

Statutory Declarations Amendment Bill 2023 (Cth)

Submission to the Senate Legal and Constitutional
Affairs Legislation Committee

22 September 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Statutory Declarations Amendment Bill 2023 ('Bill').
2. Access to justice is a deeply important value to ALA members and their clients across Australia. This includes equal access to legal processes for all individuals, a value which is enshrined in international law,² and it also includes choice (where possible) about how members of the public can engage with and access those legal processes.
3. ALA members thus broadly support the proposals contained in this Bill to expand the options for Commonwealth statutory declaration execution, allowing execution in any one of the following three ways:³
 - a. traditional paper-based, requiring wet-ink signatures and in person witnessing;
 - b. electronically, through the application of an electronic signature and witnessing via an audio-visual communication link; and
 - c. digitally verified, through the use of a prescribed online platform that verifies the identity of the declarant through a prescribed digital identity service provider.
4. In our submission, the ALA will address matters concerning all three options for executing Commonwealth statutory declarations, with particular emphasis on the provisions that relate to digitally verified execution.

Maintaining the traditional, paper-based process

5. The ALA notes that the Bill retains the traditional, paper-based process for executing a Commonwealth statutory declaration.⁴
6. We support this, as it is essential to retain this option for those who cannot access or who do not wish to access the relevant technology required for the electronic execution and digitally verified execution of Commonwealth statutory declarations.

² See, eg, *International Covenant on Civil and Political Rights* (ratified by Australia in 1980).

³ Explanatory Memorandum, Statutory Declarations Amendment Bill 2023 (Cth) 2.

⁴ Statutory Declarations Amendment Bill 2023 (Cth) cl 9.

Formalising electronic execution

7. The ALA supports maintaining and making permanent the option for electronic execution of Commonwealth statutory declarations.⁵
8. We submit that a permanent electronic execution option will facilitate access to justice and more equitable access to legal processes. The ongoing availability of electronic execution will make the signing and witnessing stages of executing a Commonwealth statutory declaration easier, especially for clients who are located in rural, regional and remote areas, as well as for those who are elderly, injured, in hospital, in care, housebound or who have limited mobility.
9. ALA members have also reported that electronic execution – introduced during the COVID-19 pandemic – has been helpful for legal practitioners, especially for practitioners who work from home and/or are themselves located in rural, regional or remote places.
10. The ALA, therefore, supports the provisions of this Bill which formalise electronic execution as an ongoing option for the execution of Commonwealth statutory declarations.

Digitally verified execution

11. The Bill proposes a new option for executing Commonwealth statutory declarations: digitally verified execution.⁶ The Federal Government has provided the following description of this proposed option:⁷

New section 9A 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*.

12. The ALA submits that digitally verified execution will also facilitate access to justice and more equitable access to legal processes, as detailed above in relation to electronic execution.
13. This section of the ALA's submission will specifically address some of the features of this proposed option of digitally verified execution.

⁵ Statutory Declarations Amendment Bill 2023 (Cth) cl 9.

⁶ Ibid cl 9A.

⁷ Explanatory Memorandum, Statutory Declarations Amendment Bill 2023 (Cth) 3.

Confirming a declarant's intent

14. This Bill affirms that a declarant of a Commonwealth statutory declaration must indicate their “intention in respect of the information recorded in the declaration”,⁸ regardless of which option for execution the declarant pursues. Supporting material for this Bill indicates that an approved online platform will need to provide a way “to confirm the declarant intends to be bound by their statement” as part of digitally verified execution.⁹
15. The ALA is supportive of this requirement, as it is particularly important in the absence of a witness – who would be involved in confirming a declarant's intention and comprehension via both traditional and electronic execution options – that approved online platforms confirm a declarant's intention and comprehension of the information contained in the Commonwealth statutory declaration (a document which denotes legal commitments and consequences for declarants) *before* the declarant finalises their statutory declaration digitally.

