

Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment 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, Stirling Hinchliffe MP, Acting Attorney-General and Minister for Justice and Acting Leader of the House, provide this human rights certificate with respect to the *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* (the Amendment Regulation), an extraordinary regulation made under the *Oaths Act 1867* (Oaths Act), *Powers of Attorney Act 1998*, *Property Law Act 1974* and *Succession Act 1981* in reliance on sections 8 and 9 of the *COVID-19 Emergency Response Act 2020*.

In my opinion, the Amendment 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 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;
- (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 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 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.

*Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents)
Regulation 2020*

On 14 May 2020, the Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020 (Wills and Enduring Documents Regulation), which prescribes modified arrangements or requirements, which will apply in addition to existing requirements, for the making, signing and witnessing of wills and enduring documents, was made by the Governor in Council.

The Amendment Regulation amends the Wills and Enduring Documents Regulation to provide modified arrangements for the making of **affidavits, oaths, statutory declarations, deeds, particular mortgages and general powers of attorney** (collectively referred to as ‘**documents**’) to reduce physical contact between persons during the COVID-19 emergency. 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.

Affidavits, oaths, affirmations, statutory declarations, particular mortgages and general powers of attorney

The *Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020* (the Amendment Regulation) amends the Wills and Enduring Documents Regulation to prescribe the following modified arrangements.

Affidavits

For **affidavits** the Amendment Regulation:

- provides that a requirement under the *Oaths Act 1867* or another law for the presence of a witness, signatory, substitute signatory or other person in relation to the making, signing or witnessing of an affidavit is taken to be satisfied if:
 - the witness, signatory or other person is present by **audio visual (AV) link**;
 - the signatory’s oath or affirmation for the declaration is administered by a **special witness** (as currently defined in section 5 of the Wills and Enduring Documents Regulation); and
 - the making, signing or witnessing of the affidavit is carried out in accordance with Part 4 of the Wills and Enduring Documents Regulation;
- allows an affidavit to be made in the **form of an electronic document** if it is made, signed and witnessed in accordance with Part 4 of the Wills and Enduring Documents Regulation.

The **affidavit’s jurat** must state the document was made or signed electronically (if applicable), made, signed and witnessed in accordance with this regulation and acknowledge that knowingly making a false statement in the affidavit may be an offence punishable by imprisonment.

Statutory Declarations

For **statutory declarations** the Amendment Regulation:

- expands the list of people who can take a statutory declaration in the normal way (i.e. in person with wet ink on paper) to match the list of people who can take a Commonwealth statutory declaration (under section 7 of the *Statutory Declarations Regulation 2018 (Cwth)*);
- provides that a requirement under the *Oaths Act 1867* or another law for the presence of a witness, signatory, substitute signatory or other person in relation to the making, signing or witnessing of a statutory declaration is taken to be satisfied if:
 - the witness, signatory or other person is present by **AV link**;

- the signatory’s oath or affirmation for the declaration is administered by a **special witness** (as currently defined in section 5 of the Wills and Enduring Documents Regulation); and
 - the making, signing or witnessing of the declaration is carried out in accordance with Part 4 of the Wills and Enduring Documents Regulation;
- allows a statutory declaration to be made in the form of **an electronic document** if it is made, signed or witnessed in accordance with Part 4 of the Wills and Enduring Documents Regulation.

The declaration must include **a statement** that the document was made, signed or witnessed under the modified requirements or arrangements under the regulation and acknowledge that knowingly making a false statement in the affidavit may be an offence punishable by imprisonment.

Oaths

For **oaths** the Amendment Regulation provides that a requirement for the presence of an authorised person (i.e. a person authorised by law to administer the oath or affirmation) in relation to a person’s oath or affirmation is taken to be satisfied if the authorised person is present by **AV link**;

This applies to all oaths or affirmations under the *Oaths Act 1867* or another law (except for an oath or affirmation administered or made in relation to an affidavit under new Part 3A inserted by the Amendment Regulation, a declaration under new Part 3B inserted by the Amendment Regulation or oaths of office and oaths of allegiance).

Deeds

For **deeds** the Amendment Regulation:

- removes the requirements for a deed to be made on paper or parchment;
- allows a deed to be made in the form of **an electronic document**;
- removes a requirement for a deed to be sealed or stated to be sealed;
- removes a requirement for a corporation to use a seal or common seal to sign a deed;
- removes a requirement for a deed signed by an individual to be witnessed**;
- provides that a corporation may sign the deed in a way consistent with the *Corporations Act 2001 (Cth)*, as amended by the Corporations (Coronavirus Economic Response) Determination (No. 1) 2020 that is, it may be signed by:
 - two directors of the corporation;
 - one director and one secretary of the corporation; or
 - for a corporation that has only one director who is also the secretary of the corporation
 - that director; or
 - a duly authorised agent of the corporation.
- allows a deed to be signed by or for an individual or a corporation by the signing of counterparts or true copies. Those counterparts need to contain the same content but do not need to contain the signatures of any other person signing the document.

