

STATUTORY DECLARATIONS REGULATIONS 2018

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Statutory Declarations Act 1959* (Cth) (the Act) establishes a regime for Commonwealth statutory declarations, including the purposes for which a statutory declaration may be used, how a statutory declaration is made and the penalty for intentionally making a false declaration.

Section 14 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Section 8 of the Act provides that a statutory declaration must be made in the prescribed form and before a prescribed person.

A Commonwealth statutory declaration is generally used in matters concerning the Commonwealth or the Australian Capital Territory. It is a frequently used document within the community and is commonly used to legally verify names, addresses, insurance claims, superannuation matters, lost passports and as evidence to support sick leave. The form is also used extensively for immigration purposes as part of visa applications.

The *Statutory Declarations Regulations 1993* (the Principal Regulations) sunset on 1 October 2018 and have been remade with minor amendments to ensure the Regulations remain fit for purpose and meet the needs of the community.

The *Statutory Declarations Regulations 2018* (the Regulations):

- set out the prescribed form for making a Commonwealth statutory declaration;
- list the occupations and persons before whom a Commonwealth statutory declaration can be made; and
- repeal the *Statutory Declarations Regulations 1993*.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Attorney-General's Department (the Department) conducted a six-week public consultation process which

included a public call for submissions on the Department's website. The Department invited written submissions seeking views as to whether the Principal Regulations remain fit for purpose and continue to meet the needs of the community. Submissions proposing the inclusion of new categories of authorised witnesses needed to demonstrate that a genuine unmet need exists in the community that could be appropriately fulfilled by the addition of the proposed category.

The Department also wrote to representatives of bodies and organisations currently listed as authorised witnesses under Schedule 2 to the Principal Regulations, inviting them to make a submission and to provide their views on whether any updates are required to the Principal Regulations. Additionally, the Department wrote to members of the public who had written over the past 10 years with suggestions for improvement or amendments to the Principal Regulations, inviting them to make an updated submission. The Department also receives and responds to a significantly large number of statutory declaration enquiries from members of the public, many of which have raised concerns about the difficulty in locating an authorised witness while overseas.

Following assessment of whether the proposed new category appropriately satisfied the unmet need requirement, the Department used criteria, including whether members of the occupation or new category are subject to a Code of Conduct or Code of Ethics, to provide a consistent standard for including new categories to the list of authorised witnesses. To satisfy inclusion as a new occupation under Part 1, the members of that occupation must be licensed or registered to practise under a Commonwealth, State or Territory law.

The Department received 27 submissions as part of the six-week public consultation process. Of the 27 submissions received, eight new categories were recommended for inclusion on the list of authorised witnesses. The submissions, excluding those who requested their submission remain confidential, are available on the Department's website. Following consideration of the submissions received during the public consultation process and the correspondence received over the past 10 years, seven new categories have been added to the list of authorised witnesses under Schedule 2.

In addition, a number of submissions requested that references to legislation or organisation names be updated where they were no longer current or relevant. Submission-makers also made recommendations to protect the privacy of the declarant and the authorised witness, and to make it easier for the receiving organisation to verify a statutory declaration.

REGULATION IMPACT STATEMENT

The Regulations have a minor regulatory impact on business, community organisations and individuals. The Office of Best Practice Regulation was consulted about the Regulations and advised that a Regulation Impact Statement was not required.

Details of the Regulation are set out in **Attachment A**.

A Statement of Compatibility with Human Rights is at **Attachment B**.

Details of the *Statutory Declarations Regulations 2018*

Section 1 – Name

This section provides that the name of the Regulations is the *Statutory Declarations Regulations 2018* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on the day after the Instrument is registered.

Section 3 – Authority

This section provides the Regulations are made under the *Statutory Declarations Act 1959*.

Section 4 – Schedules

This section provides that the *Statutory Declarations Regulations 1993* are repealed under Schedule 3 to the Regulations.

Section 5 – Definition

This section includes a number of relevant definitions. It also amends the definition of ‘address’ to clarify that the address provided does not have to be a residential address, and adds a new definition for ‘Commonwealth authority’.

