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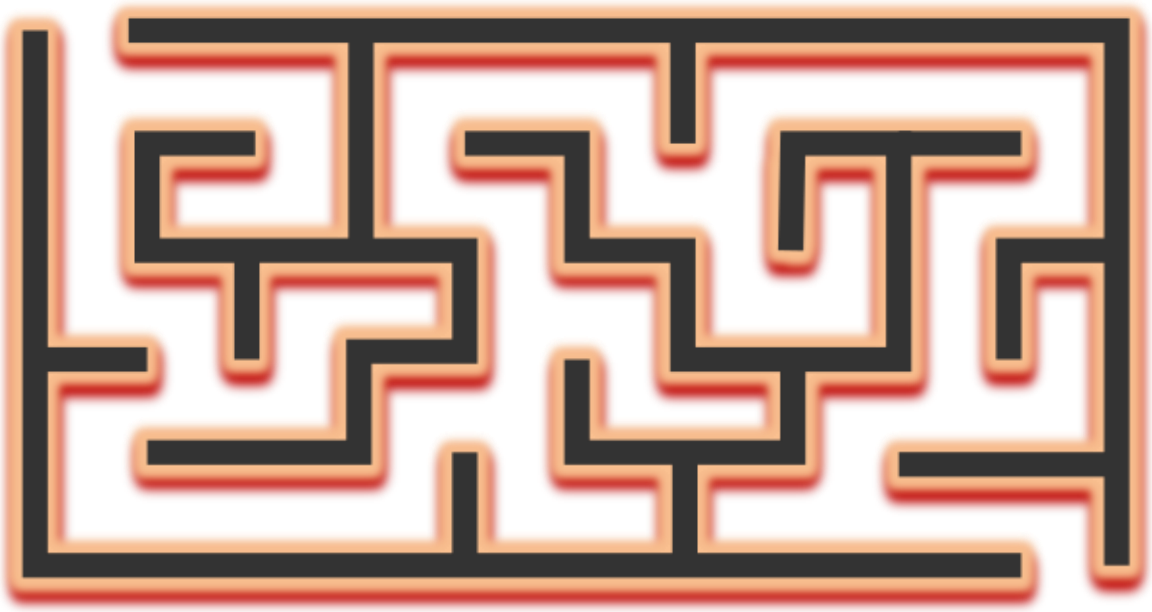

South Australian Law Reform Institute

State schemes for storing and locating wills

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Government of South Australia
Attorney-General's Department

THE LAW SOCIETY
OF SOUTH AUSTRALIA

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Terms of reference

The Attorney-General of South Australia, the Hon John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. The Institute has identified seven topics for review. This Final Report, on whether South Australia should have a register of wills, is the second in the Institute's ongoing review of succession law in South Australia.

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Definitions

Court-authorised will—a will made by a court or an instrument altering or revoking a will by court order (usually where the testator is a minor who needs the assistance of the court in making a will or is someone who lacks the capacity to make their own will). Such wills and instruments are required by statute to be retained and kept securely by the court. By contrast, see *private will*.

Model Bill—the *Wills Bill 1997* proposed by the National Committee in its *Consolidated Report*.

National Committee—The National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General.

Institute—South Australian Law Reform Institute.

Issues Paper—South Australian Law Reform Institute, *Losing It: State Schemes for Storing and Locating Wills*, Issues Paper 6 (July 2014) <http://www.adelaide.edu.au/research/law-reform-institute/>.

National Committee Consolidated Report—National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Queensland Law Reform Commission, Miscellaneous Paper No 29 (1997) <http://www.qlrc.qld.gov.au/Publications.htm#3>.

OPT—Office of the Public Trustee in South Australia.

Private will—a will made by a person with full testamentary capacity without the assistance of a court. In Australia, it is not compulsory to deposit such wills in public *will banks* or to record their whereabouts in public *will registers*. By contrast, see *court-authorised will*.

Public Trustee—the Public Trustee, or State Trustee or equivalent.

Registrar—the Supreme Court Registrar of Probates or equivalent.

Will bank—a facility for the physical or electronic deposit and safekeeping of a will, which may also maintain a searchable index or record of deposited wills.

Will register—a facility for recording the details of a will so that it can be found when the testator dies, but which does not accept the deposit of a will for safe custody.