Who or what can be an approved online platform

16. The ALA understands that who or what can be an approved online platform for the purposes of digitally verified execution of Commonwealth statutory declarations will be proscribed in accompanying regulations,¹⁰ to which the ALA has not had access at the time of writing.
17. The Bill contains minimal details on this matter, although the Explanatory Memorandum states the following:¹¹

It is intended that the regulation-making power will allow the Minister to require the entities providing the approved online platform to be authorised to operate within the Australian Government Digital ID System (AGDIS). This will include requiring an approved identity service to be accredited under the Trusted Digital Identity Framework (TDIF) to operate within the AGDIS. This requirement will ensure that these services meet the strict rules and standards relating to, for example, usability, accessibility, privacy protection, security, risk management, and fraud control contained within the AGDIS.

⁸ Statutory Declarations Amendment Bill 2023 (Cth) cl 7A(2)(a).

⁹ Explanatory Memorandum, Statutory Declarations Amendment Bill 2023 (Cth) 3.

¹⁰ Ibid.

¹¹ Ibid 14.

18. **The ALA submits that, given the importance of those regulations in defining who or what can be an approved online platform for this method of executing Commonwealth statutory declarations, direct stakeholder consultation on those regulations would be appropriate.**
19. Further, the ALA submits that it must be clear to the general public (that is, the potential declarants) *before* they commence a digitally verified execution process what fees are involved in verifying their identity and ultimately executing the Commonwealth statutory declaration through approved online platforms.
20. In the interests of access to justice and equality of access, the ALA contends there must be a limit to and transparency around what fees can be charged by approved online platforms.
21. The ALA also submits that it should be made clear to declarants *before* they commence a digitally verified execution process that they do have the choice to use other approved online platforms, or to execute their Commonwealth statutory declaration through traditional or electronic options.

Annual self-auditing of approved online platforms

22. This Bill envisages that the provider of an approved online platform “must not retain any copy of a statutory declaration that is made using the online platform”.¹²
23. Further, providers of approved online platforms must prepare a report after the end of each financial year (by 15 October, unless a further period of time is granted).¹³ The reports must relate “to the use of the platform to make statutory declarations during the financial year”.¹⁴ That includes compliance with the requirement to not retain any statutory declarations executed through that approved online platform,¹⁵ as well as whether there have been any data breaches in the 12 months prior to the report’s compilation.¹⁶
24. **The ALA submits it is inadequate that the provider of an approved online platform is only required to self-audit once a year.** Under the proposed provision as it is currently drafted, if

¹² Statutory Declarations Amendment Bill 2023 (Cth) cl 9B(1).

¹³ Ibid cl 9B(4).

¹⁴ Ibid cl 9B(2).

¹⁵ Ibid cl 9B(3)(b).

¹⁶ Ibid cl 9B(3)(c).

an approved online platform has retained any completed or even partially-completed Commonwealth statutory declarations – either accidentally or recklessly – and/or if there have been data breaches within the approved online platform’s system, then it could be months or even over a year before that is discovered and reported, and even longer for the situation to be remedied. That poses risks for declarants and the exposure of their private information contained in those retained Commonwealth statutory declarations. In the next section of our submission, the ALA will address further privacy protection and data security matters.

- 25. The ALA thus recommends – with regard to the sensitive nature of the information contained in Commonwealth statutory declarations, as well as declarants’ right to privacy – that providers of approved online platforms should be required to audit their records and operations quarterly and to update the Federal Government accordingly.**

Privacy protection and data security

26. All lawyers have a legal obligation to keep their clients’ information safe and confidential, including in the execution of Commonwealth statutory declarations.
27. As such, the support of ALA members for online options for executing Commonwealth statutory declarations – and undoubtedly the willingness of all legal practitioners and members of the general public to execute Commonwealth statutory declarations via electronic execution or digitally verified execution – is contingent upon the assurance of privacy protection and data security.
28. The ALA submits that privacy protection and data security are especially important for digitally verified execution. The Federal Government has expressed its intent that providers for approved online platforms (for example, myGov) must comply with the *Privacy Act 1988* (Cth),¹⁷ as well as that privacy and security of personal information are priorities within the Commonwealth statutory declaration execution framework.¹⁸

Further safeguards that will be prescribed include a requirement for the digital identity service to be an accredited entity under the Trusted Digital Identity Framework (TDIF)

¹⁷ Statutory Declarations Amendment Bill 2023 (Cth) cl 14(3)(a).

