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**ASSISTED AND SUBSTITUTED DECISIONS:**

**Decision-making by and for people  
with a decision-making disability**

**DRAFT REPORT**

**Queensland Law Reform Commission  
February 1995**

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*Assisted and Substituted Decisions: A New Approach, Discussion Paper No 38, July 1992.*

The Commission's premises are located on the 13th floor, 179 North Quay, Brisbane. The postal address is PO Box 312, Roma Street, Q 4003.



## INTRODUCTION

The Attorney-General of Queensland has referred to the Queensland Law Reform Commission, as part of its Fourth Programme, a review of the law with respect to matters concerning people with disabilities.

In this Draft Report the Commission analyses the current law relating to decision-making by and for adults who have impaired decision-making capacity and makes recommendations for reform.

Impaired decision-making capacity can arise from a number of causes. It is estimated that, in any one year, 58,000 Queenslanders are affected by severe mental illness.<sup>1</sup> Over 15,000 people in Queensland are presently affected by dementia and it is projected that that number will rise to over 32,000 by the year 2011.<sup>2</sup> There are also approximately 5,000 people who have a severe or profound disability related to head injury. More than 100 new cases present to the Specialist Head Injury Rehabilitation Unit at the Princess Alexandra Hospital each year, and the incidence of severe head injury is approximately 5% to 10% of that hospital's caseload.<sup>3</sup> Of course, the mere existence of a particular condition does not mean that a person is incapable of making his or her own decisions, so not all of these people would have impaired decision-making capacity. However, in the financial year from 1 July 1993 to 30 June 1994, the Public Trustee assumed responsibility for the management of the financial affairs of more than 600 individuals. The Public Trustee currently handles the affairs of almost 5,000 people.<sup>4</sup> The Intellectually Disabled Citizens Council presently has 3873 active files, representing a growth in real terms of 14% since the previous year. From 1 July 1993 to 30 June 1994, 1493 applications for assistance were received by the Council and during the same period the Legal Friend gave consent to medical treatment for 1,744 patients lacking the necessary capacity to consent on their own behalf. Of these consents almost 80% were emergency consents and only 20% for people already receiving the Council's assistance.<sup>5</sup> These figures amply demonstrate the extent of decision-making disability in Queensland.

A person with a decision-making disability may require assistance to make the decisions necessary for his or her personal welfare and financial management. Decision-making assistance may also help prevent the person from making a decision in such a way that he or she is taken advantage of. In the case of a more severe disability, a person may need a substitute decision maker to make

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<sup>1</sup> Queensland Health, *Queensland Mental Health Plan* (1994) 13.

<sup>2</sup> Alzheimer's Disease and Related Disorders Society (Australia), *A Fair Go For Dementia* (1990) 5.

<sup>3</sup> Information provided by Headway Queensland Inc.

<sup>4</sup> Figures provided by the Office of the Public Trustee.

<sup>5</sup> Figures provided by the Office of the Intellectually Disabled Citizens Council.

decisions or to protect the person from abuse or exploitation. It is imperative, in the interests of social justice, that the law provide a simple and inexpensive way of achieving these ends for all people who have a decision-making disability. However, appointment of a decision maker is a serious restriction on a person's right of self-determination and should occur only within a system which includes proper legal safeguards for the rights of the individuals concerned. Queensland is at present the only State or Territory in Australia which does not have a comprehensive legislative scheme to deal with these issues. In the view of the Commission the existing law is gravely inadequate and requires a major overhaul.

The cornerstone of the Commission's recommendations is the creation of an independent statutory tribunal to hear and determine applications about decision-making by and for a person with a decision-making disability. Although it is not the role of the Commission to undertake a funding analysis of its recommendations, the Commission is mindful that implementation of its proposals will have some resource implications for government. However, the cost to government of the Commission's proposals would be offset by savings resulting from, for example, greater legal recognition of family members as decision makers and from the rationalisation of a number of existing procedures for substitute decision-making. There would also be consequential administrative savings.

More importantly, financial considerations alone cannot be allowed to dictate whether existing deficiencies are redressed. Policies such as 'user pays' and 'revenue neutrality' are inappropriate in the context of protecting the rights of vulnerable and often disadvantaged members of the community.

The Commission would like to thank the many individuals and organisations who gave of their time, expertise and experience to contribute to the formulation of the recommendations contained in this Draft Report, and would welcome submissions in response to those recommendations. Information about how to make a submission is set out on the following page.

### **How to make comments and submissions**

You are invited to make comments and submissions on the proposals in this Paper.

Written comments and submissions should be sent to:-

The Secretary  
Queensland Law Reform Commission  
PO Box 312  
ROMA STREET QLD 4003

Oral submissions may be made by phoning (07) 227 4544

**Closing date: 19 May 1995**

It would be helpful if comments addressed specific issues or paragraphs in the Paper.

### **Confidentiality**

Submissions may be subject to release under the provisions of the *Freedom of Information Act* 1992 (Qld). If you want your submission, or any part of it, to be treated as confidential, please indicate this clearly.

The Commission may refer to or quote from submissions in its final Report. If you do not want your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.





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APPENDIX A

APPENDIX B





## **SUMMARY OF RECOMMENDATIONS AND ISSUES FOR COMMENT**

Set out below is a summary of the major recommendations made in this Draft Report. The Commission seeks submissions on these recommendations. Information on how to make a submission is set out following the Introduction.

There are some issues on which the Commission has not reached a concluded view in this Draft Report. The Commission seeks comment on these issues also. They are outlined at the conclusion of the summary of recommendations.

The figures in square brackets indicate the number of the paragraph where the recommendation or invitation to comment is made.

## **RECOMMENDATIONS**

### **Chapter 2: Principles**

- . That a comprehensive legislative scheme providing for decision-making for people with a mental or intellectual disability should embody a set of principles which governs the operation of the legislation. [2.1.1]
- . That the legislation should be based on the principle that a person is presumed to be capable of making decisions about his or her own health, lifestyle, property and financial affairs. [2.2.4]
- . That the legislation should expressly recognise that all people inherently have a valued role within the community and should require that powers and duties under the legislation be exercised in such a way as to support to the greatest extent practicable a person with a mental or intellectual disability to live a life in the general community, and to participate in activities enjoyed by the general community. [2.2.8]
- . That a person whose decision-making capacity is impaired should be encouraged to become as capable as is reasonably possible in the circumstances of the particular case of making his or her own decisions, of participating as much as possible in the life of the community and of gaining as much enjoyment as possible from life. [2.2.12]
- . That appointment of a decision-maker should be seen as a last resort to be used only if, and to the extent that, the person's proper care and protection cannot be adequately achieved by any other means. [2.2.13]

(ii)

- . That, to the extent that there is reasonably ascertainable evidence of what a person with impaired decision-making capacity would have wished to do if his or her decision-making capacity were not impaired, any determination or decision made for or about the person must take the person's wishes into account. [2.2.18]
- . That where it is not possible to ascertain the likely wishes of the person had his or her decision-making capacity not been impaired, determinations and decisions should be based on the least restrictive alternative which is consistent with the person's proper care and protection. [2.2.21]
- . That the importance of maintaining a person's existing supportive relationships should be taken into account. [ 2.2.24]
- . That the importance of maintaining a person's cultural and linguistic environments should be taken into account. [2.2.26]
- . That the importance of maintaining a person's own values and the religious beliefs, if any, held by a person should be taken into account. [2.2.28]
- . That the legislation should state that decisions made for or about a person with impaired decision-making capacity should be appropriate to the person's characteristics and needs. [2.2.32]
- . That the legislation should provide for the community to be encouraged to apply and promote the above principles. [2.2.35]

### **Chapter 3 : The Tribunal**

- . That an independent tribunal should be established to determine issues concerning decision-making by or for a person with impaired decision-making capacity. [3.5.5]
- . That the tribunal should consist of a small number of full-time members and a larger pool of part-time members. [3.6.2]
- . That all applications to the tribunal should be heard by a panel of three members, with one member from each of the three groups in para 3.7.2. [3.6.6]
- . That eligibility for membership of the tribunal should include legal qualifications combined with training or experience which makes the person suitable for appointment, qualifications and expertise in health care or other professions which involve special knowledge in various areas of mental and intellectual disability, and personal experience in working with or caring for a

(iii)

person with a mental or intellectual disability. [3.7.2]

That positions on the tribunal should be advertised; that the President and Deputy President should be appointed by the Governor-in-Council on the recommendation of the responsible Minister; that for other appointments there should be a selection committee chaired by the President; that appointments should be for a fixed term with eligibility for re-appointment. [3.7.3]

That the Governor-in-Council should have power to terminate an appointment on specified grounds. [3.7.6]

That the *parens patriae* jurisdiction of the Supreme Court should not be abolished. [3.8.6]

That, upon the establishment of the tribunal, the power of the Supreme Court to make a Protection Order on the application of the Public Trustee or any other interested person should be abolished. [3.8.10]

That the procedure of filing a Certificate of Disability in the Supreme Court Registry be terminated. [3.8.10]

That existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a tribunal order appointing a decision-maker to manage the affairs of the person concerned. [3.8.10]

That the power of the Supreme Court under the Fifth Schedule of the *Mental Health Act* to appoint committees of the person and of the estate and of the person should also be abolished. [3.8.11]

That a court which awards damages for personal injury to a person with impaired decision-making capacity should no longer have power to make a Protection Order in favour of the Public Trustee for the management of the award. [3.8.16]

That if, in a civil claim for damages for personal injury, a court awards damages to a person who, in the opinion of the court, may be a person for whom the tribunal could make a decision-making order, the court must refer the question of management of the award to the tribunal. [3.8.16]

That if a civil claim for damages is settled prior to or during the court hearing, the question of the management of any amount of agreed compensation should also be referred to the tribunal. [3.8.16]

That existing Protection Orders should continue to have effect but should be rescinded by a subsequent order of the tribunal appointing a decision-maker to manage the person's financial affairs. [3.8.18]

(iv)

- . That the Intellectually Disabled Citizens Council and the position of the Legal Friend be abolished. [3.8.21]
- . That the role of the Council in making determinations about the need for a decision-maker be transferred to the tribunal. [3.8.21]
- . That all powers of notification to the Public Trustee under the Fifth Schedule of the *Mental Health Act* that a person is mentally ill and incapable of managing his or her affairs be abolished. [3.8.23 - 3.8.25]

#### **Chapter 4 : Criteria for making an order**

- . That a decision-maker should be appointed only if a person is unable to understand the nature and foresee the consequences of his or her decisions. [4.4.8]
- . That inability to communicate decisions by any means, even with assistance, should be a ground for the appointment of a decision-maker. [4.4.10]
- . That, before a decision-maker is appointed for a person with impaired decision-making capacity, the tribunal should evaluate whether the person's needs can be addressed in any other less intrusive way. [4.4.11]
- . That appointment of a decision-maker should involve a two step process. First, it should be shown that the person's decision-making capacity is impaired. This will require the tribunal to consider not only medical evidence, but also evidence about the effect of the impairment on the person's ability to function as a member of society. Second, it should also be shown that the person needs to have a decision-maker appointed because his or her impaired capacity creates a situation which cannot be addressed without formal intervention. [4.4.17]
- . That the applicant for a decision-making order should have to satisfy the tribunal, on the balance of probabilities, that the person in respect of whom the application has been brought lacks the necessary capacity and that the decision-making needs resulting from the lack of capacity cannot be met in a less intrusive way. [4.5.4]

#### **Chapter 5 : Who should be a decision-maker**

- . That family members and close friends of a person should be eligible for appointment as decision-makers for both personal and financial decisions, provided that they meet the criteria for eligibility. [5.3.5]

(v)

. That, where the need exists to grant formal authority to someone to make decisions for a person whose decision-making capacity is impaired, consideration should be given to the importance of preserving existing support networks. [5.3.5]

. That, in relation to financial decisions, trustee companies should be eligible for appointment. [5.3.5]

. That the existing statutory preference given to the Public Trustee be terminated. [5.3.5]

. That the Public Trustee be decision-maker of last resort for financial decisions. [5.3.8]

. That a statutory office be established to act in the role of decision-maker of last resort for personal and lifestyle decisions. [5.3.8]

. That the legislation include the following criteria for the tribunal to take into account in determining the eligibility of a proposed decision-maker:

. whether the proposed decision-maker will observe the principles set out in the legislation;

. the views and wishes of the person whose decision-making capacity is impaired;

. the desirability of preserving existing family or other close personal relationships;

. the compatibility of the person whose decision-making capacity is impaired and the proposed decision-maker;

. where it is proposed to appoint different people to make different decisions, the compatibility of those people with each other;

. the availability and accessibility of the proposed decision-maker to the person;

. the competence of the proposed decision-maker to carry out the duties and functions and exercise the powers under the order; and

. whether the interests of the proposed decision-maker are likely to conflict with those of the person whose decision-making capacity is impaired. [5.4.2]

. That the existence of close personal ties should not be assumed to create a position of conflict. [5.4.6]

(vi)

. That conviction for a criminal offence should not be an automatic ground of disqualification, but that the tribunal should take into account the nature and circumstances of any previous conviction and the likelihood that the commission of the offence will adversely affect the person for whom the decision-maker is appointed. [5.4.10]

. That a person should not be automatically disqualified from appointment as a financial decision-maker because the person:

- . has proved incompetent in managing the affairs of others;
- . is a bankrupt or has applied to become one;
- . is presently unable to pay his or her debts or would be unable to do so in the future; or
- . has made an agreement with creditors as to the payment of debts

but that the above factors should be a relevant circumstance for the tribunal to take into account in determining the person's eligibility for appointment. [5.4.11 - 5.4.12]

. That, in determining the eligibility of a proposed decision-maker, the tribunal should take into account whether, and in what circumstances, the proposed decision-maker has ever been refused or removed from an appointment in Queensland or elsewhere. [5.4.14]

. That a professional care provider should not be eligible for appointment as a decision-maker. ('Professional care provider' would be defined to exclude a carer in receipt of a carer's pension). [5.4.20]

## **Chapter 6 : The role of the tribunal**

. That the tribunal should be under a duty to observe the principles set out in the legislation. [6.2.6]

. That the tribunal should have a duty to notify the following people of the hearing of an application:

- . the person who is the subject of the application;
- . the spouse, parents and adult children of the person who is the subject of the application;
- . the applicant;

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- . a primary carer other than the relatives listed above;
  - . a current decision-maker;
  - . where relevant, a statutory officer such as the Public Trustee, who may be required to act as a decision-maker;
  - . a proposed decision-maker; and
  - . any other person who, in the opinion of the tribunal, should be notified. [6.2.8]
- 
- . That notification to the person who is the subject of the application should not be able to be dispensed with. [6.2.11]
  - . That notification should be given in the way most appropriate to the needs of the person who is the subject of the application. [6.2.11]
  - . That notification to the person who is the subject of the application should not be invalidated if the person is not able to understand it. [6.2.11]
  - . That, except in relation to the person who is the subject of the application, the duty to notify should be accompanied by a power of dispensation with notice. [6.2.13]
  - . That the tribunal should be under a duty to conduct its proceedings with as little formality as possible, consistently with ensuring that a just result is achieved. [6.2.16]
  - . That the tribunal should be required to act in accordance with natural justice and that the legislation should prescribe minimum standards of procedural fairness for the tribunal to observe. [6.2.18]
  - . That the tribunal should be required to notify the person who is the subject of an application, the parties to the hearing, and any other person notified of the hearing of its decision. [6.2.21]
  - . That, in every case, the tribunal should be required to prepare a written statement of reasons which refers to the evidence and includes findings on material questions of fact. [6.2.24]
  - . That copies of the statement of reasons be provided to the person who is the subject of the application, the parties to the application and any other person to whom, in the opinion of the tribunal, it would be appropriate. [6.2.27]

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- . That an initial order should be subject to review within a period of not more than two years and that, at the conclusion of the review, the tribunal should have to revoke the order unless it is satisfied that there is a proper reason for the order to continue. [6.2.36]
- . That the tribunal should have a discretion to make orders for a longer period in circumstances where, in the opinion of the tribunal, it is clear that the need for the order will be ongoing and the need for review very limited. [6.2.36]
- . That the tribunal should have power, on review, to extend orders and that an extended order should be subject to review after a period not exceeding three years. [6.2.36]
- . That the tribunal should have power to review an order at any time, either on its own motion, or on the application of any person with a genuine interest. [6.2.37]
- . That present and past members and staff of the tribunal should be required to observe a duty of confidentiality concerning information about the person who is the subject of the application. [6.2.39]
- . That the duty of non-disclosure be qualified if:
  - . the consent of the person has been obtained;
  - . disclosure is required in carrying out the functions of the tribunal;
  - . disclosure is required by any other law or is otherwise excused by law;
  - . disclosure involves statistical or other information that could not reasonably be expected to lead to the identification of the person to whom it relates; or
  - . in the opinion of the tribunal, the duty of non-disclosure is overridden by a public interest factor involving the safety of a member of the public. [6.2.41]
- . That the duty of confidentiality should extend to information about other people involved in the hearing, subject to the above qualifications. [6.2.42]
- . That the tribunal should be required to submit an annual report to the Minister who has administrative responsibility for the tribunal. [6.2.45]
- . That the Minister should be required to table the report in Parliament within a specified time. [6.2.45]



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- . That the tribunal have power to appoint an assistant decision-maker to support and advise a person with impaired decision-making capacity. [6.3.7]
- . That the person concerned be entitled to accept or reject the advice of the assistant decision-maker, who would not have power to make decisions or act on behalf of the person. [6.3.7]
- . That the tribunal have power, whether or not it makes an order appointing an assistant decision-maker or a decision-maker, to make such recommendations as it thinks fit about the course of action which should be followed. The recommendations would not have the force of an order and would not be binding on the parties. [6.3.8]
- . That the parties to the application or the person who is the subject of the application should be able to apply to the tribunal for directions about implementation of the tribunal's recommendations. [6.3.8]
- . That the tribunal have power to make orders appointing decision-makers and to grant to a decision-maker authority to make specified kinds of decisions for such time as the tribunal considers necessary. [6.3.9]
- . That the tribunal have power to make an order conferring general decision-making authority if necessary in the circumstances of a particular case. [6.3.9]
- . That the tribunal should not have power to delegate authority to consent to the marriage or to the adoption of a child of a person who lacks the necessary capacity to make those decisions personally. [6.3.13]
- . That the tribunal should not have power to authorise a decision-maker to vote on behalf of a person who lacks decision-making capacity to vote on his or her own behalf. [6.3.21]
- . That the tribunal be able to make short term emergency orders to allow necessary measures to protect the health, welfare or financial security of a person whose impaired decision-making capacity gives rise to a risk of abuse, neglect or exploitation and that such orders not be renewable more than once before a full hearing is conducted. [6.3.24]
- . That the tribunal have power to make, within the six months prior to the eighteenth birthday of a person whose decision-making capacity is impaired, a deferred order to take effect, unless the tribunal orders otherwise, for a period of one year from the person's eighteenth birthday, but in any event for no longer than three years. [6.3.27]

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- . That, in making such an order, the tribunal be required to take into account the likelihood of any change in the person's capacity. [6.3.27]
- . That the tribunal have power to appoint an alternative decision-maker to act in a temporary capacity if the appointed decision-maker is unable to act. [6.3.34]
- . That the tribunal have power to appoint different decision-makers for different decisions. [6.3.35]
- . That the tribunal have power to appoint joint decision-makers with equal authority. [6.3.35]
- . That the proceedings of the tribunal should be open, but that the tribunal should have power to close the proceedings. [6.3.39]
- . That the tribunal have power to exclude any person other than the person who is the subject of an application from a hearing while that person's views are sought. [6.3.40]
- . That the tribunal should have power to join a party to an application for the purpose of furthering the particular application and if the person joined has a real interest in the person who is the subject of the application. [6.3.42]
- . That the tribunal have power to allow any of the parties to a hearing to be represented by a lawyer or by a non-legal advocate. [6.3.49]
- . That the tribunal have power to appoint a representative for the person who is the subject of the application if that person is not represented and if, in the opinion of the tribunal, there is a need to protect the person's rights. [6.3.49]
- . That the costs of a legal representative appointed by the tribunal be met by Legal Aid and that funding to the Legal Aid Commission be increased to compensate for the costs of such representation. [6.3.50]
- . That the tribunal have power to appoint people with appropriate professional expertise to assist in any proceedings before the tribunal. [6.3.51]
- . That the tribunal have power to require the person making the application to bring the person who is the subject of the application to the hearing. [6.3.53]
- . That the tribunal have power to visit the person the subject of the application if the person is unable to attend the hearing. [6.3.53]

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That the tribunal have power to require witnesses to attend and give evidence. [6.3.54]

That the tribunal have power to require the production of documents, to obtain information from government departments or service organisations, and to order a medical or other examination of the person who is the subject of an application. [6.3.54]

That the tribunal have power to require a witness to answer a question or produce a document, but that information so obtained be inadmissible against the person, save for certain limited exceptions, in subsequent court proceedings. [6.3.61]

That where, in the opinion of the tribunal, there is cogent evidence that a person's decision-making capacity is impaired and that there is an immediate danger to the person's welfare, the tribunal should have power to order entry to the premises and, if necessary, removal of the person to a place of safety. [6.3.64]

That, after a person has been removed to a place of safety, the tribunal should hold an inquiry as soon as possible to determine whether a decision-maker should be appointed or, if a decision-maker has already been appointed, whether that appointment should continue. [6.3.68]

That the tribunal have power to revoke the appointment of a decision-maker or to vary the terms of a decision-maker's appointment. [6.3.71]

That the tribunal have power to remove a decision-maker who is no longer suitable or competent to act, or who has neglected his or her duties, abused his or her authority, or otherwise contravened the proposed legislation. [6.3.71]

That the tribunal have power to advise or direct a decision-maker about the exercise of the authority conferred on the decision-maker or the performance of the decision-maker's duties or functions. [6.3.72]

That the tribunal have power to ratify the acts of an informal decision-maker who has acted in good faith. [6.3.74]

That an informal decision-maker whose acts have been ratified by the tribunal should be protected from personal liability. [6.3.74]

That the tribunal have power to appoint staff. [6.3.76]

That tribunal staff be responsible to and subject to the direction of the head of the tribunal. [6.3.76]

## **Chapter 7 : Duties and powers of decision-makers**

- . That the primary duty of a decision-maker appointed for a person whose decision-making capacity is impaired should be to observe the principles embodied in the legislation. [7.2.1]
- . That a decision-maker's obligations should include:
  - . consulting with the person concerned about his or her wishes and, so far as they can be ascertained, taking those wishes into account;
  - . taking into account what, in the opinion of the decision-maker, would be the wishes of the person concerned if his or her decision-making capacity was not impaired, to the extent that there is reasonably ascertainable evidence on which to base such an opinion;
  - . making decisions which are least restrictive of the person's rights, consistently with person's proper care and protection;
  - . encouraging the person to become capable of caring for himself or herself and to make his or her own decisions about financial matters or about his or her own personal welfare to the greatest practicable extent;
  - . encouraging the person to participate as much as practicable in the life of the community and to gain as much enjoyment as practicable from life;
  - . where different decision-makers are appointed with different powers, consulting with each other regularly to ensure that the person's interests are not jeopardised in any way by lack of communication between the decision-makers; and
  - . where joint decision-makers are appointed, acting unanimously or, where this is not possible, applying to the tribunal for directions. [7.2.3]
- . That a decision-maker should be under a statutory duty to act honestly and with a degree of care that would be reasonable for a person of the decision-maker's experience and expertise. [7.2.4]
- . That, in relation to financial decisions, the following additional obligations should be imposed:

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- . that, if required by the tribunal, the decision-maker must present to the tribunal or to a person nominated by the tribunal, a plan of management to be approved by the tribunal or its nominee;

- . that the decision-maker must not enter, without the consent of the tribunal, into a transaction in relation to the property of a person with impaired decision-making capacity if there is an actual or potential conflict between the interests of the decision-maker and the interests of the person;

- . that, except in relation to property owned jointly by the decision-maker and a person whose decision-making capacity is impaired, a decision-maker must keep his or her property separate from the property of the person. [7.2.7]

- . That a financial decision-maker, if ordered to do so by the tribunal, be required to present the tribunal with a summary of receipts and expenditure and, if requested by the tribunal, to provide more detailed accounts. [7.2.9]

- . That the tribunal should have a discretion to impose further obligations, such as the payment of a security if, in the opinion of the tribunal, the above obligations would be inadequate in the circumstances of a particular case. [7.2.10]

- . That, if ordered to do so by the tribunal, a decision-maker should be liable to compensate the person for whom he or she is appointed for any loss caused by the decision-maker's failure to comply with the statutory obligations. [7.2.11]

- . That a court which finds a decision-maker liable to the person for the loss caused by the breach should be required, in assessing damages, to take into account the amount of compensation paid by the decision-maker as a result of a tribunal order. [7.2.12]

- . That powers which may be given to a decision-maker in relation to personal decisions include:

- . to decide where the person is going to live;

- . to decide who is going to live with the person;

- . to decide whether the person should work and, if so, the kind and place of work, and the employer;

- . to decide what education or training the person will receive;

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- . to consent to certain treatment relating to health care;
- . to decide whether the person should apply for any licence or permit; and
- . to make normal day to day decisions on behalf of the person including decisions about diet and dress. [7.3.2 - 7.3.5]
- . That the legislation include a general provision to enable a decision-maker to be given authority to make any other decisions specified by the tribunal and required by the decision-maker to ensure the proper care and protection of the person. [7.3.6]
- . That the powers which may be given to decision-makers appointed to make financial decisions be sufficiently flexible to allow the decision-maker to meet the needs of the person and the person's dependants, but at the same time provide safeguards against poor management or exploitation. [7.3.8]
- . That, in order to achieve this balance, the powers which may be conferred on a decision-maker in relation to financial decisions be expressed as widely as possible, but be subject to such limitations as the tribunal considers necessary to impose in the circumstances of a particular case. [7.3.9]
- . That the legislation specify some of the powers which may be given to a decision-maker in relation to financial matters. [7.3.10]
- . That there should not be an absolute statutory prohibition on the power of a decision-maker to make gifts or donations on behalf of a person but rather that a decision-maker should be able to make gifts of a seasonal nature or because of a special event or in the nature of a donation that the person had made or might reasonably be expected to make, and provided that the value of the gift is not more than would be reasonable in all the circumstances, particularly the person's financial situation. [7.3.14]
- . That a decision-maker be entitled to apply to the tribunal to seek advice or direction of the tribunal if there is a doubt about the terms of the order or the exercise of the decision-making power conferred. [7.4.1]
- . That a decision-maker who acts in accordance with the advice or a direction of the tribunal should be taken to have acted properly and in accordance with the legislation unless, in representing the facts to the tribunal, the decision-maker has acted fraudulently or has knowingly misrepresented or concealed a material fact. [7.4.1]
- . That a decision-maker be entitled to apply to the tribunal for permission to withdraw or resign as decision-maker. [7.4.2]

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That the powers which may be conferred on a decision-maker include authority to make decisions about legal proceedings. [7.4.5]

That a decision-maker be liable to the other party to litigation for the costs of the litigation, but be entitled to an indemnity from the person on whose behalf the action is taken. [7.4.6]

That a decision-maker have power to agree to or reject the terms of a settlement of a claim, but that, as at present, settlement require sanction by the Public Trustee or, where appropriate, a judge of a District Court or of the Supreme Court. [7.4.7, 7.4.10]

## Chapter 8 : Enduring Powers of Attorney

That legislation provide that an enduring power of attorney may authorise the holder to make decisions other than those relating to the donor's money and property. [8.6.3]

That the donor of an enduring power of attorney not be able to give his or her attorney authority to make a decision which the tribunal could not delegate to a substitute decision-maker. [8.6.5]

That a donor be able to limit the power to be given to an attorney or to instruct the attorney about the exercise of the power. [8.6.7]

That

a) an enduring power of attorney for personal decisions does not come into effect unless the donor has lost the capacity to make the decision;

b) in relation to decisions about the management of the donor's money or property, or about legal proceedings involving the donor, the donor be able to specify that an enduring power of attorney come into effect -

- (i) immediately
- (ii) on a specified date
- (iii) when the donor loses capacity to decide;

c) if the donor fails to specify when the power is to commence, it should be effective immediately the document creating the power is executed.

