

8 April 2020

Our ref: LP-MC

Pauline Wright  
President  
Law Council of Australia  
GPO Box 1989  
Canberra ACT 2601

By email:

&

Dear President

**Witnessing solemn documents and crossing State & Territory borders**

Thank you for the opportunity to provide comments in respect of possible solutions to the issues of:

1. witnessing of wills, enduring powers of attorney, appointments of enduring guardian, affidavits and other solemn documents where it is impossible to meet the signatory face to face; and
2. facilitating practitioners needing to cross State and Territory borders to attend to essential legal services.

As noted in your memorandum, these issues are largely state-based. The Queensland Law Society (QLS) has raised issues, including around the signing and witnessing of documents, with our State government and courts and we are working with both to navigate the best way forward in light of this unfolding situation.

Therefore it seems unlikely that uniformity of approach will be achievable at this time. However, we appreciate the opportunity to share the options below in the event that it might assist in achieving some consistency across jurisdictions where appropriate.

The two issues outlined in your memorandum are present in respect of most, if not all, areas of practice and as such we have sought advice from a number of our legal policy committees. We note that members of these committees will face different challenges depending on their area of practice, geographical location and client base.

Accordingly, and given the short timeframe for response, we have not been able to reach final positions on these issues. Instead, we provide some comments about each issue and the proposed options for the consideration by the Law Council in your discussions with the Commonwealth Government.

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### Witnessing solemn documents

Some members of our policy committees have reservations about the relaxation of witnessing requirements, while at the same time agreeing that we need a more flexible method in the current circumstances.

In order to strike the right balance of all of the competing factors in this time of urgency and uncertainty, the following issues need to be given consideration:

- Any measures that are adopted should not be a restrictive, 'one size fits all' approach, given that the circumstances facing each practitioner and party may be different and due to the evolving nature of this crisis. Further, any new process should not increase the burden on practitioners or clients at this time.
- Whatever process is settled upon needs to be clearly articulated and simple to apply and take into account existing processes in all Australian jurisdictions if at all practicable.
- Any measures should be drafted in a technology neutral way.
- Any measures should only be utilised where the existing rules cannot reasonably be complied with due to the pandemic.
- It should be recognised that clients, particularly those completing enduring powers of attorney and wills etc, may be elderly and not in a position to use or comprehend technology.
- Any measures should be reviewed after a stated period of time and have a sunset date. The sunset date should apply both to the process for witnessing the document and, potentially, the validity of the document witnessed under the modified process.

In addition to considering how witnessing requirements can be satisfied in the current circumstances, some of our committee members believe that attention should be given to facilitating electronic signatures. We deal with this further below.

### Possible amendments

#### *Witnessing via videoconference*

A number of our policy committee members considered that documents could be signed by the signatory, with the witnesses present via videoconference. The strong preference of the committee members who commented is that the videoconference be recorded and retained as evidence of the process followed by the witness.

In these circumstances, issues of consent and privacy arise. Our members have considered the application of the exceptions relating to recording of private conversations in the *Invasion of Privacy Act 1971* (Qld) and the effect of the *Telecommunications (Interception and Access) Act 1979* (Cth) if the conversations were deemed "private". It may be the case that the *Invasion of Privacy Act* will not apply to a conversation between the client and the lawyer as both parties are participants in the conversation. These issues will require further consideration if jurisdictions proceed with this option. Consent should be obtained from all participants.

Further, such a measure will also need to accommodate documents being signed electronically.



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Another option, which has been adopted in other jurisdictions<sup>1</sup> could require the document to be scanned and then sent to the witness during the videoconference. However, this approach may be too cumbersome in some instances and also raises concerns about the quality of the scanned image for evidential purposes.

We make some general comments in respect of wills and enduring powers of attorney being witnessed by way of videoconference. First, we note that in Queensland, a video will has been accepted as being a valid will.<sup>2</sup> Further, in New South Wales a video codicil was accepted as being valid.<sup>3</sup> On reading these cases, it may be appropriate for existing requirements to be amended to address issues arising from this crisis. There may also be non-legislative changes that can alleviate some difficulties relating to informal wills, such as practice directions regarding how probate of such wills should be dealt with.

We are not aware of any decisions relating to Powers of Attorney being dealt with in a way other than face-to-face execution. However, providing the identity of the principal can be accurately determined, some members of our committees consider it should be legally possible for a valid Enduring Power of Attorney to be created by a witness attending via video or similar process.

