

CHECKLIST FOR WITNESSING SIGNATURES AND CERTIFYING DOCUMENTS IN NSW

You have probably been asked at some point during your career as a legal practitioner to witness or certify documents outside of your employment. Care should be taken in these instances, as the execution of documents and witnessing of certain documents (like affidavits, Enduring Powers of Attorney) may be considered providing a 'legal service', and you need to make sure that you are appropriately authorised to do so.

Below are matters for legal practitioners to consider when asked to witness or certify a document in NSW.

Are you an approved witness or certifier?

Approved Certifier: The type of *certifier* required is determined by the entity that wants the certified copies. There is no legislation that stipulates how to certify a copy of a document and it is up to the organisation requesting the certified copy to decide who is acceptable to certify a copy- digital document or otherwise. If you need to get a document certified, you should ask the person that requested it if they have rules about who can certify it. Generally, certifying a document is a public service and would not be considered a legal service under the *Legal Profession Uniform Law (NSW) (LPUL)*.

Approved Witness: In contrast to certifying a document, the type of *witness* required for a document is usually prescribed by law.

If the entity requires an "Australian lawyer", you must be admitted. If it requires an "Australian legal practitioner", you must also hold a current practising certificate (and be covered by professional indemnity insurance).

If you have retired and not renewed your practising certificate, you would be an Australian lawyer but **not** an Australian legal practitioner.

Before witnessing a document, carefully consider whether in doing so you are providing a legal service. The definition of a 'legal service' is broadly defined in the LPUL and witnessing certain legal documents, such as an Enduring Power of Attorney, requires the approved witness to do more than merely sight the person signing the document.

In NSW, a witness to an Enduring Power of Attorney must attest to the fact that they:

- explained the effect of the Power of Attorney directly to the person making the appointment before it was signed
- were satisfied that the person appeared to understand the effect of the Power of Attorney, and
- are not an attorney appointed under the Power of Attorney

If the witness has doubts about the person's ability to understand what they are signing, they are required to take reasonable steps to confirm the person's mental capacity.

If there is any chance that witnessing a document may be construed as providing a legal service, carefully consider whether your category of, and the conditions on your practising certificate authorise you to do so.

Are you providing a legal service?

“**Legal services**” means work done or business transacted in the ordinary course of legal practice [[section 6](#) of the *Legal Profession Uniform Law (NSW) 2014 (LPUL)*].

Only a **qualified entity** can provide legal services. Section 10 of the LPUL prescribes that a person must not engage in legal practice unless they are a ‘**qualified entity**’.

‘**qualified entity**’ [section 6 of the LPUL] means, *either*

- Australian legal practitioner, which means an Australian Lawyer who is admitted, and has a practising certificate, or
- Law practice (sole practitioner, law firm, community legal service, incorporated legal practice or unincorporated legal practice)

If you wish to provide **legal services**, you can only do so if you have an Australian practising certificate, and if you are an Australian legal practitioner working in a law practice (whether as an employee or principal), you must also have professional indemnity insurance (**PII**) cover under an approved policy in New South Wales. Before you witness any document, consider whether doing so falls within the ambit of legal services, and if so, whether you are authorised and prepared to provide that legal service.

Even if the witnessing of a document is not considered to be a legal service, make sure the person clearly understands whether you are providing legal advice / services or not.

Be aware of the conditions on your Practising Certificate

If you hold a practising certificate subject to supervision, then the witnessing of certain documents that constitutes a legal service is also subject to supervision and must not be done on your own account.

If you do not hold a practising certificate, you cannot provide legal services.

What can an employed solicitor (government or in-house lawyer) witness or certify?

If you hold a practising certificate as a government lawyer (government legal practitioner) or in-house lawyer (corporate legal practitioner), you cannot provide advice or legal services outside your employment. As an employed lawyer you can only act for and sign off on documents that constitute a legal service for the organisation who is employing you.

What can a retired solicitor do?

If you wish to sign off on any document as a solicitor (including witnessing affidavits, Powers of Attorney, etc) you need to retain your practising certificate as a sole practitioner, or if you are signing off documents for a particular organisation only, you need a practising certificate as an employed, government or corporate lawyer for the organisation.

If you do not hold a practising certificate, you cannot provide legal advice – see above.

