

Insurance Insights

Swearing of affidavits across Australia - what's required during the COVID-19 pandemic?

Key takeaways

- In some States and Federally, witnessing and attesting affidavits can be done remotely.
- If a sworn affidavit is not possible, an unsworn affidavit may be accepted by the Court.
- If an unsworn affidavit is relied upon, a sworn or affirmed affidavit must be filed with the Court when circumstances allow.
- Legislation and Regulations vary across jurisdictions.

When witnessing and attesting an affidavit, the legislative requirement that the witness be in the presence of a person when signing the affidavit, has been modified in some jurisdictions in order to minimise the need for personal contact during the COVID-19 pandemic.

In some jurisdictions swearing affidavits, can now be done via audio or audio-visual link. If that is not possible, parties can rely on unsworn affidavits subject to several provisos.

Currently, laws and regulations are not consistent across Courts and jurisdictions.

During this period of legislative change, case by case consideration as to the applicable law, the document being executed, and relevant Court Practice Notes is needed.

Victoria

Part 5A of the [Oaths and Affirmations Act 2018 \(Vic\)](#)¹ now allows remote completion of affidavits. If the Court is satisfied that compliance with the Act was not reasonably practicable, it will accept unsworn or 'purported' affidavits provided a reason for non-compliance is provided (s49F).

¹ Changes enacted by the *COVID-19 Omnibus (Emergency Measures) Act 2020 (Vic)* (passed 23 April, in effect 25 April 2020).

Practitioners should be aware that where an unsworn affidavit is relied on, a sworn or affirmed affidavit must be filed when circumstances allow.

The [Supreme](#) and [County](#) Courts have both issued Practice Notes for the Common Law Divisions, outlining their requirements with respect to the legislation. In addition the Law Institute of Victoria has provided the [COVID-19 Guidance on witnessing documents electronically](#).

Similar but not identical provisions have been introduced in some other states and federally.

NSW

On 22 April the *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) came into force under Section 17, [Electronic Transactions Act \(NSW\) 2000 \(No 8\)](#) which allows swearing or affirming affidavits via an audio link and audio-visual link.²

Queensland

The [COVID-19 Emergency Response Act 2020 \(Qld\)](#) came into force 25 May. Part 3A of the [Justice Legislation \(COVID-19 Emergency Response-Documents And Oaths\) Regulation 2020 \(Qld\)](#) in force 22 May 2020 provides for an affidavit to be made in the form of an electronic document and electronically signed and witnessed via audio-visual link. Section 33 of the *Oaths Act 1867* does not apply in relation to an affidavit made, signed or witnessed in accordance with this Regulation. The Court may admit an unsworn affidavit considered to be 'in the interests of justice' or if reasons are provided.

Tasmania

The [COVID-19 Disease Emergency \(Miscellaneous Provisions\) Act \(No 2\) 2020 \(Tas\)](#) in force 6 May 2020, amended the COVID-19 Emergency (Miscellaneous Provisions) Act 2020. Under Section 17 the Minister may issue a notice, allowing electronic authorisation subject to conditions, where a physical action such as a signature is required. No notices in this regard has been gazetted to date.

South Australia

South Australia has not made any amendments to legislation or regulations for the witnessing of documents. A [Practice Note -Witnessing Affidavits during COVID-19](#) from the Supreme and County Courts, states that Affidavits must continue to be witnessed in person with appropriate safety precautions in place. If this is not possible, an unsworn affidavit should be attached to a solicitor's affidavit with reasons and an undertaking to submit the sworn original once it is possible to do so.

² The *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020 No 4 (NSW)* assented to 14 May 2020, amends a number of Acts administered by the Attorney General to implement further emergency measures as a result of the COVID-19 pandemic.

Western Australia, Northern Territory and Australian Capital Territory

At the time of preparing this article, Western Australia, Northern Territory and Australian Capital Territory have not introduced measures to allow for the witnessing and attesting of affidavits other than in person, such as by audio-visual link.

Federal Court

The Federal Court will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances allow.³

The Federal Court has issued a practice note, explaining the procedure, [Special Measures in Response to COVID-19](#) (SMIN-1) on 23 March 2020, updated 31 March. The Court accepts the filing of unsworn affidavits on the understanding that if required these will be affirmed when circumstances allow.

Conclusion

As requirements differ across jurisdictions, it is necessary to refer to current provisions and practice directions of the relevant Court and/or jurisdiction of the document to be executed.



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³ *Federal Court of Australia, (SMIN-1) contains information in '4. Signatures on documents and affidavits' accessed at https://www.fedcourt.gov.au/__data/assets/pdf_file/0004/62374/SMIN-1-31-March-2020.pdf*