PRIVILEGED WILL — A DANGEROUS ANACHRONISM?

by

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1. *SHOULD PRIVILEGED WILLS BE ABOLISHED?*

Several law reform commissions in the United Kingdom, Canada and in some Australian States, when recommending reforms to the law of wills, have considered whether privileged wills should be retained, abolished or restricted in some ways.[1] In 1966, the Law Commission of the United Kingdom thought that there 'could be no question of taking away or reducing these important and ancient privileges'.[2] However, some legal academics have referred to privileged will as having become obsolete[3] and an 'outdated anachronism',[4] whose continued existence is 'hard if not impossible to justify'.[5] Wahlen regarded the privilege as being a dangerous, poorly fashioned tool for the transmission of wealth.[6] It is proposed to consider the historical basis and the present scope of the privilege, some justifications for its evolution and criticisms of its continuing existence. The main question that is posed is whether it is appropriate for the privilege to be retained as part of the law of succession in Australia in the twentieth century.

2. *EVOLUTION OF THE PRIVILEGE IN ROMAN LAW*

Under Roman law the execution of wills involved rigid formalities or rituals.[7] From the time of Julius Caesar, initially soldiers, and later on seamen in naval service were granted the special privilege of the entitlement to make valid wills without any formalities.[8] The privilege extended to 'the secretaries and orderlies of officers, and camp followers had the privilege when on *expeditione*'.[9] Seamen were entitled to the privilege when making wills whilst being members of the naval forces

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1 The views expressed by several law reform commissions are discussed in this article. The research for this article was conducted whilst the author acted as a consultant to the Law Reform Commission (N.S.W.) on a reference relating to wills. The opinions expressed are those of the author and not of the Commission.

2 Working paper entitled *Should English Wills be Registrable?*, par 40.

3 M. Rheinstein, 'The Model Probate Code: A Critique' (1948) 48 *Col L.R.* 334, at p. 535.

4 S. Cole, 'How Active is Actual Military Service?' (1982) 46 *Conv* 183, at p. 190.

5 Ibid at p. 190.

6 E. A. Wahlen, 'Soldiers' and Sailors' Wills: A Proposal for Federal Legislation' (1948) 15*U. Chicago L.R.* 702 at p. 709.

7 F. Schultz, *Classical Roman Law*, at pp. 240-243.

8 R. W. Lee, *The Elements of Roman Law* (4th ed., 1956), at p. 190.

9 Wahlen, *supra*, n. 6 at p. 704.

and being on board a ship. Initially, soldiers on active service were entitled to make military wills, but Justinian restricted the privilege to the period of actual military service whilst in camp.[10] The privilege authorised the making of wills without the formalities required of other Roman citizens, including making a written will with no witnesses or an oral will whose contents could be proved by one witness, although during some periods at least two witnesses were required. Such a will remained effective during the period of military service and for one year after the soldier's honourable discharge. A military will became ineffective immediately upon a dishonourable discharge.

3. *THE ENGLISH VERSION OF THE PRIVILEGE*

The privilege accorded to military personnel when making wills was one portion of Roman law which influenced and was adapted by several European civil law countries[11] and in England.[12] Initially, in England, there were no formal requirements for the execution of wills, the first formalities, in 1540, only applied to realty.[13] In 1590, Henry Swinburne relied on the civil law, when he recorded the existence of privileged wills as already forming part of the English law of succession:[14]

> For as much as solders being better acquainted with weapons than books, are presumed to have so much the less knowledge in the laws of peace, by how much they are the more expert in the laws of arms. For as much also as noble warriors, in the defence of their country, do often times undertake perilous enterprises, wherein they lose their lives or their limbs; and seldom escape without wounds or bodily hurt: As well therefore in regard of their small skill, in our peaceable laws on the one side; as in recompense of their great perils and hurts in furious and cruel battles, on the other side; They enjoy many notable privileges, and benefits in the making of their testaments (especially by the Civil Law) which are not allowed onto others.

In 1677, the *Statute of Frauds*,[15] whilst imposing formalities which applied to most wills disposing of realty or personalty, contained the following statutory exception to compliance with those formalities:

> XXII. Provided alwayes That notwithstanding this Act any Soldier being in actuall Military Service or any Marriner or Seaman being at Sea may dispose of his Moveables, Wages, and Personal Estate as he or they might have done before the makeing of this Act.

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10 *Institutes of Justinian*, Book II Title, XI, par 287.

