



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
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By email: nathan.macdonald@lawcouncil.au

Dear Dr Popple,

Modernising Document Execution: Consultation on proposed reform to the execution of Commonwealth Statutory Declarations

Thank you for the opportunity to contribute to the Law Council of Australia's response to the Attorney-General's Department's (AGD) consultation on proposed reform to the execution of Commonwealth statutory declarations. The Law Society's Litigation Law and Practice and Public Law Committees have contributed to this submission.

Background and the AGD proposal

We note that measures introduced during the Covid-19 pandemic period to allow electronic execution ("E-execution") of Commonwealth statutory declarations are due to expire on 31 December 2023. The AGD is now seeking stakeholder views on proposed amendments to the *Statutory Declarations Act 1959* and *Statutory Declarations Regulations 2018* to allow the following options:

- traditional paper-based execution (wet-ink signatures and in-person witnessing),
- E-execution (electronic signatures and witnessing via audio-visual link (AVL)), and
- digital execution (online execution, with digital identity providers to verify identity and satisfy witnessing requirements).

General Comments

The Law Society's comments are informed by our earlier observations¹, and those of the Law Council, made in response to the 2021 *Modernising Document Execution: Consultation on a common pathway for digital execution of statutory declarations and deeds* undertaken by the then Deregulation Taskforce, Department of Prime Minister and Cabinet. Our comments have also been considered in the context of the current digital identity verification landscape.

¹ Letter from the Law Society of NSW to the Law Council of Australia, 29 September 2021

We support the continued modernisation of arrangements for the execution of legal instruments. While the current reform proposals are confined to statutory declarations, we consider the proposed digital execution pathway could provide a model for execution of other legal instruments. We endorse the view previously expressed by the Law Council, that prescriptive rules should be avoided in the development of similar reforms. Principles-based provisions better accommodate advances in technology and future expansion of these processes to other sectors and jurisdictions.

Our responses to the questions in the AGD's Consultation Paper are set out below.

1. Benefits stemming from the proposal in relation to:

(a) traditional, paper-based execution

(b) E-execution

Availability of alternatives

We consider the primary benefit of retaining traditional paper-based execution and E-execution pathways under the proposed framework is to accommodate the needs and limitations of parties at the time a statutory declaration may be required. It is desirable to have alternative means of executing a statutory declaration in the event one mode cannot be used. For example, the technology required for electronic execution may be unavailable due to system failure or a party may not wish to interact with electronic pathways for historical, cultural or other reasons, including a lack of confidence in the security of such systems.

Witnessing

Another benefit of retaining physical and E-execution pathways is to preserve the practice of witnessing. We have previously expressed our preference for retaining the requirement for the witnessing of statutory declarations and deeds, as the involvement of witnesses contributes to the formality and solemnity of the document. However, we also acknowledge that there are difficulties associated with the process of witnessing, outlined in further detail below.

We agree with the Law Council's position as set out in its 2021 submission that formalities which simply assume a 'paper based' way of transacting should be adapted and updated. We note that the proposed digital execution pathway is designed to maintain functional equivalence with the other execution options and, in this regard, appears to specifically address concerns raised about the importance of formality.

(c) Digital execution

Cost savings and efficiency

There are significant cost and access to justice benefits offered by E-execution, as compared with traditional paper-based execution, that have been previously and comprehensively canvassed by both the Law Society and Law Council. Extending the electronic execution options to include an end-to-end digital pathway further simplifies processes, including dispensing with the requirement for witnessing by prescribed persons.

We have previously outlined some of the challenges and barriers associated with witnessing. They include:

- the additional costs involved in arranging the time and location for the declarant and witness to meet,
- the availability of persons authorised to act as a witness, particularly in rural, regional and remote areas,
- public health and safety restrictions,
- the parties' age, illness or disability, or risk of domestic or family violence,

- the potential for declarations to be invalidly executed, requiring re-execution, where a witness is not authorised, or has failed to properly state how they identified the declarant, and
- inconsistency with contemporary commercial practice.

2. Concerns stemming from the proposal in relation to:

- (a) traditional, paper-based execution**
- (b) E-execution**

None. As previously noted, retention of these options is supported.

(c) Digital execution

While dispensing with witnessing has the benefits outlined above, it also has potential risks. A function of witnessing is to ensure the legal capacity of the parties and that they understand the terms and legal consequences of the document. Witnessing is intended to protect against impersonation, duress and fraud.

Any reforms incorporating digital verification must also include safeguards to ensure execution that is reliable and secure.

3. Specific views on the proposals relating to:

- (a) Making the current temporary measures enabling electronic execution permanent**

As previously noted, retention of this option is supported.

- (b) Providing a digital execution option, including the requirements set out for this and views on how this will work in practice.**

As previously noted, the introduction of a digital pathway is supported.

Thank you for the opportunity to participate in this consultation. If you have any questions in relation to this letter, please contact Sonja Hewison, Policy Lawyer on (02) 9926 0213 or by email: sonja.hewison@lawsociety.com.au.

Yours sincerely,



Cassandra Banks
President