

7 April 2020

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Dear Ms Wright

## **WITNESSING SOLEMN DOCUMENTS AND CROSSING STATE AND TERRITORY BORDERS**

Thank you for your request for your urgent advice for the witnessing of solemn documents and crossing State and Territory borders. Please note that this expands on the comments you received from Mr Greg McIntyre SC on 3 April 2020 in his capacity as a Director of Law Council.

The Law Society of Western Australia's position is set out below by reference to the Action Requests having regard to the suggestions numbered (1 to 4) in the memorandum.

### ***Action Request 1.***

***Innovative solutions for the witnessing of wills, enduring powers of attorney, appointments of enduring guardian, affidavits and other solemn documents where it is impossible to meet the signatory face to face.***

#### **1. Witnessing of wills**

In Western Australia a testator can make an informal will (Part X of the Wills Act 1970 (WA)). Such a will does not have to be in writing although proof of such a will in writing and signed by the testator is less complicated and therefore less expensive. The will can be made by marks, symbols or perforations or by sound or images or even by a map, drawing or photograph. There is similar, but not identical legislation in the other States and Territories.

Suggestion 3 of the memorandum that wills may be executed by direction with the testator on video screen and the witnesses in a remote location, the testator giving a witness the direction to sign the will on her or his behalf is supported in principle by the Law Society in that section 32 of the Wills Act provides for informal wills and there is no necessity to further widening the discretion of the Court to validate an informal will.

#### **2. Witnessing of enduring powers of attorney and appointments of enduring guardian**

There are already many concerns from the perspective of "elder abuse" and other occasions where pressure, coercion and undue influence are exercised such that there should be an abundance of caution of any relaxation of the witnessing safeguards. The ALRC Report 131 (tabled June 2017) "*Elder Abuse – A National Legal Response*" in its recommendation 5.1(a) recommended enhancing witnessing requirements for all enduring documents. At 5.26 the reason for the enhanced requirement was the identified problems raised by community legal centres, elder abuse hotlines and other

welfare groups. Even though a number of the jurisdictions (Northern Territory, Queensland, New South Wales and South Australia) only require one witness for enduring documents (though of a narrower prescribed class than in Western Australia), at 5.29 of the Report it recommended that there should be 2 witnesses of whom one must come from a narrow prescribed class namely:

- a) A legal practitioner
- b) A medical practitioner
- c) A justice of the peace
- d) A registrar of a Local/Magistrates Court; or
- e) A police officer of the rank of superintendent or above.

There are also many other options which are already provided for in the legislation including:

1. An enduring power of attorney and enduring power of guardianship in Western Australia requires two witnesses one of whom is authorised to take a statutory declaration. While local authorities are no longer providing this service of an attendant justice of the peace, however pharmacists can also provide the service and pharmacies are likely to remain open during the pandemic. This remains an efficient way to have enduring documents executed as well as wills and statutory declarations. Lawyers are also still available to witness documents.
2. Further section 110ZJ of the Guardianship and Administration Act (WA) 1990 (GA&A) provides for an order of priority for consent to medical treatment where a person has not appointed an enduring guardian or made an advance health directive. This does not cover the position where medical treatment may involve research or experimental treatment. This is now covered by section 110ZQ of the Act which provides a similar order of priority for consent to medical treatment involving research or experimentation.
3. The *Guardianship and Administration (Medical Research) Amendment Bill 2020* which was passed by the WA Parliament last week and likely to receive Royal Assent this week, provides that an enduring guardian who has been appointed the research decision maker (new section 110(1A)) has priority in consenting on behalf of the research candidate. However that provision is ineffectual at present because the existing mandated forms have never allowed for such an appointment and new forms will need to be drafted and executed by those person wishing to give such power to an appointed guardian. Further a research decision maker cannot consent to the candidate's participation in medical research if that participation is inconsistent with any advance health directive in operation in respect of the candidate (new section 110ZR(4) of the GA&A).

Other provisions in the GA&A in situations where a person does not have an enduring power of attorney or enduring power of guardianship are also of assistance including:

- (a) If an application for an administration order or guardianship order needs to be made in respect of a person it can be made orally or in writing (section 40 (1)) and in exceptional circumstances the State Administrative Tribunal can either shorten the time for giving notice of the application or dispense with the requirements to give notice (section 41 (3)).
- (b) Part 9B of the GA&A which covers the making of a statutory Advance Health Directive in section 110ZB of the GA&A specifically states that this Part of the Act does not affect the common law relating to a person's entitlement to make treatment decisions in respect of a person's future treatment decisions. At common law there is no particular form or requirement of witnessing for a common law advance health directive. As it is for future treatment it would usually be in writing and for proof that it was made by the person concerned it would usually be witnessed by at least one person but that person needs no special qualifications.

- (c) Part 9D of the GA&A enables a health professional to provide urgent treatment for a patient who cannot make a treatment decision and where it is impracticable to determine whether the patient has an advance health directive or to obtain a treatment decision from the person's guardian or enduring guardian.
- (d) As referred to above section 110ZJ of the GA&A provides for an order of priority if a patient is unable to make reasonable judgments in respect of any treatment provided to the patient. This order is the treatment decision provided in an advance health directive but if there is no such directive then the decision can be made by the patient's enduring guardian, guardian or the person responsible under section 110ZD in that order.
- (e) The person responsible to make the treatment decision is the first in order of a list of persons set out in section 110ZD who is of full legal capacity, is reasonably available and is willing to make the treatment decision. The order is the person's spouse or de facto spouse if living with the patient, the patient's nearest relative who maintains a close personal relationship with the patient (the order is a spouse or de facto, a child, a parent, a sibling), a primary carer who is not remunerated or a person who maintains a close personal relationship with the patient who is not remunerated.

For the reasons above the Law Society does not support the waiver of the witnessing requirements of enduring documents (as set out in suggestion 4) and note that many elderly persons do not have access to technology and even when they do, they are not adept in using it.

4. Witnessing of affidavits

The Law Society does support unsworn affidavits being filed and served and adopted in court subject to the State courts and administrative tribunals implementing a similar provision to item 4 of the Federal Court Practice note dated 31 March 2020.

**Action Request 2.**

***Suggestions to facilitate practitioners needing to cross state and Territory borders to attend to essential legal services.***

The Law Society supports the proposal set out in the memorandum that production of a membership card to a bar association, law society or Supreme Court library to enable them freely to cross State or Territory borders provided that they are required to cross the border for the purposes of delivering legal services. This is of course subject to any border restrictions imposed by respective State and Territory governments.

Thank you for the opportunity to contribute to these important issues for legal practice. If you have any questions or require further information please contact Mary Woodford, General Manager Advocacy on (08) 9324 8646.

Yours sincerely



Nicholas van Hattem  
**President**