

Guardianship and Administration and Other Legislation Amendment (Postponement) Regulation (No. 2) 2020

Explanatory notes for SL 2020 No. 141

Made under the

*Guardianship and Administration and Other Legislation
Amendment Act 2019*

General Outline

Short Title

*Guardianship and Administration and Other Legislation Amendment (Postponement)
Regulation (No. 2) 2020*

Authorising law

Guardianship and Administration and Other Legislation Amendment Act 2019 in reliance
on section 15DB of the *Acts Interpretation Act 1954*.

Policy objectives and the reasons for them

The *Guardianship and Administration and Other Legislation Amendment Act 2019*
(Amendment Act) received assent on 11 April 2019.

The objects of the Amendment Act include amending Queensland's guardianship
legislation (the *Guardianship and Administration Act 2000* (GAA), *Powers of Attorney Act*
1998 (POA) and *Public Guardian Act 2014*) to:

- provide a focus on contemporary practice and human rights for adults with impaired capacity;
- enhance safeguards for adults with impaired capacity in the guardianship system; and
- improve the efficiency of Queensland's guardianship system or improve the clarity of Queensland's guardianship legislation.

Parts 2, 4 and 7 of the Amendment Act, which amended the *Government Owned Corporations Act 1993*, *Integrity Act 2009* and *Public Interest Disclosure Act 2010*, commenced on assent.

Section 2 of the Amendment Act provides for parts 3, 5, 6 and 8 and schedule 1 to commence on a day to be fixed by proclamation.

Non-legislative guardianship reforms which must commence upon amendments to Queensland's guardianship legislation in the Amendment Act include:

- a review of the enduring power of attorney (EPA) and advance health directive (AHD) forms under the POA;
- the introduction of explanatory guides to support the new forms (explanatory guides); and
- the introduction of capacity guidelines under new section 250 of the GAA (inserted by the Amendment Act) to assess capacity under Queensland's guardianship legislation (capacity guidelines).

The *Guardianship and Administration and Other Legislation Amendment (Postponement) Regulation 2020* (Postponement Regulation (No. 1)) extended the period for automatic commencement under section 15DA(2) of the *Acts Interpretation Act 1954* (AIA) to the end of 31 July 2020, so that the remaining provisions of the Amendment Act will automatically commence on 1 August 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) commenced on 23 April 2020. Section 2 of the COVID-19 Response Act provides that the main purposes of the Act include to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements and establishing an office of small business commissioner.

New section 15DB of the AIA (inserted by section 27 of the COVID-19 Response Act) applies if –

- (a) before the commencement of this section, a regulation under section 15DA(3) extended the period before commencement of a postponed law as defined in section 15DA(1) (the *postponed law*) to a day not more than 2 years after the assent day; and
- (b) on the commencement of this section, the postponed law had not commenced.

Section 15DB(2) states that a regulation may further extend the period before commencement of the postponed law for a period ending on or before 31 December 2020. Section 15DB(6) of the AIA provides that section 15DB applies despite section 15DA. Section 15DB(7) of the AIA states that section 15DB expires on 31 December 2020.

Although the Postponement Regulation (No. 1) already extended the period for automatic commencement under section 15DA(2) of the AIA to the end of 31 July 2020 (so that the remaining provisions of the Amendment Act would automatically commence on 1 August 2020), the new and temporary section 15DB of the AIA allows a further extension of the postponed law, despite being outside of one year of the assent day.

Under section 15DB(4), the Minister administering the Act may recommend to the Governor in Council the making of a regulation under subsection (2) only if satisfied that extending the period under subsection (2) is necessary for a purpose of the COVID-19 Response Act.

The implementation of the guardianship reforms has been delayed due to the disruption caused by the COVID-19 emergency. Key stakeholders have also raised concerns about commencing the guardianship reforms, including the associated non-legislative reforms (including new EPA and AHD forms), on 1 August 2020, given the impact of the COVID-19 emergency.

If not extended by regulation the remaining provisions of the Amendment Act that have not yet commenced will automatically commence on 1 August 2020.

The *Guardianship and Administration and Other Legislation Amendment (Postponement) Regulation (No. 2) 2020* (Postponement Regulation (No. 2)), made under section 15DB of the AIA, will delay the commencement of the remaining provisions of the Amendment Act to **30 November 2020** in response to the impact of the COVID-19 emergency on the implementation of the guardianship reforms on health, legal and community stakeholders.

Achievement of policy objectives

The Postponement Regulation (No. 2) will further extend the period before commencement of the Amendment Act to the end of **29 November 2020**, so that the remaining provisions of the Amendment Act that have not yet commenced will automatically commence on **30 November 2020**.

The Postponement Regulation (No. 2) will expire on 1 December 2020.

Consistency with policy objectives of authorising law

The Postponement Regulation (No. 2) is consistent with the policy objectives of the Amendment Act.

Inconsistency with policy objectives of other legislation

The Postponement Regulation (No. 2) is consistent 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

Extending the period before automatic commencement of the Amendment Act is necessary to facilitate the continuance of activities disrupted by the COVID-19 emergency. It will allow further time for key stakeholders to prepare for the commencement of the guardianship reforms including the associated non-legislative reforms (new AHD and EPA forms).

Any costs associated with the Postponement Regulation (No. 2) and the guardianship reforms will be met from existing agency resources.

Consistency with fundamental legislative principles

The Postponement Regulation (No. 2) is consistent with fundamental legislative principles.

Consultation

The Department of Justice and Attorney-General (DJAG) established a Guardianship Implementation Reference Group (reference group) in June 2018. The role of the reference group is to provide expert advice and feedback on the implementation of the Amendment Act and associated non-legislative reforms, including the revised EPA and AHD forms and the introduction of explanatory guides and the capacity guidelines.

The reference group includes representatives from the legal (Queensland Law Society) and health professions, Community Legal Centres, academics (including from the Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology and the School of Nursing, Midwifery and Social Work, Faculty of Health and Behavioural Sciences, University of Queensland), disability and older persons' advocacy groups (including Aged and Disability Advocacy Australia, COTA Queensland, National Seniors Australia, Queensland Advocacy Incorporated) and guardianship stakeholders (including the Office of the Public Guardian, Public Trustee and Public Advocate).

The proposal to further delay the commencement of the Amendment Act was made in response to stakeholder (including reference group) concerns about the implementation of the guardianship reforms, including the associated non-legislative reforms (the new EPA and AHD forms), in light of the COVID-19 emergency.

The reference group generally supports the proposal to delay commencement of the remaining provisions of the Amendment Act due to the COVID-19 emergency.

A self-assessment by DJAG determined that no further regulatory impact analysis is required as the regulatory proposal is excluded under category (g) of the *Queensland Government Guide to Better Regulation*— regulatory proposals that are of a machinery nature.