

**Government response to the recommendations of the Law Reform
Committee Report on Reforming the Law of Wills**

For a number of years there has been an acknowledged need for a new Wills Act to simplify and modernise the language of the *Wills Act 1958* and to implement useful reforms to the law of wills. The Coalition made a pre-election commitment to introducing a new Wills Act and welcomes the Law Reform Committee Report on Reforming the Law of Wills. The Committee has built on the work begun in 1984 by the Wills Working Party which culminated in 1991 in a Draft Wills Bill.

The Committee heard evidence mainly from members of the legal profession and was also assisted by a Wills Advisory Group and a Consultant. It has produced a carefully considered report which provides a vehicle for a comprehensive reform of the law of wills in Victoria. The Committee's recommendations depart from the provisions of the 1991 Draft Wills Bill mainly to relax the stringency of the formal requirements relating to the execution and validity of wills. The Committee has considered how these formal requirements can be relaxed without increasing the risk of fraud.

The Government broadly accepts the Committee's recommendations.

The Government's response to the Committee's specific recommendations is as follows:

Recommendation 1

That the intestacy and family maintenance provisions of the *Administration and Probate Act 1958* be reviewed.

Accepted. The Attorney-General's Law Reform Advisory Council is currently undertaking this review.

Recommendation 2

That the proposed Wills Act state its purpose to be the reform of the law relating to the making, alteration and revocation of wills, and to make particular provision for-

- the formalities required and the dispensation of those requirements in appropriate cases;
- the making of wills by minors and persons lacking testamentary capacity;
- the effects of marriage and divorce on a will; and
- the construction and rectification of wills.

Accepted.

Recommendation 3

The definition of "alteration" in the 1991 Draft Wills Bill be omitted.

Accepted.

Recommendation 4

That the County Court have probate jurisdiction within its jurisdictional limits and that the definition of "Court" in the 1991 Draft Wills Bill be adopted.

This recommendation is subject to consultation with the judges of the County and Supreme Courts and with the Registrar of Probates.

Recommendation 5

That the definitions of "de facto partner" and "de facto relationship" in the 1991 Draft Wills Bill be omitted.

Accepted.

Recommendation 6

That the 1991 Draft Wills Bill's definition of "disposition" be adopted.

Accepted.

Recommendation 7

That a definition of "document" be included that excludes the possibility that a will may take the form of electronically stored material.

Accepted.

Recommendation 8

That no definition of "property" be included in section 3 of the 1991 Draft Wills Bill.

Accepted.

Recommendation 9

That the new Wills Act state in the most general terms that a testator may include in a will any property to which he or she is entitled at death, or which accrues to his or her personal representatives after death.

Accepted.

Recommendation 10

That sub-section 4(3) of the 1991 Draft Wills Bill (which defines "property" as including a power of appointment) be omitted.

Accepted.

Recommendation 11

That the new Wills Act clearly restate the law that a testator cannot by will dispose of property of which he or she is trustee.

Accepted.

Recommendation 12

That section 4 of the Draft Wills Bill (What property may be disposed of by will?) appear in Part 1 of the new Wills Act and the heading to Part 2 of the new Wills Act read "Capacity and Formal Requirements".

Accepted.

Recommendation 13

That it should remain the general rule that a minor cannot make a will.

Accepted.

Recommendation 14

That the Supreme Court should have power to approve the making of a will by a minor and that the Court be satisfied of the propriety of the minor's will as well as of the minor's testamentary desires.

Accepted.

Recommendation 15

That:

- **married minors be accorded testamentary capacity; and**
- **a minor testator who has lost his or her spouse be able to revoke the will made during marriage, either in whole or in part but not otherwise retain testamentary capacity.**

Accepted.

Recommendation 16

That the Court be empowered to authorise the making of a will for a person lacking testamentary capacity.

Recommendation 17

That an application to the Court for the making of a will for a person without testamentary capacity or the alteration of a will be able to be made after the death of the person.

Recommendation 18

That the jurisdiction to make a statutory will for a person lacking testamentary capacity not be confined to adults.

Recommendation 19

That whether a person is capable of making a will should be considered to be a question of fact and the reason for the incapacity be irrelevant to the exercise of the jurisdiction to make a statutory will.

Recommendations 16, 17, 18 and 19 are subject to consultation with interested Departments, agencies and organisations. The Government notes that similar recommendations have been made by the Victorian Chief Justice's Law Reform Committee and the New South Wales Law Reform Commission.

Recommendation 20

That for a will to be valid:

- (a) the will must be signed by the testator or by some other person in the presence of and at the direction of the testator;**
- (b) the signature of the testator must be made with the intention of executing the will;**
- (c) there be no requirement that the intention of the testator in signing the will be "apparent from the document";**
- (d) the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;**
- (e) at least two of the witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other);**
- (f) it be made clear that it is not essential that the signature be made "at the foot" of the will.**

Accepted.