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- d) an attorney or any other person with a proper interest may apply to the tribunal for a declaration that the donor has lost capacity and the power is in force; and
- e) the test of capacity used by the tribunal would be the same as that used in the determination of an application for the appointment of a decision-maker. [8.6.10 - 8.6.12]

. That a donor be able, at the time the power is granted, to appoint different attorneys for specific purposes and to appoint an acting attorney or successive attorneys. [8.6.14]

. That eligibility for corporate attorneys be restricted to the Public Trustee and to statutory trustee companies. [8.6.17]

. That the authority of the Public Trustee or a trustee company to act under an enduring power of attorney should be limited to exclude decisions about the donor's personal care and welfare. [8.6.19]

. That, for the power to be valid, the donor must understand that:

- . unless the donor specifies otherwise, the attorney will have full control over the donor's affairs;
- . unless the donor specifies otherwise, the attorney will be able to do anything that the donor could have done with the property of the donor which is included in the power;
- . the donor's authority will continue after the donor has lost the capacity to make his or her own decisions;
- . if the donor does lose the capacity to make his or her own decisions, the donor will not be able to monitor the attorney's exercise of the power or to revoke the power;

and, in relation to decisions about the donor's personal welfare -

. unless the donor specifies otherwise, the attorney will have almost complete control over those personal aspects of the donor's life which the donor no longer has the capacity to manage. [8.6.22]

. That the execution of an enduring power of attorney should be witnessed by a Justice of the Peace or a legal practitioner who is not related to either the donor or the attorney. [8.6.24 - 8.6.25]



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- . That if the enduring power of attorney gives the attorney power to make a health care decision for the donor, a current health care provider of the donor should not be eligible to act as a witness. [8.6.25]
- . That a Commissioner for Declarations be authorised to witness an enduring power of attorney, retrospective to the date of commencement of the *Justices of the Peace and Commissioners for Declarations Act*. [8.6.28]
- . That
  - a) it be an offence to dishonestly induce a person to grant an enduring power of attorney;
  - b) the penalty for the offence include the forfeiture of any interest which the person might otherwise have had in the estate of the person improperly induced to execute the instrument;
  - c) there should be a power to grant relief from forfeiture in appropriate circumstances. [8.6.30]
- . That there be provision for another person to sign an enduring power of attorney on behalf of a donor who is prevented by physical disability from doing so, but that the person who signs should not be a witness or a person named in the document as an attorney. [8.6.35]
- . That
  - a) there should be a legislative test of capacity to revoke an enduring power of attorney;
  - b) the test should be the same as the test of capacity for executing a power. [8.6.40]
- . That revocation of an enduring power should be in writing and should be signed and witnessed in the same way as the power is executed. [8.6.42]
- . That the donor should be required to take reasonable steps to notify the attorney of the revocation. [8.6.42]
- . That the appointment of a person's husband or wife as attorney should be automatically revoked in the event of divorce. [8.6.46]
- . That an enduring power of attorney should be revoked by a subsequent marriage unless the power was granted in express contemplation of that marriage. [8.6.47]

- . That an enduring power of attorney should be revoked if a donor who has the necessary capacity subsequently executes another power which confers the same decision-making authority on a different attorney, or makes an advance directive for health care which includes the same decisions. [8.6.49]
- . That revocation of an enduring power of attorney should be included in the decisions which a substitute decision-maker cannot be authorised to make on behalf of a person with impaired decision-making capacity. [8.6.52]
- . That power to revoke or vary the terms of an enduring power of attorney, or to appoint an alternative attorney, be transferred from the Supreme Court to the tribunal. [8.6.56]
- . That an attorney should be required, at all times, to act in accordance with the principles of the decision-making legislation. [8.6.58]
- . That an attorney should be required to act honestly and with a degree of care that would be reasonable for a person of the attorney's experience and expertise. [8.6.63]
- . That the legislation should provide that an attorney who, on the death of the donor, will or might be a beneficiary of the donor's estate does not, for that reason alone, have a conflict of interest with the donor. [8.6.66]
- . That an attorney should not be able to enter into a transaction in which the interests of the donor and the attorney or a relation, business associate or close friend of the attorney could conflict, unless the attorney is expressly authorised to do so by the terms of the power or unless approval has been given by the tribunal. [8.6.68 - 8.6.69]
- . That the legislation should spell out the extent to which an attorney may act to benefit a person other than the donor. [8.6.70]
- . That, if ordered to do so by the tribunal, an attorney should be required to present the tribunal with a summary of receipts and expenditure or, if the tribunal considers necessary, more detailed accounts. [8.6.72]
- . That, if ordered to do so by the tribunal, an attorney should be required to present a plan of management to the tribunal or its nominee. [8.6.72]
- . That the tribunal should have power to impose additional obligations on an attorney if it considers necessary in the circumstances of a particular case. [8.6.73]

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- . That an attorney should be required to consult with any other attorney appointed by the donor to ensure that the donor's interests are not prejudiced by a breakdown in communications. [8.6.74 - 8.6.75]
- . That if attorneys are appointed to exercise a power jointly, the power must be exercised unanimously and that, if unanimous use of the power becomes impracticable, any of the attorneys should be able to apply to the tribunal for directions about the exercise of the power. [8.6.74 - 8.6.75]
- . That a paid care provider who provides services to a donor on a professional basis should not be eligible for appointment as an attorney under an enduring power of attorney, but that the fact that a person receives a carer's pension should not make the person ineligible for appointment. [8.6.77]
- . That a person's current health care provider should not be eligible to act as the person's attorney. [8.6.78]
- . That power to order compensation for loss caused by breach of the attorney's statutory obligations should be transferred from the Supreme Court to the tribunal. [8.6.80]
- . That, if the tribunal orders the attorney to compensate the donor, a court which finds the attorney liable to the donor for loss caused by the attorney should be required, in assessing damages, to take into account the compensation which the attorney has paid to the donor as a result of the tribunal order. [8.6.84]
- . That the power to grant an attorney approval to withdraw should be transferred from the Supreme Court to the tribunal. [8.6.86]
- . That, while a donor is still competent, an attorney should be able to withdraw by giving notice to the donor. [8.6.87]
- . That the statutory protection given to an attorney who acts on an enduring power which has been revoked should be restricted to an attorney who does not know or does not have reason to believe that the power has been revoked. [8.6.91]
- . That the protection given to an attorney should include an attorney who acts in reliance on an enduring power of attorney executed in another jurisdiction, provided that the attorney did not know or have reason to believe that the power did not comply with the legislation in the jurisdiction where it was executed. [8.6.93]

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- . That a third party who does not know or have reason to believe that an enduring power of attorney has been revoked should be protected by the legislation. [8.6.95]
- . That the protection given to a third party should include the situation of a third party who acts in reliance on an enduring power of attorney executed in another jurisdiction, provided that the third party did not know or have reason to believe that the enduring power did not comply with the legislation in the jurisdiction where it was executed. [8.6.97]
- . That an enduring power of attorney executed in another jurisdiction in Australia should be recognised in Queensland, to the extent that it could have been validly made in Queensland, if it complies with the requirements of the jurisdiction where it was executed. [8.6.103]
- . That the tribunal should not make an order concerning decisions which are included in the authority given to an attorney under an enduring power of attorney unless it is shown that there has been abuse, incompetence or neglect on the part of the attorney or that, for any other reason, the enduring power should be terminated. [8.6.106]
- . That there should be a saving provision to validate the acts of a decision-maker appointed in ignorance of the existence of an enduring power. [8.6.106]
- . That, if the tribunal has made a decision-making order for a person, the person should be entitled to make an enduring power of attorney over matters not included in the order. [8.6.108]

## **Chapter 9 : Health care treatment**

- . That consent to health care treatment should be given only if the decision-maker is satisfied that the proposed form of treatment is the most appropriate for the purpose of promoting and maintaining the health and well-being of the patient. [9.7.3]
- . That the treatment provider should explain to the decision-maker:
  - . the nature of the patient's condition;
  - . alternative courses of treatment available for that condition;
  - . the general nature and effect of each of those courses of treatment;

- . the nature and degree of any significant risks associated with each of those forms of treatment; and
- . the reasons why it is proposed that any particular form of treatment should be carried out. [9.7.5]

. That, in making a decision about the proposed treatment, the decision-maker should be required to take into account the views (if any) of the patient and the factors referred to above. [9.7.7]

. That a consent given by a person authorised to make health care decisions should be ineffective if the health care provider is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment. [9.7.9]

. That if the treatment is likely to cause the patient no distress, or if it may cause the patient some degree of distress which is temporary and which is outweighed by the benefit of the treatment to the patient, the objection of a patient who has little or no understanding of the proposed treatment should be disregarded and the consent of the authorised decision-maker should be effective. [9.7.11]

. That the legislation extend the scope of an enduring power of attorney by allowing a donor who wishes to do so to include in the decisions which an attorney is authorised to make decisions about the health care of the donor. [9.8.6]

. That, to be able to grant a valid enduring power of attorney for health care, a donor must be able to understand that the power authorises the attorney to make health care decisions which the donor is no longer able to make and that, once the donor has lost decision-making capacity, he or she will have no control over the decisions made by the attorney and will not be able to revoke the power. [9.8.8]

. That, if an enduring power of attorney authorises an attorney to make health care decisions, a current health care provider should not be eligible to act as a witness. [9.8.9]

. That the donor of an enduring power of attorney for health care should be able to choose whether to authorise his or her attorney to make decisions about all aspects of his or her health care, or whether to specify certain forms of health care about which the attorney is not authorised to decide or about which the attorney must decide in accordance with the directions of the donor. [9.8.12]

. That the tribunal have power, if circumstances (including advances in medical science) have changed to such an extent that the power is no

longer appropriate, to override the instructions given by a donor in an enduring power of attorney for health care. [9.8.12]

- . That the authority of an attorney under an enduring power of attorney for health care decisions should not commence until the donor has lost capacity to make the decision in question. [9.8.14]
- . That, where doubt exists as to whether or not the donor of an enduring power of attorney for health care has capacity to make his or her own decisions about treatment, the matter should be referred to the tribunal to determine whether the enduring power has come into operation. [9.8.17]
- . That a purported revocation of an enduring power of attorney for health care should not be effective unless the donor has the capacity to execute a new power if he or she chooses to do so. [9.8.19]
- . That revocation should be in writing and witnessed in the same way as the power is executed. [9.8.21]
- . That the legislation include a statutory consent mechanism authorising certain people to consent to treatment for a person who lacks capacity to make his or her own decision. [9.9.16]
- . That if a person represents to a treatment provider that he or she is authorised to give consent, and if the treatment provider does not know and could not reasonably be expected to know that the person does not have authority, the consent should be deemed effective. [9.9.19]
- . That if a decision-maker appointed by the tribunal is given authority to make health care decisions for a person, the authority of the appointed decision-maker should take precedence over the statutory power of a member of the person's support network provided that the decision-maker is reasonably available and is willing to make a decision about the proposed treatment. [9.10.2]
- . That special consent procedures should apply to some forms of treatment. [9.11.1 - 9.11.48]
- . That only the tribunal should be able to consent to removal for the purpose of donation to another person of tissue from a donor who lacks capacity to give his or her consent. [9.11.13]
- . That the tribunal should not consent if the proposed donor objects in any way to the procedure. [9.11.13]
- . That the tribunal should not consent unless it is satisfied that:

- . the risk to the proposed donor is small;
  - . the risk of failure of the donation is low;
  - . the life of the recipient would be in danger without the donation; and
  - . there is no other reasonably available donor who is likely to be compatible. [9.11.13]
  - . That the tribunal should also consider the closeness of the relationship between the proposed donor and recipient. [9.11.13]
  - . That only the tribunal should be able to consent to the performance of a sterilisation procedure on an adult who lacks capacity to decide. [9.11.22]
  - . That, before consenting to a sterilisation procedure, the tribunal must be satisfied that:
    - . the procedure is medically necessary; or
    - . the person concerned is, or is likely to be, fertile and sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or
    - . if the person on whom it is proposed to perform the procedure is female, cessation of menstruation by sterilisation is the only practicable way of overcoming demonstrated problems associated with menstruation;
- and that
- . the treatment cannot reasonably be postponed; and
  - . the person is not likely, in the foreseeable future, to develop the capacity to decide. [9.11.24]
  - . That the tribunal be required to take into account:
    - . alternative forms of treatment which are presently available, or likely to become available in the foreseeable future;
    - . the nature and extent of any significant risks associated with the proposed treatment and with any available alternative forms of treatment, including other sterilisation procedures; and
    - . whether the proposed treatment will promote and maintain the person's health and well-being. [9.11.25]

- . That only the tribunal should be able to consent to a termination of pregnancy for a woman unable to give her own consent because of impaired decision-making capacity. [9.11.31]
- . That the authority of the tribunal to consent to a termination of pregnancy should be limited to situations where the tribunal is satisfied that performance of the termination is necessary to preserve the mother from serious danger to her life or to her physical or mental health. [9.11.33]
- . That the legislation provide that a termination of pregnancy is lawful if it is performed with the consent of the tribunal. [9.11.33]
- . That only the tribunal should be able to grant consent for a person who lacks capacity to make his or her own decision to take part in research or to be given experimental treatment which is intended for the person's benefit. [9.11.42]
- . That the tribunal should not consent unless it is satisfied that:
  - . the treatment or research relates to a condition which affects the patient;
  - . the treatment or research involves minimal risk to the person;
  - . the treatment or research has been approved by a relevant ethics committee;
  - . the treatment or research may result in significant benefit to the person; and
  - . the benefit cannot be achieved without the research or treatment. [9.11.43]
- . That the tribunal should refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment. [9.11.44]
- . That only the tribunal should be able to grant consent for a person who lacks the capacity to make his or her own decision about the matter to take part in research or to be given experimental treatment intended to gain further knowledge about the patient's condition. [9.11.48]
- . That the tribunal should not consent unless it is satisfied that:
  - . the research relates to a condition which affects the person; and



- . the research involves minimal risk to the person; and
- . the research has been approved by a relevant ethics committee; and
- . the research may result in significant benefit to the person or other people affected by the same condition as the person; and
- . the research cannot be carried out without the participation of a person or persons affected by that condition. [9.11.49]

. That the tribunal should refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment. [9.11.50]

. That the legislation include a power for additional forms of treatment to be specified by regulation made under the legislation as requiring special consent procedures. [9.11.52]

. That where a treatment provider believes that treatment is necessary to meet imminent risk to the person's life or health, the treatment may be given even though consent has not been obtained. [9.12.3]

. That treatment may be administered without consent if the treatment provider believes that the treatment should be given urgently to prevent significant pain or distress. [9.12.3]

. That the treatment should not be given if the person objects or if the treatment provider is aware that the person, at a time when he or she was capable of making his or her own health care decisions, refused treatment of the kind proposed. [9.12.4]

. That it should be an offence to administer treatment to a person who lacks capacity to consent to that treatment unless:

- . consent for the treatment has been given in accordance with the requirements of the legislation or of any other Act; or
- . the legislation authorises performance of the treatment without consent; or
- . the treatment is given in accordance with an order of the Supreme Court in its *parens patriae* jurisdiction. [9.12.5]

. That the legislation enable a person with the necessary degree of decision-making capacity to make an advance directive containing information and

instructions about his or her future health care which are as effective as if the person made the decision at the time it needed to be made and had the capacity to make the decision at that time. [9.13.6]

. That an advance directive should be in writing and should be witnessed by a Justice of the Peace, a Commissioner for Declarations or a legal practitioner who is not related to or a current health care provider for the maker of the advance directive. [9.13.10]

. That if the directive is signed by another person on behalf of the maker of the directive, the person who signs the directive should not be a witness or a person whom the maker of the directive has appointed as a decision-maker. [9.13.10]

. That the maker of an advance directive be able to appoint another person to make decisions on his or her behalf if the instructions in the directive are inadequate or unclear. [9.13.16]

. That the test of capacity to revoke an advance directive for health care should be whether the person has sufficient capacity to make a new directive. [9.13.18]

. That revocation of an advance directive for health care should be in writing and signed and witnessed in the same way as the execution of the directive. [9.13.20]

. That an advance directive should also be revoked by the execution of a subsequent directive to the extent that the subsequent directive relates to the same health care decisions or appoints a different decision-maker, provided that at the time the later directive was executed, the maker had sufficient capacity. [9.13.21]

. That legislative provisions about advance directives should not detract from any existing common law rights. [9.13.24]

. That procedures relating to involuntary treatment for mental illness be contained in the *Mental Health Act* and that there be no provision for substituted consent for involuntary psychiatric care. [9.15.5]

. That a person authorised to consent to health care treatment for a mentally ill person whose decision-making capacity is impaired, should be able to consent to standard psychiatric treatment for that person, unless the person's condition is such that he or she meets the criteria for treatment as an involuntary patient. [9.15.9]

- . That the use of advance directives be available as an alternative, in appropriate cases, to involuntary treatment of patients with mental illness. [9.15.12]

## **Chapter 10 : Appeals**

- . That the proposed legislation include an appeal mechanism which allows orders of the tribunal to be challenged. [10.1.1]
- . That appeal against a determination of the tribunal should lie to a judge of the Supreme Court. [10.2.8]
- . That there should be an appeal as of right on a question of law. [10.3.7]
- . That the Court have a discretion to grant leave to appeal on any other question. [10.3.7]
- . That the Court have a discretion to allow evidence to be presented at the hearing of the appeal, if the Court considers it appropriate in the circumstances of the case. [10.5.3]
- . That the person who is the subject of an application and the parties to the application should be entitled to appeal against an order of the tribunal, and that the appeal body should have a discretionary power to allow any other person to appeal if, in its opinion, that person should be entitled to do so. [10.6.6]
- . That the Court have power to:
  - . affirm the decision of the tribunal;
  - . vary the decision of the tribunal; or
  - . set aside the decision of the tribunal and either
    - make any other decision which the tribunal could have made; or
    - remit the matter to the tribunal for reconsideration in accordance with the directions or recommendations of the Court. [10.7.2]
- . That the parties to an appeal against a decision of the tribunal should bear their own costs. [10.9.3]

- . That the Court should have a discretion to award costs in an appropriate case. [10.9.3]

## **Chapter 11 : The Adult Guardian and the Public Advocate**

- . That an office of the Adult Guardian be created. [11.2.4]
- . That the Adult Guardian be available for appointment, where the tribunal considers it appropriate, as decision-maker for decisions about personal welfare issues. [11.2.4]
- . That the Adult Guardian be able to delegate decision-making authority to another person. [11.2.4]
- . That the Adult Guardian have responsibility for a scheme of community decision-makers and for recruiting, training and supporting volunteers and monitoring their performance. [11.2.8]
- . That the role of the Adult Guardian include an advisory service and an educational and research function. [11.2.12]
- . That the Adult Guardian be given power to investigate allegations that a person with impaired decision-making capacity is being exploited or abused or is in need of assistance or that a carer or decision-maker is acting inappropriately. [11.2.21]
- . That the Adult Guardian be given power to take appropriate action in response to its investigations. [11.2.21]
- . That the legislation include guidelines for the disclosure of information about any investigations conducted by the Adult Guardian. [11.2.21]
- . That the Adult Guardian have responsibility for a scheme of community visitors to protect the rights of people with impaired decision-making capacity living in residential care facilities. [11.2.27]
- . That the Volunteer Friends programme currently existing under the *Intellectually Disabled Citizens Act* continue within the Department of Family Services and Aboriginal and Islander Affairs and be expanded to include any person with impaired decision-making capacity who needs personal support and friendship, whether or not the person is subject to a decision-making order. [11.2.36]
- . That the Adult Guardian be given power to apply to the tribunal for an order authorising entry into premises where it is believed that a person with

impaired decision-making capacity may be at risk, and removal of the person from those premises if necessary for the well-being of the person. [11.2.39]

. That an independent statutory office of the Public Advocate be established to advocate for measures which will promote and protect the interests of people with impaired decision-making capacity. [11.3.9]

## Chapter 12 : Other matters

. That there be no fee for making an application to the tribunal and that there be no award of costs against a person for unsuccessfully making or opposing an application unless the tribunal considers that there are circumstances which justify making an order for costs. [12.2.6]

. That tribunal members and any person who appears at a hearing of an application before the tribunal should be immune from liability for defamation for anything said during the tribunal proceedings. Members of the tribunal should be protected from any other kind of legal liability for the way in which they carry out their functions under the legislation, provided that they act in good faith. [12.3.3]

. That a decision-making order made in another state or territory be recognised and enforced in Queensland as though it were an order of the tribunal. [12.5.3]

. That the Department of Justice and the Attorney-General, which has administrative responsibility for the court system and for other legislation with a rights perspective - for example the *Anti-Discrimination Act* and the *Dispute Resolution Centres Act* - should be responsible for the tribunal. [12.7.3]

## ISSUES FOR COMMENT

### Chapter 5

. Whether the proposed legislation should require a person who has been nominated for appointment by the tribunal to disclose to the tribunal whether the person has been convicted of a criminal offence. [5.4.15 - 5.4.18]

(xxx)

## **Chapter 8**

- . Whether the proposed legislation should include provision for the donor of an enduring power of attorney to nominate a person (called a 'monitor') to supervise the exercise of power by an attorney. [8.6.31 - 8.6.33]
- . Whether the forms in Appendix 'A' and Appendix 'B' for executing an enduring power of attorney are appropriate. [8.8.1 - 8.8.5]

## **Chapter 9**

- . Whether an advance directive for health care should include a certificate from a medical practitioner to the effect that the practitioner has discussed with the person making the directive the instructions which the person has given in the directive. [9.13.11 - 9.13.13]

## **Chapter 12**

- . Whether the tribunal should have power to declare a contract invalid on the ground that a party to the contract lacked the capacity to understand the nature and foresee the consequences of the transaction, and to adjust the rights of parties to such a contract. [12.4.2 - 12.4.11]

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## **1. AN OVERVIEW**

### **1.1 THE SIGNIFICANCE OF DECISION-MAKING**

1.1.1 Making decisions is an important part of human life. The decisions which an individual makes impact upon his or her personal well-being, lifestyle, financial position and property. They involve issues such as accommodation, health care, education, employment, social contacts, financial arrangements and property management.

1.1.2 The exercise of choice in such matters is one of the ways in which people express their individuality. Having decisions acknowledged and acted upon by others is one of the ways in which people exert control over their own lives. Diminished decision-making capacity may reduce a person's ability to control his or her life. It may unfairly lower the esteem in which a person is held by other members of the community and also diminish the person's sense of self-respect and dignity.

### **1.2 DECISION-MAKING CAPACITY**

1.2.1 In legal terms, whether a person has the capacity to make a decision depends on whether he or she is able to understand broadly the nature and consequences of the decision. Everyday living involves a wide range of decisions which vary enormously in scope and complexity. Different decisions require different levels of understanding. As a result, a person's decision-making capacity may not be static, but may vary according to the difficulty of the particular decision.

### **1.3 PEOPLE WITH A MENTAL OR INTELLECTUAL DISABILITY**

1.3.1 Many people with a mental or intellectual disability are capable of making unaided all or some of the decisions which affect their lives. Where a person with a mental or intellectual disability is unable to make a decision alone, he or she may be able to make that decision with an appropriate level of assistance. The kind and degree of assistance, and the length of time for which it is needed, will depend on the nature and extent of the disability, and on the complexity of the decision to be made.

1.3.2 Unfortunately, some people have a mental or intellectual disability which impairs their decision-making capacity to such an extent that they are unable

to make some or all of their own decisions, either alone or with assistance. In such a situation, choices will have to be made on that person's behalf by someone else. However, at present, the law in Queensland does not recognise an automatic right for one person to make a decision on behalf of another adult, no matter how close their relationship. The existing legal procedures for the appointment of substitute decision makers were explained in the Queensland Law Reform Commission's Discussion Paper, *Assisted and Substituted Decisions: A New Approach*.<sup>1</sup> They are described briefly on pages 13-15, 29-32 and 39-41 below.

## 1.4 THE NEED FOR REFORM

1.4.1 In the Discussion Paper, the Commission criticised the existing legislation as being complex, fragmented and inflexible and, for the most part, paternalistic, inaccessible and lacking in principle.<sup>2</sup>

1.4.2 The existing rules have created a situation in which there are gaps, overlaps and inconsistencies. Different legislative provisions may apply to people whose incapacity arises from different causes, so that outcomes may vary even though the same problem exists - that is, lack of decision-making capacity. Sometimes more than one law may apply so that the outcome will depend on which law is used. Some people may have difficulty in obtaining the assistance they require. The resulting uncertainties serve only to add to the anxiety and stress already experienced by relatives and carers.

1.4.3 Many of the existing rules require an application to the Supreme Court. Often, this is financially beyond the means of people who have a relative or close friend whose decision-making capacity is impaired by a mental or intellectually disability and for whom decisions must be made. In addition to the expense, people may feel alienated and intimidated by the courtroom atmosphere and legal culture.

1.4.4 Most of the present rules also concentrate power to make decisions for a person who, because of an intellectual or mental disability, lacks the capacity to make those decisions personally, in the hands of a public officer.<sup>3</sup> While there are situations in which it may be more appropriate for a decision to be made by an independent third party, for families and close friends the inflexibility of the existing system causes considerable resentment and, in some cases, hardship.

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<sup>1</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>2</sup> See for example Discussion Paper pages 22-23, 35-36, 64-69.

<sup>3</sup> For example, the Public Trustee and the Legal Friend.



1.4.5 Much of the existing legislation has no underlying philosophical basis and fails to acknowledge the rights of people whose decision-making capacity is impaired by a mental or intellectual disability.

1.4.6 The United Nations General Assembly has stated that a person with an intellectual disability has, to the maximum degree of feasibility, the same rights as other human beings;<sup>4</sup> that where, because of the extent of a disability, a person is unable to exercise all of those rights in a meaningful way or it becomes necessary to restrict or deny all or some of those rights, the procedure used for that restriction or denial should contain proper legal safeguards against abuse and be subject to review and to the right of appeal to higher legal authority;<sup>5</sup> that a person with an intellectual disability should live in circumstances as close as possible to normal and participate in different forms of community life,<sup>6</sup> and that he or she has a right to a qualified guardian when this is required to protect his or her well-being and interests.<sup>7</sup> The United Nations has also stated that all disabled persons have an inherent right to respect for their human dignity<sup>8</sup> and are entitled to measures designed to enable them to become as self-reliant as possible.<sup>9</sup>

1.4.7 The United Nations has also issued a statement of principles concerning the rights of people with mental illness. It has declared that all persons with a mental illness have the right to be treated with humanity and respect for the inherent dignity of the human person, and to exercise all civil, political, economic, social and cultural rights recognised by the United Nations; that any decision that, because of mental illness, a person lacks legal capacity and needs another person appointed to act on his or her behalf, should be made only after a fair hearing by an independent and impartial tribunal; that such decisions should be reviewed at reasonable intervals and be subject to a right of appeal to a higher legal authority; and that where a person with a mental illness is unable to manage his or her own affairs, his or her interests should be protected by such measures as are necessary and appropriate.<sup>10</sup>

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<sup>4</sup> Declaration on the Rights of Mentally Retarded Persons, Article 1.

<sup>5</sup> Declaration on the Rights of Mentally Retarded Persons, Article 7; Declaration on the Rights of Disabled Persons, Article 4.

<sup>6</sup> Declaration on the Rights of Mentally Retarded Persons, Article 4.

<sup>7</sup> Declaration on the Rights of Mentally Retarded Persons, Article 5.

<sup>8</sup> Declaration on the Rights of Disabled Persons, Article 3.

<sup>9</sup> Declaration on the Rights of Disabled Persons, Article 5.

<sup>10</sup> Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, Principle 1.

1.4.8 Under present Queensland legislation, however, in some situations a decision-maker may be appointed without the safeguard of an impartial hearing by an independent body. Mechanisms for review are inadequate. There is an all or nothing approach to the appointment of a decision-maker. Powers given to a decision-maker are often unlimited. There is no provision for tailoring the terms of a decision-making order according to the needs of the person, or for obliging a decision-maker to act in a way which is least restrictive of the rights of the person concerned.

## 1.5 PROPOSALS FOR REFORM

1.5.1 In the Discussion Paper, the Commission explored ways of improving the existing situation. The Commission advocated the adoption of a comprehensive legislative scheme which would apply to all people who, because of a mental or intellectual disability, lack decision-making capacity and need to have a decision-maker appointed.

1.5.2 Central to this proposal was the establishment of an independent tribunal to make determinations about the appointment of decision-makers. It was the view of the Commission that a tribunal could provide an accessible, affordable and simple, but at the same time sufficiently flexible, forum.<sup>11</sup>

1.5.3 The Commission also recognised the need to create a system which, while protecting the interests of the person with a mental or intellectual disability, allowed for greater involvement of members of existing support networks in the decision-making process.<sup>12</sup>

1.5.4 The Commission envisaged that the new scheme would be underpinned by a set of principles which would be set out in the legislation and which would bind every person who exercised a power or performed a duty or function under the legislation. The principles would give statutory recognition to the right of the mentally and intellectually disabled to respect for their human dignity.<sup>13</sup> They would also attempt to strike a balance between the need of people with a mental or intellectual disability to be protected from neglect, abuse and exploitation to the extent that their disability prevents them from looking after their own interests, and their right to the greatest possible degree of autonomy.<sup>14</sup>

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<sup>11</sup> Discussion Paper pages 37-39.

<sup>12</sup> Discussion Paper pages 69-70, 118-119.

<sup>13</sup> The principles would be consistent with those contained in the *Disability Services Act 1992 (Qld)*.

<sup>14</sup> Discussion Paper pages 1-6.

## 2. PRINCIPLES

### 2.1 INTRODUCTION

2.1.1 In the previous chapter, reference was made to the view of the Commission that a comprehensive legislative scheme providing for decision-making for people with a mental or intellectual disability should embody a set of principles which governs the operation of the legislation.

2.1.2 The principles should give statutory recognition to the rights of people with a mental or intellectual disability and, at the same time, recognise their need to be shielded against neglect, abuse and exploitation if, because of their disability, they are prevented from making decisions which adequately protect their interests and personal welfare.

2.1.3 The principles should be binding on every person who exercises a power or performs a duty or a function under the legislation.

2.1.4 In the Discussion Paper,<sup>15</sup> the Commission outlined a possible set of legislative principles.<sup>16</sup> These principles were generally consistent with the provisions of the *Disability Services Act 1992* (Qld). Fewer than half the submissions received commented on the proposed principles. Amongst those which did comment, there was almost unanimous support for the development of legislative principles to bind all persons who have powers, duties and functions under the provisions of the legislation.

### 2.2 THE COMMISSION'S PROPOSALS

2.2.1 The Commission's proposals, and the views put forward in the submissions, are discussed below.

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<sup>15</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>16</sup> Discussion Paper pages 2-6.

### ***Presumption of competence***

2.2.2 Intervention in the decision-making process of a person with a mental or intellectual disability may seriously restrict that person's rights. It may also adversely affect the person's status as a member of his or her community and may, as a result, have a significant impact on the person's dignity and sense of self-esteem. It is, therefore, the view of the Commission that the existence of a mental or intellectual disability should never be assumed to cause impairment to a person's decision-making capacity.<sup>17</sup>

2.2.3 In the Discussion Paper, the Commission expressed its belief that the questions of whether, and to what extent, it is necessary to interfere with a person's right to make his or her own decisions should be approached on the basis that the person concerned has the capacity to make his or her own decisions until the contrary is shown.<sup>18</sup> In other words, a person alleging that the decision-making capacity of a person with a mental or intellectual disability is impaired should have to substantiate the claim. The majority of the submissions supported the Commission's view.

