Law Commission
Reforming the law

MAKING A WILL

This optional response form is provided for consultees' convenience in responding to our consultation on making a will.

The response form includes the text of the questions in the consultation, with boxes for yes/no answers (please delete as appropriate) and space for comments. You do not have to respond to every question. Comments are not limited in length (the box will expand, if necessary, as you type). There is an opportunity to give more general comments at the end of this form.

Each question gives a reference in brackets to the paragraph of the consultation at which the question is asked. Please consider the surrounding discussion before responding.

We invite responses by Friday 10 November 2017.

Please return this form by email to propertyandtrust@lawcommission.gsi.gov.uk.

If you would prefer to respond by post, the relevant address is:

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We are happy to accept responses in any form. However, we would prefer, if possible, to receive emails attaching this pre-prepared response form.

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YOUR DETAILS

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CONFIDENTIALITY

Do you wish to keep this response confidential?

Yes:	No: X
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QUESTION 1

In any new legislation on wills should the term “testator” be replaced by another term?

If so:

(1) should the term that replaces “testator” be “will-maker”? or

(2) should another term be used and, if so, what term? (paragraph 1.9)

Yes:	No: X	Other:
We are not aware of any evidence that the word ‘testator’ gives rise to confusion in practice. We would be surprised if any lack of public awareness of its meaning had any bearing on rates of will-making, given that almost everyone understands what a will is. The alternative suggested, “will-maker” is potentially confusing and should be avoided.		

QUESTION 2

We ask consultees to tell us about their experiences of the impact, financial and otherwise of the:

(1) preparation, drafting and execution of wills; and

(2) disputes over wills following the testator’s death. (paragraph 1.36)

As to (1), the working group’s experience as practitioners specialising in contentious probate is that will-preparation is a skilled task, which to perform well requires care and time even in simple cases, and often special skill and knowledge. We consider that much litigation and cost could be avoided if more practitioners (whether solicitors, will-writers or otherwise) took the trouble to familiarise themselves with the testator’s estate and family situation, their previous wills, and to record all meetings in proper attendance notes, and then took care to consider eventualities that may not occur to the testator without prompting, and when drafting the will, to eliminate drafting errors. We remain concerned at the low cost of many (particularly unregulated) will-writing services, which make it uneconomical for many regulated and insured will-writers to offer the service with the care the task deserves.

As to (2), it is not doubted that a dispute over a will or an estate can be a divisive and expensive event for most families. However:

(1) In our experience, a dispute over the validity of a will is often the consequence or expression of an existing, difficult family situation rather than the original cause of the disagreement.

(2) Therefore, if there were not a disagreement about the validity of the will, then there would often be a dispute about the manner of the administration of the estate, or under the Inheritance (Provision for Family and Dependants) Act 1975 or in proprietary estoppel or the like.

QUESTION 3

We provisionally propose

(1) that the test for mental capacity set out in the Mental Capacity Act 2005 should be adopted for testamentary capacity; and

(2) that the specific elements of capacity necessary to make a will should be outlined in the MCA Code of Practice.

Do consultees agree? (paragraph 2.73)

Yes: X	No:	Other: X

We are conscious that this is a question on which different members of the Association have different views. What follows represents the view of the working group.

We think it is important that the test applicable to the validity of a will made by the testator should dovetail seamlessly with the jurisdiction of the Court of Protection to make a statutory will. It would undesirable to allow a situation to exist whereby a would-be testator lacks capacity to make a valid will for himself, but where the COP would lack jurisdiction under the MCA test. Likewise, it ought not to be possible for a testator to make a valid will himself at the same time as the COP is making one on his behalf.

Accordingly, the *substance* of the test for capacity must be identical when determining jurisdiction of the court to make a statutory will as for determining the validity of a will made by the testator. We consider that the best way of ensuring this is by adopting the MCA test for the validity of wills made by the testator, while incorporating the existing law as set out in the case law from *Banks v Goodfellow* onwards (subject to the points below) into guidance, so that it applies both in and out of the Court of Protection.

However, that does not mean that the *procedural* or *evidential* aspects of the test should apply in the same way when determining whether the Court of Protection has jurisdiction as when determining whether a will made by the testator is valid. We are concerned that, without modification, the procedural and evidential framework of the MCA, designed to safeguard a person's autonomy by circumscribing the Court of Protection's jurisdiction – such as the immoveable burden of proof – could have the effect of making it harder to challenge the validity of wills made by incapable testators, in which context the justification for the safeguards does not apply.

In that regard, the most difficult area, it seems to us, is the requirement under s.1(3) MCA that a person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success. This is an important protection for personal autonomy in the context of determining when a deputy or the court can make a decision on someone else's behalf. But in the context of the validity of a will made by the testator, it is apt to cause confusion.

There is already, in our view, a problem emerging in the case law. We refer to the article by Alexander Learmonth in TQR Vol.13 issue 3 page 4, "Allow me to explain", which sets out how cases such as *Re Walker* (20.11.2014) suggest (we think wrongly) that a will, made by a testator who only has capacity to make a decision and understand the relevant information if assisted and explained, is valid, even if he or she did not in fact receive such an explanation. This cannot in our view be correct, and properly understood, is not supported by previous case law from *Re Beaney* to *Hoff v Atherton*.

This problem is not confined to will-making, of course, but applies to determining the validity of any act by person whose capacity is in question.

This category of testator consists, of course, of those people for whom supported will-making, dealt with later, is apt and necessary. We therefore suggest that any new legislation makes clear that the test for capacity when determining the validity of wills and other juristic acts made by the testator or actor themselves is relative not only to the act in question, but also to the degree of explanation and assistance provided.

QUESTION 4

We invite consultees' views on whether, if the Mental Capacity Act 2005 is not adopted as the test for testamentary capacity, the *Banks v Goodfellow* test should be placed on a statutory footing. (paragraph 2.85)

This question does not arise on our response above.

If however the MCA were not adopted, then it would not seem helpful or necessary to us to place *Banks v Goodfellow* on a statutory footing. The great benefit of the test being a common law test is that it allows it to be shaped according to developments in neurology and psychiatry, as in cases such as *Key v Key*.

QUESTION 5

We invite consultees' views on whether any statutory version of the test in *Banks v Goodfellow* should provide:

(1) a four limbed test of capacity, so that the relevance of the testator's delusions or disorder of the mind (or other cause of capacity) is not confined to understanding the claims on him or her;

(2) that a testator's capacity may be affected by factors other than delusions or a disorder of the mind; and

(3) clarification that the testator must have the capacity to understand, rather than actually understand, the relevant aspects of a will. (paragraph 2.85)

In any statutory or extra-statutory rendition of the *Banks v Goodfellow* test:

We agree that it should be made clear that what is sometimes referred to as the 'fourth limb' relates not only to the testator's ability to understand and appreciate the potential *beneficiaries* (we do not think it is helpful to refer to 'claims' in this context), but also to the testator's ability to understand the extent of the *estate* which can be left by will. Though a disorder of the mind would perhaps less frequently tend to pervert a testator's thinking with regard to their estate than their potential beneficiaries, the important point is that the testator is able to keep in mind both what they have to give and to whom they may wish to give it simultaneously, so that they can weigh that information and come to a decision.

The point of the fourth limb, in our view, is that even a testator who can understand what he has to give away and to whom he may want to give it, will lack capacity if his affections or appreciations are (to use the old phrases) 'poisoned' or 'perverted' by a disorder of the mind or delusion. Without the fourth limb, the essential point about capacity – that someone is able to *use* their appreciation of their estate and their potential beneficiaries to make a decision – risks being lost. In broad terms the first three limbs often deal with simple disorders such as memory loss and other dementia-type symptoms, whereas the fourth limb tends to capture more psychotic symptoms such as delusions or paranoid complexes.

