Inquiry into the Wills Amendment (International Wills) Bill 2011

Legislative Council

Legal and Social Issues Legislation Committee

Report No. 1

June 2012

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Legislative Council Legal and Social Issues Legislation Committee

Inquiry into the Wills Amendment (International Wills) Bill 2011

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Legal and Social Issues Legislation Committee

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Member for Eastern Victoria Region

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Member for Southern Metropolitan Region

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Committee Establishment and Functions

The functions of the Standing Committee on Legal and Social Issues are set in the Legislative Council Standing Orders. The Committee will inquire into and report on any proposal, matter or thing concerned with community services, education, gaming, health, and law and justice.

Legislation committees may inquire into, hold public hearings, consider and report on any Bills or draft Bills referred to them by the Legislative Council, annual reports, estimates of expenditure or other documents laid before the Legislative Council in accordance with an Act, provided these are relevant to their functions.

The following Members were appointed to the Legal and Social Issues Legislation Committee:

- Mr Edward O'Donohue (Chairman)
- Mr Matt Viney (Deputy Chairman)
- Ms Georgie Crozier
- Mr Nazih Elasmar
- Ms Colleen Hartland
- Ms Jenny Mikakos
- Mr David O'Brien
- Mrs Donna Petrovich

1. Introduction

1.1 Inquiry Process

On the 27 March 2012, the Legislative Council resolved that the Wills Amendment (International Wills) Bill 2011 be referred to the Legal and Social Issues Legislation Committee.

The terms of reference called for the Committee to inquire, consider and in particular, to examine the practical benefits to Victorians of having a simplified process of recognition of international wills in Victoria, noting the large number of Victorians either born overseas or who have family residing overseas. The Legal and Social Issues Legislation Committee is to report by 20 June 2012.

Section 1.2 of this Report provides a background to the Bill, including its passage through the Legislative Assembly.

On 20 April 2012, the Committee advertised its terms of reference on the Committee's website calling for written submissions. The Committee also wrote to a number of key stakeholders in Victoria inviting written submissions and/or evidence in a public hearing. Written submissions were received from the Supreme Court of Victoria, the Australian Italian Lawyers Association, and the State Trustees.

The Committee conducted a public hearing on 30 May 2012 and received evidence from the Law Institute of Victoria, the State Trustees, and the Australian Italian Lawyers Association. Appendix A contains copies of transcripts from the hearings.

As outlined below, the Committee notes the Bill is uniform legislation to be adopted by all Australian States and Territories following a July 2010 agreement by the Standing Committee of Attorneys-General for Australia to formally accede to the UNIDROIT[1] Convention.

[1] International Institute for the Unification of Private Law (Institut International pour L'unification du Droit Prive).

The referral of the Bill to this Committee presented an opportunity to examine the practical benefits of the uniform legislation and to consider any possible issues of concern with respect to the implementation of the legislation in Victoria.

Further, given other State and Territory Parliaments are currently considering the same legislation in their jurisdictions, this Report will not only assist the Victorian Parliament in its deliberations, but should inform other Parliaments throughout Australia as they proceed to consider similar legislation.

1.2 Background to the Bill

The Victorian Attorney-General introduced the Wills Amendment (International Wills) Bill 2011 into the Legislative Assembly on 8 November 2011. The purpose of the Bill is to amend the *Wills Act 1997* to adopt into Victorian law the Uniform Law contained in the UNIDROIT Convention providing a Uniform Law on the Form of an International Will 1973 (the Convention), which was signed in Washington D.C. in 1973.

The Explanatory Memorandum to the Bill states that:

> 'the primary objective of the Convention is to eliminate problems that arise when cross border issues affect a will, for example where a will deals with assets located overseas or where the will-maker's country of residence is different to the country in which the will is executed.'
>
> 'The Convention's Uniform Law provides for an additional form of will — an international will — that sits alongside other local forms of will. An international will that complies with the Uniform Law will be recognised as a valid form of will by courts of other States party to the Convention, irrespective of where the will was made, the location of assets or where the will-maker lives, and without the court having to examine the internal laws operating in foreign countries to determine whether the will has been properly executed.'
>
> 'The Uniform Law sets out requirements for the form of the will and the process for its execution—it does not deal with issues such as the capacity

> required of the will-maker or the construction of the terms of a will. These are matters that will continue to be dealt with by local law.'[2]

In July 2010 at a meeting of the Standing Committee of Attorneys-General, '… all Australian States and Territories [have] agreed to adopt the Uniform Law into their local legislation to allow Australia to formally accede to the Convention and to provide a consistent approach to the recognition of international wills across Australian jurisdictions.'[3]

In order for Australia to accede to the Convention all States and Territories need to adopt the model legislation.

Victoria was the first jurisdiction in Australia to introduce the legislation to Parliament in November 2011. The Australian Capital Territory has since introduced and passed its local legislation. The Committee is aware that a Western Australian Parliamentary Committee is currently examining a local Wills Bill and is expected to report back to the Western Australian Legislative Council by 14 August 2012. The uniform legislation has also been introduced in the Tasmanian Parliament.

A number of countries have already signed up to the Convention, these include: Belgium, Bosnia-Herzegovina, Canada[4], Cyprus, Czechoslovakia, Ecuador, France, Holy See, Iran, Italy, Laos, Libyan Arab Jamahiriya, Niger, Portugal, Russia, Sierra Leone, Slovenia, United Kingdom, United States[5], Former Republic of Yugoslavia.[6]

2. Stakeholder issues

The Committee's evidence supports the Bill's passage and notes the benefits of the uniform legislation. Some stakeholders raised concerns or suggestions for the Committee to consider which are outlined below. A key aspect of the inquiry was to examine the 'practical benefits to Victorians of having a simplified process of recognition of international wills in Victoria.'[7]

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[2] Wills Amendment (International Wills) Bill 2011, *Explanatory Memorandum*, p. 1.
[3] ibid.
[4] Not all Provinces.
[5] Not all States.
[6] UNiDROIT, http://www.unidroit.org/english/implement/i-main.htm, accessed 4 June 2012.
[7] Second reading speech p. 1678.

2.1 Benefits of the Bill

Evidence presented to the Committee summarised some overarching benefits of the Bill as follows:

- It will facilitate estate planning giving Victorians certainty that their will applies elsewhere.[8]

- The requirement of the international will to have a 'third person' – an authorised person to certify the will[9] provides formal validity of the will.[10]

- The option to have an international will provide Victorians with 'additional flexibility'[11] in managing their estate matters.[12]

In addition to the overarching benefits listed above, the key benefit of this Bill is applicable to Victoria's multicultural community. The most recently published ABS data (2006 Census), highlights that approximately 24 per cent of Victorians were born overseas in over 200 countries and a further 20 per cent of Victorians born in Australia have one or both parents being born overseas. [13]

In addition, the mobility of labour also presents opportunities for individuals to obtain assets overseas. Anecdotal evidence presented to the Committee suggested there is an increasing tendency for individuals owning assets in other countries. With such a significant proportion of Victorians that have ties outside of Australia, it is clear that the introduction of the Wills Amendment (International Wills) Bill 2011 could have some significant benefits for this community.

The submission from the Australian Italian Lawyers Association (AILA) identified the benefits of the uniform legislation for the Victorian Italian community. They highlighted that the Bill will assist in facilitating estate planning for Victorians with

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[8] Mr Esposito, hearing evidence, p. 18.
[9] Either a legal practitioner s. 19C (1)(a) or public notary of any Australian jurisdiction s.19C (1)(b).
[10] Mr Esposito, Transcripts of Evidence, 30 May 2012, p. 18.
[11] Mr Craig, Transcripts of Evidence, 30 May 2012, p. 9.
[12] ibid, p. 9.
[13] Australian Bureau of Statistics, 2006 Census of Population and Housing, Catalogue No. 2001.0, Community Profile Series, *Basic Community Profile*.
This includes those with both parents born overseas or either parent born overseas.

Italian ancestry.[14] Given that Italy has already acceded to the Convention, Victorians with Italian ancestry will be able to create an international will that would be formally valid in Italy. AILA suggested that anecdotal evidence shows that Victorians with Italian backgrounds currently experience difficulties in dealing with estate matters and that cross-border issues relating to property disposal exist around the world.[15] In their view, the Bill will assist to ameliorate some of these issues.

