



**Law
Commission**
Reforming the law

Making a will

Supplementary consultation paper

Law Commission

Consultation Paper No 260

Making a Will: A Supplementary Consultation Paper

5 October 2023



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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines KC. The Chief Executives are Joanna Otterburn and Stephanie Hack.

Topic of this consultation: We are consulting on two specific issues in wills law – electronic wills and the rule that a subsequent marriage or civil partnership revokes a will.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 5 October 2023 to 8 December 2023.

Responses to the consultation may be submitted using an online form at: <https://consult.justice.gov.uk/law-commission/wills/>. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

By email to wills@lawcommission.gov.uk

OR

By post to Wills Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The supplementary consultation paper is available on our website at <https://www.lawcom.gov.uk/project/wills/>.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email wills@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

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Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your family, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

Any queries about the contents of this Privacy Notice can be directed to:

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Contents

Glossary	v
CHAPTER 1: INTRODUCTION	1
Introduction	1
Our project	2
History	2
Scope	2
The reasons for a supplementary consultation	3
Thanks and acknowledgements	4
CHAPTER 2: ELECTRONIC WILLS	5
Introduction	5
About electronic wills and electronic execution	8
The law at the time of the Consultation Paper	10
Our provisional proposals and questions	12
Consultation responses	14
An enabling power	15
Clarification about compliance with the existing formalities	16
The demand for electronic wills	17
Security and infrastructure requirements	18
A single will	18
Video wills	19
Developments since the Consultation Paper	20
Technology	20
The law	21
Evidence of changing views	23
The comparative context	24
Re-considering the issue	28
Discussion	29
Consultation questions	47
CHAPTER 3: REVOCATION BY MARRIAGE OR CIVIL PARTNERSHIP	49
Introduction	49
The law	49
The consultation	50
Consultation responses	52
Retention of the general rule	52
Widening the exception to the rule: a future marriage	53

A new exception: where the person lacks testamentary capacity	53
Developments since the Consultation Paper	54
Re-considering the issue	56
Discussion	57
Consultation questions	60
CHAPTER 4: IMPACT OF THE POSSIBLE REFORMS	63
CHAPTER 5: CONSULTATION QUESTIONS	65

GLOSSARY

In this Glossary, references to other words and terms contained in the Glossary are in bold.

“Beneficiary”: a person who receives money or property under a **disposition** in a will.

“Capacity”: the legal ability or authority to do something. It often refers to mental capacity, meaning the cognitive ability required by the law to be able to make a decision or take an action. See **testamentary capacity**.

“Codicil”: a subsequent addition or amendment to a will.

“Consultation Paper”: Making a Will (2017) Law Commission Consultation Paper No 231.

“Court of Protection”: the court which makes decisions in relation to issues concerning the health, welfare and financial affairs of a person who lacks the **capacity** to make such decisions for themselves.

“Dispensing power”: a provision which would enable a court to recognise a will as valid even though the **formality requirements** had not been complied with.

“Disposition”: the making of a gift in a will or the transfer of property to another party during life.

“Donee”: a person appointed under a **Lasting Power of Attorney** under the Mental Capacity Act 2005 to make decisions on behalf of another person (the donor). In the Consultation Paper, we instead used the term “attorney”.

“Donor”: a person appointing someone (a **donee**) under a **Lasting Power of Attorney** under the Mental Capacity Act 2005 to make decisions on their behalf.

“Electronic will”: an **electronically executed will** or a **fully electronic will**.

“Electronic witnessing”: where a witness participates remotely in the **execution** of a will, via electronic means such as videoconferencing.

“Electronically executed will”: a will **executed** (or the **formalities** completed) using electronic means.

“Estate”: a person’s property, money and possessions.

“Execution”: the final step in making a will (or other legal document), which must be done in compliance with the **formality requirements** set out in the law for the will (or other document) to be formally valid.

“Executor”: a person appointed by a **testator** in their will to administer a person’s **estate** following their death.

“Family provision”: the statutory scheme under the Inheritance (Provision for Family and Dependents) Act 1975 which gives the courts the jurisdiction to make provision from the deceased’s **estate** for certain categories of claimant, where the deceased ought to have made reasonable financial provision for that person.

“Formalities” or “formality requirements”: the formal requirements for a valid will set out in section 9 of the Wills Act 1837, including that the will must be in writing, signed by the testator, and witnessed.

“Fully electronic will”: an **electronically executed will** which is then stored and admitted to **probate** solely as an electronic document.

“Intestacy”: where a person dies without having made a valid will. The deceased is said to have died “intestate”.

“Lasting Powers of Attorney” or “LPA”: a legal document under which a person (a **donee**) can be appointed to make decisions on behalf of a person who lacks the mental **capacity** necessary to make their own decisions regarding their personal welfare or property and affairs.

“Office of the Public Guardian”: the body which carries out functions under the Mental Capacity Act 2005, including in registering **Lasting Powers of Attorney**.

“Power of appointment”: a common provision in a will, whereby the **testator** gives someone the power to appoint a person or persons to receive or take an interest in the testator’s property.

“Predatory marriage”: where a person marries someone, often someone who is elderly or who lacks the mental **capacity** to marry, as a form of financial abuse.

“Probate”: the legal process under which a will is proved as a valid will.

“Propound”: to advance a will as authentic. The propounder of a will claims that a particular document is the **testator**’s final will and that the provisions of that document should govern the distribution of the testator’s **estate**.

“Rectification”: the process of correcting a legal document, most commonly because of a typographical error.

“Revocation”: the formal act of withdrawing a valid will. A will is, by its very nature, revocable by the **testator** until their death.

“Statutory will”: a will made by the **Court of Protection** on behalf of a person who lacks **capacity**.

“Supplementary Consultation Paper”: this publication, Making a Will: A Supplementary Consultation Paper (2023) Law Commission Consultation Paper No 260.

“Testamentary capacity”: where a person has **capacity** to make a will.

“Testator”: a person who has made a will. We use the term “testator” to refer to both male and female testators, though traditionally (and in legal documents) a female testator is referred to as a “testatrix”.

“Will writer”: professionals involved in the drafting of wills, acting otherwise than as solicitors or legal executives.

Chapter 1: Introduction

INTRODUCTION

- 1.1 We are publishing this Supplementary Consultation Paper to re-consider, and to seek consultees' views on, two specific issues: electronic wills and the rule that a marriage or civil partnership revokes a will.
- 1.2 Both topics were covered in our 2017 Consultation Paper, *Making a Will*.¹ However, we are not consulting on every issue that we consulted on in 2017. Our 2017 Consultation Paper considered the full scope of the project. While six years have passed since our consultation, we do not think that re-consulting on every topic at issue in our project is necessary. As a result of the age of the law, the issues troubling wills law are longstanding ones. Other than in relation to electronic wills and the rule that marriage or civil partnership revokes a will, we do not think the passage of time since our consultation – even the experience of the COVID-19 pandemic – has resulted in significant change, either in the issues in the law that we identified in our Consultation Paper or to consultees' views on our provisional proposals for reform. Therefore, we are not asking whether consultees' views have changed on most of the topics our review is considering.
- 1.3 However, developments in relation to electronic wills and the effects of the rule that a will is revoked by a subsequent marriage or civil partnership since the time of the Consultation Paper have caused us to re-examine these issues. We suspect that consultees' views on these issues may also have shifted. Accordingly, this Supplementary Consultation Paper focuses on those two specific issues only.
- 1.4 In relation to both electronic wills and revocation of wills by marriage or civil partnership, we outline the developments since the 2017 Consultation Paper, responses to our consultation, and our current thinking. We ask consultation questions on each topic. However, consultees should not draw conclusions from the provisional views we express and the questions we ask in this Supplementary Consultation Paper about the Commission's final policy: our recommendations for reform will be based on responses to the Consultation Paper and the Supplementary Consultation Paper, together with all the other available evidence.
- 1.5 We hope to learn during this supplementary consultation if consultees' views have changed, or if they have further information to share with us in relation to the topics covered by it. We therefore ask that consultees please respond to the questions in this Supplementary Consultation Paper, even where they have already outlined their views to us in 2017 and their views have not changed.
- 1.6 You can respond to this Supplementary Consultation Paper online at <https://www.lawcom.gov.uk/project/wills/> until 8 December 2023.

¹ (2017) Law Commission Consultation Paper No 231 (hereinafter, the "Consultation Paper").

OUR PROJECT

History

- 1.7 The wills project stems from our 12th Programme of Law Reform. In early 2016, we began the project. In July 2017, we published the Consultation Paper, after which followed a four-month consultation period. When the consultation period closed in November 2017, we began analysing consultees' responses and formulating our final policy, to prepare for drafting our final Report and the accompanying Bill which will enact our recommendations.
- 1.8 In 2019 we paused this project to undertake another piece of work, a project on the law governing weddings, having agreed to Government's request to prioritise work on weddings. The weddings project itself was delayed by the COVID-19 pandemic, which emerged at the time that we were preparing to consult. In the end, we published our final Report on weddings law in July 2022.²
- 1.9 We re-commenced the wills project shortly afterwards, in the autumn of 2022. Since then, we have continued analysing responses from our consultation and formulating our final policy. At the end of the project, we will publish a final Report, with our recommendations to reform the law governing wills, to Government. At the same time, we will publish a Bill enacting our recommendations and an impact assessment considering the potential impact of our recommendations.

Scope

- 1.10 The law governing wills is largely a product of the Victorian era. It is governed by both legislation – primarily, the Wills Act 1837 – and case law, some of which has been developing for hundreds of years.³ The Wills Act 1837 has been amended, and judge-made case law has developed, in response to modern circumstances and understandings. Nevertheless, we think the law of wills is in need of a comprehensive review, to ensure that the law governing this important topic remains fit for purpose today. That is what this project seeks to do.
- 1.11 Accordingly, this project is a general review of the law governing wills. However, we are not considering every possible topic that falls within wills law as part of our work. Instead, the project is focused on the areas that stakeholders in the 12th programme of law reform,⁴ and in the course of this project, have told us are in need of reform. We are considering the following issues.

- (1) The formal and substantial validity of a will, including:
 - (a) testamentary capacity;

² Celebrating Marriage: A New Weddings Law (2022) Law Com No 408.

³ For example, the test for capacity was first outlined in *Banks v Goodfellow* (1869-70) LR 5 QB 549.

⁴ For detail about this history of the project, see Consultation Paper, paras 1.4 to 1.6.

- (b) the formalities for a valid will (currently governed by section 9 of the Wills Act 1837), including an examination of the issue of a will being made electronically or otherwise than in writing;
 - (c) the interpretation and rectification of a will;
 - (d) the possibility of a power to dispense with the formalities otherwise necessary for a will to be valid;
 - (e) the age at which a will can validly be made; and
 - (f) knowledge and approval and undue influence in the testamentary context.
- (2) Statutory wills.
 - (3) Mutual wills.
 - (4) Ademption of testamentary gifts and revocation of wills.
 - (5) The registration of wills.
 - (6) Donationes mortis causa.
 - (7) The comparative and international context of the law of wills.
 - (8) Other areas of the law of wills as set out in the Wills Act 1837.

1.12 In this project, we are also exploring the need for possible future work on the management of digital information and assets, such as social media accounts, after a person's death.

THE REASONS FOR A SUPPLEMENTARY CONSULTATION

1.13 The delay to the wills project has afforded us an opportunity to reflect on the law governing wills in the light of the passage of time generally, and the COVID-19 pandemic in particular.

1.14 The pandemic highlighted the importance of wills. Facing a new, frightening virus spreading across the globe, many people may reasonably have wanted to ensure that they had a valid will in place. However, the need to comply with lockdown restrictions and social-isolation requirements placed barriers in the way of complying with the legal formalities to execute a will for many people. To ensure that people could make valid wills, Government amended the Wills Act 1837 to allow witnessing to take place remotely, over videoconference.⁵

1.15 The possibility of remote witnessing is a significant development in the use of technology in will-making. So too are the developments in other jurisdictions, which permanently amended their laws to recognise electronic wills as formally valid. Although we considered the possibility of electronic wills in the Consultation Paper, we

⁵ See para 2.85 below.

think these developments are significant, and merit us reconsidering the issue of electronic wills, and re-engaging with consultees to see if their views have changed. We consider electronic wills in Chapter 2 of this Supplementary Consultation Paper.

- 1.16 There has been another significant development in relation to wills law in the past six years, unrelated to the COVID-19 pandemic: predatory marriage. A predatory marriage is where a person marries someone, often someone who is elderly or who lacks the mental capacity to marry, as a form of financial abuse. Although in the Consultation Paper we had considered the need for protection of vulnerable testators in relation to the rule that a marriage or civil partnership revokes a will, our understanding of the risk and incidence of predatory marriage was limited. However, in the past few years, and in particular throughout our project on weddings law, concerns about predatory marriages have grown. In the light of increasing concerns about predatory marriage, we wish to revisit the question of whether marriage or civil partnership should revoke a will with consultees. We consider this question in Chapter 3 of this Supplementary Consultation Paper.
- 1.17 We are unaware of other developments in the past six years which would alter our or consultees' views on the other issues considered in this review. The Supplementary Consultation Paper is therefore limited to these two topics (electronic wills and revocation of a will by marriage or civil partnership) and does not re-examine any of the other issues we considered in the Consultation Paper.
- 1.18 This Supplementary Consultation Paper also provides an opportunity for us to ask consultees about the potential impact of our proposed reforms and the issues on which we consulted on in 2017 and are consulting on now. These questions are outlined in Chapter 4.

THANKS AND ACKNOWLEDGEMENTS

- 1.19 We are grateful to everyone who responded to our Consultation Paper in 2017.
- 1.20 We have met with individuals and organisations while we have been preparing this Supplementary Consultation Paper, and are grateful to them for sharing their time and expertise with us. In particular, we would like to thank Fabian Hamilton MP, the Institute of Legacy Management, Predatory Marriage UK, the Law Society Wills and Equity Committee, Stephen Lawson, and STEP (the Society of Trust and Estate Practitioners).
- 1.21 We are also thankful to officials from the Ministry of Justice, who we have met throughout our work on this project.
- 1.22 The Commissioners would like to record their thanks to the following members of staff who worked on this Supplementary Consultation Paper: Elizabeth Welch (team lawyer), Colin Oakley (team lawyer), Spencer Clarke (team lawyer), Esme Cairns (research assistant), Lauren Harris (research assistant), and Matthew Jolley (head of legal services and team head).

Chapter 2: Electronic wills

INTRODUCTION

- 2.1 The Wills Act 1837 outlines the formalities necessary to create a valid will.¹ These long-standing requirements apply most straightforwardly to paper documents, the only type of documents in mind at the time the Act came into force. It is not clear whether an electronic document could comply with these requirements. We therefore considered in the Consultation Paper whether the law could – and should – allow for electronic wills.
- 2.2 At the time of the Consultation Paper in 2017, the case for allowing wills to be made in electronic form was relatively novel. There had been little discussion about the possibility of electronic wills in England and Wales.² Looking overseas, when electronic wills had been accepted as valid they were accepted under dispensing powers,³ provisions which enable a court to recognise a will as valid even though the formality requirements had not been complied with.⁴ One jurisdiction (Nevada, USA) had enacted legislation to recognise electronic wills, but there was no evidence available to us of its provisions having been successfully used.⁵
- 2.3 The idea of electronic wills is no longer so novel. The last six years have seen increasing recognition of the use of digital documents and signatures for contracts. We have also witnessed huge developments in technology. Artificial intelligence, cryptocurrencies and distributed ledger (commonly known as blockchain) technologies all feature regularly in the news⁶ and the Commission's own work has helped to facilitate the role of technology in business transactions⁷ and transport.⁸ International standards in digital technology have continued to develop and are continuing to do

¹ Wills Act 1837, s 9.

² Other than in Electronic Commerce: Formal Requirement in Commercial Transactions (2001) Advice from the Law Commission, para 3.45.

³ Consultation Paper, para 6.111. See eg *Taylor v Holt* (2003) 134 SW 3d 830 (Tennessee Court of Appeal); *Rioux v Coulombe* (1996) 19 ETR (2d) 201 (Québec Superior Court); and *In the Estate of Wilden (Deceased)* [2015] SASC 9 (Supreme Court of South Australia).

⁴ We discuss dispensing powers in detail in the Consultation Paper, para 5.81 and following.

⁵ Consultation Paper, para 6.36.

⁶ See eg HM Treasury, *Press release: UK sets out plans to regulate crypto and protect consumers* (February 2023), <https://www.gov.uk/government/news/uk-sets-out-plans-to-regulate-crypto-and-protect-consumers> (last visited 30 August 2023); HM Government, *National AI Strategy* (September 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020402/National_AI_Strategy_-_PDF_version.pdf (last visited 30 August 2023).

⁷ Electronic Execution of Documents (2019) Law Com No 386; Electronic Trade Documents: Report and Bill (2022) Law Com No 405.

⁸ Automated Vehicles: Joint Report (2022) Law Com No 404, Scot Law Com No 258; and Remote Driving: Advice to Government (2023) Law Commission.

so.⁹ And there has been an increased adoption of technology in everyday life by members of the public. For example, when the Consultation Paper was published in July 2017, around 16% of retail sales were conducted on the internet; in June 2023 that had increased to nearly 25%.¹⁰

- 2.4 The last six years have also seen the COVID-19 pandemic. Technology played a role in facilitating will-making during this time. To enable testators to make valid wills while emergency restrictions and social-distancing measures were in place, Government made an amendment to the Wills Act 1837 to allow witnessing to take place electronically, with the witnesses attending remotely. Several international jurisdictions also reformed their laws to allow for electronic witnessing: some temporarily, to enable will-making during the pandemic, and others on a permanent basis. Other jurisdictions have introduced permanent reforms to enable electronic wills.¹¹
- 2.5 In the light of these legal and technological developments, we think that consultees' views on electronic wills might have changed. We are therefore re-visiting the issue in this Supplementary Consultation Paper and seeking fresh responses. Our provisional views have evolved from those we reached in the Consultation Paper.
- 2.6 We continue to think that whether electronic wills are currently capable of meeting the current formality requirements in the Wills Act 1837 is uncertain as it stands.
- 2.7 We consider that position should be clarified: as we provisionally proposed in 2017, we continue to think that the Wills Act should be amended to exclude the possibility of the current formality requirements in section 9 being interpreted to allow electronic wills to be valid. We think this is necessary to exclude the possibility of the most basic, and easily amended, types of electronic documents (including those editable on word-processing software and basic PDF documents) and electronic signatures (including names typed into a document or signatures copied into a document) from satisfying the formality requirements for a valid will. Paper documents are not, of course, immune from risks. A will executed on paper can be forged or can be executed by the testator as a result of undue influence exerted on them. The formality requirements for paper wills provide a level of protection against forgery and other potential forms of abuse. Electronic wills will also not be risk free. But we consider that the level of protection provided by the requirements for an electronic will should be at least the same standard as that provided by a paper will.
- 2.8 The Industry Working Group on the Electronic Execution of Documents suggests that the legal requirements for each unique type of transaction must be considered in its

⁹ See International Organisation for Standardisation and International Electrotechnical Commission, *Information technology – Security techniques – Storage security* (ISO/IEC 27040:2015), <https://www.iso.org/obp/ui/#iso:std:iso-iec:27040:ed-1:v1:en> (last visited 30 August 2023); and International Organisation for Standardisation, *Electronic document management – Design and operation of an information system for the preservation of electronic documents – Specifications* (ISO 14641:2018), <https://www.iso.org/obp/ui/#iso:std:iso:14641:ed-1:v1:en> (last visited 30 August 2023).

¹⁰ Office for National Statistics, *Internet sales as a percentage of total retail sales (ratio) (%)* (July 2023), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi> (last visited 30 August 2023).

¹¹ See para 2.92 and following below.

own context.¹² We think that is true with respect to wills. The wills context raises distinct considerations.