(1) It would be helpful to make explicit what is already inherent in the *Banks v Goodfellow* test, *ie* that capacity can be lacking for any reason; the question is whether the testator is capable of understanding the matters set out. We often see in expert reports an assumption that the fourth limb is only concerned with symptoms that can properly be described in modern psychiatric parlance as 'delusions', whereas in fact of course Lord Cockburn CJ had in mind any sort of psychiatric problem.

(2) If the test is included within the MCA, it will be necessary to make clear that the MCA's diagnostic test does not apply to the question of whether a will is valid. For example, a will may be invalid because it was executed when the testator was temporarily intoxicated by alcohol, not because of any more morbid impairment or disturbance of the mind.

(3) We agree that it should be made clear that the test of capacity is looking at ability to understand rather than actual understanding. However, as will become apparent when the test is aligned with the MCA test, the real question is in determining matters of capacity, for wills or any other decision, is whether the testator has the ability to make a decision for him or herself, not merely whether the testator understands the matters relevant to the decision. The testator must be able to bring those matters to bear in the decision-making process.

In this regard, there is a misconception evident in many cases, which the way that this consultation question is framed risks perpetuating, namely that the degree of capacity required to make a will is relative to the complexity of the *will* being made. That is in our view incorrect; capacity is relative to the complexity of the *decision* being made. The decision in question is not merely the binary choice of whether to sign this document or not, but the open-ended question of what disposition should be made of one's estate on death. Thus it is the complexity of the testator's *affairs* and *family situation* which dictates the level of capacity required, not merely the complexity or simplicity of the document put in front of the testator for signature. Take a testator with many different asset classes in different jurisdictions, ex-spouses and cohabitees, business partners and children with different partners. The will may say, "All to A". The test for this testator's capacity must reflect the fact that it is a difficult decision how to dispose of the estate, not the fact that the will is three words long.

Bringing the test for capacity in line with the MCA, which is directed at the decision-making process, should allow this point to be clarified.

QUESTION 6

We provisionally propose that if a reformed version of the *Banks v Goodfellow* test is set out in statute it should be accompanied by a statutory presumption of capacity.

Do consultees agree? (paragraph 2.88)

Yes:	No: X	Other:

As noted above, there is no need to follow the same safeguards on personal autonomy in the context of determining the validity of wills made by the testator as there is in the context of the Court of Protection's jurisdiction to make wills for others.

However, in practice, there is at common law a presumption of capacity arising from the fact of a duly executed will that is rational on its face. Case law has held that in order to displace that presumption, the evidence casting doubt on capacity must go further than merely showing some mental impairment or mental health issue, but must raise a doubt as to testamentary capacity in relation to the will in question.

That being so, we do not see that a statutory presumption would assist, but rather would risk fettering the court's powers in cases where evidence is in short supply.

QUESTION 7

We provisionally propose that the rule in *Parker v Felgate* should be retained.

Do consultees agree? (paragraph 2.95)

Yes: X	No:	Other:

This is not a question on which the working group is agreed, but a majority agrees that the rule should be retained, albeit subject to additional safeguards.

We acknowledge the conceptual difficulty of the rule in *Parker v Felgate* within the context of the current test of capacity, as expressed by Penelope Reed QC in the article cited in the consultation paper and argued by her as counsel in *Perrins v Holland*.

Putting the rule on the footing of a statutory exception would obviate those conceptual issues.

We also acknowledge the practical drawback of the rule, in that it potentially means that the testator may not be able to check the will at the time of execution. We also acknowledge that the Court of Protection

However, on balance, a majority of us considers that the advantages of the rule outweigh that drawback. People often come to make or update their wills at the end of their life, when their health and mental capacity may be failing fast. Having to have capacity both when giving instructions and when subsequently signing the engrossed will is therefore a potential fetter on the ability of people to make wills at exactly their time of greatest need. It is therefore practically convenient to have a rule that allows a will to be validly *executed* when the testator lacks capacity to make the *decision* as to what dispositions to make, provided the court can be confident that the will in question accurately reflects instructions given by the testator at a time when he or she retained capacity.

If the law is to put the rule in *Parker v Felgate* on a statutory footing, however, then we feel the opportunity ought to be taken to put additional safeguards into the rule. We suggest (a) that the will must be executed within a reasonable period of giving the instructions, (b) that there be no reason to believe that the testator is likely to have changed his or her mind since giving the instructions.

This reflects the point above that testamentary capacity is (or should be) about the capacity to make an open-ended decision as to one's testamentary dispositions, not merely the binary choice whether to make the particular disposition reflected in the draft will presented for signature.

QUESTION 8

We provisionally propose that:

(1) a code of practice of testamentary capacity should be introduced to provide guidance on when, by whom and how a testator's capacity should be assessed.

(2) that the code of practice should not be set out in statute but instead be issued under a power to do so contained in statute (which may be that contained in the MCA should the MCA test be adopted for testamentary capacity).

Do consultees agree? (paragraph 2.120)

Yes:	No: X	Other:

As the consultation paper notes, guidance on best practice is already provided by many professional bodies for practitioners. Such guidance can be regularly updated to reflect recent case law, and its status as guidance is understood by judges. Statutory codes of practice which are not overseen by an active regulatory body tend not to be updated or improved (for example the MCA Code of Practice), and for that reason are considered unsatisfactory. (We continue to encourage the introduction of proper regulation of other will-writers, which would ensure all practitioners receive proper guidance on these matters.)

If however a code of practice is to be introduced, then we agree that it should be issued by way of guidance, rather than in statute. Such statutory provisions would serve no purpose, since (as we understand the proposal) if not followed that would neither prove the invalidity of the will nor automatically expose the practitioner to sanction.

QUESTION 9

We provisionally propose that the code of practice should apply to those preparing a will, or providing an assessment of capacity, in their professional capacity.

Do consultees agree? (paragraph 2.120)

Yes:	No:	Other:X

As set out above, we do not see a need for a statutory code. It seems to us a poor substitute for proper regulation of will-writers.

If such a code were to be introduced, however, then we think it should apply to such people.

QUESTION 10

We invite consultee's views on the content of the code of practice. (paragraph 2.120)

Such a code should in our view make clear:

(a) That mental impairment is not always obvious from casual conversation, or even from taking instructions about a will, as research by psychiatrists (in which solicitors were shown videos of interviews and asked to comment on whether they thought capacity was in doubt) has shown.

(b) That (as commented by the Deputy Judge in *Ashkettle v Gwinnett*) an accurate assessment requires independently gathered knowledge of the facts being provided by the testator.

Given the reluctance of many health professionals to make assessments, the Code ought also to be framed in such a way that health professionals can feel confident when asked to make an assessment that they will not thereby expose themselves to criticism, and provide guidance on their right to charge appropriately for their time.

QUESTION 11

In principle, a scheme could be enacted allowing testators to have their capacity certified by a third party. We provisionally propose that a certification scheme should not be enacted.

Do consultees agree? (paragraph 2.131)

Yes: X	No:	Other:

We are not in favour of a formal certification scheme. This seems to us liable to create a further area for potential dispute, rather than to reduce it.

QUESTION 12

We take the view that reform is not required:

(1) of the best interests rationale that underpins the exercise of the court's discretion to make a statutory will;

(2) of the way in which that discretion is exercised; or

(3) to restrict the circumstances in which a statutory will can be made.

