

CHECKLIST FOR WITNESSING SIGNATURES AND CERTIFYING DOCUMENTS IN NSW

You have probably been asked at some point during your career as a legal practitioner to witness or certify documents outside of your employment. Care should be taken in these instances, as the execution of documents and witnessing of certain documents (like affidavits, Enduring Powers of Attorney) may be considered to be providing a 'legal service'.

Below are matters for legal practitioners to consider when asked to witness or certify a document in NSW.

Are you an approved witness or certifier?

Approved Witness:

In contrast to certifying a document, the type of witness required for a document is usually prescribed by law. If the entity requires an "Australian lawyer", you must be admitted. If it requires an "Australian legal practitioner", you must also hold a current practising certificate and be covered by professional indemnity insurance.

If you have retired and not renewed your practising certificate, you are an Australian lawyer but **not** an Australian legal practitioner under the *Legal Profession Uniform Law (NSW)* (LPUL).

Before witnessing a document, carefully consider whether in doing so you are providing a legal service. The definition of a 'legal service' is broadly defined in the LPUL and witnessing certain legal documents, such as an Enduring Power of Attorney, requires the approved witness to do more than merely sight the person signing the document.

In NSW, a witness to an Enduring Power of Attorney must attest to the fact that they:

- explained the effect of the Power of Attorney directly to the person making the appointment before it was signed
- were satisfied that the person appeared to understand the effect of the Power of Attorney, and
- are not an attorney appointed under the Power of Attorney

If the witness has doubts about the person's ability to understand what they are signing, they are required to take reasonable steps to confirm the person's mental capacity.

If there is any chance that witnessing a document may be construed as providing a legal service, carefully consider whether the conditions on, and category of, your practising certificate authorise you to do so.

Approved Certifier:

The type of certifier required is determined by the entity that wants the certified copies. There is no legislation that stipulates how to certify a copy of a document and it is up to the organisation requesting the certified copy to decide who is acceptable to certify a digital or hard copy document. If you need to get a document certified, you should ask the person or organisation requesting a certified document if they have any rules about who can certify it.

Generally, certifying a document is a public service and would not be considered a legal service under the LPUL.

Are you providing a legal service?

“**Legal services**” means work done or business transacted in the ordinary course of legal practice - see section 6 of the LPUL. Only a **qualified entity** can provide legal services. Section 10 of the LPUL provides that a person must not engage in legal practice unless they are a **‘qualified entity’**.

Under section 6 of the LPUL, **‘qualified entity’** means either:

- an Australian legal practitioner, which means an Australian Lawyer who is admitted and has a current practicing certificate, or
- a law practice (sole practitioner, law firm, community legal service, an incorporated legal practice or an unincorporated legal practice).

If you wish to provide **legal services**, you can only do so if you have an Australian practising certificate, and if you are an Australian legal practitioner working in a law practice as an employee of a law practice or as a principal. In private practice, you must also have professional indemnity insurance (**PII**) cover under an approved policy in New South Wales (corporate and government legal practitioners may be exempt from holding PII). Before you witness any document, consider whether doing so falls within the ambit of legal services, and if so, whether you are authorised and prepared to provide that legal service.

Even if the witnessing of a document is not considered a legal service, make sure the person clearly understands whether you are (or are not) providing them with a legal service.

Be aware of the conditions on your Practising Certificate

If you hold a practising certificate subject to Condition 2 (Supervision), then the witnessing of certain documents that constitutes a legal service is also subject to supervision and must not be done on your own account.

Remember, if you do not hold a current practising certificate, you cannot provide legal services.

What can government or corporate solicitors witness or certify?

When employed by a State or Commonwealth government department, or by a Corporation, and you hold a (either) a government or corporate practising certificate, you cannot provide advice or legal services outside of your employment.

As an employed government or corporate/in-house solicitor, you can only act for and sign off on documents that constitute a legal service for the entity who is employing you (whether it be a government agency or a corporation).

What can a retired solicitor do?

If you wish to sign off on any document as a solicitor (including witnessing affidavits, Powers of Attorney, etc), you need to retain a current practising certificate as a sole practitioner. Similarly, if you are signing off documents for a particular organisation (only), you need to hold a current practising certificate as (either) an employee of a law practice, a government legal practitioner or a corporate legal practitioner for the relevant organisation.

If you are a retired solicitor and no longer hold a current practising certificate, you are not permitted to provide legal services. However, under LPUL, you may refer to yourself as a lawyer as you remain on the roll for life (except if struck from the roll).

Statutory Declarations – who can witness?

This will depend on the type of statutory declaration you are witnessing. There are Commonwealth and State (and Territory) statutory declarations. An **‘approved witness’** or an **‘authorised witness’** is prescribed by the *Statutory Declarations Act 1959* (Cth) (in the case of Commonwealth statutory declarations) and by the relevant State and Territory Oaths Act/s (in the case of State and Territory statutory declarations).

Before witnessing a statutory declaration, you should check under the relevant legislation to ensure you are an approved/authorised witness.

In **NSW**, an authorised witness must be a:

- justice of the peace
- notary public
- commissioner of the court for taking affidavits
- an Australian legal practitioner who holds a current practising certificate under:
 - Part 3.3 of the *Legal Profession Uniform Law (NSW)* as applied in a participating jurisdiction; or
 - a law of a non-participating jurisdiction entitling the lawyer to engage in legal practice; or
- any person authorised to administer an oath.

