8 April 2020

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

By email: natasha.molt@lawcouncil.asn.au

Dear Ms Wright

Witnessing solemn documents and crossing State and Territory borders

1. I refer to your memorandum of 3 April 2020 in relation to witnessing solemn documents and crossing State and Territory borders.

2. The Society notes the Law Council is seeking urgent advice with respect to:

   2.1 Innovative solutions for the witnessing of wills, enduring powers of attorney, appointments of enduring guardian, affidavit and other solemn documents where it is impossible to meet the signatory face to face; and

   2.2 Suggestions to facilitate practitioners needing to cross State and Territory borders to attend to essential legal services.

3. The Society has been actively working with the South Australian Attorney-General to ensure legal services can still be provided in the face of further restrictions imposed to deal with the COVID-19 pandemic. Presently, legislation is being debated in the South Australian Parliament which has been drafted in response to the COVID-19 emergency. The legislation provides for regulation making powers to suspend or modify any requirements under any Act or law, or an instrument relating to the preparation, signing, witnessing, attestation, certification, stamping or other treatment of any document. Also, included in the Bill are regulation making powers in relation to the service of documents and extension of time limits.

4. These measures were sought by the Society to ensure legal services could still be provided in the face of further restrictions imposed to deal with the COVID-19 pandemic. If passed, the Society will be considering what regulations are required to facilitate arrangements to enable legal services to continue, such as the virtual witnessing and execution of documents. It is hoped with such provisions in place that legal services across all areas of law, whether across state borders or not, can continue to be provided to the greatest extent possible throughout the COVID-19 pandemic.

5. While such measures should largely address concerns that Members of the Society have raised with respect to witnessing and executing documents, there is significant merit in having a
consistent national approach to the issue. The Society has consulted its Members in the short time frame provided and sets out below a summary of the responses received to the matters raised in paragraphs 2.1 and 2.2 above for your consideration.

**Witnessing solemn documents**

6. Overall, there was support expressed for the suggestions outlined in your memorandum including:

6.1 The need for witnessing enduring powers of attorney and appointments of enduring guardian be waived for the duration of the pandemic;

6.2 Unsworn affidavits may be filed and served and adopted in court;

6.3 Wills may be executed by direction with the testator on video screen and the solicitor and a witness in a remote location, the testator giving the solicitor the direction to sign the will on her or his behalf; and

6.4 Documents may be signed by the signatory with the witnesses present via videoconference.

7. As noted above, the Society has sought legislative amendments at a State level with respect to allowing for regulation making powers to alter the requirements in signing, witnessing and executing a range of legal documents. In particular, Members recognised the need for alternative arrangements to be put in place with respect to Wills, Power of Attorney and Advanced Care Directives.

8. Additional comments made in relation to the proposals in paragraphs 6.1-6.4 are set out below.

**Wills**

9. There was support expressed for the use of video conferencing to be accepted as being ‘in the testator’s presence’ for the purpose of signing a Will by the Society’s Succession Law Committee. Section 8(a) of the Wills Act 1936 (SA) provides that a will must be signed by the testator or by some other person in the testator’s presence and by the testator’s direction.

10. The Society is working with the profession and has provided guidelines with respect to remote will execution and signing.

11. Similarly, there was also support expressed by the Succession Law Committee for electronic signatures to be accepted for the purpose of testator and attesting witnesses signing at the same time whilst video conferencing.

12. It was further suggested that a national position could be taken that reflects section 17 of the Wills Act 1936 (SA), which provides that no will or testamentary provision in a will is void by reason only of the fact that the execution of the will is attested by a person, or the spouse or domestic partner of a person, who has or may acquire, in terms of the will or provision, any interest in property subject to the will or provision.

**Other documents**

13. It was recommended by the Society’s Succession Law Committee that the requirement for Substitute Decision Maker to sign first be revoked with respect to Advanced Care Directives. The
Society understands this is an issue unique to South Australia and will continue to advocate this issue at the appropriate level.

14. It was also suggested the Succession Law Committee that the witnessing requirements for Enduring Power of Attorney could be relaxed, and that a similar list of witnesses that are accepted for Advance Care Directives be applicable.

15. There was also support canvassed for the use of video conferencing to enable witnessing of documents. For example, for an Enduring Power of Attorney, the solicitor can witness donor signing by video then donor returns document to solicitor for them to sign. However, it was acknowledged that not all clients may have access to technology in this regard.

**Electronic signatures**

16. The Society notes that facilitative provisions for electronic signatures are available under the *Electronic Transactions Act 1999* (SA), however, there are some limitations in place with respect to documents which are required to be witnessed. Removing those limitations might be preferable as it would retain the other safeguards provided for in the Act in terms of ensuring that practitioners can have a sense of comfort that the signatures obtained are valid. The Society will be pursuing appropriate legislative amendments/regulation with the South Australian Attorney-General.

