



Law Council
OF AUSTRALIA

Office of the President

2 August 2023

Ms Katherine Jones
Secretary
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: [REDACTED]

Dear Ms Jones

Modernising document execution: Consultation on proposed reforms to the execution of Commonwealth statutory declarations

1. The Law Council of Australia welcomes the opportunity to contribute to the consultation by the Attorney-General's Department (the **Department**) on proposed reforms to the execution of Commonwealth statutory declarations.
2. The Law Council acknowledges the assistance of the Law Institute of Victoria, the Law Society of New South Wales, and the Queensland Law Society in preparing this submission. The Law Council also thanks its Business Law Section for its guidance.

General comments

3. The Law Council supports the continued modernisation of arrangements for the execution of legal instruments. As was emphasised in its 2021 submission to the Deregulation Taskforce at the Department of the Prime Minister and Cabinet, the Law Council encourages an approach that emphasises facilitation of 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
4. The Law Council supports the Department's proposal to allow a Commonwealth statutory declaration to be executed by the following concurrent methods (addressed in turn, below):
 - traditional paper-based execution, requiring wet-ink signature and in-person witnessing;
 - electronic execution (**e-execution**), allowing electronic signatures and witnessing via audio-visual link; and
 - digital execution, with Digital Identity Providers to verify identity and satisfy witnessing requirements.

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.

5. It is important that the available execution pathways accommodate the needs and limitations of parties at the time that a Commonwealth statutory declaration may be required, and that measures are included to reduce opportunities for fraud and abuse in the utilisation of new methodologies.²
6. The proposed framework would require minor amendments to the *Statutory Declarations Act 1959* (Cth) and the *Statutory Declarations Regulations 2018* (Cth). The Law Council supports the introduction of these amendments prior to the expiry of the existing temporary measures on 31 December 2023.³ In this respect, flexible principles-based provisions, rather than prescriptive requirements, would more appropriately accommodate advances in technology and future expansion of such processes to other sectors and jurisdictions.⁴
7. This proposed framework is being made in the context of continued work to modernise and harmonise execution requirements for statutory declarations and deeds across Australian jurisdictions. As provided in its submission to the Deregulation Taskforce, the Law Council strongly supports this harmonisation process, particularly given that commercial and personal transactions regularly cross jurisdictional boundaries.⁵
8. The Law Council also refers to the submission made, to the Department, by the Law Council's Business Law Section's Digital Commerce Committee in relation to the review of the *Electronic Transactions Act 1999* (Cth) in March 2023.⁶

Paper-based execution

9. Paper-based execution enables a person to make their Commonwealth statutory declaration on paper, and sign it using wet-ink in the presence of a prescribed witness.
10. The Law Council acknowledges the 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—exacerbated for individuals living in rural, regional and remote areas, and in areas affected by natural disasters—are detailed further in the Law Council's submission to the Deregulation Taskforce.⁷
11. Nonetheless, the Law Council supports the Department's proposed retention of this method, noting the desirability of providing alternative means of executing a statutory declaration in the event that a technology-based option cannot be used. For example:
 - an individual may not have access to an affordable Internet connection or device, or may not have the necessary level of digital literacy;⁸

² Ibid 5.

³ *Coronavirus Economic Response Package (Modifications—Statutory Declarations and Notices of Intention to Marry) Determination 2021* (Cth).

⁴ 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>> 5.

⁵ Ibid 6.

⁶ Law Council of Australia, Attorney-General's Department consultation on the Electronic Transactions Act (Submission to the Attorney-General's Department, 27 March 2023) <<https://lawcouncil.au/publicassets/7d226a8c-12d4-ed11-947b-005056be13b5/2023%2003%2027%20-%20S%20-%20Electronic%20Transaction%20Act.pdf>>.

⁷ 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>> 8, 12.

⁸ 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>>.

- 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.

