

**Response to NSW Department of
Communities & Justice Consultation
Paper on Remote Witnessing via audio-
visual link**

June 2021

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1. Executive Summary

Justice Connect supports remote witnessing via audio-visual link (AVL) enablement on an ongoing basis, provided appropriate safeguards are in place to protect vulnerable older Australians from abuse.

Justice Connect's position is informed by our extensive experience in witnessing Powers of Attorney (**POA**), Enduring Guardianship Appointments (**EGA**) and Wills via AVL since April 2020, including:

- 32 documents executed via AVL;
- 19 clients assisted, including:
 - 12 metropolitan patients in Sydney;
 - 7 regional patients in the regional NSW.

In order for more vulnerable older Australians to access AVL technology, we recommend that connection to this technology be facilitated and supported by local organisations such as health and community services, in particular services that assist cultural and linguistically diverse communities. Health Justice Partnerships (HJPs) play an important role in assisting vulnerable clients to access justice via technology and ensuring the digital divide is not a further barrier for older people to access justice.



2. About Justice Connect

In the face of rising unmet legal need, Justice Connect designs and delivers high-impact interventions that increase access to legal support and progress social justice.

Our Seniors Law program has been operating for more than ten years and we provide legal help to older people on legal issues associated with ageing, with a particular focus on preventing elder abuse.

Through Health Justice Partnerships (**HJPs**) our lawyers work on-site at several 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 Powers of Attorney and Appointments of Enduring Guardian documents for clients forms a significant proportion of our work. We see these documents as instrumental in protecting our older clients against elder abuse.

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3. Should remote witnessing be enabled under NSW law on an ongoing basis?

Justice Connect strongly recommends the extension of the operation of the new remote witnessing regulations beyond the COVID-19 crisis. This would provide significant benefit to older people, particularly to those in regional and rural NSW and to those whose mobility issues affect their ability to access free services. In order to ensure that remote witnessing works effectively, there must also be adequate safeguards built in to protect against elder abuse

Justice Connect's position is informed by our extensive experience in witnessing Powers of Attorney (**POA**), Enduring Guardianship Appointments (**EGA**) and Wills via AVL since April 2020.

In December 2019 Justice Connect received funding from the Federal Attorney General's department for a twelve month pilot project to use Telehealth to deliver legal services to older people experiencing or at risk of elder abuse in the Murrumbidgee Local Health District (**MLHD**). In response to COVID-19 lockdowns and restrictions, the scope of the project was extended to incorporate delivery via AVL to our existing metropolitan clients in Sydney, as well as remote delivery to the MLHD.

Health Justice Partnerships (**HJPs**) have provided Justice Connect with a unique opportunity to utilise health workers to provide access to the infrastructure and technical expertise which allows access to legal services to our older clients via AVL. This included enabling older clients to access legal services via AVL while at home due to mobility issues, remoteness from legal services or fear of leaving the home due to COVID.

In our position paper [Changes to witnessing requirements for Enduring Powers of Attorney & Enduring Guardianship appointments \(April 2020\)](#), we highlighted that if there was sufficient protection of the principal in making Enduring Power of Attorney and Enduring Guardianship documents, enabling documents to be witnessed via AVL could have continued benefit to some older people – such as those with access barriers – beyond the COVID-19 period. Given our experience of remote witnessing arrangements during the COVID period, we now strongly affirm the benefits of access to remote witnessing for older Australians.



4. Use of the provisions by Justice Connect

During the period from April 2020 to date, we witnessed our older clients signing POA, EGAs and wills via AVL as follows:

- 32 documents executed via AVL;
- 19 clients assisted, including
 - 12 metropolitan patients in Sydney
 - 7 regional patients in the MLHD.

Documents appointing powers of attorney and enduring guardianship are key tools in the prevention elder abuse. In the majority of AVL appointments conducted by Justice Connect both regionally and in metropolitan areas, the main purpose of the consultation was to witness the signing of documents including Wills, Powers of Attorney and Enduring Guardianship Appointments. Importantly, for most of these appointments, health workers from our HJPs were present to assist them to connect to the consultation. Trusted family members also played this role in some home appointments.

The following client stories demonstrate how we have used the remote witnessing provisions to assist our clients.