¹⁸ Explanatory Memorandum, Statutory Declarations Amendment Bill 2023 (Cth) 4.

and that both the online platform and identity provider operate within the Australian Government Digital ID System (AGDIS). Being accredited under the TDIF will ensure that entities must meet strict requirements for privacy protection, security, risk management and fraud control. The AGDIS has been designed to protect privacy and security so that the individual is able to control their personal information.

29. However, the ALA notes concerns that have been raised very recently about privacy protection and data security through the Australian Government Digital Identity System (AGDIS) and Commonwealth Government platforms like myGov, after highly-publicised cyber attacks and data breaches revealed systemic vulnerabilities in privacy protection and data security.¹⁹

30. In February 2023, the Office of the Australian Information Commissioner made recommendations as to how Services Australia must improve its privacy policy, privacy management plan, and data breach response plan in relation to Services Australia's handling of personal information as part of the Identity Exchange for the AGDIS.²⁰

31. The ALA submits that it is imperative, therefore, that the Federal Government requires providers of approved online platforms to have in place the most strict privacy protections and policies plus the most secure data management systems for those providers to attain approval to process Commonwealth statutory declarations.

32. The ALA contends that the Federal Government must also ensure that privacy protections and data security measures are improved within the AGDIS and through platforms like myGov. This will ensure public trust in and willingness to use the digitally verified option for executing Commonwealth statutory declarations.

¹⁹ See, egs, Allannah Sciberras, 'Scammers hacked into Sharon's MyGov account in 2020. They are still accessing her data', *Nine News* (online, 1 May 2023) ; Ry Crozier, 'Services Australia finds 'high risk' vulnerability in identity exchange', *iTNews* (online, 23 February 2023); Sarah Curnow and Kevin Nguyen, 'Fake myGov profiles are being used to hack ATO accounts. Sue found this out the hard way', *ABC News* (online, 18 December 2022); Tom McIlroy, 'ATO battling 3m hack attempts a month', *Australian Financial Review* (online, 20 October 2022); Emilia Terzon, 'Medibank, Optus hacks and ATO attacks expose identity-theft risks, warn cyber security experts', *ABC News* (online, 21 October 2022); Josh Taylor, 'Government considers centralising digital ID verification on myGov in wake of Optus breach', *The Guardian* (online, 7 October 2022); Nick Evershed and Josh Taylor, 'AI can fool voice recognition used to verify identity by Centrelink and Australian tax office', *The Guardian* (online, 17 March 2023).

²⁰ Office of the Australian Information Commissioner, Australian Government, *Handling personal information: Services Australia's role as the Identity Exchange* (Web Page, 16 February 2023) <<https://www.oaic.gov.au/privacy/privacy-assessments-and-decisions/privacy-assessments/handling-personal-information-services-australias-role-as-the-identity-exchange>>.

Review of the *Statutory Declarations Amendment Act 2023* (Cth)

33. This Bill proposes that a review of the operation of the *Statutory Declarations Amendment Act 2023* (Cth) should be conducted “as soon as practicable after the end of 2 years after the commencement of the *Statutory Declarations Amendment Act 2023*”.²¹
34. **The ALA contends that this timeline for reviewing this legislation must be refined and that a more specific timeframe be proposed.** Significant reforms are enshrined in this Bill and it will be important to assess how all options for executing Commonwealth statutory declarations are operating, given the binding legal nature of statutory declarations.
35. **The ALA submits that proposed section 16(1) of the Bill should be amended to the following:**
“The Minister must cause a review of the operation of this Act to be conducted, with that review beginning no later than 2 years after the commencement of the *Statutory Declarations Amendment Act 2023*.”
36. **The ALA also submits that this review must include a review of the relevant regulations, which (as above) the ALA understands will play a central role in the operation of this Act.**

Conclusion

37. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input on the Statutory Declarations Amendment Bill 2023 (Cth).
38. The ALA is available to provide further assistance to the Senate Legal and Constitutional Affairs Legislation Committee on the issues raised in this submission.

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²¹ Statutory Declarations Amendment Bill 2023 (Cth) cl 16(1).