At present, the major limitations of this Bill are that it only benefits Victorians who have ties to a country that has already acceded to the Convention. Several countries of origin for many Victorians, such as China, Greece, Malaysia, New Zealand and Vietnam, have yet to accede to the Convention. Accordingly, whilst the Bill will provide benefits for some Victorians, others from different cultures will not have access to the benefits of an international will until those countries accede to the Convention. As other countries accede to the Convention further benefits will accrue. The Committee considers this an important issue and believes once all Australian States and Territories have passed the legislation, the Australian Government will need to encourage other countries represented in Australia's multicultural community to sign up to the Convention.

2.2 Community Awareness

The Law Institute of Victoria (LIV) made a submission to the Victorian Department of Justice in August 2009 on the issue of the Convention on International Wills. In this submission, the LIV advised it 'sees no practical purpose being served by the adoption of the Convention.'[16] The LIV considered the Convention to be 'onerous and time consuming when compared with the validity requirements of wills contained in s7 of the [Victorian Wills] Act.'[17] The LIV also believed the legislation may cause some confusion in the community.

In its evidence to this Inquiry, the LIV advised it is not opposed to the Bill and sees it as a positive step. The LIV emphasised that whilst it supports the principal objectives of the Bill they believe it may have limited practical application in Victoria. Ms Kathy

[14] Australian Italian Lawyers Association, submission, p.1.
[15] ibid, p. 1.
[16] ibid, p. 2.
[17] Law Institute of Victoria, Convention on International Wills, submission to the Department of Justice, dated 25 August 2009, p. 1.

Wilson, Chair of the Law Institute's Succession Law Committee, commented on the possible community confusion the legislation may create:

> '…. there is some advantage in looking to uniform succession laws both in Australia and outside. It is for that reason that we support the bill's objectives. My personal concern is that if something is held out as being an international will, people in the community will think that they can effectively dispose of their assets as they wish. It is for that reason that we think it is going to require some education and community campaigns just so that people have a better understanding of it.'[18]

The Committee heard evidence that Victorians considering an international will would be best advised to consider the succession and taxation laws in that jurisdiction, as these laws differ significantly between countries.

Mr Alistair Craig from the State Trustees believes the uniform laws will lead to some small benefits but also emphasised the need to community education:

> 'I suppose in the back of my mind I have an understanding that some people may see what is in the heading of the bill and think, 'Hooray! I want to make an international will. I don't care what my solicitor or what the trustee company says, I know I can do it, so I'm going to tell them to make one for me'. That may actually add to the complexity of explaining why it may or may not be appropriate in their particular case or maybe that making two wills would be more appropriate, or having to explain, 'Well, the jurisdiction you are worried about has not acceded to the convention yet, so it is actually not relevant yet to that jurisdiction', and so forth. There may be an educational aspect that is added in to the discussion around estate planning. As to whether over time that means that these things take a longer or a shorter time, certainly if people have a full understanding, then the bill when enacted would permit in a number of circumstances things to be done more efficaciously and more efficiently. I do not see that being in a large number of cases as yet.'[19]

[18] Law Institute of Victoria, Transcripts of Evidence, 30 May 2012, p. 2.
[19] Mr Alistair Craig, State Trustees, Transcripts of Evidence, 30 May 2012, p. 11.

The LIV proposed to the Committee that the confusion could be mitigated by developing a community education campaign. They indicated that this is something that LIV does for its members and where possible the broader community, however, they suggested that this could be an area for government involvement.

The Committee considers the issue of community education to be important and believes that Victorians would benefit from an education campaign that highlighted how and when an international will could be used and any limitations it may have. The Committee considers that the education campaign would need to take into account that not all countries represented in the Victorian multicultural community are currently signatories to the Convention.

Recommendation 1

That the Victorian Government advocate to the Federal Government to engage with the international community to encourage further countries to become signatories to the UNIDROIT Convention providing a uniform law on the Form of an International Will.

Recommendation 2

That once Australia has acceded to the Convention, the Victorian Government liaise with the Law Institute of Victoria and other relevant stakeholders to undertake an education and community awareness campaign with respect to making an international will, including the benefits of an international will and cross-border issues

Committee Room

7 June 2012

Appendix A – Transcripts of Evidence

TRANSCRIPTS FROM PUBLIC HEARINGS HELD ON

WEDNESDAY 30 MAY 2012

C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

LEGISLATION COMMITTEE

Inquiry into the Wills Amendment (International Wills) Bill 2011

Melbourne — 30 May 2012

Members

Ms G. Crozier	Mr D. O'Brien
Mr N. Elasmar	Mr E. O'Donohue
Ms C. Hartland	Mrs D. Petrovich
Ms J. Mikakos	Mr M. Viney

Chair: Mr E. O'Donohue

Deputy Chair: Mr M. Viney

Staff

Secretary: Mr R. Willis
Research officer: Ms L. Kazalac

Witnesses

Ms K. Wilson, Chair, and

Mr I. Morrison, Former Chair, Succession Law Committee, Law Institute of Victoria.

The CHAIR — Welcome, Mr Morrison and Ms Wilson. I declare open the Legislative Council Legal and Social Issues Legislation Committee public hearing. Today's hearing is in relation to the Wills Amendment (International Wills) Bill 2011. The bill is currently before the Legislative Council, having passed the Assembly in March this year. The committee has been asked to examine the bill and report back to the Council by 20 June 2012.

As I say, I welcome both Ms Wilson and Mr Morrison from the Law Institute of Victoria. All evidence at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council's standing orders. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same comments, they may not be so protected by this privilege. All evidence is being recorded. You will be provided with proof versions of the transcript in the next week. Transcripts will ultimately be made public and posted on the Committee's website.

I understand you have some opening remarks, which we would welcome, and a presentation, which is being copied. But we would welcome your initial remarks on the bill. I suppose there is quite a long background to this legislation, so I welcome your comments, and then we will have some questions from Committee members. Over to you.

Mr MORRISON — If it is all right with you, we will use our first names. Kathy is the chairman of our Committee, so I will let Kathy run this, and I will come in. I am a former chairman of our Committee.

Ms WILSON — Thank you. I am the chair of the Succession Law Committee of the Institute. I am here with my colleague Ian Morrison, who is a former chair of the Committee. The Law Institute is always pleased to assist any committee in its inquiries and in particular this inquiry into the Wills Amendment (International Wills) Bill 2011. The Institute hopes that by being here we can shed some light on the legal implications of the changes proposed by the bill and to share our views about the likely practical effect of the changes based on our members' experiences as they have been advised by members of the Succession Law Committee at the Law Institute.

This Committee will be aware that a submission was made in 2009 to the Department of Justice. That was in response to a request for comment on the merits of Australia's accession to the convention providing a Uniform Law on the Form of an International Will. We are aware that the Law Institute's 2009 submission was discussed by a number of members during the second-reading debate. As was noted in the debate, the Law Institute provided comments in confidence to the Department of Justice in 2011, prior to the introduction of the bill.

Since its introduction to Parliament, the Law Institute's Succession Law Committee has had the opportunity to fully consider the provisions of the Wills Amendment (International Wills) Bill. We can discuss our comments throughout the hearing, but in summary, the Law Institute supports the objectives of the bill. It notes, though, that it might have limited practical application, it may cause some confusion in the community, and the uncertainty and complexity will undermine the utility of the bill. Perhaps I will say no more on that but will wait for questions.

The CHAIR — If I could perhaps take you to the issue of confusion in the community; perhaps you could elaborate further. And without pre-empting what the Parliament may do, if the bill is passed, I am interested in your views on how that confusion could perhaps be mitigated or, working with the LIV and practitioners, how an understanding of the international will could be better spread throughout the legal community.

Ms WILSON — I think from reading the second-reading speeches it is evident that there will be some confusion around it. There were comments made about the likely believed effect of the legislation. In fact the legislation just provides for a form of will, and we are concerned that within the community people will think that if they make an international will, they can effectively dispose of their assets in accordance with our law, whereas they may be confined by the local succession laws in any other country. So, for example, in some European countries there are forced heirship laws that restrict your ability to leave part of your estate outside your immediate family. It is that concern that was being expressed earlier by the Institute. It is not one that can be fixed in this legislation. It has to be weighed against the objective of the bill, and that is to provide some uniformity around the law. I see it as a balancing act.

In response to a question about how we can overcome some of the issues around that confusion, I think it will require an education campaign. Certainly the Law Institute of Victoria will conduct its own campaign about it,

its effects and the areas where it might be used both for our members and, if the opportunity arises, for the public. The Law Institute often does conduct public awareness campaigns as part of Law Week and in other forums where we go out to the community to explain aspects of the law relating to succession and other areas, and this would be one such area.

