

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

## 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, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence provide this human rights certificate with respect to the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation 2021* (the Amendment Regulation) made under the *Oaths Act 1867*, *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 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* (Documents and Oaths Regulation).

The Amendment Regulation amends the Documents and Oaths Regulation to clarify two particular matters - the amendments are clarifying in nature and do not change the effect of the law.

#### Acceptance by attorney

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. For EPAs and AHDs, there are no specific provisions in the Documents and Oaths Regulation which prescribe how an attorney may accept their powers, it was always envisaged that section 44(8) of the POA would continue to apply in that regard.

To resolve any uncertainty, the Amendment Regulation replicates the requirement in section 44(8) of the POA to clarify that if an enduring document is made in accordance with the modified arrangements, 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. The Amendment Regulation also clarifies that the attorney can sign either the originating version or official version of the document.

### Special witness certificate

The Amendment Regulation also amends 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).

## **Human Rights Issues**

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

The human rights that are relevant to the Documents and Oaths Regulation are set out in the human rights certificates that accompanied each of the following regulations:

- Explanatory Note – Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Regulation 2020
- Explanatory Note – Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020

The abovementioned human rights certificates accurately reflect the human rights that are limited by the Documents and Oaths Regulation.

The Amendment Regulation does not introduce any new limitation on any human rights beyond those reflected in the above-mentioned certificates.

The clarification of the need for the attorney to sign the enduring document to accept their appointment after the enduring document is validly made, helps protect the right to property (*Human Rights Act 2019*, section 24): of the principal (the person making the enduring document).

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 amendment regulation will clarify that an attorney cannot exercise their powers under an enduring document until they have signed the document. This will assist in reducing the risk that an enduring document 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 interests.

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

Not applicable.

(a) the nature of the right

Not applicable.

(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

Not applicable.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Not applicable.

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

Not applicable.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Not applicable.

(f) any other relevant factors

Not applicable.

## Conclusion

I consider that the *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Amendment Regulation 2021* is compatible with the *Human Rights Act 2019* because it does not raise a human rights issue.

**SHANNON FENTIMAN**  
Attorney-General and Minister for Justice  
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