Nina's Story

Nina is an elderly Italian woman who was experiencing elder abuse by the person she had appointed as Attorney and Guardian. In December 2019, with the help of an interpreter, Justice Connect assisted Nina to revoke the documents and advised her to put new documents in place appointing someone who she trusted would do the right thing by her.

Nina said that she would follow up with the NSW Trustee and Guardian (NSW T&G) to assist her to appoint her daughter and granddaughter as her joint guardians and attorneys. In April 2020 Nina contacted Seniors Law and advised that the NSW T&G were not providing interpreters during the pandemic.

Nina was very anxious because she had not been able execute a new POA and EGA, so Seniors Law agreed to assist Nina to execute the documents by witnessing the signatures via Telehealth. The client was very happy with this option.

Nina did not have access to video conferencing and so Justice Connect asked permission to involve her granddaughter to assist her. Nina's granddaughter printed out the documents and facilitated the video conference. Nina's granddaughter and daughter left the room when Justice Connect's lawyer assessed Nina's capacity to make the appointments and confirmed that she was under no duress. Justice Connect lawyers were able to witness Nina signing the documents and later witnessed Nina's daughter and her granddaughter's signing their acceptance of their appointments via Telehealth.



Mariel's story

Mariel was an inpatient in the palliative care section of our HJP at St Joseph's hospital (SJH) in Auburn. In June 2020, it became clear that she would need to appoint an Enduring Guardian urgently as her health was deteriorating quickly. At this time the COVID-19 restrictions were in place and it was not possible to see Mariel at the hospital. The social worker at SJH contacted Seniors Law on Mariel's behalf and a time was arranged for a video conference.

To see Mariel over video conference was extremely important because Mariel was having difficulties with her speech, and she was difficult to understand over the phone. It was much easier to assess Mariel's capacity and take instruction from her over AVL via Telehealth. Justice Connect lawyers gave advice to Mariel, took her instructions and drafted the document.

The document was signed by Mariel and her son and was witnessed by the Justice Connect lawyer over Telehealth. The social worker then forwarded the document that Mariel and her son signed to the lawyer who was able to countersign it and scan and email the document back to Mariel.

Clive and Ellen's story:

Clive and Ellen are in their 80s and live in a nursing home 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. 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.

Clive and Ellen could not revoke their POA because there was no legislation in place enabling them to revoke their existing POA and execute a new POA via AVL. As they were unable to access legal assistance due to mobility issues and living in regional NSW, Terry was able to continue to financially abuse them by misusing the POA they had in place. Clive and Ellen were unable to afford to pursue this breach of Terry's position as their attorney through an application to the NSW Supreme Court. Our older regional clients like Clive and Ellen will benefit from the ability to execute their documents via AVL. Their situation exemplifies how making this legislation permanent will be an important tool to prevent elder abuse.

4.1 Effect on time and costs

The older clients that we represent are often extremely vulnerable and have limited income. Providing these vulnerable clients with access to justice without the need for them to leave their homes provides significant financial benefits to these clients in savings on transport costs. For our older rural and regional clients, large amounts of time spent in travelling to appointments with lawyers are saved by using AVL to execute documents and meet with their lawyers



4.2 Difficulties in using the provisions

i. Access to technology

Justice Connect's Seniors Law program assists clients who are 65 years and over or 50 years and over if they are Aboriginal or Torres Strait Islander. Our experience demonstrates that clients aged between 65 to 75 are more likely than 75+ clients to have access to the technology and skills required to use AVL to execute documents without the assistance of others. Our Aboriginal clients and rural clients are often not able to access the technology required to execute their documents remotely.

In most cases where we witnessed the execution of documents via AVL, our clients did not have their own webcam-enabled desktop computer nor an appropriate mobile device at home. For bedside and home consultations, a family member or health worker typically provided a mobile device to facilitate the consultation.

