

# Justice Legislation (COVID-19 Emergency Response–Wills and Enduring Documents) Regulation 2020

## Human Rights Certificate

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Yvette D’Ath MP, Attorney-General and Minister for Justice and Leader of the House provide this human rights certificate with respect to the *Justice Legislation (COVID-19 Emergency Response–Wills and Enduring Documents) Regulation 2020* (the Regulation), an extraordinary regulation made under the *Powers of Attorney Act 1998* and the *Succession Act 1981* in reliance on section 9 of the *COVID-19 Emergency Response Act 2020*.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

## Overview of the Subordinate Legislation

### *COVID-19 Emergency Response Act 2020*

On 22 April 2020, the Queensland Parliament’s Legislative Assembly passed the *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act). The 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 if satisfied it is necessary for a purpose of the Act. Under section 9(2), an affected Act is taken to include a power to make a regulation as provided in section 9.

### **Making and associated use of documents, meetings and physical presence requirements**

Part 3 of the COVID-19 Response Act relates to reducing physical contact between persons. Section 9 provides an additional regulation-making power for particular matters (each a relevant matter) relating to documents. A *relevant matter* means any of the following-

- (a) the signing of a document by a person;
- (b) the witnessing of signatures;
- (c) the certification of matters by signatories, witnesses or other persons involved in the making of a document;
- (d) the verification of the identity of individuals;
- (e) the attestation of a document;
- (f) the production of a document by a person;

- (g) the making of a document in a particular form or way;
- (h) the following of particular processes for making a document;
- (i) the making or signing of a document or certification of a matter by a particular person or class of persons;
- (j) the inclusion of particular content in a document;
- (k) the recording of information;
- (l) the filing, lodgement, giving or service of a notice or other document;
- (m) the sighting of a document by a person for a particular purpose;
- (n) the publication or display of a notice or advertisement for a particular purpose; and
- (o) the retention of documents or information.

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 contract or 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.

The Regulation provides modified arrangements, which will apply in addition to existing requirements, for making, signing and witnessing **wills and enduring documents** (enduring powers of attorney (EPAs) and advance health directives (AHDs)). The modified arrangements will ensure that requirements requiring physical contact between persons when making, signing or witnessing these documents can be satisfied during the COVID-19 emergency.

Allowing for altered arrangements for making documents such as wills, EPAs and AHDs to be witnessed, for example using an Audio-Visual link (AV link), will mean that these important documents associated with end of life decision making and estate planning can continue to be made even with social distancing requirements.

#### *No change to existing witnessing requirements*

Importantly, the Regulation will not impact existing witnessing requirements or safeguards but will provide an additional option for persons to make a will or enduring document who are not able to do so through existing arrangements due to COVID-19. In this regard, the Regulation will promote and protect certain rights (including the right to life, discussed below).

#### *Regulation expiry*

The use of alternative witnessing arrangements is also strictly time limited, noting that the Regulation will end when the COVID-19 Response Act expires on 31 December 2020.

## **Human Rights Issues**

### **Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)**

I consider the following human rights to be relevant to the Regulation–

- right to recognition and equality before the law (section 15 of the *Human Rights Act 2019*);
- privacy and reputation (section 25 of the *Human Rights Act 2019*);

- property rights (section 24 of the *Human Rights Act 2019*);
- protection of families and children (section 25 of the *Human Rights Act 2019*);
- right to life (section 16 of the *Human Rights Act 2019*);
- right to health services (section 37 of the *Human Rights Act 2019*); and
- protection from torture and cruel, inhuman and degrading treatment (section 17 of the *Human Rights Act 2019*).

The Regulation protects several human rights by enabling wills and enduring documents to continue to be made without breaching social distancing requirements associated with the COVID-19 emergency.

The modified arrangements protect the right to life by avoiding the need for persons, including persons at greatest risk of danger to their health from the virus, to attend in person in order to make a will or enduring document. The making of wills and enduring documents during the COVID-19 emergency will promote:

- the right to property, by enabling persons to manage or distribute their property according to their wishes;
- the protection of families and children, by enabling persons to provide financial support for their dependants;
- right to life, by enabling persons to make decisions in relation to life-sustaining treatments or withdrawal of life-sustaining treatments; and
- right to health services, by enabling persons to make decisions in relation to access to health services relating to their health care.

The Regulation also provides that nurse practitioners, in addition to doctors, are permitted to sign the doctor's certificate in an AHD, confirming that the principal has capacity to make the AHD. This will alleviate pressures on general practitioners during the public health emergency and promote the right to privacy, right to self-determination, freedom from non-consensual medical treatment and personal inviolability because it will enable people to make AHDs which provide for how decisions are to be made about their own medical treatment.

