Report 10

December 2017

South Australian Law Reform Institute

Who may inspect a will

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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THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

Terms of reference

The Attorney-General of South Australia, the Hon John Rau MP, invited the South Australian Law Reform 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 identified seven topics for review. This Report examines who may look at a will.

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Acknowledgements

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Students whose research contributed to this Report as part of the Adelaide University Law School Law Reform course were Michael Arnold, Lucy Bozzetti, Alexander Chan, Samantha Graham, Mark Hautop, Patrick Leeson, Jordan Phoustanis, Kenneth Richards Harry Wall, Alyse Walter, Siong Lung Wong and Alexandra Woodland in 2014 and Natalie Williams and Georgia Goodwin in 2016 and Giorgia Kinloch and Jemma Potezny in 2017.

Professor John Williams, Nancy Detmold and Louise Scarman provided editorial, proofing and research assistance.

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Disclaimer

This Report deals with the law as it was on 30 November 2017 and may not necessarily represent the current law.

Abbreviations and Glossary

Family Provision Laws or Legislation	Legislation creating entitlements to deceased estates based on a family and personal relationship and/or moral rights and obligations
IFPA	*Inheritance (Family Provision) Act 1972* (SA)
National Committee	National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General of Australia (SCAG) in 1995
National Committee Report	New South Wales Law Reform Commission, Uniform Succession Laws Project Committee*, Uniform Succession Laws: the Law of Wills Report,* Report No 85 (April 1998) <http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-85.pdf>
New South Wales section	*Succession Act 2006* (NSW) s 54
SALRI	South Australian Law Reform Institute
VLRC Final Report	Victorian Law Reform Commission, *Succession Laws: Family Provision,* Report No 6 (2013) < http://www.lawreform.vic.gov.au/content/6-family-provision-0>

Summary of Recommendations

Recommendation 1

SALRI recommends that no change to the present law is necessary to allow inspection of a will prior to a testator's death as SALRI does not support a legislative provision to allow inspection of a will prior to a testator's death beyond any limited situations contemplated under current law and practice

Recommendation 2

SALRI recommends that legislative provision be made in South Australia for an entitlement to inspect a will after a testator's death based on the draft Wills Bill 1997 and s 54 of the *Succession Act 2006* (NSW) and such a provision should extend to the following categories:

1. Any person named or referred to in the will, whether as a beneficiary or not; any person named or referred to in an earlier will as a beneficiary of the deceased person.
2. The surviving spouse, domestic partner (whether of the same sex or not) or child or stepchild of the deceased person.
3. A parent or guardian of the deceased person.
4. Any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate.
5. Any parent or guardian of a minor referred to in a will or who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate.
6. Any person committed with the management of the deceased person's estate under the *Guardian and Administration Act 1993* (SA), immediately before the death of the deceased person.

Recommendation 3

SALRI recommends that legislative provision should be made for a party (including a creditor) who has or may have a claim at law or in equity against the estate of a deceased person to be able to inspect a will but only by order of a court and such an order should only be granted where the applicant has some proper interest and can establish why inspection of the will is appropriate.

Recommendation 4

SALRI recommends that consolidation of South Australian succession law legislation into one new *Succession Act* for ease of reference be progressed, either after, or at the same time as, any amendments to the *Inheritance (Family Provision) Act 1972* (noting SALRI's previous Report into Intestacy).[1]

[1] South Australian Law Reform Institute, *South Australian Rules of Intestacy,* Final Report 8 (July 2017) 65 [7.4.1].

Part 1 – Background

1.1 The South Australian Law Reform Institute

1.1.1 The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the University of Adelaide Law School. SALRI conducts inquiries or references into various areas of the law. It is assisted by an expert Advisory Board. The subject of a reference is determined by the SALRI Advisory Board and at the request of other parties such as the South Australian Attorney-General or the Law Society of South Australia (the Law Society). Before coming to its conclusions, SALRI examines the relevant research and looks at similar laws and their operation in other jurisdictions. It consults widely with interested parties, experts and the community. Based on the work and research undertaken during an inquiry, SALRI makes recommendations to the Attorney-General so that the State Government and South Australian Parliament can make informed decisions about any appropriate changes to the law. SALRI's recommendations do not necessarily become law. Rather, any decision on accepting and implementing its recommendations is entirely for the Government and South Australian Parliament.

1.1.2 When undertaking its work, SALRI has a number of objectives. These include to identify law reform options that would modernise the law, fix any problems in the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, bring South Australian law into line with the law of other States and Territories.[2]

1.1.3 SALRI was established in December 2010 under an agreement between the South Australian Attorney-General, the University of Adelaide and the Law Society.[3] SALRI is based on the Alberta law reform model that is also used for the Tasmanian Law Reform Institute.[4] SALRI also draws on the work of the Law Reform elective class at the Adelaide Law School.