Ms MIKAKOS — Thank you for those comments. So do the Law Institute's original 2009 objections stand? Do you have any of those original concerns, which as I understood related to concerns around more onerous validity requirements?

Mr MORRISON — Can I take that up? Our concern before we saw the bill was that it might impinge on our very generous existing validity requirements that already exist in our Wills Act from 1997, and they already existed prior to that in the 1958 act — I think it was in section 22 — which validated other countries' wills coming to Victoria. So we already had very generous provisions to validate international wills coming into Victoria. I suppose we were inward looking — looking at other people's wills coming into Victoria and being validated in our jurisdiction. We were concerned about this, without having seen the legislation at that stage, making it more difficult for international wills coming to Victoria being validated. Now we have seen the legislation, which is expressed not to have any impact on those existing provisions, we are more relaxed. I was not a member of the subcommittee that saw this bill that was submitted to the Law Institute in confidence. The Succession Law Committee did not see the bill until just this year. Now that the Committee has seen that in general, it has relaxed its opposition to the bill.

Ms MIKAKOS — It would be helpful to Committee members if you could perhaps explain to us, none of us — perhaps David — having practised in succession law, what you feel the bill has added to or potentially might be beneficial —

Mr MORRISON — It does not add much.

Ms MIKAKOS — given that you said that there was a rewrite of the Wills Act in 2007; is that right?

Mr MORRISON — In 1997.

Ms MIKAKOS — In 1997; okay. Presumably, if I recall correctly, that may have streamlined or made a bit more straightforward the issues around validity.

Mr MORRISON — Yes, it has. And it has allowed the informal wills to be validated. It has been generous also in the area of Part IVs, for testators' family maintenance, and the group of applicants has been made larger, but that has been in the Administration and Probate Act rather than the Wills Act.

Ms MIKAKOS — I was particularly interested, Mr Morrison, in your comments that under the current act foreign wills can be brought here and regarded as valid.

Mr MORRISON — Yes.

Ms MIKAKOS — So perhaps we may have assumed that this bill was going to do that for the first time.

Mr MORRISON — That was always the case. I have been in practice for 42 years, and that has always been the case as long as I have been in practice.

Ms MIKAKOS — So what would the bill actually do?

Mr MORRISON — As far as a will coming into Victoria is concerned, it adds nothing. We are really speaking about a person who is a citizen of Victoria making a will for execution in a jurisdiction outside of Victoria, which is what concerns us a little, because I suppose, speaking for myself, I really have no experience in jurisdictions other than perhaps a little of New Zealand and a little of Great Britain. In California there is a community property where a person has to provide for their spouse and their children and they can only leave a certain amount of their estate at their discretion. Certainly in France it is the same, certainly in Holland it is the same and certainly, I think, in Germany. It is to my shame that I know very little of the Near East right around us, but there would be practitioners in Melbourne who do, and I would refer a client to someone who knew about those jurisdictions if they needed that sort of experience.

Ms MIKAKOS — Just so that we are all clear in terms of what this bill does, under current law a foreign will that was executed overseas —

Mr MORRISON — Coming in here would be valid, yes.

Ms MIKAKOS — is able to be recognised as a valid will?

Mr MORRISON — Under the existing law as it is today.

Ms MIKAKOS — But this bill will enable someone to execute a will that will extend to foreign assets for the first time?

Mr MORRISON — There are two aspects to a will. First of all there is its formal validity, and that is the form that it has to take to be actually valid; and secondly, there is its beneficial validity — the way it gives its benefits. This gives it a formal validity, so it is actually signed in the right way. Whether it is capable of disposing of the assets according to the law of that jurisdiction we cannot say, because we do not know the law of that jurisdiction.

Ms MIKAKOS — It is subject to the caveat that Ms Wilson explained earlier that it is subject to the succession law of that country.

Mr MORRISON — The law of that jurisdiction; exactly, so it will give it a formal validity, but not necessarily beneficial validity. It is like putting a potent new drug on the chemist's shelves but letting it be sold at Woolworths.

Ms CROZIER — I would like to follow up a clarification point with your answer, Ms Wilson, in relation to the question that Mr O'Donohue asked of you. I think you said that if somebody was to make an international will and their assets were disposed of, there was some confusion about how that would happen or could potentially happen, and you went on to speak about a campaign that perhaps the Law Institute would undertake. Is it your experience with other jurisdictions that they had similar issues with the issue you raised, and have they undertaken campaigns to assist with perhaps the international will aspects for their citizens?

Ms WILSON — I cannot speak in any detail for other jurisdictions. It is my general understanding that this state is considering itself as leading the way with this legislation.

Ms CROZIER — I am referring to international jurisdictions.

Ms WILSON — I am sorry; I do not know about what has happened in international jurisdictions.

Mr MORRISON — I do not either.

Mr O'BRIEN — I appreciate your submissions and input into the bill. As I understand it, the purpose of the convention is to provide an additional form of will effectively to seek to remove to the extent possible some of those confusions that can exist between jurisdictions, and it will only be as effective as the number of jurisdictions signing up. I see you nodding, Mr Morrison.

What I will ask you to turn your mind to is the question for, I suppose, this Committee and the Parliament considering this bill is: does it improve the situation that we presently have in that we will have lots of countries? The 12 parties that have signed up, for the benefit of you and the people listening to this, are Belgium, Bosnia, numerous Canadian provinces, Cyprus, Ecuador, France, Italy, Niger, Portugal, Slovenia and Yugoslavia. Then there are other countries that have signed the convention but it has not come into force, including the Holy See, Iran, Laos, Russia, Sierra Leone, the United Kingdom and the United States of America. As I understand, what the international convention is designed to do is to help solve some of those jurisdictional questions for those signing an international will and for the way it will operate in Victoria or Australian states it will sit alongside the existing Wills Act, particularly the foreign wills.

Mr MORRISON — That is my understanding too. In the United States and Canada the law of succession is state based, as it is in Australia, so that will need each of the states to accede to the convention. Europe is Roman law-based, so the new form of will will work much more readily in Europe — in the European Convention countries, which does require notarised wills and handwriting and a whole lot of other rules that I

am not really familiar with. It will work much more readily in Italy, France and Germany and those countries. I think an Australian will would work very readily in the United States; it is just I do not know what the law is in most of those states.

Mr O'BRIEN — I suppose in the balancing act what we have to consider is that we have some evidence, and there will be State Trustees and other people — the bar council has submitted — that will help clarify some of these issues, but it is not a revolutionary change. We would receive your submission partly saying it may not be of much effect, which I suppose we can live with. What we would be seeking you to clarify is are there any residual concerns where this legislation may enter the field and cause confusion that does not already exist. I suppose that would be something that we would want to really have in the balance. If those concerns have been ameliorated to some extent, we would obviously appreciate you clarifying the Institute's position on that.

Mr MORRISON — Our concern will be to know precisely in which places it will be effective. It will be a concern to know where a practitioner can find that information. I am not sure if the Law Institute will be the repository of that information or whether the Parliament or the Federal — I suspect an innocent suburban lawyer ringing up the Department of Foreign Affairs will get short shrift. I do not know what would happen to me if I rang up.

The CHAIR — If I can intercede there, what is the practice with other international conventions that are the basis of statute?

Mr MORRISON — The answer is I do not know. I have never tried to find out. Because I am a state-based practitioner I never really have to ring up and find out about that sort of thing.

The CHAIR — Fair enough. That is an issue perhaps we can explore.

Mr O'BRIEN — Further to the question or the point I am putting to you, a lot of those confusions will exist already, whether we have this bill or not.

Mr MORRISON — Quite; yes.

Mr O'BRIEN — To some extent I would see this bill as going some way to solving it if it does provide an international form of will. If that is so, then it is of some benefit, and if then the fact that it will sit alongside and not supplant the existing wills requirement in my view seems to meet the concerns that I understood the Institute to express, so if that is the case, we would obviously appreciate you clarifying that. If there are residual concerns, I would be happy for you to point them out to us.

Mr MORRISON — The only other concern we perhaps have is practitioners running into trouble with their insurance.

Mr O'BRIEN — Yes, so that will have to be reviewed as well.

Ms WILSON — I think there is some advantage in looking to uniform succession laws both in Australia and outside. It is for that reason that we support the bill's objectives. My personal concern is that if something is held out as being an international will, people in the community will think that they can effectively dispose of their assets as they wish. It is for that reason that we think it is going to require some education and community campaigns just so that people have a better understanding of it.