Part 1 – Introduction

1.1.1 In 2011, the Attorney-General of South Australia, the Hon John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to conduct a review of each area and to recommend reforms. The Institute's Advisory Board identified seven topics for review. This Final Report, on whether South Australia should have a register of wills, is the second in the Institute's ongoing review of succession law in South Australia. Further projects include Intestacy and Family Inheritance.

1.1.2 The Institute's consultation began with the release, in July 2014, of an Issues Paper and accompanying questionnaire, both posted on the Institute's website[1].

1.1.3 The Issues Paper explored two kinds of schemes that make it easier to locate a person's will after they die: a will register and a will bank. A will register scheme records the existence and location of a will. A will bank scheme is for the physical custody and safekeeping of wills.[2] The Issues Paper reviewed the relevant provisions in the *Administration and Probate Act 1919* (SA) and *Wills Act 1936* (SA). It looked at the approaches taken in other jurisdictions in Australia and overseas, including the approach contained in the Model Bill recommended by the National Committee for Uniform Succession Laws. Consideration was given to both court-authorised wills[3] and private wills.

1.1.4 The Issues Paper put forward three options for reform: (1) no public will bank or will register for private wills; (2) a public electronic will register but no public will bank for private wills and (3) a public will bank for private wills and no separate will register. All three options contemplated that the Registrar of Probates would continue to retain court-authorised wills as there was no apparent need for reform in respect of those kinds of wills.

1.1.5 The Issues Paper was provided to the South Australian Attorney-General. Invitations for submissions were sent to the Legal Services Commission of South Australia, the Crown Solicitor's Office, the Office of the Public Trustee of South Australia, the Law Society of South Australia, the South Australian Bar Association, members of the Judiciary, succession law practitioners (in South Australia), the Society of Trust and Estate Practitioners (SA Branch) and other interested community groups, organisations and persons.

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1 South Australian Law Reform Institute, Losing it: *State schemes for Storing and locating wills,* Issues Paper 6 (July 2014)

2 This kind of scheme was described as a will bank in the Issues Paper, but is also variously referred to as a will repository, a will depository, a will register or a court register.

3 Wills made, changed or revoked under court authorisation or order in respect of a minor or a person lacking testamentary capacity.

1.1.6 The Institute received a total of seven submissions. There were four submissions from solicitors in private practice[4] and submissions from the Law Society of South Australia, the Legal Services Commission and the Office of the Public Trustee of South Australia. In this Report, these submissions are referred to collectively as 'the submissions'.

1.1.7 The submissions were divided in their attitudes towards a public will bank or register. While there was acknowledgment that there are practical issues associated with the current scheme in South Australia, including a number of issues that had not been canvassed in the Issues Paper, there was also concern as to whether there is any real need for reform, the utility of a public will bank or register, its cost and how one would be implemented. The majority view was that a public will bank or register would not be worthwhile; a minority thought that it would.

1.1.8 This Report completes the Institute's review of whether South Australia should have a will bank or register of some kind. While the Report briefly sets out the key considerations as to the need for reform, it does not repeat the detail provided in the Issues Paper.

[4] Mr J R Mason, Mason Westover Homburg; Mr R Jamison, Jamison & Associates; Mr D Aston, D M Aston & Co; and one who wished to remain anonymous.

Part 2 – The need for reform

2.1 The South Australian scheme

2.1.1 In South Australia, the Registrar of Probates accepts private wills (in addition to court-authorised wills) for secure custody.[5] Wills may be deposited and withdrawn for a fee. Unlike public will bank schemes in other jurisdictions and under the Model Bill, the South Australian scheme restricts the kinds of private wills that may be deposited by reference to whether the will appoints an executor and whether at least one witness to the will is of a particular class of professionals specified under the Act. As there is no apparent policy reason for such a restriction for private wills, any reform involving a public will bank should not include such restrictions.

2.2 Uniformity

2.2.1 As discussed in the Issues Paper, the majority of the National Committee for Uniform Succession Laws took the view that, 'generally it is desirable to have a central registry for wills' and proposed model laws for the deposit of wills on that basis.[6] Whilst the Uniform Succession Laws Project did not propose Commonwealth succession laws, there being constitutional barriers to this, it proposed that each jurisdiction establish its own public will bank scheme along the lines suggested in the Model Bill replicated in Appendix 2 of this Report. New South Wales, Victoria and the Northern Territory maintain a public will bank scheme substantially the same as the model scheme. The Australian Capital Territory also has a public will bank scheme, although it is not the same as the model scheme. The desirability and value of uniformity with other Australian jurisdictions is uncontroversial and has not been questioned by the submissions.

