.[50] Similarly, on the death of an executor, the court may appoint another person to replace the deceased executor.[51]

---

49 *Wills Act* [Cap 55] s 9.
50 *Wills Act* [Cap 55] s 19.
51 *Wills Act* [Cap 55] s 20.

90. The estate of a testator vested in an executor who has died or been removed by the court shall vest in the remaining executor or executors (if any) and any new executor appointed under the Act.[52]

Q24: Are there any problems with the provisions for executors?

Q25: The Wills Act [Cap 55] provides that an executor can be removed by the Court. The Act also provides that on death of the executor, the Court may appoint another executor. Should there be other circumstances for removal of an executor? For example, can an executor renounce the role? Could a court discharge or remove and executor who fails to act within a certain period, is unable or refuses to act, or wants to be discharged from the role?

Q26: Should a person who is 18 years or older be able to be executor of an estate? Why or why not?

Small estates

91. Section 9(2) of the Wills Act provides that where it appears to the court that the value of the property or estate of the testator does not exceed VT20,000, the court may without appointing an executor or other formal proceeding pay out any debts or charges and carry out the direction so the deceased.

Q27: Should the current figure in the Wills Act for determining what is a small estate be raised? If so, what should they be raised to, and how should they be determined?

Property of an infant

92. The Wills Act provides that any property devised or bequeathed to an infant is to remain vested in, and is to be administered by the executor(s) for the benefit of the infant until the infant reaches the age of 21. Upon marriage of the infant or reaching the age of 21, all the property then vested in the executor(s) are to then vest in the infant.[53] The court may authorise the sale of any property, and the investment of such proceeds for the benefit of the infant.[54]

Offences

93. The Wills Act contains a number of offences including concealing a will, executor's mismanagement, and interfering with the estate of a deceased testator. There are no provisions in the Wills Act relating to forgery, theft or wilful damage of a testator's will. There are, however, provisions in the Penal Code which deal with such offences.

---

52 *Wills Act* [Cap 55] s 21.

53 *Wills Act* [Cap 55] s 22.

54 *Wills Act [Cap 55] s 23.*

Penalty for concealing a will

94. Section 16 provides for the offence of concealing a will. The section provides that

> '*Any person who conceals or fails to disclose the whereabouts of, or to hand over to a District Commissioner of the area, a will of a deceased person shall be guilty of an offence and on conviction thereof shall be liable to a fine of VT 20,000, or to a term of imprisonment not exceeding 6 months, or to both such fine and imprisonment*.'

95. The penalty for concealing a will applies regardless of intent. This means that a person who unknowingly fails to disclose the will of a deceased person may be liable under this provision.

96. In other jurisdictions, such an offence is found in the relevant criminal law, and an element of intent is required. For example, in Queensland, the relevant provision is found in the Criminal Code and provides that a person who, with intent to defraud, conceals the whole or part of a testamentary instrument (whether the testator is living or dead) commits a crime.[55]

Offences in the Penal Code

97. The offence under section 16 of the Wills Act is the only offence in the Act which deals with the testamentary instrument itself. There are no provisions relating to forgery, theft or wilful damage of a testator's will.

98. There are, however, provisions in the Penal Code which deal with such offences. Section 140 of the Penal Code provides for the offence of forgery, punishable by a term of imprisonment of 10 years.[56] The definition of forgery in section 139 is broad and would include a will:

> *Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within the Republic or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Republic or not.*

99. Similarly, the offence of theft, misappropriation and false pretences in section 125 of the Penal Code would also apply to wills.

100. In the Solomon Islands, the provisions of the Penal Code are relied upon, and in Fiji, the provisions of the Crimes Act.[57] Some jurisdictions make specific provisions in their

---

55 *Criminal Code Act* (Qld) s 399. See also section 398 (stealing); 469 (wilful damage); 488 (forgery).

56 Uttering is an offence under section 141 of the *Penal Code*.

57 *Crimes Act* (Fiji) s 369.

criminal law for circumstances where the property in question is a testamentary instrument.[58]

Penalty for executor's wilful mismanagement

101. An executor's duty is to preserve, protect and administer the estate of the deceased.

102. Section 24 of the Wills Act provides that any executor who:

(a) willfully deals with an estate (in whole or in part) in a manner not authorised by the will or by the court; or
(b) willfully disobeys or fails to carry out any order or direction given to him by the court in relation to the will; or
(c) willfully fails satisfactorily to account to the court for any such estate,

is guilty of an offence and liable to a fine not exceeding 20,000 vatu or a term of imprisonment of 6 months, or both.