Mr O'BRIEN — Can I just follow that up, because that is an important point? We certainly would be not wanting to portray to the community that the bill is more than it is.

Ms WILSON — No.

Mr O'BRIEN — We would be happy, certainly from the government's point of view — as a government member — and I am sure the opposition would be with us on this as well, to be very careful as to the extent to which we pitch the level of assistance this provides to persons and practitioners dealing with international wills or wills in general so that we are not inadvertently falsely representing, as it may be, the import of this legislation. But I suppose that is a second step and part of how we communicate the bill. The matter we need to report back to the Parliament on is the ultimate merits of the legislation properly considered.

With the comments I have heard this morning and with your submission, which we thank you for, so far if I am right — and I do not want to verbal you, but I want to clarify the position — it would seem that the bill does provide a positive step to some degree. I see you nodding.

Ms WILSON — Yes.

Mr MORRISON — No, we are not opposed to it. We see it as a positive step. We see it as a box or a frame in which a person can put a will, but you have to be careful about what you put inside the box.

Mr O'BRIEN — And we have to be careful how we sell the box to the community so that we are not representing it to be more than it is.

Ms WILSON — Yes.

Mr MORRISON — That is it.

Ms MIKAKOS — Just following on from that point. I know that in your written submission you say that the benefits of this convention will arise only for persons in Victoria wishing to make a will for application in a signatory country. In particular you have identified some very significant sources of migration to this state, being the Chinese, Malaysian, Vietnamese and Greek communities, who are not currently signatories to that convention and therefore will not be able to derive the benefits of this bill.

Coming to the point you made earlier, Ms Wilson, around an education campaign, how would you envisage that the government would be able to explain to certain parts of the community that they could derive a benefit from this bill and then to other parts of the community that they cannot, and particularly for those who might hear about this legislation and think that the will they have made in the past is somehow now going to cover assets that are located overseas?

Ms WILSON — I do not know how the government goes about explaining its business, but certainly the Succession Law Committee will be recommending to the Law Institute that we have some public awareness campaigns which will highlight or distinguish between an international will and other wills made in Victoria and point out the limitations on its application. One would hope that as more countries adopt or accede to the convention this will have wider support.

Ms MIKAKOS — Can I ask a follow-up question, which is: will this apply to wills that predate the commencement of this bill? Because if someone is from, say, Italy — and Italy is a signatory to the convention — —

Mr MORRISON — Lost capacity, for instance.

Ms MIKAKOS — If someone is a resident in Victoria and has signed a will a decade ago in Victoria, will that apply to Italian assets?

Ms WILSON — This legislation will not impact on such a will because it stands alongside the existing legislation. This is an additional form of will.

Ms MIKAKOS — So that they would have to then go and sign a new will?

Mr MORRISON — Yes. Once this is introduced they would have to make a new will in the form, because this form will only come in when the legislation is passed.

Ms WILSON — Yes. If they want it to be an international will, they will have to make it in accordance with the act. But it will not derogate from any existing will in the sense that they are already valid; they will not be invalidated.

Ms MIKAKOS — I was not suggesting that. My concern is coming round to the issue of community confusion and whether people will assume that because this law has passed, automatically their foreign-based assets will now be caught by their pre-existing will.

Mr MORRISON — It will do no harm to their existing arrangements at all. That would be my view — none at all. Their existing arrangements will either stand or fall, depending on their current legal status. But there are legal practitioners in Melbourne who practise in Greek and Italian and Vietnamese law as we speak. Kathy and I refer people who want those matters dealt with to those people right now.

Mr O'BRIEN — Just following on from your comments that it will do no harm, as I understand the bill, it does not yet have a proclamation date because it will not come into effect until all the other —

Mr MORRISON — Six months after the — —

Mr O'BRIEN — states and territories sign up to it and then Australia accedes to the convention. That is how I understand its legal operation. But it does not prevent, from the time the bill has effectively been put into Parliament, people signing up on an international will in the form of the international will. That is how I understand it.

Mr MORRISON — I think that is how I read it too, yes.

Mr O'BRIEN — Yes. And it will not have any retrospective adverse effect upon existing wills, as I understand it.

The CHAIR — Any other questions from members?

Mr MORRISON — And you have to die, too, of course.

Mr O'BRIEN — The things about wills in other countries is that they often operate for a very long time, so it may be that you sign up to an international will and by the time you pass on the country that you are concerned about may have also signed and joined the convention. I suppose that is a semi-long shot, but wills do deal in a long time frame. I am sure you know that already.

Ms WILSON — Yes. And I think in your second-reading speech you alluded to people living to the age of 99.

Mr O'BRIEN — Yes, I did.

Mr MORRISON — Good luck.

Ms WILSON — Or dying by other means.

Mr O'BRIEN — Yes. You know that quote. I am sure you have read it.

Ms MIKAKOS — I am sure being a member of Parliament is not conducive to that longevity.

Mr O'BRIEN — It was actually an Irish compliment I paid the Acting President, Mr Finn, who took great offence, and I will not repeat the full quote for the transcript.

Mr MORRISON — We all thought it was a good quote.

The CHAIR — If there are no other question, I thank you, Ms Wilson and Mr Morrison, for your engagement in this process and for your presence here this morning. It is much appreciated. Thank you.

Mr MORRISON — Thank you.

Witnesses withdrew.

C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

LEGISLATION COMMITTEE

Inquiry into the Wills Amendment (International Wills) Bill 2011

Melbourne — 30 May 2012

Members

Ms G. Crozier	Mr D. O'Brien
Mr N. Elasmar	Mr E. O'Donohue
Ms C. Hartland	Mrs D. Petrovich
Ms J. Mikakos	Mr M. Viney

Chair: Mr E. O'Donohue

Deputy Chair: Mr M. Viney

Staff

Secretary: Mr R. Willis
Research officer: Ms L. Kazalac

Witness

Mr A. Craig, Senior Corporate Lawyer, State Trustees.

The CHAIR — Mr Craig, from State Trustees, thank you very much for being here this morning. I caution you that all evidence taken at this hearing is protected by parliamentary privilege, as provided by the Constitution Act 1975, and further subject to the provisions of the Legislative Council standing orders. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same comments, they may not be so protected. All evidence is being recorded. You will be provided with a proof version of the transcript within the next week. Transcripts will ultimately be made public and posted on the Committee's website. We would be interested in opening remarks or an opening comment from you if you have one. We have a copy of your submission; thank you for that. The Committee members will thereafter have questions.

Mr CRAIG — Certainly. Thank you, Mr Chairman. The short submission by the State Trustees you have received. State Trustees supports the bill. We are cautious as to the risk around people misconstruing what the bill will actually mean in practice for their estate planning arrangements and needs. We have pointed out all along that each individual's circumstances need to be considered when making estate planning arrangements through wills. Currently it is often the best recommendation that a person at least seek specialist advice about assets that they hold outside of Victoria when it comes to planning for succession in relation to those assets, and there are a variety of reasons why that is important.

A lot of other jurisdictions will have quite different legal arrangements in relation to the efficacy of wills. In a number of jurisdictions you cannot even give your entire estate by will, depending on your circumstances. The law in those states will prescribe a formula, effectively, as to where your assets will go, and there may be a portion of your estate that you can distribute by will. Other considerations are that trust law may not be applied in the same manner, or the jurisdiction may not even recognise trusts in the way we understand them. The role of executor may be different or may involve a different identity, and of course there is the question of taxation law, which is very specialised in each jurisdiction. That said, what we see as the positive of the bill is that it adds a degree of additional flexibility in that an individual can ask themselves, 'Well, is this an appropriate means for me to encapsulate my testamentary wishes?'. The answer may be 'no', or the answer may be 'yes'. So it does add flexibility.

Obviously over time if the number of states or jurisdictions that accede to the convention grows — which one would assume it would over time — then it will become a more useful tool. Possibly at present it is not something that would be of immediate use in many circumstances, but if countries and jurisdictions like Victoria are not assisting in accession to the convention, then you cannot really expect the number of accession states to continue to grow. So it is positive in that respect.

Obviously in terms of any risks around misinformation about the scope of what an international will is, what it can do, what it means in terms of assets in jurisdictions overseas and whether those jurisdictions may or may not be under the convention, that is something that will put a fair amount of onus on people assisting people to make wills: obviously solicitors, trustee companies and so forth. It would help if whatever communication there is of a formal nature from government is consistent with an accurate portrayal of what the scope of the international will would be once implemented.

