



New South Wales

Succession Bill 2006

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to restate, with amendments, the law relating to wills in New South Wales in order to implement (with modifications) the recommendations of the National Committee for Uniform Succession Laws regarding the law of wills contained in its final report to the Standing Committee of Attorneys-General in December 1997. Those recommendations were endorsed by the New South Wales Law Reform Commission in Report 85 (1998) *Uniform Succession Laws: The Law of Wills*.

The Bill repeals those provisions of the *Wills, Probate and Administration Act 1898* relating to wills and renames the remaining provisions of that Act as the *Probate and Administration Act 1898*.

Significant changes to the law of wills effected by the Bill include the following:

- (a) the introduction of court authorised wills for people who lack testamentary capacity,
- (b) the provision of statutory guidance in relation to the matters to be taken into consideration by the court in authorising a minor to make a will,
- (c) new rules about beneficiaries who witness wills,

- (d) new rules about survivorship,
- (e) revision of the law relating to foreign wills to bring New South Wales law relating to choice of law issues into line with the law in other jurisdictions,
- (f) new provisions about who is entitled to see a will on the death of a testator,
- (g) new provisions for the deposit of wills,
- (h) provisions relating to the admission of limited evidence to aid in the interpretation of wills.

Outline of provisions

Chapter 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act and provides that notes included in the proposed Act do not form part of the Act. Some terms and expressions used in the proposed Act are not defined as they are defined in section 21 of the *Interpretation Act 1987* (see in particular the definitions in that Act of *minor*, *land* and *property*).

The proposed section also provides that a reference in the proposed Act to the child or issue of a person includes a reference to a child or issue *en ventre sa mere* provided the child or issue is born alive and remains alive for a period of 30 days.

Chapter 2 Wills

Chapter 2 replaces Parts 1 and 1A of the *Wills, Probate and Administration Act 1898* (*the WPA Act*).

Part 2.1 The making, alteration, revocation and revival of wills

Division 1 Making a will

Clause 4 specifies the property that a person may dispose of by will. It replaces and essentially restates section 5 of the WPA Act. A person may dispose of property to which the person is entitled at the time of the person's death (regardless of whether or not the entitlement existed when the will was made) or to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death (regardless of whether or not the entitlement existed when the person died). Proposed section 4 expressly excludes property of which the person is trustee when he or she died.

Clause 5 replaces sections 6 and 6B of the WPA Act. It provides that a will made by a minor (a person under the age of 18 years) is not valid, except in certain specified circumstances. As is the case under section 6B of the WPA Act, a minor may validly make, alter or revoke a will in contemplation of marriage, but the will is of no effect unless the marriage is solemnised. **Clause 5** extends the WPA Act provisions by enabling a minor who is or has been married or who made a will in contemplation of a marriage that was solemnised to make, alter or revoke a will. Section 6A of the WPA Act, which provides for a minor to make a will with the leave of the Court is replaced by proposed section 16.

Division 2 Executing a will

Clause 6 sets out the requirements for a valid execution of a will. It replaces and essentially restates sections 7 and 9 of the WPA Act.

Proposed section 6 (6) makes it clear that these execution requirements do not apply to a court authorised will for a person lacking testamentary capacity (see proposed section 23 on the execution requirements for such wills).

Clause 7 provides that a will that is executed in accordance with the proposed Act is validly executed even if one or more witnesses to the will do not know that the document he or she attested and signed was a will. This reflects the purpose of the requirement to have witnesses to verify the authenticity of the testator's signature and to ensure the testator is signing voluntarily.

Division 3 Dispensing with requirements for execution, alteration or revocation of a will

Clause 8 sets out the circumstances in which the Supreme Court may dispense with the requirements for the execution, alteration or revocation of a will as specified by the proposed Act. The Court may dispense with the requirements if it is satisfied that the deceased person intended the document to constitute his or her will or to amend or revoke his or her will. The proposed section replaces section 18A of the WPA Act. For the purposes of the proposed section the broad definition of *document* contained in section 21 of the *Interpretation Act 1987* is used instead of the narrower definition of document applying elsewhere in the proposed Act (see proposed section 3). The dispensing power is expanded to include parts of documents as defined and to include documents that came into existence within or outside New South Wales. As is currently the case under section 18A (2) of the WPA Act, proposed section 8 (3) provides that the Court may have regard (in addition to the document) to extrinsic evidence of the manner of execution or testamentary intentions of the deceased person. Proposed section 8 (4) makes it clear that the Court is not limited by proposed section 8 (3) in regard to the evidence it may consider.

Division 4 Witnessing a will

Clause 9 prevents a person who is unable to see and attest that a testator has signed a document from witnessing a will. It replaces section 12 of the WPA Act which provides that a person competent to be a witness in civil proceedings, other than a

blind person, may be a witness. Proposed section 9 makes it clear that not only a person who is permanently blind but also one who is temporarily unable to see is prevented from witnessing a will.

Clause 10 replaces section 13 of the WPA Act. It retains the interested witness rule contained in section 13 but unlike that section does not void a beneficial disposition to the spouse of a witness or a person claiming under the spouse of a witness. Under proposed section 10 a disposition to a person who attests the execution of a will is void unless at least two other attesting witnesses are not beneficiaries under the will, all the other beneficiaries consent in writing to the interested witness taking his or her share under the will (and have the legal capacity to do so) or the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.

A consent to the interested witness taking his or her share will not be subject to duty (see proposed section 65 (12A) to be inserted in the *Duties Act 1997* by **Schedule 3.6**).

Division 5 Revocation, alteration and revival of a will

Clause 11 replaces section 17 of the WPA Act. It sets out an exhaustive (and expanded) list of the means by which a will or part of a will may be revoked. The means are:

- (a) by a will made under an order of the Court under proposed section 16 or 18, or
- (b) the testator's marriage to the extent specified in proposed section 12, or
- (c) the testator's divorce or annulment of the testator's marriage to the extent specified in proposed section 13, or
- (d) by a later will, or
- (e) by some writing declaring an intention to revoke the will, executed in the manner in which a will is required to be executed by the proposed Act, or
- (f) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it, or
- (g) by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.

As proposed section 11 is an exhaustive statement of the means of revoking a will, a will cannot be revoked by any presumption of an intention on the ground of alteration in circumstances. This preserves the effect of section 16 of the WPA Act.

Clause 12 specifies the effect of marriage on a will. It replaces section 15 of the WPA Act. Generally, a will is revoked by the marriage of the testator (proposed section 12 (1)). However, a will made in contemplation of a particular marriage (whether or not that contemplation is expressed in the will) is not revoked by the solemnisation of the marriage concerned and a will that is expressed to be made in

contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator (proposed section 12 (3) and (4)). The proposed section also provides that a disposition to the person to whom a testator is married at the time of his or her death and certain other wills are not revoked by marriage (proposed section 12 (2)).

Clause 13 specifies the effect of divorce or annulment on a will. It replaces section 15A of the WPA Act. Proposed section 13 provides that divorce or annulment automatically revokes the following in respect of a person to whom the testator was married immediately before the marriage ended (a *former spouse*):

- (a) a disposition to the person made by a will in existence at the time of the divorce or annulment,
- (b) an appointment, made by will, of the person as executor, trustee, advisory trustee or guardian,
- (c) any grant, made by will, of a power of appointment exercisable by, or in favour of, the person.

In these circumstances, the testator's will takes effect as if the former spouse predeceased the testator.

Clause 14 sets out the requirements for validly altering a will. It replaces, and essentially restates (with expansions to cover the proposed new provisions relating to making of statutory wills for persons lacking testamentary capacity), section 18 of the WPA Act.

Clause 15 sets out the circumstances in which a will that has been revoked is revived. It replaces and essentially restates section 19 (1)–(3) of the WPA Act. A revoked will or part of a will can be revived by re-execution or by executing a will showing an intention to revive the will or part. Subject to a contrary intention in the reviving will, the revival of a will that was initially partially revoked and subsequently wholly revoked, operates only to revive the balance of that will remaining after the partial initial revocation. Proposed section 15 (4) deems a revived will to have been executed on the day that it was revived.