Penalty for interfering with estate of deceased testator

103. Section 27 of the Wills Act provides that:

'*Any person who willfully interferes with, appropriates, deals with or disposes of, or in any way uses the whole or any part of the estate of a deceased testator otherwise than for the purpose of preserving such estate or in accordance with the instructions of an executor or an order of the court shall be guilty of an offence and on conviction therefore shall be liable to a fine not exceeding VT 50,000, or to a term of imprisonment not exceeding 2 years, or to both such fine and imprisonment*.'

Q28: Is the offence framework for wills sufficient? Should the provisions of the Penal Code be made clear that they apply to testamentary instruments?

Q29: Is the penalty adequate for the offence of concealing a will? Should there be liability for damages to any person defrauded or any people claiming under them for any loss sustained through retention or concealment?

Q30: Should there be an element of intent required for the offence of concealing a will?

Q31: Should there be any other circumstances which amount to wilful mismanagement of a will?

[58] See, for example, *Criminal Code Act 1899* (Qld) s 469.

INTESTATE SUCCESSION

104. Intestate succession refers to a situation where a person dies without leaving a will (known as '**total intestacy**') or where a person dies with a will but does not distribute all of their estate under their will and therefore dies intestate as to some beneficial interest in his or her estate (known as '**partial intestacy**').

105. As discussed above, intestate succession has not been explicitly legislated for by the Vanuatu Parliament. The Constitution provides that:

> *(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom*.[59]

106. In the Court of Appeal judgement of *Banga v Waiwo* "under Article 95 of the Constitution, the French and English laws that applied on the day before the Day of Independence applied to everyone in Vanuatu, irrespective of Nationality and irrespective as to whether they were indigenous ni-Vanuatu or not".[60]

107. Accordingly, in Vanuatu, its intestate succession laws and rules are found in:
- the *Succession, Probate and Administration Regulation 1972* (The Queen's Regulation);
- the *Probate and Administration Rules;* and
- the *French Civil Code*.

108. In considering these different rules on intestate succession, important questions arise, such as:
- to what extent should a person be able to dispose of their property?
- should such distribution recognise custom?
- should family members have rights to protect them against disinheritance?
- since Vanuatu have different pieces of rules governing intestacy, would it be appropriate to merge the rules into a single piece of legislation?

109. Accordingly, this part of the Paper will focus on the intestate succession, particularly considering the distribution of estate of the intestate and whether customary involvement is allowed.

---

59 Article 95, Constitution (Vanuatu).

60 *Banga v Waiwo [1996]* VUSC 5.

Distribution

110. The intestacy regime in the Queen's Regulation applies to the 'residuary estate' of the deceased. However, this term is undefined.

111. As currently constructed, it would appear that the Queen's Regulations applies to customary land. In comparison, there is a specific exception in the Wills Act such that the rules of testate succession do not apply to custom land.[61]

