Bar Council response to the Ministry of Justice Consultation on Storage and Retention of Original Will Documents

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice Consultation on Storage and Retention of Original Will Documents.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. It seems to us that there are really two separate main issues raised by the consultation.

---

[1] Consultation

5. The first is what to do with original wills which have been proved since 2021 (and so have had digital copies made). That we see as relatively straightforward. The digital copies are adequate for the purposes of the register. But the paper originals should be returned to the executor(s), not destroyed. A period of retention is required in case the physical original is needed to test whether it is a forgery. The proposal of 25 years amply satisfies this requirement.

6. The second is what to do with pre-2021 wills. This is where the ongoing costs arise. Storing post 2021 original wills for – say – 25 years should give rise to relatively minor costs, which can easily be accommodated in the probate fee. But changing the law for wills proved post 2021 will not save any of the £4.5m pa ongoing costs quoted in the consultation. We are a little surprised that the actual cost is not known and has to be estimated. Storage is outsourced, so the MOJ or Treasury (or whichever government department) must be invoiced by the commercial storage provider. We do not understand therefore why the actual cost cannot be identified. We are strongly against any suggestion that currently-stored wills should be systematically destroyed, without being digitised. That we could not for one moment support, since reference is often needed to old wills to trace who is entitled to current assets. We do not know whether the cost of digitising all the wills currently stored would be too great, even with the saving of a good portion of the £4.5m pa cost. If it is, we suspect that the appropriate way to deal with the issue of the ongoing estimated £4.5m p.a. cost is to ensure that the probate fees cover that cost.

Question 1: Should the current law providing for the inspection of wills be preserved?

7. We consider that wills should indeed be available for inspection (whether retained physically or preserved digitally). Inheritance remains a hugely important matter within society. It is crucial to confidence in the succession process that those with a potential interest in a deceased person's estate should be able easily to access the terms of the deceased's will to establish who has succeeded to that estate. Probate and inspection of the probated will remain as important as ever.

Question 2: Are there any reforms you would suggest to the current law enabling wills to be inspected?

8. We consider that the law relating to the sealing of wills is ripe for reform (although we suspect that this is not a topic being raised by this consultation). We are not convinced that there is a valid case for sealing wills of the Royal Family or indeed any wills. It does not appear to be consistent with a more modern approach to the Royal Family, which requires any special treatment to be based on justifiable grounds.

9. We are not aware that that any other than Royal wills are ever sealed. We are not for instance aware that a will has ever been sealed to protect the address of someone on a witness protection scheme (and consider it inherently unlikely that such an address would be included in a will). Any such risk might be dealt with by refusing to admit the address of the witness to probate (in the same way that scandalous matter is not admitted to probate). A provision for that could be introduced into the long-overdue rewriting of the Non-Contentious Probate Rules.

Question 3: Are there any reasons why the High Court should store original paper will documents on a permanent basis, as opposed to just retaining a digitised copy of that material?

10. We do not see any valid reasons for storing the original paper will document permanently, where a digitised copy is retained in the Registry. But we take that view only on the basis that the original paper will document is returned to the executor(s) after whatever period it may be thought fit to retain it in the Registry. That meets the emotional attachment that a family may well have to a will. Nor is that attachment purely emotional. The family may need to refer to the will in the future and should be allowed to preserve it in whatever manner they decide. Nor can we see any justification at all for the destruction of a document by Government, which can easily be returned by Government to the persons interested in its terms.

Question 4: Do you agree that after a certain time original paper documents (from 1858 onwards) may be destroyed (other than for famous individuals)? Are there any alternatives, involving the public or private sector, you can suggest to their being destroyed?

11. We are strongly against the destruction of old wills. We might just accept destruction after – say – 125 years, but that would clearly save so little money as to be of little interest. We cannot emphasise enough how important it can be to trace back through old wills to discover who is entitled – today – to valuable property. This has to be done by lawyers on a frequent basis. The need can arise in a number of ways. Examples are as follows:

A will-trust (or inter vivos trust) may have included an individual alive when the will trust started as an ultimate default beneficiary. Years later – possibly 125 years later or even more – that trust may fail and the ultimate default kicks in. The trustees then need to trace the heirs (not necessarily the same as the family) of the ultimate default beneficiary, through a succession of wills over the past 125 years.

A will-trust may provide for no ultimate beneficiary for one reason or another. An intestacy therefore occurs up to 125 years or more after the will was proved. The next of kin who were alive 125 years earlier then need to be established and their wills (and so beneficiaries) traced.

A fund of one kind or another may be established, after very many years, not to be, or no longer to be owned by its apparent owners or beneficiaries.

That can, for instance, happen where a fund assumed to be charitable is many years later determined not to be charitable. A recent illustration of that is the National Fund – a charitable fund of some £550m, whose charitable status was disputed almost 100 years after the Fund was created. Had the Fund been held not to be charitable, the funds within it would have had to have been returned to the heirs of the two main contributors, by tracing their will entitlements, over 100 years.

