21 September 2016

Ms Glenda Newick
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By email: Glenda.Newick@justice.qld.gov.au

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Dear Ms Newick

Review of enduring power of attorney and advance health directive forms

Thank you for the opportunity to provide preliminary comments on the review of the redesign of enduring power of attorney (EPA) and advance health directive (AHD) forms. Queensland Law Society appreciates being consulted on this important issue.

The Society notes that the review of the forms being undertaken by the Department of Justice and Attorney-General (Department) is to consider relevant recommendations from the Queensland Law Reform Commission’s Report: A Review of Queensland’s Guardianship Laws (QLRC Report), tabled in November 2010, and seek feedback from stakeholders.

The Society also looks forward to a further opportunity to provide considered feedback on the redesigned forms, as part of the broader consultation foreshadowed in your email of 7 September 2016.

In the meantime, the Society has been assisted by its Succession Law, Health & Disability Law and Elder Law Committees.

The Society is the peak professional body for the State’s legal practitioners. We lead a profession of more than 9,500 members throughout Queensland. The Society is comprised of several specialist committees who provide policy advice to the Society’s Council on law reform and areas of concern to the profession.

Recommendations regarding Enduring Power of Attorney (EPA) form

The Society makes the following comments in relation to the EPA form:

1. Amending the EPA form as recommended in the Society’s correspondence of 13 June 2016 (enclosed)

On 13 June 2016, the Society provided the enclosed submission to the Attorney-General, recommending that the current EPA forms (both long form and short form) be amended in
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"Part 1 Notices" to include a note prompting those signing the EPA to consider whether they have an EPA in another state or territory (copy enclosed for your reference).

A range of legal implications arise if a person has made an EPA in one jurisdiction and then, on relocating to a new jurisdiction, the person makes a new EPA in the local form of the new jurisdiction.

It is not always clear what effect the new EPA has on the previous EPA or what the principal intended to occur. In particular, it may not be clear whether the previous EPA is intended to be revoked or whether the two documents are intended to operate concurrently.

The Society's view is that legislative intervention will be required. However, in the short term, persons ought to be warned of the issue. The easiest way is to include another explanatory note in the respective short and long forms.

Recommendation 1:
Amend Part 1 (notices) of the EPA forms (both long form and short form) to include the following note after the end of the section headed "Is there anything else that will end this power?:

What if I have an existing enduring power of attorney from another State or Territory?
If you have an enduring power of attorney in another state or territory you should ensure you obtain legal advice as to the consequence of signing a new enduring power of attorney in Queensland. If you do not consult a lawyer and seek the necessary advice, your rights may be seriously affected.

2. Amendment to notes above Witness's Certificate (Part 2 of Short Form EPA and page 12 of Long Form EPA)

The proper witnessing of an EPA is crucial to protecting the interests of the principal.


The Society recommends that the notes above the Witness's Certificate include a reference to these publications, to assist a witness in understanding their obligations as a witness and what they should consider before witnessing the EPA.
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Recommendation 2:
A note should be added referring a witness to the Public Guardian's Guidelines and the Society's Guidance Statement, to assist a witness to understand their obligations when witnessing the EPA.

3. Amendment to Part 3 Short Form EPA – Attorney’s Acceptance box
The Society also recommends that the Short Form EPA be amended in the ‘Attorney’s Acceptance’ box of the EPA form to draw the attorney’s attention to Part 3 of the form.

Recommendation 3:
Add the underlined text to the Attorney’s Acceptance box of the Short Form EPA:
'I have read Part 1 and Part 3, giving me enduring power of attorney …'

4. Amendment to provide sample conditions which may be imposed by a principal on the powers their attorney may exercise to reduce the risk of abuse by the attorney
In the current EPA forms (both Long Form and Short Form), after the heading "Appointing An Attorney", clause 2 asks: "Do you want to set any terms for the power given in Clause 1 (i.e. give specific information about your wishes)?"

Clause 3 allows for any such terms to be set out.
These aspects of the form provide significant scope for a principal to impose limitations on their attorney. In particular, if an elderly principal utilised these limitations, it could significantly reduce the risk of elder abuse. However in the experience of our practitioners, the opportunity to impose limitations in clauses 2 and 3 is rarely taken up and the majority of principals select "No" for clause 2, leaving clause 3 blank.