- 2.9 That is because wills are unique. Wills are unilateral documents which can be and are regularly made without the assistance of any professionals, or any third party at all, other than the two witnesses to the testator's signature. There is no counterparty, and no state involvement at the time the will is made. They are not subject to any requirement of registration. They are revocable until the testator's death, and until that time they can be kept entirely private by the testator. A will cannot be proved as valid until after the testator dies. Accordingly, wills are subject to no scrutiny as to whether they have been validly made, and are not acted upon by any other party, in many cases until years or decades after execution. By definition, the assessment of their validity takes place at a time when the testator cannot provide any evidence about how the will was made. Wills therefore operate in a way, and in a context, that is very different to contractual or transactional documents where electronic execution is increasingly commonplace. In such circumstances, problems and concerns may come to light very quickly and the validity of the agreement can be tested with the benefit of evidence from all the parties involved.
- 2.10 As the context of wills is unique, so are the current requirements for them to be accepted as valid. For paper wills, those requirements are set out in section 9 of the Wills Act 1837. As paper wills have their own bespoke requirements to be accepted as valid, we think that bespoke requirements will be key to allowing electronic wills to be valid.¹³ As we explain below, the formality requirements for a will perform particular functions. These functions must be satisfied for electronic wills to be effective. However, we consider that the formality requirements that need to be imposed to ensure that these functions are fulfilled in the electronic context may be different to those required for a paper document: the requirements for electronic wills may include additional formalities (such as registration) or requirements that take advantage of modern technology, for example, distributed ledger technology and digital signatures.
- 2.11 The question is therefore how and when bespoke requirements for electronic wills should be introduced. Should electronic wills be made valid under a new Wills Act, with any detailed requirements (including any technological specifications) set out in separate secondary legislation? Or should a new Wills Act contain an enabling power which can allow electronic wills to be recognised as valid in the future, at a point when the specific requirements have been determined? In other words, should electronic wills be recognised on the face of the Act, or should Government be given power to enable them at some point in the future? We are interested in consultees' views.
- 2.12 However, we do not seek to determine in this Supplementary Consultation Paper the formality requirements that electronic wills must meet when they are introduced. The proposals we made in 2017 in the Consultation Paper and responses to it have not provided us with an evidence base for us to do so. It is also possible that technical expertise may be necessary to address the question of what should be required for an electronic will to be valid. Therefore, our focus is on what the formalities need to

¹² Industry Working Group, *Electronic Execution of Documents Industry Working Group Final Report* (February 2023) pp 43 to 44.

¹³ We reached a similar conclusion in the Consultation Paper, para 6.35.

achieve: while in this Supplementary Consultation Paper we identify some possible additional requirements, we do not seek to determine what the formalities for an electronic will would be.¹⁴

- 2.13 We are eager to hear consultees' views on electronic wills, and in particular what they think is the best way forward.

ABOUT ELECTRONIC WILLS AND ELECTRONIC EXECUTION

- 2.14 In the Consultation Paper, we explained that technology was already widely used in the preparation and drafting of wills. A homemade will might be drafted using a will-making pack containing standardised electronic documents or prepared on the testator's own computer in a word-processing document. A professionally drafted will might be written after the client has given their instructions by email or videoconference. Will-drafting software might also be used: it poses questions, and the answers to them prompt the inclusion of various provisions into a will. In all of these cases, however, the final copy of the will is printed on paper and signed, both by the testator and witnesses, by hand in ink.¹⁵
- 2.15 Our Consultation Paper was instead concerned with the development of technology such that the will would be executed (or the formalities completed) using electronic means (which we called an "electronically executed will"). We also discussed a further step, where the electronically executed will would then be stored and admitted to probate solely as an electronic document (a "fully electronic will").¹⁶ We refer to both electronically executed wills and fully electronic wills as simply "electronic wills" in the Consultation Paper and this chapter.
- 2.16 There are various mediums for electronic documents, and in particular, various ways a document can be electronically executed. In the Consultation Paper we focused on how electronic documents can be signed and we considered four different forms of electronic signatures: typed names and digital images of handwritten signatures; passwords and PINs; biometrics; and digital signatures.¹⁷
- 2.17 Rather than focusing on different signature technologies, most assessments now draw on the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2019 ("UK eIDAS"), to divide electronic signatures into three types or levels.
- (1) Simple electronic signatures include any basic signature in electronic form (such as a typed name on a document), with no requirement for identity verification of the person signing.

¹⁴ While we do not think we can define the formality requirements for electronic wills in this paper because we lack the evidence base to do so, we accept that it is possible that there exists a combination of requirements that could achieve the same standard as the requirements for paper wills.

¹⁵ Consultation Paper, paras 6.4 and 6.5.

¹⁶ Consultation Paper, paras 6.2 and 6.3.

¹⁷ Consultation Paper, para 6.47 and following.

- (2) Advanced electronic signatures are required uniquely to link the signature to the signatory and be capable of verifying the identity of the signatory. They must be created using electronic signature creation data that the signatory can, with a high level of confidence, use under their exclusive control. Moreover, the signature must be linked to the data in such a way that means any subsequent change in the data is detectable.
- (3) Qualified electronic signatures are more secure versions of advanced electronic signatures. They are additionally required to be created by a qualified electronic signature creation device (with requirements for confidentiality, security and reliability) and be based on a qualified certificate for electronic signatures (meaning a certificate by a qualified trust service provider which links the signature to the person).¹⁸

2.18 By describing requirements rather than technologies, these types of electronic signatures are technology neutral. However, we understand that, at present, only digital signatures are capable of fulfilling the requirements for advanced and qualified electronic signatures.¹⁹ Digital signatures rely on asymmetric or public key cryptography, with each user given two keys: a public key, and corresponding private key. The private key, when applied to data, encrypts it, creating a signature which can be verified with the corresponding public key.²⁰ In practice, most advanced electronic signatures rely on public key infrastructure: certificate authorities create a person's public and corresponding private keys, and issue certificates which link an individual to their public key.²¹

2.19 To engage with the possibility of electronic wills and, in particular, electronic execution of wills, in some places we broadly refer to types of technology, most often the technologies that meet the requirements for qualified electronic signatures. We do so given the specific status accorded to qualified electronic signatures under UK eIDAS,²² and to draw on the existing analyses by the Law Commission in the project on the Electronic Execution of Documents²³ and by the Industry Working Group on Electronic Execution of Documents,²⁴ to develop our own analysis specific to the wills context. In this chapter, we outline our understanding of the features of the current technology so that we can consider whether electronically executed wills or fully electronic wills are functionally equivalent to paper wills, based on the current formality

¹⁸ See Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) pp 15 to 17; and Electronic Execution of Documents (2019) Law Com No 386, Appendix 2 paras 2.17 to 2.25.

¹⁹ Electronic Execution of Documents (2019) Law Com No 386, Appendix 2 para 2.21.

²⁰ Electronic Execution of Documents (2019) Law Com No 386, Appendix 2 paras 2.9 to 2.12.

²¹ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 17 and Appendix 7B; Electronic Execution of Documents (2019) Law Com No 386, Appendix 2 paras 2.13 to 2.14.

²² Under art 25(1) and (2).

²³ Electronic Execution of Documents (2019) Law Com No 386.

²⁴ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022); and Industry Working Group, *Electronic Execution of Documents Industry Working Group Final Report* (February 2023).

requirements and their functions, in some cases contemplating what bespoke requirements might be required.

- 2.20 However, technology is constantly changing. Electronic document execution platforms now offer processes that are significantly different to how they were a decade ago and, in ten years' time, are likely to look very different again. Whereas electronic execution used to rely on typed text or scanned signature images, technology now allows, for example, the use of biometric validation data, multi-factor authentication, real-time video signing and witnessing, and execution processes certified by third-party trust providers.
- 2.21 We therefore think it would be a mistake to be overly fixated on particular technological features in this Supplementary Consultation Paper. The march of technology will inevitably continue and focusing on technology that is current now, but that we could not predict in the Consultation Paper in 2017, risks the discussion becoming outdated extremely quickly. So in this Supplementary Consultation Paper we concentrate for the most part on policy arguments.
- 2.22 If, in future, provision for electronic wills is introduced, we consider that it should be technology neutral. By this we mean it should concentrate on the formality requirements an electronic will would have to meet in order to be legally valid, rather than detailing a particular type of technology that must be employed to meet those requirements. This approach would ensure that the provisions do not become obsolete and do not stifle further innovation.
- 2.23 In any case, we think technology itself is only one factor that is relevant to the question of whether provision for electronic wills should be introduced. It is possible that technology-based requirements (around, for example, the standard of electronic signature that was acceptable) could be imposed. Alternatively, other requirements (such as witnessing or registration) could be imposed, without any specific requirements related to the technology used to meet those requirements. Or a combination of both technology and other requirements could be imposed. We think a holistic assessment will be needed, based on the functions of the current formality requirements, to reach a conclusion about the combination of requirements necessary to introduce electronic wills. For example, contrary to the view we took in the Consultation Paper,²⁵ technology-based requirements for electronic wills may mean that the functions of formality requirements can be met without a separate need for witnessing, at least in a form that replicates the current witnessing requirements of a paper document.

THE LAW AT THE TIME OF THE CONSULTATION PAPER

- 2.24 We explained in the Consultation Paper that electronic wills might offer advantages over paper wills. Aside from the increasing expectation that we should be able to manage our lives digitally, technology has the potential to make it quicker and easier to make a will or to amend an existing will. If making a will is more convenient, more people might have a will, promoting testamentary freedom. Electronic wills could also offer advantages in relation to security, and, in a fully electronic probate system,

²⁵ See further para 2.38 below.

potentially allow a will to be stored and then admitted to probate automatically on the testator's death.²⁶

- 2.25 But as we explained in the Consultation Paper, the position of electronic wills under the current law is unclear. An electronic will had (and has) never been recognised as valid in England and Wales. Our view was that the formality requirements in section 9 of the Wills Act 1837 most likely precluded the electronic execution of wills.
- 2.26 To be valid, a will must be in writing and be signed by the testator²⁷ in the presence of two witnesses, who each must also sign²⁸ in the presence of the testator.²⁹
- 2.27 We explained our view that an electronic will would most likely satisfy the requirement of writing: the Wills Act 1837 imposes no restriction on the material to be used and the Interpretation Act 1978 defines "writing" broadly.³⁰ Courts have accepted emails as satisfying legislative requirements for a document to be in writing, usually in the context of contracts.³¹
- 2.28 However, we thought it was unclear whether an electronic signature could satisfy the requirements for the testator and witnesses to sign the will.
- 2.29 In the Consultation Paper, we explained that although typed signatures have been accepted as fulfilling the requirement for a signature in some contexts,³² we thought it was arguable that the requirement for signatures in the Wills Act 1837 had been held to be more stringent. We explained that in *Lim v Thompson*³³ a photocopy of the testator's signature was determined to be insufficient. Judge Purle QC considered that one of the primary purposes of the Wills Act 1837 is to prevent fraud; given that the testator is not alive to testify, the judge said that "it is very important that what must survive is an original signature ... so that the court can examine it and properly evaluate the evidence as to due execution".³⁴ Although the issue was not conclusively resolved, our view in 2017 was that this case suggested a reluctance by the courts to accept anything other than an original handwritten signature as able to fulfil the requirements in section 9 of the Wills Act 1837.³⁵

²⁶ Consultation Paper, paras 6.9 to 6.14.

²⁷ Or the testator must acknowledge their signature in the presence of the two witnesses. It must also appear that the testator intended by their signature to give effect to the will.

²⁸ And attest, or acknowledge their signature.

²⁹ At the time of the Consultation Paper, this required physical presence; as we explain at para 2.85 below, this rule was modified temporarily in 2020 to allow for electronic witnessing.

³⁰ Interpretation Act 1978, sch 1.

³¹ Consultation Paper, para 6.19.

³² Eg in *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), 1 WLR 1543, where the Court held that a typed name satisfied the requirement in the Statute of Frauds 1677 that a guarantee be signed.

³³ [2009] EWHC 3341 (Ch), [2010] WTLR 661.

³⁴ Above at [25].

³⁵ Consultation Paper, paras 6.22 and 6.23.

- 2.30 Moreover, we did not think that the EU Regulation No 910/2014 (“the eIDAS Regulation”), and the domestic measures which implemented it,³⁶ imposed any requirement for electronic signatures (even qualified electronic signatures) to be accepted in the context of wills.³⁷
- 2.31 At the time of the Consultation Paper, we also did not think that the then witnessing requirement could be satisfied by a person who was present remotely via videoconference.³⁸ We explained that “presence”, for the purposes of section 9 of the Wills Act 1837, required actual, physical presence.³⁹ The Law Commission came to the same conclusion about the meaning of “presence” in relation to the witnessing requirement for a deed in our 2019 Report on the Electronic Execution of Documents.⁴⁰

OUR PROVISIONAL PROPOSALS AND QUESTIONS

- 2.32 Although the status of electronic wills under the law was, in our view, uncertain, we welcomed development in this area. We therefore saw our project as an opportunity to ensure that any future provision for electronic wills would be introduced as smoothly as possible.
- 2.33 In the Consultation Paper, we sketched out our views on the parameters of a satisfactory system for electronic wills. First, we thought that electronic signatures would need to be secure, providing evidence – as strong as that provided by handwritten signatures – that the testator intended formally to endorse the document. This requirement for security suggested to us that electronic wills should be subject to specific rules. Secondly, because the infrastructure to support electronic wills would need to be both technologically and commercially viable, our view was that the law should be flexible about the technological form that electronic wills took. Thirdly, we thought that there should be some level of consistency across platforms for electronic will-making, to reduce uncertainty about what could constitute a valid electronic will. This requirement also pointed to the need for regulation of electronic wills.⁴¹
- 2.34 In order to strike the right balance between regulating electronic wills and allowing sufficient flexibility to allow them to develop, we suggested in the Consultation Paper that specially designed legal rules would be necessary. Specific rules could allow for effective introduction of electronic wills while also ensuring sufficient protection against fraud and undue influence. We thought these specific rules would be best made by

³⁶ The Electronic Communications Act 2000 and the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 (SI 2016 No 696).

³⁷ Consultation Paper, paras 6.24 to 6.30.

³⁸ Consultation Paper, para 6.32.

³⁹ Consultation Paper, paras 5.22, 5.26 and 6.32. Our conclusion that physical presence was required is disputed in J Brook, “Why video-witnessing of wills could sound the death knell for formalities as an end in themselves” (2021) *Conveyancer and Property Lawyer* 252; and Nicholas Bevan, “Where there’s a will, there’s a way” (2020) 170 *New Law Journal* 7889.

⁴⁰ Electronic Execution of Documents (2019) Law Com No 386, para 5.35. See also Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 15.

⁴¹ Consultation Paper, paras 6.34 to 6.38.

the Lord Chancellor, acting under a power in a new Wills Act to make provision for electronic wills by statutory instrument.⁴²

2.35 Accordingly, in the Consultation Paper we provisionally proposed that:

- (1) an enabling power should be introduced that would allow electronically executed wills or fully electronic wills to be recognised as valid, to be enacted through secondary legislation;
- (2) the enabling power should be neutral as to the form that electronically executed or fully electronic wills should take, allowing this to be decided at the time of the enactment of the secondary legislation; and
- (3) such an enabling power should be exercised when a form of electronically executed will or fully electronic will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.⁴³

2.36 Because we thought the better approach was for electronic wills to be subject to a specific legal regime, we did not think that they should be recognised as valid under the existing requirements in the Wills Act 1837.⁴⁴ We therefore provisionally proposed in the Consultation Paper that the Wills Act should make clear that electronic signatures are not capable of fulfilling the ordinary formal requirement of signing a will that applies to both testators and witnesses (currently contained in section 9 of the Wills Act 1837).⁴⁵ This approach would provide certainty in the law, until such time as any enabling power were used to allow electronic signatures.

2.37 We considered four different forms of electronic signatures available at the time of writing the Consultation Paper: typed names and digital images of handwritten signatures; passwords and PINs; biometrics; and digital signatures. Considering the four purposes of formalities,⁴⁶ we assessed the strengths and weakness of each of these forms of electronic signatures against those purposes, focusing in particular on their security, including whether they would be linked with the testator. We used handwritten signatures as the benchmark, explaining that forensic document examiners can provide valuable evidence about the authenticity of a handwritten signature.⁴⁷ We then sought consultees' comments, or any evidence they had, about the extent of the demand for electronic wills, and the security and infrastructure requirements necessary for using electronic signatures in the will-making context.⁴⁸

2.38 We did not make any provisional proposals or ask any questions specifically in relation to the requirement for witnessing, on the basis that the nature of witnessing

⁴² Consultation Paper, paras 6.39 and 6.40.

⁴³ Consultation Paper, Consultation Question 30.

⁴⁴ Consultation Paper, para 6.45.

⁴⁵ Consultation Paper, Consultation Question 31.

⁴⁶ See para 2.131 below.

⁴⁷ Consultation Paper, paras 6.46 to 6.87.

⁴⁸ Consultation Paper, Consultation Question 32.

would depend on the method of electronic signature. We noted that, with the introduction of electronic wills, the meaning of “presence” would need to be re-visited: at a minimum, clarity would be needed as to whether online presence (by videoconferencing) would satisfy the requirement. However, we did think that witnessing should continue to be required, even with the introduction of electronic wills: we explained our view that witnesses serve not only to prevent fraud but also to protect testators from undue influence and to provide evidence about, for example, capacity when a will is later contested. We did not think that electronic signatures could alone serve these protective functions.⁴⁹

- 2.39 We then considered the issue of storage of electronic wills. We noted that electronic documents are susceptible to obsolescence and hacking, risks that could perhaps best be mitigated by centralised electronic storage. We also noted that electronic wills could challenge the notion in the current law of a single original will. In the face of multiple copies, it could be difficult for revocation by destruction to be able to be applied to them. Moreover, there would be the practical problem of how to submit electronic wills to probate.⁵⁰ We asked consultees whether the loss of a testator’s ability to revoke a will by destruction was an acceptable consequence of introducing electronic wills, and about consultees’ awareness of any other serious consequences that would stem from there not being a single original copy of a will made electronically.⁵¹
- 2.40 Finally, we considered the specific case of video wills. While a video will could be a type of fully electronic will, it would not be an electronic document as it would not consist of words in visible form. We thought that video recordings were in some ways well suited to being recognised as wills: as a recording of a unilateral declaration, with the testator’s voice and image linked to their identity, a video might not raise the same issues that electronic signatures would in terms of authentication. However, against that, we noted that wills are technical documents; spoken wills might not provide the precision that is necessary for the proper interpretation of them. Moreover, we noted that technology might allow the creation of a convincing forgery of a video will. Therefore, we surmised that video recordings might not be replacements for written wills but could instead be used to provide evidence of a written will’s due execution and the testator’s capacity.⁵² But we invited consultees’ views as to whether an enabling power that provides for the introduction of fully electronic wills should include provision for video wills.⁵³

CONSULTATION RESPONSES

- 2.41 Many consultees responding to the Consultation Paper in 2017 gave detailed and considered views on the topic of electronic wills. Below is a brief summary of the

⁴⁹ Consultation Paper, paras 6.42 and 6.43.

⁵⁰ Consultation Paper, paras 6.88 to 6.97.

⁵¹ Consultation Paper, Consultation Question 33.

⁵² Consultation Paper, paras 6.98 to 6.106.

⁵³ Consultation Paper, Consultation Question 34.

issues consultees raised, which we outline to provide a tenor of the responses we received.

An enabling power

- 2.42 In 2017, the majority of consultees disagreed with our provisional proposal to introduce an enabling power which would allow electronic wills to be recognised as valid.⁵⁴
- 2.43 Some consultees specifically disagreed with our provisional proposal for an enabling power. They thought it was premature to delegate to the executive the power to introduce electronic wills, particularly in the absence of knowing what formalities electronic wills would have to comply with. Some argued that primary legislation and full Parliamentary scrutiny would be necessary.
- 2.44 Other consultees argued generally against the need to make any provision for electronic wills, believing that they did not offer advantages over paper wills in terms of execution, (long-term) storage, or cost, nor would they necessarily be easier to find after the testator's death or make the application for probate easier. Some argued that electronic wills posed security risks, including based on the perceived frailties of software and hardware, from cyberattacks or malware, or from user error, the latter on the basis that users of technology often do not know how to safeguard electronic documents.
- 2.45 Some consultees worried that fraud and undue influence would increase with electronic wills, particularly given that, unlike (for example) online banking, abuse in the wills context is more likely to be perpetrated by someone the testator knows and who through their access to the testator's home might have access to the information necessary to apply the testator's signature. Similarly, some consultees thought that enabling electronic wills would result in solicitors or other professional will writers meeting clients in person less often, meaning that indicators of coercion or of a potential lack of capacity would be missed.
- 2.46 Some consultees cautioned that allowing electronic wills would result in uncertainty about the formalities which would apply or confusion about having two different sets of formality requirements (one each for paper and electronic wills), or risk an increase in the number of disputes and invalid wills.
- 2.47 Some consultees argued that there was no current demand, or that there would not be demand in the near future, for electronic wills. One consultee specialising in internet and IT law⁵⁵ reflected on a general tendency to assume that technological innovations will arrive sooner than they in fact do. Another consultation response, provided jointly by two people specialising in the law governing electronic signatures⁵⁶ (which we refer to as "the joint consultation response"), thought that our assessment of electronic

⁵⁴ Consultation Paper, Consultation Question 30. Approximately 55% of consultees who responded disagreed and 35% agreed.

