

Legal Affairs and Safety Committee

Report No. 10, 57th Parliament

Subordinate legislation tabled between 14 April 2021 and 11 May 2021

1 Aim of this report

This report summarises the committee's findings following its examination of the subordinate legislation within its portfolio areas tabled between 14 April 2021 and 11 May 2021. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).¹

In addition, the report notes any issues identified by the committee in its consideration of compliance with the *Human Rights Act 2019* (HRA) and the human rights certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
24	Proclamation made under the <i>Associations Incorporation and Other Legislation Amendment Act 2020</i>	20 April 2021	1 September 2021
28	Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Amendment Regulation 2021	20 April 2021	1 September 2021
30	Legal Profession (Society Rules) Amendment Notice 2021	20 April 2021	1 September 2021
31	Associations Incorporation and Other Legislation Amendment (Postponement) Regulation 2021	11 May 2021	15 September 2021
32	Proclamation made under the <i>Liquor (Artisan Liquor) Amendment Act 2021</i>	11 May 2021	15 September 2021
35	Liquor (Artisan Liquor) Amendment Regulation 2021	11 May 2021	15 September 2021
39	Legal Profession Amendment Regulation 2021	11 May 2021	15 September 2021

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

3 Committee consideration of the subordinate legislation

The committee did not identify any significant issues regarding policy, consistency with fundamental legislative principles, the lawfulness of the subordinate legislation or non-compliance with the HRA.

¹ LSA, Part 4.

² HRA, s 41.

The committee considers the explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the LSA.

The committee considers the human rights certificates tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.³

An overview of the Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Amendment Regulation 2021 and the requirements imposed on the making of it by the *COVID-19 Emergency Response Act 2020* is provided below.

4 Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Amendment Regulation 2021 [SL 28]

The Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Amendment Regulation 2021 (Documents and Oaths Amendment Regulation) clarifies the intended operation of the modified requirements or arrangements for the making, signing and witnessing of wills, enduring documents and general powers of attorney under the Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020 (Documents and Oaths Regulation).⁴

There is a distinction between the valid making of enduring powers of attorney and advance health directives (enduring documents) and the attorney's exercise of power conferred by such documents. The enduring document is effective in relation to an attorney only if the attorney has accepted the appointment by signing the enduring document.⁵

While the Documents and Oaths Regulation prescribed modified arrangements in relation to the way that an enduring document could be validly made (by the signatory and witness), it was not intended to modify or displace other existing legislative requirements relating to the making or use of these documents (including the requirement that an attorney sign an enduring document to accept their appointment).⁶

The Documents and Oaths Amendment Regulation amends the Documents and Oaths Regulation to clarify that an enduring document starts to be effective in relation to an attorney only if and when the attorney accepts the appointment by signing either the official version or the originating version of the document.⁷

The Documents and Oaths Amendment Regulation also clarifies the operation of the provisions of the Documents and Oaths Regulation that relate to special witness certificates, confirming that a special witness certificate is required to be kept with the official version and the originating version of the document once the document has been made, signed and witnessed.⁸

³ HRA, s 41.

⁴ Explanatory notes, p 1.

⁵ *Powers of Attorney Act 1998*, s 44(8).

⁶ Explanatory notes, p 3.

⁷ Section 5. See s 24 of the Documents and Oath Regulation for the definitions of official and originating documents. An official document can be the paper or print out version of the true document, and if the official version of the document was not the version of the document signed by the signatory, that version of the document is called the originating document.

⁸ Sections 3, 4 and 6.

Background – regulations made in reliance on the *COVID-19 Emergency Response Act 2020*

The Documents and Oaths Amendment Regulation is made in reliance on sections 8 and 9 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act).⁹ That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency.

In broad terms, section 8 imports into any Act dealing with attending a place or meeting for a particular purpose or particular matter, or calling such meeting, a power to make a regulation that modifies attendance or procedural requirements.

Similarly, section 9 imports into any Act dealing with the making, signing, and witnessing of documents, a power to make a regulation to make provision about a relevant matter required or permitted under that Act, or required or permitted under a contract or common law rule, by:

- prescribing modified requirements or arrangements, or
- suspending requirements or arrangements.

Such a regulation is an ‘extraordinary regulation’ and an Act to which an extraordinary regulation applies is an ‘affected Act’.¹⁰

In relation to an extraordinary regulation:

- A Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation only if the Minister is satisfied the regulation is necessary for a purpose of the Emergency Response Act.
- An extraordinary regulation may be inconsistent with the affected Act, and any other Act (other than the HRA), to the extent necessary to achieve a purpose of the Emergency Response Act.
- To the extent a person’s act or omission complies with an extraordinary regulation made under an affected Act, the person does not incur civil or criminal liability under the affected Act for the act or omission.
- A regulation must declare it is made under the relevant additional regulation-making provision.
- An additional regulation-making provision does not limit any other regulation-making power conferred under an affected Act.¹¹
- An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).¹²

The Documents and Oaths Amendment Regulation was notified on 14 April 2021 and tabled on 20 April 2021, and therefore was tabled within time.

⁹ The explanatory notes (at p 1) state the authorising law as being the *Oaths Act 1867* in reliance on ss 8 and 9 of the Emergency Response Act, *Powers of Attorney Act 1998* in reliance on s 9 of the Emergency Response Act, *Property Law Act 1974* in reliance on s 9 of the Emergency Response Act and the *Succession Act 1981* in reliance on s 9 of the Emergency Response Act.

¹⁰ See Emergency Response Act, s 5(1)-(3).

¹¹ See generally Emergency Response Act, s 5(4)-(8), and s 4.

¹² See Emergency Response Act, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

Non-compliance with the *COVID-19 Emergency Response Act 2020*

As mentioned above, any regulation made in reliance on section 8 or section 9 (an extraordinary regulation) must declare it is made under the relevant section.¹³

Committee comment

The committee notes that the Documents and Oaths Amendment Regulation does not contain the required declaration. The committee further notes that a declaration was included in the initial regulation itself,¹⁴ and that the Documents and Oaths Amendment Regulation is an amendment regulation and that there has been a consistent approach of not including declarations in amendment regulations. Nonetheless, the terms of section 5 of the Emergency Response Act extend to any regulation made under an affected Act in reliance on the additional regulation-making provisions (including sections 8 and 9). The committee also notes that there is no apparent consequence for non-compliance with this statutory requirement.

5 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

Chair

June 2021

Legal Affairs and Safety Committee

Chair	Mr Peter Russo MP, Member for Toohey
Deputy Chair	Mrs Laura Gerber MP, Member for Currumbin
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	Ms Jonty Bush MP, Member for Cooper
	Mr Jason Hunt MP, Member for Caloundra
	Mr Andrew Powell MP, Member for Glass House

¹³ As required by Emergency Response Act, s 5(7).

¹⁴ See Documents and Oaths Regulation, s 2.