Part 2.2 Wills made or rectified under Court authorisation

Division 1 Wills by minors

Clause 16 replaces section 6A of the WPA Act. Section 6A empowers the Supreme Court to grant a minor leave to make a will on terms disclosed to the Court and subject to such conditions as the Court sees fit. Proposed section 16 enables a minor, or his or her representative, to apply to the Court for an order authorising the minor to make or alter a will in specific terms approved by the Court or to revoke all or part of a will. Before making an order, the Court must be satisfied that the minor understands the nature and effect of his or her testamentary proposal and the extent of any property disposed of by it, as well as being satisfied that the proposal

accurately reflects the minor's testamentary intentions and that it is reasonable in all the circumstances to make the order (proposed section 16 (4)). The order may be made subject to conditions (proposed section 16 (3)). A will made under proposed section 16 is only valid if executed in accordance with the requirements specified for execution of wills in proposed Part 2.1 of Chapter 2, and if one of the attesting witnesses is the Registrar (proposed section 16 (5)). The will is required to be deposited with the Registrar, although a failure to comply with this requirement does not affect the validity of the will (proposed section 16 (6) and (7)).

Clause 17 recognises a court authorised will for a minor made in another jurisdiction.

Division 2 Court authorised wills for persons who do not have testamentary capacity

Division 2 confers new powers on the Supreme Court to make orders authorising the making, alteration and revocation of wills for persons lacking testamentary capacity. The Division establishes a two-stage process—the seeking of leave to make an application for an order (proposed section 19) and the making of an application once leave has been obtained (proposed section 18). However, provision is made to enable the two applications to be merged (proposed section 20) to expedite the proceedings and avoid duplication of costs.

Clause 18 enables any person to apply to the Court for an order authorising a will to be made or altered in specific terms approved by the Court, or authorising all or part of a will to be revoked, on behalf of a person who lacks testamentary capacity. The person on behalf of whom the application is made must be alive when the order is made.

The section enables the Court to make a statutory order for a minor for whom the Court cannot make an order under proposed section 16 because the minor lacked the requisite degree of understanding or had a particular incapacity (proposed section 18 (4)).

Clause 19 requires a person to obtain the leave of the Court to make an application under proposed section 18 for an order to make, alter or revoke a statutory will for a person lacking testamentary capacity. Proposed section 19 (2) sets out the extensive range of information the applicant must provide to the Court in applying for leave.

Clause 20 enables the Court to merge the application for leave with an application for an order. It also enables the Court to revise the terms of any draft of the proposed will, alteration or revocation for which authorisation is sought.

Clause 21 provides that in conducting the hearing of an application for leave the Court is not bound by the rules of evidence. It may consider any information provided to it under proposed section 19 and may inform itself of any other matter in any manner it sees fit.

Clause 22 requires the Court to be satisfied about certain specified matters before granting leave.

Clause 23 requires a Court authorised will to be in writing, signed by the Registrar and sealed with the seal of the Court. The will is to be deposited with the Registrar.

Clause 24 requires the Registrar to hold a will made following an order under proposed section 18 until the Court makes an order revoking the will or the person for whom it was made acquires or regains testamentary capacity.

Clause 25 enables the Court to order that a person who lacks testamentary capacity be separately represented in proceedings under the proposed Division.

Clause 26 deems a statutory will made according to the law of a place where the deceased was resident at the time of execution of the will to be a valid will.

Division 3 Rectification of wills by Court

Clause 27 replaces section 29A of the WPA Act, which enables the Supreme Court to rectify a will if satisfied that it is so expressed that it fails to carry out the testator's intentions. The new section empowers the Court to make an order to rectify a will to carry out the intentions of a testator. However, the Court may only do so if it is satisfied that the will does not carry out the testator's intentions because a clerical error was made or because the will does not give effect to the testator's instructions. An application for such an order must be made within a period of 18 months after the death of the testator or, if the Court has made an order under section 17 of the *Family Provision Act 1982* specifying a lesser period in relation to an application concerning the testator under that Act, the lesser period. The Court may however extend the period if it considers it necessary to do so provided a final distribution of the estate has not been made.

Clause 28 protects an executor from liability in respect of certain distributions made to a beneficiary as if the will had not been rectified under proposed section 27. The protection afforded by this section applies only in respect of maintenance distributions made under proposed section 92A to be inserted in the WPA Act by Schedule 2 [7] or at least 6 months after the death of the testator and without notice of any application being made under proposed section 27 or under the *Family Provision Act 1982* and only if the executor complies with the current notice requirements set out in section 92 of the WPA Act.

Part 2.3 Construction of wills

Division 1 General rules about the construction of wills

Clause 29 specifies the interest in property that may be disposed of by will. It replaces, and essentially restates, section 20 of the WPA Act. It provides that where, subsequently to the making of a will, the testator disposes of a part interest in the property disposed of by will, the will operates to dispose of a remaining interest in the property. It is designed to prevent the failure of a disposition, which otherwise would cause the remaining interest to fall into the testator's residuary estate under proposed section 31.

Clause 30 provides that a will takes effect as if it had been executed immediately before the death of the testator. It replaces section 21 of the WPA Act. It is designed to ensure that property acquired by the testator after he or she made the will can be disposed of by it.

Clause 31 operates to avoid a partial intestacy by providing that if any disposition of property is ineffective the will takes effect as if the property were part of the residuary estate of the testator. Property that is the subject of a power of appointment is excluded because, if the power of appointment fails, the property passes according to the provisions of any gift over contained in the instrument creating the power. Proposed section 31 replaces section 22 of the WPA Act.

Clause 32 is a new provision that specifies the circumstances in which extrinsic evidence is admissible to clarify a will. It permits the Court to admit extrinsic evidence of the testator's actual intention for the purpose of construing a will, where the language used in it is meaningless or ambiguous (either on the face of the will or in the light of surrounding circumstances). Evidence of the testator's intention may not be admitted to establish any surrounding circumstances. Proposed section 32 (3) preserves the admissibility of extrinsic evidence otherwise admissible at law, for example, evidence of the testator's intention to fortify or rebut equitable presumptions of intention or where wording of the will is found to be equivocal.

Clause 33 replaces and essentially restates section 32F of the WPA Act. It provides that the construction of a will is not altered by a change in the testator's domicile after the execution of his or her will.

Clause 34 provides that a contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property which has not been disposed of by the will.

Clause 35 requires a beneficiary to survive a testator by 30 days before receiving a benefit under the testator's will, subject to a contrary intention appearing in the will. Complementary to this section is proposed section 92A to be inserted in the WPA Act by Schedule 2 [7] which enables a personal representative to make a maintenance distribution to certain beneficiaries during the 30-day period.

Division 2 Construction of particular provisions in wills

Clause 36 provides that, subject to a contrary intention expressed in the will, a general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land. It replaces section 23 (1) of the WPA Act.

Clause 37 specifies what property is, subject to a contrary intention expressed in the will, included in a general disposition of property by the testator. It replaces section 23 (2) and (3) of the WPA Act.

Clause 38 replaces and essentially restates sections 24 and 26 of the WPA Act. It provides that, subject to a contrary intention expressed in the will, a disposition of real property without words of limitation operates to pass the testator's whole estate or interest in the property.

Clause 39 specifies how a disposition to a person's issue is to operate. It provides that, subject to a contrary intention expressed in the will, a disposition of property to a person's issue, without limitation as to remoteness, must be distributed to those issue according to the intestacy rules that apply when a person is survived only by issue (see sections 61B (4) and 61C of the WPA Act).

Clause 40 specifies the manner of construing a disposition which contains a requirement that the disposition will fail if the beneficiary dies without issue. It replaces and essentially restates section 25 of the WPA Act.

Clause 41 replaces section 29 of the WPA Act. It operates as an exception to the lapse rule contained in proposed section 35 in circumstances where a beneficiary, who is the issue of the testator, fails to survive the testator for 30 days but leaves issue who do survive the testator for this period. In these circumstances, the original beneficiary's share passes to his or her surviving issue, who take the share according to the intestacy rules that apply when a person is survived only by issue (see sections 61B (4) and 61C of the WPA Act).

The section does not apply in specified circumstances, for example, if the original beneficiary fails to fulfil a condition imposed on the beneficiary by the will or if a contrary intention appears in the will. However, the section states that a general requirement or condition that issue survive the testator or reach a specified age does not of itself show a contrary intention.

Clause 42 specifies how a residuary disposition is to be construed. Proposed section 42 (1) operates (subject to a contrary intention appearing in the will) to prevent a partial intestacy occurring in circumstances where a disposition of all, or of the residue, of the testator's estate refers only to the testator's real property or only to the testator's personal property. It provides for the reference to be construed as a reference to include both. Proposed section 42 (2) deals with how property passes if a disposition of the whole or residue of the testator's estate fails as a fractional part. It operates (subject to a contrary intention appearing in the will), so that the part that fails is added to the other fractional parts proportionally.

