

# PROOF VERSION ONLY

## STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

### LEGISLATION COMMITTEE

#### **Inquiry into the Wills Amendment (International Wills) Bill 2011**

Melbourne — 30 May 2012

#### Members

Ms G. Crozier  
Mr N. Elasmarr  
Ms C. Hartland  
Ms J. Mikakos

Mr D. O'Brien  
Mr E. O'Donohue  
Mrs D. Petrovich  
Mr M. Viney

Chair: Mr E. O'Donohue  
Deputy Chair: Mr M. Viney

#### Staff

Secretary: Mr R. Willis  
Research officer: Ms L. Kazalac

#### Witnesses

Ms K. Wilson, chair, and  
Mr I. Morrison, former chair, succession law committee, Law Institute of Victoria.

**Necessary corrections to be notified to  
secretary of committee**

**The CHAIR** — Welcome, Mr Morrison and Ms Wilson. I declare open the Legislative Council Legal and Social Issues Legislation Committee public hearing. Today's hearing is in relation to the Wills Amendment (International Wills) Bill 2011. The bill is currently before the Legislative Council, having passed the Assembly in March this year. The committee has been asked to examine the bill and report back to the Council by 20 June 2012.

As I say, I welcome both Ms Wilson and Mr Morrison from the Law Institute of Victoria. All evidence at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council's standing orders. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same comments, they may not be so protected by this privilege. All evidence is being recorded. You will be provided with proof versions of the transcript in the next week. Transcripts will ultimately be made public and posted on the committee's website.

I understand you have some opening remarks, which we would welcome, and a presentation, which is being copied. But we would welcome your initial remarks on the bill. I suppose there is quite a long background to this legislation, so I welcome your comments, and then we will have some questions from committee members. Over to you.

**Mr MORRISON** — If it is all right with you, we will use our first names. Kathy is the chairman of our committee, so I will let Kathy run this, and I will come in. I am a former chairman of our committee.

**Ms WILSON** — Thank you. I am the chair of the succession law committee of the institute. I am here with my colleague Ian Morrison, who is a former chair of the committee. The law institute is always pleased to assist any committee in its inquiries and in particular this inquiry into the Wills Amendment (International Wills) Bill 2011. The institute hopes that by being here we can shed some light on the legal implications of the changes proposed by the bill and to share our views about the likely practical effect of the changes based on our members' experiences as they have been advised by members of the succession law committee at the law institute.

This committee will be aware that a submission was made in 2009 to the Department of Justice. That was in response to a request for comment on the merits of Australia's accession to the convention providing a Uniform Law on the Form of an International Will. We are aware that the law institute's 2009 submission was discussed by a number of members during the second-reading debate. As was noted in the debate, the law institute provided comments in confidence to the Department of Justice in 2011, prior to the introduction of the bill.

Since its introduction to Parliament, the law institute's succession law committee has had the opportunity to fully consider the provisions of the Wills Amendment (International Wills) Bill. We can discuss our comments throughout the hearing, but in summary, the law institute supports the objectives of the bill. It notes, though, that it might have limited practical application, it may cause some confusion in the community, and the uncertainty and complexity will undermine the utility of the bill. Perhaps I will say no more on that but will wait for questions.

**The CHAIR** — If I could perhaps take you to the issue of confusion in the community; perhaps you could elaborate further. And without pre-empting what the Parliament may do, if the bill is passed, I am interested in your views on how that confusion could perhaps be mitigated or, working with the LIV and practitioners, how an understanding of the international will could be better spread throughout the legal community.

**Ms WILSON** — I think from reading the second-reading speeches it is evident that there will be some confusion around it. There were comments made about the likely believed effect of the legislation. In fact the legislation just provides for a form of will, and we are concerned that within the community people will think that if they make an international will, they can effectively dispose of their assets in accordance with our law, whereas they may be confined by the local succession laws in any other country. So, for example, in some European countries there are forced heirship laws that restrict your ability to leave part of your estate outside your immediate family. It is that concern that was being expressed earlier by the institute. It is not one that can be fixed in this legislation. It has to be weighed against the objective of the bill, and that is to provide some uniformity around the law. I see it as a balancing act.

In response to a question about how we can overcome some of the issues around that confusion, I think it will require an education campaign. Certainly the Law Institute of Victoria will conduct its own campaign about it,

its effects and the areas where it might be used both for our members and, if the opportunity arises, for the public. The law institute often does conduct public awareness campaigns as part of Law Week and in other forums where we go out to the community to explain aspects of the law relating to succession and other areas, and this would be one such area.

**Ms MIKAKOS** — Thank you for those comments. So do the law institute's original 2009 objections stand? Do you have any of those original concerns, which as I understood related to concerns around more onerous validity requirements?