11 For example, in France (The French Civil Code, Art 984) and in Germany (The German Civil Code, XI Art. 2249-2251).

12 The influence of Roman Law on some portions of English law, including privileged wills. was discussed by T. E. Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, published in Select Essays in Anglo American Legal History, Vol. 1, at pp. 227-230; T. F. T. Plunkett, *A Concice History of the Common Law*, 5th ed. 1956), at p. 732; T. E. Atkinson, 'Soldiers' and Sailors' Wills (1948) 28 *A.B.A.J.* 733, at pp. 753-754.

13 *Wills Act*, 1540, 32 Henry VIII, c. 1.

14 *A Brief Treatise of Testaments and Last Wills*, par xiiig.

15 29 Car. II, c. 3.

The terminology used in this provision was retained in the modern English legislation, enacted in 1837:[16]

> that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

In respect of testators dying after 6 February 1918, the privilege was extended to realty,[17] to members of the Royal Air Force[18] and it was declared always to have applied to privileged testators who were minors (then under the age of twenty-one years).[19]

4. *ADOPTION AND EXPANSION OF THE PRIVILEGE IN AUSTRALIA*

The 1837 English legislation was reproduced in each of the Australian States.[20] There were amendments to most of these provisions during the First and Second World Wars and subsequently. There is now sufficient divergence in the scope of the privilege between some of the Australian States and Territories to have caused the Queensland Law Reform Commission to consider them to be 'different to the point of bewilderment'.[21] The following broadly indicates the classes of privileged testators in the Australian jurisdictions:

(1) Soldier [of any country (N.S.W.)] in actual military service (N.S.W., Tas., Vic.).

(2) Member of the Military Forces of the Commonwealth (A.C.T., N.T., S.A.) —
who is in actual military service (A.C.T., N.T.);
who is on active service (S.A.);
during First and Second World Wars (Vic., Tas.) and during Korean and Malayan conflicts (Vic.).

(3) Member of naval or marine force of any country, so circumstanced that if he were a soldier he would be in actual military service (N.S.W.).

(4) Member of Her Majesty's naval or marine forces when he is so circumstanced that if he were a soldier he would be in actual military service (Tas., Vic.).

(5) Member of the Naval Forces of the Commonwealth (A.C.T., N.T., S.A., Tas., Vic.) —

16 *Wills Act*, 1837, s. 11.
17 *Wills (Soldiers and Sailors) Act*, 1918, s. 3.
18 S. 5.
19 S. 1.
20 The current provisions dealing with privileged wills are contained in the following statutes: Australian Capital Territory: *Wills Ordinance*, 1968, s. 16; New South Wales: *Wills, Probate and Administration Act*, 1898, s. 3 (definition of 'privileged testator') and s. 10; Northern Territory: *Wills Act*, 1938, ss. 7, 7A; Queensland: *Succession Act*, 1981, s. 16; South Australia: *Wills Act*, 1936, s. 11; Tasmania: *Wills Act*, 1840, s. 11; *Wills Act*, 1918; *Age of Majority Act*, 1983; Victoria: *Wills Act*, 1958, s. 10; Western Australia: *Wills Act*, 1970, ss. 17-19.
21 *Report on the Law Relating to Succession* (Q.L.R.C. 22, 1978) at p. 10.

who is so circumstanced that if (a) he were a soldier (Vic.); (b) a member of the Military Forces of the Commonwealth (A.C.T., N.T., Tas., Vic.); he would be in actual military service; who is on active service (S.A.).

(6) Member of an air force, of any country, in actual military service (N.S.W.).

(7) Member of the Air Force of the Commonwealth (A.C.T., N.T., S.A.) —
who is so circumstanced that if he were a member of the Military Forces of the Commonwealth he would be in actual military service (A.C.T., N.T.); who is on active service (S.A.).

(8) 'Any person, whether as a member or not, serving with the armed forces of the Commonwealth or its allies while in actual military, naval or air service in connection with operations that are or have been taking place, or are believed to be imminent in relation to a war declared or undeclared or other armed conflict in which members of such armed forces are, or have been or are likely to be engaged' (Qld., W.A.).

(9) Any person who was engaged on war service as if such person was a soldier being in actual military service (Vic.).

(10) 'Persons subject to the *Defence Act* 1903-1917, or that Act as amended, by virtue of section 117A of that Act or of that Act as amended who are so circumstanced that, if they were members of the Military Forces of the Commonwealth, they would be in actual military service' (A.C.T., N.T.).

(11) 'Persons employed outside Australia as representatives of organizations rendering philanthropic, welfare or medical service to members of the Defence Force' (A.C.T.); and persons engaged outside Tasmania (Tas.), outside Victoria (Vic.), during the 1st and 2nd World Wars (Tas., Vic.), and during the Korean and Malayan conflicts (Vic.), on work of any Red Cross Society or ambulance association or body with similar objects (Tas., Vic.).