Do consultees agree? (paragraph 3.38)

Yes: X	No:	Other:
(1) We agree that it would be undesirable for the test applied by the COP in respect of statutory wills to differ from that applied by the COP in respect of its other duties under the MCA, and so for that reason we agree that the best interests test should be retained. (2) We do however agree with the suggestion in para 3.36 that section 4(6) of the MCA be amended to require a determination of the best interests test to give particular weight to that person's past and present wishes and feelings. We consider that this would reflect the actual approach of the COP in practice, and would emphasise the importance of that factor in the application of the test. (3) We do not consider that there is any good reason to restrict the COP jurisdiction only to those persons who have previously made a will. In the case of, for example, a person who has lost capacity due to injury, they may receive compensation which changes their circumstances and assets to a large extent; it would be inappropriate to exclude them from the statutory will process simply because they may not previously have made a will. In respect of the age from which the court's jurisdiction is engaged, we agree that if the general age for making a will is lowered to 16, then the COP jurisdiction to make a statutory will should likewise be lowered to 16, to ensure consistency.		

QUESTION 13

Consultees are asked whether there are reforms that could usefully be made to the procedure governing statutory wills with the aim of reducing the cost and length of proceedings and, if so, what those are? (paragraph 3.41)

Yes: X	No:	Other:

Our experience is that practitioners frequently bemoan the length of time that it can take to obtain a final order from the COP; although in cases of urgency such orders can be obtained quickly, it can often in the ordinary course of events take a significant time for a case to work through the system. A particular problem arises where death is not necessarily anticipated, but where the patient (being often elderly or in poor health) nonetheless dies midway through the process and before a statutory will can be ordered, at which point the jurisdiction of the COP ends (the working party agrees that the jurisdiction should not be allowed to continue after death in order to avoid overlap with the 1975 Act family provision mechanism, and to ensure consistency across the application of the MCA by the COP). The option to ask for expedition will not necessarily assist in such cases. One option could be to allow non-contested cases (i.e. cases where all relevant parties agree as to the terms of the proposed will) to be 'fast-tracked' and perhaps heard either on paper or by way of telephone, which would perhaps a) free up court time for other more contested cases and b) allow for a swifter resolution in straightforward cases. Further, the working party agrees with the statement in para 3.41 that if a supported will-making scheme is put into effect, this ought to remove from the COP some of the cases in which a statutory will is currently required (although given that practitioners do to some extent already offer such support, the number of cases in which this will apply may not be so very great in reality).

QUESTION 14

Do consultees think that a supported will-making scheme is practical or desirable?

Yes: X	No:	Other:

Yes: our view is that a supported will-making scheme is both practical and desirable. If a person is capable of making a will with support, then it ought to be possible to allow him to access that support and thus make a valid will without the intervention of the COP. This working group takes the view that in practical terms, such supported will-making is already or ought to be part of the existing will-making system. Anecdotally, will-makers already provide assistance where necessary by way of explanations etc. to those testators who may otherwise have problems in understanding the will-making process. However, we agree that more could and should be done in order to provide guidance and a more structured framework for such assistance. Further, the working party's view is that the role of assistance and explanations within the MCA 2005 framework requires attention, in order to ensure that wills made by persons who can understand only with assistance are valid only if they do in fact receive that assistance.

If so, we ask for consultees' views on:

(1) who should be able to act as supporters in a scheme of supported will-making?

(2) should any such category include non-professionals as well as professionals?

(3) should supporters be required to meet certain criteria in order to act as a supporter and, if so, what those criteria should be?

(4) how should supporters be appointed?

(5) what should be the overarching objective(s) of the supporter role?

(6) how should guidance to supporters be provided?

(7) what safeguards are necessary in a scheme of supported will-making? In particular:

(a) should a supporter be prevented from benefitting under a will?

(b) should a fiduciary relationship be created between a supporter and the person he or she is supporting? (paragraph 4.59)

(1) In the case of professionals, it is our view that the relevant professional bodies should be encouraged to accredit practitioners for supported will-making. Although there are of course unavoidable costs consequences where a professional acts as a supporter, our view is that this is nonetheless the preferable course, due to the risk of likely conflict of interest if a family member acted in that role, the risk of undue influence and the need for a supporter to be seen to act independently (as foreshadowed in para 4.44). Given that will making can often require a high degree of legal knowledge, our view is that the most appropriate persons to act as supporters would be appropriately accredited practitioners.

(2) It follows from the answer above that this working group does not believe it would be practically appropriate for non-professionals to act as supporters.

(3) It would seem to be sensible that certain criteria be adopted in order to identify persons who are appropriate to act as supporters: one option could be to apply similar criteria to that applied to practitioners who apply to act as Deputies in the COP. For example, such criteria could require a certain level of experience and training, to be independent of the testator (and their family / beneficiaries) and to be of good character.

(4) We agree that it should be possible for a testator to appoint his or her own supporter, provided he or she has capacity to understand the nature of that appointment. There could also be a fallback procedure enabling a person to be appointed on behalf of the testator, perhaps overseen by the COP.

(5) We agree with the conclusion in para 4.51 that the overarching objective of the supporter role is to provide whatever support is required to enable the testator to exercise his testamentary capacity to make a valid will, in the terms he desires.

(6) We consider that an enabling power in legislation, with the detail to be provided by regulations, strikes an appropriate balance to create the scheme whilst retaining flexibility as to how it should operate in practice.

(7) It follows from our conclusion that non-professionals should not be permitted to act as supporters that our view is that a supporter ought not to be permitted to benefit from the will. In our view, this safeguard is necessary to minimise so far as possible the risk both of a conflict of interest and of undue influence. We believe that this should extend to the supporter's immediate family, in order to ensure that the supporter plays a wholly independent role in the making of the will. If only professionals are acting as supporters, it may be that a fiduciary relationship would arise in any event. We note that attorneys and deputies already assume such fiduciary responsibilities; however this is in the context of an ongoing relationship. If a fiduciary relationship is to arise in the case of a supporter, the scope of that relationship would need carefully to be circumscribed such that it applied only to the will-making process.

QUESTION 15

We invite consultees' views on whether the current formality rules dissuade people from making wills. (paragraph 5.46)

On most occasions when testators make wills, their attention is drawn to the formal requirements, whether by information on a will form or by the practitioner assisting. We do not believe that the formalities associated with the execution of wills are likely to be a significant deterrent and we therefore think it unlikely that the current formality rules dissuade people from making wills.

QUESTION 16

We invite consultees' views on what they see as being the main barriers to people making wills. (paragraph 5.46)

In our (rather speculative) view the factors which are more likely to dissuade people from making wills are reluctance to confront the reality of death and (in some cases) a reluctance to decide how to their estates should be divided.

QUESTION 17

We provisionally propose that a person who signs a will on behalf of the testator should not be able to be a beneficiary under the will.

Do consultees agree? (paragraph 5.55)

Yes: X	No:	Other:
We agree. It is anomalous that a person who actually executes a will on behalf of a testator by signing it at his direction should not be under the same disqualification from taking a gift under the will as a witness to the will.		

QUESTION 18

We provisionally propose that a gift made in a will to the spouse or civil partner of a person who signs a will on behalf of the testator, should be void, but the will should otherwise remain valid.

Do consultees agree? (paragraph 5.55)

Yes: X	No:	Other:
We agree. It would be anomalous if the spouse or civil partner of a person who actually executes a will on behalf of a testator at his direction should not be under the same disqualification from taking a gift under the will as the spouse or civil partner of a witness to the will.		

QUESTION 19

We provisionally propose that if the law is changed so that a gift to the cohabitee (or other family member) of a witness is void, then a gift to the cohabitee of a person who signs the will on behalf of the testator should be void.

Do consultees agree? (paragraph 5.55)

Yes: X	No:	Other:
We agree that if a cohabitant of a witness to a will is to be disqualified from taking a gift under the will, the same disqualification should apply to the cohabitant of a person who signs the will on behalf of the testator. The Law Reform Committee stated in its 1980 Report on "The Making and Revocation of Wills", that the removal of spouses from the scope of the disqualification "would open greatly the possibilities for abuse". It is difficult to see why this argument should not apply with equal force to cohabitants. We consider that in this context the same definition of "cohabitant" as is mentioned in the response to Question 20 should be adopted.		