**Mr MORRISON** — Can I take that up? Our concern before we saw the bill was that it might impinge on our very generous existing validity requirements that already exist in our Wills Act from 1997, and they already existed prior to that in the 1958 act — I think it was in section 22 — which validated other countries' wills coming to Victoria. So we already had very generous provisions to validate international wills coming into Victoria. I suppose we were inward looking — looking at other people's wills coming into Victoria and being validated in our jurisdiction. We were concerned about this, without having seen the legislation at that stage, making it more difficult for international wills coming to Victoria being validated. Now we have seen the legislation, which is expressed not to have any impact on those existing provisions, we are more relaxed. I was not a member of the subcommittee that saw this bill that was submitted to the law institute in confidence. The succession law committee did not see the bill until just this year. Now that the committee has seen that in general, it has relaxed its opposition to the bill.

**Ms MIKAKOS** — It would be helpful to committee members if you could perhaps explain to us, none of us — perhaps David — having practised in succession law, what you feel the bill has added to or potentially might be beneficial —

**Mr MORRISON** — It does not add much.

**Ms MIKAKOS** — given that you said that there was a rewrite of the Wills Act in 2007; is that right?

**Mr MORRISON** — In 1997.

**Ms MIKAKOS** — In 1997; okay. Presumably, if I recall correctly, that may have streamlined or made a bit more straightforward the issues around validity.

**Mr MORRISON** — Yes, it has. And it has allowed the informal wills to be validated. It has been generous also in the area of part 4s, for testators' family maintenance, and the group of applicants has been made larger, but that has been in the administration of the probate act rather than the Wills Act.

**Ms MIKAKOS** — I was particularly interested, Mr Morrison, in your comments that under the current act foreign wills can be brought here and regarded as valid.

**Mr MORRISON** — Yes.

**Ms MIKAKOS** — So perhaps we may have assumed that this bill was going to do that for the first time.

**Mr MORRISON** — That was always the case. I have been in practice for 42 years, and that has always been the case as long as I have been in practice.

**Ms MIKAKOS** — So what would the bill actually do?

**Mr MORRISON** — As far as a will coming into Victoria is concerned, it adds nothing. We are really speaking about a person who is a citizen of Victoria making a will for execution in a jurisdiction outside of Victoria, which is what concerns us a little, because I suppose, speaking for myself, I really have no experience in jurisdictions other than perhaps a little of New Zealand and a little of Great Britain. In California there is a community property where a person has to provide for their spouse and their children and they can only leave a certain amount of their estate at their discretion. Certainly in France it is the same, certainly in Holland it is the same and certainly, I think, in Germany. It is to my shame that I know very little of the Near East right around us, but there would be practitioners in Melbourne who do, and I would refer a client to someone who knew about those jurisdictions if they needed that sort of experience.

**Ms MIKAKOS** — Just so that we are all clear in terms of what this bill does, under current law a foreign will that was executed overseas —

**Mr MORRISON** — Coming in here would be valid, yes.

**Ms MIKAKOS** — is able to be recognised as a valid will?

**Mr MORRISON** — Under the existing law as it is today.

**Ms MIKAKOS** — But this bill will enable someone to execute a will that will extend to foreign assets for the first time?

**Mr MORRISON** — There are two aspects to a will. First of all there is its formal validity, and that is the form that it has to take to be actually valid; and secondly, there is its beneficial validity — the way it gives its benefits. This gives it a formal validity, so it is actually signed in the right way. Whether it is capable of disposing of the assets according to the law of that jurisdiction we cannot say, because we do not know the law of that jurisdiction.

**Ms MIKAKOS** — It is subject to the caveat that Ms Wilson explained earlier that it is subject to the succession law of that country.

**Mr MORRISON** — The law of that jurisdiction; exactly, so it will give it a formal validity, but not necessarily beneficial validity. It is like putting a potent new drug on the chemist's shelves but letting it be sold at Woolworths.

**Ms CROZIER** — I would like to follow up a clarification point with your answer, Ms Wilson, in relation to the question that Mr O'Donohue asked of you. I think you said that if somebody was to make an international will and their assets were disposed of, there was some confusion about how that would happen or could potentially happen, and you went on to speak about a campaign that perhaps the law institute would undertake. Is it your experience with other jurisdictions that they had similar issues with the issue you raised, and have they undertaken campaigns to assist with perhaps the international will aspects for their citizens?

**Ms WILSON** — I cannot speak in any detail for other jurisdictions. It is my general understanding that this state is considering itself as leading the way with this legislation.