1.1.4 In 2011, the Attorney-General, the Hon John Rau MP, invited SALRI to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend any reforms. It is important that South Australia's succession laws keep up with changing values and conditions and community expectations and the law remains responsive and effective.[5]

1.1.5 The Attorney-General wrote to SALRI on 14 December 2013 and drew attention to the fact that there is no law in South Australia governing who is entitled to see a will. The Attorney-General noted that this issue had been considered by the National Committee for Succession Law which recommended a standard provision about who might inspect a will and why.[6] The Attorney-

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[2] The issue of uniformity is especially significant in the context of succession law. See National Committee for Uniform Succession Laws, *Family Provision: Report to the Standing Committee of Attorneys General,* Miscellaneous Paper No 28 (Queensland Law Reform Commission, December 1997) ii-iii.

[3] Further information about SALRI and its various projects (both past and present) is available at https://law.adelaide.edu.au/research/law-reform-institute/.

[4] See Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–64.

[5] South Australian Law Reform Institute, *Distinguishing between the Deserving and the Undeserving: Family Provision Laws in South Australia*, Report 9 (December 2017) 1 [1.1.4], 12 [2.1.13]; Victorian Law Reform Commission, *Succession Laws: Family Provision,* Report No 6 (2013) ix (Cummins J).

[6] New South Wales Law Reform Commission (Uniform Succession Laws Project Committee ('National Committee')), *Uniform Succession Laws: the Law of Wills Report,* Report No 85 (1998) [9.11]. See proposed clause 52 of the draft Wills Bill 1997 contained in this Report (reproduced at Appendix A).

General raised whether it may be appropriate for South Australia to adopt the model provision, or some form of it, and requested SALRI to give this issue some consideration as part of the current review of the State's succession laws.

1.1.6 SALRI's current Report is part of its wider work into succession law reform in South Australia. This Report has been prepared in combination with SALRI's review of the role and operation of the *Inheritance (Family Provision) Act 1972* (the *IFPA*).

1.1.7 Funding was generously provided from the Law Foundation of South Australia for much of the research and consultation necessary for SALRI's wider review of succession law.

1.1.8 As part of its succession reference, SALRI has identified various topics for review, and has completed, or is in the process of completing reports, on each of these issues. This work is nearing completion and has included:

- Review of Sureties' Guarantees for Letters of Administration.[7]
- Wills Register: State Schemes for Storing and Locating Wills.[8]
- Small Estates: Review of the Procedures for Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes in South Australia.[9]
- The law of Intestacy.[10]
- Management of the Affairs of a Missing Person.[11]
- The Role and Operation of the *IFPA*.[12]

1.1.9 Copies of the Papers and Reports mentioned above can be found at https://law.adelaide.edu.au/research/law-reform-institute/.

1.1.10 SALRI intends in early 2018 to look at the operation of the common law forfeiture rule in cases of homicide, drawing on work of Victorian Law Reform Commission[13] and the Tasmanian Law Reform Institute.[14]

1.1.11 The tension between many of the concepts in present British based succession laws in Australia and Aboriginal kinship and customary law and practice has been raised to SALRI in

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[7] South Australian Law Reform Institute, *Dead Cert: Sureties' Guarantees for Letters of Administration,* Issues Paper 2 (December 2012) and South Australian Law Reform Institute, *Sureties' Guarantees for Letters of Administration, Final Report 2* (August 2013). See also *Administration and Probate (Removal of Requirement for Surety) Amendment Act 2014* (SA).
[8] South Australian Law Reform Institute, *Losing It: State Schemes for Storing and Locating Wills,* Issues Paper 6 (July 2014) and South Australian Law Reform Institute, *State Schemes for Storing and Locating Wills,* Final Report 5 (October 2016).
[9] South Australian Law Reform Institute, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes,* Issues Paper 5 (January 2014), South Australian Law Reform Institute, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes,* Further Consultation Paper (November 2015) and South Australian Law Reform Institute, *Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes,* Final Report 6 (December 2016).
[10] South Australian Law Reform Institute, *Cutting the Cake: South Australian Rules of Intestacy*, Issues Paper 7 (December 2015); SALRI, *Intestacy Final Report*, above n 1.
[11] South Australian Law Reform Institute, *Management of the Affairs of a Missing Person,* Report 8 (July 2017).
[12] SALRI, *Family Provision Report*, above n 5.
[13] Victorian Law Reform Commission, *The Forfeiture Rule,* Report (September 2014).
[14] Tasmanian Law Reform Institute, *The Forfeiture Rule,* Report 6 (December 2004). SALRI as part of this project will examine the implications of the common law forfeiture rule in the context of family provision and the *IFPA*.

consultation.[15] SALRI is proposing to examine these issues in a future law reform project and to include in this project the law relating to funeral instructions, the disposal of human remains and the resolution of disputes that may arise. These particular issues have been highlighted to SALRI on more than one occasion in the course of its succession reference and raise particular complexities and sensitivities, especially for Indigenous communities.[16]

1.1.12 The role and operation of advance care directives and power of attorneys and the potential for abuse and exploitation in this context has also been widely raised to SALRI in the course of its succession reference, especially in the context of its Report into the *IFPA*.[17]

1.1.13 SALRI acknowledges the significant contribution of the students of the Law Reform class at the Adelaide University Law School. SALRI finally wishes to express its appreciation to the many succession lawyers and members of the community who have generously contributed to the succession reference.