2.2.4 **The Commission therefore recommends that the legislation should be based on the principle that a person is presumed to be capable of making decisions about his or her own health, lifestyle, property and financial affairs.**

2.2.5 A number of submissions raised the question of the standard of proof which should be required to rebut the presumption of competence. The difficulty is that if the standard is too high, assistance may not be available when it is needed. On the other hand, if it is too low, insufficient protection may be given to the rights of a person with a mental or intellectual disability. This issue will be addressed in Chapter 4.<sup>19</sup>

### ***Valued social role***

2.2.6 People with a mental or intellectual disability are entitled to be treated as valued members of our society. There should not be a perception that they have less to contribute than other members of the community.

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<sup>17</sup> See for example *Cocchi v Cocchi* [1989] 1 QdR 266, 269.

<sup>18</sup> Discussion Paper page 3.

<sup>19</sup> See pages 37-38.

2.2.7 The Commission believes that acknowledgment of this principle was implicit in the views expressed by the Commission in the Discussion Paper. However, a number of submissions recommended that it should be specifically included as a separate principle. Because of its importance as an underlying premise in the way people with a mental or intellectual disability are regarded by society, the Commission agrees with these submissions.

2.2.8 **It therefore recommends that legislation should expressly recognise that all people inherently have a valued role within the community and should require that powers and duties under the legislation be exercised in such a way as to support to the greatest extent practicable a person with a mental or intellectual disability to live a life in the general community and to participate in activities enjoyed by the general community.**

### ***Encouragement of self-reliance***

2.2.9 The Commission believes that people with a mental or intellectual disability should be encouraged to develop and achieve their maximum potential and to become as self-reliant as it is reasonably possible for them to be in the circumstances of each particular case. This involves encouraging a person whose decision-making capacity is impaired to make his or her own decisions, to participate as much as possible in the life of the community and to gain as much enjoyment as possible from life.

2.2.10 In the submissions which commented on the Commission's proposed legislative principles, there was general approval for inclusion of the principle of encouragement of self-reliance as promoting the rights and dignity of people with a mental or intellectual disability. However, concern was expressed that adequate levels of support should be provided.<sup>20</sup> There was also concern that the goal should not be to achieve maximum self-reliance at all costs.

2.2.11 The Commission acknowledges these concerns and agrees that the emotional well-being, physical safety or financial security of a person with a mental or intellectual disability should not be put at risk by emphasis on self-reliance without adequate support. The intention of the Commission is, through statutory recognition of the principle, to give people with a mental or intellectual disability the opportunity to be as self-reliant as practicable in matters relating to their personal and financial affairs and to foster the development of their individual potential within a challenging, but supportive, environment.

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<sup>20</sup> The *Disability Services Act* 1992 (Qld) provides, in section 9, that people with disabilities are entitled to 'any necessary support, and access to information, to enable them to participate in decisions which affect their lives' and, in section 11, that 'programs and services should be designed and implemented so that their focus is on developing the individual and on enhancing the individual's opportunity to establish a quality life'.

**2.2.12** The Commission therefore recommends that a person whose decision-making capacity is impaired should be encouraged to become as capable as is reasonably possible in the circumstances of the particular case of making his or her own decisions, of participating as much as possible in the life of the community and of gaining as much enjoyment as possible from life.

### ***Least restrictive alternative***

**2.2.13** Because appointment of a decision-maker for a person whose decision-making capacity is impaired by a mental or intellectual disability may substantially restrict the person's rights and freedoms, it should be seen as a last resort to be used only if, and to the extent that, the person's proper care and protection cannot be adequately achieved by any other means.

**2.2.14** There was strong support in the submissions which commented on the Commission's proposed principles for the views expressed by the Commission in the Discussion Paper concerning the 'least restrictive alternative'.<sup>21</sup> The Commission reaffirms its belief that assistance should be provided on an 'as needs' basis only; that formal intervention should occur only when informal support is insufficient; that the views of the person with a mental or intellectual disability should, wherever possible, be sought and taken into account in determining the need for formal intervention and in making decisions on behalf of the person; and that the extent of a decision-maker's authority should be limited to specific areas where assistance is required. The Commission acknowledges that all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection provided that they do not harm others and that they are capable of making decisions about such matters.

### ***Substituted judgment***

**2.2.15** One of the least restrictive methods of making decisions for a person whose decision-making capacity is impaired is to make them in the way that the person for whom they are being made would have done if he or she had been able to do so.

**2.2.16** However, because of its reliance on a known set of individual values, this approach is of little benefit where the nature or extent of the disability prevents formulation of preferences on which decisions can be based.<sup>22</sup> Such a situation

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<sup>21</sup> Discussion Paper page 4.

<sup>22</sup> Discussion Paper page 5.

may arise, for example, in the case of a person with a severe congenital intellectual disability. It will also provide little assistance when a person has suffered brain damage before his or her value system has been sufficiently established to provide a decision-making basis for the rest of his or her life.

2.2.17 On the other hand, the advantage of the 'substituted judgment' approach is that it allows the greatest possible degree of autonomy and self-determination for the person concerned. It is particularly appropriate, for example, in situations of dementing illness where there is a life history of personal choice on which a decision-maker is able to draw.

2.2.18 **The Commission therefore recommends that, to the extent that there is reasonably ascertainable evidence of what a person with impaired decision-making capacity would have wished to do if his or her decision-making capacity were not impaired, any determination or decision made for or about the person must take the person's wishes into account.<sup>23</sup>**

### ***Best interests***

2.2.19 In the Discussion Paper, the Commission recommended that, where a determination or decision could not be made on the basis of a person's previous decision-making history, the least restrictive alternative which is in the 'best interests' of the person concerned should be adopted.<sup>24</sup>

2.2.20 The Commission is aware that the term 'best interests' is vague and subjective, and could be given widely varying interpretations. Although it is defined in legislation in other jurisdictions,<sup>25</sup> most of the factors identified in these provisions as being in a person's best interest have been included by the Commission in the other principles it has recommended.

2.2.21 **The Commission recommends that determinations about and decisions for a person with impaired decision-making capacity should be based on the least restrictive alternative which is consistent with the person's proper care and protection.**

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<sup>23</sup> See for example *Guardianship and Administration Act 1993 (SA)* section 5.

<sup>24</sup> Discussion Paper page 5.

<sup>25</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* section 28(2); *Guardianship and Administration Act 1990 (WA)* section 51(2).

### ***Recognition of existing relationships***

2.2.22 Decisions made on behalf of a person with a mental or intellectual disability may impact significantly on the lives of people who are in an existing supportive relationship with that person. Because of the potentially extended effect of decision-making for a person with a mental or intellectual disability, there should be a legislative requirement to take into account, wherever possible, the importance of preserving such existing supportive relationships.<sup>26</sup>

2.2.23 The submissions which commented on the legislative principles proposed by the Commission generally endorsed the Commission's recommendation on this issue.<sup>27</sup>

2.2.24 The Commission therefore recommends that the legislative principles require that the importance of maintaining a person's existing supportive relationships be taken into account.

### ***Recognition of background and beliefs***

2.2.25 In an increasingly multi-cultural society, people from different ethnic and cultural backgrounds may employ different value bases in making decisions. They may also have, within their own traditions, ways of overcoming problems caused by the impaired decision-making capacity of one of their members.

2.2.26 Recognition should be given to systems of support which operate in ethnic or cultural communities, and legal intervention should be invoked only as a last resort. If legal intervention becomes necessary, **the Commission recommends that people who give assistance to or make decisions for a person with a mental or intellectual disability should be required to take into account the importance of maintaining the cultural and linguistic environments of that person.**<sup>28</sup>

2.2.27 The submissions which commented on the legislative principles proposed by the Commission generally endorsed the Commission's

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<sup>26</sup> Section 4(e) of the *Guardianship Act* 1987 (NSW) imposes a duty to recognise the importance of preserving family relationships. The Commission used the term 'existing supportive relationship' in preference to 'family relationships' in view of the variety of extended family relationships and de facto partnerships which exist in today's society. The Commission's recommendation is consistent with sections 9 and 24 of the *Disability Services Act* 1992 (Qld) which provide, respectively, that people with disabilities are entitled to 'services that support their attaining a reasonable quality of life in a way that supports their family unit and their full participation in society', and that programs and services should be designed and implemented to recognise and take into account the implications for and demands on the families of people with disabilities.

<sup>27</sup> Discussion Paper page 5.

<sup>28</sup> Discussion Paper pages 5-6. See also *Guardianship Act* 1987 (NSW) section 4(e).



recommendation on this issue.<sup>29</sup> It was suggested that the principle should be widened to acknowledge the importance of the person's religious beliefs. The Commission agrees that there are situations where the way in which a person makes a decision may be influenced by his or her religious beliefs, but where consideration of merely ethnic or cultural background may not be sufficient to allow this to be taken into account. A person's decisions may also be influenced by a set of values which is not necessarily associated with any particular kind of religious belief.

**2.2.28 The Commission therefore recommends that the legislative principles should include that the importance of maintaining a person's own values and the religious beliefs, if any, held by a person should be taken into account.**

### ***Non-discrimination***

2.2.29 Assistance given to or decisions made for a person with a mental or intellectual disability should be appropriate to the personal circumstances of that person.

2.2.30 In the Discussion Paper, the Commission recommended that legislation should require that there be no discrimination in the provision of decision-making for a person with a mental or intellectual disability on the basis of age or gender.<sup>30</sup>

2.2.31 There was wide support for the Commission's recommendation. However, a number of submissions commented that it was not sufficiently far-reaching. The Commission carefully considered whether the legislation should require decision-makers to avoid discrimination on the grounds of discrimination prohibited by the *Anti-Discrimination Act* - for example race, religion or lawful sexual activity.<sup>31</sup> Although the Commission agrees with the sentiments expressed in the submissions, it believes that their purpose is better achieved in the context of anti-discrimination legislation.

**2.2.32 The Commission therefore recommends that the legislation should state that decisions made for or about a person with impaired decision-making capacity should be appropriate to the person's characteristics and needs.**

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<sup>29</sup> The Commission's recommendation is also consistent with section 9 of the *Disability Services Act 1992 (Qld)* which provides that services should be provided in a way 'that is appropriate taking into account the disability and the person's cultural background'.

<sup>30</sup> Discussion Paper page 6.

<sup>31</sup> *Anti-Discrimination Act 1991 (Qld)* section 7.

### ***Community responsibility***

**2.2.33** The rights and welfare of people with a mental or intellectual disability are the responsibility of every member of the community, and all members of society have a moral duty to respect the need of people with a mental or intellectual disability to be valued as individuals and to be effectively included in the community.

**2.2.34** In the Discussion Paper, the Commission acknowledged that legislation cannot of itself ensure that people with a mental or intellectual disability are accorded the respect that they deserve.<sup>32</sup> However, the Commission remains of the view that legislation can and should provide for the community to be encouraged to apply and to promote the principles described in this chapter.

**2.2.35** The Commission therefore recommends that the legislation include a statement encouraging community application and promotion of the principles.

## **2.3 THE LEGISLATION**

**2.3.1** The legislative principles recommended by the Commission are set out in clauses 30 to 39 of the Draft Bill contained in Chapter 13 of this Draft Report.

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<sup>32</sup> Discussion Paper page 6.

### 3. THE TRIBUNAL

#### 3.1 EXISTING MECHANISMS

3.1.1 In the Discussion Paper,<sup>33</sup> the Commission outlined the mechanisms which currently exist under Queensland legislation for determining whether a decision-maker should be appointed for a person whose decision-making capacity is impaired by a mental or intellectual disability.<sup>34</sup> At present, decision-makers can be appointed in the following ways:

##### *Financial decisions*

3.1.2 A judge of the Supreme Court may make a Protection Order appointing the Public Trustee to manage a person's affairs.<sup>35</sup> A Protection Order may also be made in any action for damages for personal injury by a person who appears to the court to be a person for whom a Protection Order could be made.<sup>36</sup>

3.1.3 If the value of the person's property does not exceed \$10,000 and if reports from two medical practitioners are produced, the Public Trustee may file a Certificate of Disability in the Supreme Court.<sup>37</sup> The effect of a Certificate of Disability is to appoint the Public Trustee to manage the person's property.<sup>38</sup>

3.1.4 A medical practitioner (usually a psychiatrist or psychiatric registrar) in a psychiatric hospital, or a prison superintendent or a hospital administrator acting on the advice of a psychiatrist, may notify the Public Trustee that a person is mentally ill and incapable of managing his or her affairs.<sup>39</sup> The effect of

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<sup>33</sup> Queensland Law Reform Commission, Discussion Paper No. 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>34</sup> Discussion Paper pages 29-35.

<sup>35</sup> *Public Trustee Act 1978* (Qld) section 65(1).

<sup>36</sup> *Public Trustee Act 1978* (Qld) section 67.

<sup>37</sup> *Public Trustee Act 1978* (Qld) section 70.

<sup>38</sup> *Public Trustee Act 1978* (Qld) section 72.

<sup>39</sup> *Mental Health Act 1974* (Qld) Fifth Schedule clause 1.

notification is to automatically hand control of the person's property to the Public Trustee.<sup>40</sup>

3.1.5 A judge of the Supreme Court may declare that a person is mentally ill and incapable of managing his or her affairs<sup>41</sup> and may appoint a committee of the person's estate.<sup>42</sup> The committee, who is usually the Public Trustee,<sup>43</sup> has full power to manage the person's financial affairs and property.

3.1.6 The Intellectually Disabled Citizens Council may notify the Public Trustee that a person who is an assisted citizen under the *Intellectually Disabled Citizens Act*<sup>44</sup> is likely to be subject to undue influence in the management of his or her finances or that, for some other reason, it is in the best interests of the person concerned or his or her dependants that the person's property should be protected. The effect of the notification is that the Public Trustee automatically takes over management of the person's finances.<sup>45</sup>

### ***Personal decisions***

3.1.7 A judge of the Supreme Court may declare that a person is mentally ill and incapable of looking after his or her affairs and may appoint a committee of the person.<sup>46</sup> A committee of the person has full guardianship powers.

3.1.8 The Intellectually Disabled Citizens Council may authorise the Legal Friend, who is a barrister or solicitor appointed to provide specialised assistance under the *Intellectually Disabled Citizens Act*,<sup>47</sup> to make decisions for that person about medical and other health care treatment.<sup>48</sup>

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<sup>40</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 2.*

<sup>41</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 1.*

<sup>42</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 4.*

<sup>43</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 4(5).*

<sup>44</sup> See pages 30-31.

<sup>45</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 32.*

<sup>46</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 4.*

<sup>47</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 4.*

<sup>48</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 26(3).*

### **Other decisions**

3.1.9 The Legal Friend may also instruct a solicitor to act on behalf of a person who is an assisted person under the *Intellectually Disabled Citizens Act*.<sup>49</sup>

## **3.2 CRITICISMS**

3.2.1 The above procedures are open to criticism on a number of grounds. These grounds were discussed in the Discussion Paper.<sup>50</sup>

3.2.2 They include lack of regard for the fundamental principles, such as the presumption of competence and the least restrictive alternative, which were outlined in the previous chapter. There is often confusion about which is the appropriate procedure in a particular case. The number of different procedures is inefficient and wasteful of resources, and creates the risk of inconsistency as a result of different policy decisions.

3.2.3 Many of the present methods of appointing a decision-maker for a person with a mental or intellectual disability involve an application to the Supreme Court. In the Discussion Paper, the Commission expressed the view that the Supreme Court is not the most appropriate forum for making determinations of this kind at first instance. The costs of a court application, lack of familiarity with the formality of the legal system and the adversarial atmosphere of the courtroom combine to make the courts inaccessible to most of the people to whom the legislation applies.

## **3.3 AN ALTERNATIVE SYSTEM**

3.3.1 The inaccessibility of the court system has resulted in a search for an alternative to formal court litigation in applications of this kind. The aim has been to develop procedures which are easier for members of the general public to understand and to use, which involve minimum cost and which allow the issue to be resolved with a minimum of delay. This has led, in certain kinds of matters, to the creation of independent tribunals with specialist jurisdiction to provide an informal, inexpensive, common-sense method of adjudication.

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<sup>49</sup> *Intellectually Disabled Citizens Act* 1985 (Qld) section 26(1)(b).

<sup>50</sup> Discussion Paper pages 35-36.

3.3.2 In the Discussion Paper, the Commission recommended that an independent tribunal be created to determine applications for the appointment of a decision-maker for a person with a mental or intellectual disability.<sup>51</sup> Very few of the submissions received by the Commission in response to the Discussion Paper disagreed with the Commission's recommendation. The majority firmly supported the view that existing legislative mechanisms should be removed, and that they should be replaced with a comprehensive and flexible tribunal specifically established for the purpose of making determinations about decision-making by and for people with a mental or intellectual disability.

### 3.4 PERCEIVED DISADVANTAGES OF A TRIBUNAL

3.4.1 Those submissions which did not agree with the Commission's recommendation based their arguments on two main grounds: that the informal procedures of a tribunal do not provide sufficient protection for the rights of individuals with a mental or intellectual disability, and that the presence on the tribunal of people with special knowledge or experience creates the risk that applications may be prejudged on the basis of that particular expertise or interest. In the view of the Commission, both of these arguments can be satisfactorily answered.

#### *Protection of rights*

3.4.2 The first argument assumes that a formal, adversarial approach provides better protection for the rights of the people concerned. However, informal and less expensive procedures are not necessarily less thorough than those used in the traditional system. The ability of the tribunal to adopt an active rather than a passive role may, in fact, improve the thoroughness of investigation and the quality of decision-making.

3.4.3 It is possible, within an informal system, to provide protection for individual rights. Even though legislation may provide that the tribunal is not bound by the rules of evidence, and may require a procedure which is economic, informal and quick, it may also subject the tribunal to the rules of natural justice and minimum standards of procedural fairness. Failure to observe these requirements will then be grounds for review of the tribunal's determination.<sup>52</sup>

3.4.4 The requirements may include notification to the person who is the subject of the application; the right for that person to be present at a hearing and

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<sup>51</sup> Discussion Paper page 38.

<sup>52</sup> See for example *Moore v Guardianship and Administration Board* [1990] VR 902.

to participate as fully as possible; the right for the person to be represented and to call witnesses; an onus of proof which falls on those who wish to restrict the person's liberties; and a requirement that reasons be provided for decisions of the tribunal so that it can be seen that the tribunal's findings are consistent with the evidence given.<sup>53</sup>

3.4.5 It is the view of the Commission that procedures which do not comply with all the formal and adversarial features of a judicial model of adjudication may nevertheless meet the requirements of procedural fairness.<sup>54</sup> A recent evaluation of the operation of the Guardianship Board of Victoria found that the less formal procedure of the Board and reliance on active interventionist rather than passive adversarial models of fact-finding did not detract from the realisation of the classical goals of the legal system: accuracy, fairness and legitimacy of outcomes. The study concluded that a tribunal model, although departing from the traditional formalities of the courts, was entirely compatible with achieving the basic objectives of the legal system.<sup>55</sup>

### ***Prejudging the issues***

3.4.6 Where members of a tribunal are appointed to their position because of their experience or expertise in a particular area, they are entitled to use their special knowledge in their decision-making.<sup>56</sup> However, to avoid a perception of bias the rules of natural justice require that, where members rely on particular facts within their knowledge, this must be disclosed to the parties so that the parties have an opportunity to rebut those facts.<sup>57</sup> The issue, in terms of natural justice, is not whether the tribunal has a preliminary view of the matter, based on the members' own expertise and material which has been presented prior to the hearing, but the extent to which a preliminary review restricts the opportunity given to the parties to present contrary views.<sup>58</sup> The obligation to disclose not only accords with the principles of natural justice but also, coupled with a duty to give reasons based upon probative evidence, protects the parties from the risk that the issue will be prejudged.

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<sup>53</sup> These matters are discussed further in Chapter 6.

<sup>54</sup> See also M Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure' (1991) 13 *Sydney Law Review* 377.

<sup>55</sup> T Carney, 'Guardianship Boards in Australia: Accessible and Accountable Justice?', A paper (as yet unpublished) presented at the XVIIIth International Congress on Law and Mental Health, Vancouver, Canada, June 1992.

<sup>56</sup> S Hotop, *Principles of Australian Administrative Law* (1985) 199; see also M Allars, note 54 above.

<sup>57</sup> *R v Milk Board; Ex parte Tomkins* [1944] VLR 187.

<sup>58</sup> T Carney and D Tait, *Balanced Accountability: An evaluation of the Victorian Guardianship and Administration Board* (1991).

### 3.5 ADVANTAGES OF A TRIBUNAL

3.5.1 The establishment of an independent tribunal would offer a number of advantages.

3.5.2 When a matter is heard by a court, the judge generally assumes the role of a neutral umpire presiding over an adversarial dispute. Each side decides what information is to be presented to the judge. This is done by calling witnesses who are asked questions and then tested by cross-examination according to the rules of the law of evidence. The complexity of these rules usually requires the participation of lawyers. The judge is not allowed to go beyond the evidence given by the parties or the issues raised by them.

3.5.3 With a tribunal, on the other hand, procedures can be simplified and the rules about giving evidence and presenting arguments relaxed. The use of lawyers can be minimised, and public accessibility can be increased by the removal of some of the procedural and financial barriers imposed by a formal legalistic system. The tribunal can intervene to ensure that the evidence necessary to achieve the most appropriate solution is available.

3.5.4 Creation of a tribunal would also allow for the appointment to the tribunal of people who have experience or special expertise in particular areas of mental or intellectual disability and their associated problems. Their understanding of the situation would enable the evaluation of alternatives to decision-making orders or, where necessary, the making of orders designed to meet the individual decision-making needs of people with a mental or intellectual disability. In addition to meeting community needs, specialised communication skills and understanding on the part of members may contribute to public confidence in tribunal decisions.

3.5.5 **It is therefore the recommendation of the Commission that an independent tribunal be established.<sup>59</sup> The Commission believes that, without such a tribunal, much of the benefit of its proposed reforms would be lost.**

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<sup>59</sup> The Human Rights and Equal Opportunity Commission has also recommended that each State and Territory in Australia should have an independent statutory body with power to determine capacity in relation to personal and financial affairs and to appoint substitute decision-makers where appropriate. See *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, (1993) Vol 2 page 903.



## 3.6 COMPOSITION OF THE TRIBUNAL

### *Full and part time members*

3.6.1 The Discussion Paper advocated the appointment of a small number of full-time members and a larger pool of part-time members.<sup>60</sup> This proposal was also supported by the submissions. The Commission remains of the view that the appointment of part-time members would enable the flexibility to provide expertise in particular areas of disability, and would also help to overcome some of the problems of distance by allowing appointment of members from regional communities.

3.6.2 **The Commission therefore recommends that the tribunal should consist of a small number of full-time members and a larger pool of part-time members.**

### *Panels*

3.6.3 In the Discussion Paper, the Commission proposed that the majority of the hearings conducted by the tribunal should be heard by a panel consisting of three members. The Commission also suggested that simple cases might be heard by a single member of the tribunal.<sup>61</sup>

3.6.4 The weight of the submissions was heavily against single member panels. It was felt that one member hearings might not adequately protect the rights of the person the subject of the application, and concern was expressed that, if legislative provision were made for hearings to be conducted by a single member, resource implications might result in such hearings becoming the norm rather than the exception.

3.6.5 There are also the additional factors that an application which at first sight appears straightforward may develop into a much more complicated matter, and that single member hearings do not allow for the breadth of experience, expertise and skill in conducting proceedings that can be provided by a mix of professional and community based members. There is a strong argument that, because of the effect of a decision-making order on the rights of the person concerned, single member panels should always be constituted by people with legal qualifications. However, determination of an application for a decision-making order does not involve only legal issues. To gain the acceptance of the community

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<sup>60</sup> Discussion Paper page 38.

<sup>61</sup> Discussion Paper page 38.

which it is designed to serve, the tribunal must be socially responsive and must have both professional and community input.

**3.6.6 The Commission therefore recommends that all applications should be heard by a panel of three members. A panel should be constituted by one member from each of the three groups in para 3.7.2 below.**

### ***Consistency of decisions***

3.6.7 Some of the submissions received in response to the Discussion Paper emphasised that appointment of part-time members operating on a panel system would create a need to ensure consistency of decision-making by all tribunal members.

3.6.8 The Commission believes that the question of consistency can be addressed to a significant extent by a carefully planned and rigorously implemented programme of training for tribunal members so that all members are familiar with the requirements of the legislation. In addition, over a period of time a body of tribunal decisions would build up which, while not binding on members in a legal sense, could provide general guidelines for future decisions.

3.6.9 However, it needs to be remembered that each application must be decided on the facts of the particular case and that the weight which members of the tribunal, in the exercise of their discretion, give to various factors will inevitably vary according to the circumstances of each situation. Providing solutions most appropriate to the individual needs of people with a mental or intellectual disability should not be seen as inconsistency.

## **3.7 APPOINTMENT OF MEMBERS**

3.7.1 A number of submissions, while supporting the concept of a tribunal, expressed some concern as to how members would be appointed. The Commission acknowledges the necessity for the legislation to provide accountable recruitment procedures.

### ***Qualification for membership***

3.7.2 **The Commission recommends that the legislation include qualifications for members of the tribunal. These should include:**

- . legal qualifications, combined with training or experience which makes the person suitable for appointment to the tribunal;<sup>62</sup>
- . qualifications and expertise in health care or other professions which involve special knowledge in various areas of mental and intellectual disability; and
- . personal experience in working with or caring for a person with a mental or intellectual disability.

### **Selection**

**3.7.3** The Commission recommends that positions on the tribunal should be advertised. The President and Deputy President should be appointed by the Governor-in-Council on the recommendation of the Minister responsible for the government department charged with administering the legislation. The Minister should consult with key organisations. The appointments should be for a fixed term with eligibility for re-appointment. For other members, there should be a selection committee chaired by the President. The selection committee should advise the Minister, who should accept the recommendation of the committee. The appointment should be made by the Governor-in-Council on the recommendation of the Minister. The appointment should be for a fixed term with eligibility for re-appointment.

### ***Disqualification from hearing***

**3.7.4.** Situations may occur in which a member of the tribunal has a personal or financial interest in a matter before the tribunal. The Commission considered whether a member should be automatically disqualified from hearing an application in which the member may have an interest.<sup>63</sup> However, the Commission was of the view that, because of the variety of circumstances which may arise, not every situation would necessarily involve a conflict of interest.

**3.7.5** The Commission therefore recommends that members of the tribunal be required by the legislation to disclose any personal or financial interest in a particular matter to the President of the tribunal, who would then decide whether or not it would be appropriate for the member to participate in the hearing of the matter.<sup>64</sup>

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<sup>62</sup> See for example *Family Law Act 1975* (Cwth) section 22(2)(b).

<sup>63</sup> See for example *Guardianship and Administration Act 1993* (SA) section 6(6).

<sup>64</sup> If the President has such an interest, it should be disclosed to the Deputy President.

### **Removal of members**

3.7.6 A further issue which needs to be considered is the question of removal from office. In the view of the Commission, the grounds for removal should be stated in the legislation. **The Commission recommends that the Governor-in-Council should have power to terminate an appointment because of:**

- . **physical or mental incapacity to carry out official duties satisfactorily; or**
- . **neglect of duty; or**
- . **dishonourable conduct; or**
- . **conviction of an offence that, in the opinion of the Governor-in-Council, makes the person unsuitable to carry out official duties.**

### **3.8 EFFECT OF TRIBUNAL ON EXISTING LAW**

#### ***The parens patriae jurisdiction of the Supreme Court***

3.8.1 In addition to the statutory provisions creating mechanisms for determining whether a decision-maker should be appointed for a person with a mental or intellectual disability, the Supreme Court has, by virtue of its *parens patriae* jurisdiction, authority to appoint decision-makers for people whose lack of decision-making capacity makes them vulnerable.

3.8.2 The *parens patriae* jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It is derived from the responsibility of the monarch, under early English law, to protect the welfare and property of people whose mental illness or intellectual disability made it impossible for them to look after themselves.<sup>65</sup> By the middle of the seventeenth century, this protective role had passed to the Court of Chancery and was later extended to include people who, as a result of illness, accident or old age, had lost the capacity to manage their own affairs.<sup>66</sup> When the Supreme Court of Queensland was established it was given the powers of the Court of Chancery, including the power to appoint a person to look after someone who was unable to adequately safeguard his or her

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<sup>65</sup> *Statute de Praerogativa Regis*, 17 Edward II.

<sup>66</sup> *Ridgway v Darwin* (1802) 8 Ves Jun 65, 32 ER 275; *Ex parte Cranmer* (1806) 12 Ves Jun 445, 33 ER 168.

own interests.<sup>67</sup>

3.8.3 It is possible for the *parens patriae* jurisdiction of the Supreme Court to be displaced by legislation. However, since it is part of the prerogative jurisdiction formerly exercised by the Court of Chancery on behalf of the Crown, it will be displaced only if the legislation in question does so expressly or by necessary or inescapable implication.<sup>68</sup>

3.8.4 In the Discussion Paper,<sup>69</sup> the Commission raised the question as to whether the *parens patriae* jurisdiction should be abolished or retained. The *parens patriae* jurisdiction over adults with a mental or intellectual disability has been abolished in the United Kingdom.<sup>70</sup> It has been retained by legislation in other Australian jurisdictions.<sup>71</sup>

3.8.5 None of the submissions which addressed this issue favoured abolition of the *parens patriae* jurisdiction. It was seen as a formal accountability mechanism which would provide a safeguard additional to an automatic review process for tribunal decisions<sup>72</sup> and to the proposed appeal procedure.<sup>73</sup> It was also seen as providing a safety-net for situations or issues not covered or envisaged by the proposed legislation. The maintenance of the jurisdiction was considered essential to the role of the Supreme Court as a superior court.

