



Australian Government
Attorney-General's Department

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Submission to the Inquiry into the Statutory Declarations Amendment Bill 2023 [provisions]

**Senate Legal and Constitutional Affairs Legislation
Committee**

Introduction

The Attorney-General's Department (the department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Statutory Declarations Amendment Bill 2023 (the Bill). This submission provides further information to assist the Committee's consideration of the Bill and should be read alongside the Bill and its explanatory materials.

The Bill amends the *Statutory Declarations Act 1959* (the Act) to allow a Commonwealth statutory declaration to be executed one of three ways:

- a. traditional paper-based, requiring wet-ink signatures and in person witnessing
- b. electronically, through the application of an electronic signature and witnessing via an audio-visual communication link, and
- c. digitally verified, through the use of a prescribed online platform that verifies the identity of the declarant through a prescribed digital identity service provider.

The electronic option was made available as a temporary measure during the COVID-19 pandemic demonstrating that statutory declarations can be executed in new ways, facilitated by technology.

Section 8 of Schedule 1 of the Bill sets out that a statutory declaration can be made under section 9 (observed by a prescribed person) or section 9A (digital verification).

Section 9 allows for a statutory declaration to be made and witnessed in person or remotely by video link. Section 7A of the Bill allows for a paper form to be signed by hand, and an electronic form to be signed electronically. Together, sections 7A and 9 allow for the traditional paper-based execution option, and the electronic execution option.

Section 9A sets out the requirements for making a statutory declaration by digital verification, which include that the declaration be made on an approved online platform (prescribed under subsection 9A(2)) and that the declarant's identity be verified by an approved identity service (prescribed under subsection 9A(3)).

The Bill contains a number of safeguards in relation to new section 9A. This includes preconditions for a digital service to be prescribed as either an approved online platform or approved identity service, including the power to make regulations prescribing further conditions. Further, subsection 9B(1) prohibits an approved online platform from keeping a copy of a statutory declaration. An approved online platform can have its approval revoked for breaching this requirement under subsection 14(5) of the Bill.

The Bill contains ongoing Parliamentary oversight, requiring an approved online platform to report annually to the Minister about compliance with the requirements of the Act, which the Minister must table in Parliament (see section 9B). Section 16 of the Bill provides for a review of the legislation to be undertaken two years after commencement.

The Bill sets out the framework of requirements that must be met to make a valid statutory declaration – whether that be traditional paper based, electronically via video link, or through a digitally verified process – and provides that the details sitting under the framework be prescribed in the regulations.

By providing a technology neutral framework in primary legislation with the technical detail prescribed by regulations, the Bill would provide a robust statutory declarations framework with sufficient flexibility to evolve with technological advancements.

The Bill also makes minor and technical amendments to remove redundant provisions and update the language of some provisions in the Act.

Stakeholder views on proposed reforms

The department consulted the public on proposed reforms to the execution requirements of Commonwealth statutory declarations by release of a consultation paper. The consultation period ran from 6 July 2023 to 28 July 2023.

On the whole, stakeholders welcomed the proposal to amend the Act and the *Statutory Declarations Regulations 2008* to allow for three options for making a statutory declaration: the traditional (paper-based) option, an electronic option and a digital execution option. A further discussion of stakeholder views as they relate to the Bill is set out below.

Stakeholder views on benefits

Stakeholders were asked to identify benefits of the proposed options for making Commonwealth statutory declarations. Responses are summarised below.

Digital option

The digital option was well received. Stakeholders noted the reform would have the following benefits:

- convenience and efficiency savings
- potential cost savings, particularly for individuals and small businesses
- accessibility gains, particularly for those in the community with restricted mobility, sensory issues, or individuals in remote areas or with limited access to witnesses
- increased access to justice through broader accessibility, and
- reducing the risk of invalid declarations (e.g. failure to comply with the formalities).

Retaining the traditional paper-based option

In general, stakeholders supported the retention of paper-based execution as an option and were largely of the view that any new execution methods should be optional. Voluntariness was seen as a key foundation of any reform noting that a requirement to execute statutory declarations electronically or digitally would disadvantage those who either do not want to make use of technology, or those without access to necessary technology or with low digital literacy.

Electronic option

Stakeholders generally noted that electronic execution can save individuals and small businesses time and money, that the temporary measures have worked effectively, and that the COVID temporary measures should be retained.

Stakeholder suggestions and how we responded

Some stakeholders identified matters that the government should consider in designing a new digital option, including:

- how the role of the witness can be fulfilled by a digital process
- how fraud and coercion will be detected and prevented
- how personal information and data will be protected, and
- how a third party will be able to verify a statutory declaration made digitally.

How the role of the witness will be adequately fulfilled by a digital process

A witness to a statutory declaration is required to observe the declarant sign the declaration, and confirm this by signing and dating the declaration themselves.

Section 9A of the Bill includes a number of requirements that will fulfil the purposes of witnessing. To associate the declaration with the declarant, the Bill requires that the declarant's identity is verified through an approved digital ID service (paragraph 9A(1)(b), and subsection 9A(3)).