2.3 Do demand and benefit justify the cost?

2.3.1 The decisive issue is whether the benefits of a public will bank or register outweigh the costs to the State of establishing and administering the scheme. As mentioned in the Issues Paper, there are no publicly available statistics on the prevalence of lost wills, how many wills thought to have been lost are eventually found, how they are found, or the cost to estates where a will is lost or not easily found.

2.3.2 The majority of submissions the Institute received took the view that there was insufficient demand to justify setting up a new public will bank or register at public expense. Negative comment was made about the cost and low demand as supported by the low uptake of the existing facility for the deposit of wills within the Probate Registry. One submission asserted that there is no demonstrated unmet need in South Australia and said it would be difficult to justify the expenditure of public monies where there is a lack of public demand and there are currently other more economical ways to encourage people to take responsibility for the safe

5 *Administration and Probate Act 1919* (SA) Pt 2 Div 4. This legislation is reproduced in Appendix 1 to this Report.

6 National Committee Consolidated Report, 106.

storage of their wills. Consultation sessions that the Institute undertook with succession lawyers at Mt Gambier, Adelaide, Port Lincoln and Berri on 27 June 2016, 1 August 2016, 17 August 2016 and 12 October 2016 respectively, similarly found no support for a public will bank or register.[7]

2.3.3 The Law Society of South Australia, saying that it did not support the introduction of a public will bank or register, commented:

> Additionally, there appears to be no evidence that the current private methods of storing wills are not working adequately. Missing wills seem to be, anecdotally at least, a fairly rare occurrence. ...
>
> A major objection to such a scheme being proposed, is that the wills and informal testamentary documents most in need of the assistance of such a scheme, would not be benefited. Testamentary dispositions that are jotted on scraps of paper by disorganised testators are almost certainly never going to be registered in any will register by that person. As observed in the [Issues] Paper, the people most likely to use such a register are those who are already supremely organised.
>
> In addition, the storage and registration schemes implemented by other States do not seem to have received any public interest.

2.3.4 A similar view was expressed by the OPT, which also provided some quantitative data:

> A small percentage of the inquiry calls [received by the OPT] (approximately 150 per annum) involve a search for a lost Will. The majority of calls are from the immediate family of the deceased. A small number of calls are from testators who have forgotten where their Will is stored. (Many of these calls are from testators who confuse the Public Trustee with Executor Trustee.)
>
> Research would indicate that approximately 66% of the South Australian adult population has a valid Will.[8] This might suggest that of the 150 'lost Will' inquiries received only 66% or less of the testators had a Will which was 'lost'. The majority of callers rarely report back to [the] Public Trustee and as such it is not possible to ascertain if the Will was ever located, remains lost or if it ever existed.

2.3.5 The OPT noted that further empirical evidence would be necessary before it could be said whether a register was justified:

> Empirical evidence regarding the prevalence of 'lost Wills' and the associated costs to the community might be required before further evaluation of a Will bank or register scheme.

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[7] The need for a readily accessible Register of Advance Care Directives was raised at the Port Lincoln and Berri consultation sessions. It was noted that with increased social mobility (including 'grey nomads') this was an increasing issue. This significant issue is beyond the Institute's current remit. Such directives relate to medical issues and don't concern property issues. It has been noted that the recording of Advance Care Directives is being progressed elsewhere through the Enterprise Patient Administration System (EPAS) that is being introduced in South Australia and other jurisdictions.

[8] Cheryl Tilse, Jill Wilson, Ben White and Linda Rosenman, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia – Report to Industry Partners* (2012) University of Queensland School of Nursing, Midwifery and Social Work, 8 <http://www.uq.edu.au/swahs/Report%20Industry%20Partner%20October.pdf>.

> Without this evidence it is uncertain if a Will bank or Will registry systems represents value for money to the community.

2.3.6 Nonetheless, the OPT went on to say that:

> In our view, there is insufficient evidence to suggest that a public Will bank would be utilised by the community. The experience of the New South Wales trial Will bank and the British Columbia system would indicate that unless the system is mandatory, the uptake would be limited.
>
> It is unclear why the State should offer a scheme when there are already facilities in place to securely store private Wills. The Probate Registry already provides this service for a fee which has had minimal uptake. Some legal firms offer a Will bank service for their customers and some banks offer a safe custody service.