There is only one other point of clarification perhaps in relation to our submission. Just on the top of page 2 we have talked about the appropriateness of preparing a separate will for each relevant jurisdiction rather than an international will. Of course in appropriate circumstances one or both or as many as required of the separate wills could also be international wills if that were appropriate. It is a little bit like any form of financial planning or estate planning advice: you have to tailor it to the individual and their circumstances, which will evolve over time.

We touched on the question of the extension of the international will provisions to the statutory will provisions under the Wills Act. On my reading, were the bill in its current form to be enacted, it would appear on the face of it that it is possible to make an international will via the statutory will mechanisms. That is not to say that it would in practice ever be found appropriate. There may be a lot of considerations the court would have to be led through before it actually formed a view that that was something that would make sense in a given case, but in terms of allowing that option to the court, on its face it would appear that there would be means that could be brought to bear to bring that about. That seems like a sensible outcome and one that seems consistent with, for example, the charter of human rights. Those were the only high-level comments I had.

Ms MIKAKOS — I was interested in those comments that you referred to just now, on page 1 and going on to page 2 of the cover letter of your submission, where the managing director says:

> … in many cases where there are overseas assets, it may still be appropriate to prepare a separate will for each relevant jurisdiction (rather than an international will) …

It would seem, then, that in the view of the State Trustees you see a fairly limited benefit in this new bill coming into effect. Would that be correct?

Mr CRAIG — Certainly it is a benefit, but we do not want to overstate the rate of take-up of these wills. We would not envisage it becoming the most common form of will that we prepare, for example, by any stretch.

Obviously when you take instructions for the preparation of a will you ascertain what the person's assets are both within the jurisdiction and outside the jurisdiction. To the extent that there are assets outside of the jurisdiction, that leads to a discussion around the mechanisms for dealing with those, and a whole spectrum of options may arise. The person may say, 'I have already dealt with those separately. I do not need to discuss those with you, and I have separate solicitors in that jurisdiction who have helped me out in that regard', and that usually is the end of that. To the extent that they say, 'I had not thought of that', that becomes a new conversation around what mechanisms can be adopted, and it may well be that if they are complex assets, one would have to locate a specialist who would understand the best way of dealing with those in that other jurisdiction.

It is very difficult for a practitioner in Victoria to have a grasp of all the implications of a particular means of providing for assets in another jurisdiction, because the law is changing in those jurisdictions. They will often have completely different laws relating to succession. What the bill will enable, though, is for a person to at least have comfort that to the extent that they know what they are doing when they put provisions in a will, the execution of the will will not raise issues in a convention jurisdiction, because it will conform to the convention form, and the convention is solely really around form and recognition of form. That is a good thing.

Ms MIKAKOS — Just a follow-up question, if I may. Given that State Trustees is the biggest provider of estate planning, as I understand it, in Victoria, and you are suggesting that you would be relying on external specialists in cases of international wills, would you currently have that expertise in house or would you need to refer people to external solicitors in those types of situations? I am just trying to think about the consequences for the profession if this change were to come into effect and how your organisation, for example, might be able to deal with, or will be unable to deal with, these types of changes.

Mr CRAIG — I do not see the enactment of the bill as changing the responsibility of the people advising. It adds another string to the bow, in a sense, because it can be used to have a will drafted that will, as I say, be able to be recognised in convention jurisdictions and is to that extent possibly a mechanism for a safety valve. But you would still be strongly advising people by saying, 'At this point in time you are telling us that you have no assets outside Victoria, but you are requesting an international will in case you acquire assets outside Victoria. If that were to occur, we would strongly recommend you obtain advice again as to how to deal with those assets'.

As to how we get the expertise around that, sometimes there will not be, even within Victoria itself, the knowledge of a particular jurisdiction and its legal system. That sort of expertise may, in some cases, only be able to be found in that external jurisdiction. So that is a situation that not only State Trustees finds itself in but also any legal practitioners offering estate planning and will preparation services.

Ms MIKAKOS — That is the point that I made, Chair. I guess the point that I am coming to is that is currently the situation. If you have assets overseas, presumably you have to go through a solicitor overseas to execute a will overseas in relation to those assets. It does not sound as if there is a great deal of difference between that scenario and what you have just described, which is that State Trustees or some other legal practitioner in Victoria still has to secure the expertise of an overseas-based lawyer in order to be able to find out what the consequences of these foreign-located assets are going to be. I am trying to make an evaluation as to whether there will be any practical benefit for Victorians with this change.

Mr CRAIG — I think it will be a small benefit, an accretion to the benefits that they already have under the Wills Act, which I think is a good piece of Victorian legislation and will presumably be improved through the review by the Law Reform Commission. It is a good string to have to the bow of our law, but as I say we cannot

overstate what it will permit to happen. To the extent it is known that there are means by which the consequences of making a particular will within Victoria will affect overseas assets, then practitioners will in many cases actually prepare those types of wills. They do not need the international will convention to do that. The convention adds certainty to the form; it is almost like a means of getting more watertight assurance that there will not be a problem in terms of recognition of the means by which it has been executed and so forth. It gives that extra comfort, but it can already happen under the present law, and you would be aware of section 17 of the Wills Act.

The CHAIR — Mr Craig, is the issue of people having assets in different jurisdictions a growing issue that you are seeing in your work with, I suppose, immigration, with people working overseas and all the rest of it? Is this a growing issue?

Mr CRAIG — I think complexity generally is a growing issue. Certainly Victoria has a long history of immigration. The flexibility of the workforce in terms of location I would imagine would increasingly throw up issues around the location of assets. As a general rule people are not automatically keen to be putting their affairs in order until it comes to a time in their life when they think it may occur. It would be preferable if that were not the case and that everyone, as soon as they became an adult, thought, 'I had better put a will in place'. But it is human nature to put that off until they think they need to have something in place. Often then they adopt a set-and-forget approach as well. Their circumstances may well change and they end up with a 10 or 20-year-old will that does not actually fit their circumstances and so forth. That is always a challenge. To the extent that people are lucky enough to have substantial assets in multiple jurisdictions, they can probably access relevant advice to make appropriate plans for those assets.

Ms CROZIER — I have just a very quick question. You mentioned in your first answer to Ms Mikakos the challenges and the whole complexity of dealing with this issue. It is my understanding that it can be extremely complex and have a number of issues that arise from it and subsequently long time frames associated with it. You say there are benefits to this particular legislation. Do you see those time frames being one of those major benefits in shortening the process for people to deal with the assets that they have overseas or that have been dealt with in relation to an international will?

Mr CRAIG — If applied appropriately, then there will be time frame benefits. I suppose in the back of my mind I have an understanding that some people may see what is in the heading of the bill and think, 'Hooray! I want to make an international will. I don't care what my solicitor or what the trustee company says, I know I can do it, so I'm going to tell them to make one for me'. That may actually add to the complexity of explaining why it may or may not be appropriate in their particular case or maybe that making two wills would be more appropriate, or having to explain, 'Well, the jurisdiction you are worried about has not acceded to the convention yet, so it is actually not relevant yet to that jurisdiction', and so forth. There may be an educational aspect that is added in to the discussion around estate planning. As to whether over time that means that these things take a longer or a shorter time, certainly if people have a full understanding, then the bill when enacted would permit in a number of circumstances things to be done more efficaciously and more efficiently. I do not see that being in a large number of cases as yet.

Mr O'BRIEN — Thank you for your submission. I just wanted to pick up something about this. One of the key differences, as I understand it, between the existing Victorian wills regime and what is set out under the international convention is the role of the authorised person and the certificate that they provide to the will. I understand what in a sense that does, which is not much, but to pick up Ms Crozier's point, it may be of great practical significance, which is that in the absence of contrary evidence the certificate of the authorised person would be conclusive proof of the formal validity of the will. The other requirements in a sense seem to mirror in large part the existing formality requirements in the Victorian law anyway. There are some issues about signatures on each page and slightly further dates and numbers, and there is also a variation requirement in the sense that I think article 2 says that the invalidity of the will shall not affect its formal validity as a will of another kind. So there are those provisions as well.