QUESTION 20

We provisionally propose that a gift in a will to the cohabitant of a witness should be void.

Do consultees agree? (paragraph 5.59)

Yes: X	No:	Other:

Although this proposal might in some cases involve evidential difficulties, we consider that it would be anomalous if the disqualification of the spouse or civil partner of a witness to a will from taking a gift under the will were not extended to the cohabitant of a witness.

We agree that in this context "cohabitant" should, as suggested in the last sentence of paragraph 5.39, be defined as a person living in the same household as the testator as his or her spouse or civil partner at the time that the will was executed as in the Inheritance (Provision for Family and Dependants) Act 1975 (but without any qualification as to the prior duration of the relationship).

QUESTION 21

We invite consultees' views on whether gifts in a will to the parent or sibling of a witness, or to other family members of the witness should be void. If so, who should those other family members be? (paragraph 5.59)

We are not in favour of this proposal. We are not aware of any pressing need for an extension of the automatic disqualification to relatives other than spouses or civil partners of witnesses. If the witness exerts any improper pressure on the testator to leave property to other relatives, other remedies are available.

QUESTION 22

We invite consultees' views on whether it should be possible, in defined circumstances, to save a gift to a witness that would otherwise be void. (paragraph 5.61)

This a controversial proposal, but on balance we think no change should be made. The rule is admittedly rather draconian and has been relaxed in the case of a superfluous witness. But the rule exists to prevent fraud, and relaxing it would send the wrong signal.

QUESTION 23

We provisionally propose that the reference to attestation in section 9(d)(i) of Wills Act 1837 be removed.

Do consultees agree? (paragraph 5.66)

Yes: X	No:	Other:
We do not have particularly strong feelings about the removal or retention of the word "attestation" in section 9(1)(d) but would have no objection to its deletion subject as mentioned in the response to Question 24 below.		

QUESTION 24

If consultees do not agree that the attestation requirement should be removed, we invite their views as to whether attestation should:

(1) be defined to mean that the witness must sign the will and intend that his or her signature serve as clear evidence of the authenticity of the testator's signature; and

(2) apply in all cases, including those where the witness acknowledges his or her signature in the testator's presence. (paragraph 5.66)

If the word "attestation" is retained, we agree (1) that it should be defined to mean that the witness intends his or her signature to serve as evidence of the authenticity of the testator's signature and (2) that this should apply in all cases. But we also consider that even if the word "attestation" is removed, it should be made clear that the signature of the witness is in all cases intended to serve as evidence of the authenticity of the testator's signature.

QUESTION 25

We provisionally propose that holograph wills are not recognised as a particular class of will in England and Wales.

Do consultees agree? (paragraph 5.74)

Yes: X	No:	Other:
We agree. We recognise that holograph wills have the advantage that they are virtually impossible to forge, but they are not familiar in this jurisdiction and, so far as we are aware, there is no pressure for their introduction.		

QUESTION 26

We provisionally propose that provision for privileged wills should be retained, but should be confined in its scope to:

(1) those serving in the British armed forces; and

(2) civilians who are subject to service discipline within schedule 15 of the Armed Forces Act 2006.

Do consultees agree? (paragraph 5.80)

Yes:	No: X	Other:
On balance we would abolish privileged wills. We do not think there is any longer justification for privileged wills. Service personnel are, we understand, strongly encouraged to make wills before deployment.		

If however privileged wills are retained, then we agree they should be limited in the manner proposed,

QUESTION 27

We invite consultees to provide us with evidence of how common it is for a will to be invalid for non-compliance with formality requirements. (paragraph 5.90)

We are not in a position to give a statistical answer to this question, but all members of the working group have seen several cases where wills have proved invalid due to inadvertent failure to comply with the formality requirements.

QUESTION 28

We provisionally propose that a power to dispense with the formalities necessary for a valid will be introduced in England and Wales.

We provisionally propose a power that would:

(1) be exercised by the court;

(2) apply to records demonstrating testamentary intention (including electronic documents, as well as sound and video recordings);

(3) operate according to the ordinary civil standard of proof;

(4) apply to records pre-dating the enactment of the power; and

(5) allow courts to determine conclusively the date and place at which a record was made.

Do consultees agree? (paragraph 5.105)

Yes:	No:	Other: X
Our working group is evenly divided on this topic. Half the group opposes any relaxation of the current rule. The other half accepts that the formality requirements act as a deterrent to witnesses exercising improper pressure, but takes the view that there can be no objection to the court having power to save a will which would otherwise be invalid by reason of some technical infraction of the rules. However, that half would agree that convincing proof should be required before a court validates a will, to reduce opportunistic claims. Although the proposals, if adopted, would doubtless lead to increased litigation, the law should strive to save genuine attempts to make a will rather than frustrate them. As to proposal (2) we unanimously oppose the proposal to recognise electronic wills at this stage. (See our responses to Questions 30 et seq below.)		

QUESTION 29

We provisionally propose that reform is not required:

(1) of current systems for the voluntary registration or depositing of wills; or

(2) to introduce a compulsory system of will registration.

Do consultees agree? (paragraph 5.119)

Yes: X	No:	Other:
We agree.		

QUESTION 30

We provisionally propose that:

(1) an enabling power should be introduced that will allow electronically executed wills or fully electronic wills to be recognised as valid, to be enacted through secondary legislation;

(2) the enabling power should be neutral as to the form that electronically executed or fully electronic wills should take, allowing this to be decided at the time of the enactment of the secondary legislation; and

(3) such an enabling power should be exercised when a form of electronically executed will or fully electronic will, as the case may be, is available which provides sufficient protection for testators against the risks of fraud and undue influence.

Do consultees agree? (paragraph 6.43)

Yes:	No: X	Other:
We understand the difficulties in getting primary legislation enacted but the proposal to allow electronically executed wills or fully electronic wills to be recognised is very much in its infancy. The proposal is very unspecific as to detail and deliberately so. It is moreover a very radical proposal which would involve significant changes to the formality requirements for the execution of wills. To entrust a free-wheeling delegated power to legislate as is contemplated by the proposal to a non-lawyer Lord Chancellor is in our view unwise and unjustified. If, contrary to our view, such enabling legislation were proposed, then there would have to be a requirement for affirmative resolution, and it must be subject to limitations and safeguards. We would suggest that electronic wills be confined to those in a central register, to which only regulated professionals would have access.		

QUESTION 31

We provisionally propose that electronic signatures should not be capable of fulfilling the ordinary formal requirement of signing a will that applies to both testators and witnesses (currently contained in section 9 of the Wills Act 1837).

Do consultees agree? (paragraph 6.45)

Yes: X	No:	Other:
We agree.		

QUESTION 32

We ask consultees to provide us with their comments on, or evidence about:

(1) the extent of the demand for electronic wills; and

(2) the security and infrastructure requirements necessary for using electronic signatures in the will-making context. (paragraph 6.87)

(1) We are not aware of any demand for electronic wills.

(2) This question in our view highlights the difficulties inherent in the proposal to recognise electronic wills.

QUESTION 33

If electronic wills are introduced, it is unlikely that the requirement that there be a single original will would apply to electronic wills. Consequently, it may be difficult or impossible for testators who make wills electronically to revoke their wills by destruction.

(1) Do consultees think that a testator's losing the ability to revoke a will by destruction is an acceptable consequence of introducing electronic wills?