(12) 'Prisoners of war or persons interned in a country under the sovereignty, or in the occupation, of the enemy or in a neutral country who become prisoners of war or were so interned as a result of war or war-like operations and were, immediately before their capture or internment, persons included in a class of persons specified in a preceding paragraph of this sub-section' (A.C.T., N.T.);
Any person who is a prisoner of war or internee in an enemy or neutral country (Qld.);
Prisoner of war in the enemy's country or person interned in the country of a neutral power (Tas., Vic.) during 1st or 2nd World Wars (Tas., Vic.) and during Korean or Malayan conflicts (Vic.).

(13) Mariner or seaman being at sea (N.S.W., Qld., Tas., Vic., W.A.).

5. JUDICIAL CONSTRUCTION OF THE LEGISLATION

Although the Australian and the United Kingdom legislations have been amended several times during the twentieth century, generally to expand the scope of the privilege, most of the decisions focused on the meaning of four terms: 'soldier', 'in actual military service', 'mariner or seaman', 'at sea'.

a) Soldier

For the purpose of being able to make privileged wills the term 'soldier' encompasses males and females enrolled as combatants in the military, naval and air forces, and also non-combatants who are attached to the forces, such as army doctors,[22], nurses,[23] chaplains,[24] military instructors,[25] officers in the army dental corps,[26] and engineers.[27] Other military personnel, such as persons in the reserves, or in the Home Guard, also qualify as soldiers, their eligibility to make privileged wills hinging on being in actual military service, which is more contentious than in the case of full-time professional members of the forces.[28] Some of the factors considered by the courts as relevant when determining whether particular non-combatants are or are not 'soldiers' within the meaning of the legislation are: whether that person was:[29]

(1) considered a soldier by the force to which he or she was attached;

(2) subject to military law;

(3) entitled to the privileges of a soldier as a prisoner of war in the event of capture;

(4) attached to the forces as a non-combatant by contract (whose provisions are relevant for that purpose).

b) In Actual Military Service

In *In Re Wingham,*[30] Bucknill L.J. suggested the following test to determine whether a soldier was in actual military service:

> In my opinion the tests are: (a) was the testator 'on military service'? (b) was such service, 'active'? In my opinion the adjective 'active' in this connexion confines military service to such service as is directly concerned with operations in a war which is or has been in progress or is imminent.

During peacetime, whilst in the barracks, without orders to embark or to move to any theatre of war, soldiers are not entitled to make privileged wills, because they are not at that time in 'actual' military service,

22 *In the Goods of Donaldson* (1840) 2 Curt. 386.
23 *In the Estate of Stanley* [1916] P. 192.
24 *In re Wingham* [1949] P. 187 at p. 196.
25 *In the Estate of Anderson* [1943] 2 All E.R. 609.
26 *In the Estate of Gibson* [1941] P. 118.
27 *In the Application of White* [1975] 2 N.S.W.L.R. 125.
28 *In the Estate of Anderson supra*, contra *In re Wingham supra* at pp. 196-197.
29 *In the Application of White supra* at pp. 126-128, *In the Estate of Stanley supra.*
30 *Supra* at p. 192.

as that term has been judicially construed.[31] Similarly, when a soldier serves overseas, as a member of occupation forces, after hostilities have ceased.[32]

A soldier is in actual military service, when ordered to mobilize, or to embark overseas for active service, when there is a state of war or war is imminent.[33] That includes conflicts involving Australia which are not routine wars, such as when Australian forces were engaged in active hostilities as part of Australia's international or treaty obligations or as part of a United Nations Organisation peace keeping force (when engaged in some armed conflict). On that basis, soldiers have been entitled to make privileged wills, when mobilized, embarking to, or situated at, Korea,[34] Vietnam,[35] or in suppressing terrorists in Malaya.[36] The broadest expansion of a soldier being in actual military service occurred with reference to British soldiers engaged in maintaining law and order in peace time in Northern Ireland.[37] In *In re Jones*,[38] soldiers having that role were held entitled to make privileged wills, since they were aiding the civil power against '... a conjuration of clandestine assassins and arsonists,[39] by controlling or suppressing civil insurrection against the lawful government'.