Clients over 80 are unlikely to have access to technology to enable them to access justice via AVL. Clients in this age bracket also often lack the technological skills to navigate the use of AVL to execute their legal documents. As our legal service is embedded in the health system, we are able to use the infrastructure and expertise of health workers to assist older clients to use this technology. However for many older clients who cannot access an HJP, access to AVL is extremely difficult.

ii. Client fatigue

In addition to difficulties with access to the required technology, limitations such as deteriorating hearing and sight present challenges for older people both in relation to interacting with audio-visual mediums and navigating online systems. User fatigue can also be an issue for our older client group. In our experience witnessing the execution of documents via AVL, elderly clients tired quickly when participating in video-conferencing consultations.

iii. Clients experiencing elder abuse

Clients who experience abuse and live with the perpetrators are often unable to use this technology as they cannot be certain that the perpetrator will not be present during the interview and execution of documents.

We address the particular issues relating to our older client group including those subject to duress in answer to Question 9 below.



5. What changes could be made to remote witnessing requirements in NSW to further ensure that the functions of witnessing can be discharged?

5.1 Ability to witness be limited to certain class of witnesses

Justice Connect is of the view that the ability to witness Powers of Attorney and Enduring Guardianship appointments should be limited to lawyers admitted to practice in New South Wales. In relation to Wills, we recommend that at least one of the witnesses be a lawyer admitted to practice in NSW.

In our view it is important that witnesses are educated in the issues relating to duress, domestic violence and fraud that arise when documents are witnessed remotely by AVL. This education should be compulsory for all NSW lawyers who use these provisions to ensure that there is no duress to clients who execute their documents via AVL.

5.2 Verification of Identity

Reasonable steps should be taken by the witness to verify the identity of the signatory in all cases. Justice Connect's Practice Guidelines for Witnessing the signing of legal documents via Telehealth May 2020 (Attachment 1) state that it is our practice that the signatory be required to hold up their photo identity in front of their face during the meeting via AVL. It is the practice of Justice Connect's lawyers to ensure that either a screen shot of this is taken or that the photo identification of each signatory is kept on the client file.



6. Should remote witnessing legislation specify what constitutes an ‘original’ document?

Remote witnessing legislation should specify what is an original document to provide certainty for those who use these documents including financial institutions, health care facilities and Courts. The use of counterpart documents to form part of an original document creates uncertainty for those who rely on these documents such as attorneys, guardians and executors and beneficiaries of Wills. Financial institutions who are increasingly concerned by identity fraud and the legitimacy of these documents are likely to refuse to accept legal documents that are executed in counterpart.

In our view the “original” document should be the document that is signed by the principal. This original document should be sent to the witness via express post and the original document signed by the witness in accordance with what is required by the new legislation. It is best practice for a practitioner to sign a counterpart copy of the document at the time that the document is witnessed and for this counterpart copy to be saved on the client file as evidence that the lawyer witnessed the document being signed. However, the “original” document should be the document signed by the principal and then witnessed as soon as the original document is received by the witness.

Best practice, as outlined in Justice Connect’s Practice Guidelines is that the witness should take a screen shot of the document signed by the signatory to ensure that they receive and sign the same document signed by the signatory. The screen shot will have the time and date on it confirming the time that the lawyer witnessed the person signing the document.

7. Should remote witnessing legislation set out a procedure for transmitting or storing remotely witnessed document?

Justice Connect supports the process outlined in answer to Question 4 in relation to the procedure for witnessing documents via AVL. The “original” of the document should be stored as any other original documents is stored. Best practice would be for the witness to sign a counterpart copy of the document signed by the signatory at the time that the documents is signed and store this counterpart copy with the client’s file.



8. Should remote witnessing legislation specify the location where a document witnessed by AVL is taken to executed?

There is no current legislative requirement that the location of where POA, EGAs or wills are executed be specified. In our view there should be no requirement that documents witnessed remotely via AVL should specify the location of where they were witnessed from.

9. How should remote witnessing legislation address the territorial application of the scheme?

We are not in a position to comment on this question as it outside our area of expertise.

10. Should any specific provision be made for the method(s) authorised to remotely witness electronic signatures?

We are not in a position to comment on this as it is outside our area of expertise.



11. What other issues should be considered in relation to enabling remote witnessing

11.1 Mitigating the risks of duress

Prior to the emergency COVID provisions, the law in NSW precluded witnessing of documents via AVL due to concerns that 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' sight. This can make it more difficult for a witness to identify when a document is being signed as a result of undue influence or duress.

Justice Connect supports putting careful safeguards in place around the process of witnessing the execution of important legal documents via AVL as a way of mitigating some risks.

