

Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation 2021

Explanatory notes for SL 2021 No. 28

Made under the

COVID-19 Emergency Response Act 2020

Oaths Act 1867

Powers of Attorney Act 1998

Property Law Act 1974

Succession Act 1981

General Outline

Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation 2021

Authorising law

Oaths Act 1867 in reliance on sections 8 and 9 of the COVID-19 Emergency Response Act 2020

Powers of Attorney Act 1998 in reliance on sections 9 of the COVID-19 Emergency Response Act 2020

Property Law Act 1974 in reliance on section 9 of the COVID-19 Emergency Response Act 2020

Succession Act 1981 in reliance on sections 9 of the COVID-19 Emergency Response Act 2020

Policy objectives and the reasons for them

The policy objectives of the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation 2021* (the Amendment Regulation) are to clarify the intended operation of the modified requirements or arrangements for the making, signing and witnessing of wills, enduring documents and general powers of attorney under the *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Documents and Oaths Regulation), made in reliance on sections 8 and 9 of the *COVID-19 Response Act 2020* (COVID-19 Response Act).

COVID-19 Emergency Response Act 2020

On 29 January 2020, the Minister for Health and Minister for Ambulance Services declared a public health emergency under section 319 of the *Public Health Act 2005* due to the outbreak of COVID-19 (COVID-19 emergency).

The *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act) received assent and commenced on 23 April 2020. Section 2 of the COVID-19 Response Act provides that the main purposes of the Act include protecting the health, safety and welfare of persons affected by the COVID-19 emergency.

The COVID-19 Response Act includes additional regulation-making provisions to make extraordinary regulations under affected Acts. Under section 5, a Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation only if satisfied it is necessary for a purpose of the COVID-19 Response Act. Under section 9(2), an affected Act is taken to include a power to make a regulation as provided in section 9.

Part 3 of the COVID-19 Response Act relates to reducing physical contact between persons.

Section 8 of the COVID-19 Response Act provides an additional regulation-making power in relation to requirements or permissions under an Act for a person to physically attend a place or meeting or for an entity to call or hold a meeting for a particular purpose or a particular matter. This section enables a regulation under any Act to make provision about a wide variety of matters across many Acts which require or permit an attendance or meeting, including appearance before a person to take an oath.

Section 9 provides an additional regulation-making power for particular matters (each a relevant matter) relating to documents. A relevant matter includes but is not limited to the signing and witnessing of documents; the certification of matters by signatories or witnesses; and the making of a document in a particular way or form.

Section 9(3) of the COVID-19 Response Act enables a regulation under any Act to make provision about a relevant matter required or permitted under then Act, or required or permitted under a common law rule, by—

- (a) prescribing modified requirements or arrangements; or
- (b) suspending requirements or arrangements.

Section 9(4) provides that a regulation under the Act may also make provision about a matter incidental to a relevant matter mentioned.

On 14 May 2020, the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020* (Wills and Enduring Documents Regulation), was made by the Governor in Council. The Wills and Enduring Documents Regulation provided modified arrangements in relation to the making, signing and witnessing of wills, enduring powers of attorney and advance health directives (the later two known as enduring documents).

On 21 May 2020, the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* (Wills and Enduring Documents Amendment Regulation) was made by the Governor in Council. The Wills and Enduring Documents Amendment Regulation prescribed modified arrangements or requirements, which apply in addition to existing requirements, for the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, particular mortgages and general powers of attorney. It also changed the name of the Wills and Enduring Documents Regulation to the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020*.

Achievement of policy objectives

The *Powers of Attorney Act 1998* (POA) makes an important distinction between the valid making of enduring powers of attorney (EPA) and advance health directives (AHD) (enduring documents) and the attorney's exercise of the powers conferred by the documents. Section 44(8) of the POA requires an attorney to accept an appointment by signing the EPA or AHD after it has been validly made. The enduring document is effective in relation to an attorney only if the attorney has accepted the appointment by signing the enduring document.

The Documents and Oaths Regulation prescribes modified arrangements in relation to the way that the document is validly made (by the signatory and witness). It does not modify or displace other existing requirements in legislation relating to the making or use of these documents.

The Amendment Regulation achieves the policy objectives by amending the Documents and Oaths Regulation to clarify that if an enduring document is made in accordance with the regulation, an attorney appointed by the enduring document is still required to sign the document to accept their appointment before the document becomes effective in relation to the attorney. This requirement applies to all enduring documents (including enduring documents made in accordance with the Documents and Oaths Regulation) by operation of section 44(8) of the *Powers of Attorney Act 1998*. To remove any uncertainty about whether the Documents and Oaths Regulation might have displaced that requirement, the Amendment Regulation replicates the requirement in the Documents and Oaths Regulation and also clarifies that the attorney can sign either the originating version or official version of the document.

The Amendment Regulation also achieves the policy objectives by amending the Documents and Oaths Regulation to clarify that a special witness certificate is required to be kept with the official version and originating version of the document once the document has been made, signed and witnessed in accordance with the regulation and given to relevant person (as defined in section 20). This clarification helps to resolve any actual or perceived inconsistency between sections 21(4) and 20(2) of the Documents and Oaths Regulation to reassure special witnesses that there is no need for double handling of the original special witness certificate (for example, it is not necessary for the solicitor to send the original special witness certificate to the client for the client to return to the solicitor for keeping in safe custody).

Consistency with policy objective of authorising law

The Amendment Regulation is consistent with the policy objectives of the authorising laws.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is not inconsistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives.

Benefits and costs of implementation

Implementation will help to resolve uncertainty about the operation of the Documents and Oaths Regulation. Any costs associated with the Amendment Regulation will be met from existing agency resources.

Consistency with fundamental legislative principles

The Amendment Regulation is consistent with fundamental legislative principles.

Consultation

The Public Trustee of Queensland, the Public Guardian and the Public Advocate, the Queensland Law Society and the Bar Association of Queensland were consulted. Stakeholders support the amendments to the modified arrangements provided for under the Amendment Regulation.

The amendments were assessed by the Department of Justice and Attorney General (DJAG) in accordance with *The Queensland Government Guide to Better Regulation* as being machinery in nature and falling within exclusion category (g). DJAG considers the Regulation to exempt from further regulatory impact analysis. The Office of Best Practice Regulation was therefore not consulted about the Regulation.