During a state of war involving Australia, soldiers are entitled to the privilege wherever situated, even if in Australia or overseas, at places removed from the imminent threat of combat.[40]

After the termination of hostilities, the privilege may continue for some time, *e.g.* whilst the soldier recovers from war injuries or illness,[41] or whilst on duty as a member of the occupation forces.[42]

In some factual situations, privileged wills were upheld, notwithstanding that the rationale and the need for the particular testator to be able to make a privileged will is difficult to justify, when contrasted with the requirements imposed on the rest of the community. A will made in 1954, by a member of the British Occupation Forces in Western Germany whilst being on leave in England, nine years after the end of the Second World War, was held to be a privileged will.[43] A representative of the Australian Red Cross, who was subject to military law and qualified as a 'soldier', became ill in New Guinea. The will made by him in

31 *Re Spann* [1965] Q.W.N. 16.
32 *Re Will of Gillett* (1948) 48 S.R. (N.S.W.) 477.
33 *Gattward* v. *Knee* [1902] P. 99, *In the Goods of Hiscock* [1901] P. 78.
34 *In Re Berry* [1955] N.Z.L.R. 1003.
35 *Re Gillespie* (1968) Q.W.N. 1.
36 *In the Will of Anderson* (1958) 75 W.N. (N.S.W.) 334.
37 *In Re Jones* [1981] 1 All E.R. 1.
38 *Supra.*
39 *Supra* at p. 5.
40 Including at Mt Isa, *Re Ward* (1966) Q.W.N. 15; at Dubbo with an infantry training battalion *In the Will of Graham* (1949) 67 W.N. (N.S.W.) 23; or in Canada *In Re Wingham supra.*
41 *In Re Lord* (1946) V.L.R. 468.
42 *In the Estate of Colman* [1958] 2 All E.R. 35, but *c.f. Re Will of Gillett supra.*
43 *In the Estate of Colman supra.*

Victoria, in an army hospital, in December 1945, well after the end of the war, was held to be privileged.[44]

c) Mariner or Seaman

These terms cover male and female members of the merchant navy, including officers,[45] marine engineers,[46] naval surgeons,[47] apprentices,[48] members of the crew,[49] and even typists[50] performing office duties on board. The terms also extend to members of the naval forces, who are privileged as 'soldiers' when in active military service, but they also have an additional privileged situation (including in peacetime) when 'at sea'. The privilege, in applying to mariners or seamen (as distinct from members of the naval forces), has been abolished in the Australian Capital Territory, Northern Territory and South Australia, although it continues to exist in the other five Australian jurisdictions.

d) At Sea

The natural meaning of making a will 'at sea' is to do so whilst the testator is sailing on the high seas. However, for the purpose of making privileged wills; 'at sea' has acquired an expanded meaning through judicial construction. The privilege attaches from the time the seaman has received orders to join the ship for a new voyage, whilst still residing at home.[51] A seaman remains at sea while on temporary leave during voyages, including whilst the ship is in a foreign port, but not when shore leave is other than temporary.[52] The privilege applied to a seaman employed on a ship which was permanently stationed in Portsmouth harbour,[53] but not to the pilot of a ship travelling entirely in inland waters.[54] When a member of the naval forces is captured and becomes a prisoner of war, the privilege continues on the basis of that person being a soldier in actual military service. However, the member of the crew of a merchant ship in a similar situation cannot make a privileged will, as the voyage has terminated and he is not 'at sea', even if the ship carried naval and military personnel and cargo during war time and the seaman was taken prisoner and interned in Japan.[55]

6. *SOME OTHER DIFFERENCES BETWEEN PRIVILEGED AND FORMALLY EXECUTED WILLS*

The informality and relative ease of proving that a particular oral or written statement constitutes a privileged will, and the very nature of the

44 *In Re Lord supra.*
45 *In Re Broadbent* [1916] N.Z.L.R. 821.
46 *In Re Godfrey* [1944] N.Z.L.R. 476.
47 *In Re Saunders* (1865) L.R. 1 P. & D. 16.
48 *In the Goods of Newland* [1952] P. 71.
49 *Re Will of Bickley* (1948) 48 S.R. (N.S.W.) 94.
50 *In the Goods of Hale* [1915] 2 I.R. 362.
51 *In the Goods of Newland supra.*
52 *In re Broadbent* [1916] N.Z.L.R. 821, where six weeks' leave was held to be more than temporary.
53 *In the Goods of McMurdo* (1867) L.R. 1 P. & D. 540.
54 *Hodson* v. *Barnes* (1926) 43 T.L.R. 71.
55 *Re Will of Bickley supra.*

privilege, caused the courts to relax some of the principles as they apply to formally executed wills. These are particularly relevant with reference to proof of testamentary intention, and to the alteration and revocation of wills.