⁵⁵ Graham Smith.

⁵⁶ Stephen Mason and Nicholas Bohm.

will-making was undermined by an inadequate understanding of the technical issues and their possible consequences.

- 2.48 Some consultees outlined what steps should be necessary before any enabling power could be exercised, identifying the need for further consultation, independent advice, and Parliamentary debate, as well as a requirement for the affirmative resolution procedure in Parliament. Some agreed that the power should be technology neutral; but against that, one consultee identified the risk of uncertainty in the case of too high a level of abstraction (and queried how the presumption of due execution could apply).
- 2.49 Among consultees in favour, some thought a new Wills Act should be made futureproof in relation to electronic wills: they thought that electronic wills will inevitably be in use, one day; that an enabling power could encourage technological investment and development; or that a power to create secondary legislation would be beneficial if, in the future, a workable system for electronic wills were devised. One consultee argued in favour of taking the first step towards the development of a fully digital probate process.
- 2.50 Some consultees offered arguments in favour of electronic wills. They argued that there could be advantages to electronic wills which were not yet apparent. Some thought that electronic wills could be more convenient to make or store, could more easily incorporate other documents, or could be easier to understand or interpret (for example with the use of links and tooltips⁵⁷). Some thought that electronic wills could be more accessible, in particular to people with disabilities (such as those who use communication aids) or those making homemade wills.
- 2.51 Some consultees offered thoughts on what electronic wills could look like. They envisioned wills executed by qualified electronic signatures; a system involving endorsement by a notary, who would confirm the identity of the testator; and wills executed and stored on single-use tablets. Several consultees argued for mandatory registration of electronic wills.
- 2.52 One consultee specialising in internet and IT law⁵⁸ warned that it was important not to focus on electronic signatures alone, neglecting the role of the other formality requirements. The totality of the functions of all of the formalities could be met by an appropriate combination of electronic methods to form an interdependent, coherent whole. In particular, the consultee thought it was unhelpful to exclude the possibility of dispensing with the witnessing requirement as it is traditionally understood, as the benefit of witnessing could depend on the type of electronic signature used (for example, in the case of a certified digital signature where the certification authority could be a substitute for some of the functions of a witness).

Clarification about compliance with the existing formalities

- 2.53 In 2017, consultees overwhelmingly agreed with our provisional proposal that the Wills Act 1837 should be amended to confirm that electronic signatures are not to be

⁵⁷ Stephen Mason and Nicholas Bohm explained that “tooltips can display the linked text when the cursor is hovered over the linking term”.

⁵⁸ Graham Smith.

regarded as capable of fulfilling the ordinary formality requirements of signing a will that apply to both testators and witnesses (in section 9 of the Wills Act 1837).⁵⁹

- 2.54 Some consultees agreed with the proposal on the basis of providing certainty in the law. A couple thought that only express legislative provision could provide this clarity, and two others thought that electronic wills should be subject to a separate legal regime.
- 2.55 Some consultees agreed with this proposal due to their opposition to electronic wills generally or because of concerns they had with them, particularly their concerns that the current technology could not provide adequate protection for testators.
- 2.56 One consultee who disagreed thought that this proposal was unnecessary in light of our proposal to introduce an enabling power to allow the introduction of electronic wills. Another consultee who disagreed was generally in favour of electronic wills.
- 2.57 A few consultees disagreed that all types of electronic signatures should be considered invalid under the current law, variously identifying some types of biometric signatures or secure types of signatures as those which should be accepted.

The demand for electronic wills

- 2.58 Among consultees who responded to our question asking for comments on or evidence of the extent of the demand for electronic wills in 2017,⁶⁰ approximately half said that there was, or that they had experienced, no demand for electronic wills. One consultee commented that it was already possible to take advantage of the benefits of technology for will-making, for example, using word processing software in drafting a will or scanning and storing copies of wills electronically. Other consultees told us about the use of electronic services in the creation of wills, including in how clients give their instructions to solicitors or other will writers. One consultee said that people have confidence in paper wills, and another noted that most people want to discuss their wills in a face-to-face meeting. Other consultees commented that most testators are retired, older or elderly, with one consultee suggesting that older testators were unlikely to want to make an electronic will and another saying that “technological access and savviness is perceived as lower [among this demographic] than that of the population generally”.
- 2.59 Some consultees thought there would be a demand for electronic wills in the future. Some consultees saw the expectation for electronic wills as inevitable, including as younger generations begin to make wills.
- 2.60 Others thought that demand would be unlikely to survive the inconvenience and expense of electronic execution. One consultee thought that demand for electronic wills should not be the determining factor in recognising them as valid.

⁵⁹ Consultation Paper, Consultation Question 31. Approximately 90% agreed.

⁶⁰ Consultation Paper, Consultation Question 32.

Security and infrastructure requirements

- 2.61 A number of consultees who responded to our question in 2017 about the security and infrastructure requirements for using electronic signatures in the will-making context⁶¹ had a generally negative outlook about the security and infrastructure for electronic wills. Some consultees thought that digital signatures were inconvenient and expensive. Referring to existing public key technology, the joint consultation response pointed to the need for an individual's public key certificates to be renewed regularly, with the risk of certificate authorities going out of business, which might point to the need for Government to act as a certificate authority. They also noted the risk that the person who applied an electronic or digital signature is not the testator. More generally, they noted the general tendency to think that electronic failures will be spectacular and noticeable by the user, but warned that this is not necessarily how software and hardware fails. Other consultees were concerned about private bodies developing and providing infrastructure for electronic wills, but one thought Government would not be incentivised to provide it.
- 2.62 Other consultees were more positive. For example, two consultees suggested that blockchain technology could play a role in verifying the testator's identity and creating a single immutable will. One consultee was positive about electronic signatures being able to be sufficiently secure, and another suggested that the infrastructure used for online banking services could be a model for electronic wills. Another consultee suggested a form of electronic notarial system. And another consultee outlined its detailed suggestion for developing a personal data store for individuals which could include storage of electronic wills with automatic actions triggered on registration of death.

A single will

- 2.63 In 2017, we asked a consultation question about the likely consequence of electronic wills that there could not be a single original will.⁶² Among those who responded, half thought it would be unacceptable to lose the ability to revoke a will by destruction, with a quarter thinking that it would be acceptable.
- 2.64 Some consultees who saw that wills could not be revoked by destruction as an acceptable consequence of electronic wills commented that revocation by destruction was rare, with a new will being the most common method. Some thought that revocation by destruction was misunderstood or problematic, so its loss would be a positive development. Other consultees thought that the benefits of electronic wills would outweigh the loss of revocation by destruction or that, even without revocation by destruction, it would be sufficiently easy to revoke an electronic will. On the latter point, consultees suggested that there might be specific ways electronic wills could be revoked, by secure ways of deletion or digital labels which identify a will as revoked.
- 2.65 Among consultees who thought that losing revocation by destruction would be an unacceptable consequence of electronic wills, several foresaw that testators would misunderstand the law, believing that by deleting their electronic will they had revoked it; one consultee explained that this would result from the "intuitive" nature of

⁶¹ Consultation Paper, Consultation Question 32.

⁶² Consultation Paper, Consultation Question 33.

revocation by destruction. One consultee thought that revocation by destruction is practical and commonly used. Other consultees argued that losing this method of revocation would curtail testamentary freedom, with some generally emphasising the importance of the ability to revoke a will. Two consultees cautioned against having two different sets of rules about revocation, with different rules applying to paper versus electronic wills.

- 2.66 In terms of other potential consequences of there not being a single original will, several consultees said that it could make it difficult to identify which of multiple copies of a will was valid, in terms of identifying which was executed last in time; similarly, consultees worried about difficulties in identifying which amendments were most recent, and whether those amendments were validly executed. Some thought that metadata on electronic wills or proper storage (including by Government) of electronic wills could address this concern.
- 2.67 Several consultees thought that not having a single authoritative version of a will would facilitate fraud. Two consultees thought that multiple copies would make it more likely that the will could not be kept confidential during the testator's life. A couple of consultees spoke of difficulties that could arise in proving the will in another jurisdiction. Some consultees referred to problems in finding the will, admitting it to probate, or administering the estate.
- 2.68 Several consultees more generally expressed concern with the storage of electronic wills, in terms of whether it would be secure or would ensure electronic wills could be accessed or read in the future.
- 2.69 Some consultees challenged the premise of the consultation question. Some said it would be necessary for there to be a single, authoritative version of an electronic will; others suggested that there could be technological solutions to ensure a single version, identifying as possibilities document management systems which marked a copy as "official", linking all copies of a will, blockchain technology, or a central register (with two consultees arguing for mandatory registration of electronic wills). Some queried whether deleting an electronic will would or should amount to destruction.

Video wills

- 2.70 A bare majority of consultees responding in 2017 to the Consultation Paper thought that an enabling power that provides for the introduction of fully electronic wills should not include provision for video wills.⁶³
- 2.71 In favour of video wills being included within the enabling power, several consultees cited accessibility, suggesting that video wills would make will-making easier for people with disabilities. Some thought that video recordings could be useful in the testamentary context in terms of:
- (1) identifying the testator;

⁶³ Consultation Paper, Consultation Question 34. Approximately 30% thought that it should include provision for video wills.

- (2) demonstrating the testator's capacity, freedom from duress or undue influence, and/or knowledge and approval of the will;
- (3) allowing the testator to better identify the property disposed of by the will; and
- (4) for charitable gifts, establishing the relationship between the testator and the charity.

Two consultees thought that video wills might be less vulnerable to fraud or falsification. And one consultee said that the public would expect to be able to make a will by video.

- 2.72 Arguments against video wills in 2017 included concerns about the interpretation of the will. Consultees thought that vagueness, confusion, contradictions and incompleteness in how the testator expressed the provisions of their will would fuel litigation. To avoid these problems, some consultees suggested that the will might need to be scripted and the recording practised, making video wills inconvenient and time-consuming. Similar concerns were raised about the informality of videos versus the need for formality for a will, or that video wills would trivialise the seriousness of the will-making process.
- 2.73 Several consultees were concerned that video wills would be vulnerable to fraud or increase the risk of undue influence. Some said a video could not show what was happening out of frame or that the testator's behaviour in the recording might not provide reliable evidence about their capacity or whether they were subjected to duress: for example, a testator might simply be nervous about being filmed. And several consultees were worried that video wills could be fabricated or changed. Two consultees questioned how the content of a video will could be kept confidential from the witnesses.
- 2.74 Some consultees worried about storage, with specific concerns raised about storage media decaying or changes in technology rendering video wills unreadable in the future. Three consultees thought that video wills would be unappealing due to their cost. Several consultees thought video wills were unnecessary, or offered no advantages. In particular, a couple of consultees suggested that a video could not practically be admitted to probate, but that a transcript would have to be created, eliminating any benefit.
- 2.75 Several consultees agreed that video recordings could provide useful evidence in relation to a written will, such as about the testator's capacity or due execution of the will. Some suggested that specific provision should be made for their use as evidence; whereas others agreed that the use of video recordings as evidence was already permitted under the ordinary rules of evidence.

DEVELOPMENTS SINCE THE CONSULTATION PAPER

Technology

- 2.76 We explained at paragraphs 2.3 and 2.20 above that, in the six years since we last consulted there have been significant developments in technology, including in relation to electronic execution processes.

- 2.77 We do not doubt that technology will continue to develop at a similar pace in those fields, although, as we could not predict the developments between 2017 and now, we are unable to predict the detail of how those fields might develop in the future.

The law

- 2.78 We think that it remains the case that an electronic document could comply with the requirement in the Wills Act 1837 that a will be in writing. There is widespread acceptance that statutory requirements for “writing” only require text which is in visible form.⁶⁴ For example, in the recent case *Hudson v Hathway*,⁶⁵ there was no dispute that emails were “writing” for the purposes of a disposition under section 53 of the Law of Property Act 1925. While this reasoning has not been applied by a court in relation to the requirement for “writing” under section 9 of the Wills Act 1837, we continue to believe that an electronic will could satisfy this requirement.
- 2.79 It continues to be unclear whether an electronic signature would meet the requirement in the Wills Act 1837 for a will to be signed. We know of no cases on the point of electronic signatures under the Wills Act 1837. *Theobald on Wills* notes that “there is no case which has yet allowed a typed or electronic signature to stand as a signature”, and generally concludes against electronic wills being valid: “As the law now stands, it is almost certain that writing which exists only digitally, not physically, cannot be a valid will”.⁶⁶
- 2.80 There has been increasing clarity about the validity of electronic signatures in the law in other contexts, and increasing use of them; however, most statements about the legal validity of electronic signatures have, following our preliminary conclusion in the 2017 Consultation Paper, expressly excluded wills. In the Law Commission’s 2019 Report on the Electronic Execution of Documents, we concluded that electronic signatures can have the same legal effect as handwritten signatures, so long as the signatory intended to authenticate the document and provided any other requirements relating to execution are satisfied. However, wills were expressly excluded from the Terms of Reference for that project in light of our separate consideration of electronic wills in this project.⁶⁷
- 2.81 In our view, UK eIDAS, like its EU antecedent the eIDAS Regulation, does not oblige the courts to recognise electronic signatures if electronic signatures do not satisfy other legal requirements.⁶⁸ Contrary to the view we expressed in the Consultation Paper,⁶⁹ we accept that the eIDAS Regulation, and now UK eIDAS, are not limited to the transactional context and could apply to wills.⁷⁰ However, if the law of wills

⁶⁴ See Electronic Execution of Documents (2019) Law Com No 386, para 2.17.

⁶⁵ [2022] EWCA Civ 1648, [2023] 2 WLR 1227.

⁶⁶ A Learmonth, J Clarke, K Shuman, C Ford, and T Fletcher, *Theobald on Wills* (19th ed 2021) paras 3-007 and 3-009.

⁶⁷ Electronic Execution of Documents (2019) Law Com No 386, para 1.11.

⁶⁸ Under art 2(3). See *Chitty on Contracts* (34th ed 2021) para 7-011.

⁶⁹ Consultation Paper, para 6.26.

⁷⁰ Subsequently to the publication of the Consultation Paper, the Law Commission has considered the electronic execution of other documents. We did not suggest that the application of the eIDAS Regulation

attaches special significance to handwritten signatures, as *Lim v Thompson*⁷¹ suggests, then UK eIDAS does not require the recognition of electronic signatures (even qualified electronic signatures) in the context of wills.

- 2.82 Therefore, on one argument, the one we thought was the better argument in the Consultation Paper, an electronically executed will would not be accepted as valid under the current requirements in section 9 of the Wills Act 1837.
- 2.83 But we recognise that the position is not clear. *Lim v Thompson*⁷² suggests an original signature, rather than a copy of a signature, is necessary. However, seals⁷³ and signatures created by a rubber stamp⁷⁴ have also been accepted under the Wills Act 1837. Arguably, these types of marks are analogous to electronic signatures: both can be described as original, but they are created by devices which enable the signature to be added to the document by anyone with access to the device. More generally, as noted in *Internet Law and Regulation*, courts have taken a liberal approach to the form of signature acceptable, with “no English case[s] in which a signature has been held not to satisfy a legislative requirement for a signature merely because it is not in the correct form”.⁷⁵
- 2.84 Consequently, it is still uncertain whether the requirements in section 9 of the Wills Act 1837 could be satisfied by an electronic signature.
- 2.85 However, it is now clearly the case that wills can be witnessed remotely, based on amendments to the law introduced by Government to address the difficulties people have faced during the COVID-19 pandemic in meeting the requirement for testators and witnesses to be physically in each other’s presence, including where a testator has been self-isolating or is medically vulnerable.⁷⁶ Government amended the Wills Act 1837⁷⁷ to provide in section 9 that “presence” for the purposes of a witness’s presence includes “presence by means of videoconference or other visual transmission”.⁷⁸ This amendment originally applied in relation to wills made between

was limited to the transactional context in our report, *Electronic Execution of Documents* (2019) Law Com No 386, paras 3.7 to 3.16. This point was also made by a consultee responding to the Consultation Paper.

⁷¹ [2009] EWHC 3341 (Ch), [2010] WTLR 661.

⁷² [2009] EWHC 3341 (Ch), [2010] WTLR 661.

⁷³ A Learmonth, J Clarke, K Shuman, C Ford, and T Fletcher, *Theobald on Wills* (19th ed 2021) para 3-012, citing *Re Emerson* (1882) 9 LR Ir 443.

⁷⁴ *Jenkins v Gaisford* (1863) 3 Sw & Tr 93. A stamped signature was more recently accepted, although the point was not at issue, in *Perrins v Holland* [2009] EWHC 1945 (Ch), (2009) WTLR 1387, affirmed at [2010] EWCA Civ 840, [2011] Ch 270.

⁷⁵ G Smith, *Internet Law and Regulation* (5th ed 2019) para 10-177. See also Richard Hedlund, “Digital wills as the future of Anglo-American succession law” (2020) *Conveyancer and Property Lawyer* 230, where the author argues that electronic signatures could be acceptable under s 9 because of the courts’ liberal interpretation of “signature”.

⁷⁶ See Explanatory Memorandum SI 2022 No 18, para 6.5.

⁷⁷ By the Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (SI 2020 No 952), introduced under the Electronic Communications Act 2000, s 8.

⁷⁸ The provision for electronic witnessing only applies to s 9(c) and 9(d). Therefore, any person signing on behalf of the testator under s 9(a) must be in the testator’s physical presence.

31 January 2020 and 31 January 2022,⁷⁹ but was later extended to wills made on or before 31 January 2024.⁸⁰

Evidence of changing views

- 2.86 In other contexts, the use of electronic documents and signatures is increasing. We understand that simple forms of electronic signatures are currently the most widely used in the UK. Adopting the terminology of UK eIDAS, simple electronic signatures include typing a name (such as into an email or word processing software document), attaching a text or digital image to a document, using a finger or stylus to “write” on a screen, or using signature software platforms. The two more sophisticated forms – advanced electronic signatures and qualified electronic signatures, both of which generally rely on public key infrastructure – are infrequently used.⁸¹
- 2.87 Having said that, the Industry Working Group on Electronic Execution of Documents, set up by Government in the wake of our 2019 Report on the Electronic Execution of Documents,⁸² has suggested that the COVID-19 pandemic has accelerated the pace of the adoption of the more sophisticated forms of electronic signature in the business context.⁸³ The Industry Working Group explained in its Interim Report how “electronic signing has progressed dramatically”, with a transformation of the range of methods available.⁸⁴ It concluded that:

It is important that as many Government documents as possible (such as Lasting Powers of Attorney and wills) can be executed electronically. Otherwise, there is a danger of piecemeal adoption of available technologies across different elements of society. A very ill person who wishes another trusted person (whether a relative or not) to assume conduct of their affairs could be said to require the speed and convenience of electronic execution more than most; it is contradictory that these cannot currently be signed electronically. Widespread adoption across the different categories and types of documents used in citizens’ interaction with the authorities will encourage, and expand, the use of electronic signatures.⁸⁵

⁷⁹ SI 2020 No 952, art 2.

⁸⁰ Wills Act 1837 (Electronic Communications) (Amendment) Order (SI 2022 No 18), art 2.

⁸¹ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 18.

⁸² See *Electronic Execution of Documents* (2019) Law Com No 386, para 4.127; Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 8.

⁸³ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 18.

⁸⁴ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 23. It discusses the different types of electronic signature technologies at p 24 and following.

⁸⁵ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 56.