There are many ways in which these parts of the EPA form could be used to reduce the risk of abuse by the attorney, including reducing the risk of elder abuse. Examples of limits that could be set on the attorney's power are:

(a) "any transaction that is to the benefit of my attorney(s) must be counter-signed by [third party/name of solicitor]";

(b) "any transaction involving the withdrawal of funds from my bank account other than for the purpose of paying an account owing by me must be must be counter-signed by [third party/name of solicitor]";

(c) "any transaction involving funds or property of mine worth more than [$insert amount] must be counter-signed by [third party/name of solicitor]";

(d) "any transaction involving the sale of property owned by me worth more than [$insert amount] must be counter-signed by [third party/name of solicitor]".

The current EPA form is not conducive to the inclusion of such clauses because:
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- the prompt in clause 2 currently says "(i.e. give specific information about your wishes)". This prompt is unspecific and vague. The prompt should alert the principal to the possibility of setting limits on the power that could help prevent abuse; and

- the examples provided in clause 3 (which currently are "My attorney/s is not authorised to invest in ABC Pty Ltd shares" or "If I need nursing-home care, I want my attorney to try XYZ Nursing Home first") do not generate any thought in a principal's mind that this section could help to protect them from elder abuse.

The examples should include specific clauses such as those outlined above and/or direct principals to where they can get samples of other appropriate clauses that limit the risk of elder abuse.

**Recommendation 4:**
The form should include sample clauses which a principal may use to limit the powers of the appointed attorney, in order to protect the principal's interests.

**Recommendations regarding Advance Health Directive form**
The Society is supportive of the review of the AHD form, which has been in its current format for many years.

As a starting point, the Society refers you to the enclosed letter from the Society to the former Minister for Health dated 15 December 2011, which addressed the subject of AHD’s (copy enclosed).

With the context of the views expressed in that letter, the following additional preliminary comments and suggestions are provided, addressing the relevant pages of the AHD form.

5. **Page 1**
   a) Where the form is being described, specific reference should be made to its primary legal status and the significance of proper execution.
   
   b) This page may be an appropriate place to articulate the order of priority as set out in s66 of the Guardianship and Administration Act 2000 (referred to in the Society’s enclosed letter).
   
   c) It would be helpful for a line to be inserted which explains the relationship between AHD and an Advance Health Plan.
   
   d) The reference to a qualified interpreter should have a note explaining who is qualified.

6. **Page 3**
   e) Under the heading 'What is an Advance Health Directive' insert the word 'legal' in the first sentence before the word 'document'.
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f) Also, under that heading, there is a need to make it clear who decides if the principal is unable to make their own decisions. It is suggested that a further explanation regarding capacity be inserted. For example, insert words to the effect of ‘You are presumed to have capacity until proven otherwise’.

g) Ideally the explanatory notes should be made more concise and total one page in length. Some suggested sentences for removal are the following:

It is wise to review your directive every two years or if your health changes significantly.... You complete Sections 1 to 4, Section 6 or Section 7 if you wish, and Section8.... Your witness must be twenty-one years of age or over and must be a justice of the peace, a commissioner for declarations, a lawyer or a notary public. He/she must not be your attorney, a relation of yours or of your attorney, a beneficiary under your will, your current paid carer or your current health-care provider (e.g. nurse or doctor). Your witness and the doctor who signs Section 5 do not have to sign the document on the same date....If you use this form to appoint someone as your attorney for personal/health matters, you will have to complete Section 7 and the person you appoint will have to complete Section 10.... You should keep it in a safe place, and you should give a copy to your own doctor, to your attorney for personal/health matters if you have appointed one, to a family member or friend and, if you wish, to your solicitor.

7. Page 5

h) For the card referred to, it would be helpful for the public if it was available for electronic downloading, so that it can be readily produced or available at say places like a newsagent shop.

8. Page 6

i) Again the explanatory notes should be made more concise and some suggested words for removal are the following:

...that you are unsure about and will also be able to state that you were not suffering from depression or any other condition that would affect your ability to understand the decisions you have made in the document. You can then ask this doctor to be present when you sign the document...