a) Testamentary Intention

The concept of informality attaching to privileged wills has brought with it difficulties both in determining whether particular written or oral statements were testamentary and in construing them.[56] Passages in numerous letters and postcards have been held to constitute privileged wills; in some of them the existence of a present testamentary intention and the meaning of the intended benefit were questionable. For example:

> ... If you have a letter to say that I am killed, then the lot is for you. ... You will receive the lot if I am killed in action, for I shall make out my will in your favour.[57]
>
> As regards my will, I am sorry I have not made one ... I leave everything to you, as, should the boy require anything, you will provide for him.[58]
>
> Just two lines to tell you we go on the boat today. In case I don't come back Olive is to get all my insurance ...[59]

In several judicial decisions, oral statements were held to constitute privileged wills. For example, in *In re Lowe*,[60] there were two oral statements, first to the intended beneficiary:

> I will have to change my next of kin from your mother to you. I will have to go before my commanding officer to fix it up. I will alter my will leaving everything to you ...,

and later on to the soldier's commanding officer:

> I want to leave everything to Miss Tipton.

Fullagar J. admitted the second oral statement to probate, pointing out:[61]

> In the present case I would regard it as clear that Lowe did not believe at any material time that he was making or had made a will. But it is well established, I think, that such a belief is not necessary.

That passage adverts to the fact that the courts have evolved principles which appear to depart seriously from the requirements of testamentary intention for non-privileged wills. In *In Re Stable*[62] the following words were admitted to probate:

> If anything happens to me, and I stop a bullet, everything of mine will be yours.

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56 *In the Application of White supra.*
57 *Gattward* v. *Knee* [1902] P. 99.
58 *May* v. *May* [1902], P. 103, in a letter from the testator to his wife.
59 *In Re Cogan* (1915) 34 N.Z.L.R. 960, in a postcard from a soldier to his sister.
60 [1949] V.L.R. 169.
61 *Supra*, at p. 172.
62 [1919] P. 7.

Horridge J. said:[63]

> In my view it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew he was making a will, or had the power to make a will, by words of mouth. The statement made by the deceased man must, I think, be meant for a will only in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death.

Northcroft J. relied on the same principle, in *In re Godfrey*:[64]

> In the present case, it may well be that the deceased did not know that by his letter he was making a will, but I am of opinion that the letter shows that he intended deliberately to give expression to his 'wishes' as to what should be done with the property mentioned in the letter in the event of his death. That being so, I regard the language quoted as being a testamentary disposition and pronounce accordingly.

Some decisions have disclosed difficulties in dealing with expressions of past conduct or future intention, contained in diverse styles of communication, or uttered on a variety of occasions, when attempting to distinguish between those held to be testamentary and those which were held to be ineffective as privileged wills. Generally expressions of future intentions have been effective, for example, 'Of course, should we ever leave New Zealand, I will make a will leaving all to you'.[65] In *Godman* v. *Godman*,[66] Lord Sterndale M.R. said:[67]

> The testator did not purport nor did he in my opinion intend to effect that alteration by means of the letter alone, but he contemplated the preparation and execution of a formal document, probably a codicil, for that purpose. There is however as I have shown ample authority for the proposition that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property. If a long time has elapsed since the writing of the informal document, and if, during that time, the testator had opportunities of obtaining the formal document of which he did not avail himself, that affords evidence that he had changed his mind; but if he dies very soon without having had such opportunities, the presumption is that the document is the last expression of his wishes.

The uncertainty created by these propositions is self evident. It is instructive to contrast statements that were held to be non-testamentary. In *In the Estate of Knibbs*,[68] the statement, 'If anything ever happens to me, Iris will get anything I have got', was not effective as a privileged will, because it was made in the course of casual conversation between

63 *Supra* at p. 9.
64 [1944] N.Z.L.R. 476 at p. 478.
65 *In Re Martin* [1917] N.Z.L.R. 219, in a letter from a soldier to his parents.
66 [1920] P. 261.
67 *Supra* at p. 271.
68 [1962] 2 All E.R. 829.

the barman of a ship and a fellow employee at the closing time of the bar. Another basis on which such statements may fail was expressed by Lord Sterndale M.R.:[69]

> A document or a conversation which is such that it only speculates on the wishes of the person making the statement or writing the document, is not sufficient. It must be something which is, in however informal a manner, an expression of his wishes as to the disposition of his property.