Part 2 – Consultation and Research

2.1.1 SALRI has closely liaised with the Law Society Succession Committee throughout its succession reference. SALRI is committed to conducting an inclusive and accessible consultation with the South Australian community and all interested parties, including but not confined to the legal profession.[18] Genuine and inclusive consultation is integral to modern law reform.[19]

2.1.2 Under its guiding objectives, SALRI is required to consider the case for uniform laws where desirable. The issue has featured in SALRI's succession consultation.

2.1.3 The Uniform Succession Laws project commenced through the Standing Committee of Attorneys-General in 1995. The goal behind the project was the development of model succession law legislation (the National Bill) to be used as the basis for reform by States and Territories. While word-for-word uniformity of succession legislation across all jurisdictions is unrealistic, the implementation of nationally consistent laws that are up-to-date was stated to be an achievable goal[20] (though only New South Wales to date has legislated to substantially adopt the entire National Bill).

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[15] See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws,* Report No 31 (1986); Lidia Xynas, 'Succession and Indigenous Australians: Addressing Indigenous Customary Law Notions of "Property" and "Kinship" in a Succession Law Context' (2011) 19 *Australian Property Law Journal* 199; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture Final Report,* Project No 94 (September 2006) 239–241.

[16] See SALRI, *Family Provision Report*, above n 5, 118–125 [9.1.1]–[9.4.5]. See generally Queensland Law Reform Commission, *A Review of the Law in relation to the Final Disposal of a Dead Body*, Report No 69 (2011).

[17] SALRI, *Family Provision Report*, above n 5, 127 [10.2.1]–[10.2.3]. See further Australian Law Reform Commission, *Elder Abuse: a National Legal Response,* Report 131 (June 2017) 37–47, 159–202.

[18] Michael Kirby, 'Are We There Yet' in Opeskin and Weisbrot, above n 4, 433, 436.

[19] See, for example, Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform', Speech at the 'Conference on Law Reform on Hong Kong: Does it Need Reform?', University of Hong Kong, Department of Law, 17 September 2011, http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform; Roslyn Atkinson, 'Law Reform and Community Participation' in Opeskin and Weisbrot, above n 4, 160–174; Neil Rees, 'The Birth and Rebirth of Law Reform Agencies', Australasian Law Reform Agencies Conference 2008, Vanuatu, 10-12 September 2008, http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf.

[20] Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2008, 5.55 pm (Mr Parkinson).

2.1.4 The undesirable consequences of different succession laws throughout Australia has been noted.[21] One Mt Gambier practitioner, noting many of his clients (typically famers) have assets in both Victoria and South Australia, saw the benefits of consistent succession laws in Australia. Other practitioners told SALRI that it is now routine for people to hold assets in different Australian jurisdictions. As was noted in the Tasmanian Parliament: 'Having uniform or consistent succession laws is expected to make it easier and less costly to administer the estates of people who have moved between, or who have held assets in, different jurisdictions.'[22]

2.1.5 Uniformity or consistency in succession laws across Australia is a commendable aspiration but SALRI has found only very limited support in its consultation for uniform laws in the area of succession and family provision and no support for wholly or substantially adopting the Model Bill.[23] However, in relation to the inspection of wills SALRI found support among succession lawyers for consistent laws and using the model provision as at least the starting point.

2.1.6 There is no entitlement to inspect a will before the testator's death.[24] The will of a living person is considered a private document[25] (and SALRI sees no reason to change this position). There is also no entitlement in South Australia under either statue or the common law to inspect a will after the testators' death (or at least until a will is admitted to probate when it becomes a public document).[26] There is no apparent statutory or inherent power for a court to order inspection of a will before a grant of probate as Master Sanderson explained in the recent West Australian case of *Chapman v Garrigan*[27] (which is equally applicable in a South Australian context). The Master commented: 'There appears to be no reported case in which a party has sought, let alone obtained, a copy of a will not yet admitted to probate.'[28]

2.1.7 The National Committee supported a legislative provision to allow inspection of a will after a testator's death. It noted that a person who has the control of a will after the testator's death may be reluctant to show it to anyone owing to a misconceived view that a will is a private document or a desire to keep the person who is seeking to see the will in ignorance of its contents.[29] The National Committee also noted that not all wills are brought to court for probate, particularly where an estate is small and not worth the expense involved. In such a situation, possible beneficiaries and other

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[21] Northern Territory Law Reform Committee, *A Review of the Recommendations of the National Committee for Uniform Succession Laws and Draft Bills on Intestacy and Family Provision,* 8, https://justice.nt.gov.au/__data/assets/pdf_file/0019/365212/31-Family-Provisions-and-Intestacy.pdf. ; Justice Roslyn Atkinson, 'Family Provision in Australia: Addressing Interstate Differences and Family Provision Law Reform', Address given at the Queensland Law Society Conference on Family Provision, 25 July 2014, 1, 18, http://www5.austlii.edu.au/au/journals/QldJSchol/2014/44.pdf; Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories: The Law of Wills: Issues Paper,* WP 46 (June 1995) ii–iii.