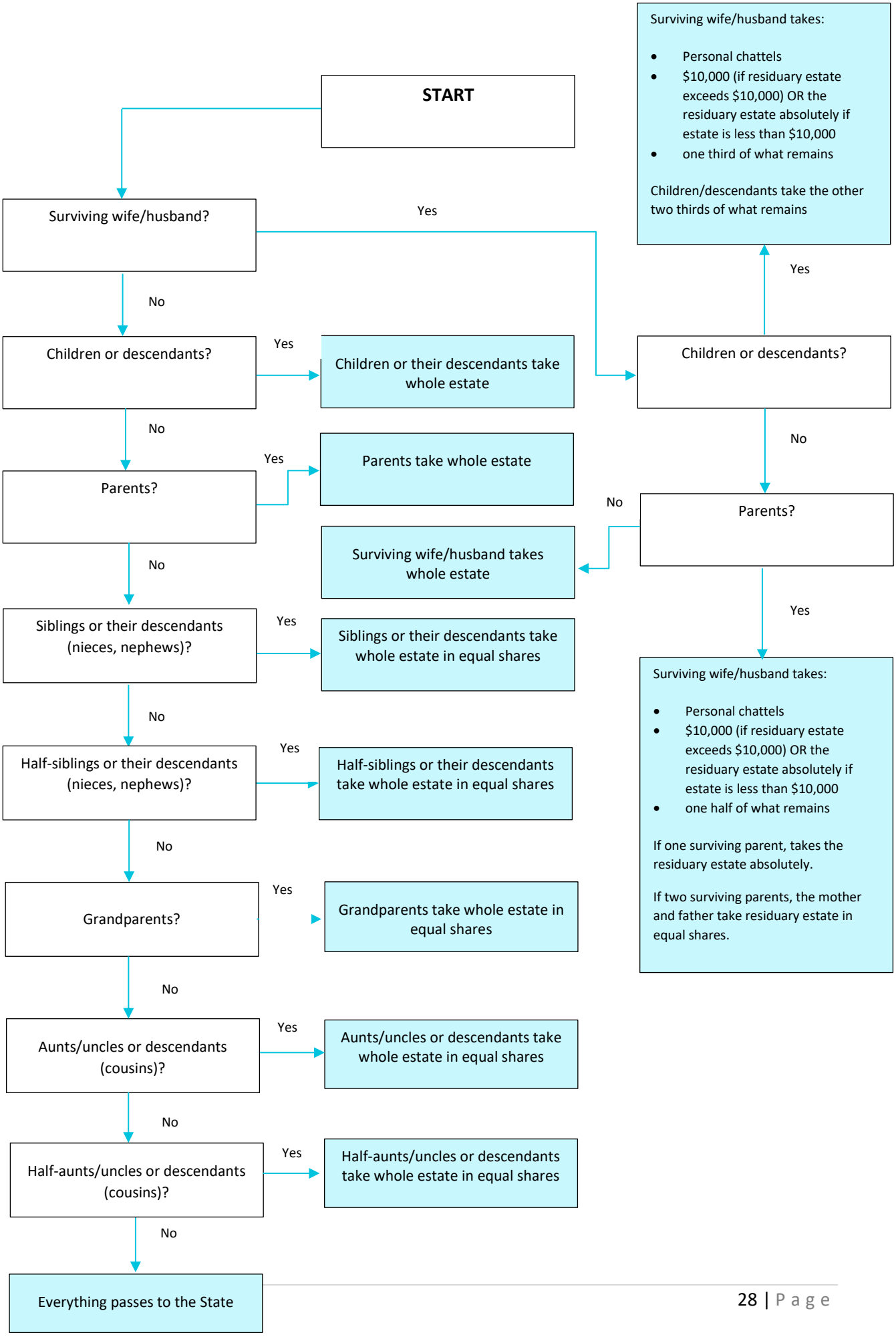
Q32: Should any intestate succession legislative framework apply to customary land or should there be a limitation to property of which the deceased is the 'sole and total owner' as is provided for in the Wills Act [Cap 55]? Are there any other customary items that should not be included in an intestate succession legislative framework?

112. The distribution of those who died intestate vary amongst the different laws within the region. In Vanuatu, for instance, if a person dies intestate but leaves a surviving husband or wife, the surviving partner takes personal chattels, $10,000, and 1/3 of what remains. The remaining 2/3 of what remains goes to the children. If no children, parents (father and mother) of deceased takes residuary estate in equal shares. However, if no parents of decease alive and only wife or husband is alive then he or she takes it all. If no surviving wife or husband, children take all the estate. If none of those mentioned above is alive then to the whole blood or half blood of their descendants (niece/nephews). If no siblings, then grandparents. If no grandparents then whole or half-blood aunts, uncles or descendants like cousins.[62]

113. The distribution of the estate as provided for in the Queen's Regulation can be shown as follows:

61 Freedom of testation in the Wills Act is limited to property 'of which he is the sole and total owner' – *Wills Act* [Cap 55] s 2.

62 *Queens Regulation* No.7 of 1972 (Vanuatu).


START
Surviving wife/husband?
Yes
Surviving wife/husband takes:
Personal chattels
$10,000 (if residuary estate exceeds $10,000) OR the residuary estate absolutely if estate is less than $10,000
one third of what remains
Children/descendants take the other two thirds of what remains
No
Children or descendants?
Yes
Children or their descendants take whole estate
Yes
Children or descendants?
No
Parents?
Yes
Parents take whole estate
No
Parents?
No
Surviving wife/husband takes whole estate
Yes
Siblings or their descendants (nieces, nephews)?
Yes
Siblings or their descendants take whole estate in equal shares
Surviving wife/husband takes:
Personal chattels
$10,000 (if residuary estate exceeds $10,000) OR the residuary estate absolutely if estate is less than $10,000
one half of what remains
If one surviving parent, takes the residuary estate absolutely.
If two surviving parents, the mother and father take residuary estate in equal shares.
No
Half-siblings or their descendants (nieces, nephews)?
Yes
Half-siblings or their descendants take whole estate in equal shares
No
Grandparents?
Yes
Grandparents take whole estate in equal shares
No
Aunts/uncles or descendants (cousins)?
Yes
Aunts/uncles or descendants take whole estate in equal shares
No
Half-aunts/uncles or descendants (cousins)?
Yes
Half-aunts/uncles or descendants take whole estate in equal shares
No
Everything passes to the State