- 2.88 This conclusion was expanded in the Industry Working Group’s Final Report, where it recommended the “wholesale adoption of e-signatures” by Government for all purposes.⁸⁶
- 2.89 There is limited evidence in the wills context about the immediate appetite for electronic execution of wills. We have the responses to the Consultation Paper in 2017 (which we discuss above), reflecting views based on our proposals and the available technology at the time. More recently, the Law Society conducted a survey of wills practitioners in November 2021, focusing on the new provisions for electronic witnessing of wills.
- 2.90 The Law Society found that although 95% of those responding had drafted wills during a lockdown period, only 14% had used electronic witnessing.⁸⁷ The main challenge for electronic witnessing appears to be the perceived risk of undue influence, with 44% of respondents commenting on this risk. Some noted that it can be difficult to determine who else is in the room with the testator when they are signing their will. In the case of elderly and vulnerable testators, relatives may need to assist with technology, but their presence can influence the testator.⁸⁸ Of the 14% of respondents to the Law Society survey who had used electronic witnessing, 58% said that they would continue to use electronic witnessing after the pandemic, and 59% commented that their experiences with electronic witnessing had been positive.⁸⁹ Although for 44% of respondents the pandemic had not affected their views on the use of technology in will-writing, 30% said that they were more likely to support the use of technology in will-writing as a result of the pandemic, with 24% saying that they were less likely.⁹⁰

The comparative context

- 2.91 In 2017 at the time of the Consultation Paper, there was little evidence from other jurisdictions about how electronic wills could be effectively introduced. As we noted at paragraph 2.2 above, electronic wills had been given legal effect pursuant to dispensing powers;⁹¹ only one jurisdiction – Nevada, USA – gave legal effect to fully electronic wills through a bespoke legal regime, but there was no evidence available to us that its provisions had been successfully used.⁹²
- 2.92 Six years later, things have changed significantly. During the COVID-19 pandemic, some jurisdictions introduced temporary provisions to enable electronic witnessing. In

⁸⁶ Industry Working Group, *Electronic Execution of Documents Industry Working Group Final Report* (February 2023) pp 42 and 77 to 78.

⁸⁷ The Law Society, *The use of video witnessing through lockdown* (November 2021) p 3.

⁸⁸ The Law Society, *The use of video witnessing through lockdown* (November 2021) p 7.

⁸⁹ The Law Society, *The use of video witnessing through lockdown* (November 2021) p 3.

⁹⁰ The Law Society, *The use of video witnessing through lockdown* (November 2021) p 9.

⁹¹ See eg *Taylor v Holt* (2003) 134 SW 3d 830 (Tennessee Court of Appeal); *Rioux v Coulombe* (1996) 19 ETR (2d) 201 (Québec Superior Court); and *In the Estate of Wilden (Deceased)* [2015] SASC 9 (Supreme Court of South Australia).

⁹² Nicole Krueger, “Life, Death and Revival of Electronic Wills Legislation in 2016 through 2019” (2019) 67 *Drake Law Review* 983.

some cases, those provisions have expired;⁹³ in other cases, they have been retained.⁹⁴

- 2.93 More radically, some jurisdictions have introduced permanent reforms to allow electronically executed or fully electronic wills: these include Nevada, which has amended its electronic wills legislation, other jurisdictions in the USA, and jurisdictions in Canada and Australia. Generally, these new laws allow electronic versions of documents, signatures and/or witnessing to satisfy the pre-existing, paper- and in-person-based requirements. However, in some cases, additional requirements have been imposed.

The United States

- 2.94 In the United States, the Uniform Law Commission produced the Uniform Electronic Wills Act 2019 (“UEWA”), template legislation which individual states can enact. Under the UEWA, a will must be “readable as text at the time of signing”.⁹⁵ A will must be signed by the testator or by another individual in the testator’s physical presence and at their direction,⁹⁶ whether electronically or through a handwritten signature. Signing is broadly defined – to include affixing or associating with the record “an electronic symbol or process”, so long as the signatory has the intention “to authenticate or adopt a record”⁹⁷ – so all forms of electronic signature, including typed signatures, would suffice. At least two witnesses must witness the testator signing, whether remotely or in person at the state’s discretion, before the witnesses also sign the will “within a reasonable time” of witnessing the testator signing.⁹⁸ If the parties use electronic witnessing, the witnesses should be present in real time.⁹⁹
- 2.95 As with paper wills, under the UEWA testators can revoke their electronic will by a subsequent will, whether expressly or impliedly, or by a physical act.¹⁰⁰
- 2.96 The UEWA also includes a “harmless error” rule (the equivalent to a dispensing power). A document which does not comply with the formality requirements but which is nevertheless readable as text is deemed to comply, provided that the propounder of the document can prove that the testator intended the document to have testamentary effect.¹⁰¹

⁹³ See eg Queensland’s Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Documents) Regulation 2020.

⁹⁴ See eg New South Wales’ Electronic Transactions Amendment (Remote Witnessing) Act 2021.

⁹⁵ Uniform Electronic Wills Act 2019, s 5(a)(1).

⁹⁶ Uniform Electronic Wills Act 2019, s 5(a)(2).

⁹⁷ Uniform Electronic Wills Act 2019, s 2.

⁹⁸ Uniform Electronic Wills Act 2019, s 5(a)(3). Instead of requiring two witnesses, as an alternative provision the UEWA provides for the testator to acknowledge their signed will in the presence of a notary: s 5(a)(3)(B).

⁹⁹ Uniform Electronic Wills Act 2019, s 2(2).

¹⁰⁰ Uniform Electronic Wills Act 2019, s 7.

¹⁰¹ Uniform Electronic Wills Act 2019, s 6.

- 2.97 Eight states have enacted the UEWA,¹⁰² although with variation in their approaches to electronic witnessing.¹⁰³ A further three states have introduced the UEWA into their legislatures but have not yet enacted the legislation.¹⁰⁴
- 2.98 Separately to the UEWA, other US states have implemented their own bespoke legal regimes for electronic wills. For example, Florida, Indiana, Arizona, Illinois and Nevada provide for fully electronic wills. The state of Maryland also enables electronically executed wills but does not appear to regulate their electronic storage or admission to probate.
- 2.99 In all six states which have implemented bespoke regimes, the testator and witnesses can sign the will using electronic signatures.¹⁰⁵ However, states define electronic signature differently. Some define it broadly, in a way that could encompass typed names and other simple electronic signatures;¹⁰⁶ other states define it more stringently. Some, for example, require the use of a security procedure which shows that the signature is unique to the signatory and under their sole control, capable of verification, and linked to an electronic record,¹⁰⁷ meaning that advanced or qualified electronic signatures will comply, but simple electronic signatures will not.
- 2.100 States have also adopted different approaches to the permissibility of electronic witnessing. In Arizona, electronic wills must still be witnessed in person.¹⁰⁸ However in other states, electronic witnessing is permissible, provided additional requirements are satisfied.¹⁰⁹
- 2.101 Some states also impose other, additional requirements. For example, in Arizona, electronically executed wills must be dated and “contain a copy of a government-issued identification card” for the testator;¹¹⁰ in Maryland, either the testator or an attorney must create a certified paper copy after the will has been executed.¹¹¹

¹⁰² Utah, Washington, North Dakota, Colorado, US Virgin Islands, the District of Columbia, Idaho and Minnesota.

¹⁰³ Under section 5(a)(3) of the UEWA, states can either adopt electronic witnessing or retain in-person witnessing for electronic wills.

¹⁰⁴ Missouri, Texas and New Jersey.

¹⁰⁵ Florida Statutes, s 732.522; Indiana Code, s 29-1-21-4; Arizona Revised Statutes, s 14-2518; Electronic Wills and Remote Witnesses Act (755 ILCS 6/5-5); Nevada Revised Statutes, s 133.085; Maryland Code, s 4-102.

¹⁰⁶ For example, Florida Statutes, s 732.521.

¹⁰⁷ For example, Arizona Revised Statutes, s 14-1201(20).

¹⁰⁸ Arizona Revised Statutes, s 14-2518(A)(3)(a).

¹⁰⁹ For example, in Florida, electronic witnessing must be supervised by a notary, who confirms the witnesses' identities and verifies that they are not under the influence of drugs or alcohol, and it is not possible for a “vulnerable adult” to have their will electronically witnessed: see Florida Statutes, ss 732.522 and 117.285.

¹¹⁰ Arizona Revised Statutes, s 14-2518.

¹¹¹ Maryland Code, s 4-102.

Canada

- 2.102 In 2021, the Uniform Law Conference of Canada amended the Uniform Wills Act (2015) – template legislation which it recommends for enactment by Canadian provinces and territories – to enable electronically executed wills.
- 2.103 Under the Act, a will which is in electronic form should be readable as text and accessible and maintained in such a manner that it is capable of subsequent reference.¹¹² The Act also allows wills to be signed by electronic signature, whether by the testator or another individual in their (electronic) presence and at their direction, and/or by the witnesses to the will.¹¹³ “Electronic signature” is broadly defined as “information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with the document”,¹¹⁴ meaning that simple, advanced and qualified electronic signatures would all be acceptable. The Act also permits electronic witnessing, provided that the witnesses are present at the same time.¹¹⁵ The Act allows revocation of electronic wills, including by deleting one or more electronic versions of the will, with intent to revoke.¹¹⁶
- 2.104 The law in British Columbia has been amended based on the work of the Uniform Law Conference of Canada. The Wills, Estates and Succession Act 2009 was amended to create a legal regime for electronically executed wills in order to provide greater flexibility in will-making.¹¹⁷
- 2.105 There are also plans to enable electronically executed wills in Saskatchewan. The Wills Amendment Act 2022 (Bill No 110) is due to come into force after it received royal assent earlier this year.¹¹⁸ The Act will allow wills to be electronically signed and electronically witnessed.
- 2.106 The degree of uptake of British Columbia’s electronic wills legislation is unclear. As of 13 October 2022, the Attorney General was unaware of any court applications involving electronic wills, although this might not be surprising given that the legislation is still relatively new.¹¹⁹ However, a company which facilitates the electronic execution of wills claims that about 300 customers executed their wills through the company between 1 December 2021 and 13 October 2022.¹²⁰

¹¹² Uniform Wills Act (2015) (as amended 2016; 2021), s 1.

¹¹³ Uniform Wills Act (2015) (as amended 2016; 2021), s 5(1).

¹¹⁴ Uniform Wills Act (2015) (as amended 2016; 2021), s 1.

¹¹⁵ Uniform Wills Act (2015) (as amended 2016; 2021), s 5(4).

¹¹⁶ Uniform Wills Act (2015) (as amended 2016; 2021), s 16(1).

¹¹⁷ *Hansard* (Legislative Assembly of British Columbia), 14 July 2020, issue no 340, p 12029.

¹¹⁸ *Hansard* (Legislative Assembly of Saskatchewan), 17 May 2023, issue no 64A, p 3941.

¹¹⁹ Michael McKiernan, “BC lawyers still wary after a year of electronic wills” (13 October 2022) *Advisor’s Edge*, <https://www.advisor.ca/tax/estate-planning/b-c-lawyers-still-wary-after-a-year-of-electronic-wills/> (last visited 30 August 2023).

¹²⁰ Michael McKiernan, “BC lawyers still wary after a year of electronic wills” (13 October 2022) *Advisor’s Edge*, <https://www.advisor.ca/tax/estate-planning/b-c-lawyers-still-wary-after-a-year-of-electronic-wills/> (last visited 30 August 2023).

Australia

- 2.107 In Australia, states continue to use a dispensing power to give effect to fully electronic and electronically executed wills.¹²¹ Additionally, COVID-19 prompted states to introduce legislation to facilitate the electronic execution of wills. Many states introduced temporary measures to enable electronic witnessing which have now expired,¹²² or been retained.¹²³
- 2.108 Victoria, however, enacted a wholly electronic execution procedure,¹²⁴ which they have decided to retain. Regulations inserted a new section into the Wills Act 1997 to allow electronic witnessing, provided that one of the witnesses to the will is a lawyer or magistrate (a “special witness”) who can ensure compliance with the remote execution procedure. Once the testator has signed the will, whether by handwritten or electronic signature,¹²⁵ the will is sent by electronic communication to any witnesses who are electronically present. The witnesses should check that the will is the same as that signed by the testator; ensure that the will includes a statement which confirms that the remote execution procedure was used; and sign, with the testator witnessing electronically.¹²⁶
- 2.109 The special witness should sign the will last. The special witness should also ensure that the will includes a statement which states that the will was executed under the remote execution procedure; that the person is a special witness; and whether there is any recording of the execution of the will.¹²⁷ The document which is checked and signed by the special witness is then treated as the testator’s will.¹²⁸

RE-CONSIDERING THE ISSUE

- 2.110 In response to our consultation in 2017, only a minority of consultees were supportive of our proposal to create an enabling power which would, in time, allow the introduction of electronic wills. On the whole, consultees were wary of electronic wills or did not think that their potential benefits outweighed their perceived drawbacks, particularly in relation to the potential risk of fraud and undue influence.
- 2.111 However, with the passage of time, improvements in technology, and the increasing acceptance of electronic execution in the consumer and commercial spheres, as well as developments in relation to electronic wills overseas, we are interested to know if consultees’ views have changed. Below, we outline our current thinking, and pose further questions, on which we are keen to hear consultees’ views.

¹²¹ See eg *Montgomery v Taylor* [2018] VSC 16 (Supreme Court of Victoria).

¹²² See eg Queensland’s Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Documents) Regulation 2020.

¹²³ See eg New South Wales’ Electronic Transactions Amendment (Remote Witnessing) Act 2021.

¹²⁴ COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020.

¹²⁵ Wills Act 1997, s 7(6).

¹²⁶ Wills Act 1997, s 8A.

¹²⁷ Wills Act 1997, s 8A.

¹²⁸ Wills Act 1997, s 8B.

Discussion

- 2.112 This Supplementary Consultation Paper affords us an opportunity to revisit an issue that has seen significant development in the past six years. The COVID-19 pandemic has accelerated many people's use of technologies, to enable them to work from home or to stay in touch with family and loved ones when travel was not possible. The past six years have also seen continuing developments in technology. Despite the limited evidence of an immediate appetite for electronic wills amongst solicitors and other will writers, we wonder whether these experiences may have accelerated the demand for electronic wills, and therefore changed consultees' views about them. In particular, solicitors and other will writers may be placing greater reliance on technology in their professional practice and see greater potential for electronic wills to be combined with the provision of professional services, rather than being associated primarily with homemade wills.
- 2.113 We continue to think that new legislation governing wills should embrace the prospect of electronic wills. We are interested whether consultees agree.
- 2.114 We remain of the view that specific, bespoke provision should be made for electronic wills, rather than them being recognised under the existing formality requirements for conventional, paper wills in section 9 of the Wills Act 1837. We consider that thought is needed as to how to ensure that the functions of formality requirements are fulfilled in the context of an electronic will given the unique circumstances of will-making and the unique role that wills perform.
- 2.115 We think the future of electronic wills is dependent on two separate, but interlinked factors. The first is the ability of electronic wills to fulfil the same functions as paper wills, considering the functions served by the current formality requirements. This issue is the focus of our discussion as it is a matter that can be addressed by law reform. The second issue is whether there is sufficient demand for electronic wills, and the benefits of them, and is a matter related to the market for the provision of will-writing. The two issues are interlinked because increasing demand will bring investment and innovation, and potentially the Government interest necessary to facilitate reform.

Should the law permit electronic wills?

- 2.116 As we noted above,¹²⁹ wills are unique. Wills are unilateral documents, with no counterparty. They are often made without the assistance of professionals. They are revocable until death, and until proved in the probate process are personal documents.
- 2.117 Comparison is often made between wills and Lasting Powers of Attorney ("LPAs"), but they are different in a few key respects. LPAs must be registered with the Public Guardian to be valid,¹³⁰ a process which involves notice to certain people and the potential for objections.¹³¹ There is therefore a contemporaneous assessment of the

¹²⁹ See para 2.9 above.

¹³⁰ Mental Capacity Act 2005, s 9(2)(b) and sch 1.

¹³¹ Mental Capacity Act 2005, sch 1 paras 7 to 10; The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No 1253), regs 12 to 15.

validity of LPAs and opportunity for challenge. Moreover, in terms of fraud or financial abuse, the appointment of the donee in the LPA may not itself be what is problematic; rather, the fraud or financial abuse might be perpetrated by the validly appointed donee in the actions they take under the authority of the LPA¹³² and may not have been in the contemplation of the donee at the time of appointment. On that point, donees acting under LPAs are subject to oversight by the Public Guardian¹³³ which can uncover financial abuse.¹³⁴ Finally, we note that it is possible that frauds may be more “obvious” in the context of LPAs. In that case, the unlawful appropriation of money or assets can be assessed against the *interests* of the donor (in many cases, whilst they are alive),¹³⁵ whereas a fraud in the wills context can only be tested against the *wishes* of the testator, and only after they have died.

2.118 Therefore, while work is underway to move towards allowing LPAs to be created digitally, online,¹³⁶ we do not see this as conclusive as to the desirability or feasibility of allowing electronic wills to be valid.

2.119 Nevertheless, we think there could be significant advantages from electronic wills. Technology or products may be developed which make electronic wills more attractive to testators, or offer advantages, not yet apparent in the wills context. For example, in the future, technological developments may offer significant advantages in terms of the probate process. The benefits of fully electronic wills could therefore be championed by the Probate Service, the courts or Government. It is also possible that electronic wills could be made more secure against forgery or loss than conventional paper wills, providing built-in audit-trails. They may also more readily provide evidence of the time and date of execution, useful evidence in determining which of a number of wills was the testator’s last.

2.120 In other respects, the advantages in the wills context may, however, be less apparent at this stage than the advantages electronic documents bring in other contexts. Electronic execution of documents clearly offers significant advantages in transactions involving two or more specific parties, in particular where they cannot conveniently or cost-effectively meet in person. What is convenient or cost-effective will vary

¹³² A Stanyer, G Dalley, G Gillien et al, *Finance and Law for the Older Client* (2023) H1.4A.

¹³³ Mental Capacity Act 2005, s 58(1)(d), (f) and (h); Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations (SI 2007 No 1253), reg 46. See A Stanyer, G Dalley, G Gillien et al, *Finance and Law for the Older Client* (2023) E2.50.

¹³⁴ See eg Gillian Dalley, Mary Gilhooly, Kenneth Gilhooly, Michael Levi, and Priscilla Harris, “Exploring financial abuse as a feature of family life: an analysis of Court of Protection cases” [2017] *Elder Law Journal* 28; A Stanyer, G Dalley, G Gillien et al, *Finance and Law for the Older Client* (2023) H1.1 and H2.34.

¹³⁵ For example, in *The Public Guardian v BW, MD* [2015] EWCOP 19 at [28] Senior Judge Lush said that, “with almost unerring monotony in cases of this kind, a failure to pay care fees and a failure to provide a personal allowance are symptomatic of more serious irregularities in the management of an older person’s finances”, as noted in Gillian Dalley, Mary Gilhooly, Kenneth Gilhooly, Michael Levi, and Priscilla Harris, “Exploring financial abuse as a feature of family life: an analysis of Court of Protection cases” [2017] *Elder Law Journal* 28.

¹³⁶ Powers of Attorney Act 2023. See Ministry of Justice, Office of the Public Guardian, and Mike Freer MP, *Press Release: Step forward to online lasting power of attorneys* (19 September 2023); and Ministry of Justice, *Modernising Lasting Powers of Attorney: Government Response* (May 2022). The Powers of Attorney Act 2023 will make amendments to the process of registration and other amendments to improve safeguards against fraud.

depending on the frequency of the agreement or transaction, and its significance (financial or otherwise). So for daily or weekly transactions, like banking, the ability to conduct them remotely offers significant advantages. And for commercial or property transactions, including financially significant ones, where parties wishing to do business together would need to travel great distances to meet, electronic execution of documents also offers significant benefits.

