

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

Explanatory notes for SL 2020 No. 72

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–Wills and Enduring Documents) Regulation 2020

Authorising law

Powers of Attorney Act 1998 in reliance on section 9 of the *COVID-19 Emergency Response Act 2020*
Succession Act 1981 in reliance on section 9 of the *COVID-19 Emergency Response Act 2020*

Policy objectives and the reasons for them

The policy objectives of the Justice Legislation (COVID-19 Emergency Response–Wills and Enduring Documents) Regulation 2020 (the Regulation) is to prescribe modified requirements or arrangements, which will apply in addition to existing requirements, for the making, signing and witnessing of wills under the *Succession Act 1981* (Succession Act) and enduring documents under the *Powers of Attorney Act 1998* (POA) in reliance on section 9 of the *COVID-19 Response Act 2020* (COVID-19 Response Act).

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 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 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 Act may also make provision about a matter incidental to a relevant matter mentioned.

Wills, enduring powers of attorney and advance health directives

The Succession Act and POA require wills, enduring powers of attorney (EPAs) and advance health directives (AHDs) (the latter two are known as enduring documents) to be made on paper, signed in wet ink and **witnessed in the physical presence** of the signatory (the person making the document) or substitute signatory (person signing on behalf of the person making the document).

For enduring documents, the witness is also required to **assess the capacity** of the principal to make the enduring document. This can only be carried out in the physical presence of the signatory.

During the current COVID-19 emergency, people are likely to turn their mind to health and end of life decisions and may have an increased need to authorise other persons to make decisions or do things on their behalf during periods of isolation. However, due to physical distancing requirements, it is difficult for people to meet existing requirements for witnessing wills, powers of attorney, EPAs and AHDs. Witness availability has also become an issue with the closure of the Justices of the Peace (JPs) in the Community Program.

Achievement of policy objectives

The Regulation will prescribe modified requirements or arrangements, which will apply in addition to existing requirements, for making, signing and witnessing wills and enduring documents to reduce physical contact between persons during the COVID-19 emergency in reliance on section 9 of the COVID-19 Response Act.

Modified arrangements

The Regulation will prescribe the following modified arrangements in relation to wills or enduring documents:

- (i) a requirement for the presence of a witness, signatory or other person in relation to a document is taken to be satisfied if the witness, signatory or other person is present by **audio visual (AV) link**;
- (ii) a document may be witnessed by AV link only if:
 - the witness or at least one of the witnesses is a **special witness** (discussed below); and
 - the **general requirements** for using an AV link under the Regulation are met.

The Regulation prescribes the following **general requirements** for using an AV link:

- if applicable, the witness observes the signatory direct the substitute signatory to sign the document;
- the AV link enables the witness to be satisfied, by the sounds and images made by the link, that the signatory or substitute signatory is signing the document;
- the witness must be satisfied that the signatory is making the document freely and voluntarily;
- the witness observes the signatory or substitute signatory signing the document in real time;
- the signatory or substitute signatory signs each page of the document.

A witness for the signing of a document by AV link must take reasonable steps to **verify particular matters**, including the identity of the signatory and that the signatory is making the document freely and voluntarily. A witness may only sign a witnessed document if satisfied the document is the original or a true copy of the document.

To minimise potential risks associated with using the modified arrangements (e.g. the ability to detect fraud and elder abuse via AV link), the Regulation will restrict who may witness a document made using the modified arrangements to a category of **special witnesses**, defined as:

- an Australian legal practitioner, a JP or commissioner for declarations (CD) approved by the chief executive, a JP or CD employed by a law practice that prepared the document or a notary public;
- for a will prepared by the public trustee, an employee of the public trustee; or
- for an enduring document prepared by the public trustee, a JP or CD employed by the public trustee.

A special witness who witnesses the signing of a document by AV link must sign a **certificate** that must be kept with the document and states particular matters, including that the document was signed and witnessed in accordance with the Regulation. This certificate is in addition to the witness certificate required under the POA.