With the addition of the following words ‘and whether you are capable to understand any decision you make in this document’. Also that there be a recommendation for the Principal to discuss it with their medical practitioner, before completing this form.

j) In the body of the text the paragraph beginning with the words 'If at any time...'. can be removed. In the next paragraph delete the words 'speak competently for myself' and insert 'communicate'.

k) The last line on that page is the main point, so it is suggested that it be emboldened.
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9. Page 7
   l) The current section numbered 4' entitled 'Personal Statement' should now be inserted as Section 2 and the current Section 2 become Section 3.

   m) There should be more lines provided after the paragraph numbered '4'.

   n) The current paragraphs numbered '5' and '6' should be moved to the 'Personal Statement' part of the document.

   10. Page 8
       o) Section 3 should now become 'Section 4'.

   11. Page 9
       p) In practice there is currently a problem, where ambulance officers approach AHD's as operating only if there is evidence of having one of the first four square points is satisfied. Perhaps this could be overcome if under the paragraph numbered 7, there was a space for a 'mini' declaration form incorporated which allows one of the four points to be asserted by allowing a doctor to sign off on one of those states reached.

   12. Pages 10 and 11
       q) Allow a strike out of one of each of the options in paragraphs 8, 9, 10 and 11, so that the option which is kept and not struck out, can then be initialled. (It is difficult for the infirmed to initial so many times).

   13. Page 12
       r) As there are dedicated organ donation regimes and relatives can override the consent for tissue donation, the entire text regarding tissue donation should be excised.

   14. Page 13
       s) The explanation is too lengthy. It is suggested that you delete the following text 'It is recommended that you discuss this section with your doctor before completing it, as it is important that anything you write should be readily understood by medical staff who are treating you....However, you may not be entitled to insist on receiving a particular treatment (if, for example, your health-care provider’s professional opinion is that the treatment would not be of benefit to you).'

   t) A new paragraph numbered 16 should be inserted with words such as 'Who would you like us to contact about your treatment?'

   15. Page 14
       u) The explanatory note can be made more concise.

       v) Add space for the doctor's email address, as well as the Uniform resource locator (url) for the practice’s website.
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16. Page 15
   w) The explanation is too lengthy.
   x) For the paragraph numbered 21, if the Principal ticks 'No' then they should be directed to a website relevant to ‘Enduring Power of Attorney’ forms. This would mean that Section 7 on pages 17 and 18 could be excised.
   y) Include a note recommending that the Principal bring the AHD to the awareness of the Attorney they have appointed.

17. Page 19
   z) The explanation is too lengthy and also the actual meaning of paid carer, should be provided.

18. Page 20
   aa) Insert in paragraph 36 what a ‘paid carer’ means.

19. Page 21
   bb) Section 10 is no longer relevant as there is no longer a Section 7.

20. Page 23
   cc) The explanation is too lengthy.

Recommendation regarding interaction of EPAs and AHDs with ‘Statement of Choices’ form

A number of our practitioners have raised concerns with respect to the “Statement of Choices” form which is presently available on the Metro South website.

The concerns raised relate to whether patients understand the status of this document as opposed to the legal status of an EPA or an AHD. It was also queried how these documents would interact if the wishes outlined in the Statement of Choices form are inconsistent with the wishes outlined in the AHD.

A further concern is that the “Statement of Choices – Form B” can be completed by a “substitute decision maker” on behalf of another person. However, the Form B does not include any prompts for the medical practitioner to require the alleged substitute decision maker to produce evidence of his or her appointment under an appropriate authorisation.

The Society recommends that the Statement of Choices form be reviewed as part of the review of the EPA and AHD forms. The Society would be pleased to work with the Department of Justice and Attorney-General and Queensland Health in this regard.

The review should focus on harmonising the Statement of Choices forms with AHDs and EPAs and also consider including further information for medical practitioners when assisting with these forms, particularly about asking for evidence of the appointment of a substitute decision maker when completing Form B.
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The Society trusts that these preliminary comments are helpful. The Society looks forward to participating in further consultation on the re-design of the EPA and AHD forms.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Wendy Devine on (07) 3842 5896 or w.devine@qls.com.au or the Advocacy Team at advocacy@qls.com.au.

Yours faithfully

Bill Potts
President