One of the things, picking up your submission, that I wanted to explore with you is in relation to these countries where it is already in existence. For example, with a will under one of the Canadian provinces it would seem to me that presently in Victoria someone who was an authorised person under the convention — and it may be, because Victoria does not have it in force as yet, they would have to be authorised presumably under Canadian law but somehow entitled to practise here, but I will leave that question alone — would be able to enter into a

law as an international will now for the purposes of the Canadian convention, given that that country has signed. As I understand the formality, it is designed to operate irrespective of where the will is signed. If you cannot answer this now, I understand that.

In a sense what this bill will be doing once it comes into force will be to enable in a sense more people to be authorised under Victorian law and effectively enable Victoria to be one of these states that then picks up this international convention, which in a sense has been existing since 1973. I am not sure if you have done this work, but there may be practitioners already in Victoria who are suitably authorised under the foreign regimes. I do not know if you are aware of any that purport to operate in this area already. If you are not, what is your understanding of that as the practical impost? So effectively once Victoria comes on board they will be able in a sense to do it more; and for the purposes of Victorian practitioners and Victorian wills they will be accepted as international wills, but ultimately it is in a sense adding to the body but not changing the fundamental issues that exist in Victoria at the moment.

Mr CRAIG — I understand your question. My reading of what the bill would effect is that Australian legal practitioners would become authorised persons for the purposes of convention wills. As you say, the whole point of the convention is that a will that complies with the form ought to be capable of being recognised in all the convention jurisdictions. I do not take it to mean that there can be no challenge brought to an international will for other reasons. It is not a way of, in a sense, giving an ironclad validation of the circumstances in which the will was made and so forth. I am not aware of any practitioners in Victoria who are holding themselves out as already authorised under another convention jurisdiction. They may well exist. It certainly would be a useful string to the bow for someone who was assisting people across jurisdictions, but I am not aware of any.

As you are aware, the list of jurisdictions that have enacted and ratified the convention obligations at the moment is not particularly long and would probably not consist of those countries where we would expect people resident in Victoria to have a lot of assets. Not to say that it would not occur, but New Zealand, for example, has not ratified, just to state an obvious neighbour. The United Kingdom has not ratified.

Mr O'BRIEN — Thank you for that. If I could just follow up, I agree with your analysis about the ironclad guarantee. That is not dissimilar to what I was putting to you, and I just want to be clear that the operation is that the international will will act in the absence of contrary evidence or conclusive proof of the formal validity of the will, but it does not affect underlying will issues. Is that your understanding?

Mr CRAIG — Which is not far removed, in a sense, from what applies under the Wills Act at present in the case of a will that has been executed in accordance with section 7 of the Wills Act. There is a strong presumption, if it has been executed in that way, that on the face of it, it will be held to be valid. Of course there is a lot of litigation around whether even validly executed wills should be overturned because of undue influence or because the person, notwithstanding the witnesses, actually did not have capacity and so forth.

Mr O'BRIEN — So it is effectively Ms Crozier's point about the efficacy of having this conclusive proof of presumption, which in most cases may not be overturned. That will in a sense speed it up, I imagine, or deal with it in a lot of cases.

I then take you back to that present situation, and I might be asking you on the spot. I would be happy, perhaps, if you respond if you need to as to some information as to current people signed off. Is it your understanding as to the operation of the bill and the international wills convention that in a sense clause 19C(1), which authorises the Australian practitioners to be authorised persons, will be brought in by this will, which will make all lawyers and public notaries in Victoria authorised persons? But assuming someone was authorised under a foreign act, if that is possible — and I know those conventions; you can become a practitioner in several countries — the operation of the international wills convention effectively means that wills by a presently authorised person in Victoria signed now or signed 10 years ago will be valid and effectively, from the date of this act, any of the other of those wills will come on, and as soon as the act comes into force then you will have the opportunity for all Victorian lawyers to effectively become authorised persons.

If you could just confirm that that is your understanding of the commencement procedures, because it is a bit unusual with the convention and the need for it to be adopted in other states and the fact that in a sense the form of the will is available now under the international convention.

You can take that on notice.

Mr CRAIG — I might take that one on notice. If I can just clarify — are you in a sense asking about the effective retrospectivity of the bill?

Mr O'BRIEN — Perhaps a clearer statement of the present position in relation to international wills in Victoria under the convention in that, as I see the convention, an international will signed in Victoria by an authorised person would be valid under the other laws — so a Canadian will, for the example — but there probably would not be practically many authorised because it is not an automatic entitlement of present Victorian lawyers without the bill. So therefore we can then look at the situation once the bill is brought into force, which is then that all Victorian practitioners will be able to sign or be authorised persons, which is the critical complicit proof step, which will obviously allow the form of the will to be much more broadly adopted in Victoria.

Mr CRAIG — Certainly what is exercising my mind arising from what you are saying is that a hypothetical person authorised in another convention jurisdiction to be an authorised person for the purposes of that jurisdiction and therefore of all other convention jurisdictions has, whilst in Victoria, made the certifications required for an international will prior to the enactment of this bill for a person, say a resident in Victoria but having assets in Canada or another convention jurisdiction. Say, when that person ultimately dies, they actually not only have assets in the Canadian jurisdiction but also have assets in Victoria, what is the consequence of that? Will that international will be deemed to be an international will for Victorian purposes, or will it have to be looked at only as a will simple, in effect, for Victorian purposes, and will there be any consequences either way?

Obviously as a general rule were a will to be executed in the form of an international will in Victoria now it would, I would suggest, have little problem being accepted as a will for Victorian purposes just based on the will provisions. I have not done a line-by-line comparison, but my take on it was that that would be satisfactory for the purposes of having a grant of probate in Victoria for that will. Whether there would be any additional consequences if the court in Victoria could not find that it actually was an international will because of the timing question for Victorian purposes, I would have to take that one on notice I am afraid.

Mr O'BRIEN — Yes. You have defined it well, and with respect I appreciate how you have defined it. My suspicion is it is valid now under the international convention — as it can be if the person is authorised, as I understand it — because as I understand the operations of the international convention it is irrespective of where the assets or the individuals are located. I think there is a theoretical, maybe an actual, existence of people presently signing these wills — there may or may not be. That is why if you could answer that question that you have defined yourself, and I will not risk defining it again, for the purposes of being able to demonstrate the true opportunities that this legislation then prevails upon or offers to the existing situation.

Mr CRAIG — Certainly.

The CHAIR — Mr Craig, we do appreciate your presence and the submission and State Trustees' involvement in this inquiry and process. As I said at the outset, a transcript will be provided to you shortly for your review and any minor alterations. We look forward to your response to that question that you very precisely framed.

Mr CRAIG — Thank you, Chair. Thank you, Committee.

Witness withdrew.

C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

LEGISLATION COMMITTEE

Inquiry into the Wills Amendment (International Wills) Bill 2011

Melbourne — 30 May 2012

Members

Ms G. Crozier	Mr D. O'Brien
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Chair: Mr E. O'Donohue

Deputy Chair: Mr M. Viney

Staff

Secretary: Mr R. Willis
Research officer: Ms L. Kazalac

Witness

Mr D. Esposito, Australian Italian Lawyers Association.

The CHAIR — I declare open again the public hearing of the Legislative Council Legal and Social Issues Legislation Committee with regard to the Wills Amendment (International Wills) Bill 2011. I welcome Mr Dominic Esposito from the Australian Italian Lawyers Association. I caution that all evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and is further subject to the provisions of the Legislative Council's standing orders. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same comments, they may not be protected by this privilege. All evidence is being recorded. You will be provided with a proof version of the transcript in the next week. Transcripts will ultimately be made public and posted on the Committee's website. I invite you to make some opening remarks, and thereafter members of the Committee will ask questions.

Mr ESPOSITO — That is lovely. Thank you very much, Chair. The first thing is that I table Mr Morfuni's letter to you of 9 May 2012, which encompasses the association's comments in relation to the inquiry on wills. In effect, the association is very supportive of the convention and the recognising of wills globally. There is a great interest in facilitating estate planning and there is an interest — in a diverse community such as Melbourne has and indeed as Australia has — in having comfort and certainty about very important instruments which deal with succession.

Anecdotally if I may, in my practice there is always an anxiety about extraterrestrial assets or assets that are held overseas and about who has control, how they are recognised and also whether or not wills in this jurisdiction have the same legal power or effect as wills anywhere else and what then happens in terms of the mechanics of proving any such will and dealing with such assets. It will be an assurance, I think, to testators and families to know and appreciate that this will is a globally recognised instrument, and they can be comforted that that instrument will have the facility of delivering what was intended. I think that is very important.