[22] Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2008, 5.55 pm (Mr Parkinson).

[23] The majority view in consultation drew attention to the existing disparities between succession laws throughout Australia and highlighted the advantage of flexibility and that South Australia's succession laws should reflect and meet local circumstances that may well not exist elsewhere. For example, the dramatic difference between house prices in Sydney and Melbourne and Adelaide was often provided as a case in point. See also SALRI, *Family Provision Report*, above n 5, 15–16 [2.1.27], 30 [3.4.1].

[24] There is no case law or South Australian statute directly on point.

[25] An exception is where the testator loses decision making capacity and an administrator is appointed under s 40 of the *Guardianship and Administration Act 1993* (SA) and whilst the administrator may view any will, he or she cannot disclose its contents.

[26] *Administration and Probate Act 1919* (SA) s 30.

[27] [2017] WASC 336 (21 November 2017) [11]–[12].

[28] Ibid [13].

[29] National Committee, above n 6, [9.2]. See, for example, *Chapman v Garrigan* [2017] WASC 336 (21 November 2017) [11].

claimants may be placed in 'an invidious position if they do not know anything about the contents of the will'.[30] A person who is eligible to apply for family provision may not be able to discover whether the testator has made provision for him or her by a will, and is unable to begin to consider whether to make a claim.[31]

2.1.8 The National Committee accepted that only a person with a 'proper interest' (not say a journalist) should be able to see the will and that the persons entitled to share in the estate should be able to see the contents of a will. The Committee noted such information is always publicly available once a will has been admitted to probate.[32]

2.1.9 The National Committee drew on the proposed s 66A of the *Administration and Probate Act 1958* (Vic),[33] but stated that, in addition to the four categories of eligible parties listed in s 66A,[34] the following people should also be entitled to see a will: beneficiaries of prior wills or a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.[35] The National Committee considered that any new provision should include either testamentary documents that have been revoked, or documents the testamentary nature of which may be disputable.[36] It noted an executor is not permitted by a probate court to pick and choose which testamentary instruments he or she should bring to court for probate purposes.[37] The National Committee recommended that the term 'will' in any provision should include 'a revoked will, or a copy of any such will and any part of such a will'.[38] The National Committee prepared a draft Wills Bill 1997 which was intended to be adopted across Australia. Clause 52 of this Bill dealt with the inspection of a will.

2.1.10 The National Committee in 2005 reiterated its support for such a provision to allow inspection of wills.[39]

2.1.11 Similar laws to that suggested by the National Committee now exist in New South Wales,[40] the ACT,[41] Northern Territory,[42] Queensland,[43] Tasmania[44] and Victoria.[45] No such law exists in

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[30] National Committee, above n 6, [9.3].
[31] Ibid [9.4].
[32] Ibid [9.5].
[33] See Ibid [9.1].
[34] The original proposed provision listed any person named or referred to in a will, whether as beneficiary or not; the surviving spouse, any parent or guardian and any issue of the testator; any person who would be entitled to a share of the estate of the testator if the testator had died intestate; and any creditor or other person having any claim at law or in equity against the estate of the deceased.
[35] Ibid [9.7], [9.11].
[36] Ibid [9.8]. The National Committee noted that a revoked instrument may still be significant to questions concerning the capacity of a testator or undue influence and if there is a question of challenging an existing will on the grounds of incapacity or undue influence, an inspection of a previously revoked will might reveal such substantial consistency of the testator's intention as to preclude or discourage such a challenge: at Ibid.
[37] Ibid [9.9].
[38] Ibid [9.11].
[39] National Committee for Uniform Succession Laws, *Administration of Estates of Deceased Persons (Vol 1)*, Report 65 (2009) 367.
[40] *Succession Act 2006* (NSW) s 54.
[41] *Administration and Probate Act 1929* (ACT) s 126.
[42] *Wills Act* (NT) s 54.
[43] *Succession Act 1981* (Qld) s 33Z.
[44] *Wills Act 2008* (Tas) s 63.
[45] *Wills Act 1997* (Vic) s 50.

South Australia or Western Australia.[46] No such law, despite the support of the New Zealand Law Reform Commission,[47] exist in New Zealand. The will of a living person is considered private in England.[48] Upon a testator's death, but before a grant of probate, only the executor has the strict authority to access the will. A will becomes public after probate and any person may search the probate records and receive a copy of the will.[49]

2.1.12 The Tasmanian section allowing access to a will provides that it does not operate while a testator is alive.[50] The Victorian provision extends to de facto spouses (or 'domestic partners' to use the South Australian expression).[51] The Queensland provision extends to an 'entitled person'. This means a person considered to have a proper interest in the will such as a person who may apply for a family provision order. The ACT section extends to 'an interested party' which includes a child or domestic partner of the deceased.