114. Other Melanesian jurisdictions rely on similar intestacy laws that are imported from other jurisdictions.[63]

115. The Solomon Islands provides for a similar distribution of the estate as the Queen's Regulation. In Solomon Islands, if a person dies intestate and leaves a husband or wife and no issue,[64] no parents, no whole blood brother or sister, the residuary estate goes to surviving husband or wife. If intestate leaves wife or husband and an issue, the surviving husband or wife takes personal chattels, $10,000 charge from the residuary estate and subject to providing that sum, he or she is entitled to ½ of the residuary estate and other ½ of statutory trust to issue of decease. If intestate leaves wife or husband + parent and whole blood brother or sister or issue of brother or sister but leaves no issue of his or her own, the surviving wife or husband takes personal chattels, $15,000 and ½ of residuary estate. Other ½ of the residuary estate to parents in equal shares or to surviving parent in full. If no parent, ½ the residuary estate to brothers and sisters of the intestate.

116. If in the event that the intestate leaves no husband or wife, the residuary estate to be held on statutory trusts for the issue of decease. If no husband or wife and no issue but both parents surviving, then estate to be held in trust for the father and mother of decease or if only one surviving parent, then residuary estate to be held in trust for the surviving parent. If intestate leaves no wife or husband and issue, then estate goes to brothers and sisters of the whole blood of decease. If no whole blood brother or sister, then to half-blood brother or sister of the decease. If no half-blood brother or sister, then to uncles or aunts of decease. The law in the Solomons islands allows for whole blood and half-blood brothers, sisters, cousins, uncles and aunties.

117. The Solomon Islands legislation also states that in default of any person taking absolute interest, the residuary estate shall belong to the government. Furthermore, the Act also has a provision regarding customary usage. It states that where an intestate leaves more than one wife or more than one issue, the interest in the estate will be divided equally between all wives and issues.

118. Considering the Fiji legislation, its provisions concerning distributions are similar to the other laws in the region however, the only difference is that the law in Fiji also recognises *de-facto* partners of the decease in the distribution of the estate. *De-facto* partners under the law are also entitled to the same shares as distributed to the surviving wife or husband of the decease. Also, the law recognises the distribution of matrimonial home. The surviving wife, husband or de-facto partner of the decease shall have the right to acquire

---

63 See, for example, *Succession, Probate and Administration Act* [Cap 60] (Fiji); *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands).

64 'Issue' means a person's children or other lineal descendants such as grandchildren and great-grandchildren. It does not mean all heirs, but only the direct bloodline.

the matrimonial home. This right cannot be transferred until after 12 months of the date of the death of the decease.[65]

119. In PNG, the provisions concerning distributions of estate of the intestate are similar to the provisions of the other legislations in the region however, the PNG law stated that if residuary estate exceeds K20,000.00, the surviving partner is entitled to K20,000.00 + a charge of the whole estate for that sum with interest at the rate of 4% per annum from death of decease until payment. Also, if the child has an interest in a property during which the decease is still alive, that property, estate or money shall be distributed to the child.

120. The PNG law also recognises custom law in terms of distribution. Distributions are made according to applicable custom of decease and according to certification of person as distributors or public curator. In doing so, the distributors are to publish name of decease in newspaper in the area of residence of the decease. Any claims of the estate under custom must be made within 14 days of publication of the notice. The distributor shall have the right to sell or bater personal property for the purpose of paying debts due from decease person. After 6 years from the death of the person, undistributed money, personal property shall be put on auction sale and pay proceeds of such sale into the consolidated revenue fund. The Village court is to deal with any arising disputes in the process. In the absence of a Village Court, the matter is to be dealt with in the District Court of PNG.

121. While the imported model of intestacy law provided for in the Queen's Regulation may have the benefit of uniformity and certainty, a law from a society based on the nuclear family and individual ownership, may not be appropriate in Vanuatu society founded on communal property and extended family relationships.

Q33: Is the distribution of a deceased's estate as provided for in the Queen's Regulation appropriate for Vanuatu?