In another interesting and controversial decision,[70] the English Court of Appeal held, by majority, that particular statements in a letter were not testamentary. The conflicting judicial approaches are indicated in the following extracts. Cohen L.J., in the majority, held that a statement in the letter was not made with testamentary intention (even within the relaxation of those requirements for privileged wills):[70]

> Looking at the evidence as a whole, we think there are cogent reasons for rejecting the argument that this letter displayed a testamentary intention. In the first place, there is the fact to which we have already drawn attention, that the deceased had already made a written will, in which he had made his son and Miss Snuggs beneficiaries and by which he had appointed trustees for his son; in the second place, this extract comes at the end of a letter giving directions to the managing director of his business as to the conduct of the business, and the extract itself is limited to giving instructions as to the administration of the business and as to what is to be paid through the business. In our view, upon the true construction of the letter, there is no testamentary intention...

Scott L.J., dissenting, said:[72]

> Parliament, in making the provision it did for dispensing with all technicalities of form for soldiers' wills, undoubtedly had in mind the national importance of giving effect to the last wishes, however informally expressed, of those who in war give their lives for this country... The court ought to strive hard to give effect to the manifest intention of the deceased, and, therefore, to be very slow to conclude that what is proved of that intention is not enough to deserve probate. I think it is just there that the dividing line lies between my view about the evidence and that taken by my brethren. As I see it, we have a plain judicial duty to give effect to the two provisions which I have stated.

It appears to be unsatisfactory that testators are held to have made testamentary statements or instruments when unaware of the legal consequences of the statement and without there being at that time testamentary intention, in the sense in which that is required for formally executed wills. Great uncertainty exists concerning the proof of such statements, particularly oral statements, and occasionally regarding their meaning and legal effect. There appears to be no cogent basis for relaxing the usual requirements applicable to the rest of the community, that testators should engage in a rational and conscious will-making exercise, but that principle has eroded with reference to privileged wills.

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69 *In Estate of Beech* [1923] P. 46 at p. 61.
70 *In the Estate of MacGillivray* [1946] 2 All E.R. 301.
71 *Supra* at p. 305.
72 *Supra* at pp. 302-303.

b) Alteration and Revocation

Whilst a testator is able to make a privileged will, similar lack of formalities attach to its alteration or revocation when the testator is privileged. Thus, a draft and unexecuted will, prepared by a fellow prisoner of war who was a lawyer, was held to be effective as a privileged will and to have revoked an earlier will.[73] Unattested alterations, which appear on a will that was executed whilst the testator was privileged, are presumed to be effective and to have been made during the continuance of the privilege, contrary to the requirements for other testators.[74]

Revocation poses at least two problems. First, it raises the possibility of revoking formally executed wills by informal oral statements. Second, a privileged will remains effective until altered or revoked. In this regard English and Australian law differs from Roman law[75] and from the law of several European civil law countries.[76] There have been some privileged wills which survived revocation and were admitted to probate when the testator died forty-two years and twenty-two years, respectively, after having made quite informal privileged wills.[77]

7. *SOME JUSTIFICATIONS FOR INTRODUCING THE PRIVILEGE*

In 1677, and to a lesser extent in 1837, there were several relatively strong grounds justifying the relaxation of formalities for making wills for those categories of testators covered by the privilege.

It has been suggested that the privilege was conferred as a reward for soldiers and sailors for engaging in socially beneficial occupations involving risks, and to provide for those engaged in combat the comfort of having been able to arrange their affairs in the event of death.[78] Furthermore, a large proportion of soldiers and sailors were minors (at that time aged under twenty-one years) lacking the capacity to make wills. It was considered reasonable that such persons, when engaged in the defence of their country or when assuming risks to further trade, should be able to make wills. Warfare and sea travel were risky and could involve lengthy periods of absence from England, without there being speedy and reliable methods of communication. In addition, there were no readily available means of consultation and professional advice to

73 *In Re Wakeling* [1946] V.L.R. 295.
74 *In the Goods of Newland* [1952] P. 71.
75 *Supra* text at n. 7*ff*.
76 In Italy, within 3 months after the testator is in a position to make a will according to the usual formalities (the topic is covered in clauses 609-619 of the Italian Civil Code). In France within 6 months after the testator is able to execute a will with the usual formalities (Article 984 of the French Civil Code). Under German law an emergency will (covering situations specified in Articles 2249-2251 of the German Civil Code, having a similar role to privileged wills) 'is deemed not to have been made if three months have expired since it was drawn up and the testator still survives' (Article 2252 (l), translation by I. S. Forrester, S. L. Goren and H. M. Ilgen (1975)).
77 *Re Booth* [1926] P. 118; *Re Ward* [1966] Q.W.N. 15.
78 A. R. Mellows, *The Law of Succession* (1977, 3rd ed.) at p. 94; I. J. Hardingham, M. A. Neave and H. A. Ford, *Wills and Intestacy in Australia and New Zealand* (1983) at p. 85.

soldiers and sailors, particularly when on campaign or in combat; they were said to be *inops consilii* (*i.e.* without advice).[79] The vast majority of the adult population, including soldiers and sailors, had a low level of general education[80] and knowledge or skill in making wills.