Where the execution of important legal documents such as POAs, EGAs and Wills is witnessed via AVL, wherever possible a mobile device such as an iPad or smartphone should be used by the principal (rather than a desktop computer). The witness is then 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 whether they are free of duress, and to check their capacity to make the documents. Wherever possible, remote witnessing should take place via a secure platform like Telehealth, to protect confidentiality.

Justice Connect recommends that in order to protect signatories against duress, the certification clauses in the Enduring Power of Attorney and Enduring Guardianship documents should be amended to include additional clauses as follows:

Section 6 of the Power of Attorney documents to include the following provision:

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.

Section 6 of the Appointment of Enduring Guardianship, to include the following provision:

(d) 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.

We support adopting the approach taken in the Queensland regulation, which requires a person witnessing a document via AVL to (among other things):

- be satisfied that the signatory gave their signature freely and voluntarily
- take reasonable steps to verify the identity of the signatory and that the name of the signatory matches the name of the signatory written on the relevant document, and



- sign a certificate stating, among other things, that the document was signed and witnessed during the relevant period, in accordance with the Queensland regulation, and the steps the witness took to verify the signatory's identity.

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

a. Assessing capacity

There are also concerns that it may be more difficult to assess the principal's capacity when instructions are taken via AVL.

In our experience, interviewing a person via AVL 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. AVL still permits a lawyer to assess a client's facial expressions, body language and non-verbal behaviour. In our view 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.

b. Considering the appropriateness of remote witnessing where there is elder abuse

Clients who are living with their abuser may not be suitable candidates for executing their documents via AVL due to the heightened risk of duress and potential for the escalation of abuse perpetrated against the client.

In accordance with NSW Health's "Violence, abuse and neglect and telehealth guidance", Justice Connect preferences face-to-face service provision rather than telehealth where it is known a client is currently experiencing violence, abuse or neglect or concerns related to these issues have been identified. This is especially relevant where the client lives with their abuser and does not have access to safe devices for telehealth consultations at home or at a trusted friend or neighbour's house. For example, with respect to 'safe devices', NSW Health notes that

"the delivery of services via telehealth can leave a "trail" and provide increased opportunities for perpetrators of violence to monitor victims' activities and conversations within the home, and an increased risk of [technology facilitated abuse](#), which can include tracking the movement and activities through devices. Where perpetrators become aware of disclosures of violence, abuse and neglect and subsequent interventions there can be increasing risk to survivors. In terms of access, it can be a lot harder for survivors / victims to get privacy in order to safely make and receive phone calls or look up information about support." (<https://www.health.nsw.gov.au/Infectious/covid-19/Pages/van-telehealth.aspx>)

Through the HJP model, older people experiencing or at risk of elder abuse can be safely connected to legal consultations for witnessing documents via telehealth by health workers. Consultations can be facilitated via the health worker's device or from a safe location such as a hospital or community health facility.



c. Fraud

Remote witnessing may also create a risk of fraud. In order to counteract the possibility that the document is tampered with during the delay between the signatory signing and the witness countersigning, Justice Connect recommends that a screen shot be taken of each page of the document that the signatory signs to ensure that the same document is signed by the witness. An electronic copy of the screen shot should be stored with the client file.

Summary

Justice Connect supports remote witnessing via audio-visual link (AVL) enablement on an ongoing basis if appropriate safeguards are in place to protect our older vulnerable client group from abuse.

For our older client group to interact with AVL we recommend that connection to this technology be facilitated and supported by local organisations such as health and community services in particular services that assist cultural and linguistically diverse communities. There is a role to play for Health Justice Partnerships in assisting vulnerable clients to access justice via technology. Justice Connect does not want the digital divide to be a further barrier for older people to access justice.

If you have any questions in relation to this document do not hesitate to contact Sadie Davis, Principal Lawyer at Justice Connect on (02) 91607174 or at sadie.davis@justiceconnect.org.au



Attachments

1. Justice Connect Position paper on COVID-19 witnessing requirements for execution of POA and EGA - April 2020.
2. Justice Connect Practice Guidelines for Witnessing via Telehealth – May 2020
3. NSW Law Society Guide to Electronic Witnessing Provision – September 2020.