**Ms CROZIER** — I am referring to international jurisdictions.

**Ms WILSON** — I am sorry; I do not know about what has happened in international jurisdictions.

**Mr MORRISON** — I do not either.

**Mr O'BRIEN** — I appreciate your submissions and input into the bill. As I understand it, the purpose of the convention is to provide an additional form of will effectively to seek to remove to the extent possible some of those confusions that can exist between jurisdictions, and it will only be as effective as the number of jurisdictions signing up. I see you nodding, Mr Morrison.

What I will ask you to turn your mind to is the question for, I suppose, this committee and the Parliament considering this bill is: does it improve the situation that we presently have in that we will have lots of countries? The 12 parties that have signed up, for the benefit of you and the people listening to this, are Belgium, Bosnia, numerous Canadian provinces, Cyprus, Ecuador, France, Italy, Niger, Portugal, Slovenia and Yugoslavia. Then there are other countries that have signed the convention but it has not come into force, including the Holy See, Iran, Laos, Russia, Sierra Leone, the United Kingdom and the United States of America. As I understand, what the international convention is designed to do is to help solve some of those jurisdictional questions for those signing an international will and for the way it will operate in Victoria or Australian states it will sit alongside the existing Wills Act, particularly the foreign wills.

**Mr MORRISON** — That is my understanding too. In the United States and Canada the law of succession is state based, as it is in Australia, so that will need each of the states to accede to the convention. Europe is Roman law-based, so the new form of will will work much more readily in Europe — in the European Convention countries, which does require notarised wills and handwriting and a whole lot of other rules that I

am not really familiar with. It will work much more readily in Italy, France and Germany and those countries. I think an Australian will would work very readily in the United States; it is just I do not know what the law is in most of those states.

**Mr O'BRIEN** — I suppose in the balancing act what we have to consider is that we have some evidence, and there will be State Trustees and other people — the bar council has submitted — that will help clarify some of these issues, but it is not a revolutionary change. We would receive your submission partly saying it may not be of much effect, which I suppose we can live with. What we would be seeking you to clarify is are there any residual concerns where this legislation may enter the field and cause confusion that does not already exist. I suppose that would be something that we would want to really have in the balance. If those concerns have been ameliorated to some extent, we would obviously appreciate you clarifying the institute's position on that.

**Mr MORRISON** — Our concern will be to know precisely in which places it will be effective. It will be a concern to know where a practitioner can find that information. I am not sure if the law institute will be the repository of that information or whether the Parliament or the federal — I suspect an innocent suburban lawyer ringing up the department of foreign affairs will get short shrift. I do not know what would happen to me if I rang up.

**The CHAIR** — If I can intercede there, what is the practice with other international conventions that are the basis of statute?

**Mr MORRISON** — The answer is I do not know. I have never tried to find out. Because I am a state-based practitioner I never really have to ring up and find out about that sort of thing.

**The CHAIR** — Fair enough. That is an issue perhaps we can explore.

**Mr O'BRIEN** — Further to the question or the point I am putting to you, a lot of those confusions will exist already, whether we have this bill or not.

**Mr MORRISON** — Quite; yes.

**Mr O'BRIEN** — To some extent I would see this bill as going some way to solving it if it does provide an international form of will. If that is so, then it is of some benefit, and if then the fact that it will sit alongside and not supplant the existing wills requirement in my view seems to meet the concerns that I understood the institute to express, so if that is the case, we would obviously appreciate you clarifying that. If there are residual concerns, I would be happy for you to point them out to us.

**Mr MORRISON** — The only other concern we perhaps have is practitioners running into trouble with their insurance.

**Mr O'BRIEN** — Yes, so that will have to be reviewed as well.

**Ms WILSON** — I think there is some advantage in looking to uniform succession laws both in Australia and outside. It is for that reason that we support the bill's objectives. My personal concern is that if something is held out as being an international will, people in the community will think that they can effectively dispose of their assets as they wish. It is for that reason that we think it is going to require some education and community campaigns just so that people have a better understanding of it.

**Mr O'BRIEN** — Can I just follow that up, because that is an important point? We certainly would be not wanting to portray to the community that the bill is more than it is.

**Ms WILSON** — No.

**Mr O'BRIEN** — We would be happy, certainly from the government's point of view — as a government member — and I am sure the opposition would be with us on this as well, to be very careful as to the extent to which we pitch the level of assistance this provides to persons and practitioners dealing with international wills or wills in general so that we are not inadvertently falsely representing, as it may be, the import of this legislation. But I suppose that is a second step and part of how we communicate the bill. The matter we need to report back to the Parliament on is the ultimate merits of the legislation properly considered.

With the comments I have heard this morning and with your submission, which we thank you for, so far if I am right — and I do not want to verbal you, but I want to clarify the position — it would seem that the bill does provide a positive step to some degree. I see you nodding.