(2) Are consultees aware of other serious consequences that would stem from there not being a single original copy of a will made electronically? (paragraph 6.97)

Yes:	No:	Other: X

This question, like the previous question, illustrates the fundamental difficulties with the proposal to recognise electronic wills. However much computer technology is employed in preparing a will, why cannot the finished product simply be printed off and signed?

QUESTION 34

We invite consultees' views as to whether an enabling power that provides for the introduction of fully electronic wills should include provision for video wills. (paragraph 6.106)

For the foregoing reasons we do not support this proposal.

QUESTION 35

There is currently a rule relating to knowledge and approval that mirrors the rule in *Parker v Felgate*, which relates to capacity. The rule allows, by way of exception, that the proponent of a will may demonstrate that the testator knew and approved the contents of his or her will at the time when he or she instructed a professional to write the will, rather than the time at which the will was executed.

We provisionally propose to retain the rule.

Do consultees agree? (paragraph 7.76)

Yes:	No:	Other: X
As set out above there is some dispute in the working group as to whether the rule in *Parker v Felgate* should be retained but if it is, then it makes sense to have a similar rule for knowledge and approval. In *Perrins v Holland* the Court at first instance considered that the testator lacked capacity when executing the will but nevertheless knew and approved the contents but that finding depended on a very narrow view of what knowledge and approval means and in many cases the Court will not be able to find that a testator lacking capacity did know and approve the contents of the Will. Whereas in most cases knowledge and approval can be presumed where capacity is established, in *Parker v Felgate* cases that presumption cannot operate. It would be odd if a will could be saved notwithstanding that the testator lacked capacity at the time of execution by the rule but declared invalid because knowledge and approval could not be proved.		

QUESTION 36

We provisionally propose that the general doctrine of undue influence should not be applied in the testamentary context.

Do consultees agree? (paragraph 7.105)

Yes: X	No:	Other:
The principles which underpin setting aside inter vivos transactions for undue influence are not appropriately applied in a testamentary context. The existence of a relationship of trust and confidence which it is presumed has been abused where a transaction calls for an explanation does not fit easily into a testamentary context where such a relationship is reason for the testator to benefit that person on death. There is (as identified in the report) a danger in applying the test of a transaction which calls for an explanation to a Will. It would invite claims where the Will did something which disappointed someone such as leaving money to charity or cutting out a child. Further, the rebuttal of the presumption in lifetime cases by showing full free and informed consent does not fit with the requirements for making a will which ought not to require legal assistance even if it is desirable.		

QUESTION 37

We provisionally propose the creation of a statutory doctrine of testamentary undue influence.

Do consultees agree? (paragraph 7.129)

Yes: X	No:	Other:

At the moment it is far too difficult in most cases to succeed on undue influence and want of knowledge and approval has become the default route by which to challenge a Will where undue influence is suspected. Therefore a statutory doctrine which makes undue influence easier to establish is welcome. However it is important that it does not make it too easy or attractive to make unjustified attacks on wills. Formulating that statutory doctrine in a satisfactory way is much more difficult. Presumptions may simply overcomplicate matters because at the end of the day the Court needs to find that there has been undue influence.

Therefore, instead of any system of presumptions, we propose a simple statutory test for the courts to apply and develop, to capture the essence of what both the courts have been looking for under the 'suspicious circumstances' requiring affirmative proof of knowledge and approval *and* undue influence in the probate context. The formulation we tentatively suggest is as follows:

> "Before granting probate of any will, the court must be satisfied to the civil standard that the testator made a free choice of the testamentary dispositions to be contained in the will. For the avoidance of doubt, the mere choice whether or not to execute a will already drawn in a particular form does not satisfy the above requirement."

QUESTION 38

We invite consultees' views on:

(1) whether a statutory doctrine of testamentary undue influence, if adopted, should take the form of the structured or discretionary approach.

(2) if a statutory doctrine were adopted whether a presumption of a relationship of influence would be raised in respect of testamentary gifts made by the testator to his or her spiritual advisor. (paragraph 7.129)

(1) The difficulty with a discretionary approach (in any area of law) is that it leads to lack of predictability for advisers and can be difficult for Judges to apply if there is insufficient guidance. However, it is not clear why the structured approach requires certain relationships to give rise to a presumption without proof of more in this context. The justification for including trustees in such a category is not understood (gifts to trustees in Wills are not in our experience a major issue) nor gifts to a medical adviser (again vanishingly rare apart from the Shipman case). In relation to those relationships and will preparers and professional carers it would be better to leave it to the Court to decide whether a relationship of trust and confidence or vulnerability and ascendancy did exist in those cases.

If our proposal above is not accepted, then in the structured approach the characterisation of what constitutes a will which calls for an explanation is a much better test than adopting the lifetime test. It is the suspicious circumstances surrounding the preparation of the Will which often signify undue influence without it being easy to prove. It is clear that cannot be confined only to situations where the person benefitting has been instrumental in the preparation and execution of the Will. However, it is important for the reasons set out above that the test is not too wide. The correct balance appears to be struck in what we propose above.

(2) We do not approve of presumptions in this context. As Lord Neuberger said in *Gill v Woodall* in the context of knowledge and approval, a judge who has heard the evidence at trial must simply decide whether the substantive test is met**.** Our preference would therefore be for there to be no categories of relationship which automatically raise the presumption. However, including spiritual advisers would in any event not be justified. Again it is the nature of the relationship which is significant not what category it falls within.

QUESTION 39

We ask consultees to tell us whether they believe that any reform is required to the costs rules applicable to contentious probate proceedings as a result of our proposed reform to the law of undue influence, and knowledge and approval. (paragraph 7.136)

If the law were reformed to make undue influence easier to establish, there would be no need to reform the rules relating to costs in probate claims. In any event, arguments based on *Spiers v English* do not succeed in many cases. In a case where a party fails on the basis of want of knowledge and approval, the likelihood is that that party will have to pay the costs. It is a rare case where the Court will accept that the circumstances justified investigation and usually any order is confined to the costs incurred at the earliest stage of the proceedings.

If the test for undue influence is made easier, then it ought to be possible to argue, even in cases where the claim fails, that investigation was justified at least to the same sort of point as now in want of knowledge and approval cases.

QUESTION 40

We provisionally propose that the requirement of knowledge and approval should be confined to determining that the testator:

(1) knows that he or she is making a will;

(2) knows the terms of the will; and

(3) intends those terms to be incorporated and given effect in the will.

Do consultees agree? (paragraph 7.149)

Yes:	No:	Other:X

Bearing in mind that the Courts have taken rather different views of what is meant by want of knowledge and approval from being shorthand for representing the testamentary intentions of the deceased to understanding and approving decisions which have already been made, certainty as to the test is to be welcomed. If want of knowledge and approval is not going to be used as frequently to challenge wills because of the wider undue influence test, then it ought to be confined reasonably narrowly.

We are concerned about the requirement for "knowledge". For example, a testator is unlikely to know the terms of the will in the sense of knowing it contains a clause excluding the rule in *Allhusen v Whittell*. We consider that the use of the word understanding is perhaps better. We would suggest:-

(1) Understands that he or she is making a will

(2) Understands the dispositions made by the will

(3) Approves the inclusion of those dispositions in the will

QUESTION 41

We provisionally propose that the age of testamentary capacity be reduced from 18 to 16 years.

Do consultees agree? (paragraph 8.28)

Yes: X	No:	Other:

Yes: for the reasons set out in the Consultation Paper, but particularly because it would ensure consistency with the approach adopted by the MCA 2005, which provides a legal framework for making decisions for and on behalf of people lacking capacity aged 16 and over. It does not seem to us that there is any compelling reason for a distinction between that regime and that relating to the law of wills.

QUESTION 42

Should the courts in England and Wales have the power to authorise underage testators to make wills?