2.1.13 The NSW model is most recent and most detailed and the one that SALRI has examined.

2.1.14 The *Succession Act* 2006 (NSW) (the NSW Act) commenced on 1 March 2008. The object of the Act is to restate with amendments the law relating to wills in New South Wales to implement, with modifications, the relevant recommendations of the National Committee. One of several changes introduced was a change in the persons entitled to inspect the will of a deceased person.

2.1.15 Section 54(2) of the NSW Act gives specified persons a right of inspection or to receive copies of the will of a deceased. This right was not previously available. Section 54 applies to wills whenever made if the testator dies on or after 1 March 2008 being the commencement date of the Act (reproduced at Appendix B). For the purposes of s 54, a will includes (reflecting the view of the National Committee) a revoked will, a document purporting to be a will, a part of a will and a copy of a will.

2.1.16 Section 54(2) provides that a person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense):

(a) Any person named or referred to in the will, whether as a beneficiary or not;

(b) Any person named or referred to in an earlier will as a beneficiary of the deceased person;

(c) The surviving spouse, de facto partner (whether of the same or opposite sex) or issue of the deceased person;

(d) A parent or guardian of the deceased person;

(e) Any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate;

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[46] See *Chapman v Garrigan* [2017] WASC 336 (21 November 2017) [11]–[13] where Sanderson M noted the absence of such a provision in Western Australia despite its utility.
[47] New Zealand Law Reform Commission, *Miscellaneous Paper*, MP2 (1996) [1].
[48] Though wills may be voluntarily deposited at the court Registry in which cases a deposited will may be viewed and copied at the court's discretion. See *Senior Court Act 1981* (Eng) ss 124-126.
[49] Indeed, English newspapers in a public column often list the contents of the wills of 'prominent' individuals.
[50] *Wills Act 2008* (Tas) s 63(3).
[51] *Family Relationships Act 1975* (SA) s 11A.

(f) Any parent or guardian of a minor referred to in a will or who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate;

(g) Any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person;

(h) Any person committed with the management of the deceased person's estate under the *Protected Estates Act 1983*, immediately before the death of the deceased person,

(i) Any attorney under an enduring power of attorney made by the deceased person;

(j) Any person belonging to a class of persons prescribed by the regulations.

2.1.17 Master Sanderson in *Chapman v Garrigan* noted the reluctance on the part of executors named in a will to provide an interested party with a copy of the will 'is an issue which not infrequently causes problems both in relation to probate matters and particularly in relation to [family provision] matters'.[52] The Master encouraged practitioners to exercise common sense in this area and remarked that it is difficult to envisage any circumstance where it would be appropriate for a party who has or may have an interest in an estate to be denied a copy of the will. The Master commented that, even if a potential beneficiary were to object to that course of action, the named executor would still be justified in providing a copy of the will upon request.[53] The Master noted the benefit of a legislative provision to allow inspection before probate.

2.1.18 There was universal support in consultation for such a legislative provision in South Australia to allow inspection of wills. Rosemary Caruso of Tindall Gask Bentley had no problem with the NSW section. The view from other succession lawyers (including Nancy Detmold) was that the NSW section is a useful starting point but it is unnecessarily wide.

2.1.19 Several experienced succession lawyers viewed some limbs of the NSW section as unnecessary or problematic.

2.1.20 The Hon Tom Gray QC opposed the notion of a creditor being able to inspect a will (at least as of right) and thought the NSW section was too expansive. Terry Evans of Minter Ellison expressed a similar view and also thought the inclusion of an attorney under an enduring power of attorney made by the deceased person was unnecessary (as such an appointment ends upon the testator's death). Mark Jordan of Carpenter and Associates also stated the concept of a person (including a creditor) who has or may have a claim at law (or equity) is too broad. He noted: 'This section basically opens it up to almost anyone to access a will. The bigger issue is how that is determined by the poor person possessing the will, namely being faced with the question of determining whether the person alleging to have a possible claim actually has (or may have) one.'

2.1.21 Mr Evans and the Hon Tom Gray QC supported a residual situation to allow a person (including a creditor) who has or may have a claim at law (or equity) to inspect the will but only with the leave of the court and that such an applicant should establish they have a proper interest in being able to insect the will after the testator's death but before the grant of probate.

2.1.22 Lesia Iwaniw of Moran and Partners said, in practice, she advises clients to release a copy of the will to all beneficiaries (occasionally when indicated, masking clauses of the will that do not relate to them). If a potential claimant requests a copy of the will, her advice to clients is to release

[52] [2017] WASC 336 [11].
[53] Ibid [13].

it, because in any event they will be able to obtain a copy from the Probate Registry once probate is granted. Ms Iwaniw noted that, despite her advice, clients do not always provide her instructions to release a copy of the will.

2.1.23 Ms Iwaniw saw benefit in a legislative provision enabling access but she viewed s 54(2) of the NSW Act as going 'too far'. She would limit the eligible classes to persons:

(a) Any beneficiary – but not extended to any person named whether a beneficiary or not.