Of particular interest in this convention is the third person — the authorised person — who participates in the validation of the will. That is a new thing for Victorians. A Victorian will, of course, only needs two witnesses. In my experience by having a lawyer involved, or a notary involved, that might give a dimension of formality and also a control in terms of how wills are generated and how wills are kept. I have had a number of terrible litigation cases, like many practitioners in Melbourne, about the last will, especially with aged people who change their allegiances or change their family status in their later years, and there is a will made 17 years ago and there is a will made 10 years ago and a will made 4 years ago in different circumstances. We have had cases where we have had to prove a mutual will that was 35 years old where there had been four subsequent wills.

It is very awkward to explain to people that you can get a will kit from a shopping centre or a stationery place and do your own document and think it has some legal effect without really understanding what other instruments you have created or what other rights and duties you are creating. Are you creating trusts? What are you doing with these assets? That sort of thing.

So if there is a lawyer involved, a notary involved, there will be some formality given at least to the execution, and it may give an opportunity also to consider the legal nature of the document — whether or not assets are inside the estate or outside. That is often a very common misunderstanding. So if a house is jointly owned, is it something that is subject to your will or not? Are superannuation assets subject to your will or not? That is an opportunity to deal with that.

A related issue which comes from people from a European background in particular is the registration of a will. People are very anxious about: where is the will? That is not contemplated by this convention and this proposed legislation. People have comfort in the registration of a will so there is some manifestation or public trust in the last being identified. When people moved interstate and they moved countries and they moved jurisdictions, did they make a will? Has a will been made or not made? We live in a very socially and spatially fluid world, and a registration system would be very important. I understand there is a notary or authorised person who can have a direction about keeping a will; that is a starting point, but I commend to the Committee that they think a little bit about the registration issue as well. They are my comments.

Ms MIKAKOS — I just want to ask you a little bit more about that issue of registration.

Mr ESPOSITO — Yes.

Ms MIKAKOS — You are talking about registering with the probate office — leaving a copy there to avoid a situation of accusations of fraud, for example?

Mr ESPOSITO — Madam, that is quite the case. It can be any arm of the government that is appropriate for that sort of role, but in Europe there is a notary system of registration. That is a very powerful thing. I have had nasty litigation where the son-in-law is on the phone to the lawyer dictating a will. That will is then executed and the question is whether or not that will is valid or not valid. If the will is registered, there is a formal process. Is that the last will? I had an octogenarian who had five wills within 18 months under the influence of one sibling or another or one child or another or other people. Wills are made out to charities and then they are made out to one party or another depending on how the power in the family or other interests might affect the testator's capacity.

Ms MIKAKOS — Are you suggesting that across the board and not just for international wills? I am just saying that that is not very common.

Mr ESPOSITO — This is an opportunity to think about the security of that very important instrument and succession. It could start with an international will, so if people were very concerned about assets overseas and succession, one step to enhance that might be to say that there is a registration system so everybody knows that is the last will, and if that will needs to be changed there is a new will change and a new registration system. Is that helpful, madam?

Ms MIKAKOS — Yes, thank you. I just have some follow-up questions. Your organisation is obviously supportive of the bill.

Mr ESPOSITO — Yes.

Ms MIKAKOS — You can only obviously comment on this in an anecdotal way, but given Australia and Italy have, as I understand it, a social security agreement —

Mr ESPOSITO — Yes.

Ms MIKAKOS — and presumably Italian-based assets would impact on someone's ability to receive the pension in Australia, is it common for Italians to have retained assets in Italy? I am just trying to think about how useful this bill will be for, say, the Italian community in Victoria.

Mr ESPOSITO — I see. Firstly, madam, I have limited practical experience with the Italian community in Italy; I am the next generation down.

Ms MIKAKOS — Yes.

Mr ESPOSITO — But certainly I have had experience that clients are anxious about what happens with assets overseas. That is very common. People also in their migration experience actually remigrate a lot and transfer a lot. We are really involved in a global world now. People have assets all over Australia and they have assets all over the world. I had a family law case where we had injunctive orders given with assets in about six different countries — Panama, Nicaragua, Italy and Switzerland. People have assets everywhere. What is important about this is the convention codification recognising a valid will so there is no doubt about your instrument taking effect in another jurisdiction. That is the comforting point.

Certainly the more wealth there is in a particular family in terms of acquired assets and trusts and things, and the complexity, the more confident they would be and the more interest there would be in a will. It really depends on what sort of fabric you are dealing with. If you are dealing with the mums and dads-type thing, there may not be any really practical difficulty, but if you have got transnational assets or if you have got assets that are of significant value and other stakeholders who might consider that they have a right or an entitlement to them, then I think international law would help a great deal.

Ms MIKAKOS — But in terms of those mums and dads, I guess the average family, do you have any sense anecdotally from your colleagues as to whether this is a common occurrence to have assets based in Italy, for example?

Mr ESPOSITO — It is common; it is common. What families do not want, if they are mums and dads on, as I say, a working income sort of thing, is to have a second or third legal process to prove a will elsewhere. It is just another process, another complexity, another cost. For mums and dads that is a very important consideration.

Mr O'BRIEN — Thank you, Mr Esposito.

Mr ESPOSITO — Yes; nice to see you, David.

Mr O'BRIEN — Yes. I should put on record that Mr Esposito and I had a previous relationship. He used to brief me for many years.

Mr ESPOSITO — Yes.

Mr O'BRIEN — I thank you very much for making your submission; it is helpful. I know the time it takes to make these submissions, and it is a very helpful submission. One of the reasons it is particularly helpful is that Italy is one of the 12 countries that has signed up to the convention. The idea you have related to this Committee about registration does sound novel and does have some practical benefit. It is obviously something beyond the terms of reference, but I imagine you are thinking something similar to what was done with the land title or conveyance system. Previously there would be lots of conveyances floating around in solicitors' offices and turning up under the general law system, and then — I think it was an Australian — Torrens developed the Torrens system and we have title by registration. Maybe you are looking at heading that way or suggesting that. I can imagine there may be some issues in that you have to give effect to the intention if you find it.

Mr ESPOSITO — Yes.

Mr O'BRIEN — But there are also exceptions in the Torrens system as well. You are looking at a practical step, and thank you for that suggestion.

Referring to the bill, you have drawn attention to the convention and point 11 of the form of the certificate, which states:

> … the testator has requested me to include the following statement concerning the safekeeping of his will …

I suppose you are saying that in an international wills context if there were assets in Italy, for example, someone could draw attention to the fact that the will is lodged with the Italian registrar or lodged with a solicitor or the State Trustees or someone else at that point and that that was the last intended will, and in the absence of evidence to the contrary that would act as conclusive evidence of the making of the will at least, if nothing else, and give some direction to the estate and those dealing with it.

Mr ESPOSITO — Yes.

Mr O'BRIEN — I asked a question of the previous witness, which you were not here for. It was about the extent to which there may be operations of international wills in Victoria at present by for example an authorised person for the purposes of the Italian jurisdiction being able to make those wills in Victoria, and they would, in a sense, be valid in the present situation. Are you aware of any practitioners who have obtained registration or are authorised for the purposes of the Italian convention law?

Mr ESPOSITO — Unfortunately I am not. As I say, I am the next generation down. To the first part of your question or comments about the registration, if you think about how many, let us say, sole practitioners there are in Victoria, it is something like 80 per cent of the law firms — there are several thousand of them — and it is an absolute administrative nightmare to think through when the last will was created by any particular testator. You know, the children might be living elsewhere for vocational reasons or for social reasons, and trying to work out where mum and dad last lived — whether they were in Queensland, where they lived for two years, and then they lived in Perth and they had an old lawyer in Melbourne — and what is the last will is an absolute nightmare.

In that trans-decade-type time frame people can have three different spouses, they can have three estates coming and going, they can have two bankruptcies, they can have unbelievable wealth and they can have assets created outside their will, which are things like trusts and things. There is a real problem about administration. In a way there is a trust issue and dealing with fraud, but it is also an administrative issue in itself.

I think the notary system works in Europe; you register your will and it is kept with a notary, so people know that is where it is. There is no risk of a person, who is in a global context living in four different cities and three different countries, having wills all over the place.

My comments about that registration are that the lawyer or the notary who is the authorised person can think carefully about where that will is kept, and there can be a demonstrable record about that. But it is a big problem. In the Italian community, for example, as in other migrant communities, there are lots of practitioners who have been working for 30 years and 50 years, and they have collected literally thousands and thousands of wills. I would say 70 to 80 per cent of them would be redundant because the person has died or there have been subsequent wills made or there have been changes that involve intention. It is a real, real problem. I mean, if you ask some of those old-standing lawyers, they literally have wall-to-wall filing cabinets full of wills made from the '50s. So which will?

