

Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation (No. 2) 2021

Explanatory notes for SL 2021 No. 55

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 (No. 2) 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 (No.2) 2021* (the Amendment Regulation) are to expire on 1 July 2021 the modified arrangements in relation to the making, signing or witnessing of wills and enduring documents under the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* (Documents and Oaths Regulation), except for the modified arrangements to enable nurse practitioners, in addition to doctors, to complete a certificate in an advance health directive (AHD) stating that the signatory, at the time of making the AHD, appeared to have the capacity necessary to make it.

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 latter 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*.

On 13 April 2021, the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation 2021* was made by the Governor in Council 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 Documents and Oaths Regulation.

Achievement of policy objectives

On 1 July 2021, the Amendment Regulation will expire all of the modified arrangements in relation to the making, signing or witnessing of **wills and enduring documents** under the Documents and Oaths Regulation, except for the modified arrangements to enable nurse practitioners, in addition to doctors, to complete a certificate in an AHD stating that the signatory, at the time of making the AHD, appeared to have the capacity necessary to make it.

This means that:

- a will signed by a signatory or substitute signatory on or after 1 July 2021 will need to be made, signed and witnessed under the ordinary law;
- an enduring power of attorney signed by a signatory or substitute signatory on or after 1 July 2021 will need to be made, signed and witnessed under the ordinary law; and
- an AHD signed by a signatory or substitute signatory on or after 1 July 2021 will need to be made, signed and witnessed under the ordinary law (but nurse practitioners can continue to complete the certificate in an AHD until the expiry of the Document and Oaths Regulation (currently 30 September 2021)).

For clarity, the Amendment Regulation does not affect the modified arrangements in relation to the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, particular mortgages and general powers of attorney under the Documents and Oaths Regulation.

Consistency with policy objectives 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

While the Documents and Oaths Regulation allowed for modified arrangements for the making of wills and enduring documents during some periods of the COVID-19 emergency, stakeholders that were consulted were in general agreement that the modified arrangements for these documents were no longer needed in the current circumstances, particularly given these documents are associated with significant risks of fraudulent and coercive behaviour. The expiry of the modified arrangements for wills and enduring documents in the current circumstances will reduce the risk of fraudulent or coercive behaviour in the making of these important documents.

It is not expected that the Amendment Regulation will impose any significant costs on agencies or the community.

Consistency with fundamental legislative principles

The Amendment Regulation is consistent with fundamental legislative principles.

Consultation

The Office of the Public Guardian (OPG), the Office of the Public Advocate (OPA) and the Queensland Law Society (QLS) were consulted on the proposal to expire certain modified arrangements for the making, signing and witnessing of wills and enduring documents. QLS supports the proposal and OPG and OPA raised no objection.

The OPA and OPG raised no objections to the proposal to continue to allow nurse practitioners, in addition to doctors, to complete a certificate in an AHD.

The Amendment Regulation was assessed by the Office of Best Practice Regulation (OBPR). OBPR determined that no further regulatory impact analysis under the *Queensland Government Guide for Better Regulation* is required as the proposal to end the temporary arrangements for wills and enduring documents is unlikely to have significant adverse impacts.