**3.8.6 The Commission agrees with these submissions, and recommends that the *parens patriae* jurisdiction of the Supreme Court should not be abolished.**

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<sup>67</sup> *Supreme Court Act 1867* (Qld) section 22.

<sup>68</sup> *Minister for the Interior v Neyens* (1964) 113 CLR 411; *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345; *Johnson v Director-General of Social Welfare* (1976) 135 CLR 92.

<sup>69</sup> Discussion Paper pages 39-40.

<sup>70</sup> *In re F* [1990] 2 AC 1.

<sup>71</sup> See for example *Guardianship Act 1987* (NSW) section 8(1), section 31; *Guardianship and Management of Property Act 1991* (ACT) section 6.

<sup>72</sup> See pages 56-58.

<sup>73</sup> See Chapter 10.

### **Protection Orders and Committees**

3.8.7 In the Discussion Paper, the Commission recommended the abolition of the legislation providing for Protection Orders and committees.<sup>74</sup> This recommendation was the logical consequence of the recommendation that a comprehensive guardianship scheme be set up.

3.8.8 The recommendation received almost unanimous approval in the submissions which considered the issue.

3.8.9 However, the recommendation did not distinguish between a Protection Order made as a result of an application by the Public Trustee or any other interested person,<sup>75</sup> and a Protection Order made by a court in the course of an action to recover damages for personal injury if, in the opinion of the court, the person awarded damages needs assistance with financial management.<sup>76</sup> A Protection Order of this kind involves consideration of a number of additional issues. These will be discussed below.<sup>77</sup>

3.8.10 The Commission recommends that, upon the establishment of a tribunal, the power of the Supreme Court to make a Protection Order on the application of the Public Trustee or any other interested person should be abolished. The procedure of filing a Certificate of Disability in the Supreme Court Registry should also be terminated. Existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a tribunal order appointing a decision-maker to manage the affairs of the person concerned.<sup>78</sup>

3.8.11 The Commission further recommends that the power of the Supreme Court under the Fifth Schedule of the *Mental Health Act* to appoint committees of the estate and of the person should also be abolished.

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<sup>74</sup> Discussion Paper page 29.

<sup>75</sup> *Public Trustee Act 1978 (Qld)* section 65.

<sup>76</sup> *Public Trustee Act 1978 (Qld)* section 67.

<sup>77</sup> See paras 3.8.12-3.8.19.

<sup>78</sup> *Cf Aged and Infirm Persons' Property Act 1940 (SA)* section 30.

### **Protection Orders in Damages Awards**

3.8.12 In the Discussion Paper,<sup>79</sup> the Commission drew attention to the problems which may arise when a court makes a Protection Order in favour of the Public Trustee for the management of damages awarded as compensation for personal injury.<sup>80</sup> In particular, the Commission highlighted the anomalous situation which may arise for the spouse of the person to whom the damages are paid in the light of provisions contained in the *Family Law Act* and the *Queensland Succession Act*.

3.8.13 The spouse of an injured person has no legal entitlement to any part of the damages awarded, even though he or she may have given up work to provide, free of charge, nursing and housekeeping services for which the injured person receives financial compensation.<sup>81</sup> If a Protection Order is made, the Public Trustee has no obligation, unless ordered to do so by the court,<sup>82</sup> to give the spouse an allowance or lump sum adequate to meet his or her own financial needs free from the scrutiny of the Public Trustee. The spouse may therefore be deprived of financial independence.

3.8.14 But if the marriage comes to an end after a damages award has been made, the amount of the award will be taken into account, along with factors such as the state of health of the parties and the capacity of each for employment, in adjusting the property rights of the injured person and the spouse.<sup>83</sup> If the injured person dies, the surviving spouse will be entitled to at least a share of the estate and possibly to compensation for loss arising as a result of the injured person's death.<sup>84</sup>

3.8.15 The Commission is conscious of the need to protect against mismanagement or exploitation, particularly where large sums of money are involved. However, the Commission considers that the interests of the person who has been awarded damages may be adequately safeguarded by means other than

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<sup>79</sup> Discussion Paper pages 66-67.

<sup>80</sup> See *Public Trustee Act 1978* (Qld) section 67.

<sup>81</sup> *Griffiths v Kerkemeyer* (1979) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327. See also Queensland Law Reform Commission, Report No 45, *The Assessment of Damages in Personal Injury and Wrongful Death Litigation*, October 1993.

<sup>82</sup> Even where the court orders the Public Trustee to apply part of the estate for the maintenance or benefit of the spouse, the amount to be applied may be left to the discretion of the Public Trustee.

<sup>83</sup> *Family Law Act 1975* (Cwth) sections 79(4), 75(2).

<sup>84</sup> *Succession Act 1981* (Qld) sections 34-39, section 41; *Common Law Practice Act 1867* (Qld) sections 12-15C. See also Queensland Law Reform Commission, Report No 48, *De Facto Relationships: Claims by surviving de facto partners for damages for wrongful death*, November 1994.

a Protection Order. The Commission does not consider that the hardships which may arise for a spouse and dependants as a result of a Protection Order in these circumstances are justified.

**3.8.16** The recommendation of the Commission is, therefore, that the power of a court to make a Protection Order in an action for damages for personal injury should be replaced. Instead, there should be a requirement that if, in a civil claim for damages for personal injury, a court awards damages to a person who, in the opinion of the court, may be a person for whom the tribunal could make a decision-making order, the court must refer the question of management of the award to the tribunal. Similarly, if the claim is settled prior to or during the court hearing,<sup>85</sup> the question of the management of any amount of agreed compensation should also be referred to the tribunal. This will allow a decision-making order to be made if one does not already exist and if the tribunal is satisfied that an order should be made in the circumstances of the case. Where there is an existing order, the tribunal will be able to review its appropriateness in the light of the amount of the award or settlement.

**3.8.17** Pending a determination by the tribunal, the money should be paid into court to be paid out according to the directions of the tribunal.<sup>86</sup> The same procedure should be adopted if a claim made by or on behalf of a person whose decision-making capacity is impaired is settled<sup>87</sup> either prior to the commencement of court proceedings or while they are in progress.<sup>88</sup>

**3.8.18** Existing Protection Orders should continue to have effect, but should be rescinded by a subsequent order of the tribunal appointing a decision-maker to manage the person's financial affairs.<sup>89</sup>

**3.8.19** The Commission recognises that, for the person who is awarded damages and for relatives and carers, a tribunal hearing in addition to the court case may cause further stress and inconvenience. However, it would have the advantages of making available the experience and expertise of the tribunal members in assessing the needs of the person concerned, and of avoiding inconsistencies which could arise if both the court and the tribunal had power to make an order about the management of the award. It would also mean that any

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<sup>85</sup> See pages 7.4.7-7.4.10 for a discussion of settlement of legal disputes involving a person whose impaired decision-making capacity means that the person cannot make his or her own decision about whether or not to agree to the terms of the settlement.

<sup>86</sup> Cf *Guardianship and Administration Board Act 1986* (Vic) section 66.

<sup>87</sup> See note 85 above.

<sup>88</sup> Payment of damages recovered when a claim is settled is presently governed by section 59 of the *Public Trustee Act 1978* (Qld).

<sup>89</sup> Cf *Aged and Infirm Person's Property Act 1940* (SA) section 30.



management order did not automatically give control of the damages award to the Public Trustee. On balance, the Commission is of the view that the benefits of its proposal outweigh the disadvantages.

### ***The Intellectually Disabled Citizens Council***

3.8.20 One of the major functions of the Intellectually Disabled Citizens Council is to make determinations about the need of certain people for a decision-maker to make financial and health care decisions. The Council also provides friendly personal support through the Volunteer Friends Programme.<sup>90</sup> The Legal Friend may give additional assistance by obtaining and giving information about a person's legal rights and specialised services available to the person, by instructing a solicitor to act for the person and by liaising with government departments and other organisations or bodies on behalf of a person.<sup>91</sup>

3.8.21 To the extent that the Council makes determinations about the need for a decision-maker, its role overlaps with that of the proposed tribunal. **The Commission recommends that this aspect of the Council's role be transferred to the tribunal.** The Commission considers that the remaining aspects of the Council's role could be carried out in other ways.<sup>92</sup> **It follows from this that the Council and the position of Legal Friend should be abolished.**

3.8.22 Although most of the submissions received generally supported the Commission's recommendation to establish an independent tribunal to determine issues concerning decision-making for all people whose decision-making capacity is impaired by mental or intellectual disability, few specifically considered the impact of such a tribunal on the roles of the Council and the Legal Friend. Of those which did consider the issue, opinion was more strongly in favour of their abolition.

### ***Notification by medical practitioners***

3.8.23 The Commission considers that the power conferred by the Fifth Schedule of the *Mental Health Act* on medical practitioners to give control of a person's finances to the Public Trustee is a violation of basic human rights requirements.<sup>93</sup> The provision lacks respect for the individual autonomy and the

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<sup>90</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* sections 35, 37.

<sup>91</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* section 26(1).

<sup>92</sup> See Chapter 11.

<sup>93</sup> See also Human Rights and Equal Opportunity Commission, *Mental Health Legislation and Human Rights*, (1992) 74.

dignity of the person concerned. The wishes of the person do not have to be sought or taken into account. Although the practitioner's decision results in a change of legal status, there is no opportunity for the person, or for someone acting on the person's behalf, to challenge the notification and there is no automatic review procedure.

3.8.24 In the Discussion Paper,<sup>94</sup> the Commission recommended that the power of medical staff at a psychiatric hospital or training centre to automatically hand control of a patient's financial affairs to the Public Trustee should be terminated. This recommendation met with overwhelming support from the submissions received.

3.8.25 The Commission therefore reaffirms its recommendation that the power of medical practitioners to notify the Public Trustee that a person is incapable of managing his or her affairs should be abolished.<sup>95</sup> It also extends the recommendation to the other powers of notification included in the Fifth Schedule of the *Mental Health Act*.<sup>96</sup>

### 3.9 THE LEGISLATION

3.9.1 The provisions concerning the establishment and membership of the tribunal are set out in clauses 140 to 149 of the Draft Bill contained in Chapter 13 of this Draft Report.

3.9.2 The *parens patriae* jurisdiction of the Supreme Court is preserved by clause 6.

3.9.3 The consequential amendments to the existing legislation have not yet been drafted.

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<sup>94</sup> Discussion Paper page 40.

<sup>95</sup> If a practitioner is concerned that a patient lacks capacity to make decisions about financial matters or personal welfare the practitioner should recommend that the patient's family make an application to the tribunal for a decision-making order. Where there is no family or the family is unwilling to take such a measure, the practitioner could either make the application or notify the Public Trustee or the proposed Adult Guardian so that an application may be made. For the recommendations of the Commission in relation to the creation of the office of the Adult Guardian see Chapter 11.

<sup>96</sup> These notification powers apply if a person is in a hospital or institution other than a psychiatric hospital or training centre and is receiving treatment for mental illness, or if the person is in prison and, in the opinion of a psychiatrist, is mentally ill and incapable of managing his or her property. See *Mental Health Act 1974 (Qld)* Fifth Schedule clause 1; Discussion Paper pages 31-32.

## 4. WHEN SHOULD THE TRIBUNAL MAKE AN ORDER?

### 4.1 THE NEED FOR CRITERIA

4.1.1 The purpose of appointing a decision-maker is to protect the welfare and financial interests of a person whose decision-making capacity is impaired and to ensure that his or her needs are adequately met. However, appointment of someone else to make decisions on that person's behalf will impact significantly on the person's rights and freedom of action. Certain powers will be withdrawn from the person and granted to the decision-maker. This constitutes a serious intrusion into the person's right to individual autonomy.

4.1.2 Because of the potential gravity of the consequences of a decision-making order, it is essential to establish criteria for determining when an order should be made. The criteria should be consistent with the principles set out in Chapter 2 and should clearly identify the matters to be proved before a decision-maker can be appointed.

### 4.2 EXISTING LEGISLATION

4.2.1 In the Discussion Paper,<sup>97</sup> the existing legislative criteria for the appointment of a decision-maker were identified.<sup>98</sup>

4.2.2 Under the present provisions, a decision-maker may be appointed in the following situations:

#### ***Financial decisions***

4.2.3 A Protection Order<sup>99</sup> may be made or a Certificate of Disability<sup>100</sup> may be filed if, as a result of age, disease, illness, physical or mental infirmity, or alcohol or drug abuse, a person is continuously or intermittently:

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<sup>97</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>98</sup> Discussion Paper pages 15-23.

<sup>99</sup> See pages 13, 39.

<sup>100</sup> See note 99 above.

- . totally or partly unable to look after his or her own financial affairs; or
- . susceptible or likely to be susceptible to undue influence in managing or disposing of his or her property;

or if, for some other reason,<sup>101</sup> it is necessary to protect the person's property in the interests of the person or his or her dependants.<sup>102</sup> A Protection Order may also be made by a court in an action for damages for personal injury if it appears to the court that an order is necessary.<sup>103</sup>

4.2.4 A committee of the estate<sup>104</sup> may be appointed for a person who is:

- . declared by the Supreme Court to be; or
- . notified to the Public Trustee by a medical practitioner (usually a psychiatrist or psychiatric registrar) in a psychiatric hospital, or a prison superintendent or a hospital administrator acting on the advice of a psychiatrist as being

mentally ill and unable to manage his or her affairs.<sup>105</sup>

4.2.5 Mental illness is not defined, except to the extent that it includes drug dependence and intellectual disability,<sup>106</sup> but does not include political, anarchic, religious, legal or illegal or moral or immoral opinions or activities.<sup>107</sup>

4.2.6 If a person is an 'assisted citizen', the Intellectually Disabled Citizens Council may notify the Public Trustee that the person is likely to be subject to undue influence in the management of his or her finances or that, for some other reason, it is in the best interests of the person concerned or his or her dependants that the person's property should be protected. On receiving such notification, the Public Trustee automatically becomes the manager of the person's property.<sup>108</sup>

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<sup>101</sup> The need for protection is not restricted to situations arising from age, disease, illness, physical or mental infirmity or drug or alcohol abuse. It involves a broad consideration of all the circumstances affecting the person: *Flood v Williscroft* [1987] 2 QdR 358.

<sup>102</sup> *Public Trustee Act 1978* (Qld) section 65(1)(a).

<sup>103</sup> *Public Trustee Act 1978* (Qld) section 67.

<sup>104</sup> See pages 14, 40.

<sup>105</sup> *Mental Health Act 1974* (Qld) Fifth Schedule clauses 1, 4.

<sup>106</sup> *Mental Health Act 1974* (Qld) section 5(2).

<sup>107</sup> *Mental Health Act 1974* (Qld) section 6(d).

<sup>108</sup> *Intellectually Disabled Citizens Act 1985* (Qld) section 32.

4.2.7 A person may become an 'assisted citizen' if he or she has an intellectual impairment which -

- . he or she has had since birth or early childhood; or
- . is the result of illness, injury or organic deterioration;

and which limits the person's functional competence.<sup>109</sup> 'Functional competence' is the ability of a person to carry out routine functions of daily living. It includes the ability to take care of his or her personal needs and home environment, and to make informed personal decisions.<sup>110</sup>

### ***Personal decisions***

4.2.8 A committee of the person<sup>111</sup> may be appointed if a judge of the Supreme Court considers a person to be mentally ill and incapable of managing his or her financial affairs.<sup>112</sup>

4.2.9 If the Intellectually Disabled Citizens Council approves an application for a person with an intellectual disability to become an 'assisted citizen',<sup>113</sup> the Legal Friend - a barrister or solicitor appointed to provide specialised assistance<sup>114</sup> - may make decisions about health care treatment for the person.<sup>115</sup>

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<sup>109</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 4.*

<sup>110</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 4.*

<sup>111</sup> See pages 14, 40.

<sup>112</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 4.*

<sup>113</sup> See para 4.2.7.

<sup>114</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 4.*

<sup>115</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 23(3).*

### **Other decisions**

4.2.10 If the Intellectually Disabled Citizens Council has approved an application for a person to become an 'assisted person' under the *Intellectually Disabled Citizens Act* the Legal Friend may instruct a solicitor to act on behalf of the person.<sup>116</sup>

### **4.3 CRITICISMS**

4.3.1 The underlying philosophy of many of the provisions is out of date, relying on a concept of benign paternalism rather than on recognition of the right of people with a mental or intellectual disability to the greatest possible degree of self-determination.

4.3.2 In addition, there is emphasis on the proof of the existence of a particular kind of disability, with insufficient regard to the effect which the disability may have on the person's capacity to make decisions. The consequences of this are firstly, over-reliance on the opinions of medical practitioners who, while qualified to determine the presence of a condition or disorder, may not be in the best position to assess the impact of any resulting impairment to the person's decision-making capacity;<sup>117</sup> and, secondly, failure to take into account the possibility that with appropriate advice and support, a person with a mental or intellectual disability may be able to make his or her own decisions.

4.3.3 The Human Rights and Equal Opportunity Commission has highlighted the problems inherent in labelling people on the basis of the existence of a particular condition. It pointed to the stigma attracted by such labels, and the discrimination which frequently results.<sup>118</sup> Although the comments made by the Human Rights and Equal Opportunity Commission related to people with a mental illness, they are equally relevant for other people who have a condition which may affect their decision-making capacity.<sup>119</sup>

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<sup>116</sup> *Intellectually Disabled Citizens Act* 1985 (Qld) section 26(1)(b).

<sup>117</sup> Canadian studies have shown that medical evidence tends not to distinguish between the existence of a particular condition and lack of capacity to make particular decisions, and that it usually sheds little light on the likely impact of the condition on the person's ability to look after his or her own personal welfare and/or financial arrangements. See R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 3-51.

<sup>118</sup> *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) Vol 1 pages 443-445.

<sup>119</sup> See also R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 6-32.

4.3.4 The fragmented nature of the existing legislative provisions also creates confusion and uncertainty about the appropriate way of obtaining assistance. Because different provisions apply to people with different kinds of disabilities, inconsistent results are produced. Further difficulties may arise because of the extent of the existence of dual and multiple disabilities.<sup>120</sup>

4.3.5 A further inadequacy is that some of the present criteria for the appointment of a decision-maker inappropriately stress capacity to manage financial affairs, even when the matter in issue is the personal welfare of the person concerned.<sup>121</sup>

#### 4.4 ALTERNATIVE CRITERIA

4.4.1 In the Discussion Paper,<sup>122</sup> the Commission considered possible alternative criteria for inclusion in a comprehensive scheme of legislation providing for appointment of decision-makers for people with a mental or intellectual disability.

4.4.2 One of the issues canvassed by the Commission was whether the legislation should require proof of a particular kind of disability. Arguments both in favour of<sup>123</sup> and against<sup>124</sup> such a requirement were outlined. The Commission concluded that it should not be necessary to show a particular cause of the need for appointment of a decision-maker.<sup>125</sup> The submissions received by the Commission on this issue generally supported the Commission's view that intervention should be based on the need for a decision-maker rather than on a specific diagnostic requirement.

4.4.3 However, the Commission recognised the danger inherent in a test relying solely on 'need' as a determinant.<sup>126</sup> It creates the risk that a wide range of people in the community might unintentionally be encompassed by the legislation. It could, for example, be used to interfere in the life of a person whose

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<sup>120</sup> See for example Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) Vol 2 page 659.

<sup>121</sup> See for example *Mental Health Act 1974* (Qld) Fifth Schedule clauses 1, 4.

<sup>122</sup> Discussion Paper pages 24-28.

<sup>123</sup> Discussion Paper pages 25-26.

<sup>124</sup> Discussion Paper page 26.

<sup>125</sup> Discussion Paper page 27.

<sup>126</sup> Discussion Paper page 27.

personal habits are, by mainstream standards, eccentric or extravagant. It might also affect the position of someone who inherits a complex estate which he or she lacks the experience to manage competently, particularly if the members of that person's immediate support network adopt a patronising or interventionist attitude to the situation.

4.4.4 The crucial question is not the quality of the decisions made by a person. No-one makes 'right' decisions all the time and, in a free society, people have the right to make some unwise decisions as well as decisions which are in their best interests. The real issue is the level of understanding and reasoning which the person is able to bring to the decision-making process. On this basis, there is no need for a decision-maker unless the person lacks the capacity to understand the nature of the decision and to foresee the consequences of making it in a particular way:

*A family member, carer or professional may not like, or agree with, a decision made by a person with a disability. But the only issue of relevance in determining whether the person is in need of a Guardian or Administrator to act on their behalf, is whether they are **capable** of considering the consequences of their decisions, not whether they happened to do so in any particular instance.<sup>127</sup>*

4.4.5 The Commission therefore believes that, consistently with the principles outlined in Chapter 2, a decision-maker should be appointed only if a person is unable to understand the nature and to foresee the consequences of his or her decisions. Assessment of the person's decision-making capacity would, of course, involve consideration of medical evidence about the person's disability, but would switch the emphasis to a multi-disciplinary approach focussed on the extent to which, if at all, the existence of a disability impairs the person's ability to look after his or her needs and to function as a member of society.

4.4.6 In the Discussion Paper,<sup>128</sup> the Commission included a further test: whether a person is acting in a manner injurious to his or her health or welfare and lacks the capacity to understand the nature or foresee the consequences of decisions about his or her personal welfare. The reason for this inclusion was to allow a decision-making order to be made when a person needs protection because his or her behaviour creates a real risk of harm to the person or to his or her property. The kind of situation which the Commission had in mind was, for example, a dementia patient who is living alone in unhygienic conditions, not eating or bathing properly and forgetting to turn off gas or electric appliances, and who, as a result of his or her illness, is unable to appreciate the risks involved in such behaviour. However, after further consideration, the Commission is of the view that such a situation would be covered by the test in para 4.4.5 above and that, as a

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<sup>127</sup> Public Guardian's Office Western Australia, *Annual Report 1992-1993*, 1.

<sup>128</sup> Discussion Paper page 28.



result, the inclusion of a specific provision is unnecessary.

4.4.7 The Commission considers that a test of decision-making capacity which centres on the ability of the person concerned to understand the nature of a decision and to foresee the consequences of making a decision in a particular way provides sufficient protection to people whose needs may otherwise be unmet. At the same time it would prevent excessive intervention where a person chooses, with a full appreciation of what is involved, to adopt an unconventional lifestyle and to reject services which others consider to be in his or her best interests.

**4.4.8 The Commission therefore recommends that the legislation should not require proof of the existence of a particular kind of disability but that a decision-maker should be appointed only if the person is unable to understand the nature and foresee the effects of a decision.**

4.4.9 Another possible criterion suggested by the Commission for appointment of a decision-maker was inability to communicate decisions.<sup>129</sup> Some of the submissions expressed concern about inclusion of this factor. It was argued that, as a ground for intervention, it could include people who do not speak English, or are non-verbal, deaf or physically incapacitated. This argument presupposes that communication must be made verbally, and in English. This is certainly not the view of the Commission. The ordinary meaning of the word 'communicate' is to impart knowledge of or make known, or (as in writing or painting) to convey one's thoughts or feelings to others. 'Communication' is the imparting or interchange of thoughts, opinions or information by speech, writing or signs.<sup>130</sup> The Commission is aware that a person may be able to make a decision and, with appropriate assistance and support, to make that decision known and have it implemented. In those circumstances, there is no need for a decision-maker. The manner in which a person communicates should not be the basis for determining that he or she lacks decision-making capacity. But there may be situations in which the nature or extent of a disability may prevent a person from conveying some opinions or wishes, despite the assistance given, and it may be necessary to appoint a decision-maker. Some submissions argued that the person seeking to be appointed as a decision-maker may have a subjective view of the person's inability to communicate. However, the determination about appointment of a decision-maker would be made by the tribunal, which would be able to assess objectively the evidence of the applicant and other interested parties and witnesses in the light of the experience and expertise of its members.

**4.4.10 The Commission therefore recommends that inability to communicate decisions by any means, even with assistance, should be a ground for the appointment of a decision-maker.**

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<sup>129</sup> Discussion Paper page 28.

<sup>130</sup> The Macquarie Dictionary (Revised Edition, 1985) 379.

**4.4.11** Once it has been determined by the tribunal that a person lacks decision-making capacity (or is unable to communicate decisions effectively), the principle of the least restrictive alternative requires the tribunal to take a second step, which is to evaluate whether the person's needs can be addressed in any other way less intrusive than appointment of a decision-maker.

**4.4.12** In many cases, a person whose decision-making capacity is impaired will have a loving and supportive family or alternative form of support network which substantially reduces the impact of the incapacity. The person's needs may be met on an informal basis by the people closest to him or her who are in the best position to know and understand his or her preferences. Informal arrangements are therefore often the simplest and most effective means of alternative decision-making for a person with impaired decision-making capacity.

**4.4.13** The Commission acknowledges that an informal system of decision-making may have some disadvantages.

**4.4.14** First, there is no formal control over the decision-makers. A person whose decision-making capacity is impaired may be vulnerable to abuse or exploitation. He or she will usually trust close relatives or members of support networks, and the closeness of the relationship may make abuse of that trust difficult to detect. However, it is the view of the Commission that, although in the majority of cases informal arrangements work perfectly well without supervision, some level of abuse is, unfortunately, probably inevitable. The question is whether a requirement that decision-makers be formally appointed would prevent that abuse. The Commission considers it unlikely that such a requirement would deter potential exploitation, but would rather constitute an unwarranted intrusion into existing relationships and an additional burden on the honest. If there is conflict among relatives or if there is evidence that a person with a mental or intellectual disability is being overborne, neglected or abused, the facts may come to the notice of a professional carer, service provider or health care worker. A person who becomes aware of such a situation would be able to approach the Adult Guardian<sup>131</sup> or to make an application to the tribunal if it appears that appropriate assistance is not being given or that advantage is being taken of the person.

**4.4.15** Second, a person who acts as an informal decision-maker may incur personal liability for decisions made on behalf of a person with impaired decision-making capacity. This problem could be overcome if the proposed legislation gave the tribunal power to ratify decisions and provided that a decision-maker would not incur legal liability for a decision which had been ratified by the tribunal.<sup>132</sup> While

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<sup>131</sup> See para 5.3.8 and Chapter 11. Part of the role of the Adult Guardian would be to conduct public education campaigns to make people aware of this avenue of assistance.

<sup>132</sup> See page 78.

the Commission does not believe that the primary purpose of legislation about assisted and substituted decision-making should be to protect the legal position of those giving assistance, it is nonetheless concerned that people may be unwilling to act on an informal basis if they are exposed to the risk of being personally liable to a third party. The Commission is therefore of the view that a mechanism which may provide protection for informal decision-makers will facilitate meeting the needs of people whose decision-making capacity is impaired, without resort to the more intrusive measure of formal appointment.

4.4.16 On balance, the Commission is not persuaded that the potential disadvantages of appropriate informal decision-making arrangements are sufficient to displace their advantages.

4.4.17 **The Commission therefore recommends that appointment of a decision-maker should involve a two step process. First, it should be shown that the person's decision-making capacity is impaired. This will require the tribunal to consider not only medical evidence, but also evidence about the effect of the impairment on the person's ability to function as a member of society. Second, it should also be shown that the person needs to have a decision-maker appointed because his or her impaired capacity creates a situation which cannot be addressed without formal intervention.**

## 4.5 ONUS AND STANDARD OF PROOF

4.5.1 In Chapter 2, the Commission recommended that, because of the impact of the appointment of a decision-maker on a person's rights and sense of dignity and self-worth, the existence of a mental or intellectual disability should never be assumed to cause impairment to a person's decision-making capacity, and that anyone claiming that a person's decision-making capacity is impaired should have to substantiate the claim.<sup>133</sup> In legal terms, this means that the applicant for a decision-making order should carry the onus of proof.

4.5.2 A number of submissions raised the question of the standard of proof which the applicant should have to meet in order to rebut the presumption of competence. The difficulty is that if the standard is too high, assistance may not be available when it is needed. On the other hand, if it is too low, insufficient protection may be given to the rights of a person with a mental or intellectual disability.

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<sup>133</sup> See page 6.

4.5.3 An application to determine the decision-making capacity of a person with a mental or intellectual disability concerns the civil, rather than the criminal law. In civil cases, the standard of proof generally required is 'on the balance of probabilities'. This is lower than the criminal standard of 'beyond a reasonable doubt'. However, within the civil standard there are varying degrees of probability. The standard of proof depends on the nature of the issue: the greater the seriousness of the allegation and the gravity of the consequences flowing from the outcome of the case, the higher the degree of probability required.<sup>134</sup> This allows appropriate weight to be given to the circumstances of each particular case.<sup>135</sup> The Commission is concerned that the higher criminal standard may prevent necessary assistance being give in some circumstances.

4.5.4 **The Commission therefore recommends that the civil standard should apply.**<sup>136</sup> Legislation should require the tribunal to be 'satisfied' that the person in respect of whom the application has been brought lacks the necessary capacity and that the decision-making needs resulting from the lack of capacity cannot be met in a less intrusive way.<sup>137</sup>

## 4.6 THE LEGISLATION

4.6.1 Clauses 10 to 12 of the Draft Bill in Chapter 13 of this Draft Report explain and define 'decision-making capacity'.

4.6.2 The criteria for appointment of a decision-maker by the tribunal are set out in clauses 81 to 84.

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<sup>134</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Hornal v Neuberger Products Ltd* [1975] 1 QB 247; *Rejtek v McElroy* (1965) 112 CLR 517; *Re Pelliteri* [1991] 1 QdR 154.