Mr O'BRIEN — I remember going through one of them for two weeks when doing my articles. It was a dusty experience; I know it. Thank you.

Mr ESPOSITO — Yes; I hope that is clear enough.

Mr O'BRIEN — Just to summarise: your view is that the bill will improve the situation; it is a step in the right direction?

Mr ESPOSITO — Yes, undoubtedly.

Mr O'BRIEN — Could you briefly summarise the reasons why you say that?

Mr ESPOSITO — The first reason is that it would facilitate the estate planning so people would have certainty about that instrument applying elsewhere. People may have confidence in the jurisdictional laws of their own domicile, but they may not know what the laws are in Senegal or any other place in the world; but if there is a convention about that, they are going to have some confidence. The second thing is it is done more formally, I think, with a third witness, which is the authorised person; that is an act of solemness, which I think is an advantage. Thirdly, it might transcend the possibility of people trying to write their own rules, getting stationery from shopping centres and stationery providers, trying to do their own thing and thinking they understand what is involved. Fourthly, I think the comfort that there is a convention means that there is no doubt that they have the application of their intentions wherever they go. I think that is really good.

Ms MIKAKOS — Mr Esposito, in the earlier part of this morning we heard evidence from the States Trustees. In their written submission they said that in many cases it may still be appropriate to execute a will overseas where there are foreign-based assets, and they particularly referred to the issues of unique succession laws, particularly in European countries, that restrict the ability for people to inherit assets outside of the immediate family, and also the uniqueness of taxation laws in every country and the limitations perhaps of practitioners in Victoria having appropriate expertise in these types of issues. Do you envisage that these are potential problems for Victorian practitioners — to be across succession laws in the convention countries and taxation laws in those convention countries?

Mr ESPOSITO — That is a very interesting question. I do not have the expertise to answer that fully, but I am aware that there are issues about the inherent flexibility in the common law succession culture, if I can use that phraseology. In English law a testator can virtually provide how he or she wishes, but in Europe — —

Ms MIKAKOS — Down to your cat!

Mr ESPOSITO — Down to your cat, or even be reckless and list 17 different charities and avoid blood relatives. But in Europe it is a far more constrained and culturally driven legal system where you must recognise blood lineage.

The Wills Amendment Act that introduced the part 4 activity in Victoria is all about recognising that there are blended families nowadays. Our grandparents lived very conventionally and very traditionally, and that is true for most parts of the globe, whether Europe or Australia. What is happening with the urbanisation and modernisation of our society is a fragmentation of communities and there is a different dynamic within families. When you expect the elder son to have the farm, for example, out in the Wimmera, that will not happen any more — the concentration of that wealth. You do not expect the nurse or your neighbour to have a greater status than your blood sister, but nowadays there are surrogate parents, there are step-parents and there are stepchildren. The English system recognises that inherent dynamic, which is really the nature of the common law for many activities or areas of interest, even commercial law.

The concept of trust, for example, is a very difficult concept in Europe. I think they are getting onto it now, but the whole idea that some person can hold something but not beneficially and hold it for someone else — there are controls about that. It is a very difficult concept in European law. I think an international convention has a power and has a capacity to help codify those things and help reconcile those things. It is always good to have a global consensus.

Ms MIKAKOS — Do you think that will get to a situation, though, where Victorian practitioners are putting big disclaimers on written advice they are giving to their clients, saying perhaps that they need to seek relevant expert advice on the implications of their will being able to have practical effect overseas? For example, where they try to disinherit a child, that may not be recognised under, for example, Italian law.

Mr ESPOSITO — That is another intriguing question. I think that is true. The first job of any practitioner is to try to identify the assets and the nature of those assets, then to think about the correlative liability. People often do not think about their liabilities at all — 'I give this, I give that'. They do not think that it might trigger liabilities that might affect the intended regime for succession. This asset might have the collateral guarantee attached to it or a mortgage; this one may not. Then there are the beneficiaries and how that works. Certainly that advice is given quite frequently for those who are concerned and interested in that.

I can give you a brief example in matrimonial law. We had this case that I mentioned, with the injunction and assets all over the world. One party went to court and tried to argue that this case should be heard in Italy because the assets were mostly in Italy, although they were all around the world, and the marriage was consummated in Italy. But there was an issue of maintenance. The judge said, 'Are you expecting the spouse to go to Italy to get her maintenance?'. There were very complex issues about domicile and very complex issues about assets around the globe, but they were dealt with. The court here was not going to be shut out because there was one immediate need for the person of domicile within the jurisdiction. Certainly people who have the confidence to draw such a will need to turn their minds to conflict-of-law issues and how those issues would have significance.

Ms MIKAKOS — I guess what I am getting at here is that we would like to think that this bill is going to make things easier and simplify things, but from what you are saying and from the evidence we have heard earlier it possibly could be just as confusing if not more complicated. We will draw our conclusions based on the evidence, obviously.

Mr ESPOSITO — Look, I think any codification and any uniform instrument that has global recognition is a positive thing. Certainly the common law experience will be to see how this convention works, and if it has to be refined, it can be refined.

We have this interesting issue at the moment with these Italian minors who are running around Australia trying to hide from jurisdictional requirements that they be sent back to Italy. Those things are very complex, and the law has to deal with those things. A starting point is: what consensus do we have?

Ms CROZIER — Thank you. You raise some very interesting points. My question really was prior to Ms Mikakos's question in relation to the benefits of estate planning. Do you see this bill supporting the efficacy benefits to those people who are having these issues with their international wills?

Mr ESPOSITO — Madam, thank you for that question. I think the first point about this will is that it will be recognised internationally. That is the first point. If you do acquire assets in an interesting place — people do that by inheritance, they do that by other dynamics; say a mining company in Australia relocates to Senegal and the assets are in Senegal, a man with shares finds they are registered there. Things are not always within your control. Jurisdictions are fluid.

Ms CROZIER — And the complexities when disposing of those assets and dealing with that situation. What I am really asking is: do you think that this bill will assist with efficacy in relation to time and the complexities that it sometimes throws up in disposing of the assets? Do you see it as a benefit?

Mr ESPOSITO — I think, madam, it will not solve all issues, but it will certainly solve the recognition issue — that the will is valid to the extent that it can be valid in another jurisdiction. That is the first step. I think the second aspect to it, madam, is the fact that it is executed more formally with an authorised person. In Europe people complete their wills with notaries and with much more significant degree of formality, as I understand it.

I have had wills that have been done in shopping centres where people turn up to a booth, they fill out parts of the document, they sign it and they think they have a will. That is a shock to the probate office here, and it would be a shock to the relevant officers in any other part of the world, I am sure. Where is the formality in it, especially when parts of the pro forma have not been completed — whole sections of it are blank — because they do not apply?

Ms MIKAKOS — It is surprising that some people have undue casualness towards the disposal of the assets that they have acquired over a lifetime.

Mr ESPOSITO — Yes. The other thing is the ambulatory nature of the will, which is a bit interesting too. A lot of Europeans do not readily understand that if they have made a will, it does not have any legal effect until they die. They have the European idea at the back of their minds that that is how things will be. By having an authorised person, an authorised person might guide them and might let them understand that they can change this will tomorrow if their circumstances change.

Mr O'BRIEN — I want to clarify and follow up something that Ms Mikakos put to you. You have outlined very helpfully a number of the problems that I would say exist within the present will scenario, both in Australia and overseas. To sum up to assist the Committee in formulating its opinion as to the merits or otherwise of this legislation, is it your evidence or opinion to this Committee that this bill will help fix up some of the problems, not all of them, but some of the problems, particularly in the areas you have identified, or will it cause further confusion? If it were to cause further confusion, we obviously need to be aware of that. That would be a downside of the bill. What is your evidence in relation to the net effect of the bill?

Mr ESPOSITO — The net effect will be positive, David, for the reasons I have outlined — consistency and formality, and the involvement of authorised persons.

Mr O'BRIEN — It is a step in the right direction?

Mr ESPOSITO — Yes.

The CHAIR — Thank you very much for your presentation and willingness to answer questions this morning. It is very much appreciated. Could you also pass on our thanks to Mr Morfuni for his submission.

Mr ESPOSITO — Thank you all. It has been a pleasure to help.

Committee adjourned.