2.3.7 Further, the OPT questioned why the community should bear the costs arising out of how a testator chooses to deal with storage of their will:

> A person is free to make choices regarding their Will including the need to have a Will. They may choose to use a Will kit, solicitor or trustee firm to make the Will or to do this themselves. There is choice regarding the appointment of the executor, who to name as the beneficiaries, who to inform of the Will as well as where to store the Will. There may be repercussions as a result of those choices however it is unclear why the choice regarding the storage of the Will should be the only one borne by the community. ...
>
> In addition, the costs associated with [a will bank scheme] would need to be funded either directly by the consumer or indirectly through the State Government general revenue.
>
> The expectation that the State (either directly or indirectly) would fund such a service seems incongruent with the expectation of the community. Other important documents that are lost are replaced at the expense of the owner (or by their estate). It is unclear why the costs associated with the loss of a Will should not also be borne by the estate.

2.3.8 As regards an electronic will register, the OPT said that the information contained on the register could not be relied upon without some form of verification, which would cause the cost, and potential liability to both manage and maintain it, to far outweigh any benefit. It said it is unclear why the community should be expected to fund such a scheme.

2.3.9 One of the reasons for the current low rate of registration or lodgement of private wills with the Registrar of Probates or under interstate schemes is that they are entirely voluntary. The OPT considered that a public scheme would not be used or be beneficial unless it were mandatory, rather than voluntary, to deposit or register a will. It said any system that is not compulsory and that only partially deals with the issue would create an administrative expense and burden on the community. No submission favoured compulsion and one described it as 'overbearing'.

2.3.10 The Law Society contended that a compulsory scheme would be, in effect, unworkable:

> Any move to make lodgement or registration of a will a compulsory part of the validity of a will would overturn many centuries, if not millennia, of testamentary law. If the lodgement and registration of a will were compulsory, that rule would need to be subject to various exceptions, which would, in effect, make it not compulsory.

2.3.11 The problem that a voluntary scheme presents is magnified where there is a fee associated with the deposit, registration or withdrawal of a will or any other dealing with a deposited or registered will.

2.3.12 Another reason for the poor uptake of voluntary schemes is the financial value to solicitors, OPT and trustee companies of providing their own will bank services. Holding the will of a deceased person increases the chance of being retained by the executors to obtain probate and administer the estate.[9] It is common for trustee companies to be appointed as executors of wills they prepare. Further, viable wills may be saleable. The existence of a secondary market for wills is a fact that is likely to negatively affect the uptake of a will bank. One solicitor wrote:

> Viable Wills are valuable to Legal Practitioners. When I retire my Will bank would sell for about $100,000 based on what I paid for the Wills that I had to pay for. I am certainly not likely to place Wills into a Will bank run by the Government at any cost if I lose control of them however.

2.3.13 Whilst general support for a government run scheme was limited, two submissions from private practitioners were generally supportive. Although not a submission, a newspaper article referring to the Institute's Issues Paper reported another solicitor as saying 'a register would eliminate stress at a traumatic time for families'.[10]

2.3.14 One submission wrote that 'the establishment by the Government of a Will Register will be a worthwhile exercise, provided of course that appropriate safe guards are put in place' to address privacy concerns. Even so, there was some caution expressed that having a will bank or register may be of less importance in areas outside metropolitan Adelaide where there are already systems in place to serve the local community.[11]

2.3.15 Another submission, which generally supported a public scheme, raised an issue not examined in the Issues Paper. It described the difficulties the firm had encountered when it attempted to return almost 3,000 wills after deciding that it was not worthwhile to hold them for clients.

> [W]e had an enormous task ahead of us locating the right people. The issues we encountered were:

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9 Indeed, the OPT prepares wills without fee only if the Public Trustee is appointed executor.

10 Jill Pengelley, 'Push for a new way forward on wills', *The Advertiser* (Adelaide) (25 August 2014) referring to Julie Height of Duncan Basheer Hannon.

11 It was submitted that:

> The register may be of more importance in the city than locally. We have in excess of 3000 Wills in our safe and maintain our own register.
>
> As a matter of course, staff members check the local newspaper (each edition) and note details of the death of any person on whose behalf we hold a Will. Should we not hear from family members within 3 weeks we will contact the executors named in the Will held by us, suggesting that they communicate with us in relation to the deceased. This seems to work very well in practice.
>
> I believe that other non-metropolitan firms with sizeable Wills and Estates practices will have similar systems in place.