However, while the Regulation will protect and promote these rights it is possible that a number of rights could also be limited by the modified arrangements, for example in the event that there is fraudulent or coercive behaviour involved in the making of a will or enduring document. Potential limitations on rights are discussed below.

### **Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

#### (a) the nature of the right

**Right to recognition and equality before the law** (*Human Rights Act 2019*, section 15): this right is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination.

The right to equality and recognition is engaged where the right to access a service (such as the services provided by a witness) is indirectly restricted to some sectors of society and not others. The Regulation provides modified arrangements for the signing, witnessing and making of wills and enduring documents through an AV link. These arrangements may disproportionately impact vulnerable groups, for example where language and communication barriers are exacerbated by electronic communication or where access to an interpreter can no longer be provided.

The Regulation also restricts who is eligible to witness documents (*special witnesses*) or sign documents on behalf of the signatory (*substitute signatories*) where an AV link is used. These arrangements may limit access to the modified arrangements if a special witness or substitute signatory is not available (for example, persons living in regional or remote communities).

**Right to life** (*Human Rights Act 2019*, section 16): the right to life protects the lives of all persons and includes the right not to be arbitrarily deprived of life. The right imposes both negative and positive obligations on the State

An EPA or an AHD which has been improperly procured could also limit this right as it could be used to make decisions in relation to life sustaining treatments or withdrawal of life sustaining treatments, without a person’s consent or in a way that is detrimental to the adult’s rights and interests.

**Right to privacy and reputation** (*Human Rights Act 2019*, section 25): the underlying value of the right to privacy is the ‘protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.’ The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The modified arrangements under the Regulation may, in some cases, make it more difficult to maintain the confidentiality of private discussions between persons involved in the witnessing process (for example, individuals may have a limited ability to maintain privacy if a person is only able to remotely report from a non-soundproof place where others can hear them, such as a boarding house or other public place).

The nature of audio/visual communication increases the risk that the communication may be intercepted or recorded without the consent of a person involved in the witnessing process. The requirement for the document to be given (for example, by email or post) to the witness for signing or a relevant person increases the potential risk for the document to be accessed by others without the consent of persons involved. As noted above, the modified arrangements may also increase the potential for identity theft.

Where a modified arrangement is used, the witness must keep a statement which may contain confidential information, including the steps taken by the witness to verify the signatory’s identity and the process followed for signing and witnessing the document.

**Property rights** (*Human Rights Act 2019*, section 24): property rights protect the right of all persons to own property (alone or with others) and provides that people have a right not be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

The modified arrangements may increase the risk that a document such as a will or EPA could be procured improperly, including as a result of undue influence, and be used to deal with an adult's property or financial assets without the adult's consent or in a way that is detrimental to the adult's interests.

**Protection of families and children** (*Human Rights Act 2019*, section 25): the right to the protection of families and children recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. The right also protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child's best interests.

An EPA or will which has been improperly procured could be used to make decisions without the consent of the adult, to deprive a child or a family member of the adult who made the document of a legitimate claim to the adult's estate or financial support from the adult's income or assets (for example, to deprive a dependant child of financial support).

**Right to health services** (*Human Rights Act 2019*, section 37): the right to health services ensures human dignity and the enjoyment of other human rights. Importantly, the right to health services under the *Human Rights Act 2019* is a right to access health services (not a right to health, or to health services). Health services has a broad meaning and the *Human Rights Act 2019* also protects the right not to be refused emergency medical treatment.

An enduring document which has been improperly procured could be used to make decisions in relation to access to health services (including limiting access to health services), without the person's consent, or in a way that may be detrimental to the person's rights and interests.

**Protection from torture and cruel, inhuman and degrading treatment** (section 17 of the *Human Rights Act 2019*): the right to protection from torture and cruel, inhuman and degrading treatment prohibits three distinct types of conduct: torture; cruel, inhuman or degrading treatment or punishment; and medical or scientific experimentation or treatment without consent.

