



29 September 2023

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Chair

Statutory Declarations Amendment Bill 2023 [Provisions]

1. The Law Council of Australia welcomes the opportunity to assist the Senate Legal and Constitutional Affairs Legislation Committee in its inquiry into the provisions of the Statutory Declarations Amendment Bill 2023.
2. The Law Council acknowledges the assistance of the Law Society of New South Wales, the Law Society of South Australia, and the Queensland Law Society in preparing this submission. The Law Council is also grateful for the guidance of its Business Law Section.

General comments

3. Temporary measures introduced during the COVID-19 pandemic period that have allowed for the electronic execution of Commonwealth statutory declarations are due to expire on 31 December 2023. The Bill proposes to make these measures permanent, through amendments to the *Statutory Declarations Act 1959* (Cth), providing that a Commonwealth statutory declaration can be executed in one of three ways:
 - traditional paper-based execution, using ink signatures and in-person witnessing;
 - electronically, by allowing electronic signatures and witnessing via an audio-visual communication link; or
 - digitally verified, through the use of an approved online platform that verifies the digital identity of the declarant through an approved identity service.
4. The Law Council continues to support the modernisation of arrangements for the execution of legal instruments, including statutory declarations. As emphasised in our 2021 submission to the Deregulation Taskforce within the Department of the Prime Minister and Cabinet, we encourage an approach that facilitates document execution without unnecessary technical requirements, while recognising that existing benefits

of current legal requirements for execution and witnessing should be retained and, where possible, enhanced.¹

5. It is important to ensure that the available execution pathways in the Bill accommodate the needs and limitations of parties, at the time that a Commonwealth statutory declaration may be required. It is also critical that measures are included to reduce opportunities for fraud and abuse in the utilisation of new methodologies.
6. With this balance in mind, the Law Council supports the Bill, but provides the following observations for the Committee's consideration.

Reliance on regulations

7. The Bill and its accompanying Explanatory Memorandum provide that the reforms will operate in conjunction with regulations that will provide further details on matters such as:
 - who is a 'prescribed person' in relation to witnesses;²
 - conditions for verifying identity;³
 - what is an 'approved online platform' and an 'approved identity service';⁴ and
 - matters that an approved online platform must include in an annual report.⁵
8. Without concurrent access to the regulations, it is difficult for the Law Council to comprehensively assess the likely impact of the proposed reforms. We therefore caution against the Government seeking to make these regulations—noting they are expected to be disallowable under the *Legislation Act 2003* (Cth)—without appropriately consulting the Law Council and other key stakeholders as to their contents, to ensure they are appropriately aligned with the Bill and do not produce unintended consequences.
9. For example, it may be appropriate to consider whether the category of persons who are permitted to witness signing via an audio-visual communication link should be narrower than those permitted to witness paper-based execution, such as a subset of witnesses who have received training in digital and electronic witnessing.

Paper-based execution

10. The traditional paper-based execution method necessarily presents a variety of risks and challenges, including the time and cost involved in arranging the face-to-face execution and witnessing of a statutory declaration. These difficulties are exacerbated for individuals living in rural, regional and remote areas, and in areas affected by natural disasters.

¹ Law Council of Australia, *Modernising Document Execution* (Submission to the Department of the Prime Minister and Cabinet, 8 October 2021) <<https://lawcouncil.au/publicassets/42e795d5-9a2c-ec11-9442-005056be13b5/4108%20-%20Modernising%20Document%20Execution.pdf>> 6.

² Statutory Declarations Amendment Bill 2023, proposed section 4.

³ *Ibid*, proposed subparagraph 9A(1)(b)(ii).

⁴ *Ibid*, proposed subsections 9A(2) and 9A(3).

⁵ *Ibid*, proposed section 9B(3)(d).

11. However, the availability of paper-based execution remains an important alternative, in the event that a technology-based option cannot be used, or is not desirable. Such instances include where:
 - an individual may not have access to an affordable Internet connection or device, or may not have the necessary level of digital literacy;⁶
 - an individual may not have the necessary identification documents required by the digital execution pathway;
 - the technology required for e-execution or digital execution may be temporarily unavailable—due to system maintenance or outage (for example); or
 - an individual may not wish to interact with electronic pathways for a range of historical, cultural or other reasons, such as a lack of confidence in the security of such systems.
12. We therefore support the retention of a paper-based execution method, as provided in proposed paragraph 7A(1)(a) of the Bill.

