Queensland Law Society

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Office of the President

13 May 2021

Our ref: BT/H&D

Office of Advance Care Planning
PO Box 2274
RUNCORN QLD 4113

By email: [redacted]

Dear Sir or Madam

Review of the Statement of Choices

Thank you for the opportunity to contribute to the 2021 review of the Statement of Choices documents. We support the Office of Advance Care Planning's goal to educate and assist Queenslanders with their advance care planning.

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the Health and Disability Law Committee whose members have substantial expertise and practice in this area.

You may be aware that we have previously raised concerns with Queensland Health about the Statement of Choices documents. A copy of our previous submission is **attached** to this letter. We continue to have concerns about the Statement of Choices documents in their current form.

We have also had the benefit of receiving a copy of the Public Advocate's submission to the review, and we agree with the comments provided therein.

1. The legal status of the Statement of Choices documents

One concern relates to whether patients understand the status of these documents as opposed to the legal status of an Enduring Power of Attorney (**EPOA**) or an Advance Health Directive (**AHD**). While the Statement of Choices documents note the legally-binding status of an EPOA and AHD, they do not explicitly state that the Statement of Choices document is not legally binding. This may be confusing to people who may presume the Statement of Choices is a legal document because it is issued by Queensland Health – Advance Care Planning, and looks to be an official legal document.

2. Statement of Choices – Form A

Part A of the 'Statement of Choices – Form A' (**Form A**) requires the person to state whether they have an AHD, an EPOA for personal or health matters, or a tribunal-appointed guardian. If a tribunal-appointed guardian is in place, it is likely that the Tribunal has already determined the person not to have decision-making capacity.

Form A should explicitly state that a valid AHD or EPOA will override any contrary wishes stated in the Form A. Similarly, it is important to note that while a substitute decision-maker (e.g., a tribunal-appointed guardian, or a person appointed under an AHD or EPOA) may take guidance from the content of the Form A, they are not bound in any way to act on it. This is particularly important where a person purports to make a Statement of Choices document after a guardian is appointed as their decision-maker, or an EPOA has commenced (i.e., where the person no longer has decision-making capacity).

Similarly, under the 'My Understanding' section on page 4 of Form A, the second dot point states that '[M]y substitute decision-maker(s) and doctors may only use this document as a guide when making decisions regarding my medical treatment.' On the contrary, a duly appointed substitute decision-maker may choose not to be guided at all by, or rely on any information in, the Form A. This should be explained in more detail for the benefit of both the person completing the Form A, as well as treating doctors and duly appointed substitute-decision makers.

3. Statement of Choices – Form B

In addition to the concerns expressed above, we continue to have strong reservations in relation to the 'Statement of Choices – Form B' (**Form B**), which purports to represent the values and wishes of a person who does not have decision-making capacity, and expresses views as to the person's medical and emergency preferences, including whether the person wants life sustaining treatment.

This is particularly concerning where the Form B is prepared on behalf of the person by someone who is not required to be a legally appointed substitute decision-maker (e.g., under an EPOA or AHD), and could have a conflict of interest. While we support the additional statement in Part A of Form B that if a substitute decision-maker has been appointed for the person, they should be the one completing the Form B, we are of the view that no one other than a legally appointed decision-maker should be able to complete the Form B. To retain the option for a non-legally appointed substitute decision-maker to complete Form B gives rise to an unacceptable level of risk of:

a) abuse (as mentioned in our previous submission); and
b) the person completing the form conveying their own views as to what types of treatments the person should receive, without those views necessarily being shared by the person (where some of our members report numerous instances where, for example, parents may have differing opinions about end of life treatment for their adult children).

While we appreciate that these risks can also arise in circumstances where the Form B is completed by a legally appointed substitute decision-maker, there are significant legal duties and obligations imposed on them under various pieces of legislation. It is unclear what recourse

a person may have where the Form B is completed inappropriately by someone who is not a legally appointed substitute decision-maker.

It is also unclear what happens if more than one alleged substitute decision-maker completes the Form B for the person and the views and wishes for that person in each Form B are different. For example, if a de-facto partner and adult child of a person both complete a Form B, and neither are legally appointed substitute decision-makers for the person, which Form B will be taken to have priority? Does one Form B cancel out the other? If completion of the Form B was limited to persons who are legally appointed substitute decision-makers, these issues would be circumvented.

Another significant concern in relation to the Form B is that it potentially encourages legally appointed substitute decision-makers (including tribunal-appointed guardians, attorneys and statutory health attorneys) to make treatment decisions on behalf of the person that they cannot lawfully make under section 66A(2) of the *Guardianship and Administration Act 2000* (Qld).

Section 66A(2) provides that no legally appointed substitute decision-maker can consent to the withholding or withdrawal of a life-sustaining measure for the person unless the person's "health provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice."[1]

Therefore, neither a guardian, attorney nor a statutory health attorney can complete the Form B, or make a decision on behalf of the person, generally rejecting life sustaining treatments, because such decisions must be consistent with good medical practice. It would be unlawful for a legally appointed substitute decision-maker to complete the Form B and indicate that the person would "not wish CPR attempted under any circumstances" or that the person "would not wish for other life prolonging treatments under any circumstances". The legally appointed substitute decision-maker would, in each particular instance, need to ensure that all medical treatments are consistent with good medical practice.

Further, it is concerning that the Form B allows for a person who is not a legally appointed substitute decision-maker to complete these sections on behalf of the person for whom the form is prepared, where a rejection of life sustaining treatment may be inconsistent with good medical practice.