Perhaps during the COVID-19 pandemic, the term "in the presence of", for the purposes of Queensland law under section 10(2)(b)(ii) of the *Succession Act 1981* (QLD) could include where the testator can see the person directed to sign the Will, sign it (e.g. on Zoom, Facebook messenger). Camera still shots can be taken as evidence of who was present. Similar amendments could also be made for Power of Attorney documents in section 12(2) (GPOA) and sections 44(3)(a)(ii) and 44(5)(b) (EPOAS) where 'in the presence of' can have a similar meaning. An amendment will also be required in section 44(5)(a) to adjust the meaning of 'in the witness's presence'.

### *Signature by a lawyer*

Another option raised in your memorandum was to have lawyers sign the document on behalf of the client. If this measure was adopted, then our committee members consider that the lawyer must take reasonable steps to:

1. verify the identity of the signing party and the signing party's entitlement to sign the document;
2. confirm the signing party has a copy of the document to be signed; and
3. confirm the signing party directs the execution of the document by their own will; and
4. confirm the authority of the lawyer to sign on behalf of the signing party.

The signing party can then direct the lawyer to sign the document on their behalf.

As to point 1, there are significant risks if the verification of identity (VOI) was expressly permitted to occur by video link for this purpose. Further, we note that in Queensland the requirements for VOI for transfers and electronic conveyancing are different and accordingly, authorising such an approach for VOI would create inconsistency and be unclear. Further, the ability to properly verify the identity of a person (principal/benefactor) may be impeded where

<sup>1</sup> For example by the Supreme Court of British Columbia

<sup>2</sup> *Radford v White* [2018] QSC 306

<sup>3</sup> *Re Estate of Wai Fun CHAN, Deceased* [2015] NSWSC 1107



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you are only meeting them by video and attempting to view identity documents and the resolution of those documents is unclear.

We note that there are other platforms and more advanced processes available. If these are available to the solicitor this could alleviate some of the risks. In other cases, these processes may be new to solicitors as well as their clients. This might create further risks of misuse or misunderstanding if solicitors are not confident to determine whether a particular platform might appropriately mitigate these risks in all of the circumstances.

The lawyer should be required to keep a record of the direction by the client. The execution by the lawyer would be on behalf of the party and would not require witnessing. Effectively, the signatory is giving the lawyer a power to sign a single document, which can be signed by the lawyer without a witness. Capacity guidance for practitioners dealing with these specific circumstances might also be of assistance, particularly where the client is being met for the first time.

The lawyer should also be released from any liability, provided they took reasonable steps to confirm the matters above.

### ***Removing requirement to witness***

There was limited support amongst members of our policy committees for removing the requirement for witnessing on certain documents. It was noted that taking this approach, where there has not been time to fully consider what should be excluded and what impacts this will have, could create further issues. However, some of our members also considered that an effective VOI process could alleviate the need for witnessing altogether.

Another option could be broadening who is able to witness a document. For example, if an adult is in hospital, a health professional (or potentially two) who is a member of a health professional association could perform this role. Other examples of witnesses could include a police officer of a certain rank, a bank manager, a doctor or a pharmacist. The critical point is that the witness is not a beneficiary or relative.

If witnessing occurs under these circumstances, the document should include a brief disclosure statement for the witness.

There may be issues to consider if the signatory is suffering from COVID-19 or is otherwise in quarantine.

### ***Filing unsworn documents***

Similarly, there was limited support for filing unsigned documents, however, it was recognised that there may be situations of urgency where this may be one of the only available options.

A potential issue here is how a Court can be satisfied that the client has the same document that it does. Further consideration should be given to how this issue might be addressed.

### **Other issues and stakeholder positions and documents**

In relation to electronic signatures, the view of some of our committee members is that the states' and territories' electronic transaction legislation could be amended to provide for

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electronic signing of such solemn documents. This may go some way to achieving uniformity on this particular issue.

We also refer the following advices which also may be useful in your consultations:

1. A document from the Registrar of Titles Queensland titled "[Effect of COVID-19 on the witnessing of Land Title Act, Land Act and Water Act Titles Registry instruments - New options for witnessing from 6 April 2020 until further notice<sup>4</sup>](#)"
2. Suggested amendments to the *Electronic Transaction Act* (**enclosed**). The view of some of our committee members is that the states' and territories' electronic transaction legislation could be similarly amended which would go some way to achieve uniformity on this particular issues.
3. Suggested processes for witnessing documents via video link (**enclosed**).

