

Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation (No. 2) 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 (No. 2) 2021* (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*, which expires certain modified arrangements or requirements for the making, signing and witnessing of wills and enduring documents under the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Regulation 2020* (Documents and Oaths Regulation) on 1 July 2021.

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

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 Advance Health Directive (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.

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 engaged by the Amendment Regulation:

- right to recognition and equality before the law (section 15 of the *Human Rights Act 2019*);
- right to life (section 16 of the *Human Rights Act 2019*);
- protection from torture and cruel, inhuman and degrading treatment (section 17 of the *Human Rights Act 2019*);
- property rights (section 24 of the *Human Rights Act 2019*);
- privacy and reputation (section 25 of the *Human Rights Act 2019*);
- protection of families and children (section 26 of the *Human Rights Act 2019*); and
- right to health services (section 37 of the *Human Rights Act 2019*).

The Documents and Oaths Regulation promotes human rights (for example the right to life) by enabling wills and enduring documents to continue to be made without breaching social distancing requirements associated with the COVID-19 emergency, thereby 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.

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 Amendment Regulation expires 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 to complete a certificate in an AHD. In so doing, the Amendment Regulation generally restores the requirements for making, signing and witnessing of wills and enduring documents under the ordinary law, including the requirement that wills and enduring documents be witnessed in physical presence rather than by audio-visual link.

The return to the ordinary law promotes human rights (including the right to privacy and reputation) by reducing the opportunity for fraudulent or coercive behaviour to impact the making of a will or enduring document.

The Amendment Regulation does not impact the modified arrangements which allow nurse practitioners, in addition to doctors, to sign the doctor's certificate in an AHD. These modified arrangements promote human rights (including the right to recognition and equality before the law) by allowing vulnerable persons, such as those who may be subject to home confinement or who may have difficulty obtaining timely access to a doctor (for example people who live in remote and regional communities), to make an AHD.

Conclusion

I consider that the *Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation (No. 2) 2021* is compatible with the *Human Rights Act 2019* because it promotes human rights.

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ATTORNEY-GENERAL AND MINISTER FOR
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DOMESTIC AND FAMILY VIOLENCE

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