

## Wills: Substantial Compliance

### Terms of Reference

In 1979 the Commission was asked to examine and report upon two matters with respect to the law of wills:

- (a) whether or not it would be desirable to adopt some modification of the requirement of strict compliance with the formalities of the *Wills Act 1970* (WA) by the adoption of the doctrine of substantial compliance; and
- (b) the effect of marriage or divorce on a will including, in particular, the wills of people who subsequently lose the mental capacity to make a new will.

The Commission divided the reference into two parts: Part I dealing with the question whether the doctrine of substantial compliance should be adopted, and Part II dealing with the effect of marriage and divorce on wills.

### Background of Reference

At the time of the reference the *Wills Act 1970* (WA) ("the Act") provided that a will was not valid unless certain formalities were met.<sup>1</sup> Although the requirements were not unduly onerous, a testator could fail to comply due to oversight or misreading the technical requirements. Judges had expressed regret that on such occasions they were forced to make the entire will invalid. Various academic commentators and law reform agencies had urged that the courts be given power to validate wills that had substantially complied with the formalities if they could be certain that the document represented the intention of the testator.

The Commission issued a discussion paper on the subject in November 1984, which outlined the arguments for and against change and analysed the provisions in other Australian jurisdictions and overseas.<sup>2</sup> The paper concluded that the functions the formalities served were important and that nothing should be done which would unduly weaken them, however case law served to suggest that some discussion of the issue was needed. No final view was formed on whether there should be a judicial discretion to dispense with the formalities in certain circumstances, and if so what form it should take or what standard of proof should be required. As such, the Commission welcomed views and specifically called for examples of cases where a testamentary document was held to be invalid due to failure to comply with the formalities.

### Nature and Extent of Consultation

As an area of potentially wide public concern, the paper was circulated widely both in Western Australia and elsewhere. To broaden the scope of consultation an advertisement was placed in *The West Australian* newspaper. The paper was also discussed in an article in *Brief* the journal of the Law Society of Western Australia. Consequently, the Commission received a large number of oral and written submissions from a variety of sources including; academics from Universities within Australia and overseas, judicial officers, government departments and legal practitioners.

The Commission submitted its final report in November 1985.<sup>3</sup>

<sup>1</sup> See Law Reform Commission of Western Australia, *Wills: Substantial Compliance*, Project No 76(I) (1985) para 2.7 for the precise requirements.

<sup>2</sup> Specifically, Canada, Manitoba and British Columbia.

<sup>3</sup> Above n 1.

### Recommendations

The Commission recommended that the Act be amended to allow for substantial compliance by adopting a provision similar to that which existed in South Australia.<sup>4</sup> Such a provision would give the Supreme Court the power to dispense with the formalities of the Act if satisfied that the testator intended the document to constitute their will. The high standard of proof recommended was suggested as a safeguard against fraudulent claims. It was also intended that adoption of the South Australian provision would enable lawyers and others to rely on South Australian case law.

The Commission further recommended that the proposed provision should also apply to alterations to a will, revocation of a will by a later will or by a written instrument, and revival by re-execution of a revoked will. It was finally recommended that the provisions should take effect only in relation to the estates of people dying after the provisions came into effect.

A comprehensive summary of all the recommendations may be found in chapter seven of the Commission's final report.

### Legislative or Other Action Undertaken

The *Wills Amendment Act 1987 (WA)* and the *Wills Amendment Act 1989 (WA)* implemented the Commission's recommendations.

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<sup>4</sup> *Wills Act 1936 (SA)* s 12(2).