## Crossing State & Territory borders


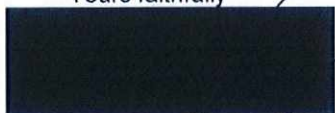
QLS has advocated to the Queensland Government that legal services are "essential services" and we understand that the Law Council has similarly made this argument at a federal level. This being the case, a lawyer ought to be permitted to travel interstate if this is required to perform their work. However, lawyers should avoid travelling and attending to matters in person except in extenuating circumstances consistent with current government health guidelines.

As to a suitable identification process, QLS does not issue membership cards to practitioners. We consider that the provision of ordinary personal identification should suffice, perhaps together with a business card.

We are also cognisant that any attempt to travel under false pretences, which resulted in the issue of an infringement notice or the like, could give rise to a disciplinary investigation. Accordingly, we would submit that upon provision of suitable identification, the practitioner ought be allowed into the state or territory to which they seek entry.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully

  
  
Luke Murphy  
President

<sup>4</sup> [https://www.dnrme.qld.gov.au/data/assets/pdf\\_file/0006/1478544/witnessing-provisions-covid19.pdf](https://www.dnrme.qld.gov.au/data/assets/pdf_file/0006/1478544/witnessing-provisions-covid19.pdf)



### **Example of an alternative process for witness solemn documents**

The steps could be as follows:

1. The Solicitor and the Benefactor connect via some secure online technology such as Microsoft teams though there are many others that will provide the necessary security.
2. The solicitor accurately identifies the Benefactor through some acceptable technology. For example if Jumio is used then the Benefactor will using their smart phone download the Jumio app and then take a photo of themselves and their government issued identity document that has as part of it a photo of the authorised holder of the identity documents such as a drivers licence or passport. The Jumio app will send to both the Benefactor and the solicitor notification of the verification. The verification data which will be time stamped and digitally signed by Jumio must then be stored securely by the Law Firm as it may be needed at some time in the future. The security of the verification data is for privacy purposes as the data will be Personal Identifiable Information.
3. The solicitor can send the drafted enduring power of attorney to the Benefactor. It would be advisable for the footing or header identify the solicitor's law firm.
4. Once the Benefactor has the enduring power of attorney, the solicitor can via a video connection which will be recorded (noting that the Solicitor **MUST** obtain the consent of the Benefactor prior to recording so as to comply with the Telecommunications Interception Act 1989) ask a series of particular questions and follow a certain approved procedure such as:
  - a. In order to capture your intent and that you are voluntarily signing the enduring power of attorney do you consent to me recording this video communication?
  - b. The document presently in front of you, is it the enduring power of attorney that I recently sent you?
  - c. It is important that you have not altered it; hence have you altered it from the document that I sent you?
  - d. Then the Solicitor will follow the usual procedure as if the Benefactor was in the solicitor's presence and ask the Benefactor to sign the document as per the usual manner.
  - e. The solicitor will then ask the Benefactor to send the document duly signed with no further alterations back to the solicitor who will upon receipt print it out in duplicate and sign it in the usual manner. Following this the solicitor can scan in the fully executed document and send on copy to the Benefactor for their records and keep one copy for the law firms records.
  - f. The documents to be securely kept by the law firm will be:
    - i. Identification verification data;
    - ii. The video recording that will be time stamped by the recording technology; and
    - iii. A copy of the enduring power of attorney duly executed.These documents **MUST** be kept in a secure manner.

## **Proposed amendments to the *Electronic Transactions (Queensland) Act 2001***

### Section 14 -Requirement for signature

(1) If, under a State law, a person's signature is required, the requirement is taken to have been met for an electronic communication if—

(a) a method is used to identify the person and to indicate the person's intention in relation to the information communicated; and

(b) the method used was either—

(i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; or

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and

(c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).

(2) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

### Proposed Temporary Legislative Response:

#### 14A Requirement for witnessing

If, under a State law, a person's signature is required to be witnessed ("the signer"), the requirement is taken to have been met for an electronic communication if—

A person ("the witness") who otherwise has the requisite qualifications to witness the document is, at the time the person signs, communicating electronically with the signer and

(a) a method is used to identify the person and to indicate the person's intention to sign the document; and

(b) the method used was either—

(i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstance; or

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and

(c) the witness has, after the document is signed by the signer, signed a copy (which may be an unsigned copy) of the same document.

(2) The reference in subsection (1) to a law that requires a witness includes a reference to a law that provides consequences for the absence of a witness