Recommendation 21

That:

- section 6 (2) of the Draft Wills Bill 1991 be omitted;
- section 6 of the Draft Wills Bill 1991 (titled "How should a will be executed?") contain a statement that it is not essential for a will to contain an attestation clause;
- solicitors should continue as a matter of correct practice to include attestation clauses in wills.

Accepted.

Recommendation 22

That the rule that a valid execution of a will validly exercises a power of appointment should not be altered.

Accepted.

Recommendation 23

That:

- no class of persons should have the status of privileged testators;
- section 10 of the *Wills Act 1958* which deals with soldiers' and mariners' wills be repealed;
- section 7 of the 1991 Draft Wills Bill which deals with wills of members of the armed forces be omitted.

Accepted.

Recommendation 24

That no change be made to the rule that a witness need not know the instrument signed is a will and that section 8 of the 1991 Draft Wills Bill (which reinforces this rule) be adopted.

Accepted.

Recommendation 25

That:

- there be a dispensing power;
- the standard of proof be the civil standard;
- the Registrar of Probates be able to deal with cases where the parties consent or cases involving small estates;
- the Registrar of Probates power be governed by Rules of Court for which the new Wills Act should make provision.

Accepted.

Recommendation 26

That the new Wills Act make clear that anyone may witness a will, other than a person who is unable to see and attest its signing.

Accepted.

Recommendation 27

That the interested witness rule be abolished.

Accepted.

Recommendation 27.1

That if the interested witness rule is not abolished, it be restricted to the witness alone and the disqualification of the spouse be removed.

Recommendation 27.2

That if the interested witness rule is not abolished, removing the provision which enables a witness to take either.

Recommendation 27.3

That if the interested witness rule is not abolished, repealing Part V of the *Administration and Probate Act 1958*.

As recommendation 27 is accepted, recommendations 27.1, 27.2 and 27.3 are redundant.

Recommendation 28

That a disposition to the person to whom the testator is married at the time of the testator's death not be revoked by the marriage to that person.

If adopted, this recommendation will effect a substantial change to the law of wills in Victoria, a change that has not been made in other jurisdictions. The present rule that a will is not revoked by marriage of the testator if the will is expressed to be made in contemplation of that marriage has worked well in practice and has survived the test of time as a clear and positive statement. In light of the effect the adoption of this recommendation would have on the law of wills in Victoria, the Government is still in the process of considering this recommendation. The Government intends to consult with the legal profession and other groups and individuals experienced in this area of the law before making a final decision.

Recommendation 29

That appointments of the person to whom the testator is married at the time of the testator's death as trustee, guardian, advisory trustee not be revoked by the marriage to that person.

Accepted.

Recommendation 30

That the dispensing power apply to acts of revocation; that a statutory will be able to effect revocation; otherwise the law of revocation remain unchanged.

Accepted.

Recommendation 31

That divorce effect a partial revocation of a will with dispositions to the former spouse treated as if he or she had predeceased the testator; the rest of the will to remain on foot.

Recommendation 32

That the revocation of dispositions to the former spouse not apply to the exercise by the spouse of a power of appointment in favour of the spouse's children, where the power is not exercisable in favour of any persons other than those children.

Recommendations 31 and 32 have already been implemented by the *Administration and Probate (Amendment) Act 1994*.

Recommendation 33

That the dispensing power apply to the alteration of wills; that a statutory will be able to effect an alteration; that otherwise the law relating to alteration remain unchanged.

Accepted.

Recommendation 34

That there be no change to the law relating to the revival of revoked wills or parts of wills.

Accepted.

Recommendation 35

That there be no change to the law as to the applicability of foreign law to the execution of wills.

Accepted.

Recommendation 36

That there be no change to the law as to the determination of the system of law applicable to a will or to the law as to the construction of the law.

Accepted.

Recommendation 37

That Parliamentary Counsel give consideration to including a single all-embracing "contrary intention" provision.

Accepted.

Recommendation 38

That it continue to be the law that a will disposing of property disposes of whatever interest the testator has in that property.

Accepted.

Recommendation 39

That it continue to be the law that a will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.

Accepted.

Recommendation 40

That section 21 (3) of the 1991 Draft Wills Bill be omitted.

Accepted.

Recommendation 41

That there be no change to the law which provides that a failed disposition, other than the exercise of a power of appointment, should form part of the residuary estate unless the will otherwise provides.

Accepted.

Recommendation 42

That the law relating to powers of appointment that allow the donee of the power to appoint to him or herself or to his or her legal personal representatives be reviewed in the context of a review of the *Administration and Probate Act 1958* or the *Property Law Act 1958*.