<sup>135</sup> See for example *Blyth v Blyth* [1966] AC 643.

<sup>136</sup> The English Law Commission initially suggested that, in view of the drastic consequences of a finding adverse to the person with a mental or intellectual disability, the criminal standard of 'beyond reasonable doubt' may be more appropriate. (The Law Commission, Consultation Paper No 119, *Mentally Incapacitated Adults and Decision-Making: An Overview* (1991) 104.) However, the Commission subsequently proposed that the standard of proof should be the standard of proof in civil proceedings. (Consultation Paper No 128, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (1993) 35.)

<sup>137</sup> The requirement that the tribunal be 'satisfied' is consistent with legislation in other Australian jurisdictions. See for example *Guardianship and Administration Board Act* 1986 (Vic) sections 22, 46; *Guardianship Act* 1987 (NSW) section 14; *Guardianship and Administration Act* 1990 (WA) sections 43 and 64; *Guardianship and Management of Property Act* 1991 (ACT) sections 7, 8; *Guardianship and Administration Act* 1993 (SA) sections 29(1), 35(1). See also *Cocchi v Cocchi* [1989] 1 QdR 266, 269.

## 5. WHO SHOULD BE A DECISION-MAKER

### 5.1 EXISTING LEGISLATION

5.1.1 Existing Queensland provisions offer little choice in the appointment of a decision-maker for a person with a mental or intellectual disability, concentrating decision-making authority primarily in the hands of public officers such as the Public Trustee and the Legal Friend.

5.1.2 The present legislation provides for the appointment of the following decision-makers:<sup>138</sup>

#### *Financial decisions*

5.1.3 Where a Protection Order<sup>139</sup> has been made, the Public Trustee is appointed to manage the financial affairs and property of the person concerned.<sup>140</sup> The court has no discretion to appoint anyone other than the Public Trustee to manage the property which is subject to the Protection Order.<sup>141</sup>

5.1.4 Similarly, where a Certificate of Disability<sup>142</sup> is filed, the Public Trustee is appointed as financial manager.<sup>143</sup>

5.1.5 The Public Trustee may also be appointed to control the property and finances of an 'assisted citizen'<sup>144</sup> if the Intellectually Disabled Citizens Council or, in an emergency, the Legal Friend considers the appointment necessary.<sup>145</sup>

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<sup>138</sup> See Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992, 58-63.

<sup>139</sup> See pages 13, 29.

<sup>140</sup> *Public Trustee Act 1978* (Qld) sections 65, 67.

<sup>141</sup> However, the court may except part of the estate from the order. (*Public Trustee Act 1978* (Qld) section 68(a)). The property which is excepted may be subject to alternative management arrangements such as a private trust.

<sup>142</sup> See pages 13, 29.

<sup>143</sup> *Public Trustee Act 1978* (Qld) section 72.

<sup>144</sup> See pages 30-31.

<sup>145</sup> *Intellectually Disabled Citizens Act 1985* (Qld) sections 32(1), 32(1A).

5.1.6 Where a person has been admitted to a psychiatric hospital or training centre, and a medical practitioner - usually a psychiatrist or a psychiatric registrar - notifies the Public Trustee that the person is mentally ill and incapable of managing his or her financial affairs, the Public Trustee automatically assumes control of that person's finances and property.<sup>146</sup>

5.1.7 If the Supreme Court declares that a person is mentally ill and incapable of managing his or her financial affairs, it may appoint the Public Trustee or any other person as committee of the estate of the person concerned. However, a private committee (that is, someone other than the Public Trustee) may not be appointed unless there is 'sufficient reason' for preferring the private committee to the Public Trustee.<sup>147</sup> In practice, although this amounts to no more than a statutory presumption in favour of the Public Trustee,<sup>148</sup> 'sufficient reason' is rarely found.<sup>149</sup> Information provided by the Office of the Public Trustee indicates that only a handful of private committees have in fact been appointed.

### ***Personal decisions***

5.1.8 The Supreme Court may appoint a committee of the person<sup>150</sup> to make personal decisions for a person who is mentally ill and incapable of managing his or her financial affairs.<sup>151</sup> The committee is usually a close relative such as the son or daughter of an elderly person with a dementing illness or a parent of a younger person with a severe intellectual disability.

5.1.9 The Legal Friend may consent to medical, dental, surgical or other treatment or care for a person who is an 'assisted citizen'<sup>152</sup> or, in an emergency, for a person with an intellectual disability for whom an application for assistance has not been made or approved.<sup>153</sup> The Legal Friend is a barrister or solicitor appointed under the *Intellectually Disabled Citizens Act* to provide specialised

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<sup>146</sup> *Mental Health Act* 1974 (Qld) section 55, and Fifth Schedule clauses 1 and 2.

<sup>147</sup> *Mental Health Act* 1974 (Qld) Fifth Schedule clause 4.

<sup>148</sup> *Re O'Sullivan*, Pet No 1 of 1986, 18 July 1988 (unreptd), Thomas J.

<sup>149</sup> See for example *In the matter of LEM* [1929] QWN 3; *O'Dell v Barwick* [1983] 1 QdR 114.

<sup>150</sup> See pages 14, 31.

<sup>151</sup> *Mental Health Act* 1974 (Qld) Fifth Schedule clause 4.

<sup>152</sup> See page 31.

<sup>153</sup> *Intellectually Disabled Citizens Act* 1985 (Qld) section 26.

assistance to intellectually disabled citizens.<sup>154</sup> The powers of the Legal Friend may be delegated to other barristers or solicitors. The delegation may be made by the Legal Friend, or as a result of a decision of the Intellectually Disabled Citizens Council.<sup>155</sup>

### **Other decisions**

5.1.10 The Legal Friend may also instruct a solicitor to act on behalf of an assisted citizen.<sup>156</sup>

## **5.2 CRITICISMS**

5.2.1 In the Discussion Paper,<sup>157</sup> the Commission outlined some of the problems which arise under the existing legislation.

5.2.2 The present provisions do not allow sufficient flexibility in the choice of appointed decision-makers and result, in many instances, in the unnecessary intrusion of bureaucratic mechanisms into individual and family affairs. They give little recognition to the role played by family members and close friends of a person whose decision-making capacity is impaired, and provide limited scope for the appointment of those closest to and in the best position to understand and interpret the wishes of the person for whom decisions are made. They also fail to acknowledge the commitment of primary carers, the impact which the needs of the person may have on the person's family as a whole and the effect which a decision-making order may have on other relationships. Understandably, this situation may be a source of resentment and frustration.

## **5.3 RECOMMENDATIONS FOR REFORM**

5.3.1 In the Discussion Paper, the Commission suggested some possible alternatives to the present system.<sup>158</sup> One proposal was that there should be

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<sup>154</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* section 4.

<sup>155</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* sections 26(7), 31A(4)(b)(ii).

<sup>156</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* section 26(1).

<sup>157</sup> Discussion Paper pages 64-69.

<sup>158</sup> Discussion Paper pages 69-71.

greater choice in the appointment of a decision-maker for a person with a mental or intellectual disability. The Commission believes that, since primary responsibility for assistance and support often rests with family members and friends, expansion of their role in the decision-making process is often the least intrusive form of intervention.

5.3.2 In relation to financial management, there is a range of possible alternatives, including private trust arrangements and trustee companies, as well as management by a family member, friend or other personal representative, which should also be considered. One of the consequences of increased flexibility in the appointment of a decision-maker for financial decisions would be to remove the statutory advantage presently given to the Office of the Public Trustee. The removal of this advantage was another of the Commission's proposals.

5.3.3 While the Commission acknowledges that the assistance given by the Public Trustee has been of benefit to many individuals, it is also aware that the virtual monopoly held by the Public Trustee sometimes gives rise to an unfavourable perception within the community of the attitude towards clients and their families and of the level of service provided. The Commission believes that greater scope in appointment of financial decision-makers would not only allow for the most appropriate order to be made in the circumstances of a particular case, but would create a competitive environment for the Office of the Public Trustee.

5.3.4 The majority of the submissions received by the Commission which commented on these issues endorsed the Commission's proposals.

5.3.5 **The Commission therefore recommends that, where the need exists to grant formal authority to someone to make decisions for a person whose decision-making capacity is impaired, consideration should be given to the importance of preserving existing support networks and, subject to safeguards to ensure that the principles of the legislation are observed, that relatives or close friends should be eligible to act as decision-makers for both personal and financial decisions. The Commission further recommends that, in relation to financial decisions, trustee companies should also be eligible for appointment, and that the existing statutory preference given to the Public Trustee be terminated.**

5.3.6 There will, of course, be situations in which it is not possible or appropriate for a relative or friend to be appointed. For example, there are some decisions which, because of their personal nature or because of their potential interference with the rights of a person with impaired decision-making capacity, either should not be able to be delegated or should be able to be made only by the tribunal.<sup>159</sup> There may be evidence that the person is being neglected or abused by family members or that, at the other extreme, the family is likely to stifle potential for development by over-protectiveness. There may be a dispute among

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<sup>159</sup> See pages 63-66, 145-159.



family members which it is impossible to resolve without outside intervention. In cases such as these, there is a need for a decision-maker of last resort.

5.3.7 In the Discussion Paper, the Commission suggested that, if no other alternative is available or appropriate in the circumstances, the Public Trustee should be the decision-maker of last resort for financial decisions. There is, at present, no statutory equivalent to the Public Trustee to act as decision-maker of last resort in relation to decisions concerning lifestyle matters and personal welfare. Another of the Commission's proposals was the creation of a statutory office to fill this void. There are other functions which could also be performed by this office.<sup>160</sup> These proposals also received support from the majority of submissions which discussed the issue.

5.3.8 The Commission therefore recommends that a statutory office be established to act in the role of decision-maker of last resort for personal and lifestyle decisions, where it is not possible or appropriate to appoint a relative, friend or other personal representative,<sup>161</sup> and that the Public Trustee be available for appointment as decision-maker of last resort for decisions about a person's property and financial affairs.

## 5.4 CRITERIA FOR ELIGIBILITY

5.4.1 If the legislative scheme recommended by the Commission is implemented, it should also provide criteria for determining the eligibility of nominated decision-makers other than the statutory decision-makers of last resort. The Discussion Paper put forward a list of considerations for the tribunal to take into account in appointing a decision-maker. Possible grounds for disqualification were also identified.<sup>162</sup>

5.4.2 The proposed criteria for eligibility were:

- . whether the proposed decision-maker will observe the principles set out in the legislation;
- . the views and wishes of the person whose decision-making capacity is impaired;<sup>163</sup>

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<sup>160</sup> The role of the office is discussed in Chapter 11.

<sup>161</sup> See pages 184-185.

<sup>162</sup> Discussion Paper pages 72-74.

<sup>163</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 23(2)(a) and 47(c)(i); *Guardianship Act 1987* (NSW) section 14(2)(a); *Adult Guardianship Act 1988* (NT) section 14(2)(a); *Guardianship and Administration Act 1990* (WA) sections 44(2)(c) and 68(3)(b); *Guardianship and Management of Property Act*

the desirability of preserving existing family or other close personal relationships;<sup>164</sup>

the compatibility of the person whose decision-making capacity is impaired and the proposed decision-maker;<sup>165</sup>

where it is proposed to appoint different people to make different decisions, the compatibility of those people with each other;<sup>166</sup>

the availability and accessibility of the proposed decision-maker to the person;<sup>167</sup>

the competence of the proposed decision-maker to carry out the duties and functions and exercise the powers under the order;<sup>168</sup> and

whether the interests of the proposed decision-maker are likely to conflict with those of the person whose decision-making capacity is impaired.<sup>169</sup>

**5.4.3** The submissions generally supported the Commission's proposals. **The Commission therefore recommends that the above factors be included in the legislation as criteria to be taken into account by the tribunal in determining the eligibility of a proposed decision-maker.**

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1991 (ACT) section 19(4)(a).

<sup>164</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 23(2)(b); *Guardianship Act 1987* (NSW) section 14(2)(b); *Adult Guardianship Act 1988* (NT) section 14(2)(b); *Guardianship and Administration Act 1990* (WA) section 44(2)(a); *Guardianship and Management of Property Act 1991* (ACT) section 10(4)(b); *Guardianship and Administration Act 1993* (SA) section 50(1)(b).

<sup>165</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 23(2)(c) and 47(2)(b); *Guardianship Act 1987* (NSW) section 17(1)(a); *Adult Guardianship Act 1988* (NT) section 14(2)(c); *Guardianship and Administration Act 1990* (WA) sections 44(2)(b) and 68(3)(a); *Guardianship and Management of Property Act 1991* (ACT) section 10(4)(c); *Guardianship and Administration Act 1993* (SA) section 50(1)(a).

<sup>166</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 23(2)(c) and 47(2)(b); *Adult Guardianship Act 1988* (NT) section 14(2)(c); *Guardianship and Administration Act 1990* (WA) sections 44(2)(b) and 68(3)(a).

<sup>167</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 23(2)(d); *Guardianship Act 1987* (NSW) section 17(1)(c); *Adult Guardianship Act 1988* (NT) section 14(2)(d); *Guardianship and Management of Property Act 1991* (ACT) section 10(4)(E); *Guardianship and Administration Act 1993* (SA) section 50(1)(d).

<sup>168</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 47(1)(c)(iv); *Protection of Personal and Property Rights Act 1988* (NZ) sections 12(5)(a) and 31(5)(a); *Guardianship and Administration Act 1990* (WA) sections 44(2)(d) and 68(3)(c); *Guardianship and Management of Property Act 1991* (ACT) section 10(4)(f); *Guardianship and Administration Act 1993* (SA) section 50(1)(c).

<sup>169</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 23(1)(b) and 47(1)(c)(ii); *Guardianship Act 1987* (NSW) section 17(1)(b); *Adult Guardianship Act 1988* (NT) section 14(1)(b); *Protection of Personal and Property Rights Act 1988* (NZ) sections 12(5)(c) and 31(6); *Guardianship and Administration Act 1990* (WA) section 44(1)(b); *Guardianship and Management of Property Act 1991* (ACT) section 10(4)(g); *Guardianship and Administration Act 1993* (SA) section 50(1)(e).

5.4.4 The question of conflict of interests is of particular significance in the context of the appointment of a private decision-maker. Often, the most appropriate decision-maker will be someone close to the person whose decision-making capacity is impaired - a relative or other member of the person's immediate support network. Situations may arise where the decision-maker has personal interests which are different from those of the person on whose behalf decisions must be made. The closer the relationship, the greater the potential for conflict. For example, the decision-maker may be a beneficiary under the person's will. Any money spent on providing for the person will mean that there is less left for the decision-maker to inherit. But the power given to a decision-maker must be exercised consistently with the proper care and protection of the person whose decision-making capacity is impaired.<sup>170</sup> The decision-maker must be able to distinguish between his or her own interests and those of the person and must be able to act in accordance with the person's care and protection, rather than in accordance with whatever is to the advantage of the decision-maker. In the majority of cases, this is not a problem. However, the potential for abuse is a serious consideration.

5.4.5 The Discussion Paper proposed that the likelihood of conflict of interest should be taken into account, but that the existence of close personal ties should not be assumed to create a position of conflict. Such an assumption would automatically disqualify many of the people who would be the most appropriate decision-makers. This proposal was supported by the submissions.

**5.4.6 The Commission therefore recommends that legislation should provide that the existence of close personal ties should not be assumed to create a position of conflict.**

5.4.7 The disqualifications proposed in the Discussion Paper were, in relation to decision-making about personal matters, that a person had been convicted of a criminal offence involving fraud, dishonesty or violence or had been refused or removed from an appointment as a decision-maker in Queensland or elsewhere. The objective of the proposal was to ensure protection for the person whose decision-making capacity is impaired.

5.4.8 There was concern in some of the submissions about the first proposed ground of disqualification. It was argued that, given the wide range of circumstances which can lead to a conviction and the degrees of severity in different instances of the commission of the same offence, otherwise suitable candidates from within the person's support network should not be automatically disqualified because they had committed a minor offence in the distant past. It was also argued that the inequitable impact of the criminal justice system on Aboriginal and Torres Strait Islander people, and the higher incidence of criminal convictions among such people than among the general community, may unfairly prevent the appointment of culturally appropriate decision-makers for people within

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<sup>170</sup> See page 81.

these communities. It was submitted that allowing the tribunal a discretion to disqualify a nominated decision-maker on the basis of his or her criminal record would provide adequate protection for a person with impaired decision-making capacity and, at the same time, give sufficient flexibility to ensure the appointment of the most appropriate decision-maker. The Commission acknowledges the force of these submissions.

5.4.9 After further consideration, the Commission is of the view that consideration of a proposed decision maker's criminal record should not be restricted to conviction of offences of a specified kind such as fraud, violence or dishonesty. There are, for example, some sexual offences which do not involve violence but which may indicate that a person is not suitable to be appointed.

5.4.10 **The Commission therefore recommends that, in determining the eligibility of a proposed decision-maker, the tribunal should take into account the nature and circumstances of any previous conviction, and the likelihood that the commission of the offence will adversely affect the person for whom the decision-maker is to be appointed.**

5.4.11 In relation to financial decisions, the Discussion Paper proposed that a person should also be disqualified from appointment as a decision-maker if he or she had proved incompetent in managing the affairs of others, was a bankrupt or had applied to become one; was presently unable to pay his or her debts or would be unable to pay them in the future, or had made an agreement with creditors as to the payment of debts.<sup>171</sup> There was general acceptance of this proposal in the submissions received. However, after further consideration the Commission is now of the view that this ground of disqualification may also be too broad. Sometimes honest and reasonable people become bankrupt through circumstances entirely beyond their own control. A sub-contractor, for example, may become bankrupt because of the financial collapse of a principal contractor. In such a situation it seems unfair that the bankruptcy should constitute an absolute disqualification, particularly if the bankrupt person is part of the usual support network for the person whose decision-making capacity is impaired.

5.4.12 **The Commission therefore recommends that the factors outlined above should not automatically disqualify a person from appointment to make financial decisions, but should be a relevant circumstance for the tribunal to take into account.**

5.4.13 The submissions generally agreed that a person who had been refused or removed from appointment as a decision-maker in Queensland or elsewhere should not be eligible for appointment. However, the Commission is again concerned that the consequences of automatic disqualification may be broader than intended. For example, a person may have been refused appointment because the relevant authority decided that the needs of the person

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<sup>171</sup> Discussion Paper page 74.

for whom the application was sought could be met in a less intrusive way. Similarly, a person's appointment as decision-maker could be terminated for reasons unrelated to the person's suitability or capacity to perform the duties of a decision-maker.

**5.4.14 The Commission therefore recommends that, in determining the eligibility of a proposed decision-maker, the tribunal should take into account whether, and in what circumstances, the proposed decision-maker has ever been refused or removed from an appointment in Queensland or elsewhere.**

5.4.15 In order for the tribunal to take into account the nature and circumstances of a person's criminal or financial history, or the circumstances of any previous decision-making appointment, it will be necessary that the tribunal be informed about such matters. This could be achieved by a legislative requirement that the proposed decision-maker disclose to the tribunal, in confidence, whether he or she has ever been convicted of a criminal offence, whether his or her financial arrangements had ever been subject to a situation described in para 5.4.11 above or whether he or she had ever been refused or removed from appointment as a decision-maker.<sup>172</sup> However, such a requirement may be seen to be inconsistent with the spirit of legislation, intended to assist the rehabilitation of people convicted of a criminal offence, which provides that a person's criminal record is not to be disclosed after a period of ten years (or five years if the person was dealt with as a minor) has elapsed since the date of the person's conviction.<sup>173</sup>

5.4.16 The policy of the legislation is to remove the social stigma and legal disability associated with a criminal act committed perhaps at an early age or perhaps only once in a lifetime.<sup>174</sup> On the other hand, the legislation recognises that, in certain circumstances, notwithstanding rehabilitation, disclosure of previous convictions may be necessary. One of those circumstances is, for example, assessment of character for a particular purpose. The legislation allows disclosure if the person to be assessed is expressly required by law to make disclosure of the person's criminal history or if the person or authority making the assessment is expressly required by law to have regard to the criminal history of the person to be assessed.<sup>175</sup> It would therefore be possible for the legislation proposed by the Commission to override the rehabilitation provisions.<sup>176</sup>

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<sup>172</sup> See for example *Guardianship and Management of Property Act 1991 (ACT)* section 10(2).

<sup>173</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* sections 3, 6(1).

<sup>174</sup> See Second Reading Speech of the Hon Mr N J Harper, Minister for Justice and Attorney-General: Hansard 12 March 1986.

<sup>175</sup> *Criminal Law (Rehabilitation of Offenders) Act 1986* section 9.

<sup>176</sup> See for example *Adoption of Children Act 1964 (Qld)* section 14B.

5.4.17 The Commission acknowledges the importance of giving past offenders the opportunity to create a new life, free from the stigma of previous conviction. However, the Commission is also concerned to ensure that the tribunal is sufficiently well-informed to enable it to act in the best interests of the person for whom the appointment of a decision-maker is sought. A requirement of disclosure would allow the tribunal to assess the suitability of the proposed decision-maker in all the circumstances of the case. An early conviction for an offence unrelated to the nature of the proposed decision-maker's duties would not, by itself, mean that the proposed decision-maker should not be appointed. However, conviction for a sexual offence or an offence of violence may indicate unsuitability for appointment as a decision-maker for personal decisions. Past conviction for an offence involving a breach of trust would also indicate unsuitability for appointment as decision-maker for financial decisions.

5.4.18 **The issue of disclosure was not raised in the Discussion Paper and, at this stage, the Commission has reached no concluded view on it. The Commission specifically seeks submissions as to whether the legislation should require disclosure in the terms outlined in para 5.4.15 above.**<sup>177</sup>

5.4.19 A further question raised in the submissions was the eligibility of a paid carer for appointment as a decision-maker. A number of submissions expressed concern about the inherent conflict of interest involved. The Commission considered whether a person who cares for a person with impaired decision-making capacity on a professional basis should be automatically disqualified from appointment as a decision-maker,<sup>178</sup> or whether a blanket prohibition might operate unfairly in situations where a paid carer would be an ideal decision-maker. The Commission believes that, because of the scope of the potential for abuse, a professional care provider should not be eligible for appointment as a decision-maker.

5.4.20 **The Commission therefore recommends that if the person whose decision-making capacity is impaired needs to have a decision-maker appointed, but does not have a relative or other member of his or her support network to act on his or her behalf, the role should be given to the Adult Guardian<sup>179</sup> as statutory decision-maker of last resort. However, the legislation should enable the tribunal to authorise the Adult Guardian to delegate day-to-day decision-making power to a paid carer in appropriate circumstances.**

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<sup>177</sup> Disclosure of a person's criminal history would be subject to confidentiality requirements imposed on the tribunal. See pages 58-60.

<sup>178</sup> See for example *Guardianship and Administration Act 1993 (SA)* section 29(5).

<sup>179</sup> See Chapter 8.

## **5.5 ENDURING POWERS OF ATTORNEY**

5.5.1 None of the mechanisms discussed in the preceding paragraphs allow the person concerned to choose whom he or she would like to make decisions on his or her behalf.

5.5.2 An enduring power of attorney is a simple, relatively inexpensive method of allowing a person who has decision-making capacity to nominate the person he or she would like to act as a decision-maker if, in the future, the need should arise.

5.5.3 Enduring powers of attorney are discussed in Chapter 8 of this Draft Report.

## **5.6 THE LEGISLATION**

5.6.1 Clauses 85 to 87 of the Draft Bill in Chapter 13 of this Draft Report deal with eligibility for and disqualification from appointment as a decision-maker.

5.6.2 The factors which the tribunal must take into account in deciding whom to appoint are set out in clause 88.

## 6. THE ROLE OF THE TRIBUNAL

### 6.1 INTRODUCTION

6.1.1 A legislative scheme which creates a tribunal to consider the appointment of a decision-maker for a person whose decision-making capacity is impaired must also clearly define the role of the tribunal it establishes. The legislation must incorporate the duties to be imposed on the tribunal and the powers given to it.

6.1.2 The legislation must also deal with a number of administrative and procedural matters relating to the operation of the tribunal and the conduct of the tribunal's proceedings.

### 6.2 DUTIES

6.2.1 In the Discussion Paper,<sup>180</sup> the Commission outlined duties which might be imposed on the tribunal.<sup>181</sup> The submissions which addressed these issues in general supported the Commission's proposals.

#### *The primary duty*

6.2.2 Throughout the Discussion Paper, one of the Commission's major criticisms of the existing legislation was the absence of any identified underlying principle.<sup>182</sup> In Chapter 2, the Commission stated its belief that all persons who have duties, powers or functions under the legislation should be bound to perform those duties, powers or functions in accordance with the principles identified in that chapter. This obligation would extend to members of the tribunal.

6.2.3 In determining an application for a decision-making order, the tribunal would have to be satisfied that the applicant had shown that the person concerned had impaired decision-making capacity, and that his or her needs could not be met in any less intrusive way. In some cases, this would mean that the duty of the tribunal would be not to make an order. If the tribunal made an order, in so doing

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<sup>180</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>181</sup> Discussion Paper pages 41-50.

<sup>182</sup> See for example Discussion Paper pages 22, 35 and 64-65.



it would have to comply with the legislative principles, among them the principles of the least restrictive alternative and the encouragement of self-reliance and, where appropriate, the substituted judgment principle.

6.2.4 One of the submissions to the Commission expressed concern that imposition of an obligation to comply with the legislative principles would give rise to the possibility of action against the tribunal, either through the judicial process or by administrative law review mechanisms. It was submitted that this may defeat the Commission's aim of reducing the cost and formality of decision-making applications and, further, may allow the process to be subverted by resort to judicial mechanisms to challenge whether or not the principles have, in fact, been applied.

6.2.5 However, in the Commission's view, it is vital to the accountability of the tribunal that it is seen to fulfil its legislative requirements and, to the extent that it does not, that its decisions are open to scrutiny by a higher authority.<sup>183</sup> In a number of other Australian jurisdictions legislation concerning decision-making for people with a mental or intellectual disability imposes an obligation on adjudicating bodies to observe the principles set out in that legislation.<sup>184</sup> The Commission is not aware of any problems arising from the imposition of an obligation to adhere to these legislative principles.

6.2.6 **The Commission therefore recommends that the proposed legislation impose an obligation on the tribunal to observe the principles set out in the legislation.**

### *Other duties*

#### ***Notification***

6.2.7 The tribunal should have a duty to notify certain people of the hearing of an application. An outcome which is both fair to the person whose decision-making capacity is alleged to be impaired and acceptable to the people closest to that person is more likely to be achieved if everyone with a proper interest in the welfare of the person is given an opportunity to attend and to express a point of view. The list of people to whom notice must be given should therefore be framed fairly widely.

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<sup>183</sup> Appeal mechanisms for reviewing decisions of the tribunal are discussed in Chapter 10.

<sup>184</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 4(2); *Guardianship Act 1987* (NSW) section 4; *Guardianship and Administration Act 1990* (WA) section 4; *Guardianship and Management of Property Act 1991* (ACT) section 3; *Guardianship and Administration Act 1993* (SA) section 5.

**6.2.8 It is the Commission's view that the tribunal should be required to notify the following people:**

- . **the person who is the subject of the application;**
- . **the spouse, parents, and adult children of the person who is the subject of the application;**
- . **the applicant;**
- . **a primary carer other than the relatives listed above;**
- . **a current decision-maker;**
- . **where relevant, a statutory officer such as the Public Trustee, who may be required to act as a decision-maker;**
- . **a proposed decision-maker;**
- . **any other person who, in the opinion of the tribunal, should be notified.**

**6.2.9** In the Discussion Paper,<sup>185</sup> the Commission considered whether or not the duty to notify the person who is the subject of the application should be accompanied by a power to dispense with notification. There may be circumstances where the person concerned may be distressed by the application, or may not be able to understand the notification. On the other hand, the need to protect the interests of a person who may be vulnerable to exploitation may be so strong that dispensation of notice to the person can never be justified.

**6.2.10** Those submissions which referred to the question of dispensation of notice to the person who is the subject of the application were strongly opposed to such a suggestion. They were firmly of the belief that the rights of the person concerned demand that he or she should always be notified. The Commission agrees with these submissions.

**6.2.11** The Commission therefore recommends that the legislation should provide that notification to the person who is the subject of the application should not be able to be dispensed with.<sup>186</sup> The legislation should also provide that notification to the person who is the subject of the application should be given in the way most appropriate to the needs of the

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<sup>185</sup> Discussion Paper page 43.

<sup>186</sup> See *Guardianship and Administration Act 1990 (WA)* section 41(3)(b).

**person concerned<sup>187</sup> and should not be invalidated if the person is not able to understand it.**

**6.2.12** The duty to notify a list of specific people in every case may prove unduly onerous. It is not the intention of the Commission that the tribunal should go to extraordinary lengths, such as searching electoral rolls, in order to locate a person or that the hearing of an application should be delayed while attempts are made to determine the whereabouts of someone on the list. There may also be exceptional circumstances in which it is not appropriate for a person on the list to be notified of the application. For example, such a situation could arise where the purpose of the application is to remove a person from the care and control of someone who is acting in an abusive or exploitative manner, or who is unreasonably denying access to the person by relatives or friends.

**6.2.13** The Commission therefore recommends that the duty to notify should be accompanied by a power of dispensation, except in relation to the person who is the subject of the application.

### *Informality*

**6.2.14** In the Discussion Paper,<sup>188</sup> the Commission referred to the importance of minimising, as far as possible, the stress caused by the hearing of an application for a decision-making order for the person who is the subject of the application and for his or her relatives, friends and carers. It proposed that the proceedings of the tribunal should be as informal as possible. The Commission recognises, however, that in exceptional circumstances, the tribunal may need the flexibility to adopt a more formal approach.