(b) Any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person. Ms Iwaniw stated this would cover any party with a potential claim under the *IFPA*.[54]

2.1.24 Thomas Rymill of Mt Gambier noted two situations should be addressed – those testators who are still alive, and those testators who have died. Mr Rymill identified two areas where problems may arise. One situation is where the testator has become infirm and someone else is managing their estate.[55] It may be relevant for that person to know what is in the will, so as to avoid disrupting any testamentary plans. The other situation relates to a disharmonious family, (often a blended marriage) where one branch of the family tries to cut out the other. Mr Rymill noted both of these situations are increasing in frequency.

2.1.25 Mr Rymill supported the inclusion in any legislative provision allowing access to a will of the following categories:

(a) A person named or referred to in an earlier will as a beneficiary (and if they have been unexpectedly omitted from the final will, that may well be an indication of undue influence upon the testator).

(b) The surviving spouse, partner, or issue of the deceased (which covers the next category or two).

(c) Any person who would entitled to share in the estate in the event of an intestacy.

(d) A parent or guardian of a minor who would be entitled to a share of the estate if there had been an intestacy.

(e) Creditors who have a claim against the estate.

2.1.26 Mr Rymill disliked two of the NSW categories, namely:-

i. Any person belonging to a class prescribed by Regulations ('this could be widened to all manner of busy bodies').

[54] The National Committee also made this point. See National Committee, above n 6, n 131.

[55] Mr Rymill explained: 'Quite often I insert a clause into grants of powers of attorney which authorises the custodian of the will to make it available to an attorney if there is good reason. This is to avoid the difficulty of an attorney blindly dealing with an estate and perhaps unaware certain items should be retained as specific bequests to beneficiaries. Hence, I think there is sometimes a need for the will of a living testator (but one who has lost mental capacity) to be reviewed via a limited category of people. Note s 11a of the *Powers of Attorney and Agency Act* (SA) – in effect, if the attorney tramples over the testamentary plans of a testator, the Supreme Court can make orders that compensate for, or rectifies the damage (I usually think of Humpty Dumpty and the King's men). Besides attorneys, I think we can bring in guardians appointed by a court or tribunal; managers likewise appointed; and possibly those people that a court or tribunal so authorises.'

ii. A parent or guardian of the deceased (but if a parent or guardian does have a good reason then they can use one of the other clauses of the legislation to apply for production of the will).

2.1.27 Mr Rymill favoured a provision requiring limited confidentiality as to the contents of a will – perhaps to be enforced by a sanction

Part 3 - SALRI Reasoning and Recommendations

3.1.1 SALRI accepts that there are situations where it would be helpful to allow inspection of a will before a testator's death[56] but this undermines legitimate consideration of privacy and confidentiality (a view also emphasised by the Hon Tom Gray QC). SALRI does not support a legislative provision to allow inspection of a will prior to death beyond any limited situations contemplated under current law and practice. In contrast, SALRI supports allowing inspection of a will after a testator's death to parties with a proper interest or potential interest in the estate.

3.1.2 SALRI considers that there are four benefits to a legislative provision for the inspection of wills after a testator has died.

3.1.3 First, it would encourage openness and transparency in the administration of estates. In the absence of a clear obligation to provide access to a will, those in control of the will may be reluctant to show it to anyone or allow inspection. This may be because they view a will as a private item or desire to keep it secret. Refusing to allow access may lead to suspicion and mistrust. In contrast, allowing those with a proper and legitimate interest (not a mere 'busy body' as Mr Rymill notes) in the estate to see a will may help defuse distrust and prevent unnecessary litigation.[57] Given the tensions and stresses all too often evident in the aftermath of a testator's death, anything which serves to alleviate tension and distrust is welcome.

3.1.4 Secondly, it would assist in the orderly administration of estates. As Master Sanderson observed, the administration of estates would run more smoothly if access to a will was provided as a rule rather than as an exception to some assumed rule.[58]

3.1.5 Thirdly, to allow access to a will promotes fairness. It enables creditors to find out about the assets of the deceased. Those eligible to make a claim under the *IFPA* will have more time to consider whether to make a claim because they can determine earlier if any claim under the *IFPA* is likely to be successful. A person only has six months in South Australia to make a claim under the *IFPA* after probate is granted.[59] Access to the will may address the unfairness experienced by possible beneficiaries and other claimants (including under the *IFPA*) where an estate is informally administered without a grant of probate[60] (this is a regular event, notably in smaller estates).[61]

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[56] Mr Rymill supported limited access to the will of a living party by a manager of a protected estate who may well have good reason to see what is in the will; the holder of an enduring power of attorney and a court should be allowed to order production of a will (as a provision to cover the unexpected).

[57] National Committee, above n 39, 369.

[58] *Chapman v Garrigan* [2017] WASC 336 (21 November 2017) [13].

[59] SALRI, *Family Provision Report*, above n 5, 84-88 [6.1.1]–[6.5.2].

[60] See Queensland, *Parliamentary Debates*, Legislative Assembly, 23 August 2005, 2586–2589 (Linda Lavarch, Attorney-General); New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 September 2006, 1861 (Bob Debus, Attorney-General).