Clause 43 sets out the requirements for administering a disposition of property to an unincorporated association (proposed section 43 (2)–(5)). It operates to save a disposition to an unincorporated association of persons that would otherwise be invalid either on the grounds that it could be construed as a trust for non-charitable purposes or that it breaches the rule against perpetuities. Proposed section 43 (1) deems certain dispositions of property to be an augmentation of the general funds of the beneficiary association. Dispositions to associations that are charities are expressly excluded because the grounds of invalidity the proposed section seeks to avoid do not apply to charities. If an unincorporated association has aims, objectives or purposes which are exclusively charitable or which can be considered to be exclusively for charitable purposes, then both the validity and the administration of the gift to the association are governed by the law relating to charities. Proposed section 43 (6) saves dispositions to an unincorporated association that might fail because, for example, a list of members of the association at the time of the testator's death cannot be compiled.

Clause 44 puts it beyond doubt that the creation of a power of appointment by will does not constitute an unacceptable delegation of a testator's will-making power.

Clause 45 specifies how a reference, whether express or implied, to a valuation in a will is to be construed. It operates (subject to a contrary intention appearing in the will) to provide a default method of valuation of property when a will makes specific reference to a valuation that it is not possible to make. In those circumstances the valuation is to be a valuation of the property as at the testator's death, made by a competent valuer.

Clause 46 replaces and essentially restates section 14 of the WPA Act. It provides that a beneficiary does not (except in so far as the will otherwise expressly provides) lose any right or entitlement under the will merely because the person is a transgender person.

Part 2.4 Wills under foreign law

Part 2.4 replaces and essentially restates Part 1A of the WPA Act.

Clause 47 defines *internal law* for the purposes of the proposed Part.

Clause 48 sets out the general rules for determining the validity of wills made outside the jurisdiction of New South Wales. Proposed section 48 (1) replaces and essentially restates section 32C of the WPA Act and proposed section 48 (2) and (3) replace and essentially restate section 32D of that Act. The proposed section identifies which jurisdiction's domestic law is to be applied to the determination of whether a will has been validly executed. The new definition of *internal law* operates to exclude a jurisdiction's rules of private international law (which might have the effect of applying the domestic law of another jurisdiction).

Clause 49 sets out the process for ascertaining which system of law applies to a will where there is more than one system of internal law relating to the formal validity of a will operating in the place. It replaces and essentially restates section 32A (2) of the WPA Act.

Clause 50 sets out the manner for construing the law applying to wills where there may have been an alteration to the relevant law. It also provides guidance as to the way in which the requirements of a foreign law are to be applied to the determination of whether a will has been validly executed in that jurisdiction. It distinguishes requirements for formal and essential validity. It replaces and essentially restates section 32A (4) of the WPA Act.

Part 2.5 Deposit of and access to wills

Clause 51 provides for the deposit of wills in the office of the Registrar.

Clause 52 provides for the delivery of deposited wills by the Registrar.

Clause 53 ensures that a failure by the Registrar to retain a will as required by the proposed Act does not affect the validity of the will.

Clause 54 specifies the persons who are entitled to inspect and make copies of a will of a deceased testator.

Chapter 3 Miscellaneous

Clause 55 makes provision for the service of documents under the proposed Act.

Clause 56 enables the making of court rules for the purposes of the proposed Act.

Clause 57 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 58 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 59 is a formal provision that gives effect to the amendments to the Acts and regulation set out in Schedules 2 and 3.

Clause 60 provides for the review of the proposed Act in 5 years.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Wills, Probate and Administration Act 1898

Schedule 2 [1]–[3] and [5] amend the WPA Act to omit provisions relating to wills.

Schedule 2 [4] makes an amendment that is consequential on the enactment of section 52 of the proposed *Succession Act 2006*.

Schedule 2 [6] makes an amendment that is consequential on the enactment of section 28 of the proposed *Succession Act 2006*.

Schedule 2 [7] inserts section 92A into the WPA Act. The proposed section enables a personal representative to make a maintenance distribution from an estate during or after the 30-day period following the deceased person's death to a person who was wholly or substantially dependent on the deceased person when the deceased person died or who would be (provided he or she survives the deceased person for 30 days) entitled to a share in the deceased person's estate. The distribution may be made only for the recipient's maintenance, support or education. The fact that the personal representative is aware of a pending or intended family provision application is not an impediment to the making of a maintenance distribution under this section. Under proposed section 92A (5), such a maintenance distribution is treated as an advance distribution of the person's share of the estate and accordingly, the amount is to be deducted from the person's final entitlement.

Succession Bill 2006

Explanatory note

Schedule 3 Amendment of other Acts and regulation

Schedule 3 amends the Acts and regulation specified in the Schedule to make consequential amendments. The majority of these relate to the change of name of the *Wills, Probate and Administration Act 1898*.



New South Wales

Succession Bill 2006

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New South Wales

Succession Bill 2006

No. , 2006

A Bill for

An Act to restate, with reforms, the law relating to wills in New South Wales; and for other purposes.

The Legislature of New South Wales enacts: 1

Chapter 1 Preliminary 2

1 Name of Act 3

This Act is the *Succession Act 2006*. 4

2 Commencement 5

This Act commences on a day or days to be appointed by proclamation. 6

3 Definitions 7

(1) In this Act: 8

administrator has the same meaning as it has in the *Probate and Administration Act 1898*. 9
10

Court means the Supreme Court. 11

disposition includes the following: 12

(a) any gift, devise or bequest of property under a will, 13

(b) the creation by will of a power of appointment affecting property, 14

(c) the exercise by will of a power of appointment affecting property. 15

document: 16

(a) except as provided by paragraph (b)—has the same meaning that it is given by section 21 of the *Interpretation Act 1987*, and 17
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(b) in Chapter 2 (other than section 8)—means any paper or material on which there is writing. 19
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personal representative means the executor or administrator of the estate of a deceased person. 21
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Registrar means a person who is: 23

(a) appointed in accordance with section 120 of the *Supreme Court Act 1970*, and 24
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(b) nominated by the Principal Registrar of the Court for the purposes of this Act. 26
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will includes a codicil and any other testamentary disposition. 28

Note. The *Interpretation Act 1987* contains definitions of some terms and expressions used in this Act. See, for example, the definitions of **minor**, **land** and **property** in section 21 of that Act. 29
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(2) A reference in this Act to a child or issue of any person includes a child or issue *en ventre sa mere* at the death of the person, provided such child or issue is born alive and remains alive for a period of 30 days. 32
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34

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- (3) Notes included in this Act do not form part of this Act. 1
- Note.** References in headings to sections of this Act to “WPA” are references to 2
the *Wills, Probate and Administration Act 1898* as in force before it was 3
amended by this Act. 4

Chapter 2	Wills	1
Part 2.1	The making, alteration, revocation and revival of wills	2 3
Division 1	Making a will	4
4	What property may be disposed of by will? (cf WPA 5)	5
(1)	A person may dispose by will of property to which the person is entitled at the time of the person's death.	6 7
(2)	Subsection (1) applies whether or not the entitlement existed at the date of the making of the will.	8 9
(3)	A person may dispose by will of property to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death.	10 11 12
(4)	Subsection (3) applies whether or not the entitlement existed at the time of the person's death.	13 14
(5)	A person may not dispose by will of property of which the person is trustee at the time of the person's death.	15 16
5	Minimum age for making a will (cf WPA 6 and 6B)	17
(1)	A will made by a minor is not valid.	18
(2)	Despite subsection (1):	19
(a)	a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place, and	20 21 22
(b)	a minor who is married may make, alter or revoke a will, and	23
(c)	a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.	24 25 26
(3)	Subsection (1) does not apply to a will made by an order under section 16 (Court may authorise minor to make, alter or revoke a will).	27 28
Division 2	Executing a will	29
6	How should a will be executed? (cf WPA 7 and 9)	30
(1)	A will is not valid unless:	31
(a)	it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and	32 33