8. *CHANGED SOCIAL CONDITIONS BY THE TWENTIETH CENTURY*

There have been several important changes in social conditions between 1677, and to a lesser extent, 1837, and the present time, which have substantially removed most of the justifications for the introduction and retention of the privilege which existed during the seventeenth to nineteenth centuries.

The literacy and general level of education of the community has improved markedly in the twentieth century.[81] There are speedy and reliable forms of communication, including to and from combat zones. Ample legal advice is available to soldiers and sailors, after enlisting, and before and after moving into a combat zone.[82] Indeed the military authorities strongly urge them to make wills. The ability or inability of individual soldiers or sailors to obtain professional advice has not been a determining factor for their capacity to make privileged wills. In *In the Estate of J. King Spark*,[83] Hodson J. held that a soldier made a privileged will, notwithstanding the following facts:[84]

> The soldier in the present case had every opportunity of having legal advice, and he was not in any sense *inops consilii*. He was in England, and he was in touch with his solicitor. He had given instruction to his solicitor to prepare his will, and, if he had chosen to spend part of his leave with the solicitor, he could have completed the testamentary act on which he had started, but he did not do so.

Since the age of majority has been reduced generally from twenty-one to eighteen years in England and in Australia, soldiers and sailors in that age group are now able to make formally executed wills.

The concept of modern warfare has changed to total, atomic, or nuclear wars,[85] with increasing incidence of terrorism and civil insurrec-

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79 D. C. Potter, *Soldiers' Wills* (1949) 12 *Mod.L.R.* 183, at p. 184.
80 Potter (*supra*), at p. 184; Wahlen (*supra*), at p. 714.
81 Report of Law Reform Committee (United Kingdom) on *The Making and Revocation of Wills* (1980); Wahlen (*op. cit.*) at pp. 708-9.
82 F. C. Hutley (1949) 23 *A.L.J.* 118 at p. 118; Wahlen *op. cit.* at p. 709.
83 [1941] P. 115.
84 *Supra* at pp. 116-117.
85 The Law Reform Committee (U.K.) in its *Report on the Age of Majority* (1967) Cmnd. 3342, pointed out, at par 417, that 'the distinction between what is and is not "actual military service" has become blurred to the point of extinction by long-range weapons and informal hostilities'. The Queensland Law Reform Commission pointed out in its *Report on the Law Relating to Succession* (Q.L.R.C. 22) at p. 10:

> Modern warfare does not begin and end on the battlefield; and does not even depend on the existence of an official state of war. Support services of various kinds are as essential to the conduct of military operations as the actual placing of troops in the field.

tion, involving an increasing proportion of the community.[86] Those changes would tend to broaden the scope of the privilege far beyond its original purpose and intended operation.

It is becoming increasingly difficult to justify conferring this privilege on soldiers and sailors, when numerous persons involved in similarly dangerous and socially beneficial occupations or situations are not entitled to such a privilege. That would include policemen in dangerous situations,[87] firefighters,[88] persons involved in earthquake rescue work[89] or in landslip evacuation[90] or in defusing explosive devices planted by terrorists or by criminals,[91] underground miners,[92] and explorers in space.[93]

If there is adequate justification for the existence of wills formalities for the general community, in order to encourage considered and rational will making and to reduce the risk of fraud, there is insufficient reason for soldiers and sailors not being expected to arrange their affairs before arriving at a combat zone, as the rest of the community is expected to do, or for extending the privilege to other persons in dangerous situations.

It has also been suggested to be questionable whether the ability to make informal, including oral, wills is a privilege for soldiers and sailors. It enables some casual, informal and not always fully considered statements, occasionally made without an actual testamentary intention, to control the distribution of a person's estate.[94] That is opposed to the notion of responsible will making which is imposed on the rest of the community. It has even been suggested that privileged testators should make formal wills in order to prevent the possibility of some informal oral or written statement being successfully relied on after their deaths as privileged wills.[95]

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86 Hutley (*supra*) at p. 118.