**6.2.15** In the submissions received by the Commission, there was general support for this proposal. A number of submissions emphasised the importance of the absence of legal trappings and technicalities to acceptance of the tribunal and its role by people whose decision-making capacity is impaired and by their relatives and carers. One submission, however, argued that the fundamental rights of the person who is the subject of the application could be adequately protected only by maintaining an appropriate degree of judicial formality in the hearing of decision-making applications. The Commission nonetheless remains of the view that statutory procedural requirements can properly protect the rights of the person concerned within the framework of an informal hearing,<sup>189</sup> and that there are

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<sup>187</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* section 71; *Guardianship Act 1987 (NSW)* section 99; *Guardianship and Administration Act 1990 (WA)* section 115.

<sup>188</sup> Discussion Paper page 45.

<sup>189</sup> See pages 16-17.

substantial benefits to be obtained from the absence of technical legal requirements. Almost every other Australian jurisdiction<sup>190</sup> has adopted the tribunal model, which has resulted in increased rather than diminished rights for people with impaired decision-making capacity.

**6.2.16 The Commission therefore recommends that the tribunal should be under a duty to conduct its proceedings with as little formality as possible, consistently with ensuring that a just result is achieved.<sup>191</sup>**

### ***Fairness***

**6.2.17** Because the legal rules which govern a court hearing would not apply to the proceedings of the tribunal, it is essential that the tribunal be under a duty to act fairly. In Chapter 3 reference was made to the rules of natural justice as a way in which the individual rights of the person who is the subject of the application could be safeguarded despite a requirement of informality of procedure.<sup>192</sup>

**6.2.18 The Commission recommends that the legislation should require the tribunal to act in accordance with natural justice and should prescribe minimum standards of procedural fairness for the tribunal to observe.**

### ***Notification of decision***

**6.2.19** In the Discussion Paper,<sup>193</sup> the Commission proposed that the tribunal should be under a duty to notify the person who is the subject of the application and any other genuinely interested person of the outcome of the hearing of an application for a decision-making order. It further proposed that the reasons for the tribunal's decisions should be recorded in writing and should be available on request to any person who was entitled to be notified of the hearing.

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<sup>190</sup> The only exception is the Northern Territory where, although the legislation is based on that in other jurisdictions, circumstances dictated the use of the existing Local Court structure.

<sup>191</sup> See for example *Guardianship Act 1987* (NSW) section 55(2); *Guardianship and Administration Act 1990* (WA) section 15; *Guardianship and Management of Property Act 1991* (ACT) section 37(2); *Guardianship and Administration Act 1993* (SA) section 12(3).

<sup>192</sup> See pages 16-17.

<sup>193</sup> Discussion Paper page 47.

6.2.20 In the light of submissions received and of the recommendation of the Commission concerning a power of dispensation of notice of the hearing<sup>194</sup> the Commission is now of the view that its original proposal with respect to notification of the decision was too wide and would constitute an unreasonably onerous task for the tribunal.

6.2.21 **The Commission therefore recommends that the tribunal's obligation to notify of the decision should be restricted to the person who is the subject of the application, those persons appearing as parties to the application and those actually notified of the hearing.**

### *Notification of reasons*

6.2.22 The recording of written reasons has a number of advantages. It contributes to the quality of tribunal decisions, by requiring the tribunal to focus on all the relevant issues which must be considered before a determination can be made. It also provides guidelines for members of the tribunal in the determination of future hearings, thereby contributing to the consistency of tribunal decisions. It promotes the tribunal's accountability and is therefore likely to enhance its public acceptance. By explaining why an order was made and the expectations of the tribunal at the time of the making of the order, it helps decision-makers to understand their role. It also assists in the review procedure.

6.2.23 Provision of written reasons takes time. It may be argued that, in a case where the facts and issues are clear, only oral reasons should be given. However, on balance, the Commission remains of the view that the advantages of written reasons outweigh the disadvantages.

6.2.24 **The Commission therefore recommends that the tribunal should be required, in every case, to prepare a written statement of reasons which refers to the evidence and includes findings on material questions of fact.**<sup>195</sup>

6.2.25 Such a requirement is consistent with United Nations principles concerning the rights of people with mental and intellectual disabilities.<sup>196</sup> The Commission also believes that, for the reasons outlined in para 6.2.22 above, the process of providing written reasons will prove more cost-effective in the long term, despite the initial cost of preparation.

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<sup>194</sup> See paras 6.2.12-6.2.13.

<sup>195</sup> See for example *Guardianship Act 1987* (NSW) section 68(1); *Guardianship and Administration Act 1990* (WA) Schedule 1 Part B clause 4(2).

<sup>196</sup> For example, Declaration on the Rights of Mentally Retarded Persons and Principles for the Protection of Persons with Mental Illness.

6.2.26 One of the submissions received by the Commission suggested that, rather than being available on request, the written statement of reasons should be provided automatically to all persons entitled to be given notice of the hearing of an application. The submission was concerned that people may not be aware of the right to request the statement. The Commission agrees that it is undesirable for people to be denied their rights through lack of knowledge. However, because of the sensitive nature of material which may be contained in the reasons, and the issues of privacy which may arise, the Commission has reservations about making the reasons available to people who may not have been present at the hearing.

6.2.27 **The Commission therefore recommends that copies of the statement of reasons should be provided to the person who is the subject of the application, the parties to the application and any other person to whom, in the opinion of the tribunal, it would be appropriate.**

### *Review*

6.2.28 For many people, the extent to which their decision-making capacity is impaired by a mental or intellectual disability is not static. Their condition may improve over time or, in some cases, may deteriorate further. If a decision-making order is made, the order should be subject to review to ensure that it has not become an unjustifiable intrusion into the rights of the person concerned or, if the person's needs have changed or increased, that it continues to cater adequately for them.

6.2.29 A mandatory review process also provides an additional protection for the person in respect of whom the order was made by enabling the way in which an appointed decision-maker has exercised his or her authority to be scrutinised. Provision of a review mechanism is, in fact, a requirement of the United Nations Declaration on the Rights of Mentally Retarded Persons<sup>197</sup> and of the Principles for Protection of Persons with Mental Illness.<sup>198</sup>

6.2.30 Depending on the circumstances of the case, the review could consist of an examination by the tribunal of written reports, telephone interviews, or of the presentation of oral evidence to the tribunal. The nature and extent of the review should be a matter of discretion for the tribunal.

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<sup>197</sup> Resolution 2856 (XXVI), 20 December, 1971. Article 7 provides that:

'Wherever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure ... must be subject to periodic review and to the right of appeal to higher authority.'

<sup>198</sup> Principle 1(6).

6.2.31 In the Discussion Paper, the Commission outlined options for providing a review mechanism.<sup>199</sup> These included:

- . imposing on the tribunal a duty to specify, at the time an order is made, a period within which, subject to a statutory maximum, that order must be reviewed;<sup>200</sup>
- . incorporating a specific time-frame into the legislation;<sup>201</sup>
- . conferring on the tribunal power to review an order on its own motion;<sup>202</sup>
- . conferring on the person in respect of whom the order was made, and on any other person with a genuine interest, the right to apply for a review.<sup>203</sup>

6.2.32 Most of the submissions which considered the issue agreed that legislation must include a review process. Another viewpoint put forward in submissions to the Commission was that a greater measure of protection would be afforded to the rights of the individuals concerned by providing that all decision-making orders should automatically terminate after a specified period of time, and that the authority of the appointed decision-maker should be subject to a fresh application to the tribunal. The advantage of this approach is that it concentrates the attention of the tribunal on the need for an order, and the appropriateness of any previous order and the way in which it was implemented. Its disadvantages are its demand on resources which may be better spent if, in the circumstances of the case, it is obvious that the order should be renewed, and the possibility that the situation might be created where there is no legally authorised decision-maker.

6.2.33 An alternative approach is to require the tribunal to review the circumstances of a person who is the subject of an order at set intervals and, on completion of a review, to revoke the order or orders to which a person with impaired decision-making capacity is subject, unless it is satisfied that there are

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<sup>199</sup> Discussion Paper page 48.

<sup>200</sup> See for example *Guardianship and Administration Act 1990 (WA)* section 84.

<sup>201</sup> See for example *Intellectually Disabled Citizens Act 1985 (Qld)* section 28; *Guardianship and Administration Board Act 1986 (Vic)* section 61(2); *Guardianship and Management of Property Act 1991 (ACT)* section 19(2); *Guardianship and Administration Act 1993 (SA)* section 57(1).

<sup>202</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* section 61(3); *Guardianship Act 1987 (NSW)* section 25; *Guardianship and Administration Act 1990 (WA)* section 86; *Guardianship and Management of Property Act 1991 (ACT)* section 19(1).

<sup>203</sup> See for example *Intellectually Disabled Citizens Act 1985 (Qld)* section 27; *Guardianship and Administration Board Act 1986 (Vic)* section 61(3); *Guardianship Act 1987 (NSW)* section 25(3); *Guardianship and Administration Act 1990 (WA)* section 86.

proper grounds for the order or orders remaining in place.<sup>204</sup> This is the approach which the Commission recommends be adopted in Queensland.

6.2.34 It is difficult to determine what is an adequate time-frame for the review process. The longer the mandatory review period, the weaker the protection given to people who are subject to decision-making orders. Conversely, the shorter the mandatory review period, the greater the burden on the time and resources of the tribunal. Provisions in other jurisdictions vary considerably.<sup>205</sup>

6.2.35 The Commission considers that the mandatory period of five years which is contained in some legislation<sup>206</sup> is too long to provide effective protection for the rights of people who are subject to a decision-making order. On the other hand, the Commission recognises that to require the tribunal to review orders after only twelve months<sup>207</sup> may be administratively and financially unrealistic.

6.2.36 **The Commission therefore recommends that, as a general rule, an initial order should be subject to review within a period of not more than two years and that, at the conclusion of the review, the tribunal should have to revoke the order unless it is satisfied that there is a proper need for the order to continue. The tribunal should have a discretion to extend the review period in circumstances where, in the opinion of the tribunal, it is clear that the need for the order will be ongoing and the need for review very limited. If the tribunal is satisfied that it is appropriate for an order to continue in force after the initial review, it should have power to extend the order. The extended order should be subject to review after a period not exceeding three years.**

6.2.37 **The tribunal should also have power to review an order at any time, either on its own motion, or on the application of any person with a genuine interest in the particular individual.**

### ***Confidentiality***

6.2.38 Members of the tribunal and other people acting in the administration of the legislation would, during the course of an application, come into possession

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<sup>204</sup> *Guardianship and Administration Act 1993 (SA)* section 57.

<sup>205</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* section 61; *Guardianship Act 1987 (NSW)* sections 18, 25; *Guardianship and Administration Act 1990 (WA)* section 86; *Guardianship and Management of Property Act 1991 (ACT)* section 19; *Guardianship and Administration Act 1993 (SA)* section 57.

<sup>206</sup> See for example *Intellectually Disabled Citizens Act 1985 (Qld)* section 28; *Guardianship and Administration Act 1990 (WA)* section 84.

<sup>207</sup> See for example *Guardianship Act 1987 (NSW)* section 18.



of material containing sensitive information about the person who is the subject of the application. In the Discussion Paper,<sup>208</sup> the Commission proposed that the legislation should impose, subject to certain exceptions, a duty on current and past tribunal members and support staff not to disclose confidential information about the person concerned.<sup>209</sup> The submissions which commented on this issue agreed with the Commission's approach.

**6.2.39 The Commission therefore recommends that present and past members and staff of the tribunal should be required to observe a duty of confidentiality concerning information about the person who is the subject of the application.**

6.2.40 However, the Commission recognises that there will be situations which override the duty of confidentiality. A number of submissions pointed out, for example, that it will often be necessary for tribunal members or staff to disclose information to relatives, service providers and health care professionals during the course of investigating and making a determination about the decision-making needs of the person concerned.

**6.2.41 The Commission therefore recommends that the duty of non-disclosure be qualified in the following situations:**

- where the consent of the person has been obtained;<sup>210</sup>
- where disclosure is required in carrying out the functions of the tribunal;<sup>211</sup>
- where disclosure is required by any other law or is otherwise excused by law;<sup>212</sup>
- where disclosure involves statistical or other information that could not reasonably be expected to lead to the identification of the person to

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<sup>208</sup> Discussion Paper page 49.

<sup>209</sup> See for example *Intellectually Disabled Citizens Act 1985* (Qld) section 42; *Guardianship and Administration Board Act 1986* (Vic) section 9(1); *Guardianship and Management of Property Act 1991* (ACT) section 66(1); *Guardianship and Administration Act 1993* (SA) section 80(1).

<sup>210</sup> See for example *Guardianship Act 1987* (NSW) section 101(a); *Guardianship and Administration Act 1990* (WA) section 113(1)(c); *Guardianship and Management of Property Act 1991* (ACT) section 66(3).

<sup>211</sup> See for example *Intellectually Disabled Citizens Act 1985* (Qld) section 42; *Guardianship and Administration Board Act 1986* (Vic) section 9(1); *Guardianship Act 1987* (NSW) section 101(b); *Guardianship and Administration Act 1990* (WA) section 113(1)(b); *Guardianship and Administration of Property Act 1991* (ACT) section 66(2).

<sup>212</sup> See for example *Guardianship Act 1987* (NSW) section 101(d), 101(e); *Guardianship and Administration Act 1990* (WA) section 113(1)(b).

whom it relates;<sup>213</sup> or

where, in the opinion of the tribunal, the duty of non-disclosure is overridden by a public interest factor involving the personal safety of a member of the public.

6.2.42 In the Discussion Paper, the duty of confidentiality suggested by the Commission was confined to information concerning the person who is the subject of the application. It is likely, however, that the tribunal will obtain sensitive information about people involved in the hearing of the application. **The Commission therefore recommends that the duty of confidentiality should extend to information concerning those other people, subject to the above exceptions.** This recommendation is consistent with the approach adopted in most other Australian jurisdictions.<sup>214</sup>

6.2.43 The Commission does not consider that the tribunal should be exempt from the operation of the *Freedom of Information Act*. The personal affairs exemption<sup>215</sup> and the exemption which applies to matter communicated in confidence<sup>216</sup> would prevent access to confidential information being given to anyone other than the person to whom the information relates. If material containing personal information about a person involved in the hearing of an application is given to the tribunal, the view of the Commission is that the person should be entitled to access to that information, unless, in the opinion of the tribunal, it would be prejudicial to the function of the tribunal or to the well-being of the person who is the subject of the application. In such a situation, the information would be exempt from disclosure under the *Freedom of Information Act*.<sup>217</sup>

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<sup>213</sup> See for example *Guardianship and Administration Act 1990 (WA)* section 113(2).

<sup>214</sup> Only the Western Australian provision is restricted to information concerning the person whose decision-making capacity is alleged to be impaired.

<sup>215</sup> *Freedom of Information Act 1992 (Qld)* section 44.

<sup>216</sup> *Freedom of Information Act 1992 (Qld)* section 46.

<sup>217</sup> Section 6 of the Act provides that: 'If an application for access to a document is made under this Act, the fact that the document contains matter relating to the personal affairs of the applicant is an element to be taken into account in deciding -

(a) whether it is in the public interest to grant access to the applicant; and

(b) the effect that the disclosure might have.'

### ***Reporting requirements***

6.2.44 In the Discussion Paper,<sup>218</sup> the Commission expressed the view that the tribunal should be required to submit an annual report to ensure that, as a publicly funded body, it is accountable and operating within its legislative framework. The submissions which considered this issue supported the Commission's recommendation that the tribunal should be under a duty to present an annual report. There was a view, however, that the status and independence of the tribunal would be enhanced if the legislation required the tribunal to report, not to an individual Minister, but rather to the Parliament as a whole. However, the Commission sees an advantage in reporting to a particular Minister who is able to advocate on behalf of recommendations made by the tribunal in the report and to address issues which may arise from the report.

6.2.45 **The Commission therefore recommends that the tribunal should report to the Minister who has administrative responsibility for the tribunal, and that the Minister should be required to table the report in Parliament within a specified time limit.**

### **6.3 POWERS**

6.3.1 The Discussion Paper also outlined some of the powers which the tribunal would need to carry out its functions.<sup>219</sup>

#### ***Power to make orders***

6.3.2 The most important power to be conferred on the tribunal is the power to make orders about decision-making by and for people whose decision-making capacity is impaired by an intellectual or mental disability.

6.3.3 It is the view of the Commission that, consistently with the least restrictive alternative principle, the authority conferred by the order should be no greater than is required to meet the needs of the person concerned. The Commission therefore proposed that the tribunal should have power to make orders specifically designed for the circumstances of the person for whom the application is brought.<sup>220</sup> The submissions strongly endorsed this proposal.

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<sup>218</sup> Discussion Paper page 50.

<sup>219</sup> Discussion Paper pages 50-56.

<sup>220</sup> Discussion Paper page 51.

### ***Assisted Decision-Making***

6.3.4 Decision-making is a largely inter-dependent process, often involving consultation with others to seek their opinions and advice. Many people with impaired decision-making capacity will be able to make some, if not all, of their own decisions, provided that adequate support is available. Forms of support may include encouraging the person to maximise his or her abilities and to develop confidence, providing information and advice in a way the person is able to understand, and allowing for the fact that the person may need repeated explanations and may take longer to arrive at a decision.

6.3.5 Support of this nature is often provided on a purely informal basis. Family members, friends and carers are frequently involved in giving assistance with everyday personal and financial matters. It is not the Commission's intention to interfere where such a situation exists and is to the person's advantage.

6.3.6 However, there are circumstances in which the formal appointment of an assistant decision-maker may be a useful option. For example, if the person does not have a support network to provide assistance and advice on an informal basis, it may be able to be obtained by appointing the Adult Guardian<sup>221</sup> or a community decision-maker.<sup>222</sup> If the person is in obvious need of assistance but is reluctant to seek advice, appointment of an assistant decision-maker would allow the assistant decision-maker to take a pro-active role rather than merely waiting for advice to be sought. The status given by a formal appointment may also be useful for family and carers in unlocking services for the person. In situations such as these, appointment of an assistant decision-maker would be a less restrictive alternative than appointment of a decision-maker, which may sometimes be the only other available option.

6.3.7 **The Commission therefore recommends that the legislation should provide for the tribunal to be able to appoint an assistant decision-maker to support and advise a person with impaired decision-making capacity.** An assistant decision-maker would not have power to make decisions or to act on behalf of the person. The actual decision would be made by the person concerned, who would have the right to accept or reject the assistant decision-maker's advice.<sup>223</sup>

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<sup>221</sup> See Chapter 11.

<sup>222</sup> See pages 184-186.

<sup>223</sup> In Canada, provision for appointment of assistant decision-makers (called advisers) has existed for some years. See *Civil Code* Art. 328 (Quebec). British Columbia has recently enacted similar legislation for the appointment of associate decision-makers. See *Adult Guardianship Act* 1993 section 6(1)(a).

## **Recommendations**

**6.3.8** The tribunal should have power, on hearing an application, to make such recommendations as it thinks fit about the course of action which it considers should be followed by a party to the application or by the person who is the subject of the application. It should be able to make such recommendations whether or not it makes an order. The tribunal should also have power, if it decides to make recommendations instead of an order, to adjourn or to formally dismiss the application. The parties or the person who is the subject of the application should be able to apply to the tribunal for directions about the implementation of the tribunal's recommendations, even though the application has been adjourned or dismissed. The recommendations would not have the force of an order of the tribunal, and would not be binding on the parties.<sup>224</sup> However, while not legally enforceable, they would provide useful guidelines for carers and service providers. Their moral authority may be of assistance in obtaining services for the person whose decision-making capacity is impaired. In this way, the needs of the person concerned may be able to be adequately met, without resort to the more intrusive option of a decision-making order.

## **Decision-Making Orders**

**6.3.9** The tribunal should also have power to make orders appointing decision-makers and to grant to a decision-maker authority to make specified kinds of decisions for such time as the tribunal considers necessary.<sup>225</sup> The Commission envisages that in most cases it will not be necessary for the tribunal to make an order conferring unlimited decision-making authority. Nonetheless, the tribunal should have power to make such an order should the need arise in the circumstances of a particular case.

## **Decisions for which orders may not be made**

**6.3.10** Some decisions may be considered so personal that the tribunal should not have power to authorise any other person to act as a decision-maker in relation to decisions of that kind.<sup>226</sup> In the Discussion Paper,<sup>227</sup> the

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<sup>224</sup> See for example *Protection of Personal and Property Rights Act 1988 (NZ)* section 13.

<sup>225</sup> See para 6.2.36 for the Commission's recommendation concerning limits on the duration of an order.

<sup>226</sup> Some other decisions - for example, decisions about certain medical treatments - may involve such serious issues that their delegation should be subject to particular requirements. Decisions about medical treatment will be discussed in Chapter 9.

Commission identified some decisions for which the tribunal should not be able to appoint a decision-maker.

6.3.11 These decisions included:

- . voting;
- . consenting to marriage;
- . making a will;
- . consenting to the adoption of a child of a person with a mental or intellectual disability; and
- . consenting to or withholding consent for some forms of medical treatment.

6.3.12 Decisions about medical treatment will be discussed in Chapter 9. Of the submissions received by the Commission, those which addressed the issue of delegation of authority to consent to marriage, to consent to adoption, or to make a will on behalf of a person with impaired decision-making capacity unanimously considered that the decisions are too personal to be delegated or that existing legislation<sup>228</sup> provides an adequate solution to any lack of capacity.<sup>229</sup>

**6.3.13 The Commission agrees with these submissions and recommends that the tribunal should not have power to delegate the authority to consent to the marriage or to the adoption of a child of a person who lacks the necessary capacity to make those decisions personally.<sup>230</sup>**

6.3.14 *Eligibility to vote.* During the public debate which followed the publication of the Discussion Paper,<sup>231</sup> opinion appeared to be fairly evenly divided on the question of whether the tribunal should be able to grant power to an appointed decision-maker to vote on behalf of someone with a mental or intellectual disability who lacked capacity to vote in person. On the one hand,

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<sup>227</sup> Discussion Paper page 52.

<sup>228</sup> For example *Succession Act 1981* (Qld) sections 34-39 and 40-44, and *Adoption of Children Act 1964* (Qld) sections 24 and 25.

<sup>229</sup> If a person is a parent with young children, the decisions which the person makes will include decisions about the welfare of those children. If the person's decision-making capacity is impaired - for example by traumatic brain damage or by psychiatric illness - the person may not have sufficient understanding to make some or all of the decisions which need to be made about the children's welfare. However, as the scope of this reference is confined to decision-making by and for adults with impaired decision-making capacity, the adequacy of existing legislation concerning decision-making about a person's children has not been considered.

<sup>230</sup> The question of a statutory will-making power is discussed in Chapter 12.

<sup>231</sup> See for example 'Vote for the Mentally Disabled', *The Courier Mail* 3 August 1992, page 1.

delegation of the right to vote was seen as a means of redressing the powerlessness of a significantly disadvantaged section of the community. On the other, the impossibility of predicting how the person would have voted in changing circumstances and the dangers inherent in any interference with the system of one-person, one-vote democracy were perceived as insurmountable obstacles. The written submissions strongly supported the second view. Only fourteen per cent of the submissions on this point favoured enabling the tribunal to confer a delegated right to vote on an appointed decision-maker.

6.3.15 Since the Discussion Paper was published, there have been changes to the law in Queensland concerning entitlement to vote in state elections. Previously, a person was disqualified from voting if he or she were mentally ill and incapable of managing his or her affairs.<sup>232</sup> The legislation did not define 'mental illness'. A presiding officer could ask a person claiming to be a voter if he or she were disqualified from voting, and the person was then not allowed to vote until he or she had provided a signed written answer.<sup>233</sup> The criteria for eligibility are now the same as for Commonwealth elections - namely, that a person who, because of unsoundness of mind, is incapable of understanding the nature and significance of voting is not entitled to vote.<sup>234</sup> 'Unsoundness of mind' is not defined.

6.3.16 The Commission recognises that it is desirable for eligibility criteria for Commonwealth and State elections to be uniform. It also recognises that the present ground of inability to understand the nature and significance of voting is a more relevant basis for disqualification than inability to manage financial affairs. However, the Commission still has concerns about the present form of the electoral legislation.

6.3.17 First, the term 'unsoundness of mind' is inappropriate. It is negative and stigmatising. It is also unclear. In common usage, it refers to mental illness or psychiatric disability. Given this interpretation, it would not include people whose lack of understanding stems from causes such as intellectual disability, acquired brain damage or dementia.

6.3.18 Second, it is not clear what degree of understanding is required or what issues are involved in the term 'nature and significance of voting'. It could mean that it is sufficient for the person to understand how to complete a ballot paper. Alternatively, it may be necessary for the person to be able to identify candidates and parties and to understand issues of policy. In the view of the Commission, the second test would place an unfair burden on people with mental

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<sup>232</sup> *Elections Act 1983 (Qld) section 23(a).*

<sup>233</sup> *Elections Act 1983 (Qld) sections 73, 85.*

<sup>234</sup> *Commonwealth Electoral Legislation Amendment Act 1983 (Cwth) section 23(e); Electoral Act 1992 (Qld) section 64(1)(a)(i).*

or intellectual disability. Because they may not fully understand the complexities of the electoral system, it may be assumed that they do not have sufficient understanding to exercise their right to vote. However, other members of the community are not placed under such scrutiny and their right to vote is not questioned.

6.3.19 Third, the legislation does not prescribe how decisions about 'unsoundness of mind' are to be made or challenged.

6.3.20 The Commission believes that changes to the electoral laws are beyond the scope of the present reference and therefore makes no recommendation in relation to them. However, the Commission is of the view that the government should give further consideration to the legislative criteria for eligibility to vote to ensure that they:

- . are non-discriminatory;
- . use non-stigmatising terminology;
- . provide a clear statement of what a voter is required to understand;
- . identify who is to decide that a person should be disqualified on the basis of lack of understanding; and
- . provide an avenue of appeal against such a decision.

6.3.21 **The Commission recommends that, if a person is not entitled, on the grounds of lack of understanding, to vote on his or her own behalf, there should be no power to authorise another person to cast a substituted vote.**

### ***Interim orders***

6.3.22 A person whose decision-making capacity is impaired may be vulnerable to exploitation, neglect or abuse and, as a result, there may be an immediate risk to the person's health or welfare. The person's financial security may also be endangered by exploitation or because of the person's impaired decision-making capacity. In such situations, there may not be sufficient time to obtain full proof of all the matters that need to be established before a decision-making order can be made. The Discussion Paper proposed that the legislation should include power for the tribunal to make short term emergency orders to allow necessary measures to be taken to protect the interests of the person



concerned.<sup>235</sup>

**6.3.23** There was general agreement in the submissions for this proposal. Some of the submissions pointed to the need for safeguards to ensure that interim emergency orders could not become a mechanism for subjecting a person to a decision-making order without satisfying the specified requirements of proof. The Commission shares this concern.

**6.3.24** **The Commission therefore recommends that such orders be able to be made for short periods only and not be renewable more than once before a full hearing is conducted.**

### *Deferred orders*

**6.3.25** The legislation proposed by the Commission is intended to apply only to people over the age of eighteen years. The reason for this is that, in most situations, parents of children under the age of eighteen have legal authority to make decisions which their children do not have a sufficient degree of understanding to make for themselves.<sup>236</sup> However, if an application for a decision-making order is not made until after a child turns eighteen, there may be a period when, because the parents no longer have automatic decision-making power, there is no-one who has the legal authority to make the necessary decisions.

**6.3.26** In the Discussion Paper, the Commission suggested that a solution to this situation may be for the tribunal to have power to make an order for a person under the age of majority, which does not come into effect until the person turns eighteen.<sup>237</sup> This approach would be consistent with legislation in other jurisdictions.<sup>238</sup> However, while there was support for the concept of deferred orders, some submissions considered that such orders should be subject to an early review process to confirm their necessity.

**6.3.27** **The Commission therefore recommends that within the six months prior to the eighteenth birthday of a person whose decision-making**

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<sup>235</sup> Discussion Paper page 55. See also *Intellectually Disabled Citizens Act 1985* (Qld) sections 26(9), 32(1)(A); *Guardianship and Administration Board Act 1986* (Vic) sections 33, 60; *Guardianship Act 1987* (NSW) section 18(2); *Adult Guardianship Act 1988* (NT) section 19; *Guardianship and Administration Act 1990* (WA) section 65; *Guardianship and Management of Property Act 1991* (ACT) section 67; *Guardianship and Administration Act 1993* (SA) section 14(7).

<sup>236</sup> But see para 9.11.21.

<sup>237</sup> Discussion Paper page 53.

<sup>238</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 19(1), 43(1); *Guardianship and Management of Property Act 1991* (ACT) section 7(4).

capacity is impaired, the tribunal should have power to make a deferred order. A deferred order should take effect for a period of one year from the person's eighteenth birthday, unless the tribunal orders otherwise, but in any event for no longer than three years. In making such an order, the tribunal should be required to take into account the likelihood of any change in the person's capacity.

### *Conditional orders*

6.3.28 In the Discussion Paper, the Commission raised the possibility of giving the tribunal power to make orders which come into operation only on the occurrence of a specified event which would act as a triggering mechanism.<sup>239</sup> The object of such a power would be to allow people to make their own decisions when they are able to do so, while providing a speedy method of authorising substitute decision-making if the need should arise. The Commission envisaged that power to make such an order could be of particular benefit in the case of a person with an episodic psychiatric illness, who may, at times, have the capacity to make his or her own decisions, but may also have a recurring need for assistance.

