



Archives and Records Association response to the Ministry of Justice consultation-

## **Storage and retention of original will documents**

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

We believe that there does need to be a framework in place which ensures all due processes have been followed and the original authentic signed will is that which is duly processed and preserved. Currently wills are not created and signed as digital copies. Digital signatures currently have a short lifespan before the encryption tool that underpins the verification of their authenticity expires. As such the paper process works well and is in line with the process followed across the devolved countries of the UK and more generally on a global scale.

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

We have no recommendations to make in this regard.

*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?*

There are many reasons why the original should be retained. Only the original document can evidence authenticity in the event of any concern that the contents have been altered (whether accidentally or deliberately) or inaccurately copied. Disposal of the original prevents examination of fine details, which can demonstrate whether the contents have been altered. Also, the disposal of the originals means that common mistakes in scanning cannot be rectified, for example blurred text or missing pages. Some wills cannot be reliably scanned, due to the materials: text from the reverse of thin paper can 'bleed-through' in a scan, while variations in inks cannot always be reproduced and any three-dimensional elements require different methods of scanning. For a number of reasons the original authentic copy may need to be inspected both in the short and longer term.

The consultation implies that digitisation comes without costs – this is certainly not the case. It is often cheaper to retain physical copies and yet the digitisation costs are absent from this documentation. Typically, records need to be prepared for digitisation by cleaning, relaxing and flattening, and by the removal of fasteners without damaging the original, all under the supervision of qualified professional conservators, otherwise the text will not be readable when digitised. Some records will need active conservation to avoid loss of critical information. The digital capture will require to be at the highest quality, while additional lower quality images will be needed for routine access purposes. High quality images will create substantial storage requirements, which will need

to be replicated several times as part of any disaster planning. A scanning programme for the range and types of documents involved will require careful planning and use of a variety of methodologies and equipment, and consideration of wider implications for digital preservation and legal admissibility.

The long-term storage and preservation of these images will require active intervention to ensure images are migrated to new formats and platforms as technology changes and older systems become obsolete and inaccessible. Long-term access to the images requires on-going investment in additional metadata capture and cataloguing systems.

Clearly there are risks that original copies could be destroyed in a disaster and for this reason we would encourage the retention of both physical and digital copies.

Digital copies in addition to retaining the originals would be a significant benefit to the wider research community as well as to the High Court, beneficiaries and their lawyers. They would enable more rapid and more frequent access by multiple concurrent users from remote locations.

We note that in other devolved nations physical originals are retained although digital/microfiche copies have been made. As an example, the National Records of Scotland holds Scottish wills and testaments from 1513-1999, and all of these up to 1925 have been digitised. Scottish wills are made more available through the Scotland's People website, but the physical records are retained as the legal record and there is no suggestion this would be changed. The digital version is an added benefit provided but not a cost saving measure as indicated in this consultation. For more details see <https://www.scotlandspeople.gov.uk/guides/record-guides/wills-and-testaments>. The destruction of originals in England and Wales will create inconsistency across the UK.

In Northern Ireland, the Public Record Office of Northern Ireland (PRONI) holds wills and letters of administration from 1858 - 2009. Will books from 1858 - 1900 have been digitised and made available via the PRONI website but the physical records including individual wills are retained as public records under the Public Records Act (Northern Ireland) 1923.

Consideration is required of wider implications on the legal admissibility of digitised wills used in other jurisdictions and the certification of such documents for evidential purposes as part of foreign court or probate proceedings. It would be common for residents of England and Wales to hold assets in other jurisdictions. This would include emigrants from England and Wales living abroad, as well as immigrants resident in England and Wales. Consideration is required as part of any digitisation programme to ensure individuals and beneficiaries, as well as the State, are not disadvantaged in such circumstances where the original has been destroyed. Failure to adequately consider the wider implications of authentication of digital surrogates may result in litigation. At present, certification of original documents in paper format is a straightforward process and such copies are accepted for legal purposes in other jurisdictions.