(b)	the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and	1 2
(c)	at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).	3 4
(2)	The signature of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.	5 6 7
(3)	It is not essential for a will to have an attestation clause.	8
(4)	If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.	9 10 11
(5)	If a power is conferred on a person to make an appointment by a will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.	12 13 14 15 16
(6)	This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity).	17 18 19
7	Must witnesses know that they are signing a will?	20
	A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that the document he or she attested and signed was a will.	21 22 23
Division 3	Dispensing with requirements for execution, alteration or revocation of a will	24 25
8	When may the Court dispense with the requirements for execution, alteration or revocation of wills? (cf WPA 18A)	26
(1)	This section applies to a document, or part of a document, that:	27
(a)	purports to state the testamentary intentions of a deceased person, and	28 29
(b)	has not been executed in accordance with this Part.	30
(2)	The document, or part of the document, forms:	31
(a)	the deceased person's will—if the Court is satisfied that the person intended it to form his or her will, or	32 33
(b)	an alteration to the deceased person's will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or	34 35 36

- (c) a full or partial revocation of the deceased person's will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will. 1
2
3
- (3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to: 4
5
- (a) any evidence relating to the manner in which the document or part was executed, and 6
7
- (b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person. 8
9
10
- (4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2). 11
12
- (5) This section applies to a document whether it came into existence within or outside the State. 13
14

Division 4 Witnessing a will 15

9 Persons who cannot act as witnesses to wills (cf WPA 12) 16

A person who is unable to see and attest that a testator has signed a document may not act as a witness to a will. 17
18

10 Can an interested witness benefit from a disposition under a will? (cf WPA 13) 19

- (1) This section applies if a beneficial disposition is given or made by will to a person (the *interested witness*) who attests the execution of the will. 20
21
- (2) The beneficial disposition is void to the extent that it concerns the interested witness or a person claiming under the interested witness. 22
23
- (3) A beneficial disposition is not void under subsection (2) if: 24
- (a) at least 2 of the people who attested the execution of the will are not interested witnesses, or 25
26
- (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition under the will and have the capacity to give that consent, or 27
28
29
30
- (c) the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator. 31
32
33

Note. Consent under section 10 (3) (b) is not liable to duty. See section 65 (12A) of the *Duties Act 1997*. 34
35

(4)	In this section:	1
	<i>beneficial disposition</i> does not include a charge or direction for the payment of:	2
		3
(a)	a debt, or	4
(b)	reasonable remuneration to an executor, administrator, legal practitioner or other person acting in relation to the administration of the testator's estate.	5
		6
		7
Division 5	Revocation, alteration and revival of a will	8
11	When and how can a will be revoked? (cf WPA 16 and 17)	9
(1)	The whole or any part of a will may be revoked but only:	10
(a)	by a will revoking the whole or part of the will that is made by the authority of an order under section 16 or 18, or	11
		12
(b)	by the operation of section 12 or 13, or	13
(c)	by a later will, or	14
(d)	by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act, or	15
		16
		17
(e)	by the testator, or by some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it, or	18
		19
		20
(f)	by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.	21
		22
		23
		24
(2)	No will or part of a will may be revoked by any presumption of an intention on the ground of an alteration in circumstances.	25
		26
12	Effect of marriage on a will (cf WPA 15)	27
(1)	A will is revoked by the marriage of a testator.	28
(2)	Despite subsection (1), the following are not revoked by the marriage of the testator:	29
		30
(a)	a disposition to the person to whom the testator is married at the time of his or her death,	31
		32
(b)	an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death,	33
		34
		35

(c)	a will made in the exercise of a power of appointment if the property in relation to which the appointment is exercised would not pass to the executor, administrator or Public Trustee if the power of appointment was not exercised.	1 2 3 4
(3)	A will made in contemplation of a particular marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage concerned.	5 6 7
(4)	A will that is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.	8 9 10
13	What is the effect of divorce or an annulment on a will? (cf WPA 15A)	11
(1)	The divorce of a testator or annulment of his or her marriage revokes:	12
(a)	a beneficial disposition to the testator's former spouse made by a will in existence at the time of the divorce or annulment, and	13 14
(b)	an appointment of the testator's former spouse as an executor, trustee, advisory trustee or guardian made by the will, and	15 16
(c)	a grant made by the will of a power of appointment exercisable by, or in favour of, the testator's former spouse.	17 18
(2)	Subsection (1) does not apply if a contrary intention appears in the will.	19
(3)	The divorce of a testator or the annulment of his or her marriage does not revoke:	20 21
(a)	the appointment of the testator's former spouse as trustee of property left by the will on trust for beneficiaries that include the former spouse's children, or	22 23 24
(b)	the grant of a power of appointment exercisable by the testator's former spouse exclusively in favour of the children of whom both the testator and the former spouse are the parents.	25 26 27
(4)	If a disposition, appointment or grant is revoked by this section, the will takes effect in respect of the revocation as if the testator's former spouse had died before the testator.	28 29 30
(5)	Nothing in this section affects:	31
(a)	any right of the former spouse of a testator to make any application under the <i>Family Provision Act 1982</i> , or	32 33
(b)	any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability (including any liability under a promise) of the testator to the former spouse of the testator or to the executor or the administrator of the estate of the former spouse.	34 35 36 37 38

(6)	In this section:	1
	<i>annulment</i> , in relation to a testator, means:	2
(a)	the annulment of the testator's marriage by the Family Court of Australia, or	3 4
(b)	the annulment of the testator's marriage under a law of a place outside Australia, if the annulment is recognised in Australia under the <i>Family Law Act 1975</i> of the Commonwealth.	5 6 7
	<i>divorce</i> means the ending of a marriage by:	8
(a)	a divorce order in relation to the marriage taking effect under the <i>Family Law Act 1975</i> of the Commonwealth, or	9 10
(b)	a decree of nullity in respect of the marriage by the Family Court of Australia, or	11 12
(c)	the dissolution of the marriage in accordance with the law of a place outside Australia, if the dissolution is recognised in Australia under the <i>Family Law Act 1975</i> of the Commonwealth.	13 14 15
	<i>spouse</i> includes a party to a purported or void marriage.	16
	<i>testator's former spouse</i> means the person who was the testator's spouse immediately before the testator's marriage was ended by divorce or annulment.	17 18 19
14	How a will may be altered (cf WPA 18)	20
(1)	An alteration to a will after it has been executed is not effective unless the alteration:	21 22
(a)	is executed in the manner in which a will is required to be executed under this Part, or	23 24
(b)	is made by a minor by the authority of an order of the Court under section 16 and is executed in accordance with, and satisfies the requirements for such a will set out in, section 16 (5), or	25 26 27
(c)	is made for and on behalf of a person who does not have testamentary capacity by the authority of an order under section 18 and satisfies the requirements for such a will set out in section 23.	28 29 30 31
(2)	Subsection (1) does not apply to an alteration to a will signed by or at the direction of the testator if the words or effect of the will are no longer apparent because of the alteration.	32 33 34
(3)	If a will is altered, it is sufficient compliance with the requirements for execution if the signatures of the testator and of the witnesses to the alteration are made:	35 36 37

(a)	in the margin, or on some other part of the will beside, near or otherwise relating to the alteration, or	1 2
(b)	as authentication of a memorandum referring to the alteration and written on the will.	3 4
	Note. Section 21 of the <i>Interpretation Act 1987</i> defines sign to include making a mark.	5 6
15	How a revoked will may be revived (cf WPA 19)	7
(1)	A will or part of a will that has been revoked is revived by re-execution or by execution of a will showing an intention to revive the will or part.	8 9
(2)	A revival of a will that was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.	10 11
(3)	Subsection (2) does not apply if a contrary intention appears in the reviving will.	12 13
(4)	A will that has been revoked and is later wholly or partly revived is taken to have been executed on the day on which the will is revived.	14 15
Part 2.2	Wills made or rectified under Court authorisation	16 17
Division 1	Wills by minors	18
16	Court may authorise minor to make, alter or revoke a will (cf WPA 6A)	19
(1)	The Court may make an order authorising a minor:	20
(a)	to make or alter a will in the specific terms approved by the Court, or	21 22
(b)	to revoke a will or part of a will.	23
(2)	An order under this section may be made on the application of a minor or by a person on behalf of the minor.	24 25
(3)	The Court may impose such conditions on the authorisation as the Court thinks fit.	26 27
(4)	Before making an order under this section, the Court must be satisfied that:	28 29
(a)	the minor understands the nature and effect of the proposed will or alteration or revocation of the will and the extent of the property disposed of by it, and	30 31 32
(b)	the proposed will or alteration or revocation of the will accurately reflects the intentions of the minor, and	33 34

