

Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) (Transitional) Regulation 2021

Explanatory notes for SL 2021 No. 56

Made under the

COVID-19 Emergency Response Act 2020
Powers of Attorney Act 1998
Succession Act 1981

General Outline

Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) (Transitional) Regulation 2021

Authorising law

Powers of Attorney Act 1998 in reliance on section 25 of the COVID-19 Emergency Response Act 2020
Succession Act 1981 in reliance on section 25 of the COVID-19 Emergency Response Act 2020

Policy objectives and the reasons for them

The policy objective of the *Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) (Transitional) Regulation 2021* (the Transitional Regulation) is to provide transitional arrangements for the completion of wills and enduring documents following the expiry of relevant provisions under the *Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) Regulation 2020* (Documents and Oaths Regulation) on 1 July 2021 by operation of the *Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) Amendment Regulation (No.2) 2021* (Amendment Regulation).

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 COVID-19 Response Act may also make provision about a matter incidental to a relevant matter mentioned.

Section 25 provides a regulation-making power for transitional matters.

Section 25(1) provides that the transitional regulation may make provision where the COVID-19 Response Act or an affected law does not make sufficient provision in order to allow or facilitate the doing of anything to achieve the transition from the operation of an affected law, as modified by a COVID-19 law, to the operation of the affected law after the expiry of the COVID-19 law.

A transitional regulation may apply retrospectively to a day no earlier than the day the COVID-19 law expires and expires two years after the day the COVID-19 law expires.

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* (Documents and Oaths Regulation).

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.

Amendment Regulation

On 1 July 2021, the Amendment Regulation will expire 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.

Achievement of policy objectives

The Transitional Regulation provides transitional arrangements for the completion of wills and enduring documents following the expiry of relevant provisions under the Documents and Oaths Regulation on 1 July 2021 by operation of the Amendment Regulation.

Documents and Oaths Regulation

The Transitional Regulation will allow incomplete documents (wills and enduring documents) made under the modified provisions of the Documents and Oaths Regulation to be finalised if they have been started but not finished by 1 July 2021 when the Amendment Regulation commences.

The Documents and Oaths Regulation permits wills and enduring documents to be validly made (including signed, witnessed and confirmed) over a period of time.

For wills and enduring documents, the signatory or substitute signatory can transmit the document to the witness for the witness to confirm as soon as practicable after witnessing it, which may or may not be the day on which the document is signed by the signatory and witnessed. This means that the witness may confirm on a later date that they witnessed the signing of the document.

A special witness who witnesses the signing of a will or enduring document by audio visual (AV) link must sign a certificate that must be kept with the document. The signing of the special witness certificate may confirm on a later date that the special witness witnessed the signing of the document.

The Documents and Oaths Regulation provides that after a witness confirms a will or enduring document by AV link, the witness must give the document or a true copy of the document to a relevant person (for example, a person that the testator or principal directs be given the document). In some cases, there may be a delay in the witness complying with this requirement. For example, the signatory or substitute signatory and witness may sign the document before 1 July 2021, but the witness may give the document to the relevant person after 1 July 2021.

Given the scenarios outlined above, it is possible that a will or enduring document may be started (i.e. signed and witnessed) but not finished (in accordance with the requirements of the Documents and Oaths Regulation) by 1 July 2021 when the Amendment Regulation expires the relevant provisions under the Documents and Oaths Regulation.

The Transitional Regulation will provide that if the will or enduring document has been signed by the signatory or substitute signatory and witnessed according to the Documents and Oaths Regulation, prior to the Amendment Regulation, then the document may be completed in accordance with the provisions of the Documents and Oaths Regulation that were in existence prior to the commencement of the Amendment Regulation.

The Transitional Regulation also clarifies that if an AHD contains a certificate signed by a nurse practitioner before 1 July 2021, the signatory or substitute signatory and witness can sign the document on or after 1 July 2021 in accordance with the requirements under the *Powers of Attorney Act 1998*.

By operation of section 25 of the COVID-19 Response Act, the Transitional Regulation will expire 2 years after the commencement of the Amendment Regulation (the Amendment Regulation will commence on 1 July 2021). This means that a document started but not finished before 1 July 2021 must be completed by 1 July 2023, noting that the Documents and Oaths Regulation requires the will or enduring document to be confirmed as soon as practicable (see section 19(2) of the Documents and Oaths Regulation).

However, an attorney appointed by an enduring document made in accordance with the modified arrangements can sign the document to accept their appointment at any time in the future after the expiry of the modified arrangements (there is no time limit to accept an appointment).

The Transitional Regulation only applies to documents made under the Documents and Oaths Regulation and does not impact wills or enduring documents made under the ordinary law (that is, where they are witnessed in the physical presence of the signatory or substitute signatory).

The Transitional Regulation will commence immediately after the commencement of the Amendment Regulation on 1 July 2021 (see section 2 of the Amendment Regulation).

The Transitional Regulation is declared a transitional regulation for the purposes of the COVID-19 Response Act.

For clarity, the Transitional 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 objective of authorising law

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

Inconsistency with policy objectives of other legislation

The Transitional 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

The Transitional Regulation will provide certainty for persons who start making a will or enduring document under the Documents and Oaths Regulation before the expiry of the modified arrangements on 1 July 2021 that the document can be completed after 1 July 2021 and still be valid and will avoid documents being invalidated simply because certain final steps were not completed.

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

Consistency with fundamental legislative principles

The Transitional Regulation is consistent with fundamental legislative principles.

Consultation

External stakeholders were not consulted in relation to the Transitional Regulation as the regulation only relates to transitional matters and is machinery in nature.

The Transitional Regulation was 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 Transitional Regulation.