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 Regulation provides that a witness may either sign the original signed document sent to them by the signatory or substitute signatory or a true copy of the document (such as a copy scanned and emailed to the witness). The official document is taken to be the document that was signed by the last witness and sent to the signatory or another person directed by the signatory - contrary to current requirements, this official document need not bear the wet ink original signatures of all persons who are required to sign the document.

If a document made, signed or witnessed in accordance with this regulation is required to be given, produced or used for any purpose, the official version of the document may be given, produced or used for the purpose and may be relied on as evidence of the document. However, the document bearing the original wet ink signature of the signatory or substitute signatory (the originating document) must be kept with the official document and may be required to be produced by a court in relation to a proceeding or by the registrar of titles if the official document is produced or lodged with the titles register.

The Regulation will also allow an AV recording of the signing or witnessing of a document to be made with consent. However, whether a recording is made or not made does not affect the validity of the document or signing or witnessing of the document.

The Regulation will modify the POA 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. The doctors or nurses may conduct the capacity assessment using AV link.

In order to reduce the evidentiary burden for simple proceedings, the Regulation provides a presumption of validity of certain matters unless a party to the proceeding contests the matter.

The Regulation will expire on 31 December 2020 (the expiry date of the COVID-19 Response Act).

Consistency with policy objective of authorising law

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

Inconsistency with policy objectives of other legislation

The 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

Any costs associated with the Regulation will be met from existing agency resources.

Consistency with fundamental legislative principles

The provisions modifying requirements or suspending requirements for wills and enduring documents may depart from the fundamental legislative principle (FLP) that legislation have sufficient regard to the **rights and liberties of individuals** (*Legislative Standards Act 1992* (LSA), section 4(2)(a)).

In the absence of physical presence requirements, the introduction of modified arrangements relying on the use of an AV link may increase the risk of breach of privacy and confidentiality and increase the potential for fraud, undue influence and unconscionable dealing.

The modified arrangements may also depart from the FLP that legislation is consistent with the principles of **natural justice** (LSA, section 4(3)(b)), particularly for disadvantaged groups or persons residing in rural or remote locations who have disproportionate access to technology, giving rise to concerns about procedural fairness. The introduction of additional criteria for special witnesses or substitute signatories for a document made using modified arrangements may also reduce access to available witnesses and substitute signatories.

These arrangements are considered justified given the extraordinary nature of the COVID-19 emergency and are in the interests of public health and safety. The Regulation will provide alternative arrangements which will apply in addition to existing requirements and will reduce physical contact between persons during the COVID-19 emergency.

These provisions are also considered reasonable and justified to facilitate the execution of important personal documents (i.e. wills, EPAs and AHDs) associated with end of life decision-making and estate planning.

The restrictions on who can be a special witness using the modified arrangements will provide additional safeguards by ensuring that witnesses have appropriate training or experience to assure themselves that the document they witness is the same as the document that the signatory signed, that the signatory is making the document freely and voluntarily and for an enduring document, that the principal has capacity to make the document.

The restrictions on who can be a substitute signatory under the altered arrangements also provides additional safeguards against the potential for fraud, undue influence and unconscionable dealing.

The modified arrangements will mean that these documents can continue to be made even with social distancing requirements under the COVID-19 emergency.

Consultation

The Public Trustee of Queensland, the Queensland Law Society, the Bar Association of Queensland, the Office of the Public Advocate, the Public Guardian, Legal Aid Queensland and all departments were consulted. While some concerns were expressed about the modified arrangements, stakeholders broadly supported the modified arrangements provided for under the Regulation.

An assessment by the Office of Best Practice Regulation determined that no further regulatory impact analysis is required as the regulatory proposal is excluded under category (k) of the *Queensland Government Guide to Better Regulation* – regulatory proposals designed to reduce the burden of regulation, or that clearly do not add to the burden, and it is reasonably clear there are no significant adverse impacts.