(c)	it is reasonable in all the circumstances that the order should be made.	1 2
(5)	A will made under this section is not valid unless:	3
(a)	for a will—the will is executed in accordance with the requirements of Part 2.1, and	4 5
(b)	in addition to the requirements of Part 2.1, one of the witnesses to the making of the will under this section is the Registrar, and	6 7
(c)	the conditions of the authorisation (if any) are complied with.	8
(6)	A will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.	9 10 11
(7)	A failure to comply with subsection (6) does not affect the validity of the will.	12 13
17	Will made by minor under an order of a foreign court	14
(1)	A will of a deceased person that is a court authorised will for a minor is a valid will.	15 16
(2)	A will is a <i>court authorised will for a minor</i> if:	17
(a)	a court, in a place outside New South Wales, made an order authorising a minor to make the will, and	18 19
(b)	the will was executed according to the law of the place relating to wills of minors, and	20 21
(c)	the minor was a resident in the place at the time the will was executed.	22 23
Division 2	Court authorised wills for persons who do not have testamentary capacity	24 25
18	Court may authorise a will to be made, altered or revoked for a person without testamentary capacity	26 27
(1)	The Court may, on application by any person, make an order authorising:	28 29
(a)	a will to be made or altered, in specific terms approved by the Court, on behalf of a person who lacks testamentary capacity, or	30 31
(b)	a will or part of a will to be revoked on behalf of a person who lacks testamentary capacity.	32 33
	Note. A person may only make an application for an order if the person has obtained the leave of the Court—see section 19.	34 35

(2)	An order under this section may authorise:	1
(a)	the making or alteration of a will that deals with the whole or part of the property of the person who lacks testamentary capacity, or	2
(b)	the alteration of part only of the will of the person.	3
(3)	The Court is not to make an order under this section unless the person in respect of whom the application is made is alive when the order is made.	4
(4)	The Court may make an order under this section on behalf of a person who is a minor and who lacks testamentary capacity.	5
(5)	In making an order, the Court may give any necessary related orders or directions.	6
	Note. The power of the Court to make orders includes a power to make orders on such terms and conditions as the Court thinks fit—see section 86 of the <i>Civil Procedure Act 2005</i> . The Court also has extensive powers to make directions under sections 61 and 62 of that Act.	7
(6)	A will that is authorised to be made or altered by an order under this section must be deposited with the Registrar under Part 2.5.	8
(7)	A failure to comply with subsection (6) does not affect the validity of the will.	9
19	Information required in support of application for leave	10
(1)	A person must obtain the leave of the Court to make an application to the Court for an order under section 18.	11
(2)	In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information:	12
(a)	a written statement of the general nature of the application and the reasons for making it,	13
(b)	satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,	14
(c)	a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,	15
(d)	a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court’s approval,	16
(e)	any evidence available to the applicant of the person’s wishes,	17
(f)	any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,	18
(g)	any evidence available to the applicant of the terms of any will previously made by the person,	19

(h)	any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,	1 2 3
(i)	any evidence available to the applicant of the likelihood of an application being made under the <i>Family Provision Act 1982</i> in respect of the property of the person,	4 5 6
(j)	any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the person,	7 8 9 10
(k)	any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,	11 12 13
(l)	any other facts of which the applicant is aware that are relevant to the application.	14 15
20	Hearing of application for leave	16
(1)	On hearing an application for leave the Court may:	17
(a)	give leave and allow the application for leave to proceed as an application for an order under section 18, and	18 19
(b)	if satisfied of the matters set out in section 22, make the order.	20
(2)	Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.	21 22 23
21	Hearing an application for an order	24
	In considering an application for an order under section 18, the Court:	25
(a)	may have regard to any information given to the Court in support of the application, and	26 27
(b)	may inform itself of any other matter in any manner it sees fit, and	28
(c)	is not bound by the rules of evidence.	29
22	Court must be satisfied about certain matters	30
	The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:	31 32
(a)	there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and	33 34 35

(b)	the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and	1 2 3
(c)	it is or may be appropriate for the order to be made, and	4
(d)	the applicant for leave is an appropriate person to make the application, and	5 6
(e)	adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.	7 8 9 10
23	Execution of will made under order	11
(1)	A will that is made or altered by an order under section 18 is properly executed if:	12 13
(a)	it is in writing, and	14
(b)	it is signed by the Registrar and sealed with the seal of the Court.	15
(2)	A will may only be signed by the Registrar if the person in relation to whom the order was made is alive.	16 17
24	Retention of will	18
(1)	Despite section 52 (Delivery of wills by Registrar), a will deposited with the Registrar in accordance with this Part may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless:	19 20 21 22
(a)	the Court has made an order under section 18 authorising the revocation of the whole of the will, or	23 24
(b)	the person has acquired or regained testamentary capacity.	25
(2)	On being presented with a copy of an order under section 18 authorising the revocation of the whole of a will, the Registrar must withdraw the will from deposit.	26 27 28
25	Separate representation of person lacking testamentary capacity	29
	If it appears to the Court that the person who lacks testamentary capacity should be separately represented in proceedings under this Division, the Court may order that the person be separately represented, and may also make such orders as it considers necessary to secure that representation.	30 31 32 33 34

26	Recognition of statutory wills	1
(1)	A statutory will made according to the law of the place where the deceased was resident at the time of the execution of the will is to be regarded as a valid will of the deceased.	2 3 4
(2)	In this section: <i>statutory will</i> means a will executed by virtue of a provision of an Act of New South Wales or other place on behalf of a person who, at the time of execution, lacked testamentary capacity.	5 6 7 8
Division 3	Rectification of wills by Court	9
27	Court may rectify a will (cf WPA 29A)	10
(1)	The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied the will does not carry out the testator's intentions because:	11 12 13
(a)	a clerical error was made, or	14
(b)	the will does not give effect to the testator's instructions.	15
(2)	A person who wishes to make an application for an order under this section must apply to the Court:	16 17
(a)	within 18 months after the date of the death of the testator, or	18
(b)	if the Court has made an order under section 17 of the <i>Family Provision Act 1982</i> specifying a lesser period in relation to an application concerning the deceased testator under that Act—within that period.	19 20 21 22
(3)	However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if:	23 24
(a)	the Court considers it necessary, and	25
(b)	the final distribution of the estate has not been made.	26
28	Protection of personal representatives who distribute as if will had not been rectified (cf WPA 29A)	27
(1)	This section applies if:	28
(a)	a will is rectified under section 27, and	29
(b)	a personal representative made a distribution to a beneficiary as if the will had not been rectified.	30 31
(2)	A personal representative is not liable if:	32
(a)	the distribution was made under section 92A (Personal representatives may make maintenance distributions within 30 days) of the <i>Probate and Administration Act 1898</i> , or	33 34 35

- (b) the distribution was made at least 6 months after the date of the death of the testator and at the time of making the distribution the personal representative was not aware of an application in respect of the estate having been made under section 27 or under the *Family Provision Act 1982*,
and the personal representative has complied with the requirements of section 92 (Distribution of assets after notice given by executor or administrator) of the *Probate and Administration Act 1898*.

Part 2.3 Construction of wills

Division 1 General rules about construction of wills

29 What interest in property does a will dispose of? (cf WPA 20)

- If:
- (a) a testator has made a will disposing of property, and
- (b) after the making of the will and before his or her death, the testator disposes of an interest in that property,
- the will operates to dispose of any remaining interest the testator has in the property.

30 When a will takes effect (cf WPA 21)

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
- (2) This section does not apply if a contrary intention appears in the will.

31 Effect of failure of a disposition (cf WPA 22)

- (1) If, and to the extent, that a disposition of property under a will is ineffective wholly or in part, the will takes effect as if the property or undisposed part of the property were part of the residuary estate of the testator.
- (2) This section does not apply if a contrary intention appears in the will.
- (3) In this section:
disposition of property does not include the exercise of a power of appointment.