Considering that there are serious legal consequences for legally appointed substitute decision-makers in making unlawful decisions relating to life sustaining treatments, QLS recommends that substantial drafting amendments be made to the Form B to ensure the legal obligations of legally appointed substitute decision-makers are clarified in the form. Only lawful treatment options should be offered in the Form B.

4. The role of doctors in Statement of Choices documents

We refer to the 'guide for health professionals using the Statement of Choices document' produced by your office. We note that this guide (at page 4) states that the doctor's signature on the 'Statement of Choices – Form A' indicates they believe the person has capacity to make the Statement of Choices themselves, and on Form B indicates they believe the form has been completed by an appropriate substitute decision-maker. The guide gives no guidance to

[1] *Guardianship and Administration Act 2000* (Qld) s 66A(2).

medical practitioners as to how they should satisfy themselves that the person does or does not have decision-making capacity, and further in the case of Form B, that the person who has completed the form is acting in the best interests of the person to whom the form applies. The guide also makes no reference to the Capacity Assessment Guidelines 2020.

QLS recommends that the review of the Statement of Choices documents should consider including further information for medical practitioners when assisting with these forms, particularly in relation to assessing whether a person has decision-making capacity (in relation to both forms), and asking for evidence of the appointment of a substitute decision-maker when completing Form B. QLS recommends that the Form B should be amended to include the usual witnessing procedures, and further, that the Form B should not be allowed to be completed by anyone other than a duly appointed substitute-decision maker.

5. Witnessing requirements

Neither Form A nor Form B adhere to the usual witnessing procedures that are in place to protect a person from someone making critical decisions on their behalf without the proper authority. The absence of any requirement for a formal witness on both Statement of Choices documents presents risks as to the validity and reliability of the document and its content. In relation to Form A, there is no independent person who can verify that the person who has purportedly completed the Statement of Choices has done so willingly and that the information contained therein reflects the person's views, wishes and preferences.

In relation to the Form B and in addition to the above concern, 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.

We recommend that both Statement of Choices documents be amended to include the usual witnessing requirements, and that consideration be given, particularly in relation to Form B, as to whether that document should be signed under the *Oaths Act 1867* (Qld).

We trust that these preliminary comments are helpful. We would be pleased to meet with you and discuss these concerns in more detail. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Elizabeth Shearer
President

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Office of the President

26 October 2017

Statement of Choices Team
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Our ref (VK ACP- WG)

By email: [redacted]

Copy to: John Wakefield: [redacted]

Dear Professor Reymond

Statement of Choices - Version 5

Thank you for your email of 22 September 2017, advising that a new version of the Statement of Choices form has been released.

As you know, the Queensland Law Society has engaged a working group comprising of legal professionals, health care practitioners (including geriatricians and palliative care specialists), health consumer representatives, and Queensland government officers (including representatives of Queensland Health), as well as key stakeholders such as the Public Advocate and Public Guardian in relation to formulating an improved system of advanced care planning (**ACP**) in Queensland.

The working group has reviewed the current ACP structure, including the Advance Health Directive (Form 4), with a view to identifying potential improvements to this form and to the ACP system more generally. This review has encompassed a thorough consideration of the intersecting roles of patients, substitute decision makers, legal practitioners and health care providers in the ACP process, and to propose improvements which are both compliant and patient-centric.

It is important that health and legal practitioners, Government and health care consumer representatives continue to participate in this process.

In the course of undertaking this review, the working group had several discussions about the 'Statement of Choices' document which has been developed by Metro South. Several participants of the working group, including leading legal and health practitioners, expressed some concerns about the use and content of this document.

On 5 May 2017, QLS attended a meeting chaired by Dr John Wakefield at the Royal Brisbane Hospital, to discuss the Statement of Choices document.

You will recall that several stakeholders at the meeting – including QLS, the Public Guardian and the Public Advocate – raised concerns about the content and use of the Statement of Choices document, noting particularly that it purports to have legal status and that this presented a significant risk for healthcare practitioners, patients and their families as reliance upon it may be in conflict with other enduring documents – such as an Advance Health Directive or Enduring Powers of Attorney.

Concerns were also raised at the meeting about the potential that the form may lead to abuse, as it allows a person who does not have legal authority to make medical decisions on behalf of a patient to act as a substituted decision maker for that person. The form does not adhere to any of the usual witnessing procedures that protect a person from someone who does not have the proper authority from making critical (potentially life-affecting) decisions on their behalf.

Following the meeting, QLS informed your office that we would be happy to work through the process of amending the document together, to ensure that any changes appropriately serve the needs of health practitioners and consumers whilst also being legally compliant and structured to avoid the potential for confusion, exposure and abuse that we considered problematic with the current document.

We had not received anything further, or been given the chance to provide this feedback, until receiving the new version of the document on 22 September 2017.

While we are pleased to observe that some of the feedback from the QLS working group and from the meeting in May has been incorporated, to some degree, in the new version – however, it does not go far enough and does not alleviate our concerns regarding the confusion that this document may cause, as well as the potential for it to become a tool of abuse.

As an example, the form still allows for a person who does not have legal authority to make medical decisions on behalf of a patient to act as a substituted decision maker for that person. This is very concerning, as the form does not adhere to the usual witnessing procedures that are in place to protect a person from someone making critical decisions on their behalf without the proper authority.

We would be pleased to meet with you and discuss these concerns in more detail. If you would like to discuss the contents of this letter further please contact Vanessa Krulin at [redacted] or on (07) 3842 5872.

Yours sincerely

[redacted]

Christine Smyth
President