Section 6 – Statutory declaration – prescribed form

This section provides the form set out in Schedule 1 is prescribed for the purposes of paragraph 8(a) of the Act.

Section 7 – Persons before whom a statutory declaration may be made

This section provides the following persons are prescribed for the purpose of paragraph 8(b) of the Act:

- a person who is enrolled as a legal practitioner on the roll of the Supreme Court of a State or Territory, or the High Court of Australia (however described);
- a person who is currently licensed or registered to practise in Australia under a law of the Commonwealth, a State or Territory, in an occupation listed in Part 1 of Schedule 2; and
- a person who is listed in Part 2 of Schedule 2.

Section 8 – Transitional – form of statutory declaration

This section provides that a statutory declaration made in accordance with the *Statutory Declarations Regulations 1993* either before, or during the six-month

period starting on the day this Instrument commences, remains valid and effective under the *Statutory Declarations Regulations 2018*.

Schedule 1 – form of Statutory Declaration

Schedule 1 provides the prescribed form for a Commonwealth statutory declaration, including information such as the name, address and occupation of the declarant and name, qualification and address of the authorised witness.

It also provides the declarant and authorised witness with the option to provide their email address or phone number to assist the receiving organisation to verify the form.

Schedule 2 – Persons before whom a statutory declaration may be made

Part 1 - Occupations

Part 1 amends the list of occupations who are authorised to witness a statutory declaration for the purposes of paragraph 7(b). It adds architects, midwives, migration agents registered under Division 3 of Part 3 of the *Migration Act 1958*, occupational therapists, financial advisers and financial planners to the list of occupations who can witness a statutory declaration.

Part 2 – Other Persons

Part 2 amends the list of persons who are authorised to witness a statutory declaration for the purposes of paragraph 7(c). Specifically the Part:

- updates the names of professional accounting bodies and consolidates the category of accountants under one item;
- broadens the current category of engineers to include Registered Professional Engineers of Professionals Australia, registered engineers under a law of the Commonwealth, State or Territory, and engineers registered on the National Engineering Register by Engineers Australia;
- clarifies that a Notary Public appointed in Australia, and a Notary Public (however described) appointed outside Australia exercising their functions in that place are able to witness a Commonwealth statutory declaration;
- updates references to be consistent with the *Public Service Act 1999*; and
- amends the current reference to teacher to provide that teachers employed on either a full-time or part-time basis at a school or tertiary institution can witness a statutory declaration.

Schedule 3 – Repeals

Section 1 repeals the *Statutory Declarations Regulations 1993*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Statutory Declarations Regulations 2018

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

1. The purpose of the *Statutory Declarations Regulations 2018* (the Regulations) is to:
 - prescribe the form for making a Commonwealth statutory declaration;
 - list the occupations and persons before whom a Commonwealth statutory declaration can be made; and
 - repeal the *Statutory Declarations Regulations 1993* under Schedule 3.
2. The Regulations are proposed to be remade with the following amendments:
 - update references to authorised witnesses where the names of bodies or organisations have changed. This includes updating references to employees of the Commonwealth and Commonwealth authorities to align with references under the *Public Service Act 1999*;
 - list additional categories of persons as authorised witnesses to meet an unmet need within the community. Proposed additional categories include architects, midwives, migration agents, occupational therapists, financial advisers and financial planners. It also includes the addition of a major professional body that represents engineers;
 - consolidate categories such as accountants into one item;
 - provide better options for people to make a Commonwealth statutory declaration overseas by including Notary Publics who are appointed overseas, exercising their functions at that place, on the list of authorised witnesses;
 - make minor amendments to the Commonwealth statutory declarations form to allow an option for the declarant or authorised witness to provide either their email address or phone number on the form, to assist receiving organisations to make contact should they wish to verify the declaration; and
 - provide a clearer definition of ‘address’ to clarify that the address provided does not have to be a residential address.

Human rights implications

3. The legislative instrument engages the following human rights:

- the right to recognition everywhere as a person before the law: Article 16 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD)
- right to non-discrimination: Article 2 of the ICCPR
- right to hold opinions without interference and the right to freedom of expression: Article 19 of the ICCPR
- right to equality before the law: Article 26 of the ICCPR, Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women* and Article 5 of the CRPD, and
- the right to privacy: Article 17 of the ICCPR.