It occurs also where unincorporated associations turn out to be non-charitable, and not to be owned by their ongoing members. This is a surprisingly common occurrence.

12. It is now possible to trace the inheritances through the wills of the relevant individuals who have died over the intervening period which can exceed 125 years. It must remain possible. The links in the chain – the wills over the intervening period – cannot simply be destroyed.

13. We accept that a contrarian view is tenable. Family branches that were wholly unaware of the wealth might be said to have no moral claim to it and not to miss it if it never comes to them. Such funds could escheat to the Crown and pass into the Consolidated Fund, for the benefit of the entire population. But depriving people of

such potential inheritances should not be done without full debate, simply by destroying the resource – stored wills – which enables them to be traced.

14. Given that we consider that the contents of wills from at least 1900 (and arguably further back) should be retained, we suspect that there is not much cost to be saved in destroying wills from 1858-1899.

15. We would very much value older wills being archived generally somehow, but as lawyers, have no particular expertise in archivism to offer. What we do know is that wills - while often dry documents – can and do shed light on different times which it would be a shame to lose. The opening words of wills from the late Victorian and Edwardian eras stating "I wish to be buried without hired grief" are an example of a relatively insignificant but still fascinating insight into a lost world.

Question 5: Do you agree that there is equivalence between paper and digital copies of wills so that the ECA 2000 can be used?

16. Yes. There would not be equivalence for the period during which a challenge on the grounds of forgery might be likely to be maintained. After that, undoubtedly.

Question 6: Are there any other matters directly related to the retention of digital or paper wills that are not covered by the proposed exercise of the powers in the ECA 2000 that you consider are necessary?

17. No.

Question 7: If the Government pursues preserving permanently only a digital copy of a will document, should it seek to reform the primary legislation by introducing a Bill or do so under the ECA 2000?

18. Under ECA 2000.

Question 8: If the Government moves to digital only copies of original will documents, what do you think the retention period for the original paper wills should be? Please give reasons and state what you believe the minimum retention period should be and whether you consider the Government's suggestion of 25 years to be reasonable.

19. The digitised copy of the will should provide the complete information about it that is needed, forgery apart. We suspect a period of 12 years from probate would probably be sufficient to meet any concern that the physical document itself may need to be inspected for evidence of forgery. It follows that we would support the Government's suggestion of 25 years as entirely reasonable.

20. There is an important point to be appreciated here: where a will needs to be inspected for forgery (a surprisingly common occurrence), the original must be inspected, not merely a digitised copy. Many physical aspects of the will are crucial to a forgery investigation. A non-exhaustive list includes:

the age and quality of the paper,
the age and quality of the ink,
the depth and firmness of impressions made by the signatures,
invisible impressions left by tracing,
invisible impressions left by writing on overlaid documents,
minute sprays of ink from printing devices.

Without the physical will it is impossible to make an adequate examination.

21. The chances of a forgery challenge reduce significantly over time. It certainly cannot be said that forgery will only be raised before the will is submitted to probate. A will is often admitted to probate either while or more commonly before reasons to challenge it are discovered. There is no limitation period for challenging a will, but a 12-year period seem likely to be appropriate, on analogy with the longer long-stop in the Limitation Act. Since this is primarily cost-driven, the appropriate length of period may be determined by cost. If the difference in cost between 12-year and 25-year retention is minimal than we would favour a 25 period.

Question 9: Do you agree with the principle that wills of famous people should be preserved in the original paper form for historic interest?

22. We do not regard this interesting question as raising legal considerations. We suspect however that there is sufficient public interest in the wills of famous people (and wills in which famous people are named) to make the preservation of such documents in the original (and certainly in digitised form) a worthwhile function of government. An example is Lord Byron's Will. He left most of his estate to his daughter Ada on the intriguing condition that she should not marry a Frenchman. Amusing for that, but even more fascinating when one remembers that Ada (who

married the Earl of Lovelace, not a Frenchman) is now herself remembered as an early pioneer (with Charles Babbage) of computers and computer-programming.

Question 10: Do you have any initial suggestions on the criteria which should be adopted for identifying famous/historic figures whose original paper will document should be preserved permanently?

23. This appears to us to fall outside our area of expertise.

Question 11: Do you agree that the Probate Registries should only permanently retain wills and codicils from the documents submitted in support of a probate application?
Please explain, if setting out the case for retention of any other documents.

24. Yes.

Question 12: Do you agree that we have correctly identified the range and extent of the equalities impacts under each of these proposals set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

25. We do agree. We do not see that the issue of digitising future or past wills raises any equality considerations.

Bar Council[2]

23 February 2024

For further information please contact:

Eleanore Lamarque, Policy Manager, Regulatory Issues, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Email: ELamarque@barcouncil.org.uk

[2] Prepared by a member of the Law Reform Committee