

Question 1: As a business or as an individual, when and why do you use statutory declarations or deeds? Please provide any examples of the costs involved in the process. Why might you use a statutory declaration over a standard declaration, or a deed over a contract?

Statutory declarations are demanded and provided due to their commitment to the truth of what is stated in the declaration, noting the penalties imposed for false declarations.

Legal Aid NSW primarily uses statutory declarations for the purpose of:

- official applications and tribunal forms
- substitutes for affidavits when providing formal evidence of facts, particularly in proceedings before tribunals, and
- responding to the demands of businesses, such as credit providers, for formal statements of fact.

We use deeds almost exclusively for the purpose of recording formal settlements between our clients and their opponents in legal disputes. Deeds are preferred over contracts as they avoid complicated issues about the passing of consideration between the parties and have a commonly known structure, which promotes time efficiency.

The principal cost for Legal Aid NSW in preparing statutory declarations and deeds is the cost of professional time taken to prepare them. In most circumstances, our clients do not incur specific costs for the preparation or execution of statutory declarations and deeds.

Question 2: What barriers, challenges or difficulties have you experienced with physical document execution? Do you have examples relating to paper requirements, witnessing requirements or jurisdictional inconsistencies? Are there other barriers that aren't captured here? What can we learn from international approaches?

Legal Aid NSW considers that the requirement for a person to physically execute a document before an authorised witness can create significant barriers for our clients, due to:

- a person's physical disability
- a person's work or home commitments
- rural or remote location, which is further limited when travel is restricted by law, such as Public Health Orders, and/or
- a person's ability to own a home printer or limited access to a printer, where the document is sent to them electronically.

These barriers can be accentuated when it is also necessary to append special certificates of translation and understanding by interpreters, or to execute on behalf of those physically unable to sign.

Legal Aid NSW submits that witnessing documents via audio-visual link (**AVL**) does not overcome the above barriers, as our clients may not be able to travel to AVL rooms, and may not have access to email servers or equipment, or clear and reliable AVL connections.

Whilst introducing digital identity verification may be desirable as it allows versatility, Legal Aid NSW does not believe it should become the only option available to verify documents due to the above barriers which are likely to impact upon some of Legal Aid NSW's most vulnerable and disadvantaged clients.

Question 3: What would you consider to be a desirable outcome from reforming document execution? Are these the right principles for reform? Are there other outcomes or principles we should consider?

Legal Aid NSW suggests that accessibility should be prioritised over consistency when considering the reform of document execution. A variety of means should be permitted to suit the needs and limitations of the executing party. We suggest that accessibility should ensure that document execution is easy to undertake and uncomplicated in nature, without risking security and fraud prevention.

Question 4: Should electronic execution of statutory declarations and deeds be permitted? What would be the benefits and costs for you of digital options?

Yes. Legal Aid NSW considers that electronic execution provides a flexible alternative to traditional execution and can expedite the completion of our client's legal issues.

Question 5: Is witnessing a necessary requirement for statutory declarations and deeds? Are there documents that should still require the presence of either a physical witness or a witness over AVL? Do advances in digital identity verification make witnessing requirements redundant?

Legal Aid NSW submits that where digital identity verification is available, in most instances it will not be necessary to witness a document. However, we acknowledge that there may be situations where a physical witness is required as digital verification is unavailable, such as where electricity or electronic transmission is unavailable, and during natural disasters.

In the absence of reliable digital verification, physical witnessing of statutory declarations and deeds is our preferred method for witnessing documents as it ensures proper understanding of the document, and avoids impersonation, duress and fraud.

Further, Legal Aid NSW has reservations about the advances of digital identity verification as there is no universally established description or standard, and it is not clear how a person can gain reliable and easy access to a digital record of verification where digital execution is disputed.

Legal Aid NSW considers that both physical and electronic verification need to operate alongside one another for a sufficient time to enable the community to become satisfied that digital verification is better, universally available and entirely reliable.

Question 6: What minimum reliability requirements should apply to the electronic execution of statutory declarations and deeds? Are the existing provisions in the ETA appropriate and effective? From your perspective, would providing common requirements and definitions, enabling digital verification or improving national usability increase reliability?

Legal Aid NSW considers that the minimum reliability requirements for electronic execution of documents should include:

- the reliable and indefinite preservation of the form and terms of the document from the moment of its execution, free from any possibility of tampering
- indefinite and immediate access by all parties to the document itself, including for the purpose of copying
- provision of copies of the document to third parties by authority of at least one party to the document
- absolute certainty that the document was indeed executed by the party who purports to have executed it, and
- so far as possible, ensuring that documents are executed voluntarily, with sufficient capacity for understanding, and free from immediate duress.

The provisions of the *Electronic Transactions Act 1900* (Cth) need to be considered in combination with the provisions of the *Oaths Act 1900* (NSW) and the *Oaths Regulation 2017* (NSW), which concern the identification of a person executing documents and provide a level of surety.

National standardisation of digital verification and improving national usability are highly desirable. However, the creation of a digital verification system should not be privatised and, where possible a variety of digital verification should be accepted to avoid confusion and eliminate fraud. We suggest that such standardisation should allow flexibility for a person to meet the identity requirements of digital verification through a variety of means, as not everyone has access to the same identity documents.

Question 9: Are there risks with document execution that might lead to an adverse outcome for you, your clients or other third parties as a result of reforms to document execution?

Legal Aid NSW supports reforms that do not undermine the traditional principles of document execution. Reforms should preserve principles that ensure proper understanding of the document, voluntary execution free from fraud, and proof of execution that is reliable and free from tampering.

Reforms should not result in executed documents becoming unavailable for ready access by all participating parties, or subject to destruction, corruption or forgery, if they exist purely in electronic form. Confidentiality between the executing parties should be preserved, except to the extent that parties expressly waive confidentiality in accordance with their agreement.