32	Use of extrinsic evidence to construe wills	1
(1)	In proceedings to construe a will, evidence (including evidence of the testator's intention) is admissible to assist in the interpretation of the language used in the will if the language makes the will or any part of the will:	2
		3
		4
		5
	(a) meaningless, or	6
	(b) ambiguous on the face of the will, or	7
	(c) ambiguous in the light of the surrounding circumstances.	8
(2)	Despite subsection (1), evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1) (c).	9
		10
		11
(3)	Despite subsection (2), nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.	12
		13
		14
33	Effect of a change in testator's domicile (cf WPA 32F)	15
	The construction of a will is not altered because of a change in the testator's domicile after executing the will.	16
		17
34	Income on contingent, future or deferred dispositions	18
	A contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property that has not been disposed of by will.	19
		20
		21
35	Beneficiaries must survive testator by 30 days	22
(1)	If a disposition of property is made to a person who dies within 30 days after the testator's death, the will is to take effect as if the person had died immediately before the testator.	23
		24
		25
(2)	This section does not apply if a contrary intention appears in the will.	26
(3)	A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purposes of this section.	27
		28
		29
Division 2	Construction of particular provisions in wills	30
36	What a general disposition of land includes (cf WPA 23 (1))	31
(1)	A general disposition of land, or of land in a particular area, includes leasehold land whether or not the testator owns freehold land.	32
		33
(2)	This section does not apply if a contrary intention appears in the will.	34

37	What a general disposition of property includes (cf WPA 23 (2) and (3))	1
(1)	A general disposition of:	2
(a)	all or the residue of the testator’s property, or	3
(b)	all or the residue of his or her property of a particular description,	4
	includes all of the property, or all of the property of the relevant	5
	description, over which he or she has a general power of appointment	6
	exercisable by will and operates as an exercise of the power.	7
(2)	This section does not apply if a contrary intention appears in the will.	8
38	Effect of devise of real property without words of limitation	
	(cf WPA 24 and 26)	9
(1)	A disposition of real property to a person without words of limitation is	10
	to be construed as passing the whole estate or interest of the testator in	11
	that property to that person.	12
(2)	This section does not apply if a contrary intention appears in the will.	13
39	How dispositions to issue operate	14
	A disposition to a person’s issue, without limitation as to remoteness,	15
	must be distributed to that person’s issue in the same way as the	16
	person’s estate would be distributed if that person had died intestate	17
	leaving only issue surviving.	18
40	How are requirements to survive with issue construed? (cf WPA 25)	19
(1)	If a disposition to a person is expressed to fail if there is:	20
(a)	a want or failure of issue of that person either in his or her lifetime	21
	or at his or her death, or	22
(b)	an indefinite failure of issue of that person,	23
	the words used are to be construed to mean a want or failure of issue in	24
	the person’s lifetime or at the person’s death and not an indefinite	25
	failure of his or her issue.	26
(2)	This section does not apply if a contrary intention appears in the will,	27
	except where the result would be to cause a failure of the disposition.	28
41	Dispositions not to fail because issue have died before testator	
	(cf WPA 29)	29
(1)	This section applies if:	30
(a)	a testator makes a disposition of property to a person, whether as	31
	an individual or as a member of a class, who is issue of the	32
	testator (<i>the original beneficiary</i>), and	33

(b)	under the will, the interest of the original beneficiary in the property does not come to an end on or before the original beneficiary's death, and	1 2 3
(c)	the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness, and	4 5
(d)	the original beneficiary does not survive the testator for 30 days.	6
(2)	The issue of the original beneficiary who survive the testator for 30 days take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.	7 8 9 10
(3)	Subsection (2) does not apply if:	11
(a)	the original beneficiary does not fulfil a condition imposed on the original beneficiary in the will, or	12 13
(b)	a contrary intention appears in the will.	14
(4)	A general requirement or condition that issue survive the testator or reach a specified age does not indicate a contrary intention for the purposes of subsection (3) (b).	15 16 17
(5)	A gift to persons as joint tenants on its own indicates a contrary intention for the purposes of subsection (3) (b).	18 19
42	Construction of residuary dispositions	20
(1)	A disposition of all, or the residue, of the estate of a testator that refers only to the real estate of the testator, or only to the personal estate of the testator, is to be construed to include both the real and personal estate of the testator.	21 22 23 24
(2)	If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail, and, if there is more than one part that does not fail, to all those parts proportionally.	25 26 27 28
(3)	This section does not apply if a contrary intention appears in the will.	29
43	Dispositions to unincorporated associations of persons	30
(1)	Each of the following dispositions of property has effect as a disposition in augmentation of the general funds of the association to which the disposition is made:	31 32 33
(a)	a disposition to an unincorporated association of persons that is not a charity,	34 35
(b)	a disposition to or on trust for the aims, objects or purposes of an unincorporated association of persons that is not a charity,	36 37

(c)	a disposition to or on trust for the present and future members of an unincorporated association of persons that is not a charity.	1 2
(2)	Property, a disposition of which is, or has effect under subsection (1) as, a disposition in augmentation of the general funds of an unincorporated association, must be:	3 4 5
(a)	paid into the general fund of the association, or	6
(b)	transferred to the association, or	7
(c)	sold or otherwise disposed of on behalf of the association, with the proceeds being paid into the general fund of the association.	8 9
(3)	If a personal representative pays an amount to an unincorporated association under a disposition, the receipt of the treasurer or a like officer of the association (however described) is an absolute discharge for the payment.	10 11 12 13
(4)	If a personal representative transfers property to an unincorporated association under a disposition, the transfer of the property to a person nominated in writing by any two persons holding the offices of president, chairperson, treasurer or secretary of the association, or like officers of the association (however described), is an absolute discharge to the personal representative for the transfer of the property.	14 15 16 17 18 19
(5)	Subsections (3) and (4) do not apply if a contrary intention appears in the will.	20 21
(6)	It is not an objection to the validity of a disposition to an unincorporated association of persons that:	22 23
(a)	a list of persons who were members of the association at the time of the testator's death cannot be compiled, or	24 25
(b)	the members of the association may not divide assets of the association beneficially among themselves.	26 27
(7)	In this section: <i>charity</i> means a body constituted primarily for a purpose that is a charitable purpose under the general law.	28 29 30
44	Can a person, by will, delegate the power to dispose of property?	31
	A power or a trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator by instrument during his or her lifetime.	32 33 34 35

45	Effect of referring to a valuation in a will	1
(1)	This section applies if:	2
(a)	there is an express or implied requirement in a will that a valuation of property be made or accepted for a purpose, and	3
(b)	either:	4
(i)	the will does not provide an effective method of valuation, or	5
(ii)	the method of valuation is not provided for by a law of New South Wales or of another place.	6
(2)	The reference to the valuation in the will is to be construed, to the extent the method of valuation is not provided for as mentioned in subsection (1) (b) (i) or (ii), as if the reference were a reference to a valuation of the property at the date of the testator's death made by a competent valuer.	7
(3)	Subsection (2) does not apply if a contrary intention appears in the will.	8
46	Operation of wills relating to transgender persons (cf WPA 14)	9
	A beneficiary under a will does not, except in so far as the will may otherwise expressly provide, lose any right or entitlement under the will merely because the beneficiary is a transgender person as referred to in Part 3A of the <i>Anti-Discrimination Act 1977</i> .	10
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(2)	The following wills are also taken to be properly executed:	1
(a)	a will executed on board a vessel or aircraft in conformity with the internal law in force at the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances,	2 3 4 5
(b)	a will, to the extent that it disposes of immovable property, executed in conformity with the internal law in force in the place where the property is situated,	6 7 8
(c)	a will, to the extent that it revokes:	9
(i)	a will, or a provision of a will, that has been executed in accordance with this Act, or	10 11
(ii)	a will, or a provision of a will, that is taken by this Act to be properly executed,	12 13
	if the later will has been executed in conformity with any law under which the earlier will or provision would be taken to have been validly executed.	14 15 16
(3)	A will to which this section applies is not, to the extent that it exercises a power of appointment, to be taken to have been improperly executed only because it has not been executed in accordance with the formalities required by the instrument creating the power.	17 18 19 20
49	Deciding system of law to apply if more than one system of law (cf WPA 32A (2))	21
(1)	This section applies if:	22
(a)	the internal law in force in a place must be applied under section 48, and	23 24
(b)	there is more than one system of internal law in force in that place relating to the formal validity of wills.	25 26
(2)	The system of law to be applied under section 48 is to be determined as follows:	27 28
(a)	if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed,	29 30 31
(b)	if there is no rule, the system of internal law is that with which the testator was most closely connected:	32 33
(i)	if the matter is to be determined by reference to circumstances prevailing at the testator's death—at the time of the testator's death, or	34 35 36
(ii)	in any other case—at the time of execution of the will.	37

