

# Modernising the making of statutory declarations and affidavits

## Discussion paper

November 2023



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## How to make a submission

You can provide comments on the draft Regulations and/or draft Codes of Practice (including any comments in response to the Discussion Points in this paper) by email to [LLPsubmissions@sa.gov.au](mailto:LLPsubmissions@sa.gov.au) until close of business **Monday 15 January 2024**.

## Submissions and confidentiality

Please be aware that, unless a request for confidentiality is made, information contained in any submission may be referred to publicly or published. Any material identified as 'confidential' is still subject to the *Freedom of Information Act 1991* and, while efforts will be made to keep the material confidential, in some circumstances it may be disclosed under that Act.

Where disclosure of information may identify you attempts will be made to consult with you under the *Freedom of Information Act 1991* before the documents are disclosed.

# About statutory declarations

A **statutory declaration** is a legally binding written statement of fact made for official or legal purposes.

Where there is concern about fraud or other necessity to ensure the provision of reliable information, businesses and Government agencies will often require information from clients and other people they deal with to be supported by a statutory declaration.

For example, you may be required to provide a statutory declaration:

- to confirm your personal details
- for financial matters
- for health matters
- as evidence for sick leave.

If you make a false statement on purpose, you can be charged with an offence under section 27 of the *Oaths Act 1936 (SA)* (**Oaths Act**).

The person who makes a statutory declaration (the **declarant**) must sign the document before an authorised witness in accordance with the requirements under the Oaths Act or another Act that governs the making of a particular statutory declaration. Except where a more specific legislative provision applies to govern the making of a statutory declaration for a particular purpose, statutory declarations for use in South Australia are to be made in accordance with section 25 of the Oaths Act.

The classes of people authorised to witness statutory declarations for use in South Australia are set out in the Oaths Act and *Oaths Regulations 2021* (**Oaths Regulations**). They include Justices of the Peace (JPs) but also a wide range of prescribed occupations.

## Research on impacts of modernising statutory declarations

Research undertaken by Accenture in 2021 found that more than 3.8 million statutory declarations are completed nationally each year by small and medium enterprises (**SMEs**) and consumers.

It was estimated that SMEs and consumers spent around 9 million hours a year, nationally, printing and collecting, travelling to authorised witnesses, discussing and filling out declarations with witnesses, making copies and submitting completed declarations.

Assuming a 60 per cent adoption of electronic document execution (also replacing physical witnessing requirements) in South Australia, Accenture modelling estimated

that South Australian SMEs and individuals could save up to \$10 million per annum in time and money from avoiding these activities (eg printing, copying and travelling to have documents witnessed and submitted).

## Recent amendments to the Act

In 2021, amendments to the Oaths Act were passed with the objective of making permanent certain modifications to the operation of the Oaths Act that were introduced in response to the COVID-19 pandemic. Those changes were to broaden the classes of people authorised to witness statutory declarations to ensure wide availability of witnesses in circumstances where the availability of JPs was constrained due to social distancing measures.

The 2021 amendments also legislated for the first time more detailed requirements for statutory declaration and affidavit documents, as well as procedures for the making of statutory declarations and affidavits.

What those changes did not do was introduce electronic execution and remote witnessing by audio-visual link (**AVL**) of statutory declarations in South Australia. However, the Commonwealth and several Australian States and Territories have introduced electronic execution and/or AVL witnessing, temporarily in response to the COVID-19 pandemic and now permanently.

The statistics discussed above show that there is scope for significant cost benefits by introducing electronic execution and AVL witnessing of statutory declarations in South Australia.

In addition, these proposed changes should make it easier for people living in regional and remote areas, or experiencing mobility constraints, to make and provide a statutory declaration.

## What is proposed for statutory declarations?

It is proposed to allow statutory declarations to be executed by electronic means and to provide that witnessing of a statutory declaration can occur where the declarant and witness meet remotely by AVL to undertake the witnessing process, as well as where they meet in person in the same place.

These proposed changes are shown in the accompanying draft Oaths (Prescribed Requirements) Amendment Regulations 2023 (**draft Regulations**) as well as the accompanying draft Code of Practice in relation to Statutory Declarations (to be gazetted by the Minister under section 33 of the Oaths Act).