Electronic execution

12. Electronic execution involves execution of Commonwealth statutory declarations through the use of electronic signatures, real time witnessing via audio-visual link and the actual signing by the witness subsequent to the online witnessing of the signatory's signing.
13. As previously expressed in the Law Council's submission to the Deregulation Taskforce, there has been a longstanding need to modernise the way in which documents, including statutory declarations, are created and used.⁹ The Law Council supports the Department's proposed retention 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. The Law Council considers the digital options for executing documents, which have been available during the COVID-19 pandemic, have allowed parties to create and execute documents without the potentially significant impost on their health, time, caring responsibilities and finances (travel and other costs) that physically meeting with a witness can necessitate.¹⁰
15. In addition, the Law Council has received feedback from the legal profession that allowing electronic execution of documents, such as statutory declarations, improves efficiency for legal practices and their clients, reducing costs. This is an access to justice issue. In addition there are positive flow-on effects for courts, government departments, other agencies and the community more broadly due to the more cost-effective and timely delivery of documents and progression of legal matters.¹¹
16. The Law Council acknowledges that there are challenges and risks associated with e-executed statutory declarations, which may relate to:
 - verification of identity of the signatory and witness;
 - cyber-security risks;
 - the risk of error in the execution process; and
 - the risk of fraud or undue influence, which may be more difficult to detect and prove compared to paper-based processes.¹²

⁹ 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>> 9.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 12.

17. In light of these risks, the Law Council considers that 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.¹³ A potential measure in this regard is narrowing the scope of the persons who are permitted to witness via audio-visual link to a limited number of ‘special witnesses’, as was introduced in Queensland in 2021.¹⁴ Limiting such witnessing to Commissioners for Affidavits who have received training in digital and electronic witnessing would be an option.

Digital execution

18. As proposed by the Department, digital execution would provide for the end-to-end execution of Commonwealth statutory declarations through an online platform that utilises a Digital Identity Provider approved to operate within a digital identity system maintained by the Commonwealth, obviating the need for a second person as a witness.¹⁵

Benefits

19. The implementation of digital execution would likely improve accessibility by enabling a greater number of Australians to make Commonwealth statutory declarations more easily. For example, members of the community with restricted mobility, sensory issues, social anxiety disorder, or limited access to approved witnesses would benefit from the ability to execute digitally a statutory declaration without the impediment of arranging to meet a witness, either face-to-face or virtually.
20. Digital execution would also remove the potential for statutory declarations to be invalidly executed due to a failure to comply with formalities, which can lead to additional costs and delays.¹⁶
21. Another advantage is that users will only be required to prove their identity to the digital identity system once. Legal practitioners and witnesses will not therefore need to receive, validate, take copies, and securely store the identification documents of the declarant, which is particularly beneficial in light of recent data breaches and should be encouraged.

Concerns

22. Certain concerns have been raised with the Law Council in relation to the digital execution of Commonwealth statutory declarations. These concerns may be in part due to the minimal detail in the Consultation Paper as to how this method will work in practice, and what specific safeguards will be implemented to ensure digital execution.

¹³ Ibid 13.

¹⁴ *Justice and Other Legislation Amendment Act 2021* (Qld) ss 12, 31Q, 31S.

¹⁵ Attorney-General’s Department, *Modernising Document Execution: Consultation on proposed reform to the execution of Commonwealth statutory declarations* (Consultation Paper, July 2023) 3.

¹⁶ 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>> 9.

23. In addition to potential cyber-security risks,¹⁷ the first concern relates to the potential for a person to alter a digitally-executed statutory declaration fraudulently after it has been downloaded from the online platform. Whilst acknowledged that PDF documents can be secured from further editing, it is conceivable that users may have access to software that makes it possible to alter downloaded statutory declarations digitally. This is a distinct issue for digital documents as, ordinarily, organisations will require (or can request) an original wet-inked statutory declaration.
24. The second concern relates to the Digital Identity Provider performing the role of witness, as is proposed in the Consultation Paper,¹⁸ noting that identity verification witnessing is a different function to capacity or non-duress verification.¹⁹
25. While dispensing with the need for human witnessing can have advantages, as outlined above, 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. Requiring the Digital Identity Provider to perform the role of witness could consequently increase the potential for exploitation and coercion of vulnerable people. The Law Council considers it inappropriate to use the term “witnessing” where the Digital Identity Provider does no more than verify the signer’s identity.
26. 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. Consideration ought to be given to whether digitally executed Commonwealth statutory declarations should be available for use in all circumstances, including in proceedings before a court or tribunal. Indeed, on one view, the limitation of identity-only verification might be thought significant enough to preclude that mode of execution for statutory declarations even if it is sufficient for less solemn instruments.