6.3.29 The difficulty which some submissions saw with this proposal was in defining a suitable triggering mechanism. The condition suggested by the Commission - admission to a psychiatric hospital - may not be appropriate partly because of the increased emphasis on treatment of psychiatric illness within the community, and partly because, if the person is admitted to hospital, the need is likely to have arisen before that time. Further, in relation to involuntary hospitalisation, there is likely to be a degree of overlap with mental health legislation.<sup>240</sup> After further consideration, the Commission is of the view that the kinds of situation it had in mind would be adequately catered for by a short-term emergency order or, in less urgent circumstances, an order for a limited period of time.

6.3.30 The Commission therefore recommends that legislation does not include power to make conditional orders.

### *Appointment of alternative decision-makers*

6.3.31 Where the tribunal has decided that appointment of a decision-maker is necessary for a person with impaired decision-making capacity, it may become

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<sup>239</sup> Discussion Paper page 51.

<sup>240</sup> In the Discussion Paper, the Commission recognised at page 135 that there are arguments in favour of dealing with issues arising from involuntary treatment of psychiatric illness in separate, detailed mental health legislation. These matters are discussed further in Chapter 9.

impossible for the person appointed to continue to act. Absence, illness, loss of capacity or death may mean that the decision-maker is either temporarily or permanently unable to carry out the duties and functions specified in the order. This may mean that there is no-one with legal authority to make certain decisions for the person concerned.

6.3.32 In the Discussion Paper, the Commission proposed that the tribunal should have power to appoint, at the time the decision-making order is made, an alternative decision-maker who would automatically assume responsibility if the original decision-maker became unable to act. The Commission further suggested that, because circumstances may have changed considerably in the interval between the time when the order is made and the time when the need for the alternative decision-maker arises, the authority of the alternative decision-maker should be of a temporary nature and subject to ratification by the tribunal.<sup>241</sup>

6.3.33 One submission put forward the suggestion that, in any situation where an alternative decision-maker is required, the role could be assumed by the statutory decision-maker of last resort,<sup>242</sup> who would then have the responsibility to advise the tribunal that a review of the original order is necessary. The Commission is not persuaded of the advantages of this procedure. It considers that it would be unnecessarily cumbersome in a case where the need for an alternative decision-maker was of a temporary nature caused, for example, by overseas travel or illness. Even where the unavailability of the appointed decision-maker is permanent, the Commission is of the view that unnecessary demands would be put on the resources of the decision-maker of last resort. Further, the Commission believes that the intervention of a statutory officer should be used only where there is no other appropriate alternative.

6.3.34 The Commission therefore recommends that legislation should provide that the tribunal has power, in addition to appointing a decision-maker, to appoint an alternative decision-maker to act in a temporary capacity if the appointed decision-maker is unable to act.

#### *Appointment of more than one decision-maker*

6.3.35 The tribunal should have power, if it considers appropriate, to appoint different decision-makers to make different decisions.<sup>243</sup> For example, the tribunal may wish to appoint one person to make decisions about personal and lifestyle matters, and a different person to make financial decisions.

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<sup>241</sup> Discussion Paper page 53.

<sup>242</sup> See paras 5.3.6-5.3.8 above.

<sup>243</sup> See for example *Guardianship Act 1987* (NSW) section 16(3).

**The tribunal should also have power to appoint joint decision-makers with concurrent powers.** This would allow the parents of a son or daughter with impaired decision-making capacity to act together with equal authority.<sup>244</sup>

### ***Procedural powers***

6.3.36 In addition to the power to make orders appointing decision-makers, the tribunal will require powers relating to its own procedure. These powers should enable the tribunal to carry out its functions effectively and efficiently.

### ***Conduct of hearings***

6.3.37 The Discussion Paper canvassed the question of whether the tribunal should conduct open or closed proceedings.<sup>245</sup> The principal arguments in favour of open proceedings are the protection of the rights of the person who is the subject of the application and the need for the tribunal to be accountable for its decisions. The principal arguments against open proceedings are the need to protect the privacy and the dignity of the person who is the subject of the application and to encourage all parties to speak frankly. Some tribunals which deal with matters that are often personal and sensitive conduct closed hearings.<sup>246</sup> On the other hand, no other Australian jurisdiction has adopted this approach in relation to a tribunal concerned with decision-making for a person with impaired decision-making capacity.

6.3.38 The submissions which addressed this issue were almost evenly divided on the question.

6.3.39 **Having considered the various arguments, the Commission recommends that the proceedings of the tribunal should be open but that, to preserve the necessary elements of confidentiality and frankness, the tribunal should have power to close the proceedings.**<sup>247</sup>

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<sup>244</sup> The appointment of joint decision-makers gives rise to the possibility of disagreement between the decision-makers and the need for a mechanism to resolve disputes. See para 7.2.3.

<sup>245</sup> Discussion Paper pages 43-44.

<sup>246</sup> See for example *Social Security Act 1947* (Cwth) section 194; *Veterans' Entitlements Act 1986* (Cwth) section 150.

<sup>247</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 7; *Guardianship Act 1987* (NSW) section 56; *Guardianship and Administration Act 1990* (WA) Schedule 1 Part B clause 11; *Guardianship and Management of Property Act 1991* (ACT) section 37(1); *Guardianship and Administration Act 1993* (SA) section 14(10), 14(11).

### ***Exclusion of parties***

6.3.40 In making a determination about an application for a decision-making order, the tribunal should, wherever possible, obtain the views of the person who is the subject of the application.<sup>248</sup> However, the person may feel under considerable pressure and may be reluctant to communicate frankly in front of relatives or carers. **The tribunal should therefore have power to exclude any other person from the hearing while the person's views are sought.**<sup>249</sup>

### ***Joining parties***

6.3.41 When an application is made to the tribunal it may not always be possible for the staff of the tribunal to determine who should be a party to the application. The Commission therefore sees merit in the suggestion made in one of the submissions that the tribunal should have power to join parties. However, the Commission is of the view that such a power should be exercised only for the purpose of furthering the particular application.

6.3.42 **The Commission therefore recommends that the tribunal should have power to join as a party to an application any person who has a real interest in the person who is the subject of the application.**

### ***Representation before the tribunal***

6.3.43 It is the view of the Commission that the parties to a hearing should be entitled and encouraged to speak for themselves and that the procedures of the tribunal should be designed to assist them to appear for themselves without the need for professional legal representation.

6.3.44 In the Discussion Paper, the Commission raised the question of representation for a person who is the subject of an application.<sup>250</sup> In some jurisdictions, because of the potential erosion of the rights of the person concerned, the court or tribunal is under a duty to ensure that the person is protected by independent legal representation.<sup>251</sup> In others, the adjudicating

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<sup>248</sup> See para 2.2.14.

<sup>249</sup> See for example *Guardianship and Administration Act 1993* (SA) section 14(11).

<sup>250</sup> Discussion Paper pages 45-47.

<sup>251</sup> See for example *Protection of Personal and Property Rights Act 1988* (NZ) section 65(1); *Adult Guardianship Act 1988* (NT) section 13(2).

body has a power to appoint someone to represent the person.<sup>252</sup>

6.3.45 The person bringing the application may also wish to be represented before the tribunal, either by a lawyer or by a non-legal advocate, in order to explain to the tribunal as convincingly as possible the perceived need for the appointment of a decision-maker. Other relatives or close friends whose interests may be affected by the tribunal's decision may also have a legitimate claim to representation.

6.3.46 The Commission proposed that parties to the hearing should be entitled to representation by a non-legal advocate; that parties who wish to have legal representation should have an automatic right to do so; and that the tribunal should have power to arrange independent legal representation for the person who is the subject of the application if it appears that his or her interests are not otherwise being adequately met.

6.3.47 The submissions received by the Commission varied widely on these issues. One view agreed that the person who is the subject of the application should be entitled to be represented by a lawyer or other advocate. However, a number of submissions argued strongly that there should be no automatic right for any of the parties to be represented by a lawyer. The arguments against an automatic right were that it could lead to an 'over-legalisation' of the tribunal's procedures, causing delays and additional expense and creating an adversarial courtroom atmosphere, effectively negating the reasons for establishing the tribunal. It would also disadvantage people who could not afford representation and create additional anxieties in situations where not all the parties are represented. Some submissions also argued that there should not be an automatic right to non-legal representation.

6.3.48 The Commission is aware of the need to safeguard the rights of the person who is the subject of the application. After careful consideration of the submissions, the Commission considers that the person's interests may be adequately protected if a non-legal representative were allowed to speak on his or her behalf. Indeed, cultural differences may make such representation essential for Aboriginals and Torres Strait Islanders and for members of other ethnic communities. The Commission is also of the view that insistence on legal representation in every case may impact negatively on the operation of the tribunal.

6.3.49 **The Commission therefore recommends that the tribunal should have a discretionary power to allow any of the parties to a hearing to be represented by a lawyer or non-legal advocate. It should have a further power to appoint a representative for the person who is the subject of the application if the person is not represented and, in the opinion of the tribunal, there is a need to protect the person's rights.**

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<sup>252</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 12(3); *Guardianship and Administration Act 1990* (WA) Schedule 1 Part B clause 13(4); *Guardianship and Management of Property Act 1991* (ACT) section 36(4).

6.3.50 If the tribunal appoints a lawyer to represent the person, there should be provision for the costs of such representation to be met by Legal Aid. The Commission further recommends that funding to the Legal Aid Commission should be increased to compensate for the costs of this representation.

### *Assistance for the tribunal*

6.3.51 The tribunal should also have power to appoint people with appropriate professional expertise - for example, medical specialists or interpreters - to assist in any proceedings before the tribunal.<sup>253</sup>

### *Investigatory and supervisory powers*

#### *Obtaining information*

6.3.52 To make an informed judgment about an application for a decision-making order, the tribunal must have access to all relevant facts and materials. In the Discussion Paper, the Commission identified a number of powers which would assist the tribunal to obtain the necessary information.<sup>254</sup> The submissions which considered the issue were supportive of the Commission's proposals.

6.3.53 The Commission therefore recommends that the tribunal should have power to require the person making the application to bring the person who is the subject of the application to the hearing. The tribunal should also have power to visit the person who is the subject of the application, if the person is unable to attend the hearing.

6.3.54 Because of the sensitive nature of matters discussed at the hearing of an application for a decision-making order, family members and friends may be unwilling to give evidence, and professional service providers and carers may be concerned about breaching their ethical duty of confidentiality. **The tribunal should therefore have power to require witnesses to attend and give evidence.**<sup>255</sup> It should also have power to require the production of documents, to obtain information from government departments or service organisations, and to order a medical or other examination of the person who

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<sup>253</sup> See for example *Guardianship and Administration Act 1986 (Vic)* section 11(1); *Guardianship and Administration Act 1993 (SA)* section 13.

<sup>254</sup> Discussion Paper page 54.

<sup>255</sup> Members and staff of the tribunal should be under a duty of confidentiality in relation to evidence given at the tribunal. See pages 58-60. Tribunal members and any person who appears before the tribunal should be protected from legal liability for anything said during the course of a hearing. See pages 197-198.

is the subject of the application.<sup>256</sup>

6.3.55 A person may also be reluctant to reveal information which indicates that the person may have acted wrongfully. However, it is essential that the tribunal is able to obtain information necessary to protect the interests of people at risk because of impaired decision-making capacity. Without access to such information, it may not be able to determine what is in the best interests of a person whose decision-making capacity is impaired or to take appropriate action to safeguard those interests.

6.3.56 In a number of Australian jurisdictions, legislation provides that a person must not, without reasonable excuse, fail to answer a question that the person is required to answer or to produce a document that the person is required to produce. It is not a reasonable excuse that the answer or document might tend to incriminate the person. However, the information obtained as a result of giving the answer or producing the document is not admissible against the person in subsequent court proceedings.<sup>257</sup> Legislation of this kind is intended to overcome fear of prosecution for an offence or of incurring civil liability as a result of information given to the tribunal.

6.3.57 However, the Commission is of the view that circumstances might arise which would warrant the use against a person of evidence given to the tribunal by that person. In particular, the Commission is concerned that, if a person holding a position at a hospital or care facility made an admission that he or she had physically abused persons in his or her care, appropriate action must be able to be taken.

6.3.58 If there were a blanket prohibition on the use of such evidence, the person's employer could be placed in an invidious position. The tenor of the employee's evidence could be such as to demonstrate that he or she is entirely unsuitable for the position held. The employer's duty of care towards those persons in its care could arguably demand that those persons not be exposed to the risk of abuse which may arise from the continued employment of the delinquent employee. While the most appropriate action might be the dismissal of the employee, the employer could, as a result of that action, be exposed to an action for damages for wrongful dismissal, or to proceedings in respect of unlawful dismissal under Subdivision 3 of the *Industrial Relations Act 1990*.

6.3.59 If the only evidence of the employee's wrongdoing were the admission made before the Tribunal, the employer could be found liable to compensate the employee for what, in the absence of the incriminating evidence,

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<sup>256</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 10(7), 11(2); *Guardianship Act 1987* (NSW) section 60(1); *Adult Guardianship Act 1988* (NT) section 12(3), 12(4); *Guardianship and Administration Act 1990* (WA) Schedule 1 Part B clause 7(1); *Guardianship and Administration of Property Act 1991* (ACT) sections 39(1), 40, 41; *Guardianship and Administration Act 1993* (SA) section 14(1), 15(1).

<sup>257</sup> See for example *Guardianship Act 1987* (NSW) section 61; *Guardianship and Management of Property Act 1991* (ACT) section 50.



might be held to be a wrongful or unlawful dismissal. Perhaps even more importantly than what would, in those circumstances, be an obvious injustice to the employer, is the possibility that the Industrial Commission could make an order requiring the employer to reinstate the employee.<sup>258</sup> Such an order would expose adults in the care of the employer to a continuing risk of abuse.

6.3.60 Accordingly, the Commission favours a limited use of incriminating evidence to allow an employer to use the incriminating evidence given by an employee in proceedings brought by or on behalf of<sup>259</sup> the employee against his or her employer. This exception to the general prohibition on the use of incriminating evidence is, in the Commission's view, required to protect employers who take such action as is necessary to protect the vulnerable persons to whom the employer has responsibilities. The exception is also consistent with the primary objective of the Tribunal's power to obtain information, which is to protect those people who are at risk because of their impaired decision-making capacity.

6.3.61 **The Commission therefore recommends that the legislation include a provision enabling the tribunal to require a witness to answer a question or produce a document, but making information obtained in this way inadmissible, save for certain limited exceptions, against the person in subsequent court proceedings.**

### ***Entry and removal***

6.3.62 In the Discussion Paper,<sup>260</sup> the Commission proposed that the tribunal should have an express legislative power to act where there is reason to believe that the welfare of a person whose decision-making capacity is impaired is at risk through neglect, exploitation or abuse.<sup>261</sup> The submissions which considered the issue supported the grant of such powers to the tribunal, but, in some cases, expressed concern that it be subject to safeguards.

6.3.63 The Commission acknowledges the coercive nature of a power to order entry to premises and removal of a person to another place, and believes that such a power should be exercised sparingly. It should not be used, for example, to force elderly people to leave their homes and move to institutional accommodation, merely because their living standards fall short of conventional

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<sup>258</sup> Orders for reinstatement can be made pursuant to section 297(2)(b) of the *Industrial Relations Act 1990* (Qld).

<sup>259</sup> For example, section 295(1)(b) of the *Industrial Relations Act 1990* (Qld) provides that in certain circumstances, an application under Subdivision 3 of the Act may be brought by an industrial organisation on behalf of an employee.

<sup>260</sup> Discussion Paper page 55.

<sup>261</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 27; *Guardianship Act 1987* (NSW) sections 11, 12; *Guardianship and Administration Act 1990* (WA) section 49; *Guardianship and Management of Property Act 1991* (ACT) section 68.

values of cleanliness and tidiness. On the other hand, the safeguards should not be so stringent as to prevent urgent measures being taken to protect a vulnerable person who may be exposed to significant risk.

**6.3.64 The Commission therefore recommends that, where, in the opinion of the tribunal, there is cogent evidence that a person's decision-making capacity is impaired and that there is an immediate danger to the person's welfare, the tribunal should have power to order entry to the premises and, if necessary, removal of the person to a place of safety.**

6.3.65 The Adult Guardian<sup>262</sup> or any person with a genuine interest in the person's welfare should be able to bring an application for such an order. The application should be able to be brought whether or not a decision-maker has been appointed to make decisions about the person's welfare. The tribunal should have power, if it is satisfied that there is sufficient evidence to justify the making of an order, to authorise the Adult Guardian with the assistance of members of the Police Service if necessary, and using such force as is reasonable, to enter the premises and remove the person.

6.3.66 The order should specify -

- (a) the purpose for which it is issued;
- (b) the person whose removal it authorises;
- (c) the place from which removal is authorised;
- (d) particular hours during which removal is authorised at any time of day or night; and
- (e) the date on which it ceases to have effect, being a date no later than seven days after the issue of the order.<sup>263</sup>

6.3.67 It should be an offence to hinder or obstruct the Adult Guardian or a member of the Police Service acting under the authority of an order.

6.3.68 After a person has been removed to a place of safety, the tribunal should hold an inquiry as soon as possible to determine whether a decision-maker should be appointed or, if a decision-maker has already been appointed, whether that appointment should continue. If the tribunal is satisfied that there is a need to appoint a decision-maker and if there is no appropriate decision-maker available, the tribunal should appoint the Adult Guardian to make decisions about the person's welfare.

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<sup>262</sup> See Chapter 11.

<sup>263</sup> See for example *Guardianship and Management of Property Act 1991 (ACT)* section 68.

### **Variation or revocation of order**

6.3.69 The requirement that a decision-making order be regularly reviewed has already been discussed.<sup>264</sup> The purposes of the review process are to ensure that there is still a need for the order; that, where an order is needed, it satisfies the decision-making requirements of the person who is the subject of the application; and that, where a decision-maker has been appointed, the powers conferred on the decision-maker by the tribunal have been exercised appropriately.

6.3.70 The Discussion Paper proposed that the duty to review an order appointing a decision-maker should be accompanied by a power to vary or revoke the order and a power to remove a decision-maker.<sup>265</sup> The submissions received on this issue were in favour of the Commission's proposal.

6.3.71 The Commission therefore recommends that the tribunal should have power to revoke the appointment of a decision-maker or to vary the terms of a decision-maker's appointment.<sup>266</sup> The Commission further recommends that the tribunal should have power to remove a person as decision-maker if it considers the person is no longer suitable or competent to act as a decision-maker, or if the decision-maker has neglected his or her duties or abused his or her authority, or has otherwise contravened the legislation.<sup>267</sup>

### **Giving directions**

6.3.72 The Commission also recommends that the tribunal be given power to advise or direct a decision-maker or an assistant decision-maker about the exercise of the authority conferred on the decision-maker or the performance of the decision-maker's duties or functions.<sup>268</sup>

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<sup>264</sup> See pages 56-58.

<sup>265</sup> Discussion Paper pages 53-54.

<sup>266</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 63(1); *Guardianship Act 1987* (NSW) section 25(5); *Adult Guardianship Act 1988* (NT) section 23(5); *Guardianship and Administration Act 1990* (WA) section 90; *Guardianship and Management of Property Act 1991* (ACT) section 19; *Guardianship and Administration Act 1993* (SA) section 30.

<sup>267</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) section 31.

<sup>268</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 30(3); *Guardianship Act 1987* (NSW) section 28; *Guardianship and Administration Act 1990* (WA) sections 47(1), 74(1); *Guardianship and Management of Property Act 1991* (ACT) sections 16(1), 18(1); *Guardianship and Administration Act 1993* (SA) section 74.

### ***Ratifying acts of informal decision-makers***

6.3.73 In Chapter 4, the Commission noted that people who act as decision-makers on an informal basis may expose themselves to the risk of personal liability for the decisions they make. The Commission was concerned that such a risk may deter people from acting as informal decision-makers, leaving no alternative other than the more intrusive option of a formal appointment.<sup>269</sup> It is the view of the Commission that where the needs of a person with impaired decision-making capacity can be met on an informal basis, there is no justification for formal intervention.

6.3.74 **The Commission therefore recommends that the tribunal be given power to ratify the acts of an informal decision-maker who has acted in good faith, and that such a decision-maker whose acts have been ratified by the tribunal should be protected from personal liability.**

### ***Administrative powers***

#### ***Power to appoint staff***

6.3.75 The efficient operation of the tribunal will require that the tribunal has power to appoint staff. The staff of the tribunal will be responsible for the performance of duties such as processing applications, providing information to and otherwise assisting clients, investigating applications and preparing reports for the tribunal, organising sittings of the tribunal and the general administrative functions of the tribunal office.

6.3.76 **The Commission recommends that staff should be appointed by the tribunal and should be responsible to and subject to the direction of the head of the tribunal.**

## **6.4 THE LEGISLATION**

6.4.1 The tribunal is established by Chapter 10 of the Draft Bill in Chapter 13 of this Draft Report, and its functions and powers are set out in clauses 142 and 143.

6.4.2 Chapter 12 of the Draft Bill provides for the procedure of the tribunal.

6.4.3 Provisions relating to the tribunal's power to make orders appointing a decision-maker or a decision-making assistant are set out in Chapter 7 of the Draft Bill.

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<sup>269</sup> See pages 36-37.

## 7. DUTIES AND POWERS OF DECISION-MAKERS

### 7.1 INTRODUCTION

7.1.1 In the Discussion Paper,<sup>270</sup> one of the criticisms made by the Commission of existing legislation for decision-making for people whose decision-making capacity is impaired, concerned the 'all or nothing' approach to the powers given to an appointed decision-maker.<sup>271</sup> Such an approach fails to acknowledge the individual and sometimes changing needs of people with impaired decision-making capacity.

7.1.2 For example, if the Public Trustee is appointed to manage a person's financial affairs,<sup>272</sup> the Public Trustee has a statutory obligation to comply with the obligations normally imposed on a trustee<sup>273</sup> - namely, to preserve the property, to act for the benefit of the person concerned and to account for the property.<sup>274</sup> However, there is no requirement that in performing these functions, the Public Trustee act in a way which is least restrictive of the rights of the person with impaired decision-making capacity or which encourages the person to be as self-reliant as possible. The Public Trustee may, in relation to the management of property, do anything that a person of full capacity could do, subject only to the obligations of a trustee and to certain restrictions on the ability to dispose of property by way of sale, lease, partition or exchange, and on the ability to borrow money or secure a loan against the person's property.<sup>275</sup> There is no provision for imposing any further limit on the powers of the Public Trustee. This means that the Public Trustee has very wide authority to make decisions about the property in question.

7.1.3 If someone other than the Public Trustee is appointed as committee of the estate under the *Mental Health Act*,<sup>276</sup> the committee is not placed in the position of a trustee, and subject to a requirement to provide security for the

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<sup>270</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>271</sup> Discussion Paper pages 64-69.

<sup>272</sup> See pages 13-14, 29-30 and 39-40.

<sup>273</sup> *Public Trustee Act 1978* (Qld) section 80(1)(c).

<sup>274</sup> Ford and Lee, *Principles of the Law of Trusts* (1983) 383.

<sup>275</sup> *Public Trustee Act 1978* (Qld) section 80(1)(d).

<sup>276</sup> See page 40.

management of the property<sup>277</sup> and to account to the Public Trustee,<sup>278</sup> has complete control over the property in question. Again, there is no obligation for the powers of the committee to be exercised in a way which is least restrictive of the rights of the person for whom the decision is being made, or which encourages the person to be as self-reliant as possible.

7.1.4 A committee of the person appointed under the *Mental Health Act*<sup>279</sup> has complete authority to make decisions about the personal welfare and lifestyle of the person concerned. There is no provision for the committee's authority to be limited to particular decisions which need to be made according to individual circumstances. The views of the person do not have to be sought or taken into account. The extent of a committee's authority creates significant potential for abuse of power and for an unwarranted intrusion into the rights of a person with impaired decision-making capacity.<sup>280</sup>

7.1.5 The Commission believes that any new legislative scheme should also address the issues of the duties to be imposed and the powers to be conferred on people appointed as decision-makers. Inclusion of statutory provisions concerning such duties and powers establishes the parameters of a decision-maker's authority and also furnishes a basis for assessing the performance of a decision-maker.

## 7.2 DUTIES

### *General*

7.2.1 **The primary duty of a decision-maker appointed for a person whose decision-making capacity is impaired should be to observe the principles embodied in the legislation.** In the Discussion Paper,<sup>281</sup> the Commission proposed that the principles binding a decision-maker should include the least restrictive alternative, encouragement of self-reliance, substituted judgment where appropriate and otherwise the best interests of the person concerned. These proposals were generally supported by the submissions received by the Commission.

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<sup>277</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 9.*

<sup>278</sup> *Mental Health Act 1974 (Qld) Fifth Schedule clause 10.*

<sup>279</sup> See pages 14, 31 and 40.

<sup>280</sup> See page 3 for a discussion of rights issues involved in decision-making for people with impaired capacity.

<sup>281</sup> Discussion Paper page 75.

**7.2.2** In Chapter 2 the Commission outlined the principles which, in the light of the submissions received, should provide the philosophical basis for the operation of the legislation and which should bind every person who exercises a power or performs a duty or a function under the legislation.

**7.2.3** The Commission further recommends that the obligations of a decision-maker should include:

- consulting with the person with impaired decision-making capacity about his or her wishes and taking into account those wishes, so far as they can be ascertained;<sup>282</sup>
- taking into account what, in the opinion of the decision-maker, would be the wishes of the person if his or her decision-making capacity were not impaired, to the extent that there is reasonably ascertainable evidence on which to base such an opinion;<sup>283</sup>
- making decisions which are least restrictive of the person's rights, consistently with the person's proper care and protection;<sup>284</sup>
- encouraging the person to become capable of caring for himself or herself and to make his or her own decisions about financial matters or about his or her own personal welfare to the greatest practicable extent;<sup>285</sup>
- encouraging the person to participate as much as practicable in the life of the community and to gain as much enjoyment as practicable from life;<sup>286</sup>

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<sup>282</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 28(2)(e) and 49(2)(b); *Guardianship Act 1987* (NSW) section 4(d); *Adult Guardianship Act 1988* (NT) section 20(2)(e); *Protection of Personal and Property Rights Act 1988* (NZ) sections 18(4)(c)(i) and 43(1)(a); *Guardianship and Administration Act 1990* (WA) sections 51(2)(e) and 70(2)(b); *Guardianship and Management of Property Act 1991* (ACT) section 3(2)(a); *Guardianship and Administration Act 1993* (SA) section 5(b).

<sup>283</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) sections 3(2)(b) and 14(1); *Guardianship and Administration Act 1993* (SA) section 5(a).

<sup>284</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 4(2)(a); *Guardianship Act 1987* (NSW) section 4(b); *Adult Guardianship Act 1988* (NT) section 4(a); *Guardianship and Management of Property Act 1991* (ACT) section 3(2)(d); *Guardianship and Administration Act 1993* (SA) section 5(d).

<sup>285</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 28(2)(c) and 49(2)(a); *Adult Guardianship Act 1988* (NT) section 20(2)(c); *Protection of Personal and Property Rights Act 1988* (NZ) sections 18(4)(a) and 36(1); *Guardianship and Administration Act 1990* (WA) sections 51(2)(c) and 70(2)(a); *Guardianship and Management of Property Act 1991* (ACT) section 3(2)(e).

<sup>286</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 28(2)(b); *Guardianship Act 1987* (NSW) section 4(c); *Adult Guardianship Act 1988* (NT) section 20(2)(b); *Protection of Personal and Property Rights Act 1988* (NZ) section 18(4)(b); *Guardianship and Administration Act 1990* (WA) section 51(2)(b); *Guardianship and Management of Property Act 1991* (ACT) section 3(2)(f).

- where different decision-makers are appointed with different powers, consulting with each other regularly to ensure that the person's interests are not jeopardised in any way by lack of communication between the decision-makers;<sup>287</sup> and
- where joint decision-makers are appointed, acting unanimously or, where this is not possible, applying to the tribunal for directions.<sup>288</sup>

7.2.4 A decision-maker should also be under a statutory duty to act honestly and with a degree of care that would be reasonable for a person of the decision-maker's experience and expertise. This is the standard of care which the Commission has recommended should also apply to a decision-maker appointed under an enduring power of attorney.<sup>289</sup>

### ***Financial decisions***

7.2.5 In the Discussion Paper, the Commission raised the question of the imposition of additional obligations on decision-makers appointed to manage the financial affairs or property of a person with impaired decision-making capacity.<sup>290</sup>

7.2.6 Most of the submissions which considered the issue were in favour of provisions to create additional safeguards for the financial security of a person whose decision-making capacity is impaired. There was, however, some concern that attempts to prevent fraud or mismanagement might result in unduly onerous responsibilities in situations where the size of the estate does not warrant such an approach or where the risk of exploitation is minimal.

7.2.7 It is the view of the Commission that, in the majority of cases, sufficient protection will be given by requiring:

- that, if required by the tribunal, the decision-maker must present to the tribunal or to a person nominated by the tribunal, a plan of management to be approved by the tribunal or its nominee;
- that the decision-maker must not enter, without the consent of the tribunal, into a transaction in relation to the property of a person with

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<sup>287</sup> See for example *Protection of Personal and Property Rights Act 1988* (NZ) sections 18(5) and 43(6). The appointment of more than one decision-maker is discussed at page 69.

<sup>288</sup> See for example *Guardianship and Administration Act 1990* (WA) section 53.

<sup>289</sup> See pages 114-115.

<sup>290</sup> Discussion Paper pages 77-78.