1. Wills are not required to have a date of birth thus making it difficult to ascertain as to whether it is logical that this person is still alive.
2. Wills are not required to have any additional contact details regarding the person. No longer are we John Black the blacksmith whose father was a blacksmith who was born and bred in the same house for his whole life, thus making it very difficult to find people.
3. Less and less people have a land line phone number registered with the White Pages thus making it difficult to locate people that way.
4. The electoral roles are now locked down for privacy reasons thus not being a source for locating people.
5. There is no nationwide death register you can search to find out if someone has passed away already thus the will not being needed anymore, or indeed wanted and unable to be located.

2.3.16 There was no support in the submissions for a mandatory scheme. There would appear to be many practical, legal and financial obstacles to a successful implementation. The Institute considers it may be an unnecessary burden on the affairs of citizens and could discourage people from making wills.

2.3.17 It is evident from the submissions that it is unclear whether the introduction of a voluntary, government run, public will bank or register justifies the expenditure of public funds (especially at a time of financial restraint). On the other hand, there is no doubt that some wills are hard to locate, some are lost and some are destroyed, whether wittingly or unwittingly. In the Institute's view, any decision about whether to reform South Australia's present law to bring it into conformity with the National Committee's model provisions should be informed by a cost-benefit analysis, namely whether the benefit to the community is likely to justify the cost to taxpayers. If, and only if, the government decides to reform the existing scheme, the Institute considers that the Model Bill would serve as an appropriate starting point, but it would need to be accompanied by the requisite resources.

2.4 Other reform considerations

2.4.1 The submissions raised other issues for consideration that were not explored in detail in the Issues Paper. These are set out below.

Third party providers

2.4.2 Although the Law Society of South Australia does not support a government run will bank or register, it has recently set up its own wills register, the possibility of which was foreshadowed in its submission following the Issues Paper. The register is an electronic database, the function and purpose of which is to record the location and date of wills and codicils held by legal practitioners or legal practices in South Australia. The scheme is purely voluntary and is free to South Australian legal practitioners and legal practices.

2.4.3 After approximately three months in operation, the use of the scheme by legal practitioners was described as 'disappointingly low'.[12] However, a significant contributing factor to that is almost certainly the fact that a legal practice with an annual turnover in excess of $3 million is unable to disclose personal information without the consent of the individual.[13] This means that, in relation to wills held by them when the scheme commenced, such legal practices are prevented from participating in the register in respect of those wills without obtaining the consent of each individual whose will is held by the legal practice. This is a problem which may be overcome in time with the education of the legal profession and members of the public and if, in future, consent is given at the time a will is made.

2.4.4 The initiation of the project is to be commended, but its benefits will only be realised over time and with continued education of the legal profession and their clients as to its benefits. The Law Society said of its proposal in its submission:

> The Society may offer such a service to members, and potentially to the public, if it were viable to do so. If the Government were seriously contemplating the introduction of a will registration scheme, the Society may approach the Government at that time, to discuss whether the Society would be better placed to administer such a scheme as opposed to, say, the Registrar of Births Deaths & Marriages or the Public Trustee.[14]

2.4.5 The advantage of using a third party provider is that the expense of introducing and maintaining the scheme would not be borne by the community at large. Where such a scheme is provided by an institution having a quasi-public function such as the Law Society, the concerns discussed in the Issues Paper that relate to a purely private provider are significantly reduced. The recent establishment by the Law Society of a Wills Register is a significant development and allays any concerns relating to a purely private provider.[15]

Private will banks which cease to exist and testators who cannot be found

2.4.6 Two solicitors who made submissions highlighted an issue for which the current system does not provide a useful solution. One of those submissions has been previously referred to (see [2.3.15] above). The other submission wrote:

> I have been in the legal profession for [many] years and I have prepared thousands of Wills and probated many hundreds of estates. As a result of my work in this area I have been invited by lawyers who are retiring or [who] become judges to either take over or buy out their Will banks and my current collection of about 1,400 Wills represents the legal practices of 8 lawyers.
>
> There are a number of problems that this causes me. Many of the Wills which I am holding are more than 50 years old. I have exhausted every reasonable avenue to locate the Testators. I have about 250 Wills for which I can find no trail of the Testator and that lead me to enquire of

[12] Ms Joan Sedsman, Chair, Succession Law Committee, Law Society of South Australia. The Law Society informed the Institute that, as of 12 October 2016, over 14,000 wills has been deposited with the Law Society Register.