The deed must include a **conspicuous statement** that the instrument is a deed.

General Powers of Attorney

For **general powers of attorney**, the Amendment Regulation will:

- provide that where a law requires a general power of attorney made by an **individual** to be witnessed, a requirement for the presence of a witness, signatory, substitute signatory or other person in relation to the making, signing or witnessing of a general power of attorney is taken to be satisfied if:
 - the witness, signatory or other person is present by **audio visual (AV) link**;
 - the signing of the general power of attorney is witnessed by a **special witness** (as currently defined in section 5 of the Wills and Enduring Documents Regulation); and
 - the making, signing or witnessing of the general power of attorney is carried out in accordance with part 4 of the Wills and Enduring Documents Regulation;
- provide that a general power of attorney made by a corporation may be signed in accordance with the modified signage arrangements for corporations with respect to deeds (see above).

The Amendment Regulation does not remove a requirement under another law for a general power of attorney to be witnessed. If witnessing is required, it may be witnessed using the modified arrangements under the Amendment Regulation.

Particular Mortgages (lodged under the Electronic Conveyancing National Law)

For **particular mortgages (lodged under the Electronic Conveyancing National Law (ECNL))**, the Amendment Regulation provides that a mortgage that is held by a mortgagee on the same terms as the mortgage that is lodged for electronic conveyancing, as required by the participation rules under the ECNL, can be electronically signed and does not need to be witnessed, as long as it complies with section 11 of the *Property Law Act 1974*. This enables electronic signature of mortgage documents that are required before electronic conveyancing to be used for a transaction.

While the Amendment Regulation will protect rights by facilitating the making of important documents, such as deeds, during the COVID-19 emergency, it is possible that a number of rights could also be limited by the modified arrangements, for example in the event that an unwitnessed deed is procured for improper or fraudulent purposes.

Regulation expiry

The use of these modified arrangements is also strictly time limited, noting that the Amendment 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 Amendment 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 a fair hearing (section 31 of the *Human Rights Act 2019*);
- rights in criminal proceedings (section 32 of the *Human Rights Act 2019*); and
- children in the criminal process (section 33 of the *Human Rights Act 2019*).

The Amendment Regulation protects several human rights by enabling 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 document.

The modified arrangements protect the right to recognition and equality before the law, the right to a fair hearing, rights in criminal proceedings and children in the criminal process, by providing alternative arrangements for making documents, in circumstances where a person is unable to physically attend ‘in person’ to make or witness a document or where a requirement to be physically present would put at risk a person’s health or wellbeing.

The Amendment Regulation also expands the list of eligible persons before whom a statutory declaration may be made and remove the requirement for a deed for an individual to be witnessed. These modified arrangements will facilitate the making of documents (such as affidavits that may be used to adduce evidence) which are required for both criminal and civil proceedings.

While the Amendment Regulation will protect and promote the rights identified above, 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 or witnessing of a document, despite the safeguards contained in the Amendment Regulation, or where because of the modified arrangements, the document maker does not fully appreciate the consequences of making a false statement or declaration under oath.

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 Amendment Regulation provides modified arrangements for the signing, witnessing and making of documents (including electronic versions of the document) 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.

It is possible that individuals, for example persons whose first language is not English, may not appreciate the gravity of making a declaration or statement under oath or the consequences of making a false statement, where a modified arrangement is used to make or sign the document.

The Amendment 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).

It is possible that the removal of the requirement for a deed to be witnessed under the modified arrangements may disproportionately impact vulnerable or disadvantaged individuals, who may be more susceptible to fraud or undue influence.

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 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).

A deed which has been procured improperly could 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 rights and 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.

The modified arrangements may disproportionately impact vulnerable persons, for example victims of domestic violence, whose ability to access AV communication technology may be limited by the difficult or dangerous situation they face. For example, an aggrieved person may not be able to make a statutory declaration by AV link, because they are confined in their home as a result of a domestic violence.

It is possible that individuals, for example persons whose first language is not English, may not appreciate the gravity of making a declaration or statement under oath or the consequences of making a false statement, where a modified arrangement is used to make or sign the document.

It is possible that the removal of the requirement for a deed to be witnessed under the modified arrangements may disproportionately impact vulnerable or disadvantaged individuals, who may be more susceptible to fraud or undue influence.

Right to a fair hearing (*Human Rights Act 2019*, section 31): this right affirms the right of individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard by a competent, impartial and independent court or tribunal. The right includes that each party is given a reasonable opportunity to present its case.

Mere inconvenience is not enough to show that the right to a fair hearing has been limited.

What constitutes a 'fair' hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and the victim (in criminal proceedings) or of all parties (in civil proceedings).