122. The diagram above outlines the intestacy rules in the Queen's Regulation as to how an estate is to be distributed if a person dies intestate. In understanding this distribution, there are various elements which need to be considered to ensure that the law is reflective of modern Vanuatu. These include:
- the definition of 'personal chattels'
- the definition of 'surviving partner'
- the prescribed amount of $10,000.

65 *Succession, Probate and Administration Act 1970* (Fiji).

123. It is also necessary to consider whether the distribution arrangements are suitable. These include determining how a deceased's estate should be distributed where the deceased is survived by:
- a partner, but no descendants
- a partner and descendants
- descendants, no partner
- No partner, descendants, parents or siblings (or their descendants) but grandparents, aunts and uncles (known as '**bona vacantia estates**')

Definition of 'personal chattels'

124. The Queen's Regulation defines personal chattels as "livestock, vehicles and accessories, furniture, furnishings, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, jewellery and other articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but does not include any chattels used at the death of the intestate for business purposes nor money or securities for money".

Q34: Should the term 'personal chattels' be re-defined so that it is clear to the users of the legislation or should it be left as it is? What word would better describe "personal chattels"?

Definition of 'surviving partner'

125. Under the current law, where there is a surviving partner but there is no surviving children or parents of the deceased, the surviving partner takes the whole estate. However, a surviving partner is entitled to a prescribed amount where the deceased is also survived by issue or parents. The prescribed amount is $10,000 (if residuary estate exceeds $10,000) or the residuary estate absolutely if estate is less than $10,000.

126. In Fiji, the surviving partner includes de facto relationships. It is worth asking whether Vanuatu's legislation should also include de facto relationships? It also raises the questions as to what happens where the deceased is survived by more than one qualifying partner.

Q35: Should the proposed new law also recognise *de-facto* partners as the case in the legislation of Fiji? If yes, how would this happen?

Q36: Should the law recognise the distribution of matrimonial home as the case in Fiji? If yes, how would this happen? Should a *de-facto* partner be also entitled to the matrimonial home of the deceased person?

Prescribed amount

127. As mentioned above, a surviving partner is entitled to a prescribed amount where the deceased is also survived by issue or parents. The prescribed amount is $10,000 (if residuary estate exceeds $10,000) or the residuary estate absolutely if estate is less than $10,000.

128. The prescribed amount (sometimes referred to as a statutory legacy) is a method that aims to protect the partner against hardship. Overseas law reform bodies have suggested one of the main objectives of the prescribed amount is to enable a surviving partner to purchase the deceased's interest in the family home, so the partner does not have to move. There may be issues arising from the use of a prescribed amount and the way it currently operates including that it does not reflect that an estate be shared between partners and children on a fixed proportion basis regardless of the total estate size; and it may produce inequitable outcomes. In small estates, the prescribed amount may mean that children receive little or none of the estate.

Q37: The prescribed amount of personal chattels as it currently stands in the law is $10,000. Should this amount be as it is or should it be converted into vatu for the purposes of the new legislation? If it should be converted into vatu then what should be the appropriate amount in vatu?

Partner, no descendants

129. Where the deceased is survived by a partner and no descendants, but whose parent(s) are still alive, the Queen's Regulation provides that if there is one surviving parent, that parent takes the residuary estate absolutely. If two surviving parents, the mother and father take residuary estate in equal shares.

Q38: Where the deceased is survived by a partner and no descendants, should the partner should take the entire estate rather than the deceased's parents receiving a share or is it appropriate that surviving parents should be entitled to the residuary estate?

Partner and descendants

130. Where the deceased is survived by a partner and descendants, should the surviving partner continue to be entitled to the deceased's personal chattels. Such an approach may discourage conflict over ownership of the items and help to avoid delay for administrators. The deceased's partner may have depended on several of the items for day-to-day living. A surviving partner's entitlement to the personal chattels should cause less disruption for the surviving partner than if the chattels were to be sold or distributed to other beneficiaries.

Survived by descendants but no partner

131. Where the deceased is survived by descendants but no partner, the current law provides that the deceased's children should share the estate evenly.

No partner or descendants but siblings and parents

132. Where the deceased is survived only by their siblings and parents, should the deceased's parents have priority above siblings. This is the position under current law as well as in most comparable jurisdictions. It is likely that the deceased's siblings will inherit from their parents when the parents die.

Survived by siblings, nieces or nephews but no partner, descendants or parents

133. Where the deceased is survived by siblings or nieces and nephews but no partner, descendants or parents, our preliminary preference is to retain priority for siblings over nieces and nephews.