An enduring document which has been improperly procured could be used to make decisions in relation to medical treatment (including limiting access medical treatment), without the person's consent or in a way that is detrimental to the person's rights and interests.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the Regulation is to broaden the method by which wills and enduring documents can be made, signed and witnessed to avoid the need for persons to be physically present and thus avoid the risks to health and life arising from COVID-19. By broadening the method by which these documents can be witnessed it is possible that the Regulation could potentially have consequences which could limit human rights, such as third parties overhearing private discussions or accessing confidential communications or documents, or potentially a greater risk of fraud in the making of these documents. The purpose of the Regulation is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the provisions if enacted, and the purpose, including whether the limitation helps to achieve the purpose

The Regulation will achieve the purpose by allowing wills and enduring documents to be made, signed and witnessed safely while respecting social distancing requirements. Stakeholders in Queensland are urgently seeking regulatory changes to enable these important documents to continue to be witnessed despite the social distancing requirements.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

To overcome the need for persons to sign or witness documents in the physical presence of others there are no less restrictive and reasonably available alternatives other than to allow witnessing of documents via an AV link. Where modified arrangements are used, the Regulation provides that they are subject to strict safeguards to ensure that the rights and liberties of the individuals are protected, to mitigate against the risk that improper or fraudulent documents will be made, in particular for vulnerable persons.

To minimise potential risks associated with using the modified arrangements, **the Regulation** will, in addition to existing witness eligibility requirements under the *Succession Act 1981* and *Powers of Attorney Act 1998*, further restrict who may witness a document using an AV link to a category of special witnesses, defined as:

- an Australian legal practitioner; a Justice of the Peace (JP) or Commissioner for Declarations (CD) approved by the chief executive; a JP/CD employed by a law practice or a notary public;
- for a will, prepared by the public trustee, an employee of the public trustee; and
- for an enduring document prepared by the public trustee, a JP or CD employed by the public trustee.

These types of witnesses are more likely to have access to and be familiar with using an AV link for the modified arrangements. This restriction will also allow communication channels to be secured and monitored from unwanted intrusion and to preserve confidentiality, as the persons eligible to witness documents (e.g. lawyers and JPs) using the alternative witnessing arrangements are subject to obligations to protect confidentiality. These restrictions will protect against potential limitations on the right to privacy which could otherwise result from the altered witnessing arrangements.

In addition, persons who witness these documents will be required to satisfy themselves of particular matters, including the identity of the signatory and that the signatory is making the document freely and voluntarily. Special witnesses must also sign a certificate that is kept with the document and confirms a number of matters, including the steps the witness took to verify the identity of the signatory and document and process followed for signing and witnessing the document which they must then record in a certificate and keep with the document.

The Regulation will also restrict who may sign on behalf of a signatory as substitute signatory for documents made in accordance with the Regulation. In addition to existing exclusions that apply under the law, a substitute signatory cannot be:

- for a will, an executor or beneficiary or person witnessing the will (or a relation of an executor or beneficiary); or
- for an enduring document, an attorney of the signatory or person witnessing the document (or a relation of the attorney);
- a person witnessing the document.

In addition, if the substitute signatory is not physically present with the signatory, then the substitute signatory must be an Australian legal practitioner or public trustee employee.

The purpose of these limitations is to facilitate alternative witnessing arrangements and to ensure via an AV link that the signatory is not being subject to undue influence to make the document, that the same document that is signed by the signatory is the one witnessed and that the principal has capacity to make the document over an AV link.

To ensure that only persons who are qualified to make capacity assessments and to certify the matters required in the doctor's certificate in an AHD, the Regulation limits those eligible to sign the certificate to nurse practitioners. Allowing nurse practitioners, in addition to doctors to sign the certificate, will allow vulnerable persons such as those who may be subject to home confinement or who may have difficulty obtaining timely access to a doctor to make an AHD.

These safeguards will protect against the fraudulent or improper procurement of documents that limit a person's rights as discussed above, including rights to property or protections of family or children, which may be impacted by a will or EPA, and will also protect against the fraudulent or improper use of documents to make decisions about life sustaining treatments or the withdrawal of life sustaining treatments that prolong or hasten the end of the person's life, which could otherwise limit rights to life, obtaining of medical treatment without consent, and access to health services.

To ensure the alternative arrangements only apply for the length of time that social distancing is required the Regulation will expire on 31 December 2020, although all documents made using the alternative arrangements will have ongoing effect.

- (e) The balance between the importance of the purpose of the provisions, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance the need to provide flexible alternative arrangements to allow witnessing of documents via audio/visual communication is considered to outweigh any impact on a person's human rights identified above, including rights to recognition and equality before the law, rights to privacy. The Regulation will have a positive impact for some persons who would otherwise be unable or unwilling to access in person witnessing services because of health and safety concerns, including persons in quarantine, to have important documents prepared and witnessed using alternative witnessing arrangements.

Any other relevant factors

Nil.

## Conclusion

I consider that the Regulation is compatible with the *Human Rights Act 2019*. To the extent that the Regulation does limit, restrict or interfere human rights, the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice  
Leader of the House