In terms of safeguards against fraud, the draft Regulations require that:

- The signing of a statutory declaration by the declarant must occur under the observation of an authorised witness. This can be either in person or remotely by AVL.
- If a statutory declaration is taken in circumstances where the authorised witness and the declarant meet remotely by AVL, the statutory declaration must be endorsed with a statement specifying that
  - the statutory declaration was witnessed by AVL; and
  - the requirements under the Oaths Act for taking statutory declaration by AVL were complied with.
- Reasonable modifications may be made to the process of taking a statutory declaration if the person making the declaration has a disability that prevents the person from doing so in accordance with the requirements under the Oaths Act, in which case alternative methods used must be specified in a statement endorsed on the statutory declaration.

For example:

- if it appears to an authorised witness that the person making the declaration is illiterate, blind or has a cognitive impairment, the statutory declaration must be endorsed by the authorised witness with a statement that the affidavit was read to the declarant by the authorised witness.<sup>1</sup>

The proposed new **Code of Practice in relation to Statutory Declarations** requires that:

- the remote meeting between an authorised witness and a declarant by AVL be conducted so that the authorised witness and the declarant are visible to each other and can hear each other while the declarant signs the statutory declaration and while the witnessing process is undertaken;
- the authorised witness—
  - i. observe the declarant signing the statutory declaration in real time; and
  - ii. attest or otherwise confirm that—
    - A. the statutory declaration was signed by the declarant; and
    - B. the declarant's signature on the statutory declaration was witnessed, by signing the statutory declaration or a copy of the statutory declaration;

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<sup>1</sup> More detailed examples of modifications to accommodate various types of impairment or barriers to witnessing are set out in the JP Handbook, published on the SA Attorney-General's Department website: [Justices of the Peace and authorised witnesses | Attorney-General's Department \(agd.sa.gov.au\)](https://www.agd.sa.gov.au/Justices-of-the-Peace-and-authorised-witnesses).

- iii. be reasonably satisfied the statutory declaration the authorised witness signs is the same statutory declaration, or a copy of the statutory declaration, signed by the declarant;
- iv. endorse the statutory declaration, or the copy of the statutory declaration, with a statement—
  - A. specifying the method used to witness the signing of the statutory declaration by the declarant; and
  - B. that the requirements under the Oaths Act for witnessing statutory declarations by AVL were complied with.

## Discussion questions

1.1 Are the safeguards for electronic execution and AVL witnessing of statutory declarations listed above / contained in the draft Regulations and Code of Practice in relation to Statutory Declarations appropriate and sufficient?

1.2 Are there additional safeguards you think should be included?

1.3 Are any of these proposed safeguards impractical?

## About affidavits

An **affidavit** is a written statement of fact, sworn on oath or affirmed, which may be used as evidence in court.

An affidavit is usually set out in the format required by the court in which it is to be lodged. The person who makes the affidavit is called the **deponent**. The deponent makes the affidavit by taking an oath or affirmation in the presence of an **authorised person** that:

- they are the person named in the affidavit
- the contents of the affidavit are true
- the signature or mark on the document is theirs.

The '**jurat**' (also described as the signing clause, witnessing clause or attesting clause) of an affidavit is a certificate on an affidavit showing when, by whom and before whom the affidavit was sworn or affirmed.

The classes of persons authorised to witness affidavits in South Australia are set out in Clause 2 of Schedule 1 of the Oaths Act and regulation 7 of the Oaths Regulations.

## What is proposed for affidavits?

It is proposed to allow affidavits to be executed by electronic means and to permanently allow affidavits to be witnessed remotely by AVL.

The South Australian Government introduced AVL witnessing for affidavits in response to a request from the courts in October 2021, initially in COVID-19 pandemic response legislation and then, after expiry of the COVID-19 response legislation, in a Code of Practice in relation to Affidavits gazetted under section 33 of the Oaths Act. That measure in the Code of Practice in relation to Affidavits commenced on 1 December 2021 and was expressed to be temporary pending review.

No complaints have been received about the temporary measure to allow AVL witnessing of affidavits. It is therefore now proposed to make this arrangement permanent in these proposed draft Regulations and the accompanying proposed new Code of Practice in relation to Affidavits.

Similar benefits are expected from continuing this measure to those discussed above in relation to electronic execution and AVL witnessing of statutory declarations.

The draft Regulations and Code of Practice in relation to Affidavits include the same proposed safeguards to those listed above for statutory declarations.

### Discussion questions

2.1 Are the safeguards for AVL witnessing of affidavits listed above / contained in the draft Regulations and draft Code of Practice in relation to Affidavits appropriate and sufficient?