Statutory Declarations – who can witness?

Who is authorised to witness a statutory declaration will depend on the type of statutory declaration that is being given. There are Commonwealth and state and territory statutory declarations, and an ‘**approved witness**’ or ‘**authorised witness**’ is prescribed by the *Statutory Declarations Act 1959* (Cth) (in the case of Commonwealth statutory declarations) and the relevant state and territory Oaths Act (in the case of state and territory statutory declarations). Before witnessing a statutory declaration, you should check under the relevant piece of legislation whether you are an approved / authorised witness.

In NSW, an authorised witness must be a:

- justice of the peace
- notary public
- commissioner of the court for taking affidavits
- legal practitioner, i.e., an Australian lawyer who is granted a practising certificate under:
 - Part 3.3 of the Legal Profession Uniform Law (NSW) as applied in a participating jurisdiction; or
 - a law of a non-participating jurisdiction entitling the lawyer to engage in legal practice; or
- any person authorised to administer an oath.

See [sections 21](#) and [27](#) of the *Oaths Act 1900* (NSW) (**the Oaths Act**).

For Commonwealth statutory declarations, an approved witness must be:

- legal practitioner, with or without a practicing certificate
- A person is an approved witness if they are on the roll of:
 - the Supreme Court of a state or territory in Australia
 - the High Court of Australia as a legal practitioner

This applies even if they do not have a practising certificate.

See [section 7](#) of the *Statutory Declarations Regulations 2018* (Cth).

Statutory Declarations – who cannot witness?

You cannot witness your own statutory declaration, even if you are an approved / authorised witness.

A person who was an approved / authorised witness but has retired or changed to an occupation that is not listed /permitted is not an approved / authorised witness. For example, a retired teacher cannot witness a Commonwealth statutory declaration.

*This **does not apply** to someone who is on the roll of the Supreme Court or the High Court. They will be on the roll for life unless they have been removed.*

What if I am doing a favour for family or a friend?

There is no exception for family and friends, or where there is no fee charged.

If you wish to provide **legal services**, you can only do so if you have an Australian practising certificate as a Principal, including PII

You can provide such services either as:

- (i) an employee of the current law practice (which will have PII); or
- (ii) set up your own law practice (and take out his own PII) and provide such services as sole practitioner.

In the case of (i), the provision of legal services to a friend may not be permitted by your employer and you would need to get their consent.

In any event, the provision of legal services to friends and family is risky and may lead to unforeseen difficulties and conflicts. Please particularly note the Australian Solicitors' Conduct Rules – [Rule 4.1.4](#) (Compromise and professional independence) and [Rule 17](#) (independence – avoidance of personal bias).

Can I take an oath?

As the administration of oaths is a reserved activity, you must have a current practising certificate and not be interested in the declarant's business or represent them.

Please see the definition in the [Oaths Act](#) of who can take an oath which links to the definitions in LPUL.

Do not witness / certify anything that is not true and clear

Usually a witness can be anyone who:

- is 18 years or older
- knows the person whose signature they are witnessing or has taken reasonable steps to verify their identity
- isn't a party to the document
- if the document is a trust deed, isn't a beneficiary of the trust

If you do not see the person sign their signature, then you must not say that you have witnessed it, regardless of whether you know them and their signature. You should always sight the original before you certify a copy.

Can a document be witnessed remotely?

Part 2B of the Electronic Transactions Act 2000 (NSW), which is titled “Remote witnessing scheme”, provides a mechanism to allow witnessing of documents by audio visual link when those documents would otherwise need to be witnessed in the physical presence of a signatory.

NSW allows certain legal documents to be witnessed remotely – please see the [NSW Government Witnessing legal documents remotely](#) fact sheet and also [The Law Society Summary](#) (December 2021).

Can a digital document be certified?

There is no legislation that stipulates how to certify a copy of a document and it is up to the organisation requesting the certified copy to decide who is acceptable to certify a copy – digital document or otherwise. If you need to get a document certified, you should ask the person that requested it if they have rules about who can certify it.

Jurisdictions outside NSW

Each state and territory legislation may have different requirements for varying circumstances.

For more information, please contact the Law Society’s Regulatory Compliance unit at regulatory.compliance@lawsociety.com.au or call (02) 9926 0115.