

23 November 2015

Ms Julie Duffy
Acting Public Guardian
Office of the Public Guardian
GPO Box 13554
BRISBANE QLD 4003

Our ref: H&D - 11

Dear Ms Duffy

Appointment of the Public Guardian under an Enduring Power of Attorney

The Queensland Law Society (QLS) is seeking further information pertaining to the Office of the Public Guardian's (OPG) policy, *Accepting appointments to act as an Attorney for Health/Personal Matters*, dated July 2014 and its associated *Application for the Public Guardian to act as Attorney*.

In regards to the OPG's appointment policy, the QLS has the following questions and concerns. These include:

Section 1

Section 1 of the OPG's policy states:

In electing to accept an appointment to act as attorney for personal/health matters under an enduring document, the Public Guardian will make a considered decision based on the circumstances of each case.

Essentially, the QLS has concerns that this policy indicates that the Public Guardian can refuse an appointment as an attorney for Personal Matters under a properly executed Enduring Power of Attorney (EPA).

1. If so, has the Public Guardian ever refused an appointment?

Successive appointment

The OPG policy states:

*The Public Guardian may accept a **successive appointment**: that is, to act as attorney in the event that all other nominated attorneys are unable to perform their duty at the time of activation of the document.*

2. On what grounds would the Public Guardian refuse to act under a successive appointment?

Appointment Policy

The OPG requires, as part of their appointment policy, that the Principal “*must submit*” three documents (e.g., Form 2 or 3, Application form and Personal Profile) in order to consider an appointment under an EPA. In Queensland there are prescribed forms (either Form 2 or 3) for such an appointment. The requirement for a Principal to complete the OPG’s *Application for the Public Guardian to act as Attorney or Personal Profile for EPA* in order for the Public Guardian accepting the appointment seems unnecessary and out of step with the legal framework. Section 44(1) and (3) of the *Powers of Attorney Act 1988* (Qld) stipulates the formal requirements for an EPA.

3. If a Principal does not complete the OPG’s Application Form and Personal Profile for an EPA, would the Public Guardian refuse to accept the appointment under a Form 2 or 3?

We certainly appreciate that the Public Guardian may want people to consider all other appointment options before being approached to act as an EPA for personal matters. The QLS suggests this could be done in a different manner without collecting detailed and very personal information.

Attorneys can accept an appointment, under a properly executed EPA, after the Principal has lost capacity.

- 4. The QLS has concerns that it seems possible that a person may be left without a decision maker if the OPG were to refuse appointment, in these circumstances.**
- 5. The QLS has concerns that these steps add unnecessary layers to the process of appointment. Along with this concern is the potential to gather highly sensitive information when the OPG asks the Principal (on application form) to state the reason they believe a particular person is unsuitable to act as an attorney. For example, some information may contain a mandatory reportable offence, under Queensland or Commonwealth law.**

Section 14(2)

The OPG policy refers to s14(2) of the *Guardianship and Administration Act 2000* (Qld). This reference appears somewhat confusing when the policy document purportedly relates to the appointment of an attorney and not a Guardian.

6. If this section is being used to advance the argument that the Public Guardian should only be appointed as a "last resort", then is this section being misrepresented in regards to the appointment of attorney under an EPA?

It is our understanding that there is no legislative requirement for the Public Guardian to be appointed an attorney, under an enduring document, as a "last resort". In fact there may be compelling reasons as to why an independent statutory officer should be appointed in the first instance (or following valid revocation of an unsuitable or abusive attorney). Section 29 of the *Powers of Attorney Act 1998* (Qld), defines who is an *eligible* attorney. The act is silent as to any rank order for appointments.

The QLS would certainly support an attorney, including the Public Guardian, seeking further information in regards to the Principal's wishes. This information however, could be sourced following the Public Guardian's acceptance of the EPA application. The QLS has concerns about the OPG's requirement for a Principal to justify why a family member or close friend is not suitable to act as their attorney.

The QLS endorses a straightforward approach when adults are contemplating the need to complete enduring documents. The OPG policy in regards to accepting appointments appears to add a further layer of complexity that is not necessary and indeed may deter some from completing an EPA (which is usually encouraged). As a result, more QCAT hearings could be anticipated.

If you have any questions in regards to the above questions and concerns please do not hesitate in contacting our Policy Solicitor, Ms Louise Pennisi on [REDACTED]
[REDACTED] Members of the Health & Disability Committee would also welcome further discussion on these issues and would be happy to invite you to our first committee meeting on Wednesday 10 February 2016 at 8am at Queensland Law Society House to discuss further.

Yours faithfully

[REDACTED]
Michael Fitzgerald
President