[13] *Privacy Act 1988* (Cth). See particularly s 6, definition of 'APP entity', s 6C, definition of 'organisation' and s 6D, definition of 'small business operator'.

[14] The Society confirmed, by email dated 28 September 2015, that the Society's position remains the same as that stated in its submission.

[15] See, for example, Issues Paper, above n 1, [70], last bullet point.

> the Supreme Court Probate Registry whether they would accept them under the current legislation. They agreed that they had a duty to accept them but said that they had a fee which I think at the time was about $75 per will. I keep my Will bank in a safe … and that is where these Wills with no homes remain until the day I die and some poor sucker gets to take them over and he can pay the $75. By then there will be hundreds more Wills in my collection with no hope of finding a Testator and which no one is authorised to destroy.
>
> I would be delighted to get rid of the Wills that are hopeless since I am not allowed to dispose of them and I am certainly not going to pay for that privilege.

2.4.7 The Institute is not aware of any market for wills made by testators who cannot be traced.

2.4.8 This raises two different, but closely intertwined, questions. The first question relates to what is to happen to wills held in a private will bank, whether by a law firm or private company, which ceases to exist, whether by death or retirement of a legal practitioner or winding up of a practice or company, where no person is willing and able to take custody of the wills. The second question relates to what is to be done with wills where the person who has custody of them cannot locate the testator. In both situations there is a real question as to who should be responsible for the custody of those wills and the associated cost. As other submissions demonstrate,[16] there is a secondary market for viable wills which substantially reduces the number of wills likely to fall into these categories. However, the categories do exist, and a premature destruction or loss of such wills may well work an injustice and unnecessary stress to relatives and possible beneficiaries.

2.4.9 The creation of a will bank of last resort to accommodate such wills cannot be imposed on a private provider. It is unreasonable to expect a solicitor, who at no cost to the testator has been storing a will and who may have gone to some lengths unsuccessfully to try to locate the testator, to pay for the privilege of depositing such a will in will bank of last resort. The Institute is of the view that it is in the public interest that such a facility should be provided and that it should be provided as a public service at no cost to the depositor. Such a provision is reflected in the Model Bill where a legal practitioner has died, or has ceased, or is about to cease, practising in the relevant jurisdiction.[17]

2.4.10 The Institute is also of the view that such a public service can be provided at little or no material cost to the public purse by the OPT which already has the necessary storage facility in place and is able to provide a suitable electronic recording system.[18]

2.4.11 In order to minimise the cost to the public it would not be unreasonable for the person or body seeking to deposit a will, or wills, under the scheme to be required to comply with a few essential procedures. That would include placing each will to be deposited in a prescribed standard sized envelope bearing prescribed information on the envelope and accompanying the

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16 See [2.3.12] above.

17 Model Bill, clause 49(3)(b).

18 The Institute has discussed this proposal with the author of the submission of the OPT made in response to the Issues Paper. Subject to being granted appropriate statutory authority to do so, the OPT would have no objection to providing the facility as proposed by the Institute.

will or wills deposited with prescribed information in electronic form. That could then be merged into a master electronic index maintained by the OPT with access to a variety of relevant search criteria. The sort of information that would need to be supplied by the depositor would include:

- The name of the testator;
- The address of the testator at the date of the will;
- The date of the will;
- The date of birth of the testator if known;[19] and
- Possibly the name(s) of the executor(s) stated in the will.

2.4.12 There would be no need for the OPT to verify the details supplied or their accuracy. These should be certified by the person depositing the will. The OPT would only be providing a public storage and retrieval facility, and would need to be afforded an appropriate relief from liability for loss or destruction of the will or for any inaccuracy in, or omission from, the register.

2.4.13 Apart from a small initial setup cost and physical identification and storage of the envelope, the only other significant cost would be of retrieval and verification of entitlement to the will against criteria which the OPT would need to prescribe. An entitlement to a stored will would only arise on proof of death of the testator and access would normally be limited to a named executor or person entitled to apply for letters of administration with the will annexed.

2.4.14 In most cases access to a will would only be sought because there are assets of the deceased of some value to be administered. It would therefore not be inappropriate for the OPT to charge a reasonable fee for recovery and delivery of a stored will.