- 2.121 These benefits are less apparent to us in the context of a will. Wills are made infrequently. And there is no need for any specific individual other than the testator themselves to sign the will: anyone can act as a witness to a will, so long as they are not a beneficiary (or the spouse or civil partner of one).¹³⁷ Accordingly, for a will to be executed, there is no need to get together specific parties who live at opposite sides of the world, the country, or even the village.
- 2.122 We do not think that the current technology and processes are (at the moment) sufficiently accessible, well-understood or trusted among the general public for them feasibly to be used by the vast majority of testators. For example, as we discuss below, we think that electronic wills are likely to require the use of more sophisticated levels of electronic signature, like qualified electronic signatures. These are expensive to obtain and given the simplicity of paper-based wills and the current apparent lack of demand for electronic wills it is unlikely that anyone would want to obtain one solely for the purpose of executing their will. In addition, from the responses of consultees, we see little evidence of the appetite required to build the necessary technology and processes, albeit these responses were from 2017.
- 2.123 However, we continue to think that in the future, the demand for electronic wills will increase. This seems inevitable given that there are generations who have spent most of or their whole lives using digital technologies during their education, their careers, and their personal lives. Those who have electronically managed their lives may expect to be able to electronically prepare for what happens to their belongings when they die. That expectation may be increased the more that those belongings themselves take the form of digital assets. An inability of the law to accommodate that demand for electronic wills may reduce the likelihood of people executing a will at all. That demand may arise when sophisticated and secure types of electronic signatures (for example, qualified electronic signatures) become used widely enough to be accessible and cost-effective to testators, such that testators would not need to acquire one specifically to execute their will.
- 2.124 We think it would be a lost opportunity not to make provision for electronic wills in a new Wills Act. However, we welcome consultees' views as to whether they, in principle, support electronic wills being valid under the law.

¹³⁷ See Consultation Paper, para 5.57; see also para 2.156 below. We provisionally proposed expanding this rule to apply to cohabitants of any witness: Consultation Paper, Consultation Question 20.

Consultation Question 1.

2.125 We invite consultees' views as to whether provision should be made so that electronic wills can be valid under the law.

How could electronic wills be enabled?

2.126 If a new Wills Act should make provision to allow electronic wills to be valid, the question becomes how it should do so.

2.127 Considering the formalities necessary for a valid will holistically and purposively, we continue to believe that, as a policy matter, electronically executed and fully electronic wills should not be considered as valid under the current requirements which apply to conventional, paper wills (that is, simply by application of section 9 of the Wills Act 1837 or any replacement provision). That conclusion is reinforced strongly by the significant majority of consultees who agreed with our provisional proposal in that respect. Although there have been considerable developments since the Consultation Paper, we do not think they have resolved the specific issues that we identified in the Consultation Paper as arising in the wills context such that the general law should simply apply to electronic wills. Moreover, it is necessary to preclude the possibility of electronic wills being accepted as valid under section 9 or any replacement provision, so that their validity can be determined exclusively based on requirements specific to electronic wills.

2.128 We continue to believe that electronic wills should be subject to their own specific requirements (for example, as to execution and storage). Provision for electronic wills to be recognised as valid could be made on the face of a new Wills Act to allow for electronic wills, with any detailed requirements provided in regulations. Alternatively, an enabling power could be enacted so that provision for electronic wills could be made in the future by way of secondary legislation: the specific requirements which would apply to electronic wills would be devised when the enabling power is exercised. In either case, the specific requirements applying to electronic wills could ensure that the same functions as those provided by the current formality requirements in respect of paper wills are met.

2.129 We do not think that video wills could fulfil these functions, and so we provisionally conclude that video wills should not be included in primary legislation or an enabling power to enable fully electronic wills in the future.

The functions of the formality requirements in section 9

2.130 We think it is worth reviewing whether the functions of the current formality requirements in section 9 of the Wills Act 1837 could be met by electronic wills. That is, we think it is worth outlining our thinking as to whether electronically executed or fully electronic wills should be accepted as valid under the same formality requirements that apply to conventional wills. Our analysis benefits from consultation responses, as well as the in-depth consideration of electronic execution of documents by the Law Commission in a separate project and the Industry Working Group. Rather

than considering whether each element could be replaced, like for like – an electronic signature for a handwritten signature, a remote witness for an in-person witness – we think a more holistic assessment is warranted.

2.131 In the Consultation Paper, we outlined the four main functions that formality requirements are considered to perform in the context of wills.

- (1) An evidentiary function: the formalities provide strong evidence that the will was executed by the testator, evidence that is particularly important as a will can only be proven (or challenged) after the testator has died.
- (2) A cautionary function: the formalities alert the testator to the serious nature of making a will and cause them to think carefully about what they want to achieve with their will.
- (3) A channelling (and/or labelling)¹³⁸ function: the formalities direct the testator into complying with standard, clearly defined requirements when making their will in order to give effect to their testamentary intentions, and make clear to third parties that they have made a valid will.
- (4) A protective function: the formalities assist in shielding the testator from fraud or undue influence when making their will.¹³⁹

2.132 Similarly, the Law Commission's 2019 Report on the Electronic Execution of Documents identified three functions of the formalities which apply to various types of transactions: evidential, cautionary, and labelling, with the cautionary function encompassing the function of protecting weaker parties to a transaction.¹⁴⁰ We considered how these functions can be fulfilled by the various formality requirements for a deed, including the requirement for witnessing and attestation.¹⁴¹

2.133 The Industry Working Group built on this analysis in relation to deeds.

- (1) With respect to the evidential function of formalities, the Industry Working Group argued that a qualified electronic signature is "at least as secure, and in the view of most members of the Working Group more secure", than a handwritten signature, because "gaining unauthorised access to a private key is harder than forging a handwritten signature".¹⁴² A qualified electronic signature could perform the evidential role as effectively, if not more so than, the requirements for witnesses and attestation of a deed: a witness's role is limited because there is no requirement for witnesses to a deed to know the signatory or identify

¹³⁸ We use these terms as synonyms, but there are slight differences between them. See Lon L Fuller, "Consideration and Form" (1941) 51:5 *Columbia Law Review* 799 at 801 on the channelling function.

¹³⁹ Consultation Paper, para 5.6, citing Lon L Fuller, "Consideration and Form" (1941) 51:5 *Columbia Law Review* 799 at 803; Ashbel G Gulliver and Catherine J Tilson, "Classification of Gratuitous Transfers" (1941) 51 *Yale Law Journal* 1; and John H Langbein, "Substantial compliance with the Wills Act" (1975) 88:3 *Harvard Law Review* 489.

¹⁴⁰ Electronic Execution of Documents (2019) Law Com No 386, para 2.11.

¹⁴¹ Electronic Execution of Documents (2019) Law Com No 386, paras 5.15 and 5.16.

¹⁴² Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 21.

them. The Group concluded that the essence of the witness's role in attesting a document is to confirm that they saw someone sign a document which they also signed,¹⁴³ and so qualified electronic signatures could also fulfil this function.

- (2) The Industry Working Group thought that the requirement for a deed to be in writing and make clear on its face that it is a deed fulfils the cautionary function, ensuring that the party appreciates its nature and effect, and that it is intended to have legal consequences.¹⁴⁴
- (3) The Industry Working Group concluded that the requirement for a deed to be in writing and to make clear on its face that it is a deed also fulfils the labelling (or channelling) function.¹⁴⁵
- (4) The Industry Working Group questioned the degree to which witnesses and attestation were protective in the context of a deed. It argued that any undue influence or duress is likely to be sustained, meaning that it would be difficult for a witness to identify and prevent it. Even if undue influence or duress takes place as an isolated incident, the witness may be the source of the problem, and the requirement for witnessing is unlikely to deter anyone who is intent on coercing the signatory. Finally, the Group noted that, in the context of deeds, there is no requirement for witnesses to be independent, so the need for a witness is unlikely to deter fraud or forgeries.¹⁴⁶

2.134 This analysis is an important starting point in considering, in the round, whether an electronically executed or fully electronic will fulfils the functions served by the current formality requirements in the Wills Act 1837 to the same standard as a conventional will.

The evidentiary function

2.135 We have explained above the unique context of a will and, with those specific considerations in mind, we are concerned that electronic signatures could not perform the evidentiary function of handwritten signatures in the wills context, in the light of the other formality requirements. We also have concerns about fully electronic wills fulfilling the evidentiary function. We think that, to ensure electronic wills could fulfil the evidentiary function, specific requirements would be necessary, different to those which apply under section 9 to conventional, paper wills.

¹⁴³ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) pp 52 to 53.

¹⁴⁴ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 52.

¹⁴⁵ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 52, citing s 1(2)(a) of the Law of Property (Miscellaneous) Provisions Act 1989.

¹⁴⁶ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) pp 52 to 53, citing Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237, para 8.22. The Industry Working Group's view is that qualified electronic signatures can fulfil the objectives of witnesses and attestation in the context of deeds. However, they noted that the law does not permit this: in-person witnessing and attestation is still required, absent reform of the law: see Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 22.

- 2.136 Our concerns about electronic signatures replacing handwritten signatures under section 9 is particularly true for simple electronic signatures. Simple electronic signatures appear to offer no protection against forgery: anyone can type a name or insert an image of a signature into a document.¹⁴⁷
- 2.137 While advanced and qualified electronic signatures offer much more protection, there are still specific considerations that apply in the wills context. The processes involved in verifying a person's identity in order for them to obtain a qualified electronic signature are sophisticated and robust. However, as the Industry Working Group commented, "any private key is only as secure as the signatory is prepared to ensure", referring to the risk of the signatory's password or electronic token, which must be entered to apply an electronic signature, being shared (knowingly or not) with someone else.¹⁴⁸ We think this point is particularly salient in the wills context.
- 2.138 As one consultee commented, the biggest concern in the wills context is not about fraud committed by a stranger, but by someone the testator knows: a member of their family, a friend, a neighbour, an employee or a carer. As we noted in the Consultation Paper, a testator may share their passwords with family members and others who help care for them, or may allow their personal devices to remember their passwords to apply them automatically.¹⁴⁹ They may do so even in relation to passwords for particularly sensitive and important information if the testator trusts that person or relies on them to assist them with their affairs. Even with two-factor authentication, we think these concerns arise: if the testator has shared their password with someone, they may equally have given them access to their phone. Therefore, we think there is a significant risk of this type of "user error" or abuse in the wills context, potentially even with the use of sophisticated electronic signatures.
- 2.139 Biometrics, which measure a unique physical attribute of the signatory, could be used to protect a qualified electronic signature to help to address these concerns. For example, a biodynamic signature creates a digital reproduction of the signature while also measuring, by various parameters, the unique way a person signs.¹⁵⁰ Facial recognition is another type of biometric, one that is now commonly used, including to unlock mobile phones. However, as we explored in the Consultation Paper, biometrics are limited by the systems used to record and analyse them, and the quality of those systems vary.¹⁵¹ Biometrics may not be as secure as many people might think, with some types of biometric data potentially being able to be obtained from a photograph of the person.¹⁵² Nor are biometric systems necessarily uniformly accurate, as we noted in our project on Automated Vehicles in relation to facial recognition:

¹⁴⁷ Consultation Paper, para 6.52.

¹⁴⁸ Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 21.

¹⁴⁹ See Consultation Paper, paras 6.62 and 6.85 to 6.87.

¹⁵⁰ See Consultation Paper, para 6.69.

¹⁵¹ Consultation Paper, para 6.70.

¹⁵² Consultation Paper, paras 6.70 to 6.71.

Current facial recognition software may also exhibit a bias towards white, male faces. For non-white and non-male faces, the accuracy of facial recognition systems may decline significantly.¹⁵³

We do not seek to suggest that there is definitely no technology now or in the works that, on its own or in tandem with other technologies, could not address the risk of fraud, at least to the standard of protection that there is in the context of paper wills. However, we note that there are technologies (for example, “simple” two-factor authentication) that we think would not, in the unique context of wills, address that risk.

2.140 Of course, handwritten signatures, written in ink,¹⁵⁴ can also be forged and a forged signature of the testator forms the basis of many reported cases in the wills context.¹⁵⁵ However, expert handwriting evidence, together with other analysis (such as chemical analysis of the inks used in a document), is frequently used in the wills context to help to discover forgeries after the fact.¹⁵⁶

2.141 The requirement for witnesses can provide evidence of the identity of the testator, a requirement some might argue addresses any concerns about fraud. However, witnesses are not always available to testify as to the circumstances of execution when a will is admitted for proof; moreover, they may not always give reliable testimony.¹⁵⁷ Witnesses’ signatures may also be forged.¹⁵⁸ Additional formality requirements could more directly ensure that it is the testator who applied the electronic signature to address these concerns. Examples could be a requirement that the testator’s identity is verified while they are appending their electronic signature to the will or that the execution process is recorded so the testator’s identity can be

¹⁵³ Automated Vehicles: Joint Report (2022) Law Com No 404, Scot Law Com No 258, para 2.80.

¹⁵⁴ We acknowledge that the requirement for the testator to sign the will can be met by the will being signed on their behalf or being signed using a “mark”. From reported cases, however, it appears that claims of fraud tend to arise when an attempt has been made to copy the testator’s signature, rather than rely on other forms of signature or execution. Arguably, the presence of a mark rather than a signature on a will purported to have been made by a testator who habitually signs documents in full, would itself raise suspicion. It is worth noting that when admitting a will to proof in common form, if the testator’s signature is “frail or otherwise indicates lack of competency”, an affidavit of due execution will be required: *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (21st and 9th eds 2018) para 18-05. See also Non-Contentious Probate Rules 1987 (SI 1987 No 2024), r 12.

¹⁵⁵ Recent examples include *Ahmed v Ahmed* [2016] EWCA Civ 686; *Re Ball (Deceased)* [2020] 1 WLUK 544; and *Face v Cunningham* [2020] EWHC 3119 (Ch), [2021] WTLR 1261.

¹⁵⁶ See eg *Patel v Patel* [2017] EWHC 133 (Ch) at [77] and following; *Loabrahams v Cook* [2018] 7 WLUK 953 at [14]; and *Re Ball (Deceased)* [2020] 1 WLUK 544 at [92] and following. G Smith, in *Internet Law and Regulation* (5th ed 2019), notes determining who bears the risk of forged signatures is “of especial concern with electronic signatures since it is less easy to detect forgery or impersonation than with manuscript signatures where (at least at leisure after the event if not in the heat of the transaction) a forensic handwriting expert can provide expert evidence to the court”: para 10-189.

¹⁵⁷ See eg *Watts v Watts* [2014] EWHC 668 (Ch), where the testator’s sister gave evidence that she had witnessed the testator signing the will, but the court found that the testator’s son had instead signed it, simulating the testator’s signature.

¹⁵⁸ *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (21st and 9th eds 2018) para 9-77. See eg *Re Dimberline (Deceased)* [2022] EWHC 2202 (Ch), where one of the witnesses’ signatures was forged.

verified later.¹⁵⁹ They might also address concerns, in the context of advanced or qualified electronic signatures, about the ability to verify an electronic signature years or decades after the will is made.¹⁶⁰

2.142 We therefore do not think that electronic signatures should simply be able to be accepted as valid in the place of handwritten signatures, even bearing in mind the requirement for witnessing. We think further, bespoke requirements about the type of electronic signature and potentially further requirements to confirm the testator's identity at the time of execution might be necessary for electronically executed wills to be accepted as valid if the same standards are to be met.

2.143 The requirement that a will be in writing also serves the evidentiary function. The written will, as a document or series of documents, evidences the testamentary intentions of the testator. Paper is not indestructible and ink fades over time. Paper documents can also be easily lost or can be unintentionally destroyed. Nevertheless, paper documents can remain decipherable for hundreds of years.

2.144 Many types of electronic documents cannot so straightforwardly be stored for long periods without the risk of obsolescence, due to the continuous development of software which can render old forms obsolete. Hardware, such as storage media, can also deteriorate.¹⁶¹ Qualified electronic signatures may not be able to be reliably verified many years after they are used.¹⁶² These concerns raise the question of the degree to which fully electronic wills could fulfil this evidentiary function. Wills set out the testator's instructions as to how and to whom their estate is to be divided; for electronic wills to be acceptable, they would need to be in a form that could reliably be accessible and decipherable years or decades after being made. Technology appears to exist that would address this concern,¹⁶³ but given that it does not appear to be widely used it is not clear how practical (or cost efficient) it would be for individual testators to use in the wills context. One possible way of addressing the concern about obsolescence, as suggested by some consultees, would be to impose an additional requirement of registration which would apply only to electronic wills: a requirement for registration could ensure that documents were maintained as necessary and kept accessible.¹⁶⁴ A requirement of registration could involve the

¹⁵⁹ See eg Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 32; Industry Working Group, *Electronic Execution of Documents Industry Working Group Final Report* (February 2023) pp 33 to 35. See also the requirement in Arizona that requires electronically executed wills to contain a copy of a current ID document for the testator, noted at para 2.101 above.

¹⁶⁰ Industry Working Group, *Electronic Execution of Documents Industry Working Group Final Report* (February 2023) p 35.

¹⁶¹ Consultation Paper, para 6.89.

¹⁶² Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 35.

¹⁶³ See Industry Working Group, *Electronic Execution of Documents Industry Working Group Interim Report* (February 2022) p 35.

¹⁶⁴ For example, using International Organisation for Standardisation, *Electronic document management – Design and operation of an information system for the preservation of electronic documents – Specifications* (ISO 14641:2018), <https://www.iso.org/obp/ui/#iso:std:iso:14641:ed-1:v1:en> (last visited 30 August 2023).

creation of a single register for all electronic wills, or more than one register, maintained by different providers.

2.145 It does now appear that technology addresses our earlier concern that it would not be possible to ensure that only a single electronic will could exist, without duplicates or copies.¹⁶⁵ For example, in recent years, distributed ledger technology (“DLT”) has been promoted as a key technological development capable of reducing many of the practical concerns currently raised by electronic documents and electronic transactions. If applied to wills, it could be used as evidence that there is only one electronic will that is considered to be valid. DLT is technology that enables the operation and use of a distributed ledger – a store of information or data which is shared (or “distributed”) among a network of computers (known as “nodes”). The ledger contains a record of data, such as a history of transactions involving a particular document and each node may hold a copy of the ledger. When data is added to the ledger – for example, a document, or a change is made – the data on each node is updated.¹⁶⁶ For current purposes, features of DLT which may be relevant to electronic wills include the following.

- (1) DLT can support the storage of electronic documents – potentially linked to a token stored on an external system¹⁶⁷ – with control of the document in the hands of the person(s) with knowledge of the relevant private key.
- (2) DLT offers the prospect of creating an “original” electronic document which is capable of being distinguished from copies.
- (3) It is possible to design systems that make the content of electronic documents invisible to all but the relevant participant, thereby safeguarding private or confidential information.
- (4) The ledger may be practically immutable, so participants in the system can trust in its veracity. For example, any attempt to manipulate the contents of the ledger or a document held on it to facilitate a fraud is potentially, near to impossible.
- (5) Data, such as a token, stored on a DLT system can be “destroyed” by sending it to a “burn address”¹⁶⁸ from which it is irrecoverable.
- (6) A DLT can be administered by a central authority such as a government or registrar.

¹⁶⁵ See Consultation Paper, paras 6.94 to 6.96.

¹⁶⁶ Data will be added when it is valid according to the protocol rules of the DLT system. Invalid data will not be added. For a more detailed explanation of DLT technology, see Electronic Trade Documents: Report and Bill (2022) Law Com No 405, Appendix 3.

¹⁶⁷ For example, non-fungible tokens link a token to an image stored on another system: see “Best Practices for Storing NFT Data using IPFS”, <https://docs.ipfs.tech/how-to/best-practices-for-nft-data/#types-of-ipfs-links-and-when-to-use-them> (last visited 15 September 2023).

¹⁶⁸ A crypto-token public address the private key to which is inaccessible. This type of address is normally used to remove tokens from circulation, thus reducing the total number and so “burning” or “destroying” them.

This aspect of the evidentiary functions of the formalities could therefore be satisfied by an electronic will, although perhaps only with an express requirement mandating a single authoritative version to be made and kept.¹⁶⁹

2.146 Therefore, we provisionally think that additional formality requirements might also be required of electronic wills to ensure that they can provide reliable evidence of the testator's intention and that a single authoritative copy exists for many years.

2.147 In the Consultation Paper, we questioned whether a video would fulfil the evidentiary functions of the current formality requirements. One reason was that the testator's appearance and voice would be captured on the recording, providing evidence of their identity as the person making the will. However, we also questioned whether the testator's appearance and voice could be faked.¹⁷⁰ Since the Consultation Paper, the rise in deepfakes – fake images generated by artificial intelligence¹⁷¹ – seems to increase this risk, undermining the case for video wills. Concerns about obsolescence also apply in relation to video wills.

