

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

Explanatory notes for SL 2020 No. 78

Made under the

*COVID-19 Emergency Response Act 2020*

*Oaths Act 1867*

*Powers of Attorney Act 1998*

*Property Law Act 1974*

*Succession Act 1981*

## General Outline

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

### Authorising law

*Oaths Act 1867* in reliance on section 8 and section 9 of the *COVID-19 Emergency Response Act 2020*

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

*Property Law Act 1974* in reliance on section 8 and 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) Amendment Regulation 2020 (the Amendment Regulation) will prescribe modified requirements or arrangements for the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, particular mortgages and general powers of attorney, in reliance on sections 8 and 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 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.

### **Wills, enduring powers of attorney and advance health directives**

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).

## **Affidavits, declarations, oaths, deeds, particular mortgages and general powers of attorney**

As for the making of wills and enduring powers of attorney, the making, signing and witnessing of affidavits, declarations, deeds, particular mortgages and general powers of attorney also usually requires the physical presence of signatories and witnesses.

A number of documents in Queensland also require the document to be signed in the presence of or before a person who takes or witnesses the document under a declaration, oath or affirmation regulated under the *Oaths Act 1867*. As a mark of the seriousness of making a statutory declaration or statement under oath, the *Oaths Act 1867* requires oaths to be taken in certain settings or before certain people.

The making, signing and witnessing of these important documents and the taking of oaths has been impeded by the COVID-19 emergency, including the requirements for social distancing and in some cases the requirement for individuals to be in self-isolation.

## **Achievement of policy objectives**

The Amendment Regulation prescribes modified requirements or arrangements for the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, particular mortgages and general powers of attorney, in reliance on sections 8 and 9 of the COVID-19 Response Act.

The Amendment Regulation prescribes alternative arrangements which will apply in addition to existing requirements and will not prevent a person from making these documents in compliance with existing requirements where possible.

### **Modified arrangements**

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:

- provides 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;
- provides 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. For example, if a general power of attorney for an individual is lodged with the titles registry, it is required to be witnessed by the *Land Title Act 1994*. In order to meet that requirement, a general power of attorney may be witnessed by a special witness by audio visual link in accordance with this 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.

### **Electronic signing**

The Amendment Regulation allows for affidavits, statutory declarations, deeds, general powers of attorney and particular mortgages to be electronically signed using a method that:

- (a) identifies the signatory and the signatory's intention in relation to the contents of the document; and
- (b) that is either:
  - i. as reliable as appropriate for the purpose for which the document is signed, having regard to all the circumstances, including any relevant agreement; or
  - ii. proven in fact to have fulfilled the functions described above (by itself or together with further evidence).

These requirements reflect the principles for electronic signature in section 14 of the *Electronic Transactions (Queensland) Act 2001* (ETA) and also reflect the principles for the modified arrangements for electronic signature of documents by corporations under the *Corporations Act 2001* (Cth).

A document may be signed electronically using a number of methods including, through the use of an electronic platforms which allows electronic signing of documents (such as Docusign), copying and pasting an image of a handwritten signature or applying a digital signature to the document (e.g. using Adobe).

### **Safeguards**

To minimise potential risks associated with using the modified arrangements, the Amendment Regulation, in addition to existing witness eligibility requirements, restricts 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.

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

## **Consistency with policy objective of authorising law**

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

## **Inconsistency with policy objectives of other legislation**

The Amendment 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 Amendment Regulation will be met from existing agency resources.

## **Consistency with fundamental legislative principles**

The provisions modifying requirements or suspending requirements for the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, particular mortgages and general powers of attorney 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.

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.

These arrangements are considered justified however 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 documents and the taking of oaths, related to a variety of important legal transactions and proceedings that need to continue even during the COVID-19 emergency.

The restrictions on who can be a special witness for affidavits, statutory declarations and general powers of attorney 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 and that the signatory is making the document freely and voluntarily.

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 and Legal Aid Queensland were consulted. While some concerns were expressed about the modified arrangements, stakeholders broadly supported the modified arrangements provided for under the Amendment 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.