No partner, descendants, parents or siblings (or their descendants) but grandparents, aunts and uncles (bona vacantia estates)

134. When the deceased is not survived by a relative closer than a descendant of their grandparent, the estate would be considered ownerless and be taken by the Crown as bona vacantia. Currently the legislation provides that the Crown retains its discretion to distribute any or all of a bona vacantia estate.

Q39: Would it be a good idea to have a provision inserted into the Vanuatu legislation to state that in default of any person taking absolute interest, the residuary estate shall be given to and owned by the government?

Q40: Should a provision be inserted to state that after 6 years from the death of the person, undistributed money, personal property shall be put on auction sale and pay proceeds of such sale into the consolidated revenue fund as the case in PNG?

Other classes of parent–child relationships

135. The current provisions include issue so it is unclear whether the term would include a deceased's adopted children – whether under state law, or by custom. There may also be other classes of children for whom the deceased has accepted parental responsibilities such as stepchildren. The inclusion of other classes of children may complicate the law, create practical uncertainties and establish extra responsibilities for administrators.[66]

[66] It would be consistent with the intestacy regimes throughout Australia, the United Kingdom and Canada for the definition of descendants to refer only to natural and legally adopted descendants and do not include other classes of children.

136. In the New Zealand Law Reform Commission's consideration of this issue, they noted that:

> *Administrators may be required to undertake complicated factual analyses about the nature of the child's relationship with the deceased. It may have the unintended result of encouraging rather than dissuading claims against the estate. Where the surviving family are all in agreement that a parent child relationship existed, they may have no trouble accepting that the child should also share in the estate, but where there is contention about that relationship, conflict is likely to arise. At times, this approach will produce seemingly unfair results, for example, where one of the child's biological parents died when the child was very young and a stepparent assumed the place of that biological parent.*

137. It may also be the case that the deceased leaves behind a pregnant partner – that is a child in utero.

Q41: Should adopted children (formally, or through custom), stepchildren or other children for whom the deceased has accepted parental responsibilities be included in the intestacy regime? Should illegitimate children be also considered as child in the new legislation? Similarly, should the intestacy rules be extended to include guardians or other parental figures?

Q42: Should a child in utero at the time of the deceased's death who are later born be eligible to succeed on intestacy?

Q43: Would it be appropriate to have a provision that provides the distributor power to sell personal property for the purpose of paying the debts due from the deceased person?

Grants of representation

138. Grants of probate and letters of administration are collectively referred to as grants of representation. A grant of representation gives a person the legal right to administer the estate of a deceased person. For clarity's sake, a grant of probate is the approval granted to an executor of a will by the Court to administer that will. The grant of letter of administration applies when someone dies without a will.

139. A grant of representation is a legal document issued by the Court, which enables the executor or administrator to deal with the deceased's assets. It allows the deceased's money held in banks to be collected, their debts to be paid, and their property to be sold or transferred. The grant is proof that the person named in the grant is entitled to collect and distribute the estate of the deceased.

Process of applying for probate and administration

140. There are different processes depending on whether the deceased left a will. If the deceased left a will, then the correct application would be for a grant of probate, rather than letters of administration.

141. Probate is a legal document that certifies that a will is valid and can be acted upon. Probate is the approval that is granted to an executor of a will by the Court to administer that will. Applying for (or "filing for") probate occurs after the death of the will maker, and involves making an application to the Court to approve the will and give the executor (the person named in the will to manage the estate) the authority to start carrying out the instructions in the will on behalf of the beneficiaries.

142. A grant of letters of administration is required where someone has passed away without leaving a will. This is known as 'dying intestate'. The application process for letters of administration is similar to probate, but there are different documents involved.

143. Letters of Administration is the approval granted to the deceased's closest living next of kin (the Administrator) by the Supreme Court, allowing the Administrator to administer the deceased's estate in accordance with the laws of intestacy. Once the approval is granted by the Court, the next of kin will be called the "administrator" of the estate (rather than the executor).