2.2 Are there additional safeguards you think should be included for AVL witnessing of affidavits?

2.3 Are any of these proposed safeguards impractical for AVL witnessing of affidavits?



# Electronic execution requirements for affidavits and statutory declarations

In the case of both affidavits and statutory declarations the draft Regulations require that:

- a method of signing by electronic means must:
  - a) identify the person and indicate the person's intention in respect of (the information recorded in) the statutory declaration or affidavit; and
  - b) be either—
    - (i) as reliable as appropriate for the purpose for which the statutory declaration or affidavit was made, in light of all the circumstances; or
    - (ii) be proven in fact to have identified the person and indicated the person's intention in respect of the statutory declaration or affidavit, by itself or together with further evidence.
- a statutory declaration or affidavit signed by electronic means must be endorsed with a statement that the declaration or affidavit was signed by electronic means.

## Technology requirements

These proposed requirements are intended to be technology-neutral.

It is not proposed that any particular platforms or methods for electronic execution be prescribed or authorised.

For example, to ensure wide accessibility and maximise the efficiency and cost benefits, a declarant or deponent could take a photograph or scan of their handwritten signature and insert the image into a statutory declaration or affidavit proforma, or use the draw function in a Microsoft Word or PDF version of the document to write their signature on the screen of their device.

A scanned signed version could then be emailed to the witness to sign using that, or another, electronic means (noting the requirement that the witness observe the declarant or deponent signing or adding their signature, including by AVL).

The Code of Practice in relation to Statutory Declarations and Code of Practice in relation to Affidavits set out these non-exhaustive examples of permissible electronic means for executing statutory declarations and affidavits.



## Discussion questions

3.1 Are the proposed safeguards for electronic execution listed above / contained in the draft Regulations appropriate and sufficient?

3.2 Are the proposed examples of ways to electronically sign and execute statutory declarations and affidavits (contained in the Codes of Practice) appropriate?

# Interstate statutory declarations and interstate and overseas witnessing

## Recognition of non-SA statutory declarations

Statutory declarations made outside of South Australia under non-South Australian laws are recognised in South Australia for the purposes of South Australian law. South Australia's *Legislation Interpretation Act 2021* defines a statutory declaration to include a declaration made outside the State:

- a) under a law in force in the place where the declaration is made, being a law that renders the declarant liable to a criminal penalty for a false declaration; and
- b) before a person who has authority under that law to take declarations.

## Local witnessing of statutory declaration or affidavit signed outside SA

Witnessing a South Australian statutory declaration or affidavit while the witness is located in South Australia and the declarant or deponent is located outside South Australia is allowed. The draft Regulations state that a statutory declaration or affidavit may be signed by the declarant or deponent and the witness even if the declarant or deponent is located outside of South Australia if the document is made under an Act or law of South Australia.

## Making a SA statutory declaration outside SA

South Australia's *Evidence Act 1929* provides that certain authorised witnesses located interstate or overseas may witness a statutory declaration or affidavit required for a court or matter in this State. Section 66 of the *Evidence Act 1929* (SA) provides that an oath (statutory declaration) or affidavit required for a court or matter in this State may be taken or made in any place outside of the State before the persons, including Commonwealth embassy and consular officials, listed in that section<sup>2</sup> as well as "a person having authorisation to administer an oath in that place".

### Discussion questions

4.1 Are these proposed provisions in the draft Regulations and other SA legislation about interstate statutory declarations and interstate and overseas witnessing appropriate and sufficient?

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<sup>2</sup> 66—Taking of affidavits out of the State (1) Any oath or affidavit required for the purpose of any court or matter in the State may be taken or made, in any place out of the State, before -

(a) a commissioner for taking affidavits in the Supreme Court empowered and authorised to act in that place; or

(b) a British diplomatic or consular agent exercising his function in that place; or

(ba) any person appointed to hold or act in any of the following offices of the Commonwealth in that place:

(i) ambassador; (ii) high commissioner; (iii) minister; (iv) head of mission; (v) commissioner; (vi) charge d'affaires; (vii) counsellor or secretary at an embassy, high commissioner's office, legation or other post; (viii) consul-general; (ix) consul; (x) vice-consul; (xi) trade commissioner; (xii) consular agent; or

(bb) an employee of the Commonwealth, or the Australian Trade Commission, authorised under section 3 of the Consular Fees Act 1955 (Commonwealth) and exercising his or her function in that place; or

(c) any person having authority to administer an oath in that place.