50	Construction of the law applying to wills under foreign law	1
	(cf WPA 32A (4))	
(1)	In determining, for the purposes of section 48, whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.	2 3 4 5 6 7
(2)	If a law outside New South Wales is applied to a will (whether or not for the purposes of section 48), a requirement of that law that special formalities must be observed by testators of a particular description, or that the witnesses to the execution of the will must have certain qualifications, is taken to be a formal requirement only, despite any rule of law to the contrary.	8 9 10 11 12 13
	Note. Section 17 provides for the recognition in New South Wales of a court authorised will for a minor made in another jurisdiction. Section 26 provides for the recognition of statutory wills (including such wills made in other jurisdictions) made for persons lacking testamentary capacity.	14 15 16 17

Part 2.5 **Deposit of and access to wills** 18

51	Will may be deposited with Registrar	19
(1)	Any person may deposit a will in the office of the Registrar.	20
(2)	A will is not to be deposited unless it is in a sealed envelope that has written on it the following information:	21 22
	(a) the testator's name and address (as they appear in the will),	23
	(b) the name and address (as they appear in the will) of any executor,	24
	(c) the date of the will,	25
	(d) the name of the person depositing the will.	26
(3)	A will that is deposited must be accompanied by the fee prescribed by the regulations.	27 28
(4)	Despite subsection (3), a fee is not payable for the deposit of a will if:	29
	(a) the will is deposited:	30
	(i) in accordance with section 16 or 18, or	31
	(ii) because a local legal practitioner has died, or has ceased, or is about to cease practising law in New South Wales, or	32 33
	(b) the fee is waived by the Registrar in accordance with regulations made under the <i>Civil Procedure Act 2005</i> .	34 35

52	Delivery of wills by Registrar (cf WPA 32)	1
(1)	If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to another person authorised by the testator in writing to receive it.	2 3 4 5
(2)	On receiving the application, the Registrar must give the will to the testator or the person authorised by the testator unless the testator is a minor or a person who lacks testamentary capacity.	6 7 8
(3)	If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.	9 10 11 12
(4)	On receiving the application referred to in subsection (3), the Registrar must give the will to the executor or other person or to any Australian legal practitioner or trustee company nominated by the executor or person.	13 14 15 16
(5)	The Registrar may examine any will to enable the Registrar to comply with this Part.	17 18
(6)	The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.	19 20
(7)	If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.	21 22 23
53	Failure to retain does not affect validity of will	24
	Any failure of the Registrar to retain a will as required by this Act does not affect the validity of the will.	25 26
54	Persons entitled to inspect will of deceased person	27
(1)	In this section: <i>will</i> includes a revoked will, a document purporting to be a will, a part of a will and a copy of a will.	28 29 30
(2)	A person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense):	31 32 33
(a)	any person named or referred to in the will, whether as a beneficiary or not,	34 35
(b)	any person named or referred to in an earlier will as a beneficiary of the deceased person,	36 37

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| (c) | the surviving spouse, de facto partner (whether of the same or the opposite sex) or children of the deceased person, | 1
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| (d) | a parent or guardian of the deceased person, | 3 |
| (e) | any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate, | 4
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| (f) | any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate, | 6
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| (g) | any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person, | 9
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| (h) | any person committed with the management of the deceased person's estate under the <i>Protected Estates Act 1983</i> immediately before the death of the deceased person, | 11
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| (i) | any attorney under an enduring power of attorney made by the deceased person, | 14
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| (j) | any person belonging to a class of persons prescribed by the regulations. | 16
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| (3) | A person who has possession or control of a will of a deceased person must produce it in a court if the court requires the person to do so. | 18
19 |

Chapter 3	Miscellaneous	1
55	Service of documents	2
	A document that is authorised or required by this Act or the regulations to be served on any person may be served in accordance with rules for the various methods of service of documents under the <i>Uniform Civil Procedure Rules 2005</i> .	3 4 5 6
	Note. On the enactment of this section, Rule 10.5 of the <i>Uniform Civil Procedure Rules 2005</i> contained the rules for general service of documents.	7 8
56	Rules of Court	9
(1)	Rules of Court may be made under the <i>Supreme Court Act 1970</i> for or with respect to the practice and procedure to be followed in respect of proceedings under this Act and any matters incidental to, or relating to, such practice and procedure.	10 11 12 13
	Note. Under section 9 (2) and clause 30 of Schedule 3 to the <i>Civil Procedure Act 2005</i> rules may also be made under that Act.	14 15
(2)	Without limiting subsection (1), rules of court may be made for or with respect to the following:	16 17
(a)	the service of documents (including the service of documents outside New South Wales),	18 19
(b)	the giving of notices under this Act,	20
(c)	applications under this Act,	21
(d)	matters relating to costs in proceedings under this Act.	22
(3)	This section does not limit the rule-making powers conferred by the <i>Supreme Court Act 1970</i> .	23 24
57	Regulations	25
	The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	26 27 28 29
58	Savings, transitional and other provisions	30
	Schedule 1 has effect.	31
59	Amendment of other Acts and regulation	32
	The Acts and regulation specified in Schedules 2 and 3 are amended as set out in those Schedules.	33 34

60	Review of Act	1
(1)	The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.	2 3 4
(2)	The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.	5 6
(3)	A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.	7 8

Schedule 1	Savings, transitional and other provisions	1
		2
	(Section 58)	3
Part 1	General	4
1	Regulations	5
(1)	The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts: this Act	6 7 8
(2)	Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.	9 10
(3)	To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:	11 12 13
(a)	to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or	14 15 16
(b)	to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.	17 18 19
(4)	Regulations made as referred to in subclause (1) may have effect despite the terms of any savings or transitional provisions contained in this Schedule, if the regulations so provide.	20 21 22
Part 2	Provisions consequent on enactment of this Act	23 24
2	Definition	25
	In this Part:	26
	<i>repealed provisions</i> means the provisions of the <i>Wills, Probate and Administration Act 1898</i> repealed by Schedule 2.	27 28
3	Transitional provisions	29
(1)	This Act, other than sections 4, 7, 8, 27–31, 33, 34, 36–38 and 43–45, applies only to wills made on or after the commencement of this clause.	30 31
(2)	Sections 4, 7, 8, 27–31, 33, 34, 36–38 and 43–45 apply to a will whether or not it is made before, on or after the commencement of this clause, if the testator dies on or after that commencement.	32 33 34

(3)	The repealed provisions, as in force immediately before the commencement of this clause, continue to apply to wills made before the commencement of this clause, in so far as those wills are not affected by the operation of subclause (4), (5) or (6) or by the operation of the sections specified in subclause (2).	1 2 3 4 5
(4)	Section 9 (Persons who cannot act as witnesses to wills) extends to a codicil or other testamentary disposition that alters or revokes a will and that is made on or after the commencement of this clause even if the will was made before the commencement.	6 7 8 9
(5)	Section 12 (Effect of marriage on a will) applies to a will made before the commencement of this clause, in relation to a marriage solemnised on or after the commencement.	10 11 12
(6)	Section 13 (What is the effect of divorce or an annulment on a will) applies to a will made before the commencement of this clause, if the divorce or the annulment of the marriage occurs on or after the commencement of this clause.	13 14 15 16
4	Will of minor pursuant to leave of Court	17
	Despite the repeal of section 6A of the <i>Wills, Probate and Administration Act 1898</i> , a will may be made by a minor after repeal of that section pursuant to (and in accordance with any conditions of) leave granted under that section before its repeal.	18 19 20 21
5	Anti-lapse provisions	22
	Despite clause 3 (1), section 41 (Dispositions not to fail because issue have died before testator) applies to a will made before the commencement of this clause if the testator dies on or after the commencement and on or after the death of the issue.	23 24 25 26
6	Construction of references	27
	Subject to this Schedule and the regulations, in any Act (other than this Act) or instrument:	28 29
	(a) a reference to a repealed provision for which there is a corresponding provision in this Act extends to the corresponding provision of this Act, and	30 31 32

(b) a reference to any act, matter or thing referred to in a repealed provision for which there is a corresponding provision in this Act extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act. 1
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7 Pending proceedings 5

(1) Subject to this Schedule and the regulations, this Act and the rules apply to proceedings commenced before the commencement of this clause in relation to the repealed provisions in the same way as they apply to proceedings commenced on or after the commencement. 6
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(2) The Court may in such proceedings make such orders dispensing with the requirements of this Act or the rules in relation to the proceedings, and such consequential orders (including orders as to costs) and directions, as are appropriate in the circumstances. 10
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8 Wills deposited in registry of Court 14