The right to recognition everywhere as a person before the law

4. The Instrument engages the right to recognition everywhere as a person before the law, an absolute right. The Instrument promotes this right as any person can make a Commonwealth statutory declaration and declare a written statement to be true as evidence.

The right to non-discrimination

5. The Instrument engages the right to non-discrimination and promotes this right on the basis that any person is able to declare a written statement to be true as evidence in the form of a Commonwealth statutory declaration and therefore the Instrument promotes the right to non-discrimination. Further policy guidance about how to make a statutory declaration will be provided on the Attorney-General's website to assist people who have a disability such as a visual impairment or who are unable to write for the purposes of making a statutory declaration.
6. Providing policy guidance to people who have a disability supports Article 12(3) of the *Convention on the Rights of Persons with Disabilities* in relation to State Parties' obligation to take appropriate measures to provide access for persons with disabilities to the support they may require in exercising their legal capacity.
7. The Human Rights Committee has commented on the "basic and general character" of the principle of non-discrimination, the right to equality before the law and equal protection of the law, and that it is for State Parties to determine appropriate measures to implement the relevant provisions.¹

The right to hold opinions without interference and the right to freedom of expression

¹ Human Rights Committee, General Comment No 18, HRI/GEN/1/Rev.9 (Vol.I).

8. The Instrument engages the right to hold opinions without interference and the right to freedom of expression. It promotes this right by providing a medium in which any person is able to declare what they believe to be true, without exception or restriction.

The right to equality before the law

9. The Instrument also engages the right to equality before the law and promotes this right on the basis that any person can assert statements of fact they believe to be true as a form of evidence, on a non-discriminatory basis.

The right to privacy

10. The Instrument also engages the right to privacy. Schedule 1 of the Instrument limits the right to privacy by requiring the witness to provide their address and qualification. This was also required under the *Statutory Declarations Regulations 1993*.
11. Australian and Norfolk Island Government agencies and most private sector and not-for-profit organisations are subject to the Australian Privacy Principles (APPs) under the *Privacy Act 1988* (the Act)², and it will be the agency or organisation's responsibility to comply with privacy legislation in relation to the collection, use, access and disclosure of personal information, which includes a statutory declaration.
12. Such a limitation is necessary as it is the only practical way for the receiving organisation to verify the declaration and confirm that the witness was authorised to witness the declaration in accordance with Schedule 2 of the Instrument i.e. an authorised occupation or person.
13. In its submission to the Department, the Australian Public Service Commission put forward a recommendation to better balance the right to privacy of the declarant and authorised witness in relation to the requirement to provide their address on the form, with the need to ensure that receiving organisations are able to verify the statutory declaration.
14. In response to this recommendation, the Instrument provides a clearer definition of 'address' to clarify that the declarant and authorised witness are not compelled to provide their residential address, and may, for example, use another address at which they can be contacted. This provides greater protection to the declarant and authorised witness from arbitrary or unlawful interference with their privacy, family, home or correspondence.
15. Additionally, the Instrument makes it optional for the declarant or authorised witness to provide either an email address or phone number, for the purpose of assisting the receiving organisation to verify the declaration, for example, where the declarant or authorised witness change residence or occupation.
16. The Instrument does not compel the declarant or authorised witness to provide their email address or phone number, but rather provides this as an option. The limitation does not exceed the minimum level of personal information required for the receiving organisation to sufficiently verify the declaration and is therefore reasonable, necessary and proportionate to pursuing the legitimate objective.

² The *Information Privacy Act 2014* applies to ACT public sector agencies.

Conclusion

17. The Regulations engage the following rights: right to recognition before the law and right to equality before the law, the right to non-discrimination, the right to hold opinions without interference and the right to freedom of expression. The Regulations promote the above rights for people in the community who are required to make a Commonwealth statutory declaration, in a non-discriminatory and inclusive manner.
18. As discussed at paragraphs 10 to 15, Schedule 1 of the Instrument creates some limitation on the right to privacy for the purpose of assisting the receiving organisation to verify the declaration. As discussed above, the limitation is reasonable, necessary and proportionate to achieve this outcome.