87 R. D. Mackay, 'When is a Soldier Privileged?' (1981) 131 *N.L.J.* 659 at p. 660.

88 F. K. Maxton, 'Privileged Wills — The Meaning of "In Actual Military Service" [1981] *N.Z.L.R.* 129 at p. 130.

89 *Supra*, fn. 86.

90 *Supra*, fn. 86.

91 *Supra*, fn. 85.

92 O. M. Stone, 'Capacity to Make Wills — Some Exceptions and a Rule' (1958) 21 *Mod.L.R.* 423 at pp. 424-425.

93 Mellows (*supra*) at p. 103.

94 Wahlen pointed out (*supra*) at p. 709:

> Formal requirements for the execution of an ordinary will are imposed to protect the testator, his devisees, and legatees from fraud and mistake in the disposition of the estate. A doctrine permitting such disposition without safeguards against fraud, dishonesty, and loss of memory, and depending chiefly upon the moral restraint and responsibility of a witness to effect the intended distribution, does not commend itself.

Atkinson commented (*Wills*, 2nd ed., at p. 374):

> What the soldier said, or is alleged to have said, to a companion in a fox-hole or to a barmaid in a English pub might conceivably govern the disposition of his large estate when he dies many years later.

This point is also made by Potter (*supra*) at p. 190; Hutley (*supra*) at p. 118; Davey (*supra*) at p. 72.

95 Hutley (*supra*) at p. 119; Hardingham Ford and Neave (*supra*) at pp. 85-86; Atkinson (*supra*) at p. 374.

The laws of succession have been modernised and liberalised in ways which enable the affairs of persons who died intestate, or have failed to make or to update wills before being involved in combat, to have that adjustment imposed by the rules of statute law both fairly and equitably, with protection being afforded to the testator's or the intestate's immediate family and dependents. That includes the laws of intestacy and family provision legislation. Soldiers and sailors are also subject to the benefit and burden of those general laws, which do cover the possibility of their having failed to make wills or to have considered adequately the claims of some persons.[96]

The uncertainties, difficulties and additional legal costs inherent in proving and interpreting privileged wills, which generally require a solemn grant of probate (*i.e.* a formal court hearing) renders the continuance of the privilege less satisfactory than to impose the fairly simple formal requirements for will making which are imposed on the rest of the community.

There is no longer any proper justification for the continuance of the privilege to members of the merchant navy during peacetime.

9. *APPROACHES OF LAW REFORM COMMITTEES*

Although the English Law Committee heard evidence from several witnesses who thought that privileged wills were no longer justified or necessary, it recommended that the retention of the privilege in its present form continue.[97] In the United States of America, the *Uniform Probate Code*, which individual states can adopt, contains no provision for privileged wills. In Canada, the Law Reform Commission of British Columbia recommended[98] the abolition of the privilege with reference to adult military personnel, mariners and seamen.

In Australia, the Queensland Law Reform Commission '... doubt[ed] the value of these special privileges' and pointed out that a '... lack of articulation ... characterises the existing piecemeal legislation'.[99] However, the Commission recommended the preservation of the privilege, with only minor statutory amendments. In Tasmania, the Law Reform Commission, after having referred in its working paper to possible reform to privileged wills, made no recommendations in its report[100] for any change in the law.

10. *CONCLUSIONS*

This author contends that there are overwhelming arguments for the total abolition of privileged wills in Australia,[101] England, Canada and New Zealand.

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96 Cole (*supra*) at p. 190.
97 *Report on The Making and Revocation of Wills* (1980) at p. 9.
98 Report on *The Making and Revocation of Wills* (1981) *L.R.C.* 52 at p. 28.
99 Report on *The Law Relating to Succession* (Q.L.R.C. 22) at p. 11.
100 Report on *Reform in the Law of Wills*, Report No. 35 (1983) at p. 12.
101 A. L. Goodhart (1949) 65 *L.Q.R.* 299-300; Hutley (*supra*) at p. 118; Davey (*supra*) at p. 72; Cole (*supra*) at p. 190.

If that view is not accepted in any jurisdiction, the following are considered as the minimum reforms which should be implemented in order to limit the scope of the privilege:

1. The privilege relating to mariners or seamen should be abolished;
2. Minors should not have the capacity to make privileged wills;
3. Privileged wills should be in writing;
4. For an effective privileged will it should be necessary that the testator should have written the particular statement with testamentary intention, consciously intending to make a privileged will;
5. Privileged wills should cease to be effective at the expiration of twelve months after the privileged situation has come to an end.[102]

102 Mellows (*supra*) at p. 103; Wahlen (*supra*) at p. 715; J. G. Miller, *The Machinery of Succession (1977)* at pp. 162-163.