Electronic execution

13. Section 9 of the Bill will allow for remote witnessing via an audio-visual communication link. We support the continuation of electronic execution for Commonwealth statutory declarations, noting that this method is currently temporarily provided for under the *Coronavirus Economic Response Package (Modifications—Statutory Declarations and Notices of Intention to Marry) Determination 2021*.
14. As noted above, arrangements permanently permitting the electronic execution of Commonwealth statutory declarations must be balanced with appropriate safeguards, to forestall any unintended adverse consequences brought about by alternatives to in-person formalities.
15. Given the potential risks associated with remote witnessing, the Law Council considers that it may be appropriate for the regulations, once developed, to narrow the scope of the persons who are permitted to witness via audio-visual link. For instance, and as referred to above, permitted persons could be limited to a specific category of ‘special witnesses’ with the requisite training in electronic witnessing.
16. An additional measure to protect against fraud is the intention, set out in the Explanatory Memorandum, for the declarant and witness to be required to include their telephone number or email address on the statutory declaration.⁷ The Law Council largely supports this approach, and acknowledges the rationale behind it.
17. However, the Law Council has received feedback from the Queensland Law Society (QLS), querying whether the provision of a witness’s contact details is an effective fraud control measure. The QLS cautions that this requirement may dissuade some prospective witnesses from witnessing a declaration, due to concerns that their personal information would subsequently be made available to third parties.

⁶ See Erin Parke, Australia’s digital divide means 2.8 million people remain ‘highly excluded’ from internet access, ABC News (Online, 16 October 2022) <<https://www.abc.net.au/news/2022-10-16/australia-digital-divide-millions-cannot-access-internet/101498042>>.

⁷ Explanatory Memorandum, [34].

18. Consideration could perhaps be given to including a witness's official Law Society number, or Justice of the Peace number, as a general principle for all witnesses to minimise the potential for fraud.

Digitally-verified execution

19. Proposed section 9A of the Bill provides that a statutory declaration will be valid where it is completed and signed through an approved online platform, and where the identity of the declarant has been verified using an approved identity service.
20. Under this process, the statutory declaration would not require a witness, in the traditional sense. As provided in the Explanatory Memorandum:

Instead, the digital option would establish a number of requirements that would fulfil the underlying purposes of witnessing, including verification of identity, evidence of execution, and to confirm the declarant intends to be bound by their statement.⁸

21. While dispensing with the need for human witnessing can have advantages, it also has potential risks, given that a function of witnessing is to ensure the legal capacity of the party, and that they understand the solemnity of signing the document. These are very different functions to the role of a Digital Identity Provider, which is concerned only with the verification of the declarant's identity.
22. As witnessing is intended to protect against impersonation, duress and fraud, there is a risk that public confidence would be reduced in relation to a statutory declaration that is executed digitally, as it arguably lacks the same (perceived) checks and balances associated with a statutory declaration that is witnessed by a person, either in person or via audio-visual link.
23. In light of the above, consideration ought to be given to whether digitally executed Commonwealth statutory declarations should be available for use in all cases, or whether this should be reserved for a select set of circumstances. Consideration should also be given to whether some supplementary action should be required, such as a short video recording of the declarant, stating their understanding of what they are signing, and why.

Retention of a statutory declaration

24. Subsection 9B(1) prohibits an approved online platform from retaining any copy of a statutory declaration made using that platform. However, the Explanatory Memorandum provides:

This prohibition is not intended to cover temporary storage of statutory declarations by an online platform that is incidental to the technical process of making the declaration.⁹

25. This prohibition may be problematic, given that making, and temporarily storing, such reproductions would seem to be fundamental to the operation of any online or computerised platform where the document is 'retained' in some form, so that it may be accessible for verification purposes.

⁸ Ibid [10]

⁹ Explanatory Memorandum, [52].

26. The Law Council's support for a minimum timeframe for retention was provided in its response to the recent consultation by the Attorney-General's Department on reforms to the execution of statutory declarations, dated 2 August 2023:¹⁰

A copy of all digitally executed Commonwealth statutory declarations should be retained on the online platform for a specific period (not less than one year longer than the limitation period applicable to the transaction or context in which the statutory declaration is being executed), so that it is accessible by the recipient of the statutory declaration for verification purposes.¹¹

27. Online providers should have greater clarity as to how subsection 9B(1) will operate, including whether the digitally executed statutory declaration is retained on the online platform for a specified period, so that it is accessible by the recipient of the statutory declaration for verification purposes.
28. There is also the potential for confusion between:
- the platform that is merely facilitating the digital identity verification (e.g., MyGovID), which does not need to keep a copy of the document being signed; and
 - the platform through which the declaration is being completed, which needs to retain a copy of the duly signed document.
29. We recommend that the Bill, or, at a minimum, the Explanatory Memorandum, clarify this distinction, to minimise the potential for confusion and noncompliance.

Guidance materials

30. The Law Council understands that the Attorney-General's Department intends to create new guidance material to explain these changes and provide information on how to use the new execution methods. We support this initiative and reiterate the importance of accessible guidance to support witnesses to properly perform their role when witnessing via video link. This guidance should, in particular, assist witnesses when a suspicion arises that the declarant is acting under coercion or duress.

Contact

If the Law Council can be of any further assistance to the Committee in the course of its inquiry, please contact

Yours sincerely

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Chief Executive Officer

¹⁰ Law Council of Australia, Consultation on proposed reforms to the execution of Commonwealth statutory declarations (Submission to the Attorney-General's Department, 2 August 2023) <<https://lawcouncil.au/resources/submissions/consultation-on-proposed-reforms-to-the-execution-of-commonwealth-statutory-declarations>>.

¹¹ Ibid 6.