2.4.15 Implementation of the scheme proposed would require amendment to the *Public Trustee Act 1995* ('the *PTA*'). Although the Public Trustee has the powers of a natural person, such powers are '(s)ubject to (the) Act',[20] and s 52 of the *PTA* would appear to limit the class of documents which may be deposited with the OPT for safekeeping to the class of documents specified in that section. That would exclude a will bank of last resort.

E-wills

2.4.16 It was accepted by all who made submissions using the questionnaire that, if a public will bank were established, scanned copies of a will should be kept by the will bank as a backup copy. However, the consensus was that it would be imprudent to accept anything but a paper will for deposit until such time as electronic wills (e-wills) are recognised as legally valid.

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[19] This should be a mandatory requirement for all wills made after the commencement of the scheme in order to assist in determining a destruction date.

[20] *PTA* s 5(1).

2.4.17 As mentioned in the Issues Paper, while the grant of probate for e-wills is still a rare occurrence, rapid technological advances suggest change in this area may well be needed. A growing acceptance and prevalence of e-wills would impact upon the way that wills are stored or kept track of. If a will bank or register were to be established and the law relating to wills were to be reformed soon after to recognise e-wills, it is probable that these systems would have to be redesigned.

Part 3: Recommendations

3.1.1 Whilst the National Committee, albeit by majority, recommended that it is desirable to have a central bank for the voluntary deposit of wills, the Institute's consultation found only a limited response with divided opinions about a public will bank or register's utility and cost effectiveness. Notwithstanding Recommendations 3 to 5 below, the Institute recommends that no decision be made to establish either a public will register or public will bank at this time. The recent introduction by the Law Society of a Wills Register is a positive step that is likely to remove much of the need or business case for a public will bank.

Recommendation 1

The Institute recommends that no decision be made to establish either a public will register or public will bank at this time.

3.1.2 The Institute recommends that, if statutory changes are considered to recognise e-wills, it would be appropriate to reconsider the possibility of establishment of a will bank or register in that context. The Institute recommends in any event that s 13 of the *Administration and Probate Act 1919* (SA) be amended to remove the requirement that only wills appointing an executor and witnessed by persons of a particular class may be deposited with the Registrar of Probates.

Recommendation 2

If statutory changes are considered to recognise e-wills, it would be appropriate to reconsider the possibility of establishment of a will bank or register in that context.

Recommendation 3

That Section 13 of the *Administration and Probate Act 1919* (SA) be amended to remove the requirement that only wills appointing an executor and witnessed by persons of a particular class may be deposited with the Registrar of Probates.

3.1.3 In addition, the Institute recommends the following changes to the *Public Trustee Act 1995* (SA):

Recommendation 4

That the *Public Trustee Act 1995* (SA) be amended –

a. to allow the Public Trustee to operate and maintain a will bank for the deposit of wills held by a legal practitioner or legal practice in South Australia where the legal practitioner has died or where the legal practitioner or legal practice ceases or proposes to cease practising in South Australia or where a legal practitioner or legal practice in South Australia is unable to locate the person whose will is being held;

b. to provide that such deposit be at no charge to the person or body making the deposit;

c. to authorise the destruction of any deposited will if the Public Trustee is reasonably satisfied that the person making the will has died and that a reasonable time has elapsed in which a person might be expected to have sought access to the will;

d. to relieve the Public Trustee of any liability for the loss of or damage to any will deposited under the scheme or for any inaccuracy in or omission from the register of wills so deposited;

e. to allow for the prescription by regulation of the following matters:

   i. the nature, form and labelling of containers of such wills deposited;

   ii. the form and content of an index of such wills to accompany their deposit;

   iii. the conditions to be met before delivery of a deposited will to any person; and

   iv. the fee to be paid for the search, recovery and delivery of a deposited will to any person.

3.1.4 The Institute further recommends:

Recommendation 5

That if such amendments to the *Public Trustee Act 1995* are made (as described in Recommendation 4 above), the Public Trustee be directed to implement the scheme proposed.

Appendix 1

South Australian will deposit legislation

Administration and Probate Act 1919 **(SA)**

Part 2—Granting, revoking etc of probate and administration

Division 4—Deposit of wills

13—Wills may be deposited

(1) Any will, duly executed as provided by subsection (3) of this section, and whereof an executor or executors is or are appointed, may at any time previous to the death of the testator be deposited for safe custody with the Registrar by the testator, or on his behalf by any district registrar, solicitor, notary public, or commissioner for taking affidavits in the Supreme Court.

