

Modification orders ease restrictions on electronic signing

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With the emergency brought about by the COVID-19 pandemic and the issue of the Epidemic Preparedness (COVID19) Notice 2020, has come a huge upsurge in the use of electronic systems to sign legal documents, both unsophisticated, such as email, and sophisticated and secure, such as digital signing systems, as people scramble to find alternative ways to make documents they sign legally binding during this period of mandatory self-isolation.

Signatures made electronically have been legal for some time under the Contract and Commercial Law Act 2017 and before that, the Electronic Transactions Act 2002. Subject to certain conditions being met, in most situations they are given the same weight as paper-based written signatures. The key exceptions are wills, oaths and declarations, and powers of attorney. Legislation governing the signing and witnessing of these contemplates that the signing party is in the physical presence of the witness.

As the country moved to the Level 4 lockdown, it quickly became evident that some form of judicial or regulatory intervention was needed to allow signing of these sorts of documents to occur remotely. For people living alone, making or updating their wills requires two witnesses and this became impractical, if not impossible, whilst living in isolation. For people needing to swear oaths or make an affirmation or a statutory declaration for the purposes of Court proceedings and other applications, again, this became difficult under lockdown. The New Zealand Law Society in conjunction with Auckland barrister, Paul Collins and Perpetual Guardian, issued some helpful guidance on workarounds ([here](#) and [here](#)), with the caveat that parties asked to accept documents signed using these workarounds may still choose not to accept them as validly executed.

Regulatory relief came on Friday in the form of two modification orders made under the Epidemic Preparedness Act 2006, temporarily relaxing the rules for signing wills and oaths and declarations.

[Under the Epidemic Preparedness \(Wills Act 2007 – Signing and Witnessing of Wills\) Immediate Modification Order 2020](#), wills can be signed and witnessed via an audiovisual link while the Epidemic Notice is in force. Clause 4 temporarily modifies section 11 of the Wills Act 2007, mandating that it must be made clear on the face of a will that it has been signed and witnessed in this way because the Epidemic Notice is in force. A photograph or scanned copy of all copies of the will must be sent to one designated holder.

[The Epidemic Preparedness \(Oaths and Declarations Act 1957\) Immediate Modification Order 2020](#) temporarily allows oaths, declarations and affirmations to be administered or taken via an audiovisual or audio link. Again, the person witnessing the oath, declaration or affirmation is not required to physically sign the same document as the person making it. The order also allows organisations that receive statutory declarations to temporarily authorise some of their employees to take the declarations rather than requiring a lawyer, JP or other person usually authorised to do that.

But what about powers of attorney? Despite previous indications that regulatory changes could be made to allow powers of attorney to be signed remotely, as it currently stands, they remain specifically excluded under part 4 of the Contract and Commercial Law Act 2017. The logistics of signing powers of attorney are such that the person granting a power of attorney is required to assemble at least three other people – the attorney and two witnesses. This means that many of those people who may wish to grant a power of attorney, particularly those who are in ill health or may be close to losing capacity, will find this difficult, if not impossible, under lockdown. The New Zealand Law Society guidance remains the best practice in the meantime.

The exclusion of powers of attorney has another less obvious consequence. Many lending and security documents contain a form of power of attorney provision in favour of the bank. As banks scramble to get their heads around the logistical issues relating to the Level 4 lockdown, some are reluctant to accept documents that have not been signed in 'wet-ink', seemingly on the basis that their powers of attorney might be found to be invalid. This is, in turn, hampering the ability to complete financing transactions.

Isolation measures are likely to continue for some time, particularly for our more vulnerable people, even under a lower Alert Level. Modification orders similar to those made to allow the temporary relaxation of the signing rules for wills, oaths and declarations, could easily made for the signing of powers of attorney as well, and ease some of the logistical difficulties posed by the current emergency.

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