

Coronavirus (Scotland) (No.2) Bill

Briefing for Stage 2 - Amendment number 8

Execution of Documents etc.

- (1) The following requirements (however expressed) do not apply:
- (a) a requirement for a relevant person to be physically in the same place as another person when that person:
 - (i) signs or subscribes a document,
 - (ii) takes an oath, or
 - (iii) makes an affirmation or declaration,
 - (b) a requirement for another person to be physically in the same place as a relevant person when the relevant person signs or subscribes a document.

- (2) In this paragraph:

“relevant person” means:

- (a) a solicitor,
- (b) an advocate,
- (c) a notary public,

“requirement” means a requirement arising from an enactment or rule of law.

- (3) For the avoidance of doubt:

- (a) the requirements described by sub-paragraph (1)(a) include a requirement that may be fulfilled by the physical presence of a professional of a type not mentioned in the definition of “relevant person” as well as by a professional of a type that is (for example, it includes a requirement for the physical presence of a solicitor or a registered medical practitioner), but
- (b) sub-paragraph (1) only causes such a requirement not to apply in relation to a professional of a type that is mentioned in the definition of “relevant person”.

Effect

Amendment 8 makes changes to the current law to remove the requirement for a notary public, solicitor or advocate to be personally present when a person signs a document, takes an oath or makes a solemn affirmation or declaration.

It does not affect the ordinary law which requires witnesses to certain types of document such as wills or title deeds where there is no need for a solicitor or notary to be present.

This section will be limited by the validity of the coronavirus legislation.

Reason

Current requirements for execution of a notarial document.

This amendment will enable notaries and solicitors to authenticate the signing or execution of a document where they have not been personally present where the document is signed but have seen the signing remotely using video conference technology.

The Law Society supports this amendment and is grateful to the Scottish Government for lodging this amendment.

Any notarial document is currently required to be sworn or affirmed and then signed by the deponent in the presence of a notary. It is professional misconduct for a notary to send a document for signature and for the notary to “notarise” that signature without having seen the deponent sign or having that signature personally acknowledged.

In addition, section 9 of the Requirements of Writing (Scotland) Act 1995 provides for subscription of a document on behalf of a person who is blind or unable to write by a solicitor (or advocate). Section 9 (2) requires the subscription or signing to take place in the presence of the granter.

The current coronavirus social distancing measures and the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 are preventing notaries and solicitors from fulfilling these legal requirements.

Those requirements are impeding the signature of a number of documents including affidavits, affirmations, and statutory declarations. There is a clear public interest in allowing the personal presence rule to be relaxed and therefore allowing the use of video technology to enable these documents to be completed notwithstanding the current restrictions.

The use of video technology in these circumstances is increasing as a result of the current restrictions.

In England and Wales, The Faculty Office of the Master of the Faculties, who regulates notaries in England and Wales has recently issued COVID-19: Guidance on remote notarisation.

In the EU, whilst most countries adhere to the traditional method of execution of documents, in Latvia notaries can certify signatures via a national e-notary system, Estonian notaries have a system that operates through embassies and in the Netherlands, the Senate has approved an emergency bill on 21 April to allow notaries to temporarily execute deeds through an audiovisual connection.

In the USA, even though most US notaries do not have legal qualifications, it is worth noting that there have been some developments around remote online notarisation. On 23 April, the Massachusetts State legislature passed an act providing for remote notarisation. This is a temporary measure and will expire three business days after the termination of the current state of emergency in Massachusetts. Also, in the US Congress, the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020 (SECURE Notarization Act) if passed into law would authorise every US Notary to perform Remote Online Notarisation.