(2) The Registrar shall—

(a) enclose such will in a packet and seal the same; and

(b) endorse on such packet the names of the testator and executor or executors, the date of the will, the time of its being deposited, and the number of the deposit; and

(c) deliver to the depositor a certificate of such deposit.

(3) Every will deposited under this section shall be executed by the testator as required by law, and one of the attesting witnesses shall be the Registrar, a district registrar, notary public, solicitor, or a commissioner for taking affidavits in the Supreme Court.

(4) Such attesting witness, unless he is the Registrar or a district registrar, shall verify the testator's execution of the will by a certificate in the prescribed form, which shall accompany the will.

14—Deposit of codicil

On depositing any codicil to a will already deposited, and not withdrawn, a reference to the numbers of the will and codicil and any previously deposited codicil shall be made on the packets containing the will and codicil or codicils and in the index to be kept by the Registrar.

15—Withdrawal

(1) A deposited will may be withdrawn by the testator, or someone authorised by him.

(2) On such withdrawal the Registrar shall take a receipt for the will and enter a memorandum of the withdrawal and the time thereof in his index, and also on the will, before delivery.

(3) Any other will deposited by the testator shall not receive the number of the former will so withdrawn.

(4) On the withdrawal of a will, the certificate of deposit given by the Registrar shall be delivered up and cancelled, unless the Registrar sees fit to dispense with such delivery.

16—Proceedings for probate on death of testator where will has been deposited

(1) On the death of a testator, whose will is at the time of his death deposited with the Registrar, any executor of the will may in person apply for probate of such will.

(2) The Registrar shall thereupon supply the executor so applying with a printed form of declaration in the prescribed form, and upon the executor making such declaration the Registrar, if he thinks the case a proper one for the exercise of the power by this section given to him may, on payment of all duties due, grant probate to the executor.

(3) Such probate shall be made out by the Registrar, or a clerk in his office, and the Registrar shall make the prescribed charges for the form of declaration and for making out the probate.

Supreme Court Probate Rules (SA)

Restrictions on searches and removal of documents

72.01 No person shall, without the permission of the Registrar or of the Court be allowed to inspect, or to order a copy, or any extract of, any will or document deposited under section 29 of the Act, or filed in the Registry other than the registered copy of the will of a deceased person or the administration act, or order.

72.02 No affidavit or record of the Court in its Testamentary Causes Jurisdiction shall be taken out of the Court without an order of the Court or the Registrar and no subpoena for the production of any such document shall be issued.

72.03 Where an order has been obtained under Rule 72.02 the Registrar may require that before the document is taken out of the Court, an office copy of the document be filed in the Registry by the person requiring the document to be produced.

Appendix 2

Model will deposit laws

Extracts from

Uniform Succession Laws Project

Draft Wills Bill 1997

Part 6 Deposit of wills with Registrar

49 Will may be deposited with Registrar

(1) Any person may deposit a will in the office of the Registrar.

(2) Any will deposited in the office of the Registrar under this Act must be in a sealed envelope that has written on it:

(a) the testator's name and address (as they appear in the will), and

(b) the name and address (as they appear in the will) of any executor, and

(c) the date of the will, and

(d) the name of the person depositing the will,

and must be accompanied by the fee prescribed by the regulations.

(3) A fee is not payable in respect of any will deposited with the Registrar if the deposit is made:

(a) in accordance with Part 3, or

(b) because a legal practitioner has died, or has ceased, or is about to cease, practising in [*insert name of jurisdiction*].

(4) The regulations may prescribe fees for the purposes of this section.

(5) Any regulations made under this section:

(a) may prescribe fees in respect of a particular class or classes of wills or will makers, and

(b) may prescribe different fees in respect of different classes of wills or will makers, and

(c) may authorise the Registrar to waive fees in particular cases or classes of cases.

50 Delivery of wills by Registrar

(1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to a person as directed by the testator.

(2) On receiving the application, the Registrar must give the will to the testator or to any person nominated by the testator, but only if the testator is, at the time of making the application, not a minor and not a person who lacks testamentary capacity.

(3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.

(4) On receiving the application, the Registrar must give the will to the executor or other person or to any legal practitioner or trustee company nominated by that executor or person.

(5) The Registrar may examine any will to enable the Registrar to comply with this Part.

(6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.

(7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.

51 Retention of wills

Any failure by the Registrar to retain a will as required by this Act does not affect the validity of the will.