144. In Vanuatu, application for probate or administration of an estate is to be made to the Supreme Court with a requirement for the advertisement of the application to be broadcast on the radio on 3 days in one week, at least once in a morning and once in an evening.[67] Any person opposing the application must file a response to the court within 28 days. Failure to do so, the court will grant administration to the applicant.[68]

145. Comparably in Solomon Islands, application is made to the High Court[69] while in Fiji application is lodged with the registrar of the National Court. The Solomon Islands *Wills, Probate and Administration Act* [Cap 33] prohibits granting of probate and administration to applicant within 7 - 14 days but only if deems urgent in the interest of proper administration[70] and it requires that all applications must be supported by an oath. The Solomon Island's legislation also has provisions limiting the granting of probate and administration if the deceased person has been declared insolvent[71] and it divides the grants in small estates from big estates. For example, application of grant of small estate

---

67 *Probate and Administration Rules* (Vanuatu), r 2.5(4).
68 *Probate and Administration Rules* (Vanuatu), r 2.6(1).
69 *Will Probate and Administration Act* [Cap 33] (Solomon Islands), ss 3(1) & 16.
70 *Wills Probate and Administration Act* [Cap 33] (Solomon Islands), s 18.
71 *Wills Probate and Administration Act* [Cap 33] (Solomon Islands), s 17.

is to be made to the Magistrate Court in the area in which the deceased person was resident at the time of his/her death.[72]

Q44: Are there any issues with the current process for applying for probate and administration?

Q45: Is the current requirement spelled out in Vanuatu's legislation enough or do we need to include requirements such those applicable in Solomon Islands such as a section prohibiting granting of probate or administration within 7-14 days? If yes, state your reasons.

Q46: Should Vanuatu have a provision on deceased being declared insolvent and how to deal with such situation? If yes, how can the law address such situation?

Q47: Should there be a provision dividing small estates from big estates in the Vanuatu legislation? If so, state your reasons. Should different applications lodge to different jurisdiction of courts as the case in Solomon Islands?

Process of opposing an application for probate and administration

146. Part 2 of the Probate and Administration Rules of Vanuatu state that:

> *A person who opposes the grant of probate or administration to the applicant must file a response within 28 days after the advertisement required by Rule 2.5 was last broadcast or published. A response must state that the person opposes the grant of probate or administration to the applicant; state the person to whom probate and administration should be granted; and set out the address that is the person's address that is the person's address for service of documents; and be in form 12.*

147. The requirements are somewhat different in the other countries of the region. In the Solomon Islands, any application for revocation of grant shall be made to the court by notice of motion.[73] The Fiji and PNG legislation are silent on the issue however, in PNG its legislation provides for the revocation of the grant of probate and administration where a person is living.[74]

Q48: Is it a good idea to keep the process for opposing an application for probate and administration in legislation?

Q49: Should there be a provision inserted into the proposed new legislation that allows for revocation of grant according to certain circumstances as highlighted in the PNG and Solomon legislation? If yes, what could be some circumstances for revocation?

---

72 *Wills Probate and Administration Act* [Cap 33] (Solomon Islands), ss 55-59.
73 *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands)
74 *Wills, Probate and Administration Act 1966* (Papua New Guinea)

Granting of letters of administration

148. The provisions for granting of letters of administration varies amongst the different legislations of the region. In Vanuatu, grant must be made to a person not less than 21 years and is to be awarded to a husband or wife of the deceased. In the absence of a husband or wife, to one or not more than four or the next of kin in order of priority of entitlement as stated under the Regulation in the distribution of the estate of the deceased or to any other person, whether a creditor or any other person who applied for administration and is deem fit by the courts.[75]

149. In Solomon Islands, grant is not to be made to more than 5 persons and joinder administration is also allowed.[76] Like PNG, there is also a provision providing the grant of letters of administration on circumstance of presumption of death of a decease.[77] However, in PNG, only the National Courts has the power to grant this power and will only do so if requires fees are paid.[78] The courts in the Solomons may not grant probate or administration to any person until all enquiries are satisfied. The court is also expected to determine any arising disputes between 2 persons concerning the distribution of the estate before any actual distribution.[79]

150. In terms of revocation of grant of probate and administration, the PNG and Fiji's *Probate and Administration Act* have provisions on revocation of grant based on evidence if person is alive.[80] Also, in Fiji, the court may grant administration of estate to a person dying intestate to a person not less than 18 years of age. Person or persons in Fiji includes a wife, a husband or *de-facto* partner of the decease. If no surviving wife, husband or de-facto partner, then to 1 or more next of kin in order of priority of entitlement or to any other person fit to be so entrusted.[81]

Q50: Should granting of letters of probate and administration be awarded to a person on presumption of death of a person? If yes, what would be some possible criteria for the grant?

Q51: In Vanuatu, grant must be made to a person not less than 21 years. Is this age (21 years of age) an appropriate age for such responsibility or should a grant be made to a person more than 21 years of age considering Vanuatu's situation?

Q52: Should joinder administration be allowed in the proposed new legislation?