Yes:	No: X	Other:

No. For the reasons given in the Consultation, this working group does not support any wider powers enabling testators under 16 to make wills. The difficulties surrounding how and by whom a child's capacity to make a will could be assessed outweigh the limited circumstances in which the application of the intestacy rules might be undesirable (although we recognise that in those limited and rare cases, the impact on the individual may be considerable). We have identified the following possible complications in the operation of any power to authorise underage testators to make wills:

A high level of understanding is required to make a will.

The *Gillick* competence test (for consent to medical procedures) is not wholly analogous to the will-making process and so is not a direct comparator

The issue of whether such assessment should be contemporaneous or not is complex – if the usual rules as to execution would otherwise apply, then the issue of capacity may arise only later. However, it would seem to be desirable that the minor's capacity be assessed before any will is drawn up or executed

Following on from that point, would special rules regarding execution be needed? For example, is it envisaged that a child could make a will only after express authorisation; or that a will would only be valid if witnessed by the person confirming capacity?

Who should assess capacity? Should it be a doctor or a legal professional, or a court? If a court is to have the power to authorise, it would still require expert evidence, so the question of whether this should be from a legal professional or doctor is still live. A legal professional has experience in assessing testators, but usually in cases involving testamentary capacity a court will expect to see expert medical evidence. However, where the question is instead whether the minor is sufficiently mature to be capable of making a valid will, it is perhaps arguable whether medical expertise is in fact appropriate or necessary

Would a will by an underage testator be valid only if professionally prepared, in order to ensure that the appropriate assessment has been carried out? If so, special rules will be needed.

Given these difficulties and taking into account how rarely the power may be used in practice, we do not believe that there is a compelling need to enact such a power; and instead take the view that lowering the age of testamentary capacity to 16 years strikes the appropriate balance, without the need for any wider power.

If so, who should be allowed to determine an underage testator's capacity at the time the will is executed? (paragraph 8.44)

As noted in 8.37, the circumstances in which an underage testator might wish to make a will are likely to arise rarely and inevitably raise serious and sensitive issues. If such a power to authorise underage testators to make a will is to be granted, in our view the appropriate forum for the determination of capacity would be the family court, which is used to dealing with both minors and sensitive family situations. However, the question of who should in turn provide evidence to the court in order to enable it properly to exercise its discretion (i.e. a doctor, legal professional or other) remains undetermined and for the reasons set out above, is a complex and difficult point.

QUESTION 43

We provisionally propose that statute should not prescribe the order in which interpretation and rectification should be addressed by a court.

Do consultees agree? (paragraph 9.43)

Yes: X	No:	Other:

We agree.

With respect, and with some hesitation, we do not accept that rectification is any sense conceptually prior to interpretation. The true meaning of a will must be collected from its words as understood in their documentary, factual and commercial context: *Marley v Rawlings*. This means considering the document that actually exists rather than a hypothetical rectified version of it. Such an exercise may show that the true meaning of the will is altogether different from the true intention of the testator. If so, the will may be rectified. While in theory it is correct that the rectified document must then be interpreted afresh, in practice its meaning will by this stage be plain because the rectified or rectifying words will have been carefully drafted to guard against further ambiguity.

However, we acknowledge that there may be cases in which construction and rectification are claimed in the alternative and the court considers that the logical approach is to decide the rectification claim first: see, e.g., *A v D* [2017] EWHC 2222 (Ch). This makes practical sense where (a) there is a clear case for rectification *if* the will cannot be construed to give effect to the testator's intentions and (b) any arguments that it can be so construed are strained, complicated or reliant on extrinsic evidence admitted under s. 21 AJA 1982. In such cases, if the court finds that the grounds for rectification are made out, that the claim is not time-barred *and* that rectification should as a matter of discretion be granted, the court may grant rectification on the implicit assumption that the construction arguments would have failed (or, had they succeeded, that the result would be the same as rectification).

We agree that the order in which these issues are taken is best left to the courts and should not be dictated by statute.

QUESTION 44

Do consultees know of any cases in which the order of interpretation and rectification has caused problems in practice? If so, please explain the facts of the case and the nature of the problem. (paragraph 9.43)

No. We are not aware of any cases where this has caused problems in practice. *A v D* and *Marley v Rawlings* are both examples of where the Supreme Court pragmatically decided the case on the basis of rectification in order to avoid deciding a difficult point of construction.

QUESTION 45

We provisionally propose to replace sections 23 to 29 of the Wills Act 1837, modernising and clarifying the language of those sections while retaining their substantive effect.

Do consultees agree? (9.47)

Yes: X	No:	Other:
Broadly speaking, we agree.		

S. 23 – In these consultees' experience, this section is rarely invoked. But it has in the past been a useful aid to will construction: see, e.g., *Fleming's Will Trusts* [1974] 3 All ER 323. In many cases it may add little or nothing to the ordinary common law rules of construction, but on balance we would preserve it and would support the proposal that its language be updated.

S. 24 – This is a valuable rule of construction. It is well known to practitioners and is often cited as though it were axiomatic, but in fact it seems that wills would often be construed and operate differently if the section were repealed: see *Doe d York v Walker* (1844) 12 M. & W. 591. We would preserve the rule if for no other reason than that it would darken counsel to abolish such a familiar principle. There is also a policy justification. People may be presumed to want their wills to operate over property acquired in the future but their wills may not always expressly provide for this. People should be spared having to review or republish their wills every time they acquire new property. Not least because it is so well known, we are not persuaded that the section needs rewording.

We doubt whether ss. 25-29 are valuable rules of construction and in a few cases they seem to add nothing to the ordinary principles by which wills are now construed. Nevertheless we agree that they should be preserved.

QUESTION 46

As regards sections 23 to 29 of the Wills Act 1837, we ask consultees whether in their view:

(1) any of those provisions are obsolete;

(2) any of those provisions require substantive alteration; and

(3) if any provisions are obsolete or require substantive alteration, what changes are needed and why. (paragraph 9.47)

See answer to Q45.

Ss. 23, 25, 26 and 28 may not add anything to the ordinary principles by which wills are now construed. But repealing them may have unforeseen consequences and, on balance, we support their retention.

If they are to be rewritten, which we do not recommend, then since the distinction between realty and personalty is not as relevant as it once was in estate administration, it may be useful to reword these sections to refer to "gifts" and "dispositions" rather than the older styles of "devises" and "bequests". The effect of s. 29 is also unclear – particularly the words "indefinite failure of his issue" and the proviso to that section.

QUESTION 47

We provisionally propose that section 30 of the Wills Act 1837 be repealed.

Do consultees agree? If not, please provide evidence of the practical use of section 30 of the Wills Act 1837. (paragraph 9.47)

Yes: X	No:	Other:

We agree.

QUESTION 48

We provisionally propose that section 31 of the Wills Act 1837 be repealed.

Do consultees agree? If not, please provide evidence of the practical use of section 31 of the Wills Act 1837. (paragraph 9.47)

Yes: X	No:	Other:
We agree.		

QUESTION 49

Do consultees think that there is a need for any new interpretative provisions in the law of wills?

If so, please state:

(1) what problem the new provisions would address; and

(2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which the problem has arisen where possible. (paragraph 9.55)

Yes:	No: X	Other:
In general we do not support the introduction of new statutory rules of construction. The law of interpretation of documents has been extensively reviewed since the enactment of the 1837 Act. A great deal of guidance has been provided at appellate level (including, on more than one occasion, the House of Lords/Supreme Court). It is now accepted that the learning on bilateral commercial documents applies also to wills. We consider that new statutory rules of construction would only sow further confusion in this field. It would also be inconsistent with the modern and increasingly purposive approach to construction. While we cannot absolutely rule out the utility of statutory rules of construction in future (and we support the retention of s. 24 WA 1837), we have not identified a present need for any new provisions of this kind.		