[61] SALRI notes the helpful comments of Mr Rymill:

3.1.6 Finally, to allow access promotes clarity and certainty. SALRI has been told by succession lawyers that they often hold wills on behalf of their clients and may have no instructions from the testator but they often receive requests after the testator's death for access to the will. The firm may be placed in a difficult position in deciding who should or should not have access. Tasmanian practitioners welcomed the Tasmanian section based on the draft Wills Bill 1997 setting out access to a will and remarked that the provision simply gave effect to what already happened in practice.[62]

3.1.7 SALRI considers that its proposal does not undermine considerations of privacy or confidentiality. A will is always publicly available once it has been admitted to probate. The proposed provision is simply designed to ensure the same result prior to a will's admission to probate, or in the event that no application is made for probate.[63]

3.1.8 SALRI considers that there is benefit in a legislative provision to provide for access to wills prior to probate. It draws on what was identified by Master Sanderson as sound practice and common sense.[64]

3.1.9 SALRI's starting point is conformity to national uniformity and consistency. SALRI will only depart from this aim, if it is justified to do so, for the benefit of South Australians. Based on its consultation and the benefits of a legislative provision governing inspection of wills and the fact that such laws (based on the draft Wills Bill 1997) exist in the ACT, Northern Territory, New South Wales, Tasmania and Queensland, SALRI sees the value of nationally consistent (though not necessarily uniform) laws in inspecting a will.

3.1.10 SALRI accepts that only parties with a proper interest or potential interest in the estate should be entitled to a copy of the will prior to probate. 'A party who does not have and could not conceivably have any interest in the estate should not have access to the will.'[65] SALRI considers that a legislative provision allowing inspection should cover two situations. First, certain classes of relatives with an automatic entitlement to inspection of a will and, subject to the payment of any necessary cost, to be provided with a copy of the will upon request. Secondly a residual category of persons with a proper interest who do not possess an automatic entitlement to inspection of the will but who have an ability to apply to a court for an order to allow inspection and the taking of any copy of the will.

3.1.11 SALRI considers that the first category of automatic entitlement should include the following categories:

a) Any person named or referred to in the will, whether as a beneficiary or not; any person named or referred to in an earlier will as a beneficiary of the deceased person.

'It could well be possible for a fleet-footed executor to wind-up the estate and distribute all of it without other people knowing about it. (Of course, this might cause some trouble for an executor who is meant to pay liabilities and fail to do so). One of the major problems is that a sizeable amount of money can often be dealt with on an informal basis – that is, without the need to obtain probate. So the assets might be called in, and distributed, and the executor completed their duty before anyone knows what has happened.'

[62] Tasmania, *Parliamentary Debates*, Legislative Council, 19 November 2008, 6.05 pm (Mr Wilkinson).

[63] See National Committee, above n 6, [9.5].

[64] *Chapman v Garrigan* [2017] WASC 336 (21 November 2017) [13].

[65] Ibid.

b) The surviving spouse, domestic partner[66] (whether of the same sex or not) or child or stepchild of the deceased person.

c) A parent or guardian of the deceased person.

d) Any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate.[67]

e) Any parent or guardian of a minor referred to in a will or who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate.[68]

f) Any person committed with the management of the deceased person's estate under the *Guardian and Administration Act 1993* (SA), immediately before the death of the deceased person.

3.1.12 SALRI notes that an attorney under an enduring power of attorney made by a deceased person is included in the NSW section. However, an enduring power of attorney lapses upon the testator's death and it is unnecessary, as Mr Evans and others pointed out in consultation, for such a person to be entitled to inspect the will. SALRI does not support the inclusion of this class in the automatic entitlement to inspect a will.

3.1.13 SALRI does not support the automatic entitlement of any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person. SALRI agrees with the view expressed in consultation that this is too wide. The notion of any creditor having an automatic entitlement to inspect a will is intrusive and undermines the privacy and confidentiality of a testator's will. An automatic entitlement of any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person to inspect a will would also imposes unrealistic expectations and obligations upon an executor.

3.1.14 SALRI accepts that circumstances may arise where it is appropriate for a party (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person to be able to inspect a will. Rather than an automatic entitlement, SALRI agrees with the view of Mr Evans and the Hon Tom Gray QC that a party (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person should be able to inspect a will but only by order of a court. Such an order should only be granted where the applicant has some proper interest and can establish why inspection is necessary.

3.1.15 SALRI notes that the NSW section also includes any person belonging to a class of persons prescribed by the regulations. This is presumably to provide flexibility to changing social values and developments to allow other genuine classes to be brought within the NSW section without the delay of Parliamentary intervention. SALRI has no strong view on the inclusion of such a category but it is difficult to conceive of additional categories of persons beyond those recommended who should have an automatic entitlement to inspect a will.

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[66] *Family Relationships Act 1975* (SA) s 11A. This now includes a 'registered partner' as the definition of 'domestic partner' in s 11A as well as other relevant South Australian and Commonwealth legislation has been amended to include a person who is in a registered relationship with the other person under the *Relationships Register Act 2016* (SA), or a corresponding law registered relationship under the *Relationships Register Regulations 2017*.

