

Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) (Transitional) 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) (Transitional) Regulation 2021* (Transitional Regulation) made under *Powers of Attorney Act 1998* and *Succession Act 1981* in reliance on section 25 of the *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act), which provides transitional arrangements for the completion of wills and enduring documents, following the expiry of relevant provisions under the *Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) Regulation 2020* (Documents and Oaths Regulation) on 1 July 2021 by operation of the *Justice Legislation (COVID-19 Emergency Response–Documents and Oaths) Amendment Regulation (No. 2) 2021* (Amendment Regulation).

In my opinion, the Transitional 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

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

The Transitional Regulation will allow incomplete documents made under the Documents and Oaths Regulation to be finalised if they have been started but not finished by 1 July 2021.

The Transitional Regulation will clarify that if an advance health directive (AHD) contains a certificate signed by a nurse practitioner before 1 July 2021, the signatory or substitute signatory and witness can sign the document on or after 1 July 2021 in accordance with the requirements under the *Powers of Attorney Act 1998*.

By operation of section 25 of the *COVID-19 Emergency Response Act 2020*, the Transitional Regulation will expire two years after the commencement of the Amendment Regulation (the Amendment Regulation will commence on 1 July 2021). This means that a document started but not finished before 1 July 2021 must be completed by 1 July 2023, noting that the Documents and Oaths Regulation requires the will or enduring document to be confirmed as soon as practicable (see section 19(2) of the Documents and Oaths Regulation).

The Transitional Regulation only applies to documents made under the Documents and Oaths Regulation and does not impact wills or enduring documents made under the ordinary law.

For clarity, the Transitional 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*)

The Documents and Oaths Regulation engages a number of human rights including right to recognition and equality before the law (section 15 of the *Human Rights Act 2019*).

The right to equality and recognition is engaged where the right to access a service (such as the services provided by a witness) is indirectly restricted to some sectors of society and not others. The Regulation provides modified arrangements for the signing, witnessing and making of wills and enduring documents over audio visual link. The Documents Regulation allowed access to witnessing services and enhanced the ability for vulnerable groups to make wills and enduring documents during the COVID-19 emergency at the time.

The Amendment Regulation will be expiring the modified arrangements for wills and enduring documents (with the exception of the modified arrangement to allow 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). Under the modified provisions of the Documents and Oaths Regulation it is possible that a will or enduring document may be validly started (i.e. signed and witnessed) but not completed (in accordance with the provisions of the Documents and Oaths Regulation) at the time that the Amendment Regulation commences.

By allowing documents started under the Documents and Oaths Regulation before the commencement of the Amendment Regulation to be completed, the Transitional Regulation will promote human rights (including the right to equality before the law).

Conclusion

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

SHANNON FENTIMAN MP
ATTORNEY-GENERAL AND MINISTER FOR
JUSTICE, MINISTER FOR WOMEN AND
MINISTER FOR THE PREVENTION OF
DOMESTIC AND FAMILY VIOLENCE