QUESTION 50

Do consultees think that the scope of rectification in the law of wills should be expanded?

If so, please state:

(1) what problem the expanded doctrine of rectification would address; and

(2) why that problem is inadequately addressed under the current law.

Please also give an example of a case in which a problem has arisen where possible. (paragraph 9.62)

Yes: X	No:	Other:

We are firmly of the view that the jurisdiction to rectify wills should be expanded. We think it is wrong in principle that the jurisdiction for wills is narrower than the equitable jurisdiction to rectify unilateral *inter vivos* documents.

An expanded jurisdiction would eliminate the unfairness highlighted in cases such as *Kell v Jones* [2013] WTLR 507, where rectification was refused on the grounds that the mistake in recording the testator's intentions was not, properly speaking, the consequence of a clerical error or a failure by the draftsman to understand the testator's instructions. The limiting effect of s. 20 AJA 1982 as it applied in that case has been the subject of convincing criticism (K. Shannon, 'Reluctance and regret over will rectification', Solicitor's Journal, 1 Feb 2013).

In the working group's experience, *Kell v Jones* was <u>not</u> an exceptional case. Unfortunately it is not unusual for mistakes in wills to fall outside the scope of s. 20 as currently framed. We see absolutely no reason why the law should continue to tolerate this lacuna, which (though it may have a historical explanation) appears now to be anomalous and unjustified.

With respect, we do not understand or accept the Commission's objections to this reform.

<u>Negligence</u>

While it is perfectly correct that a mistake in a will may give rise to a claim for damages against the negligent draftsman, we do not see any reason in principle why the draftsman should incur liability (or the disappointed beneficiaries be forced to resort to hostile litigation against him) if the mistake can readily be undone by rectification. We believe the proper response to such mistakes is for the parties affected to sue for rectification and for the negligent draftsman to volunteer to pay (or, if necessary, be sued for) the wasted costs. We note that parties are already expected to adopt this approach lest they fail to mitigate their losses**:** *Walker v Geo. H. Medlicott*. We also think that corrective action of this kind is preferable on policy grounds to the "compensation culture" of *White v Jones* claims, which result in an effective doubling of the estate at the expense of solicitors' insurers.

<u>Estate planning</u>

We do not agree that an expanded jurisdiction will "open the door to rectification claims that are unwarranted as a matter of principle".

First, there is no objection in principle to posthumous estate planning **–** it has parliamentary approval in s.142 of the Inheritance Tax Act 1984 **–** and we note that deeds of variation are commonly used for this purpose.

Secondly, it begs the question to say that fiscally motivated rectification claims are unwarranted as a matter of principle. Rectification of voluntary *inter vivos* documents is a jealously guarded remedy. By its nature it will not usually assist where the mistake in question relates purely to tax consequences if the instrument is in all other respects consistent with the disponor's intentions. But where a disponor's specific intention was to obtain tax advantages which the *inter vivos* document then fails to secure, rectification may be available: see, e.g., *A v D* (above). There is no suggestion that granting relief in such cases is unprincipled. Yet the current effect of s. 20 is to debar relief in identical cases where the document is a will and the mistake flows from a legal analytical mistake by the draftsman.

The Commission considers that, under an expanded jurisdiction, "*rectification claims might focus on the effect desired by the testator rather than the wording desired by the testator.*" We respectfully suggest that this concern is unfounded. It is clear from cases such as *Allnutt v Wilding* [2007] EWCA Civ 412 and *Racal Group Services Ltd v Ashmore* [1995] STC 1151 that court's equitable jurisdiction to rectify *inter vivos* instruments (discussed above) permits no such thing. Any expanded jurisdiction to rectify wills need be no wider than the equitable jurisdiction as described in those cases.

If the Commission considers that the court's equitable jurisdiction to rectify is too wide or that its integrity is being eroded by fiscally motivated applications (and, apart from the surprising and anomalous decision in *Lobler v HMRC* [2015] UKUT 152, we see little evidence that it is), that would be a basis for reviewing the law of rectification as a whole. In the meantime, and in the absence of any such review, we suggest that the jurisdiction to rectify wills should be brought into line with the wider equitable jurisdiction.

We would also recommend that the time limit on rectification under s.20(2) of the Administration of Justice Act 1982, be removed or at least substantially relaxed, but rather that the usual equitable defences should apply.

<u>Ademption</u>

We here make some observations regarding the law of Ademption before answering the specific questions raised in the consultation.

The current law, as demonstrated in *National Westminster v Banks* ("Banks") is essentially based in the interpretation of Wills. The Court looks at the specific gift and determines whether or not the words used include property that was within the testator's estate. Where the property referred to in the Will has changed its nature in the intervening period between execution and death then the Court asks itself the question whether the new/altered property could be within the words used by the testator.

The problem that *Banks* highlights is that this is an inadequate response where the property has changed in nature by actions other than those of the testator. If a testator sells a property or gives something away then it is only to be expected that a reference to that property in their Will should fail to have effect. But if a third party takes those steps or causes the property to change in nature then it is not easy to see why the question should turn solely on interpretation. Moreover, in one limited respect, that of unauthorised dealings with property, it seems that ademption will not arise (your footnote 9).

We therefore consider that there are grounds for providing that a gift will not adeem in all circumstances where the property has been altered or destroyed by reason of some person (or body) other than the testator. Such a rule would apply not only to the actions of LPA attorneys when a testator is incapable of making a Will, but at any time and to the actions of any other attorney. It would also apply where property is subject to compulsory purchase and so on.

If the Commission does not agree with that approach, then we suggest that there are strong grounds for preventing ademption in all circumstances where property changes form or nature at a time when a testator is incapable of altering their Will because they lack the capacity to do so. That would, therefore, include the actions of an LPA attorney acting whilst their principal was incapable. It should, however, also include those circumstances referred to at paragraph 10.66.

We also bring to your attention a further problem with the current provisions of Schedule 2 to the Mental Capacity Act 2005. As drafted (and even if extended to LPA attorneys) it applies only to gifts taking effect by Will or intestacy or by gifts or nominations taking effect on death. It does not (on the face of it) therefore apply to property passing by survivorship. That means that where a Deputy causes a joint tenancy to be severed the property will pass according to Will or intestacy notwithstanding the inability of the testator to make proper provision by Will. We are aware of at least one case where this issue arose (the claim was compromised). We suggest that the existing law should be expanded so as to include the severance of a joint tenancy by Deputies or LPA attorneys at a time when the testator lacks capacity.

QUESTION 51

We provisionally propose that the Mental Capacity Act should be amended to provide that disposal of property by an attorney, where the donor lacks testamentary capacity, does not adeem a gift.

Do consultees agree? (paragraph 10.42)

Yes: x	No:	Other:
See above. We favour a wider rule which would also have that effect but if that suggestion is not adopted we agree to this more limited change.		

QUESTION 52

We provisionally propose that a specific gift should not adeem where, at the time of the testator's death, the subject matter of that gift:

(1) has been sold but the transaction has not been completed; or

(2) is the subject of an option to purchase.

In those circumstances, the beneficiary of the specific gift that would otherwise have adeemed will inherit the proceeds of the sale.

Do consultees agree? (paragraph 10.52)

Yes: x	No:	Other:
We agree. This problem arises from an historical quirk in the way the law regards property that is subject to a contract for sale or option for purchase which is not known or understood by the general public and which is generally contrary to their intention. There are a number of Will clauses designed to address the problem but we are aware that in many cases they are not used.		

QUESTION 53

We provisionally propose that, except where a contrary intention appears from the will, a gift of shares will not be subject to ademption where the subject of the gift has changed form due to dealings of the company which the testator has not brought about.

Do consultees agree? (paragraph 10.61)

Yes: x	No:	Other:
We believe this is encompassed (and justified) by our suggested wider rule.		

