

Article Information

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State by State - Electronic witnessing during COVID-19

The witnessing of documents is one area which has become fraught with difficulty as a consequence of COVID-19 social distancing restrictions, as it is generally not possible for documents to be witnessed in the physical presence of the witnesses as required by legislation.

Given the nature of a pandemic, this is a particular problem for estate planning documents including Wills, Powers of Attorney and Advance Care Directives/Enduring Guardians (or their state-based equivalents). Some Australian jurisdictions are, however, taking steps to address the issue.

New South Wales

The New South Wales Government has enacted the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* to temporarily facilitate the witnessing of documents by audio-visual link.

The Regulation applies to (at least):

- Wills;
- Powers of Attorney including Enduring Powers of Attorney;
- Deeds or Agreements;
- Enduring Guardianship Appointments;
- Affidavits; and
- Statutory Declarations.

The Regulation allows a person to witness a document by audio-visual link as long as they observe the signing of the document in real time, and then sign the document, or a copy of the document themselves.

The witness is required to endorse the document (or copy document) by specifying how the document was witnessed, and that the document was witnessed in accordance with the Regulation. For example:

"I, [name] attest that this document was signed in counterpart and witnessed by me by audio-visual link in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017".

The witness must also be "reasonably satisfied" that the document which the person signed is the same document that the witness signed.

The Regulation contemplates that the witness could either sign and endorse a counterpart of the document, or that the person could scan and send to the witness a copy of the signed document electronically, which the witness could then countersign.

Which method is more appropriate will depend on the circumstances and document being signed. For a Will for example, the second method is likely to be more preferable so all signatures appear on the same document.

The Regulation also allows matters incidental to witnessing documents (such as verifying a person's identity) to occur by video link.

Queensland

The Queensland Government has made the *Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Document) Regulation 2020* under the *COVID-19 Emergency Response Act 2020*. The Regulation was subsequently amended on 21 May 2020 to extend its application beyond only Wills and enduring documents.

As amended, the Regulation applies to the following documents, provided they are executed prior to 31 December 2020:

- Wills;
- Enduring documents (as defined under the *Powers of Attorney Act 1998*);
- Affidavits;
- Declarations;
- Deeds;
- General Powers of Attorney; and
- particular Mortgages.

The Regulation provides that witnessing requirements for those documents will be taken to be satisfied if the witness is present by audio visual link and the document is signed in accordance with the Regulation.

Importantly, at least one of the witnesses is a “special witness”. This is defined in section 5 of the Regulation, and includes an Australian legal practitioner.

Following the signing process set out in Part 4 of the Regulation, the special witness must sign a certificate confirming the matters set out in section 21(2) of the Regulation, and a copy of the certificate must be kept with the signed document.

It should also be noted that on 22 April 2020, the Supreme Court of Queensland published Practice Direction Number 10 of 2020, which is pertinent to the witnessing of Wills by audio-visual link.

Subject to the conditions below, the Practice Direction empowers a Registrar of the Court with the Court’s power to dispense with the requirement under the *Succession Act 1981* (QLD) that to execute a valid Will, the witnesses must physically be in the presence of a testator when they sign their Will.

For the Registrar to dispense with that requirement, satisfactory evidence must be produced that:

- the will was drafted by a solicitor, or a solicitor is one of the witnesses or person supervising the execution of the will;
- the deceased intended the document to take immediate effect as their Will (or as an alteration or revocation of their Will);
- the testator executed the Will in the presence of at least one witness by way of audio-visual link;
- the witness(es) were able to identify the document executed; and
- the reasons for the testator being unable to execute the will in the physical presence of two witnesses in the usual way was due to COVID-19.

The Practice Direction applies to Wills executed between 1 March 2020 and 30 September 2020.

Victoria

The Victorian Government has passed the *COVID 19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020*.

The Regulation applies to:

- Documents (including a deed or mortgage) witnessed under the *Electronic Transactions (Victoria) Act 2000*;
- Statutory Declarations;
- Powers of Attorney and Enduring Powers of Attorney;
- Supportive Attorneys; and
- It does not appear to apply to affidavits.

The Regulation modifies the *Electronic Transactions (Victoria) Act 2000*, to provide that an electronic transaction including remote witnessing by audio visual link is not invalid because it takes place in that way. This includes a person using audio visual link to confirm another person’s identity.

The process for (in particular) taking statutory declarations and witnessing enduring powers of attorney and Wills is very prescriptive, and care should be taken to ensure that each of the requirements under the Regulation are followed.

For example, taking a statutory declaration requires the following process:

- the person making the statutory declaration signs the document, while in the “presence” of the witness by audio visual link, then makes a copy of the document and electronically sends it to the witness;
- while still present on the audio visual link, the witness signs the document and includes a statement that the person’s signature was witnessed by audio-visual link in accordance with the Regulation; and
- finally, the witness sends the document back to the person making the statutory declaration, who then writes on the document that it is a true copy of the document signed by the person, and that the conditions in sub-regulation 16(4) have been met.

The Regulation requires that each of the steps must take place on the same day.

For both powers of attorney and Wills, the Regulation also contemplates and provides further requirements for a situation where one of the two witnesses required is physically present, while the other is present by audio visual link.

South Australia

At this stage, South Australia has not put in place any measures to allow for the witnessing of documents by audio-visual link, or other substantial amendments to current requirements in that regard.

To the contrary, the *COVID-19 Emergency Response (Section 17) Regulations 2020* (SA) specifically provide that while meetings which are otherwise required to occur in person may occur by audio-visual means, this does not apply to physical witnessing requirements for signing documents.

The Attorney-General’s office has indicated that this is unlikely to change.

It should be noted though that the *COVID-19 Emergency Response (Section 16) Regulations 2020* (SA) has increased the category of persons authorised to witness a statutory declaration to the broader list of persons defined under Commonwealth regulations.

Tasmania

The *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* commenced on 27 March 2020, however it does not appear to contemplate regulations as wide as those in Victoria and Queensland. It provides that the Minister may by notice declare that despite any requirement to the contrary, signatures or documents may be taken or evidenced by electronic means specified in the notice.

It is unclear whether this could apply to a declaration permitting the audio-visual witnessing of documents. The Minister has not yet declared any notices relating to the witnessing of documents, so the current requirements appear unchanged.

Western Australia, Northern Territory and Australian Capital Territory

At the date of this article, neither WA, NT nor ACT have put in place any measures to allow for the witnessing of documents by audio-visual link or any similar measures.

Notes: updated Monday, 25 May 2020.