**Ms WILSON** — Yes.

**Mr MORRISON** — No, we are not opposed to it. We see it as a positive step. We see it as a box or a frame in which a person can put a will, but you have to be careful about what you put inside the box.

**Mr O'BRIEN** — And we have to be careful how we sell the box to the community so that we are not representing it to be more than it is.

**Ms WILSON** — Yes.

**Mr MORRISON** — That is it.

**Ms MIKAKOS** — Just following on from that point. I know that in your written submission you say that the benefits of this convention will arise only for persons in Victoria wishing to make a will for application in a signatory country. In particular you have identified some very significant sources of migration to this state, being the Chinese, Malaysian, Vietnamese and Greek communities, who are not currently signatories to that convention and therefore will not be able to derive the benefits of this bill.

Coming to the point you made earlier, Ms Wilson, around an education campaign, how would you envisage that the government would be able to explain to certain parts of the community that they could derive a benefit from this bill and then to other parts of the community that they cannot, and particularly for those who might hear about this legislation and think that the will they have made in the past is somehow now going to cover assets that are located overseas?

**Ms WILSON** — I do not know how the government goes about explaining its business, but certainly the succession law committee will be recommending to the law institute that we have some public awareness campaigns which will highlight or distinguish between an international will and other wills made in Victoria and point out the limitations on its application. One would hope that as more countries adopt or accede to the convention this will have wider support.

**Ms MIKAKOS** — Can I ask a follow-up question, which is: will this apply to wills that predate the commencement of this bill? Because if someone is from, say, Italy — and Italy is a signatory to the convention — —

**Mr MORRISON** — Lost capacity, for instance.

**Ms MIKAKOS** — If someone is a resident in Victoria and has signed a will a decade ago in Victoria, will that apply to Italian assets?

**Ms WILSON** — This legislation will not impact on such a will because it stands alongside the existing legislation. This is an additional form of will.

**Ms MIKAKOS** — So that they would have to then go and sign a new will?

**Mr MORRISON** — Yes. Once this is introduced they would have to make a new will in the form, because this form will only come in when the legislation is passed.

**Ms WILSON** — Yes. If they want it to be an international will, they will have to make it in accordance with the act. But it will not derogate from any existing will in the sense that they are already valid; they will not be invalidated.

**Ms MIKAKOS** — I was not suggesting that. My concern is coming round to the issue of community confusion and whether people will assume that because this law has passed, automatically their foreign-based assets will now be caught by their pre-existing will.

**Mr MORRISON** — It will do no harm to their existing arrangements at all. That would be my view — none at all. Their existing arrangements will either stand or fall, depending on their current legal status. But there are legal practitioners in Melbourne who practise in Greek and Italian and Vietnamese law as we speak. Kathy and I refer people who want those matters dealt with to those people right now.

**Mr O'BRIEN** — Just following on from your comments that it will do no harm, as I understand the bill, it does not yet have a proclamation date because it will not come into effect until all the other —

**Mr MORRISON** — Six months after the — —

**Mr O'BRIEN** — states and territories sign up to it and then Australia accedes to the convention. That is how I understand its legal operation. But it does not prevent, from the time the bill has effectively been put into Parliament, people signing up on an international will in the form of the international will. That is how I understand it.

**Mr MORRISON** — I think that is how I read it too, yes.

**Mr O'BRIEN** — Yes. And it will not have any retrospective adverse effect upon existing wills, as I understand it.

**The CHAIR** — Any other questions from members?

**Mr MORRISON** — And you have to die, too, of course.

**Mr O'BRIEN** — The things about wills in other countries is that they often operate for a very long time, so it may be that you sign up to an international will and by the time you pass on the country that you are concerned about may have also signed and joined the convention. I suppose that is a semi-long shot, but wills do deal in a long time frame. I am sure you know that already.

**Ms WILSON** — Yes. And I think in your second-reading speech you alluded to people living to the age of 99.

**Mr O'BRIEN** — Yes, I did.

**Mr MORRISON** — Good luck.

**Ms WILSON** — Or dying by other means.

**Mr O'BRIEN** — Yes. You know that quote. I am sure you have read it.

**Ms MIKAKOS** — I am sure being a member of Parliament is not conducive to that longevity.

**Mr O'BRIEN** — It was actually an Irish compliment I paid the Acting President, Mr Finn, who took great offence, and I will not repeat the full quote for the transcript.

**Mr MORRISON** — We all thought it was a good quote.

**The CHAIR** — If there are no other question, I thank you, Ms Wilson and Mr Morrison, for your engagement in this process and for your presence here this morning. It is much appreciated. Thank you.

**Mr MORRISON** — Thank you.

**Witnesses withdrew.**