

# **COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) – Changes to witnessing requirements for Enduring Powers of Attorney & Enduring Guardianship appointments**

## **Justice Connect Position Paper, April 2020**

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### **Summary**

COVID-19 is placing older people in NSW at increased risk of abuse due to growing pressure on families and isolation away from community supports.

The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (the **COVID-19 Act**) provides a critical opportunity for the NSW government to amend witnessing rules to allow the use of videoconferencing to make and revoke Enduring Power of Attorney and Appointment of Enduring Guardian documents—key strategies for preventing elder abuse. We are aware, from our clients and sector partners, of growing community demand and need for the changes.

### **Recent change to the law**

The NSW government recently introduced the COVID-19 Act which, amongst other things, allows for regulations under specified Acts to be amended to provide for alternative arrangements for signing and witnessing documents in response to the COVID-19 pandemic. Specified Acts include the *Guardianship Act 1987* and the *Powers of Attorney Act 2003*.

We understand the NSW Attorney General's Department is currently amending the regulations under these Acts.

### **Justice Connect**

Justice Connect is a social justice organisation that addresses public interest, access to justice and unmet legal need issues through a range of programs. Our Seniors Law program provides legal help to older people on legal issues associated with ageing, with a particular focus on preventing elder abuse. Our lawyers work on-site at a number of hospitals and health services in Sydney and Melbourne, where we provide face-to-face assistance to patients identified by health staff as experiencing or at risk of elder abuse. Making and revoking Enduring Power of Attorney and Appointment of Enduring Guardian documents for clients forms a significant proportion of our work.

We recently commenced an Australia-first pilot Telehealth program where we provide legal services using Telehealth—a videoconferencing platform used to deliver health services to patients. Now, due to COVID-19, all of our lawyers are providing legal services to our clients remotely via telephone and Telehealth.

### **Older people at heightened risk of abuse due to COVID-19**

At the time of any disaster, the older people in our community are particularly at risk of abuse and harm. Growing pressure caused by job, housing and financial insecurity for many adult



children will also place older Australians at risk of elder abuse.

Justice Connect is concerned that in this time of increased social isolation due to COVID-19, our elderly clients are at heightened risk of abuse. [Our recent article further reflects our clients' experiences and our insights on COVID-19 impacts.](#) The making and revoking of Enduring Power of Attorney and Appointment of Enduring Guardian documents can go some way to preventing and combating abuse. Currently, however, the law in NSW requires lawyers to be physically present to witness the making or revoking of these documents. This is impossible where COVID-19 prevents solicitors from assisting clients in-person.

### **Changes to regulations for witnessing requirements**

Justice Connect strongly recommends amending the regulations to the *Guardianship Act 1987* and *Powers of Attorney Act 2003* to allow for changed witnessing requirements during the COVID-19 crisis. The Australian Law Reform Commission has expressed that witnessing requirements 'should not be so onerous that people are dissuaded from putting in place enduring documents'.<sup>1</sup> Due to COVID-19, clients face increased barriers to putting these documents in place if unable to meet with lawyers in-person. We propose changes to allow for lawyers witnessing the making and revoking of Enduring Power of Attorney and Enduring Guardianship documents over specified videoconferencing platforms such as Skype and Telehealth.

To date the law in NSW has precluded witnessing of documents via videoconferencing due to concerns the person witnessing the document would be unable to see if the principal is subject

to duress by another person in the room, hidden from the witness's sight. There are also concerns that it may be more difficult to assess the principal's capacity when instructions are taken via videoconference. While we acknowledge these concerns, in our experience, and with adequate safeguards in place (see further below), changing the witnessing requirements could strike a workable balance between protecting the principal from abuse, and allowing for the continued making of these documents during the COVID-19 crisis.

Under the COVID-19 Act, these measures would only be in effect for the short term. Yet this period should be cautiously viewed as a trial of digital witnessing arrangements, which if found to be sufficiently protective of the principal in making Enduring Power of Attorney and Enduring Guardianship documents, could have continued benefit to some older people – such as those with access barriers – beyond the COVID-19 period.

### **Federal and state-based precedent for relaxing the rules**

We understand that there is no precedent in Australian law permitting witnessing of legal documents over videoconferencing platforms. We note however there has been a recent relaxing of the rules on related issues in some jurisdictions in response to COVID-19. The Federal Circuit Court, for example, has recently indicated it will now allow affidavits to be signed electronically by deponents and filed without being witnessed, on the condition that the deponent commits to subsequently providing evidence at court via phone or videoconference to verify the truth of the document's contents.<sup>2</sup> While this differs to witnessing the signing of a document over a digital platform, it shows a willingness to rely on videoconferencing as a platform to accept evidence.