The Amendment Regulation provides modified arrangements for the making of documents via AV link which in some cases may be used in criminal or civil proceedings in a court or tribunal (e.g. affidavits). These arrangements may disproportionately impact vulnerable groups, for example where language and communication barriers are exacerbated by electronic communication or where access to the required technology is not available. This may impact a person's capacity to adequately prepare documents to support their case in a proceeding.

It is possible that individuals, for example persons whose first language is not English, may not appreciate the gravity of making a declaration or statement under oath or the consequences of making a false statement, where a modified arrangement is used to make or sign the document. These risks could be exacerbated, if for example, a document was urgently required for a proceeding.

A deed which has been procured improperly could be used in a way that is detrimental to the person's rights and interests in the proceeding, for example to compromise the person's claim without their knowledge and consent.

Rights in criminal proceedings (*Human Rights Act 2019*, section 32): The right explicitly protects the right to be presumed innocent until proven guilty. The right provides a set of specific rights to be afforded to accused persons in criminal trials, including, for example, the right to be tried without unreasonable delay, the right to examine witnesses, and the right of an individual not to be compelled to testify against themselves or to confess guilt. The right of an accused to defend himself or herself includes the right to instruct their lawyer on the case and to testify on their own behalf.

The right not to be compelled to testify against himself or herself or to confess guilt includes the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.

These arrangements may disproportionately impact vulnerable groups, for example where language and communication barriers are exacerbated by electronic communication or where access to the required technology is not available to assist with the preparation of documents. This may impact a person's capacity to adequately prepare documents to defend themselves in a criminal proceeding.

The modified arrangements may also increase the risk that a document could be procured improperly, including as a result of undue influence, and used in a criminal proceeding in a way that is detrimental to the right of accused persons:

- not to be compelled to testify against themselves or to confess guilt.
- to have the free assistance of an interpreter if the person can not understand or speak English;
- to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;
- to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person; or
- to be told, if the person does not have legal assistance, about the right, if eligible, to legal aid.

Children in the criminal process (*Human Rights Act 2019*, section 33): The right recognises that young persons that become involved in the criminal justice system deserve special protections by virtue of their age.

The Amendment Regulation provides modified arrangements for the making of documents (such as affidavits) via AV link which may be used in criminal proceedings in a court or tribunal. These arrangements may disproportionately impact vulnerable groups, for example where language and communication barriers are exacerbated by electronic communication or where access to the required technology is not available. This may impact a child or advocate's capacity to adequately prepare documents to defend the child in a criminal proceeding.

The modified arrangements may also increase the risk that a document could be procured improperly, including as a result of undue influence, and used in a way that was detrimental to a child's rights and interests in a criminal proceeding.

(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 Amendment Regulation is to broaden the method by which documents can be made, signed or 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 made it is possible that, despite the inclusion of safeguards, the Amendment Regulation could potentially have consequences which could limit the human rights, identified above.

The purpose of the Amendment Regulation is consistent with a free and democratic society based on human dignity, equality and freedom and will ensure that such matters can proceed without delays which would otherwise arise where the existing arrangements for making these documents cannot be complied with due to the COVID-19 emergency.

(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 Amendment Regulation will achieve the purpose by allowing documents to be made safely while respecting social distancing requirements. Stakeholders in Queensland are urgently seeking regulatory changes to enable these important documents to continue to be made, 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 make, sign or witness documents in the physical presence of others there are no less restrictive and reasonably available alternatives. Where modified arrangements are used, the Amendment 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 Amendment Regulation will, in addition to existing witness eligibility requirements, restrict who may witness an affidavit, statutory declaration or general power of attorney 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; and
- for an affidavit or a statutory declaration, prepared by the public trustee, an employee of 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 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 modified arrangements.

To minimise potential risks that a person may unintentionally swear or affirm a statutory declaration or affidavit created electronically, a signatory will be required to include a special

clause in the document acknowledging that the declaration was made, signed and witnessed in accordance with the regulation and either the contents of the declaration are true or if the contents of the declaration are stated on the basis of information and belief—that those contents are true to the best of the knowledge of the person and that the signatory understands that a person who provides a false matter in the declaration commits an offence.

To ensure that deeds only operate where the parties intend to be bound as a deed (as opposed to a simple contract), the modified arrangements require that a deed contain a conspicuous statement that it is executed as a deed.

To ensure the alternative arrangements only apply for the length of time that social distancing is required the Amendment 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. The Amendment 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 or because they are unable to access an eligible witness before whom a statutory declaration may be made.

Any other relevant factors

Nil.

Conclusion

I consider that the Amendment Regulation is compatible with the *Human Rights Act 2019*. To the extent that the Amendment 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.

STIRLING HINCHLIFFE MP
Acting Attorney-General and Minister for Justice
Acting Leader of the House