---

75 *Queens Regulation* No. 7 of 1972 (Vanuatu), s 7.
76 *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands).
77 *Wills, Probate and Administration Act 1966* (Papua New Guinea), s 39.
78 *Wills, Probate and Administration Act 1966* (Papua New Guinea), s 40.
79 *Wills, Probate and Administration Act* [Cap 33] (Solomon Islands).
80 *Wills, Probate and Administration Act 1966* (Papua New Guinea), s 41 and *Succession, Probate and Administration Act 1970* (Fiji), s 36.
81 *Succession, Probate and Administration Act 1970* (Fiji), s 7.

Q53: Should a provision be inserted into the proposed new legislation to allow solving of disputes prior to any granting of letters of administration?

Probate and administration

151. In Vanuatu, in cases where a person dies intestate, the law states that the administration of an estate is to be vested in the court until grant is ordered by the court. Similarly, as in the case of Fiji, all property held under trust to vest subject to trust. Thus, the law also stated that an estate of an intestate shall vest according to the right of proving executors.[82]

152. In cases where there is a dispute or question arising from an administration of an estate, the Solomon Islands legislation allows the court exclusive power to settle such dispute or question. The Fiji legislation has a similar provision but is inclusive of disputes or questions arising from administration or distribution of the estate.[83]

153. The legislation in the Solomon Islands also states that where the deceased died domicile outside Solomon Islands, the court having jurisdiction at that place shall have the right to grant administration to person responsible. This issue of decease dying domicile outside the country is silent in the Vanuatu laws or rules.

154. The law in Fiji is similar to the other laws in the region where the power to administer shall vest with the administrator appointed by the courts. Recognition is also given to infants of the intestate. Where an infant is entitled to the intestacy, the court may appoint 2 or more not exceeding 4 to be trustee(s) for the infant. The law in Fiji also caters for funeral testamentary expenses and in cases where the appointed administrator is out of the country, there is a provision that allows for a person to be appointed under power of attorney within jurisdiction according to the conditions as the court thinks fit. The law also stated that the distribution of the intestate shall be made after 1 year from the date of the grant of administration. Like many other jurisdictions, the court in Fiji has the power to settle questions/disputes with administration.[84]

Q54: Should the proposed new law in Vanuatu cater for cases where deceased dies outside the country like the case in Solomon Islands? If yes, should the law allow the court in the jurisdiction where the deceased died the power to appoint an administrator to administer and distribute the estate?

Q55: Should a provision be inserted in the proposed new law to deal with children of the intestate? If yes, how could the court deal with such issue?

---

82 *Queens Regulation* No.7 of 1972 (Vanuatu).

83 *Succession, Probate and Administration Act 1970* (Fiji), s 41.

84 *Succession, Probate and Administration Act 1970* (Fiji).

Q56: In cases where an administrator is out of the country, should a provision be inserted to allow another to be appointed/given the power of attorney within the jurisdiction according to the conditions as the court thinks fit?

Q57: Should a provision be also inserted to cater for disputes arising out of administration or distribution of the intestate estate as the case in Fiji and Solomon Islands?

OTHER ISSUES

The Act is framed in outdated and inaccessible language

155. The Queen's Regulation does not comply with modern legislative drafting principles. The provisions that detail the statutory distribution rules use uncommon terms and phrases such as "issue" and "absolutely vested interest". There are several examples of long, unbroken sentences throughout the Regulations that make it difficult to understand. The Commission considers that the terminology used for intestate succession should be updated.

156. For example, the current law uses the term 'issue' but does not define it. Indeed, the term 'issue' is used frequently in intestacy regimes internationally and rarely defined. The Commission considers this terminology should be updated.

157. The Commission is considering whether the term issue should be replaced with a better understood term such as "descendants" to include all lineal descendants.[85]

Q58: Are there any other issues you wish to raise in relation to the operation of succession law in Vanuatu?

[85] This would accord with most Canadian jurisdictions: Intestate Succession Act RSNWT 1988 c I–10, s 1(1); The Intestate Succession Act CCSM 1990 c 185, s 1(1); Intestate Succession Act RSNL 1990 c I–21, s 2(b); Intestate Succession Act RSNS 1989 c 236, s 2(b); Probate Act RSPEI 1988 c P-21, s 86(b); Wills and Succession Act SA 2010 c W-12.2, s 1(1)(e); Wills, Estates and Succession Act SBC 2009 c 13, s 1; and The Intestate Succession Act SS 2019 c I-13.2, s 2.