The cautionary function

2.148 The requirement for a will to be in writing contributes to fulfilling the cautionary function. We are not convinced that a will being in paper itself plays a cautionary role; accordingly, in our view, an electronic will that was required to be in words in visible form could also contribute to satisfying the cautionary function, particularly together with a requirement that the document evidences the testator's intent to adopt it as their will.¹⁷²

2.149 In the wills context, we think that the requirement for two witnesses also plays an important cautionary function: most agreements or documents, if they require witnesses at all, only require one.¹⁷³ Therefore, the requirement for two witnesses, even where they are attending remotely, creates a ceremonial aspect to executing a will, which we think meaningfully contributes to conveying the significance of making a will to the testator.¹⁷⁴ As noted above, we now consider that the formality requirements for an electronic will may not require witnessing, at least in a manner that replicates

¹⁶⁹ Potentially also with requirements regulating the use of DLT in this way.

¹⁷⁰ Consultation Paper, paras 6.101 and 6.102.

¹⁷¹ Concerns about deepfakes are well-established in other contexts: see *Intimate Image Abuse: Final Report* (2022) Law Com No 407, para 1.4.

¹⁷² We considered whether code could constitute "writing" in our 2021 *Advice to Government on Smart Legal Contracts*, concluding that it depended on whether the code could be considered as a mode of "representing or reproducing words in a visible form": see *Smart Legal Contracts: Advice to Government* (2019) Law Com No 401, para 3.79 and following.

¹⁷³ As we discuss in our report on *Electronic Execution of Documents*, most contracts and agreements signed under the law of England and Wales have no formalities – they are not even required to be in writing, and signing and witnesses are unnecessary. However, deeds, required for a variety of types of transactions, must be signed in the presence of a witness (or, in the case of execution by a company, must be executed by affixing the company's common seal or signed by two authorised signatories or a director attested to by a witness: see *Electronic Execution of Documents* (2019) Law Com No 386, paras 2.7, 2.10, and 5.7 to 5.12.

¹⁷⁴ See Lon L Fuller, "Consideration and Form" (1941) 51:5 *Columbia Law Review* 799 at 800; Ashbel G Gulliver and Catherine J Tilson, "Classification of Gratuitous Transfers" (1941) 51 *Yale Law Journal* 1 at 6; and John H Langbein, "Substantial compliance with the Wills Act" (1975) 88:3 *Harvard Law Review* 489 at 495.

the witnessing of a paper will. We do, however, consider that in the context of wills, the cautionary function requires something more than that a document is in writing and signed by the testator, to highlight to the testator the particular significance of executing a will.

- 2.150 With the benefit of consultation responses, we also do not think that a video will could adequately fulfil the cautionary function. It would be novel for the law to recognise a video recording itself as having legal effect, rather than evidencing a legal transaction such as, for example, a contract. We do not think that creating a video would impress on testators the legal significance of making a will, given that making recordings using personal devices is relatively common. We moreover think that reducing something to writing often helps to ensure focus on important details, directing the testator to think carefully about what testamentary dispositions they want to make.

The channelling function

- 2.151 A will need not identify itself as a will; a document, or a number of documents, intended to express the testator's testamentary intentions, is a will. Therefore, testators are not required to express their will using particular words or expressions. However, the total of the formality requirements – for the will to be in writing, signed by the testator in the presence of two witnesses, who must also sign in the testator's presence – channel wills into a standard, recognisable form. But we think that digital equivalents could fulfil similar functions.
- 2.152 We do, however, think that an electronic will should continue to be in writing, meaning words in visible form, together with further formality requirements to denote it as a formal and significant document. We do not think that a video will would adequately channel a testator into making a will in a common or standard form, making it less likely that their testamentary intentions take effect as they would have wished, and also more difficult to establish, after the testator's death, whether they have a will.

The protective function

- 2.153 We think that protection is a key function of the required formalities to make a valid will. We remain unconvinced that this protective function can be effectively fulfilled by electronically executed or fully electronic wills without additional formality requirements being imposed in relation to electronic wills.
- 2.154 As we noted above, we are concerned that electronic signatures are insufficiently protective against fraud in the wills context. We think that specific rules or requirements will be necessary if electronic signatures are to be accepted as a valid way to execute a will.
- 2.155 We also think that, in the wills context, the witnesses can serve an important protective role. We think this role is additional to the protective functions of the requirement for the testator to sign, a role that will need to be considered in the context of electronic wills.
- 2.156 Unlike in the context of a deed, witnesses to a will are required to be independent, in that they cannot benefit under the will: any gift in a will to a witness, or to their spouse

or civil partner, is void.¹⁷⁵ We sought to increase this protective function in the Consultation Paper, where we provisionally proposed that this rule should be extended to apply to cohabitants of witnesses and asked whether it should also be extended to other family members of witnesses.¹⁷⁶ That said, as we noted above, witnesses are not always available to testify as to the circumstances of execution when a will is admitted for proof; and despite the rules about witnesses being unable to benefit directly under a will, they may nevertheless be party to wrongdoing.¹⁷⁷

2.157 But the requirement for two witnesses can make it more difficult for someone to impersonate the testator; if the will is later challenged on that basis, the witnesses may testify that the person who executed the will was not, in fact, the testator.¹⁷⁸ The requirement may also help to prevent undue influence, although it might only do so where the influence is apparent at the time of execution; of course, a person may unduly influence a person when the will is being prepared, not when it is being executed.

2.158 Technology might develop in a way that means witnessing is less necessary or takes a different form from that in relation to a paper document. However, we do not think that any type of electronic signature technology – including those which satisfy the requirements to be a qualified electronic signature – on its own is capable of fulfilling the same functions as a requirement of witnessing. Something more is required.

2.159 Moreover, we are not aware of any existing process of using (specifically) a qualified electronic signature with in-person witnessing.¹⁷⁹

2.160 It could be that technology enables electronically executed wills to be witnessed remotely, or that a different requirement could be imposed that replicates the function of witnessing. However, from a policy perspective, we are not sure that electronic witnessing of a paper will serves the protective function as well as in-person witnessing. In the guidance issued by Government in relation to witnessing by videoconference, it advises that “where people can make wills in the conventional way they should continue to do so”.¹⁸⁰ If witnessing by videoconferencing is used, Government guidance suggests additional steps as safeguards. These steps include the testator stating that they are signing their will, in front of the two witnesses; the testator holding up the first page of the will, and then the page to be signed, to the camera; the witnesses, if they do not know the testator, asking to view documents to

¹⁷⁵ Wills Act 1837, s 15.

¹⁷⁶ Consultation Paper, Consultation Question 20 and Consultation Question 21; see also Consultation Paper, paras 5.57 to 5.59.

¹⁷⁷ See para 2.141 above.

¹⁷⁸ See eg *Watts v Watts* [2014] EWHC 668 (Ch), where the nurse who had witnessed the will was told by the testator’s son that she was witnessing him, not the testator, execute a document.

¹⁷⁹ We note, however, that it appears that processes are being developed for the use of some electronic signatures (but not necessarily qualified electronic signatures) with in-person witnessing: see HM Land Registry, *Practice Guide 82: Electronic Signatures accepted by HM Land Registry* (30 January 2023) para 3.2.

¹⁸⁰ Ministry of Justice, *Guidance on making wills using video-conferencing* (January 2022), <https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing#video-witnessing> (last visited 30 August 2023).

confirm the identity of the testator; and the signing process being recorded and the recording being retained.¹⁸¹ Some of the other jurisdictions that permit electronic witnessing together with electronic execution also impose requirements that one of the witnesses is a lawyer (or magistrate).¹⁸² We think these additional suggestions or requirements reflect that the role of witnessing serves an important protective function, and moreover that that function might not be as well served when witnessing takes place remotely.¹⁸³

The need for a bespoke regime

- 2.161 We continue to think that electronic wills should not be accepted as valid under section 9 of the Wills Act 1837. Consultees overwhelmingly agreed with our provisional proposal that electronic signatures should not be capable of fulfilling the requirement of a signature under section 9 for the testator and witnesses and we do not ask a further question in that respect.
- 2.162 Our provisional view remains that electronic wills should be enabled, but that doing so should be achieved by provision being made for specific formality requirements for these wills. The requirements that are put in place for electronic wills should ensure that the functions served by the formality requirements are met by an electronic will at least to the same standard as they are met by a paper will that is executed under section 9 of the Wills Act 1837. We are more clearly of the view than we were at the time of the 2017 Consultation Paper that the formality requirements for electronic wills are likely to be different than those for paper wills. The aim is to provide at least an equivalence of protection for testators; but how that protection is achieved is likely to differ as between electronic and paper documents.
- 2.163 Our provisional view means that it will not be possible for an electronic will to be made, as a matter of course, except under a bespoke regime specifically for electronic wills. That does not mean, however, that an electronic will could not be recognised as valid exceptionally. In the Consultation Paper, we provisionally proposed that a power should be introduced, to be exercised by the court, to dispense with the formality requirements where a record demonstrated testamentary intention. The record could be an electronic record.¹⁸⁴ Accordingly, under our provisional proposals an electronically executed or fully electronic will could be accepted as valid under a dispensing power. But this power would only apply to electronic wills on a case-by-case basis, to the degree they could be proven to the court to demonstrate testamentary intent. It would not allow electronic wills in a general sense.
- 2.164 In terms of allowing electronic wills more generally, our thinking about what electronic wills must be able to do before they should be legally recognised as formally valid has developed since the Consultation Paper. We think that, to introduce electronic wills in

¹⁸¹ Ministry of Justice, *Guidance on making wills using video-conferencing* (January 2022), <https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing#video-witnessing> (last visited 30 August 2023).

¹⁸² See eg the law in Victoria, Australia, discussed at para 2.108 above.

¹⁸³ See also A Learmonth, J Clarke, K Shuman, C Ford, and T Fletcher, *Theobald on Wills* (19th ed 2021) para 3-031.

¹⁸⁴ Consultation Paper, Consultation Question 28.

a way that ensures that the functions of formality requirements are met at least to the same standard as they are for paper wills under section 9, they should be subject to specific rules.

- 2.165 We note that some overseas jurisdictions have introduced electronic wills by allowing “like for like” replacements of signatures and witnessing with electronic versions. We are not persuaded by that approach. As explained in our detailed analysis at paragraphs 2.126 to 2.160 above in the specific context of wills, we do not think that such an approach fulfils the functions of the formality requirements at least to the same standard as section 9 achieves in relation to a paper will. We have particular concerns with the ability of electronic signatures to fulfil the evidentiary and protective functions of the formality requirements, without any further requirements imposed to ensure that the testator themselves intended to make the will and was not unduly influenced into doing so. Given that concerns with the execution of wills may not be revealed for many years, until wills made under new rules are admitted to probate, we are cautious about too quickly following the lead of other jurisdictions in this area.
- 2.166 In our provisional view, the specific rules required to ensure that an electronically executed or fully electronic will is made in such a way that is functionally equivalent to the requirements that apply to paper wills must ensure the following: that they provide strong evidence that the testator made the will, and of the testator’s testamentary intentions; that they caution the testator about the serious nature of making a will, prompting them to think carefully about the dispositions they are making; that they channel testators into well-understood and standard methods of accomplishing their wishes; and that they protect testators from fraud and undue influence in making their will. At the least, the most basic types of electronic signatures and the most easily amended types of electronic documents should be precluded from satisfying the formality requirements for a valid will.
- 2.167 We think that, as far as possible, any rules for electronic wills should be technology neutral. By technology neutral, we mean that the provisions should not be predicated on the use of a particular technology. Instead, they should identify features and functionalities that an electronic will should have to satisfy, without setting out how such features and functionalities must be achieved. We consider that this will foster innovation, allowing for constant improvement of technological solutions. It also circumvents the risks of referring to particular technologies which may quickly become outdated or obsolete, and of excluding other potential existing or future solutions. But we acknowledge that this may not be possible and that, for example, there may be benefit in setting out technological requirements for how and where something might be electronically stored.
- 2.168 At this time, it appears that there is likely to be an argument for requiring electronic wills to satisfy additional, or different, formality requirements, as compared to paper wills, to ensure that they adequately fulfil the same functions to at least the same standard. For example, it might be that, to make a valid electronically executed will, the testator’s identity must be confirmed at the time of execution or a recording made of execution, and the witnesses must attest in a specific form; it might be that a specific, and more secure, type of electronic signature is required for the testator, but not the witnesses. The role of witnessing and how the functions met by a witnessing requirement are most appropriately achieved may also need to be considered. And it

might be that a fully electronic will must be registered with an authority, or stored in a particular fashion or location,¹⁸⁵ in order to be valid. That said, we think it is important to bear in mind that electronic wills need not be infallible; they need not be held to a higher standard than paper wills in terms of protection, security and reliability. Paper wills are not immune to forgery or undue influence, nor to loss or (accidental) destruction.

- 2.169 In order to create a bespoke regime for electronic wills, it will also be necessary to consider other aspects of the rules and presumptions which apply in the law governing wills. It might be necessary to consider revocation: in particular, if there is any requirement to register an electronic will, it will be necessary to consider whether a testator should be able to revoke an electronic will by a later paper will; it may also be worthwhile considering revocation by destruction, and whether deleting a document (or requesting it is removed from a register) is equivalent to destruction. If the formalities for electronically executed wills focus on compliance with a technological protocol, it will be necessary to consider how compliance can be proved years or decades later, as well as if and when the presumption of due execution should apply. It might be that rectification under section 20 of the Administration of Justice Act 1982 should be reconsidered in the light of the types of errors that may be made in the context of electronic documents and execution.
- 2.170 We think it should always be possible for a paper will, executed in ink, to be valid. Accordingly, any bespoke regime for electronic wills should also involve consideration of how the two sets of formality rules are likely to operate alongside each other, in terms of the complexity of the law and the scope for confusion. One consideration is whether the resulting complexity to the law of wills as a whole in having two sets of formality rules (one for electronic wills and another for paper wills) negates the benefits of introducing electronic wills. Any bespoke regime for electronic wills should also involve consideration about how the two sets of rules might interact: if a will can be validly made both in paper and in electronic form, a person's will might be comprised of both paper and electronic documents, with paper and electronic wills and codicils amending and revoking each other.
- 2.171 There seem to be two options to make bespoke requirements for electronic wills to be valid: to enact an enabling power in a new Wills Act, which would allow provision for electronic wills to be made in secondary legislation; or to make provision for electronic wills to be valid on the face of a new Wills Act.

An enabling power

- 2.172 In the Consultation Paper we provisionally proposed¹⁸⁶ the introduction of an enabling power that would allow electronic wills to be introduced in the future. Although the majority of consultees disagreed with that proposal, this Supplementary Consultation Paper provides the opportunity to re-visit that point with consultees. We also wish to re-visit with consultees the detail of any enabling power, with our question on that point aiming to address some of the concerns that consultees raised.

¹⁸⁵ Including, possibly, DLT.

¹⁸⁶ Consultation Paper, Consultation Question 30.

- 2.173 An enabling power might have a number of benefits.
- 2.174 The development of the necessary requirements for electronic wills (and the drafting of rules to reference those requirements) could be a significant endeavour, bringing together Government and legal, technology and industry experts. At present, we do not think there is the drive to adopt electronic wills on the scale necessary for it to be seen to be worthwhile (bearing in mind the comparative simplicity of the current process associated with handwritten signatures). We do, however, believe the demand for electronic wills may emerge over time. As electronic dealings and activities become more common, accepted and trusted in all areas of our lives, and particularly for those generations who have grown up with them, the lack of an electronic alternative to handwritten signatures, in any sphere – including wills – may become less acceptable (and, perhaps, even distrusted).
- 2.175 There is therefore an argument that it is too soon to legislate for electronic wills. Including an enabling power in a new Wills Act will provide Parliament with the opportunity to scrutinise the general question of whether to allow electronic wills and what the process should be to identify the specific requirements they must meet, in advance of electronic wills being permitted.
- 2.176 Moreover, provided it is correctly worded, an enabling power would be facilitative and flexible. It could enable the introduction of electronic wills in a way that reflects the technology that is current at the time the power is used. And it would be capable of being exercised again if later technological advancements emerged that would further improve electronic wills. In that way, it offers flexibility that would not be available if the requirements – particularly any technology-based requirements – for electronic wills were contained in primary legislation.
- 2.177 It is worth noting that the Electronic Communications Act 2000 contains a broad power, in section 8, for legislation to be modified by way of statutory instrument to authorise or facilitate the use of electronic communications or storage. This power was used by Government to amend the Wills Act 1837 to permit electronic witnessing of wills during the COVID-19 pandemic.¹⁸⁷ While this power could possibly be used to allow for electronic wills, we think that electronic wills require specific consideration, and would be better served with a bespoke power, with particularised safeguards, to enable them.
- 2.178 We appreciate the views of some consultees that electronic wills should only be introduced by way of primary legislation and after further consultation. We agree that there would be a need for broad consultation before the power could be exercised and therefore ask consultees whether the Secretary of State should be required to do so before exercising the power.
- 2.179 In addition, or alternatively, there could be the requirement for the Secretary of State to obtain advice from a committee which would be designed to offer an expert and representative view. We provisionally think that the committee should consist of persons representing the legal profession, will writers, His Majesty's Courts and

¹⁸⁷ See para 2.85 above.

Tribunals Service, consumer interests, technologists, as well as anyone else with experience of value to the committee.¹⁸⁸

2.180 Finally, to ensure appropriate scrutiny by Parliament, secondary legislation introduced under the enabling power could be subject to the affirmative resolution procedure, meaning that it will require active approval by both Houses of Parliament.

2.181 We welcome consultees' views on this approach to the introduction of electronic wills.

Provision in primary legislation

2.182 Instead of an enabling power, provision to make electronic wills valid could instead be made on the face of a new Wills Act. A section in the new Wills Act could outline the specific rules to apply to electronically executed or fully electronic wills, which they would need to comply with in order to be accepted as valid. Such a provision could include a regulation-making power, allowing further requirements to be set out in secondary legislation, to allow requirements to respond to changes in technology.

2.183 The difference between this option and an enabling power is that making provision for electronic wills in primary legislation would put the principle that electronic wills are valid on the face of the Act. Unlike an enabling power, it would not be an option that Government could, or could not, implement. It would therefore be a more positive statement of intent to enable electronic wills. As we explained at paragraph 2.94 and following above, this approach has been taken in other jurisdictions, including in the United States, Canada and Australia.

2.184 In the light of the developments since 2017, we wonder whether consultees might support going this step further.

2.185 A potential model could be the Electronic Trade Documents Act 2023. In section 2, it provides that information in electronic form constitutes an "electronic trade document" if "a reliable system" is used to, among other things "identify the document so that it can be distinguished from any copies" and "protect the document against unauthorised alteration". It also outlines some of the matters that can be taken into account in determining if a system is reliable.¹⁸⁹ A list of requirements that must be met for an electronic will to be valid could similarly be provided on the face of a new Wills Act.

2.186 Making provision for electronic wills to be valid on the face of a new Wills Act would address some consultees' concerns about the level of scrutiny necessary for electronic wills to be enabled. That is because full scrutiny by Parliament would take place at the time electronic wills would be enabled as part of Parliament's scrutiny of the new Act as a whole.

2.187 As noted above, it would also make a more positive statement about the validity of electronic wills, by providing that they are valid, subject to certain requirements being

¹⁸⁸ For a similar provision, see Land Registration Act 2002, s 127(2), which prescribes the composition of the Rule Committee.

¹⁸⁹ See Electronic Trade Documents Act 2023, s 2(5) and Electronic Trade Documents: Report and Bill (2022) Law Com No 405.

met, whether those requirements are outlined on the face of the legislation or in regulations.

2.188 We welcome consultees' views.

Consultation questions

2.189 Our analysis in this Supplementary Consultation Paper builds on our discussion in the 2017 Consultation Paper, and what we heard from consultees in response to it. It also reflects developments – in both the law and technology – since then.

2.190 At paragraph 2.125 above, rather than focusing on particular aspects of electronic wills,¹⁹⁰ we ask one general question about consultees' general support for electronically executed or fully electronic wills to be valid.