See [sections 21](#) and [27](#) of the *Oaths Act 1900* (NSW) (**Oaths Act**).

An authorised witness must satisfy the identification requirements under [section 34](#) of the Oaths Act.

Under [section 34\(1\)](#), an authorised witness who takes and receives a statutory declaration or affidavit in NSW-

- (a) must see the face of the person making the declaration or affidavit, and
- (b) must know the person who makes the declaration or affidavit or confirm the person’s identity in accordance with the regulations (see [regulations 5](#) and [6](#) of the *Oaths Regulations 2024* (Oaths Regulation)), and
- (c) must certify on the declaration or affidavit in accordance with the regulations that this section has been complied with (see [regulation 7](#) and the proforma certificate in [Schedule 1](#) of the Oaths Regulations).

For **Commonwealth** statutory declarations, a declaration can be made under the observation of a ‘prescribed person’. A prescribed person is defined under [section 4](#) of the *Statutory Declaration Act 1959* (Cth) (**Statutory Declaration Act**) and [section 6](#) of the *Statutory Declarations Regulations 2023* (Cth) and includes:

- A person who is enrolled on the roll of the Supreme Court of a State or Territory, or the High Court of Australia, as a legal practitioner (however described);
- An Australian legal practitioner holding a current practising certificate.

You can view a list of who can witness a Commonwealth statutory declaration here: [Who can witness a Commonwealth statutory declaration | Attorney-General's Department \(ag.gov.au\)](#)

Statutory Declarations – who cannot witness?

You cannot witness your own statutory declaration, even if you are an approved/authorised witness. A person who was an approved/authorised witness but has retired, or changed to an occupation that is not listed/permitted is not an approved/authorised witness. For example, a retired teacher cannot witness a Commonwealth statutory declaration.

*This **does not apply** to someone who is on the roll of the Supreme Court or the High Court. They will remain on the roll for life, unless removed from the roll (for example, by a designated local regulatory authority under the LPUL, such as the NSW Office of the Legal Services Commissioner or by the Law Society Council).*

Commonwealth Statutory Declarations – how can they be made?

With effect from 1 January 2024, a Commonwealth statutory declaration can be validly made under [section 8](#) of the Statutory Declarations Act 1959 in one of three ways:

- traditionally, as a paper-based interaction requiring wet-ink signatures and in person witnessing;
- electronically, through the application of an electronic signature and witnessing via an audio-visual communication link; and
- digitally verified, through the use of the myGov platform which authenticates the declarant's Digital Identity through myGovID.

You can view further information about making a Commonwealth statutory declaration with a witness and about remote witnessing here:

[Making a Commonwealth statutory declaration with a witness | Attorney-General's Department \(ag.gov.au\)](#)

What if I am doing a favour for family or a friend?

There are no exceptions for family and/or friends, or in circumstances where no fee is charged. If you wish to provide **legal services**, you can only do so through the scope of your employment within a government agency or a corporation or as an employee of a law practice or as a principal of a law practice (in private practice) and hold an appropriate cover of PII. Therefore, in private practice, legal services can only be provided as:

- (i) an “employee of a law practice”, which will have PII in place for each of its solicitors; or
- (ii) a “principal of a law practice”, for example, a sole practice, which will have its own PII in place.

Being an employee of a law practice - or an employee of a corporate or government entity - means that provision of legal services to a friend may not be permitted by your employer. You would need to get their consent.

The provision of legal services to friends and family is risky and may lead to unforeseen difficulties and conflicts. Particularly, please note the following *Legal Profession Uniform Law Australian Solicitors' Conduct Rules (Conduct Rules)*: [Rule 4.1.4](#) (Compromise and professional independence); and [Rule 17](#) (Independence – avoidance of personal bias).

Can I take an oath?

As the administration of oaths is a reserved activity, you must have a current practising certificate and not be interested in the declarant's business or represent them. Please see the definition in the [Oaths Act](#) of who can take an oath (which links to the definitions in the LPUL).

Do not witness / certify anything that is not true and clear

Usually, a witness can be anyone who:

- is 18 years or older
- knows the person whose signature they are witnessing or has taken reasonable steps to verify their identity
- Is not a party to the document
- if the document is a trust deed, is not a beneficiary of the trust

If you do not see the person sign their signature, then you must not say that you have witnessed it, regardless of whether you know them and their signature. You should always sight the original document before you certify a copy.

Can a document be witnessed remotely?

Part 2B of the *Electronic Transactions Act 2000 (NSW)*, titled “Remote witnessing scheme” provides a mechanism to allow witnessing of documents by audio-visual link (AVL) when those documents would otherwise need to be witnessed in the physical presence of a signatory.

Please note, NSW allows certain legal documents to be witnessed remotely. For further information, see the [NSW Government Witnessing legal documents remotely](#) fact sheet.

Can a digital document be certified?

Currently, there is no legislation stipulating how to certify a copy of a document. It is generally up to the organisation requesting the certified copy to decide who is acceptable to certify a digital or hard copy document. If you need to get a document certified, you should ask the person or organisation that requested it if they have rules about who can certify it.

Jurisdictions outside NSW

Each State and Territory legislation may have different requirements for varying circumstances.

For more information or clarification on any of the above, please contact the Professional Support Unit's Regulatory Compliance team on **(02) 9926 0115** or, alternatively, you can email your query confidentially to regulatory.compliance@lawsociety.com.au