There is currently no proposal to undertake a wholesale review of either the *Administration and Probate Act 1958* or the *Property Law Act 1958*. However, in the event of such a review being undertaken, the Committee's recommendation will be considered.

Recommendation 43

That the common law rules as to the admissibility of extrinsic evidence in the construction of a will be liberalised and that the narrower effect of section 21 of the *English Administration of Justice Act 1982* be preferred to that of section 23 of the 1991 Draft Wills Bill.

Accepted.

Recommendation 44

That it continue to be the law that the construction of a will is not altered by a change in the testator's domicile.

Accepted.

Recommendation 45

That there be no change to the rule that contingent and future dispositions carry the intermediate income; that this rule should also apply to deferred dispositions.

Accepted.

Recommendation 46

That in the absence of a contrary intention in the will the death of a beneficiary within 30 days of the testator's death should give the will the effect it would have had had the beneficiary predeceased the testator.

Accepted.

Recommendation 47

That a general disposition of land should continue to include both leasehold and freehold land unless the will indicates otherwise.

Accepted.

Recommendation 48

That a general disposition of property should continue to include property the subject of a general power of appointment (whether the power arises before or after the date of the will) and to operate as an exercise of the power.

Accepted.

Recommendation 49

That it continue to be the law that words of limitation are not required to pass the whole of the testator's interest in real property.

Accepted.

Recommendation 50

That the law should ensure that a disposition of property amongst issue of the testator is (unless otherwise intended in the will) distributed to them in the same way as if the testator had died intestate leaving only issue surviving.

Accepted.

Recommendation 51

That the current law as to the construction of a reference to want or failure of issue not be changed.

Accepted.

Recommendation 52

That the statutory substitutional provision should ensure that the substituted issue take the disposition in the same shares as if there were an intestacy.

Accepted.

Recommendation 53

That the statutory substitutional gift to issue of deceased issue be contingent on attaining the age of 18 years, or marrying sooner.

Accepted.

Recommendation 54

That section 32 (4) of the 1991 Draft Wills Bill be redrafted.

Accepted.

Recommendation 55

That a disposition of residue which does not differentiate between realty and personalty should be construed as including both, although only one of these categories is mentioned.

Accepted.

Recommendation 56

That where there is a partial failure of a disposition in fractional parts, the new Wills Bill should provide for a substitutional gift to give effect to a residuary intention and to prevent a presumably unintended partial intestacy.

Accepted.

Recommendation 57

That where there is a partial failure of a disposition expressed in fractional parts, the statutory substitutional gift apply not only to a fractional disposition of the residue but also to a fractional disposition of the whole estate.

Accepted.

Recommendation 58

That the law facilitate the giving of effect to a testator's desire to make a gift to an unincorporated association .

Accepted.

Recommendation 59

That a testator be able by will to create a power or trust to dispose of property if the same power or trust would be valid if made by the testator by instrument during his or her lifetime.

Accepted.

Recommendation 60

That unless a law of Victoria or another jurisdiction requires some other method or the will otherwise provides, an express or implied reference in a will to a valuation is to be taken as referring to a valuation made by a competent valuer and that the time of valuation is at the time of the testator's death.

Accepted.

Recommendation 61

That the Court be given jurisdiction to rectify a will where it is satisfied that the will does not carry out the testator's intentions because of a clerical error or an error by the solicitor or other person preparing the document in carrying out the testator's instructions.

Accepted.

Recommendation 62

That the personal representative not be protected against liability for making distributions from the estate (other than maintenance distributions) until six months after the taking out of representation; that the provision in sub-section 37(5) of the 1991 Draft Wills Bill preventing recovery from a beneficiary not be adopted.

Accepted.

Recommendations 63, 64, 65 and 66

These recommendations deal with transitional matters and are accepted.

Recommendation 67

This recommendation deals with consequential amendments to the *Administration and Probate Act 1958* and is accepted.

Recommendation 68

That persons having possession or control of a purported will of a deceased testator be required to produce it in certain cases.

Accepted.

Recommendation 69

That section 40 of the 1991 Draft Wills Bill (which transforms a joint tenancy into a tenancy in common if tenants die within 30 days of each other) not be proceeded with.

Accepted.

Recommendation 70

That the *Wills Act 1958* be repealed and the Wills Act formulated by the Law Reform Committee and contained in the Report be substituted, subject to consideration of Parliamentary Counsel.

Accepted. However, it should be noted that the Government while accepting a majority of the Committee's recommendations has not accepted some of the Committee's recommendations or is still considering certain of the recommendations. Accordingly, the new Wills Act will differ from that formulated by the Law Reform Committee to the extent that it will not contain certain provisions contained in the Committee's Wills Act.