Law Council position

27. On balance, and subject to the below recommendations, the Law Council supports the option to permit digital execution in cases where capacity or duress aspects are not of concern. It considers the existing digital identity infrastructure, such as the myGov platform, would likely provide sufficiently robust evidence of due execution.
28. The myGovID platform is already well accepted for lodgement of Commonwealth documents and forms, such as taxation returns and government assistance applications, without witnessing and without fresh identity verification being required for each instance. Further, the more universal the usage of such digital credentials, the more efficient its adoption can be for purposes such as those under discussion in this consultation.²⁰

¹⁷ Ibid 13.

¹⁸ Attorney-General’s Department, Modernising Document Execution: Consultation on proposed reform to the execution of Commonwealth statutory declarations (Consultation Paper, July 2023) 3.

¹⁹ 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>> 11.

²⁰ Ibid.

29. Implementation of this approach would need to be readily accessible and not unduly complicated for it to work effectively. Nationwide guidance will also be required.²¹ In addition, the online platform must facilitate the involvement of multiple users. For example, legal practitioners will need to have the ability to upload and edit the proposed content of the statutory declaration in the online platform and then invite their client to review and sign it during a suitable share-screen mode audio-visual call. Not all clients will have the technical aptitude to be able to carry out that task.
30. The Law Council looks forward to receiving more detailed information regarding the practical implementation of the digital execution method and would welcome the opportunity to contribute to further consultation in due course. In the interim, the Law Council makes the following recommendations for consideration which may assist in addressing the concerns raised above:
- 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.
 - The digitally executed statutory declaration should contain a date and time stamp and unique number identifier, with the option to send a basic date and time receipt to the declarant's email address or phone number. Where technically possible, the metadata associated with the execution process should also include the location of the device on which the execution process is being performed and the media access control (**MAC**) address and/or International Mobile Equipment Identity (**IMEI**) of the device.
 - The downloaded copy of a digitally executed statutory declaration should contain either:
 - a QR code that, when scanned, links to the online version of the document; or
 - a unique number identifier that can be entered online to view the original document (similar to verifying a grant of probate in Victoria).²²
 - A downloaded copy of a digitally executed statutory declaration should be secured and non-editable.
31. Ultimately, the Law Council considers that the risks associated with modernising document execution should be balanced against an acknowledgement that there are, as noted above, similar risks associated with paper-based documents. A disproportionate focus on eliminating risk altogether could lead to the introduction of overly prescriptive requirements, which may reduce the broader benefits of these proposed reforms.²³

²¹ Ibid 13.

²² Supreme Court of Victoria, Searching Probate Records (Web Page, 2023) <<https://www.supremecourt.vic.gov.au/wills-and-probate/searching-probate-records>>.

²³ 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>> 13.

32. As technological capacity improves, more robust approaches will be viable—such as activating the camera on a user’s device to record and store with the document a briefly recited acknowledgement of the purpose of the document. For example, the user could be asked to recite a phrase such as ‘I swear that the contents of this statutory declaration are true and correct in all material respects’.
33. The Law Council considers it quite feasible to merge that video fragment digitally with the electronically executed document so that the composite is available for future reference. The use of such technology may obviate the need for a formal witness since anyone seeking to rely on the declaration can view the signatory’s recorded video for themselves. Where the context of the statutory declaration is such that a high level of identity/capacity/non-duress verification is required, more sophisticated technological capabilities can be utilised and combined.

Contact

34. If the Department requires further information or clarification, please contact in the first instance [REDACTED] on [REDACTED] or at [REDACTED]

Yours sincerely

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