[67] This is not a simple question and it may be necessary for any executor to seek specialist legal advice about such a situation.

[68] See above n 67.

3.1.16 Recommendations:

Recommendation 1

SALRI recommends that no change to the present law is necessary to allow inspection of a will prior to a testator's death as SALRI does not support a legislative provision to allow inspection of a will prior to a testator's death beyond any limited situations contemplated under current law and practice.

Recommendation 2

SALRI recommends that legislative provision be made in South Australia for an entitlement to inspect a will after a testator's death based on the draft Wills Bill 1997 and s 54 of the *Succession Act 2006* (NSW) and such a provision should extend to the following categories:

1. Any person named or referred to in the will, whether as a beneficiary or not; any person named or referred to in an earlier will as a beneficiary of the deceased person.
2. The surviving spouse, domestic partner (whether of the same sex or not) or child or stepchild of the deceased person.
3. A parent or guardian of the deceased person.
4. Any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate.
5. Any parent or guardian of a minor referred to in a will or who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate.
6. Any person committed with the management of the deceased person's estate under the *Guardian and Administration Act 1993* (SA), immediately before the death of the deceased person.

Recommendation 3

SALRI recommends that legislative provision should be made for a party (including a creditor) who has or may have a claim at law or in equity against the estate of a deceased person to be able to inspect a will but only by order of a court and such an order should only be granted where the applicant has some proper interest and can establish why inspection of the will is appropriate.

3.1.17 The Law Society suggested that, after any amendments in due course to the *IFPA* (also noting SALRI's previous Report into Intestacy[69] and the role and operation of the *IFPA*[70]), consolidation of South Australian succession law legislation into one new *Succession Act* be

[69] SALRI, *Intestacy Final Report*, above n 1, 65 [7.14].
[70] SALRI, *Family Provision Report*, above n 5, 130 [10.4.1]–[10.4.3].

considered. This has already been done in Queensland, New South Wales and Victoria (along with updating or discarding any outdated or antiquated provisions). This is a sensible suggestion. It would assist both the community and practitioners and support the goal of the law being as understandable and accessible as possible.[71] Succession lawyers have consistently supported this goal.[72] SALRI considers that an area of law as important as succession should be as clear, comprehensible and accessible as possible.

3.1.18 A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context: 'The right of citizens… to have the most modern, well-informed, efficient system of law that the state can reasonably provide.'[73]

3.1.19 Recommendation:

Recommendation 4

SALRI recommends that consolidation of South Australian succession law legislation into one new *Succession Act* for ease of reference be progressed, either after, or at the same time as, any amendments to the *Inheritance (Family Provision) Act 1972* (noting SALRI's previous Report into Intestacy).[74]

[71] Ibid 81 [5.5.2], 130 [10.4.1]–[10.4.3].
[72] The erudite Ken Mackie of the University of Tasmania also notes that it would make the life of interstate researchers a lot easier as well.
[73] Hon Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform', Speech at the 'Conference on Law Reform on Hong Kong: Does it Need Reform?', University of Hong Kong, Department of Law, 17 September 2011, http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform.
[74] SALRI, *Intestacy Final Report*, above n 1, 65 [7.14].

APPENDIX A – PROVISION IN DRAFT WILLS BILL 1997

WILLS BILL 1997 - CLAUSE 52

52 Persons entitled to see will

(1) Any person having the possession or control of a will including a revoked will, or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all of the following persons to inspect and, at their own expense, take copies of it:

(a) any person named or referred to in it, whether as beneficiary or not,

(b) the surviving spouse, any parent or guardian and any issue of the testator,

(c) any person who would be entitled to a share of the estate of the testator if the testator had died intestate,

(d) any creditor or other person having any claim at law or in equity against the estate of the deceased,

(e) any beneficiaries of prior wills of the deceased,

(f) a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.

(2) Any person having the possession or control of a will, including a revoked will, or a copy of any such will and any part of such a will (including a purported will), of a deceased person must produce it in Court if required to do so.

APPENDIX B – NEW SOUTH WALES PROVISION

SUCCESSION ACT 2006 - SECT 54

54 Persons entitled to inspect will of deceased person

(1) In this section:
"will" includes a revoked will, a document purporting to be a will, a part of a will and a copy of a will.

(2) A person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense):

(a) any person named or referred to in the will, whether as a beneficiary or not,

(b) any person named or referred to in an earlier will as a beneficiary of the deceased person,

(c) the surviving spouse, de facto partner (whether of the same or the opposite sex) or issue of the deceased person,

(d) a parent or guardian of the deceased person,

(e) any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate,

(f) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate,

(g) any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person,

(h) any person committed with the management of the deceased person's estate under the *NSW Trustee and Guardian Act 2009* immediately before the death of the deceased person,

(i) any attorney under an enduring power of attorney made by the deceased person,

(j) any person belonging to a class of persons prescribed by the regulations.

Note : "De facto partner" is defined in section 21C of the *Interpretation Act 1987* .

(3) A person who has possession or control of a will of a deceased person must produce it in a court if the court requires the person to do so.

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