2.191 Assuming that electronic wills should be permitted, we ask a series of questions below to gather consultees' views as to what the best way forward might be. We ask consultees whether a new Wills Act should either include an enabling power, to be exercisable by the Secretary of State, to make provision for electronic wills within secondary legislation, or make provision for the validity of electronic wills on the face of the Act. We then ask consultees what the detail of any enabling power should be, if an enabling power is enacted. Finally, we invite consultees to share with us their views as to what requirements electronic wills should have to comply with in order to be valid, if provision is made for them on the face of the Act.

2.192 Given that we think the case has been made out for clarifying that the current formality requirements cannot be satisfied by an electronically executed or fully electronic will,¹⁹¹ and that we think that video wills have little to commend them, we do not ask questions about either.¹⁹²

Consultation Question 2.

2.193 We invite consultees' views as to whether a new Wills Act should either:

- (1) include an enabling power, exercisable by the Secretary of State, for secondary legislation to make provisions that would permit electronically executed wills or fully electronic wills that complied with the secondary legislation to be recognised as valid, or
- (2) allow for and outline the requirements for electronic wills to be valid on the face of the Act.

¹⁹⁰ As in Consultation Paper, Consultation Questions 32 and 33.

¹⁹¹ We are therefore not asking a question equivalent to Consultation Paper, Consultation Question 31.

¹⁹² We are therefore not asking a question equivalent to Consultation Paper, Consultation Question 34.

Consultation Question 3.

2.194 We invite consultees' views as to whether an enabling power, if enacted, should:

- (1) be neutral as to the form that electronically executed wills or fully electronic wills should take;
- (2) ensure that the requirements imposed for an electronically executed will or fully electronic will, as the case may be, are able to fulfil the functions served by the current formality requirements to at least the equivalent degree of paper wills executed with a handwritten signature and in person;
- (3) require the Secretary of State to obtain the advice of a committee on electronic wills and/or to consult;
- (4) require the draft of the secondary legislation to be laid before and approved by resolution of each House of Parliament; and
- (5) enable the Secretary of State to make provision to address issues that might arise where electronic wills and paper-based wills co-exist (such as where a paper will is amended by an electronic codicil or *vice versa*) and/or to mirror or modify elements of the existing law in an electronic wills context (for example, in relation to revocation by destruction).

Consultation Question 4.

2.195 We invite consultees' views about what the formality requirements should be for electronic wills to be valid, if provision is made for their validity on the face of a new Wills Act.

Chapter 3: Revocation by marriage or civil partnership

INTRODUCTION

- 3.1 By its nature, a will is revocable by the testator until their death. A testator can revoke their will by another will or codicil, by a written intention to revoke, or by destruction.¹ Under the terms of the Wills Act 1837, a will is also revoked by a subsequent marriage or civil partnership. It is this last type of revocation that we want to revisit in this Supplementary Consultation Paper.
- 3.2 We think this issue warrants a fresh look in the light of increasing concerns about what are often called “predatory marriages”. A predatory marriage is one where a person marries someone, often someone who is elderly or who lacks the mental capacity to marry, as a form of financial abuse. They might marry an elderly person in order to inherit from them, which, unfortunately, is facilitated by the rule that a marriage revokes a will, together with the intestacy provisions.
- 3.3 This issue seems to arise most often in relation to marriage, but it can also arise in relation to civil partnership, given that forming a civil partnership also revokes any pre-existing will.²
- 3.4 Although the Consultation Paper discussed the revocation of a will by marriage, we did not specifically consider the risk of predatory marriages, which is now more widely known and understood.³ We are interested in gathering evidence on the prevalence of predatory marriage and are keen to hear whether consultees’ views about revocation of a will by marriage or civil partnership have changed in the light of this concern.

THE LAW

- 3.5 As we explained in the Consultation Paper in 2017, if a person has an existing will, that will is automatically revoked if they get married or form a civil partnership, by virtue of section 18 (in the case of a marriage) and section 18B (in the case of a civil partnership) of the Wills Act 1837. This rule is unique. As section 19 of the Wills Act makes clear, no other change in the testator’s circumstances – such as the birth of a child – functions to revoke a will.⁴

¹ See Consultation Paper, Ch 11.

² See eg *WU v BU* [2021] EWCOP 54, [2022] COPLR 46.

³ We did however note it in our discussion of undue influence: Consultation Paper, para 7.95.

⁴ Consultation Paper, paras 11.38 to 11.41. Divorce or dissolution of a civil partnership also does not revoke a will; however, from the time of the divorce or dissolution, the testator’s former spouse or civil partner is treated as having predeceased the testator for the purpose of both the appointment of executors and trustees and the inheritance of property under the will: Wills Act 1837, ss 18A and 18C.

- 3.6 There are certain narrow exceptions to this rule.⁵ A marriage or civil partnership does not revoke a previous will⁶ where the will is expressed to have been made in contemplation of marriage or civil partnership to the specific person the testator married or formed a civil partnership with, and it is clear from the drafting of the will that it should not be revoked.⁷ A subsequent marriage or civil partnership will also not revoke an exercise of a power of appointment in certain circumstances.⁸
- 3.7 Where a will is revoked by a marriage or civil partnership, in the absence of the person making a new will, the intestacy rules will apply. Under the intestacy rules, the person's spouse or civil partner is likely to receive the majority of their estate, if not their entire estate. Where the person dies without any children (or other direct descendants), the spouse or civil partner receives the entire estate; where the person has children (or other direct descendants) the spouse or civil partner receives a fixed net sum (currently £322,000) and half of any remainder, with the other half going to the deceased's children (or other direct descendants).⁹ Moreover, on intestacy, the spouse or civil partner will have the authority to make funeral arrangements and decide whether the person's body should be buried or cremated, and where it should be interred.¹⁰

THE CONSULTATION

- 3.8 We explained in the Consultation Paper that the general rule that a marriage¹¹ revokes a will has not been reconsidered in any detail since the enactment of the Wills Act 1837. We considered that the rule could be regarded as inappropriate and reflective of outdated societal norms, for two reasons. First, we said that its effect would be to favour second families over children from a previous or other beneficiaries, which could ignore any ongoing moral or financial obligations the testator felt from events prior to the marriage. Secondly, we said it could frustrate the wishes of people for whom marriage is not a significant change, including many couples who cohabit before they marry.¹²

⁵ The High Court recently held that there was no real prospect of success in the argument that the court has the power to refuse to treat a marriage as valid on the grounds of public policy, to avoid the application of this rule. The court said that "section 18 does not provide that it only takes effect if it is just for it to do so or if there are no public policy reasons for it not to do so – though Parliament could have qualified its effect": *Lattimer v Karamanoli* [2023] EWHC 1524 (Ch) at [98].

⁶ Or specific provisions in the previous will: see Wills Act 1837, ss 18(4) and 18(B)(4) to (6).

⁷ Wills Act 1837, ss 18(3) and 18B(3). A conversion from a civil partnership into a marriage will also not revoke an existing will: s 18(5).

⁸ Wills Act 1837, ss 18(2) and 18B(2). See Consultation Paper, paras 11.44 to 11.46. See the glossary for the meaning of "power of appointment".

⁹ Administration of Estates Act 1925, s 46 and sch 1A; Administration of Estates Act 1925 (Fixed Net Sum) Order 2023 (SI 2023 No 758), art 2.

¹⁰ H Conway, *The Law and the Dead* (2016) pp 62 to 63; Non-Contentious Probate Rules 1987 (SI 1987 No 2024), r 22.

¹¹ In the Consultation Paper, we noted that the formation of a civil partnership also revokes a will, but generally referred to the rule in the context of marriage. Our summary of the Consultation Paper, and our summary of consultees' responses, reflects this focus on the operation of the rule in the context of marriage.

¹² Consultation Paper, paras 11.47 to 11.49.

- 3.9 On the side of the rule's retention, we explained that the operation of the rule, together with the intestacy rules, provides strong protection for the surviving spouse when the testator has not made another will to provide for them.¹³ While we noted that the surviving spouse would nonetheless be able to make an application for family provision from the deceased's estate under the Inheritance (Provision for Family and Dependents) Act 1975¹⁴ (the "1975 Act"), this protection comes at the emotional and financial costs of bringing a claim under the 1975 Act. We also explained that changing the rule could cause problems where people were unaware of the change and rely on the operation of the rule: for example, if a person marries but does not consider revoking their existing will or making a new will to make provision for a new spouse, assuming that the marriage would have revoked their will and the intestacy provisions will apply.¹⁵
- 3.10 The issue raises the policy question of the level of protection to be afforded to a surviving spouse. Where the testator does not make a new will, we summarised the essential question as:
- whether greater overall fairness is achieved by application of the intestacy rules and the 1975 Act (with the earlier will having been revoked), or by applying the earlier will together with the 1975 Act.¹⁶
- 3.11 Because we found it difficult to form a view on this issue, we did not make a provisional proposal. Instead, we asked an open question of consultees, asking for any evidence they have about the level of public awareness of the existing rule that a marriage revokes a will, and whether consultees thought the rule should be retained.¹⁷
- 3.12 We also asked consultees whether testators should be able to opt out of the rule, by clearly stating in their will that they do not wish for it to be revoked on any subsequent marriage.¹⁸ Not requiring contemplation of a marriage to a specific person would liberalise the current exception. We thought this approach would strengthen testamentary freedom and increase awareness of the rule that marriage revokes a will; however, we also thought it would put testators in the position of making decisions under conditions of uncertainty, which might undermine the ability of a testator to make a real choice.¹⁹
- 3.13 Finally, while not expressly considering predatory marriages, we did consider the situation where a testator has the necessary capacity to marry but lacks the necessary capacity to make a new will. There is no single test for capacity under the law: the test for capacity to marry is different, and has a lower threshold, than the test for capacity

¹³ Consultation Paper, para 11.50.

¹⁴ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1)(a).

¹⁵ Consultation Paper, para 11.51.

¹⁶ Consultation Paper, para 11.53.

¹⁷ Consultation Paper, Consultation Question 59. See Consultation Paper, para 11.55.

¹⁸ Consultation Paper, Consultation Question 60. See Consultation Paper, para 11.58.

¹⁹ Consultation Paper, paras 11.56 to 11.58.

to make a will.²⁰ Accordingly, a person may have capacity to marry, and do so, resulting in their will being revoked, but lack capacity to make a new, valid will. In some sense, however, the test for capacity to marry is irrelevant in this context,²¹ as even where the person lacks capacity to marry but nevertheless does so, the effect is the same: the marriage – a voidable marriage²² – revokes any pre-existing will, in the same way as a valid marriage.²³ In both of these situations, unless a statutory will is obtained for the person, the intestacy provisions will apply when they die.²⁴

- 3.14 We therefore provisionally proposed that if the general rule is retained, so that marriage continues to revoke a will, a specific exception should apply. Under the exception, a will would not be revoked by marriage where, at the time of the marriage, the testator lacks testamentary capacity and is unlikely to recover that capacity.²⁵

CONSULTATION RESPONSES

Retention of the general rule

- 3.15 In response to our consultation question on this issue, few consultees supported abolition of the rule that a marriage revokes a will: only a small percentage were in favour of abolition, with the majority in favour of retention of the rule.²⁶ This support for the continuation of the rule was in spite of the fact that a substantial majority of consultees²⁷ thought either that public awareness of the rule was low or that methods should be used to increase public awareness if the rule were retained. Very few²⁸ said that they thought that the public was generally aware of the rule.²⁹

²⁰ On the capacity to marry, see *Sheffield City Council v E (An Alleged Patient)* [2004] EWHC 2808 (Fam), [2005] Fam 32. The precise scope of the test for capacity to form a civil partnership is unclear but it is likely to be similar to the test for capacity to marry: see *WU v BU* [2021] EWCOP 54, [2022] COPLR 46 at [47] to [50] and [102].

²¹ But is of primary importance in the context of weddings law: we explain our project on weddings law at para 3.24 below.

²² A voidable marriage arises when one or both of the parties lacked the capacity to marry, when a party's consent was vitiated by duress or mistake, or by other factors affecting the parties or their relationship but not their compliance with the formality requirements to enter a marriage: Matrimonial Causes Act 1973, s 12. This is also the case for civil partnerships: Civil Partnership Act, s 50.

²³ See Consultation Paper, para 11.40. However, a void marriage or civil partnership does not revoke a will. A void marriage (or civil partnership) arises where one or both of the parties knowingly and wilfully failed to comply with certain key formalities: see *Getting Married: A Consultation Paper on Weddings Law* (2020) Law Commission Consultation Paper No 247, para 10.17.

²⁴ Consultation Paper, paras 11.59 to 11.62.

²⁵ Consultation Paper, Consultation Question 61. See Consultation Paper, para 11.62.

²⁶ Consultation Paper, Consultation Question 59. Approximately 60% of consultees were in favour of retention of the rule, and 20% in favour of abolition.

²⁷ More than 70%.

²⁸ Less than 10%.

²⁹ Of note, Professor Daniel Monk noted the results of a 2014 project by the Socio-Legal Studies Association on will-writing which involved interviews with ten solicitors, who between them had drafted approximately 13,000 wills over their combined years of practice. All ten solicitors agreed that clients had no awareness of the rule. The project also found that, with increasing specialisation within the profession, awareness among lawyers may have also decreased.

- 3.16 Consultees who were in favour of retaining the rule at the time of the consultation often supported the rule's prioritisation of the interests of the surviving spouse, who is protected by the intestacy rules and is therefore spared from needing to claim under the 1975 Act for family provision. Others thought that the combined effect of the rule and the intestacy provisions would be in line with testators' intentions, on the basis that people would generally want their new spouse to inherit the majority or entirety of their estate. Some also thought the rule was justified by the legal importance of marriage.
- 3.17 The minority of consultees who were in favour of abolition thought that the rule could frustrate a testator's intentions. Some said the testator should be free to decide if and when they want to change their will, rather than have a change imposed on them. Others gave examples where the testator's wishes would be frustrated because they were unaware of the rule, so that people they would want to benefit under their will would not do so. Several consultees thought that the rule could operate contrary to the intentions of long-term cohabitants who later marry. Some consultees thought the rule was outdated. One consultee said that purchasing property before marriage is more common than in the past, and people often make wills when they buy property, suggesting that the rule may defeat a testator's intentions more frequently than previously. Some noted that surviving spouses who did not inherit through intestacy in the absence of an existing will being revoked would, nevertheless, be able to make a claim under the 1975 Act for family provision. A few consultees also commented that, if the will is revoked, beneficiaries under the will might be less likely than the surviving spouse to be able to bring a successful family provision claim.
- 3.18 Only two consultees – who both favoured abolition of the rule – mentioned predatory marriages: one noted that it was aware of several cases perpetrated by professional carers; and the other commented that the rule incentivises predatory marriage.

Widening the exception to the rule: a future marriage

- 3.19 The majority of consultees were also not in favour of empowering testators to prescribe whether a will (or particular dispositions in it) should be revoked by a future (uncontemplated) marriage.³⁰ They did so for similar reasons that we raised in the Consultation Paper: while this extension of the current exception would arguably increase testamentary freedom, and might be particularly well-suited for cohabitants, it would require people to make a decision in too much of a vacuum as to the consequences it would ultimately have. Consultees were also concerned that such a reform would generally increase the difficulty and complexity of will-making.

A new exception: where the person lacks testamentary capacity

- 3.20 A bare majority of consultees did, however, agree with our provisional proposal that a marriage entered into where the testator lacks testamentary capacity, and is unlikely to recover that capacity, should not revoke a will.³¹
- 3.21 Some in favour thought that it would act as a safeguard to vulnerable testators, with some consultees considering or appearing to consider the circumstances of a

³⁰ Consultation Paper, Consultation Question 60. Approximately 40% agreed, and 55% disagreed.

³¹ Consultation Paper, Consultation Question 61. Approximately 55% agreed.

predatory marriage. Some thought that it would help to address the situation that a voidable marriage, where a person lacks capacity to marry, nevertheless revokes a will, on the basis that a person who lacks capacity to marry would probably also lack capacity to make a will.

- 3.22 Consultees opposed to the provisional proposal outlined a variety of arguments. Some thought that the legal threshold for capacity to marry should be increased to create parity between capacity to marry and testamentary capacity. One consultee observed that, by treating disabled persons differently to non-disabled people, this proposal would constitute direct discrimination under the UN Convention on the Rights of Persons with Disabilities; others commented that disabled or vulnerable testators may nevertheless wish their spouse to be the primary beneficiary of their estate. And a number of consultees were concerned that the provisional proposal could be unworkable in practice, on the basis that invoking the exception would require evidence of the person's testamentary capacity at the time they were getting married, when testamentary capacity, not at issue at the time, would not be assessed.

DEVELOPMENTS SINCE THE CONSULTATION PAPER

- 3.23 At the time of the Consultation Paper, awareness, and perhaps the incidence, of predatory marriages seemed low. Our provisional proposal to make an exception for cases where the person marrying, or entering into a civil partnership, lacked testamentary capacity was intended to provide protection to older, vulnerable testators. But our understanding of the risk of this situation was limited.
- 3.24 As explained at paragraph 1.8 above, we paused completion of the wills project to undertake a review of the law concerning weddings. Throughout our weddings project, which ran from 2019 to 2022, consultees raised concerns with us about predatory marriages. It was an issue that attracted increasing interest during the course of that project: it was covered in the media³² and in questions in Parliament.³³ As we explained in our report, *Celebrating Marriage: A New Weddings Law*:

Concerns have centred around circumstances where elderly people, including those with dementia, have married without the knowledge of their family. These weddings have, understandably, given rise to significant concerns of elder abuse, including financial abuse.³⁴

In the weddings project, our focus was on the issue of a person marrying when they lacked the required capacity to do so, or when they were being coerced into marrying.³⁵ Both of these situations amount to forced marriage, which is an existing

³² See eg Editorial, "The Guardian view on predatory marriage: new safeguards are needed" (3 October 2021) *The Guardian*, <https://www.theguardian.com/commentisfree/2021/oct/03/the-guardian-view-on-predatory-marriage-new-safeguards-are-needed> (last visited 30 August 2023).

³³ See eg Ministry of Justice: Forced Marriage Written Answer (HC) 92940 (22 December 2021) (James Cartlidge); Ministry of Justice: Wills Written Answer (HC) 115814 (19 November 2020) (Alex Chalk MP); Ministry of Justice: Forced Marriage Written Answer (HL) HL6614 (14 July 2020) (Lord Keen).

³⁴ *Celebrating Marriage: A New Weddings Law* (2022) Law Com No 408, para 1.73.

³⁵ The weddings project considered how and where couples can marry in England and Wales; the Terms of Reference provided that it would be for the Government to consider the detail of making corresponding provision where appropriate for civil partnership ceremonies.

criminal offence.³⁶ As the weddings project focused on the formalities necessary to be legally married, reviewing the capacity required to marry was outside the project's terms of reference. However, concerns around forced marriage were central in our recommendations to make the preliminaries process (the process for giving notice of intention to marry) more robust and to put specific duties on officiants to ensure that parties to a marriage have capacity to marry. These recommendations would enhance the protection against predatory marriages in those situations where a person has lost capacity to marry, and so the marriage is a forced marriage.

3.25 However, our recommendations in relation to weddings law will not provide any assistance where a person does in fact have capacity to marry or form a civil partnership, but has lost testamentary capacity, and there are concerns in respect of predatory marriage. Nor will our recommendations assist in a case where, despite the protections put in place, a person gets married or forms a civil partnership despite lacking the capacity to do so. Our recommendations in respect of weddings law will not assist in these cases because that project could not address concerns about the consequences of a predatory marriage on an existing will. But the effect of marriage or civil partnership on a will falls squarely within the scope of our wills project.