A will deposited in the registry of the Court under section 32 of the *Wills, Probate and Administration Act 1898*, as in force immediately before the repeal of that section by this Act, is taken to have been deposited with the Registrar under section 51 (Will may be deposited with Registrar). 15
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Schedule 2	Amendment of Wills, Probate and Administration Act 1898 No 13	1
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	(Section 59)	3
[1] Section 1 Name of Act		4
	Omit “ <i>Wills</i> ,”.	5
[2] Part 1 Wills		6
	Omit the Part (other than sections 30 and 31).	7
[3] Section 30 Place of original wills		8
	Omit “brought into the Court or”.	9
[4] Section 31 Official copy of whole or part of will may be obtained		10
	Omit “An”.	11
	Insert instead “Without limiting section 52 (Delivery of wills by Registrar) of the <i>Succession Act 2006</i> , an”.	12
		13
[5] Part 1A Formal validity of wills		14
	Omit the Part.	15
[6] Section 92 Distribution of assets after notice given by executor or administrator		16
		17
	Insert “or the distribution was not made in the circumstances described in subsection (2) (a) or (b) of section 28 (Protection of personal representatives who distribute as if will had not been rectified) of the <i>Succession Act 2006</i> ” after “time of the distribution” in section 92 (2).	18
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[7] Section 92A		22
	Insert after section 92:	23
92A Personal representatives may make maintenance distributions within 30 days		24
		25
(1)	This section applies if a person (the <i>survivor</i>):	26
(a)	survives a deceased person, and	27
(b)	at the time of the deceased person’s death, was wholly or substantially dependent on the deceased person, and	28
		29
(c)	will be entitled to part or all of the deceased person’s estate if the person survives the deceased person for 30 days.	30
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Succession Bill 2006

Schedule 2 Amendment of Wills, Probate and Administration Act 1898 No 13

- (2) The executor or administrator of the deceased person's estate may make a distribution that is an adequate amount for the proper maintenance, support or education of the survivor at any time after the death of the deceased person, including within 30 days after the death of the deceased person. 1
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- (3) The executor or administrator may make the distribution even though the executor or administrator knows, when the distribution is made, of a pending application, or an intended application, for an order under the *Family Provision Act 1982* in relation to the deceased person. 6
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- (4) The executor or administrator is not liable for a distribution under subsection (2) that is made in good faith. 11
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- (5) An amount distributed under subsection (2) to a person must be deducted from any share of the estate to which the person becomes entitled. 13
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- (6) However, if the person does not survive the deceased person for 30 days, the distribution is to be treated as an administration expense. 16
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- (7) An authorised deposit-taking institution does not incur any liability in relation to any transaction concerning an account of the deceased person kept with the institution or with some other financial institution that it is authorised to make by the executor or administrator of the deceased person for the purposes of a distribution under subsection (2). 19
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- (8) Subsection (7) does not relieve an authorised deposit-taking institution from any liability or obligation it would have apart from that subsection. 25
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Schedule 3	Amendment of other Acts and regulation	1
	(Section 59)	2
3.1	Administration (Validating) Act 1900 No 38	3
[1]	Section 1 Incorporation and name of Act	4
	Omit “ <i>Wills</i> ,”	5
[2]	Section 4 Power of court to authorise sale, mortgage, or lease	6
	Omit “ <i>Wills</i> ,”	7
3.2	Adoption Act 2000 No 75	8
[1]	Section 99 Relationship of adopted child to other children of the adopter	9
	Omit “ <i>Wills</i> ,” from section 99 (1) (a).	10
[2]	Section 100 Liability of trustees and personal representatives in relation to adopted persons	11
	Omit “ <i>Wills</i> ,” from the definition of <i>claims notice</i> in section 100 (3).	13
3.3	Compensation to Relatives Act 1897 No 31	14
	Section 7 Construction of Act	15
	Omit “ <i>Wills</i> ” from section 7 (2).	16
3.4	Contaminated Land Management Act 1997 No 140	17
[1]	Section 14 Concept of notional owner	18
	Omit “ <i>Wills</i> ,” from section 14 (2) (c).	19
[2]	Section 38 Limit on liability of representative or trustee	20
	Omit “ <i>Wills</i> ,” from section 38 (3).	21
3.5	Conveyancing Act 1919 No 6	22
[1]	Section 7 Definitions	23
	Omit “ <i>Wills</i> ,” wherever occurring from the definitions of <i>Administrator</i> and <i>Disposition</i> in section 7 (1).	24
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[2] Section 23B Assurances of land to be by deed	1
Omit “ <i>Wills</i> ,” from section 23B (2) (a).	2
[3] Section 33 Meaning of heir, next of kin, or statutory next of kin of any person	3
Omit “ <i>Wills</i> ,” wherever occurring in section 33 (1) and (3).	4
[4] Section 37 Extension of sec 29 of Wills, Probate and Administration Act 1898	6
Omit the section.	7
[5] Section 152 Definitions	9
Omit “ <i>Wills</i> ,” from section 152 (a).	10
3.6 Duties Act 1997 No 123	11
Section 65 Exemptions from duty	12
Insert after section 65 (12):	13
(12A) Consents to gifts by will to interested witnesses	14
No duty is chargeable under this Chapter on a consent referred to	15
in section 10 (3) (b) of the <i>Succession Act 2006</i> .	16
3.7 Family Provision Act 1982 No 160	17
Section 6 Definitions	18
Omit “ <i>Wills</i> ,” from paragraph (a) of the definition of <i>administration</i> in section	19
6 (1).	20
3.8 Inheritance Act of 1901 No 19	21
Section 14 Extent of Act	22
Omit “and the <i>Wills Probate and Administration Act 1898</i> ”.	23
Insert instead “the <i>Probate and Administration Act 1898</i> and the <i>Succession</i>	24
<i>Act 2006</i> ”.	25

3.9 Landlord and Tenant (Amendment) Act 1948 No 25	1
[1] Section 83B Public Trustee’s title not a defence to recovery of possession of prescribed premises after death of lessee in certain cases	2
Omit “ <i>Wills</i> ,”.	3
	4
[2] Section 83C Periodic leases may not be disposed of by will or pass on intestacy	5
	6
Omit “ <i>Wills</i> ,”.	7
3.10 Limitation Act 1969 No 31	8
Section 11 Definitions	9
Omit “ <i>Wills</i> ,” from the definition of <i>Personal representative</i> in section 11 (1).	10
3.11 Minors (Property and Contracts) Act 1970 No 60	11
Second Schedule Saving of specific enactments	12
Omit “ <i>Wills</i> ,” from under the heading “ Subject ” in the Table to the Schedule.	13
3.12 Powers of Attorney Act 2003 No 53	14
[1] Section 3 Definitions	15
Omit “ <i>Wills</i> ,” from paragraph (b) of the definition of <i>disposition</i> in section 3 (1).	16
	17
[2] Section 24 Effect of disposal of home shared by spouses under enduring power of attorney in cases of intestacy	18
	19
Omit “ <i>Wills</i> ,” wherever occurring.	20

3.13 Public Trustee Act 1913 No 19	1
[1] Section 1 Name of Act, construction and commencement	2
Omit “ <i>Wills</i> ,”.	3
[2] Section 1	4
Insert “the <i>Succession Act 2006</i> ,” after “1898,”.	5
[3] Section 4A Definitions	6
Omit the definition of <i>Principal Act</i> .	7
[4] Section 18A Election by Public Trustee to administer	8
Omit “ <i>Wills</i> ,” from section 18A (5A).	9
[5] Section 34A Small estates	10
Omit “section 30 of the Principal Act” from section 34A (1).	11
Insert instead “section 51 (Will may be deposited with Registrar) of the <i>Succession Act 2006</i> ”.	12
	13
[6] Section 34B Dispute by Public Trustee of any claim	14
Omit “Principal Act” wherever occurring.	15
Insert instead “ <i>Probate and Administration Act 1898</i> ”.	16
[7] Schedule Enactments of Principal Act repealed by this Act	17
Insert at the end of the Schedule:	18
Note. The Schedule repealed provisions of the <i>Wills, Probate and Administration Act 1898</i> .	19
	20
3.14 Stamp Duties Act 1920 No 47	21
Second Schedule Stamp duties and exemptions	22
Omit “ <i>Wills</i> ,” from Part 1.	23

3.15 Trustee Act 1925 No 14	1
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