QUESTION 54

We provisionally propose that a beneficiary be entitled to the value of a specific gift that has been destroyed where the destruction of the property concerned and the testator's death occur simultaneously.

Do consultees agree? (paragraph 10.64)

Yes:	No: x	Other:
We are not sure if the suggested rationale for this rule is correct. The reason the destroyed property does not pass is that it no longer exists and instead a new right to insurance monies or in the form of a damages claim exists arising from the circumstances of the death. We cannot be sure that in all such cases it will be right to give the beneficiary of the specific gift a right to make a claim against the estate for the value of the destroyed asset. In some circumstances we can also imagine that such claims will be very upsetting (e.g. a friend of the testator claiming from the family for the value of the car in which the testator was killed).		

QUESTION 55

We invite consultees' views about whether there are further specific instances in which the effects of the doctrine of ademption should be mitigated. (paragraph 10.64)

See our wider discussion above.

QUESTION 56

We ask consultees for their views on reform to create a general exception to ademption where the property that is the subject of a specific gift and would otherwise adeem is no longer in the testator's estate due to an event beyond the control of the testator. (paragraph 10.71)

See our wider discussion above.

QUESTION 57

We ask consultees for their views on reform to create a general exception to ademption, so that the beneficiary of the gift receives any interest that the testator holds in the property that was the subject of the gift at the time of his or her death. (paragraph 10.74)

See our wider discussion above.

QUESTION 58

We provisionally propose that no reform is required to the law governing the revocation of wills by will or codicil, writing or destruction.

Do consultees agree? (paragraph 11.37)

Yes:	No: x	Other:
We consider that there is one area of difficulty not considered by the consultation paper and one area where reform should be considered.		

The difficulty not considered is dependent relative revocation. This is a doctrine that provides that the revocation of a Will is dependent upon some later event, such as the execution of another Will or (for example) the sale of a property. The doctrine depends wholly upon the testator's subjective intention and so can give rise to cases of significant doubt or difficulty, albeit rarely. Notwithstanding that, we consider this to be an area where the Court is able to temper what would otherwise be a doctrine reliant upon the strict words of a Will by considering the underlying circumstances and intention. Were it abolished the law would be harsher. We do not therefore consider that the law needs to be changed.

The area where we consider reform is desirable is where a testator writes on a Will within the intention of revoking it (e.g. the words 'cancelled') but that writing is not witnessed. In those circumstances, we believe that the writing should have the effect of revoking the Will notwithstanding the absence of formalities. The intention and desire to revoke is obvious and many lay persons will not appreciate that these actions will not revoke the Will. **As we are divided on the suggested dispensing power for the reasons given above that power may not assist in these circumstances.**

QUESTION 59

We ask consultees to provide us with any evidence that they have on the level of public awareness of the general rule that marriage revokes a will.

Do consultees think that the rule that marriage automatically revokes a previous will should be abolished or retained? (paragraph 11.55)

We do not have evidence, beyond anecdotal, of public awareness of this rule. However, we believe that only a very small proportion of the public are aware of the rule. Moreover, because getting married need not (and only in limited cases does) involve any form of legal advice the public is rarely informed of the rule at the relevant time.

We consider that the rule itself has both advantages and disadvantages. There are essentially two scenarios:

a) The unwitting cohabitees, who have previously made Wills in favour of one another who do not realise that their sensible will planning is undone by their getting married.

b) The persons who made Wills before they met and did not change them. In these circumstances their revocation is, as a matter of policy, desirable since they are unlikely to want the earlier Wills to be effective.

The law cannot satisfactorily cater for both scenarios by one single rule. It is observed, though, that the rules of intestacy were recently changed so that in the majority of cases they will have the effect of providing that the surviving spouse takes the whole estate, something which is probably less capricious than allowing the Will in (b) to stand.

We therefore consider that the most satisfactory response is to provide a default rules that the Will is revoked but to make it possible for a testator to specify *whether* marriage would revoke the Will and in what circumstances. Thus, a testator could provide that in general marriage would not revoke the Will or that marriage to a particular person would not revoke the Will. Therefore, we favour widening the existing s18(3) of the Wills Act 1837.

We also repeat the suggestion made at the Chancery Bar / Law Commission joint seminar that the Home Office be encouraged to inform persons getting married of the effect of that marriage on their existing Wills in any literature provided to them when obtaining the licence to marry.

QUESTION 60

Should testators be empowered to prescribe whether a will or particular dispositions in it should be revoked by a future (uncontemplated) marriage? (paragraph 11.58)

Yes: x	No:	Other:
See the answer to question 59.		

QUESTION 61

We provisionally propose that marriage entered into where the testator lacks testamentary capacity, and is unlikely to recover that capacity, will not revoke a will.

Do consultees agree? (paragraph 11.62)

Yes:	No: x	Other:
We do not agree. The rationale for the current law (and for the reforms suggested above) is the possibility that the earlier Will does not make adequate provision for a spouse, so that after marriage that provision 'defaults' to that made by the intestacy rules. That rationale is not changed or altered by the inability of the testator to make a valid Will, indeed is potentially strengthened. Moreover, it is not the case that a new Will cannot be made in those circumstances since it is possible for the Court of Protection to make a statutory Will.		

QUESTION 62

We propose that section 8 of the Inheritance (Provision for Family and Dependants) Act 1975 be amended to provide that property that is subject to a mutual wills arrangement be treated as part of the net estate.

Do consultees agree? (paragraph 12.42)

Yes: X	No:	Other:

We agree that it is not desirable to otherwise reform the law of mutual Wills. Although the consequences of a mutual Wills agreement are often undesirable this is an area where the testators are found to have exercised free Will and made a mutual agreement. We think it is undesirable for the law to prohibit such agreements.

However, there should be a rule requiring them to be in writing and signed by both parties to the agreement.

We agree that the effect of a mutual wills agreement should not be to put the subject matter beyond the reach of a claim under the 1975 Act.

The logic of that extends beyond mutual will agreements to any agreement or arrangement which puts property outside of a person's net estate, including by proprietary estoppel. So we consider that the proposed reform should be widened to include any circumstances where an agreement or arrangement has put property outside of the dispositions of the Will or the rules of intestacy.

QUESTION 63

Do consultees believe that the DMC doctrine should be abolished or retained? (paragraph 13.50)

We agree with many of the consultation report's observations regarding the doctrine of DMC. It is anomalous, unprincipled goes against the rationale for imposing formalities on Will making (something we strongly support) and is open to abuse.

We therefore think the doctrine should be abolished.

QUESTION 64

Are consultees aware of particular issues concerning the transfer of digital assets (be it on death or otherwise)?

If so, please provide details of:

(1) the effect that the issue had upon the people concerned;

(2) the scope of the problem; and

(3) why the problem is inadequately addressed under the current law. (paragraph 14.18)

We are aware of a considerable volume of writing on this topic, both academically and in the form of articles / news items aimed at potential testators. That suggests that this is something which does concern people and is a reason for making a Will. However, we consider that the problems with making adequate testamentary provision for digital assets are not caused by the law of Wills (which permits testators to make more or less any disposition of their assets as they think fit) but with the nature of digital assets themselves, especially the fact that many perceived assets (itune accounts, facebook pages and so on) are not assets at all but limited permissions conferred by very large service providers. In other words, whatever changes you were to propose regarding the law of Wills would probably have no real impact on what is ultimately a consumer rights issue.

QUESTION 65

Are consultees aware of any instances in which the requirement to date an appointment of guardianship but not to date a will has caused difficulty in practice?

If so, please provide details of the case. (paragraph 14.33)

Yes:	No: x	Other:
So far as we are aware, in practice, almost all Wills are dated.		