3.26 Daphne Franks, of Predatory Marriage UK, has campaigned to raise the profile of the issue of predatory marriage, based on her own experiences.³⁷ The press has reported that other families have reported similar experiences.³⁸ The typical circumstances in which a predatory marriage comes about have been described as follows:

When a person is faced with the upsetting news of a diagnosis of dementia, or other degenerative illness affecting the brain, they will often be keen to maintain their independence for as long as possible. This means that they are often unwilling to accept the care services that they may need as well as familial support which will also protect them and keep them safe from being targeted. Many elderly people become isolated as they are unable to carry out the daily activities they once enjoyed. Alongside this, the well documented limited availability of social care services increases the scope for an opportunist fraudster to befriend such individuals. A common trend is for the vulnerable person to be alienated from their other relatives and as they are then married in secret the families do not become aware of the marriage until after their loved one has passed away. ...³⁹

3.27 The effect can be devastating on the families of the deceased. In addition to the testator's will being revoked, and family members other than the new spouse or civil partner being excluded from the estate, the family can also be denied any involvement in decisions about their loved one's funeral or what happens with their remains. And

³⁶ Anti-social Behaviour, Crime and Policing Act 2014, s 121.

³⁷ Dan Gilbert, "In a bind: the legal future of wills and weddings" (November 2022), <https://www.lawsociety.org.uk/topics/private-client/in-a-bind-the-legal-future-of-wills-and-weddings> (last visited 30 August 2023); S Marriott, "Why is it so much easier to marry than to change a will?" (27 July 2023) *The Times*.

³⁸ See eg You Magazine, "Predatory marriages: To love, honour ... and steal everything you own" (November 2021), <https://www.you.co.uk/predatory-marriages-to-love-honour-and-steal-everything-you-own/> (last visited 30 August 2023).

³⁹ Jemma Garside, "Exploring predatory marriages" [February 2022] *Family Law* 200 at 200.

this may happen when the testator or their family members had no idea that a marriage or civil partnership would revoke an otherwise valid will.

- 3.28 However, not all cases are straightforward. The law protects the rights of people to marry or form a civil partnership. The threshold for capacity to marry (or form a civil partnership), as decided by the courts, is relatively low, as too high a level would “operate as an unfair, unnecessary and indeed discriminatory bar against the mentally disabled”.⁴⁰ The mere fact a person has been diagnosed with dementia, or has any other mental impairment, does not necessarily mean that they lack capacity to marry or form a civil partnership. And so long as a person has capacity, the wisdom of the decision is a matter for them. The decision to marry or form a civil partnership late in life, even when others, such as adult children, disagree, is a decision for the older person to make.⁴¹
- 3.29 However, we understand from stakeholders that some of the people wishing to commit financial abuse against vulnerable or elderly people are aware of the rule that a marriage or civil partnership revokes a will, and that the rule can provide a financial incentive to marry or form a civil partnership.⁴² The possibility that the operation of the rule could be a motivation for predatory marriages, including forced marriages (which may involve other forms of abuse, such as coercive control),⁴³ on vulnerable people is very troubling. As explained in one textbook, “people may not be saved from their own foolishness but [should] be protected from being victimised by other people”.⁴⁴

RE-CONSIDERING THE ISSUE

- 3.30 In the light of increasing concerns about predatory marriage,⁴⁵ we wish to gather evidence of its prevalence, and re-engage with consultees on the question whether marriage and civil partnership should revoke a will. As we explain above, few consultees responding to the Consultation Paper expressly considered the issue of predatory marriage in their response. Few also supported changes to the rule that a marriage or civil partnership revokes a will. We therefore outline our current thinking on this issue and again invite consultees’ views.

⁴⁰ *Sheffield City Council v E (An Alleged Patient)* [2004] EWHC 2808 (Fam), [2005] Fam 326 at [144]. It is likely that the threshold for capacity to form a civil partnership is at a similarly low level: see *WU v BU* [2021] EWCOP 54, [2022] COPLR 46 at [47] to [50] and [102].

⁴¹ However, in *WU v BU* [2021] EWCOP 54, [2022] COPLR 46, although X, who had vascular dementia, had capacity, N was found to be exercising coercive control over her, so the Court of Protection ordered an injunction under its inherent jurisdiction, as well as a forced marriage or civil partnership protection order to prevent a civil partnership from taking place.

⁴² See also You Magazine, “Predatory marriages: To love, honour ... and steal everything you own” (November 2021), <https://www.you.co.uk/predatory-marriages-to-love-honour-and-steal-everything-you-own/> (last visited 30 August 2023).

⁴³ See eg *WU v BU* [2021] EWCOP 54, [2022] COPLR 46.

⁴⁴ G R Ashton, *Court of Protection Practice 2016* (1st ed 2016) para 1.36 (this statement is not included in the most recent edition).

⁴⁵ See paras 3.24 to 3.26 above.

Discussion

- 3.31 We are now inclined to the view that the concerns with the rule cannot be resolved by expanding the existing exception to allow testators, in their will, to opt out of the rule in relation to un contemplated marriages or civil partnerships, or by making a new exception for people who lack testamentary capacity at the time of a marriage or civil partnership. Instead, we think that the question is whether a marriage or civil partnership should, or should not, revoke a will. We invite consultees to share their views with us on this question.
- 3.32 With the benefit of our work on weddings law, we agree with those consultees and with Predatory Marriage UK⁴⁶ that a specific exception to the current rule for those who lack testamentary capacity at the time of their marriage or civil partnership would not be workable. When a person is married or enters into a civil partnership, the person mainly responsible for assessing their capacity to marry is the person to whom they give notice, a registration officer or (in the case of an Anglican preliminaries) a member of the Anglican clergy.⁴⁷ It is impractical to expect that, in relation to every person getting married or entering into a civil partnership, the registration officer could also assess, and keep contemporaneous evidence of, the person's capacity to make a will. It is a different legal test, requiring the person to be able to understand different things. It would also be unrealistic to expect the registration officer to have the necessary contextual information about the person's family (or other potential beneficiaries) and estate necessary to form a view of the person's capacity to make a will. We think the primary focus for registration officers must be on assessing capacity to marry or form a civil partnership. In short, we think that it would be very difficult to establish when this exception would apply. It would therefore be difficult in many cases for a person or their family to know with any certainty whether their will had been revoked by operation of law.
- 3.33 We are also unconvinced that widening the existing exception that wills expressly made in contemplation of the specific marriage or civil partnership to include future un contemplated marriages or civil partnerships would help to address either the issue of predatory marriages or the general lack of public knowledge about the general rule.⁴⁸
- 3.34 While allowing testators to prescribe, in their wills, that the will should not be revoked on a future un contemplated marriage or civil partnership could be valuable in some circumstances, it does not seem apt as a means of providing protection against predatory marriage. Protection from predatory marriage or its consequences should not depend on whether an earlier will happened to anticipate the possibility of a future marriage or civil partnership, or what a testator considered should be the effect of a

⁴⁶ Dan Gilbert, "In a bind: the legal future of wills and weddings" (November 2022), <https://www.lawsociety.org.uk/topics/private-client/in-a-bind-the-legal-future-of-wills-and-weddings> (last visited 30 August 2023).

⁴⁷ The forms of Anglican preliminaries are more complex, and the responsibilities on clergy may not be the same as those on registration officers. In this context it is particularly noteworthy that Anglican preliminaries do not currently require each of the couple to meet with a member of clergy: see *Celebrating Marriage: A New Weddings Law* (2022) Law Com No 408, para 3.283 and following. For simplicity, we confine the discussion in the text to registration officers.

⁴⁸ Consultation Paper, Consultation Question 60.

future marriage or civil partnership. Whether a person contemplates a future marriage or civil partnership at the time they make their will is likely to depend on a variety of factors, including the stage of life they have reached when they do so. Further, a person is unlikely to contemplate that a future relationship might be a predatory one.

- 3.35 Allowing testators to prescribe that their wills should not be revoked on a future marriage or civil partnership, un contemplated or not, also depends both on knowledge of the general rule and the ability to make express provision for the rule not to apply. Those who make wills without legal advice might be particularly unlikely to know about either.
- 3.36 Our current view is that, rather than attempting to resolve problems through exceptions to the general rule, the rule itself must be more closely considered. The fundamental question is whether a marriage (or civil partnership) should revoke a will. The majority of consultees were not in favour of abolition of the rule in 2017; however, we wonder if their views may have changed.
- 3.37 We continue to think that the rule may be out of step with current societal norms.⁴⁹ The rule was enacted in a social and legal context very different than today's.⁵⁰ The rule also made invariable what had, until then, been a rebuttable presumption developed by the courts which had only applied after marriage and the birth of a child or children.⁵¹
- 3.38 Marriage and civil partnership are the only circumstances which operate to revoke a person's will; in every other case, it is a decision for the testator, and the testator alone. We are not sure that marriage and civil partnership, today, warrant this singular treatment.
- 3.39 Responses to the Consultation Paper suggest that the rule is not generally known by people.⁵² That means they are unaware of the need to make a new will when they get married or form a civil partnership, or, to obtain a statutory will for a person who lacks testamentary capacity. While we suggested, in the weddings project, that an online system for giving initial notice could signpost couples to further information about the legal consequences of marriage, we do not think that providing couples with information about the rule at the time of marriage or civil partnership provides a complete solution. The legal rights and responsibilities which accompany marriage and civil partnership change, so the information which the couple receive may not

⁴⁹ See Consultation Paper, para 11.47.

⁵⁰ For example, it applied primarily to men, as women's wills were revoked on marriage in any event (under section 18) and married women were generally unable to make a will (under section 8): see H Sugden, *An Essay on the Law of Wills as altered by the 1 Victoria*, c 26 (1837) pp 3, 8 to 9 and 56; L Shelford, *A Practical Treatise on the Law of Wills, as altered by The Statute 7 Will IV & 1 Vict c 26 for the Amendment of the Laws with Respect to Wills* (1838) pp 165 to 166.

⁵¹ L Shelford, *A Practical Treatise on the Law of Wills, as altered by The Statute 7 Will IV & 1 Vict c 26 for the Amendment of the Laws with Respect to Wills* (1838) pp 172 to 173.

⁵² See also research commissioned by Solicitors for the Elderly that found that only 16% of people know that marriage invalidates a will: Wrigleys Solicitors, "Half of wills in the North of England are out of date" (30 March 2022), https://www.wrigleys.co.uk/news/tax-and-estate-planning/half-of-wills-in-the-north-of-england-are-out-of-date/?utm_source=mondaq&utm_medium=syndication&utm_term=Family-and-Matrimonial&utm_content=articleoriginal&utm_campaign=article (last visited 30 August 2023).

remain true. And it would only help to inform couples marrying or forming a civil partnership going forward, and those who do so in England and Wales. So testators' intentions might still be defeated due to ignorance of the rule, which is worrying.

- 3.40 Most concerning, however, is the apparent rise in predatory marriages,⁵³ and the role that the general rule might be playing in them. Our considerations in the Consultation Paper focused on the balance of fairness between first and second families, between adult children and surviving spouses or civil partners.⁵⁴ We did not consider marriages and civil partnerships motivated by financial abuse, which might not legitimately be seen, or experienced by the testator, as genuine family relationships at all.
- 3.41 We also did not consider the consequence that the rule has on decisions in relation to the testator's remains. The law does not allow individuals to make legally binding decisions about what happens to them when they die.⁵⁵ If the testator dies with a valid will, the executor will have the legal authority to make the arrangements for the deceased's funeral and decide whether the deceased should be buried or cremated, and if they are buried or their ashes interred or scattered, where. Accordingly, testators often appoint executors who they trust to carry out their wishes. But when a marriage or civil partnership revokes a will, the appointment of the executor is also revoked. On the application of the intestacy rules, the new spouse or civil partner will have decision-making authority, and can exclude the involvement of the rest of the person's family.⁵⁶ It is not difficult to imagine the devastating impact this can have.
- 3.42 The operation of family provision claims under the 1975 Act is important to consider in detail, to understand how the 1975 Act and the rule interact in practice.
- 3.43 The 1975 Act allows persons with specific relationships to the deceased to apply to the court on the grounds that either the deceased's will and/or the operation of the intestacy rules does not make reasonable financial provision for them.⁵⁷ Spouses and civil partners benefit from favourable treatment under the 1975 Act as compared to other types of potential claimant: surviving spouses and civil partners can apply for such provision that would be reasonable in the circumstances for them to receive, a

⁵³ See paras 3.24 to 3.26 above.

⁵⁴ It is worth noting that abolition of the rule will not benefit former spouses or civil partners, due to the Wills Act 1837, ss 18A and 18C: those provisions provide that from the time of the divorce or dissolution, the former spouse or civil partner is treated as having pre-deceased the testator, in relation to appointments of executors and trustees and inheritance of property under the will.

⁵⁵ In our 13th Programme of Law Reform, we identified that our now current project on Burial, Cremation and New Funerary Methods would seek to provide greater certainty that a person's wishes in respect of what happens to their body following death are respected, whilst ensuring that the public interest in this sensitive area of law is properly respected: see <https://www.lawcom.gov.uk/project/a-modern-framework-for-disposing-of-the-dead/>.

⁵⁶ H Conway, *The Law and the Dead* (2016) pp 62 to 63; Non-Contentious Probate Rules 1987 (SI 1987 No 2024), rr 20 and 22. However, as we explained in the Consultation Paper, under s 116 of the Senior Courts Act 1981 the court can appoint an administrator who would not be given priority under the probate rules where "special circumstances" make it "necessary or expedient" to do so: Consultation Paper, para 14.24.

⁵⁷ Specifically, their spouse or civil partner; their former spouse or civil partner; their cohabitant; their children; person they treated as a child of the family; and a person they wholly or partly maintained: Inheritance (Provision for Family and Dependents) Act 1975, s 1(1). See *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (21st and 9th eds 2018) para 53-01.

standard which includes consideration of the provision that might have been expected on divorce; all other applicants may only apply for such financial provision reasonable for their maintenance.⁵⁸ In effect, spouses and civil partners can apply for a “share of the family assets”, whereas adult children “cannot apply for a share of the estate simply because of the relationship” but must show need.⁵⁹

- 3.44 Accordingly, adult children attempting a family provision claim under the 1975 Act are unlikely to meet with success, unless they were financially dependent on the parent or are otherwise unable to support themselves, and may often have to show a moral claim.⁶⁰ The same will not be true of surviving spouses and civil partners.
- 3.45 The current law therefore gives double protection to surviving spouses and civil partners: they benefit from the rule that marriage or civil partnership revokes a will together with the intestacy rules, and are also more likely to succeed than other potential claimants in a family provision claim under the 1975 Act. But the current law provides limited or no protection to adult children and other beneficiaries under pre-existing wills, in the circumstances where the testator marries or forms a civil partnership and does not remake their will.
- 3.46 Accordingly, abolishing the rule could be seen as rebalancing the interests of various potential beneficiaries. Although doing so would disadvantage spouses and civil partners, as they would no longer be able to rely on the intestacy provisions, they are, and would remain, protected by the 1975 Act.
- 3.47 We therefore agree with one consultee (who favoured retention of the rule) that abolition of the rule that a marriage revokes a will may increase the number of family provision claims. Without the operation of the intestacy rules, spouses excluded under pre-existing wills (where the testator does not make another will after marriage) might be more likely than others to claim for family provision out of the deceased’s estate when they die, because their claims are more likely to be successful. However, any increase in litigation may only be modest, as the possibility of a successful claim under the 1975 Act may be an influential factor in negotiations and settlements out of court.⁶¹

Consultation questions

- 3.48 We are interested to hear whether consultees have any evidence on the prevalence of predatory marriage and would like to hear consultees’ views as to whether the rule that a person’s will is revoked by a subsequent marriage or civil partnership should continue.

⁵⁸ Inheritance (Provision for Family and Dependants) Act 1975, s 1(2).

⁵⁹ See B Sloan, *Borkowski’s Law of Succession* (4th ed 2020) pp 324 and 331, respectively.

⁶⁰ See B Sloan, *Borkowski’s Law of Succession* (4th ed 2020) p 337.

⁶¹ As noted in B Sloan, *Borkowski’s Law of Succession* (4th ed 2020) p 287.

Consultation Question 5.

- 3.49 We invite consultees' views on the prevalence of predatory marriage, and welcome any evidence they can provide.

Consultation Question 6.

- 3.50 We invite consultees' views as to whether the rule that marriage and civil partnership automatically revokes a previous will should be abolished or retained.

Chapter 4: Impact of the possible reforms

- 4.1 In the Consultation Paper, we asked consultees to tell us about their experiences of the impact, financial or otherwise, of the preparation, drafting and execution of wills, and disputes over wills following the testator's death.¹ We welcome any further evidence consultees would like to share with us about the impact of the current law, both in relation to the issues that we cover in this Supplementary Consultation Paper, but also any new evidence that they have not yet shared with us about the proposals we made in the Consultation Paper.

Consultation Question 7.

- 4.2 We invite consultees to share with us any evidence or data they have about the impact of possible reforms considered in this Supplementary Consultation Paper and the 2017 Consultation Paper.
- 4.3 This Supplementary Consultation Paper also affords us an opportunity to ask consultees for any views or evidence they have about the potential impact of our proposed reforms on particular groups. In order to assess the benefits of reform, we must consider whether potential reforms could have disparate impacts on particular groups, with particular care as to whether they might have disparate impacts on the basis of characteristics protected under the Equality Act 2010. A disparate impact could be a disproportionately negative one, but equally could be a disproportionately positive one.
- 4.4 The topics that we consider in this Supplementary Consultation Paper might be ones that raise specific considerations for different groups: for example, electronic wills could increase the accessibility of will making to persons with particular types of disabilities. However, many of the topics that we considered in the Consultation Paper which we are not re-visiting here could also have a specific impact on a group of people: for example, the rules governing capacity might disproportionately affect elderly testators or testators with intellectual disabilities.
- 4.5 We welcome any information about the potential equality impact of possible reforms considered in this project that consultees can share.

¹ Consultation Paper, Consultation Question 2.

Consultation Question 8.

- 4.6 We invite consultees to share with us any evidence or data to suggest that possible reforms, considered in this Supplementary Consultation Paper and the 2017 Consultation Paper, could result in advantages or disadvantages to particular groups or based on particular characteristics (with particular attention to age, disability, transgender identity, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Chapter 5: Consultation Questions

Consultation Question 1.

- 5.1 We invite consultees' views as to whether provision should be made so that electronic wills can be valid under the law.

Paragraph 2.125

Consultation Question 2.

- 5.2 We invite consultees' views as to whether a new Wills Act should either:
- (1) include an enabling power, exercisable by the Secretary of State, for secondary legislation to make provisions that would permit electronically executed wills or fully electronic wills that complied with the secondary legislation to be recognised as valid, or
 - (2) allow for and outline the requirements for electronic wills to be valid on the face of the Act.

Paragraph 2.193

Consultation Question 3.

5.3 We invite consultees' views as to whether an enabling power, if enacted, should:

- (1) be neutral as to the form that electronically executed wills or fully electronic wills should take;
- (2) ensure that the requirements imposed for an electronically executed will or fully electronic will, as the case may be, are able to fulfil the functions served by the current formality requirements to at least the equivalent degree of paper wills executed with a handwritten signature and in person;
- (3) require the Secretary of State to obtain the advice of a committee on electronic wills and/or to consult;
- (4) require the draft of the secondary legislation to be laid before and approved by resolution of each House of Parliament; and
- (5) enable the Secretary of State to make provision to address issues that might arise where electronic wills and paper-based wills co-exist (such as where a paper will is amended by an electronic codicil or vice versa) and/or to mirror or modify elements of the existing law in an electronic wills context (for example, in relation to revocation by destruction).

Paragraph 2.194

Consultation Question 4.

5.4 We invite consultees' views about what the formality requirements should be for electronic wills to be valid, if provision is made for their validity on the face of a new Wills Act.

Paragraph 2.195

Consultation Question 5.

5.5 We invite consultees' views on the prevalence of predatory marriage, and welcome any evidence they can provide.

Paragraph 3.49

Consultation Question 6.

- 5.6 We invite consultees' views as to whether the rule that marriage and civil partnership automatically revokes a previous will should be abolished or retained.

Paragraph 3.50

Consultation Question 7.

- 5.7 We invite consultees to share with us any evidence or data they have about the impact of possible reforms considered in this Supplementary Consultation Paper and the 2017 Consultation Paper.

Paragraph 4.2

Consultation Question 8.

- 5.8 We invite consultees to share with us any evidence or data to suggest that possible reforms, considered in this Supplementary Consultation Paper and the 2017 Consultation Paper, could result in advantages or disadvantages to particular groups or based on particular characteristics (with particular attention to age, disability, transgender identity, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Paragraph 4.6