*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?*

No, we do not agree with this suggestion. Many individuals leave little trace of their survival. The consultation refers to the retention of the 'great and the good' as a metric for retention. This concept has for some time been obsolete in terms of determining an overall appraisal/retention strategy. There are processes for sampling which organisations such as The National Archives have been involved in developing in order to ensure that there are reliable samples retained. However, these have not been developed for record sets such as wills. We would expect that wills and census are key data sets that should be retained as both physical authentic records with a digital version for backup reasons.

We have very few record sets that capture data in a standardised manner from citizens across the UK. Many citizens do die intestate but nevertheless after the census, wills provide one of the most important record sets for understanding aspects of our citizens lives through time.

Going forward, we would suggest that a thorough review of the current physical storage and retrieval arrangements be undertaken by an independent expert and the results made public before any irrevocable decisions are taken. It is likely that the greatest proportion of the costs are those incurred by frequent retrievals. Digitisation for access purposes (rather than preservation) would significantly reduce these retrieval costs and enable the originals to be put into deep storage facilities, which generally have lower operating costs.

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

For legal admissibility purposes it may be that we can move to digital copies to be retained. However, this consultation has not provided a framework which details how citizens and lawyers will produce wills in a digital format which is future proofed for security, preservation and legal admissibility purposes.

For historical purposes the original authentic record should be retained. There is not a process in place to agree a digital original will. This raises more challenges than are replaced. Transformation from a paper-based to digital system will require significant planning and resourcing over a number of years, as well as wide-spread consultation with relevant parties.

*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?*

This proposal does not properly articulate a digital strategy or set of costs. It is normal for a commercial entity to digitise and then charge for access. The commercial entity does this based on access and demand. It does not deal with any ongoing retention, preservation and migration costs beyond a term from which they can make profit. In the context of probate, not all charges can be applied over to access rights in the probate process. This consultation does not recognise that digitisation is expensive. Wills are normally bound and cannot be easily scanned. There is a process in place to verify documents if staples are removed – as this undermines the authenticity of the document – but this is not mentioned. With a large scan project there needs to be careful checks and balances. Often some digital copies will not meet a required standard and require rescanning. So scanning, ongoing retention, preservation and migration require ongoing management. If a physical copy is retained then this minimizes some physical checks but if the physical copy is destroyed then this means that standards for digitisation and storage need to be far higher and many new risks are raised.

Creating and retaining documents in digital formats does bring some benefits in terms of accessibility. It does bring significant new risks, as has been evidenced by the recent British Library security breach. The consultation does not explain how backups, migrations and security will be managed. Disaster planning would also be a significant consideration and cost, and would need to be integrated into the planning of any digitisation process. The consultation appears very naïve in terms of these processes.

*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?*

We do not agree with the preservation of just the digital copy. A physical and digital copy should be retained.

*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.*

We do not agree with this as a proposal. The consultation is weighted to digitisation being the natural conclusion but it has missed out many key points. It is hard to believe The National Archives was consulted. We note the concern of many stakeholder groups and the naivety of this proposal. Wills are legal documents that may be required for evidential purposes for a variety of reasons long beyond the issuing of a grant of probate.

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

No! Have this team not understood the need to better research and recognise the contributions of many individuals to the development of our nation's history – please refer to recent studies such as 'black beyond data' and social studies from as far back as the 1980s. This is a 1960s term which does not recognise the needs of our society to understand and reflect on its shifting history through time.

The selection of documents on the basis of ephemeral, current fame is itself a flawed concept as it ignores the reality that our judgements on the importance of specific individuals changes and evolves. Some people become famous long after their deaths. Others might be famous at their death but would now be considered infamous, whether slave-owners and traders or alleged but unproven paedophiles.

*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?*

As stated in question 9 we do not agree this is a good idea. However, if the government proceeds it should consult experts in the field including the Archives and Records Association, the government's own advisory body The National Archives and the Advisory Council on National Records and Archives, which has a direct interest given that these are public records under the 1958 Public Records Act. There are plenty of others including the Royal Historical Society and the Society of Genealogists. This document does not evidence any due consultation with experts in this field. We note the many commentaries that are now in the public domain condemning this consultation. We are very happy to be consulted on draft consultations in the future. Many of the problems with this consultation could have been avoided had this been properly informed.

*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.*

We believe that expert advice should be taken and that actually, ideally, this wider set of records is likely to be determined to be worthy of preservation.