<sup>1</sup> Australian Law Reform Commission, 'Elder Abuse – A National Legal Response' (ALRC Report 131), p. 167

<sup>2</sup> Federal Circuit Court, 'Joint Practice Direction 2 of 2020 – Special Measures in Response to COVID-19', 31 March 2020

In Victoria, the Law Institute has recently issued a practice note on taking instructions for wills and powers of attorney during COVID-19. It notes there are currently no legal authorities or precedents in Victoria permitting video witnessing of these documents. Despite this, it seems to cautiously accept the need for a change in practice in light of COVID-19 to allow for the taking of instructions for wills and powers of attorney over videoconference where necessary, 'contrary to established prudent practice'. If taking instructions via videoconference is permissible, and if in doing so a practitioner can satisfy themselves that the client is providing the instructions free from duress and has the capacity to execute the document, it is not a significant additional step to then permit the practitioner to witness the signing of the document over videoconference. Putting careful safeguards in place around the process can mitigate some risks, and suggested certification clauses are set out below.

## Safeguards

Our support for digital witnessing and certification of Enduring Power of Attorney and Enduring Guardianship documents via videoconference is currently limited to a trial of circumstances where the principal is unable to access a certified witness in person due to COVID-19. Where digital witnessing occurs, if possible, a mobile device such as an iPad or smartphone should be used by the principal (rather than a desktop computer) so that the witness is able to get a broad visual of the room and anyone else present before witnessing the document. In accordance with usual practice, lawyers should request to initially speak to the principal alone, to permit them to speak freely and confirm they are free of duress, and to check their capacity to make the documents. Wherever possible, digital witnessing should take place via a secure platform like Telehealth, to protect confidentiality. If the use of Telehealth is

not possible then another form of video conferencing such as Skype could be used.

In our experience, interviewing a person via video conference does not present a barrier to properly assessing their capacity, provided that the audio quality of the interview is adequate and the lawyer has sufficient time to assess the principal's understanding and intention. Videoconferencing still permits a lawyer to assess a client's facial expressions, body language and non-verbal behaviour. The emphasis instead should be on ensuring that lawyers have adequate training to assess clients' capacity to make decisions, rather than the method by which the interview took place.

## New certification clauses

The certification clauses in the Enduring Power of Attorney and Enduring Guardianship documents should be amended to allow for digital witnessing via videoconferencing. For Enduring Powers of Attorney, an additional clause should be added to section 6 as follows:

- f) *As it was impracticable for the principal to have this document witnessed in person, I witnessed the signature of this power of attorney by the principal over video conference. I am not aware of anything that causes me to believe that the principal did not freely and voluntarily sign the document.*

Clauses e) or f) can be crossed out as appropriate in the circumstances.

For Appointment of Enduring Guardianship, an additional option should be added in clause 6(d) as follows:

- *As it was impracticable for the appointor to have the execution of this instrument witnessed in person, I witnessed the appointor execute this instrument over video conference. I am not aware of anything that causes me to believe that the appointor did*

*not freely and voluntarily execute the instrument.*

Our approach to witnessing seeks to provide appropriate protection against elder abuse, while ensuring that our elderly clients can put in place Enduring Powers of Attorney and Enduring Guardianship appointments as an important planning tool for later life.

### **Benefits to regional clients**

While the changes to witnessing arrangements are being effected strictly in response to the COVID-19 crisis, we note that these arrangements could particularly benefit older people experiencing abuse in regional and rural NSW, as the following case study highlights:

*Clive and Ellen, in their 80s, live in a nursing home in Narrandera in western NSW. They suffer from multiple health issues affecting their mobility, and cannot leave the facility without assistance. They are being financially abused by their son Tom who they previously appointed as their attorney; they wish to immediately revoke that appointment and execute new documents appointing their daughter instead. Clive and Ellen cannot afford to pay for a private lawyer to assist them with this however. While they are eligible to access free help through NSW Trustee & Guardian, the nearest office is in Wagga Wagga, and the service has indicated they are unable to travel and assist them to make the documents at their nursing home.*

The situation for clients who make enduring documents under the amended witnessing arrangements should be carefully monitored over the coming months. If adequate safeguards to protect against abuse can be put in place, extending the operation of the new regulations beyond the COVID-19 crisis may offer significant benefit to older people in regional and rural NSW and to those suffering from mobility issues affecting their ability to access free services.

### **Ongoing effect of documents**

Of course we note that any instruments made pursuant to amended witnessing arrangements, including via video conferencing during the COVID-19 crisis, must have continued legal effect after the crisis passes and the new measures lapse pursuant to the COVID-19 Act.

If you have any questions in relation to the above, please contact Yvonne Lipianin on (02) 8599 2111 or [Yvonne.lipianin@justiceconnect.org.au](mailto:Yvonne.lipianin@justiceconnect.org.au), or Sadie Davis on (02) 9160 7174 or [Sadie.Davis@justiceconnect.org.au](mailto:Sadie.Davis@justiceconnect.org.au).