In witnessing and signing a declaration, the witness verifies that the declaration was made in accordance with the Act. Paragraph 9A(1)(c) of the Bill will allow the Government to require the online platform to include certain information in the completed statutory declaration so that it can be certified as being executed in accordance with the Act, for example the date and time of execution and confirmation that the declarant's identity has been verified as required.

Detection and prevention of fraud

The Bill contains safeguards for fraud detection and prevention, including preconditions that a digital service must satisfy to be an approved online platform under subsection 9A(2) or an approved identity service under subsection 9A(3):

- the Minister must be satisfied that a digital service has effective protective security (including security governance, information security, personal security, personnel security and physical security) and fraud control arrangements before that digital service can be prescribed as an approved online platform or approved identity service (paragraph 14(3)(b)).
- the Minister must be satisfied of any other conditions prescribed under paragraph 14(3)(c).

Paragraph 14(3)(c) can be used to incorporate a further layer of protection by requiring an approved online platform to be a Participating Relying Party in the Australian Government Digital ID System (AGDIS). Participating Relying Parties must meet obligations including reporting of identified dishonest activity and responding to disclosures as a result of Identity Providers identifying fraud in their space.

Paragraph 14(3)(c) can also be used to require that an approved identity service to be accredited under the Trusted Digital Identity Framework (TDIF) to provide identity services within the AGDIS. TDIF accreditation requires services to meet the strict rules and standards relating to, for example, usability, accessibility, privacy protection, security, risk management, and fraud control.

As is currently the case, it is a criminal offence to provide a fraudulent statement on a statutory declaration and this will remain the case under the new execution methods.

Detecting and preventing coercion in the execution of statutory declarations

Statutory declarations do not create or assign legal rights in and of themselves – they are always part of a broader process (compared to, for example, a contract or deed). Through any of the three methods of execution, the usual checks and balances that apply in the broader system would apply.

Witnessing does not necessarily guard against coercion – there is no legal requirement that a witness must be independent, and many forms of coercion are difficult to detect. The department acknowledges this risk, and will support users of the system by providing easily accessible information on existing avenues for advice and redress about coercion.

As with in person execution, a receiving entity is able to refuse to accept a statutory remotely witnessed or digital declaration if they think it is not bona fide. The Australian Federal Police will remain the appropriate responder where there is a concern that a declaration is fraudulent, or that it may have been made under duress or through coercion.

How personal information and data will be protected

The Bill and the statutory and regulatory framework include a number of safeguards that will protect a declarant's personal information and data:

- the approved online platform must not retain any copy of a statutory declaration that is made using its service (see subsection 9B). If it does, its approval may be revoked under subsection 14(5).
- the Minister must be satisfied that the digital service will operate in a way that complies with the *Privacy Act 1988* (the Privacy Act) and any law of a State or Territory that the Minister considers relevant before prescribing a digital service to be an approved online platform or approved identity service, and any other conditions.
- the Minister must be satisfied of any other conditions prescribed under paragraph 14(3)(c).

As discussed above, paragraph 14(3)(c) can be used to require that an approved online platform or approved identity service is appropriately accredited to operate within the AGDIS. Currently, only Commonwealth entities can operate within the AGDIS (providing identity services, or as a Relying Party providing services to the public). myGovID is the sole TDIF accredited identity service provider within the AGDIS. myGov is a Relying Party within the AGDIS.

Section 9B of the Bill will require the approved online platform to prepare and give a report on the use of the platform for the financial year to the responsible Minister. This report is to be tabled in Parliament and must include information about the number of statutory declarations executed through the platform, their compliance with the requirement not to keep copies of the declaration and a requirement to report any eligible data breach within the meaning of the Privacy Act.

For the digital option, an individual will be able to lodge a complaint with the Office of the Australian Information Commissioner if they think such an organisation has mishandled their personal information, including where they think their information has been accessed or disclosed without authorisation or is lost.

How a third party will be able to authenticate a statutory declaration made digitally

There are two related aspects of the Bill that will go to the authenticity of a statutory declaration made by digital verification:

- data the approved online platform must include on the completed digital statutory declaration under paragraph 9A(1)(c), and
- the requirement to verify the declarant's identity through a Digital ID provider under paragraph 9A(1)(b).

Paragraph 9A(1)(c) of the Bill allows requirements to be placed on an online platform to include particular information on the completed declaration. This information would not be information of a personal nature, and would confirm that a declaration was made at a particular date and time and on which approved online platform. The information would be visible on the PDF that the declarant receives when they complete their declaration under section 9A, and also visible on a print out of the PDF.

In addition, paragraph 9A(1)(c) will allow for a requirement that the approved online platform include encrypted information that would only be visible on the original PDF declaration. This would provide an additional level of verification of the information in the declaration, and would verify that the declaration was, in fact, made on the approved online platform.

Paragraph 9A(1)(b) of the Bill sets out the requirements for verifying the declarant's digital identity, including allowing for conditions to be set (such as Identity Proofing levels). The online platform will be required to confirm that the requirements have been satisfied by placing a statement that the declaration was made in accordance with the Act on the completed declaration.

If a third party has concerns about the authenticity of a print out of the statutory declaration, they can verify the declaration by requesting the original PDF from the declarant. It is appropriate to prescribe these requirements in the regulations, as they are likely to be technical in nature. Parliament will have oversight of these requirements through its power to disallow regulations.