17. The difference between an electronic signature and a digital signature was also raised by the Society’s Legal Technology Committee. It was suggested encrypted verified digital signatures (such as those used by Pandadocs or Docusign) are a more secure option which might be used with greater comfort.

**Affidavits**

18. The Society notes the suggestion included in the memorandum that unsworn affidavits may be filed and served and adopted in court. It has been suggested by the Society’s Legal Technology Committee that, the extent to which unsworn affidavits are appropriate should depend on the circumstances in which the affidavit is proposed to be used, and the extent to which the Court will ultimately have the opportunity to require the deponent to swear to the truth of the matters set out in the affidavit in Court. This may be less critical in the context of say, an interlocutory application for disclosure in a civil matter, compared with circumstances where the affidavit constitutes substantive evidence on a matter which would substantially affect the parties’ rights. If the latter, the Courts may still consider it appropriate to receive unsworn evidence in the first instance but need to supplement it with sworn testimony before relying on it (which could occur over video link if required).

19. Furthermore, it has also been suggested by the Legal Technology Committee that where a practitioner would otherwise swear an affidavit in support of an interlocutory application, there could be a provision of some nature that says that any such affidavit is deemed to have been duly sworn or affirmed if the practitioner completes a specific certification to that effect. Regardless of how this is done, there should be some sort of capability to adopt such documents in court under oath, with the understanding that usual contempt rules apply to all filings, sworn or not.

**Concerns expressed**

20. While there was broad support expressed for the use of these innovative solutions by the Society’s Special Interest Committees and Members, there were concerns raised to ensure that sufficient safeguards were also put in place. It was noted that the measures proposed may increase the risk
of fraudulent transactions or data breaches, as well as general concerns about relegating the signing and witnessing of solemn documents, given the nature of those documents, to electronic means.

21. Members reported that they are taking a number of steps currently in this regard, including with respect to verification of identity using video link.

22. There were concerns raised by the Society’s Legal Technology Committee about allowing documents such as enduring power of attorneys, enduring guardianships and advance care directives to be executed without a need for witnessing at all - electronic witnessing, albeit imperfect, would at least allow a practitioner to ask questions to confirm capacity and intention. If electronic witnessing is to be used practitioners should take care to as far as possible, ensure that there is no one else present in the room at the signatory’s end of the link who might be able to place the witness under duress out of sight of the practitioner.

23. Furthermore, while it was accepted that measures would need to be put in place during the pandemic, relevant sunset provisions should be applied. It was also suggested that consideration could be given to a form of verification post-pandemic for any documents executed in less than ideal circumstances. For example, a system that allows for unwitnessed documents given the circumstances, but that requires a follow-up when the situation allows, for confirmation of the documents (i.e. scheduled updating with appropriate witnessing). This could include circumstances of video witnessing at first instance and updating subsequently in person. That way the intentions are appropriately on record should the worst happen, but with a process for returning to usual practices and for confirming the unwitnessed positions to follow.

24. Finally, another key concern raised with respect to the innovative measures proposed was the issue of access to technology. In order to utilise the proposed solutions, it is assumed that all parties have access to technology. It is understood that Members are still trying to facilitate face to face appointments where a client does not have access to technology (with social distancing measures in place) in these circumstances. However, this may become difficult, or perhaps prohibited, if further COVID-19 restrictions are put in place.

25. It has been suggested that other measures could be considered in these circumstances, for example, an understanding that the document may be signed and an annotation made by the person signing that there is no one available to witness could be effective in those circumstances, with follow-up to re-execute with proper witnesses when possible (as noted above).

**State and territory borders**

26. In terms of facilitating interstate travel for the delivery of legal services, Members considered that it would be helpful to have a national consolidated position on the matter. For example, the Society notes that Western Australia requires travellers to provide a letter indicating their purpose for travel and that judiciary and court staff are considered essential workers, but not necessarily (or explicitly) lawyers.

27. As to the suggestion that a membership card could be presented by practitioners where they are required to travel across State and Territory borders, there were some concerns raised that not all practitioners may belong to a Law Society or Bar Association. It was considered that it might be more appropriate that a practitioner is required to produce a copy of the solicitor’s practising certificate instead.
28. There were also concerns raised by the Society’s Country Practitioners’ Committee regarding the need for country lawyers working between different offices in regional areas be recognised as undertaking ‘essential legal work’, if additional restrictions are imposed on intrastate travel.

29. It also appears that this issue overlaps with the issue currently being considered by the Law Council with respect to what constitutes essential legal services and highlights the need for national consistency on the matter.

I trust these comments are of assistance. The Society would be pleased to provide further assistance or comment on this matter.

Yours sincerely

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