**impaired decision-making capacity if there is an actual or potential conflict between the interests of the decision-maker and the interests of the person;**<sup>291</sup>

**that, except in relation to property owned jointly by the decision-maker and a person whose decision-making capacity is impaired, a decision-maker must keep his or her property separate from the property of the person.**<sup>292</sup>

7.2.8 The Commission considered the possibility of imposing on decision-makers a statutory requirement to file, on an annual basis<sup>293</sup> or as directed by the tribunal,<sup>294</sup> with the Public Trustee<sup>295</sup> or with the tribunal,<sup>296</sup> a statement of accounts in a prescribed form. However, mindful that the intention of the proposed legislation is to assist people with impaired decision-making capacity and their families and carers, the Commission was concerned that a broad, coercive provision would prove too onerous in many situations.

7.2.9 The Commission recommends that decision-makers, if ordered to do so by the tribunal, should be required to present the tribunal with a summary of receipts and expenditure and that the tribunal have power to ask for more detailed accounts where it considers necessary. The tribunal should also have power to appoint an auditor. The Commission believes that a discretionary provision of this kind, coupled with the power of the tribunal to demand production of documents,<sup>297</sup> would provide adequate protection against mismanagement or exploitation.

7.2.10 The Commission also recommends that the tribunal should have a discretion to impose further obligations, such as the payment of a

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<sup>291</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) section 14(4)(a).

<sup>292</sup> See for example *Property Law Act 1974* (Qld) section 175E(1)(b); *Guardianship and Management of Property Act 1991* (ACT) section 14(4)(b).

<sup>293</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 58; *Protection of Personal and Property Rights Act 1988* (NZ) section 45(2)(b).

<sup>294</sup> See for example *Guardianship and Administration Act 1990* (WA) section 80(1); *Guardianship and Administration Act 1993* (SA) section 44(1).

<sup>295</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 58; *Guardianship and Administration Act 1993* (SA) section 44(1).

<sup>296</sup> See for example *Guardianship and Administration Act 1990* (WA) section 80(1).

<sup>297</sup> See pages 73-74.

security,<sup>298</sup> on a decision-maker if, in the opinion of the tribunal, the requirements listed above would be inadequate in the circumstances of a particular case.

### ***Liability for breach of duty***

7.2.11 A decision-maker appointed under an enduring power of attorney may be required to compensate the donor of the power for loss caused by the attorney's breach of statutory duty.<sup>299</sup> The Commission believes that a decision-maker appointed by the tribunal should also be subject to such a liability. **The Commission therefore recommends that, if ordered to do so by the tribunal, a decision-maker appointed by the tribunal should be liable to compensate the person for whom he or she is appointed for any loss caused by the decision-maker's failure to comply with his or her statutory obligations.**

7.2.12 However, if the tribunal orders the decision-maker to compensate the person, a court which finds the decision-maker liable to the person for the loss caused by the breach should be required, in assessing damages, to take into account the amount of compensation paid by the decision-maker as a result of the tribunal order.

## **7.3 POWERS**

7.3.1 In Chapter 6, the Commission recommended that the tribunal should have power to make orders conferring unlimited decision-making authority.<sup>300</sup> In such a situation, the decision-maker would have extremely wide powers, similar to those exercised by parents in relation to their young children.<sup>301</sup> However, the Commission envisages that the need for an order of this kind would occur only in exceptional circumstances. It is the view of the Commission that, consistently with the principle of the least restrictive alternative, the powers given to a decision-maker should be confined to those which are necessary to meet the needs of the particular case, and should ordinarily be specified in the terms of the order.

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<sup>298</sup> See for example *Protected Estates Act 1983* (NSW) section 31; *Protection of Personal and Property Rights Act 1988* (NZ) section 37; *Guardianship and Administration Act 1990* (WA) section 64(3)(b).

<sup>299</sup> See page 118.

<sup>300</sup> See page 63.

<sup>301</sup> R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 4-6.

## **Personal decisions**

7.3.2 In the Discussion Paper,<sup>302</sup> the Commission identified powers which could be given to a decision-maker in relation to personal decisions for a person whose decision-making capacity is impaired. These powers were:

- . to decide where the person is going to live;<sup>303</sup>
- . to decide who is going to live with the person;<sup>304</sup>
- . to decide whether the person should work and, if so, the kind and place of work, and the employer;<sup>305</sup>
- . to decide what education or training the person will receive;<sup>306</sup> and
- . to consent to certain treatment relating to health care.<sup>307</sup>

7.3.3 Legislation in the Canadian provinces of Alberta,<sup>308</sup> Saskatchewan<sup>309</sup> and British Columbia<sup>310</sup> includes in the powers which may be conferred on a person appointed to make personal and lifestyle decisions for a person whose decision-making capacity is impaired the authority:

- . to decide whether the person should apply for any licence or permit; and
- . to make normal day-to-day decisions on behalf of the person including

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<sup>302</sup> Discussion Paper page 79.

<sup>303</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 24(2)(a); *Adult Guardianship Act 1988* (NT) section 17(2)(a); *Guardianship and Administration Act 1990* (WA) section 45(2)(a); *Guardianship and Management of Property Act 1991* (ACT) section 7(2)(a).

<sup>304</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 24(2)(b); *Adult Guardianship Act 1988* (NT) section 17(2)(b); *Guardianship and Administration Act 1990* (WA) section 45(2)(b); *Guardianship and Management of Property Act 1991* (ACT) section 7(2)(a).

<sup>305</sup> See for example *Guardianship and Administration Board Act 1988* (Vic) section 24(2)(C); *Adult Guardianship Act 1988* (NT) section 17(2)(c); *Guardianship and Administration Act 1990* (WA) section 45(2)(c); *Guardianship and Management of Property Act 1991* (ACT) section 7(2)(c) and (d).

<sup>306</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) section 7(2)(b).

<sup>307</sup> Health care decisions for people whose decision-making capacity is impaired will be discussed in Chapter 9.

<sup>308</sup> *Dependent Adults Act*, R.S.A. 1980, c. D-32.

<sup>309</sup> *The Dependent Adults Act*, S.S. 1989, c. D-25.1.

<sup>310</sup> *Adult Guardianship Act 1993* section 19.

decisions about diet and dress.

**7.3.4** The Commission considered whether similar provisions should be incorporated into its proposed legislation. In many instances, such matters would be able to be dealt with informally, and there would be no need for a decision-maker to be granted formal authority to make decisions about them. However, it is possible to envisage a situation - for example, a family dispute - where it would be desirable for one person to have legal authority to have the final say.

**7.3.5** The Commission therefore recommends that the powers which may be conferred on a decision-maker should include the power to make decisions about licences and about matters such as diet and dress, provided that such powers are exercised in accordance with the principles of the legislation and are not used as a means of controlling behaviour which is merely unusual or eccentric.

**7.3.6** The Commission also recommends that the legislation should include a general provision which would allow a decision-maker to make any other decisions specified by the tribunal and required by the decision-maker to ensure the proper care and protection of the person.

**7.3.7** There are some decisions for which the Commission has recommended that it should not be possible for decision-making authority to be delegated. These decisions were discussed in Chapter 6. They include consenting to marriage, voting on behalf of a person whose decision-making capacity is impaired, and consenting to some forms of medical treatment.<sup>311</sup>

### ***Financial decisions***

**7.3.8** The legislation should identify powers which may be given by the tribunal to decision-makers appointed to make decisions about financial matters. These powers should be sufficiently flexible to allow the decision-maker to meet the needs of the person whose decision-making capacity is impaired and his or her dependants, but at the same time provide safeguards against poor management or exploitation.

**7.3.9** The Commission recommends that, in order to achieve this balance, the powers which may be conferred on a decision-maker should be expressed as widely as possible,<sup>312</sup> but be subject to such limitations as the

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<sup>311</sup> Decisions about medical treatment are discussed in Chapter 9.

<sup>312</sup> See for example Section 8(2) of the *Guardianship and Management of Property Act 1991* (ACT) which provides:

'The powers that may be conferred on a manager of a person's property are those that the person would have if he or she were legally competent to exercise them.'

**tribunal considers necessary to impose in the circumstances of a particular case.** In determining the powers, if any, to be conferred the tribunal would be bound by the principles set out in the legislation. The decision-maker, in exercising the powers, would also be bound.

**7.3.10 The Commission further recommends that the legislation should specify some of the powers which may be given to a decision-maker in relation to financial matters, including:**

- . **paying for maintenance and accommodation expenses for the person and his or her dependants;**
  - . **paying the person's debts;**
  - . **receiving money payable or belonging to the person and taking action to recover such money;**
  - . **discharging any mortgage over the person's property;**
  - . **paying rates, taxes, insurance premiums or other outgoings payable in respect of the person's property;**
  - . **insuring any property of the person;**
  - . **preserving and improving the estate of the person;**
  - . **carrying on any trade or business of the person;**
  - . **performing contracts entered into by the person;**
  - . **investing, on behalf of the person, in authorised trustee investments;**
  - . **investing, with the approval of the tribunal, in investments other than authorised trustee investments;**
  - . **purchasing or selling any real property; and**
  - . **taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by virtue of an existing shareholding, whether or not the shares are an authorised trustee investment.**
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## **Gifts**

7.3.11 In the Discussion Paper,<sup>313</sup> the Commission suggested possible statutory restrictions on the powers of a financial decision-maker. These restrictions were intended to provide an additional safeguard for the financial security of the person with impaired decision-making capacity. They included prohibiting the making of any payment which the person is not legally required to pay; prohibiting a decision-maker from making, without the prior approval of the tribunal, any gifts on behalf of the person; and imposing a limit - for example \$25 per gift, not to exceed \$100 per year - on the value of gifts which a decision-maker may make on behalf of the person without first obtaining approval of the tribunal.

7.3.12 There was, however, some concern expressed in the submissions that a limitation of this nature would constitute an unwarranted qualification to the principle of substituted judgment and would prevent the person from engaging in a highly valued human activity. The Commission recognises that giving gifts is a normal and important incident of family life. Gifts are given for anniversaries and special occasions, at particular seasons or to mark a religious celebration. Many people also make gifts to charity.

7.3.13 After further consideration, it is the view of the Commission that there should not be an absolute statutory prohibition on the power of a decision-maker to make gifts or donations on behalf of a person with impaired decision-making capacity. However, the Commission remains of the belief that, in order to protect a person whose decision-making capacity is impaired, the power of a decision-maker to use that person's money for the benefit of someone other than that person should not be unqualified.

7.3.14 **The Commission therefore recommends that a decision-maker should be able to make a gift to a relation or close friend of a person whose decision-making capacity is impaired if the gift is of a seasonal nature or because of a special event or is in the nature of a donation that the person had made or might reasonably be expected to make, and provided that the value of the gift is not more than would be reasonable in all the circumstances, particularly the person's financial circumstances.**

## ***Trusteeship***

7.3.15 Prior to the onset of incapacity, a person with impaired decision-making capacity may have been a trustee of a trust. Appointment to act as financial decision-maker for an incapacitated trustee does not give the decision

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<sup>313</sup> Discussion Paper page 80.

maker authority to act as a substitute trustee.<sup>314</sup>

## 7.4 MISCELLANEOUS

### *Advice and directions*

7.4.1 The legislation should entitle a decision-maker to apply to the tribunal to seek the advice or direction of the tribunal if there is a doubt about the terms of the order or the exercise of the decision-making power conferred. For example, a decision-maker who becomes aware of a conflict of interest between his or her own interests and those of the person on whose behalf a decision is to be made, should be able to approach the tribunal for directions. **A decision-maker who acts in accordance with the advice or a direction of the tribunal should be taken to have acted properly and in accordance with the legislation unless, in representing facts to the tribunal, the decision-maker has acted fraudulently or has knowingly misrepresented or concealed a material fact.** The legislation should also provide that a decision-maker who, without reasonable excuse, contravenes a direction of the tribunal about the exercise of the decision-maker's powers or performance of the decision-maker's duties, commits an offence against the legislation.<sup>315</sup>

### *Withdrawal and resignation*

7.4.2 The legislation should entitle a decision-maker to apply to the tribunal for permission to withdraw or resign as a decision-maker.

### *Legal proceedings*

7.4.3 In order to protect the interests of a person with impaired decision-making capacity, legal proceedings may become necessary. If the person concerned lacks a sufficient degree of understanding to instruct legal representatives, another person must give instructions on his or her behalf. At present, the Supreme Court Rules provide for a person with impaired decision-

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<sup>314</sup> Sections 12 and 80 of the Trusts Act 1973 (Qld) provide for the appointment of a new trustee in such a situation. See also page 202.

<sup>315</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) sections 30(1) and 55(1); *Guardianship Act 1987* (NSW) sections 26, 28 and 30; *Protection of Personal and Property Rights Act 1988* (NZ) sections 18(6) and 43(3); *Guardianship and Administration Act 1990* (WA) sections 47(1) and 74(1); *Guardianship and Management of Property Act 1991* (ACT) sections 16 and 18; *Guardianship and Administration Act 1993* (SA) section 74.

making capacity to sue by his or her 'next friend', usually a close relative such as a spouse or a parent, and to defend an action by a 'guardian ad litem' appointed by the court. Similar provisions exist in the Rules of the District Courts and of the Magistrates Courts.<sup>316</sup> In addition, the Legal Friend may instruct a solicitor on behalf of a person who is an assisted citizen under the *Intellectually Disabled Citizens Act*.<sup>317</sup>

7.4.4 Recent legislation in other jurisdictions has enabled appointed decision-makers to make decisions on behalf of the person with impaired capacity in relation to legal proceedings.<sup>318</sup> The Commission is of the view that this approach should also be taken in Queensland. The Commission envisages that the power of appointed decision-makers in relation to legal proceedings would be additional to the procedures provided by the rules of the various courts. The Commission's proposal would result in costs savings where the person with impaired decision-making capacity is a defendant in an action, since it would not be necessary to make a court application for the appointment of a guardian ad litem.

7.4.5 **The Commission therefore recommends that the tribunal should be able to authorise an appointed decision-maker to make legal decisions on behalf of a person with impaired decision-making capacity.**

7.4.6 The role of a decision-maker in giving instructions in legal proceedings involving a person with impaired decision-making capacity raises the question of liability for the costs incurred during the litigation. **The Commission recommends that the decision-maker should be liable to the other party to the proceedings, but should be entitled to an indemnity from the person whose decision-making capacity is impaired.** This approach would reflect the position which presently exists under the Supreme Court Rules.

7.4.7 Sometimes parties to a legal dispute agree to settle it themselves without going to court or, if court proceedings have commenced, before they are completed. However, a person whose decision-making capacity is impaired may not have a sufficient degree of understanding to decide whether or not to agree to a settlement. At present, in this situation, the 'next friend' or 'guardian ad litem'<sup>319</sup> would have to decide whether or not to agree to the terms of a

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<sup>316</sup> Rules of the Supreme Court O3 rr 16, 17. See also the District Courts Rules r 28, Magistrates Courts Rules r 29.

<sup>317</sup> *Intellectually Disabled Citizens Act* 1985 (Qld) section 26(1)(b).

<sup>318</sup> See for example *Guardianship and Administration Act* 1990 (WA) Schedule 2 clause 15; *Guardianship and Management of Property Act* 1991 (ACT) section 7(2)(f); *Guardianship and Administration Act* 1993 (SA) section 39(1)(k).

<sup>319</sup> See para 7.4.3.



settlement.<sup>320</sup> In keeping with the recommendation in para 7.4.5 above that an appointed decision-maker be able to be given power to act in relation to legal proceedings on behalf of a person with impaired capacity, **the Commission further recommends that a decision-maker also have power to agree to the terms of a settlement of a claim.**

7.4.8 In Queensland, settlement of a claim made by or on behalf of a person who lacks the necessary capacity to agree to the settlement on his or her own behalf is not valid at present unless it has been sanctioned by the Public Trustee or, if court proceedings are in progress, by a judge or magistrate of the court having jurisdiction to hear the claim.<sup>321</sup> The Commission recognises the importance of this provision, and does not propose to alter it.

7.4.9 The purpose of the requirement is to ensure that the interests of the person with impaired decision-making capacity are protected. If the person has been injured, for example, his or her family may be anxious for legal proceedings to be finalised and may be susceptible to pressure from an insurer to accept a settlement offer which is not in the person's best interests. Independent scrutiny of a settlement offer prevents potential conflict of interest problems.

7.4.10 **The Commission therefore recommends that settlement of a claim by an appointed decision-maker should require sanction by the Public Trustee or, where appropriate, by the relevant court.**

## 7.5 THE LEGISLATION

7.5.1 The kinds of decisions for which a decision-maker can be appointed are set out in Chapter 3 Part 3 of the Draft Bill in Chapter 13 of this Draft Report.

7.5.2 The duties and powers of decision-makers are set out in Chapter 9 of the Draft Bill. Additional provisions are contained in Chapter 12 of the Draft Bill.

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<sup>320</sup> As to the authority of a next friend or guardian ad litem to settle proceedings, see *Rhodes v Swithenbank* (1889) 22 QBD 577; *Katundi v Hay* [1940] St R Qd 39. Cf *Glassford v Murphy* (1878) 4 VLR 123 (L).

<sup>321</sup> *Public Trustee Act 1978* (Qld) section 59(1); *Justice and Attorney-General (Miscellaneous Provisions) Act 1994* Schedule.

## 8. ENDURING POWERS OF ATTORNEY

### 8.1 THE CONCEPT OF AN ENDURING POWER OF ATTORNEY

8.1.1 The concept of an enduring power of attorney was developed from an ordinary power of attorney. A power of attorney is a formal document by which one person empowers another to act on his or her behalf for certain purposes. The person who grants the power is called a donor. The person who is authorised to act on behalf of the donor is called a donee or an attorney. An attorney is a kind of agent. A person who acts as an attorney does not have to be a lawyer.

8.1.2 For a power of attorney to be valid the donor must be able to understand, at the time the power is created, the general nature of the acts or transactions which the power purports to authorise.<sup>322</sup>

8.1.3 Most powers of attorney are intended to have legal effect as soon as they are created. However, the terms of the document may state that it is intended to take effect in the future. Sometimes, even though it is not actually stated that the power is not to come into effect immediately, it may be apparent from the rest of the document that the power is intended to commence in the future. In general, the attorney's authority will continue until the donor revokes the power or dies, unless there is an express or implied limitation on the duration of the power.<sup>323</sup>

8.1.4 A donor with the necessary degree of capacity may revoke a power of attorney at any time.<sup>324</sup> There is little authority as to what is the requisite capacity. Revocation need not necessarily be by formal instrument. It would appear that a donor may orally revoke a power of attorney.<sup>325</sup>

8.1.5 The power is also revoked if the donor subsequently loses the ability to understand, in broad terms, its nature and effect.<sup>326</sup> A power of attorney may be revoked in a number of other ways. It will cease to have effect if, for example, the donor marries, becomes bankrupt or dies.<sup>327</sup>

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<sup>322</sup> *Gibbons v Wright* (1953) 91 CLR 423 445.

<sup>323</sup> See for example *Danby v Coutts & Co* (1885) 29 ChD 500.

<sup>324</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 219. A power of attorney which has been given as a security is irrevocable.

<sup>325</sup> *Halsbury's Laws of England*, Fourth Edition, Vol 1, para 876; *R v Wait* (1823) 11 Price 518, 147 ER 551; *The Margaret Mitchell* (1858) 4 Jur NS 1193, 166 ER 1174.

<sup>326</sup> *Drew v Nunn* (1879) 4 QBD 661; *Yonge v Toynbee* [1910] 1 KB 215.

<sup>327</sup> *Tingley v Muller* [1917] 2 Ch 144 at 183 per Bray J.

8.1.6 The creation and operation of powers of attorney in Queensland are now partly controlled by legislation.<sup>328</sup> The *Property Law Act* contains a standard form for creating a general power of attorney.<sup>329</sup>

8.1.7 A general power of attorney, in the form provided, confers on the attorney (or attorneys, if more than one) authority to do anything on behalf of the donor which the donor could lawfully delegate to an attorney.<sup>330</sup> A donor can authorise an attorney to do anything which the donor could lawfully have done, unless the act in question is required by statute to be performed by the donor personally, or demands the exercise of the donor's own skill or discretion.<sup>331</sup> The terms of the authority conferred by a general power of attorney are therefore very wide.

8.1.8 However, it is not mandatory to use the standard form to create a power of attorney. The *Property Law Act* clearly envisages a kind of power of attorney other than the wide conferral of authority effected by the general power.<sup>332</sup> It is therefore possible to limit the extent of an attorney's authority or to specify the period during which the authority may be exercised. For example, a donor who is going overseas and wishes to appoint someone to act on his or her behalf for certain purposes while he or she is away is able to do so.

8.1.9 The *Property Law Act* also contains a form for revoking a power of attorney.<sup>333</sup> The Act does not affect revocation of a power on other grounds such as the death of the donor.

8.1.10 The provisions in the *Property Law Act* do not alter the position with respect to the capacity required for a donor to grant a power of attorney or to the revocation of a power of attorney if the donor subsequently loses capacity.<sup>334</sup> The revocation of a power of attorney by the subsequent loss of the donor's capacity has serious implications. For example, if, as a result of traumatic brain injury or dementia, a person who has granted a power of attorney loses the

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<sup>328</sup> The *Property Law Act* 1974 (Qld) contains provisions which apply to powers of attorney generally. Provisions in some other statutes relate to powers of attorney in specific situations. See for example *Land Title Act* 1994 Part 7 Division 3; *Trusts Act* 1973 (Qld) section 6; *Corporations Law* 1990 section 182(8).

<sup>329</sup> *Property Law Act* 1974 (Qld) Second Schedule Form 16.

<sup>330</sup> *Property Law Act* 1974 (Qld) section 170.

<sup>331</sup> *Halsbury's Laws of England*, Fourth Edition, Vol 1, para 3.

<sup>332</sup> Section 170 provides for the revocation of a general or other power of attorney.

<sup>333</sup> *Property Law Act* 1974 (Qld) section 170(2); Second Schedule Form 17. Section 170 states that a power of attorney 'may' be revoked by instrument in Form 17. Although use of the form provided would appear not to be mandatory, it would clearly facilitate proof of revocation.

<sup>334</sup> See paras 8.1.2, 8.1.5.

necessary degree of understanding, the attorney will no longer have any legal authority to make decisions for the donor. This means that the attorney may incur liability for acts done in reliance on the power.<sup>335</sup> It also destroys the potential value of a power of attorney as a simple and relatively inexpensive mechanism for allowing people to have some degree of control over the decisions which affect them even after they have lost the capacity to decide for themselves.

8.1.11 The concept of an enduring power of attorney was developed to overcome the problems caused by the revocation of an ordinary power of attorney by the donor's loss of capacity. It was recognised that, in many cases, the benefit of the power of attorney was taken away from people at the very time it was most needed. In many jurisdictions there is now legislation specifically enabling a power of attorney to survive or endure after the donor's loss of capacity.

## 8.2 ADVANTAGES OF ENDURING POWERS OF ATTORNEY

8.2.1 Although the usefulness of an enduring power of attorney is restricted to individuals who have the initial capacity to confer authority on another person to act for them, the availability of such a mechanism provides significant advantages in overcoming some of the problems caused by subsequent loss of decision-making capacity.

8.2.2 An enduring power of attorney allows an individual to plan for the future and to choose the person whom he or she would want to make decisions on his or her behalf if he or she became unable to decide personally. It is a private arrangement, which can be changed or revoked at any time while the donor has the capacity to do so. It therefore enhances individual autonomy and provides a far less intrusive solution than appointment of a decision-maker by the tribunal.

8.2.3 The advance appointment of a decision-maker of the individual's choice also removes the need which may otherwise subsequently arise for a hearing to determine whether the tribunal should appoint a decision-maker. For people with impaired decision-making capacity and for their relatives and carers, such hearings almost inevitably involve some inconvenience and anxiety and, no matter how sensitively they are handled, there may also be some degree of embarrassment or distress. The simple expedient of granting an enduring power of attorney while it is possible avoids these difficulties.

8.2.4 The execution of an enduring power of attorney also has the advantage of being relatively inexpensive, particularly if the only other available option is a court application. Standard forms are available from legal stationers

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<sup>335</sup> The *Property Law Act 1974* (Qld) provides some protection for an attorney who, not knowing that the power has been revoked as a result of the donor's loss of capacity, acts in reliance on that power. However, the protection is limited to the extent that knowledge of revocation includes knowledge of any event which has the effect of revoking the power. See section 174(1), 174(5).

and, sometimes, from newsagents. Further, because an enduring power of attorney eliminates the need for an appointment to be made by the tribunal, it reduces the demand on the system for appointing decision-makers and hence the cost to government.<sup>336</sup>

### 8.3 LIMITATIONS AND DISADVANTAGES

8.3.1 A power of attorney will not provide a solution in every situation. Because of the threshold requirement of capacity, there will be some people who will never have a sufficient level of understanding to take advantage of the procedure. Alternatively, people who initially have the required degree of capacity may fail to make an enduring power of attorney while they have the opportunity. This may be because they are unaware of its existence, or because of apathy, or it may be the result of a reluctance to confront the possibility of their own incapacity. Whatever the reason, if the document is not completed while the person has the capacity to do so, subsequent loss of capacity will mean that the exercise of personal choice in the appointment of a decision-maker will no longer be possible. In other words, an enduring power of attorney will not assist a person who loses capacity as a result of, for example, traumatic brain damage or dementia unless the person granted the power prior to the loss of capacity.

8.3.2 Enduring powers of attorney create significant potential for abuse. First, if the donor's mental faculties have begun to deteriorate, he or she may be easily persuaded that granting a power is in his or her best interests, yet may not fully appreciate the extent of the authority conferred on the attorney. The donor may be subjected to undue pressure to grant the enduring power, or may be manipulated into granting it in favour of a particular person. Second, since an enduring power is designed to operate after the donor of the power has lost capacity, the donor will have no control over the attorney or the way the power is exercised.

### 8.4 THE QUEENSLAND LEGISLATION

8.4.1 The *Property Law Act* was amended in 1990 to allow the creation of an enduring power of attorney in Queensland. The Act contains a standard form for the donor of an enduring power to use.<sup>337</sup> The form gives the attorney power to do on behalf of the donor anything which the donor could lawfully authorise an attorney to do. To be an enduring power, a power must be 'in or to the effect of' this form. The form must be signed by a Justice of the Peace or a qualified legal

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<sup>336</sup> R Creyke, 'Privatising Guardianship - the EPA Alternative', (1993) 15 *Adelaide Law Review* 79.

<sup>337</sup> *Property Law Act* 1974 (Qld) Second Schedule Form 16A.

practitioner who certifies that, at the time the donor signed the form, he or she appeared to understand the nature and effect of the power being given to the attorney.<sup>338</sup> The form also contains a notice to the attorney of the importance of the obligations involved in becoming an attorney.<sup>339</sup>

8.4.2 An attorney must not use the power to enter into any transactions where there is a possibility of conflict between his or her interests and the interests of the donor. An attorney must keep accurate records<sup>340</sup> and, apart from money and property which are owned jointly by the donor and the attorney, must keep his or her own money and property separate from the money and property of the donor.<sup>341</sup>

8.4.3 The holder of an enduring power of attorney must use the power honestly and with reasonable diligence to protect the interests of the donor. Failure to do so may result in a substantial fine, and the attorney may be liable to compensate the donor for any loss caused by the failure.<sup>342</sup> The attorney may apply to the Supreme Court for directions on the meaning of the power and the way the power should be exercised.<sup>343</sup>

8.4.4 Where there are reasonable grounds for suspecting that the interests of the donor are not being protected according to the provisions of the Act, the Public Trustee may require the attorney to produce records and accounts of transactions made by the attorney on behalf of the donor.<sup>344</sup> The Public Trustee or any other person with a proper interest in the affairs of the donor may apply to the Supreme Court for an order for the attorney to provide to the Court and to the applicant records of all dealings where the attorney has used the power; for the records to be audited; and for the power to be revoked or varied or for the attorney to be removed.<sup>345</sup> The Court may appoint an attorney to act in place of an attorney who has been removed.<sup>346</sup>

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<sup>338</sup> *Property Law Act 1974 (Qld) section 175A.*

<sup>339</sup> *Property Law Act 1974 (Qld) Second Schedule Form 16A.*

<sup>340</sup> *Property Law Act 1974 (Qld) section 175D.*

<sup>341</sup> *Property Law Act 1974 (Qld) section 175E.*

<sup>342</sup> *Property Law Act 1974 (Qld) section 175H.*

<sup>343</sup> *Property Law Act 1974 (Qld) section 175G(2).*

<sup>344</sup> *Property Law Act 1974 (Qld) section 175F.*

<sup>345</sup> *Property Law Act 1974 (Qld) section 175G(1).*

<sup>346</sup> *Property Law Act 1974 (Qld) section 175G(3).*

8.4.5 If the attorney breaches any of the obligations imposed by the Act the Court may, if it is satisfied that the attorney acted honestly and reasonably and ought fairly to be excused, relieve the attorney of liability for the breach.<sup>347</sup>

8.4.6 An enduring power of attorney may be revoked in the same way, apart from the donor's loss of capacity, as an ordinary power.<sup>348</sup> The Act also specifically provides that a power is revoked if the Court gives the attorney leave to withdraw, if either the donor or the attorney becomes bankrupt, if the attorney loses capacity or if the Court, on an application by any person who has a proper interest in the matter, revokes the power during any period of incapacity of the donor.<sup>349</sup>

## 8.5 THE NEED FOR REFORM

8.5.1 The present enduring power of attorney legislation provides, for the first time, a simple and inexpensive method of allowing people to plan for any future loss of decision-making capacity by selecting the person they would like to act on their behalf. It is, therefore, a major advance on the previous law concerning substituted decision-making in Queensland. However, there are still considerable improvements which could be made.

8.5.2 In the Discussion Paper,<sup>350</sup> the Commission proposed significant changes to Enduring Power of Attorney provisions in Queensland.<sup>351</sup> The Commission also suggested that the amended provisions should not remain as part of the *Property Law Act*, but should be incorporated into the legislative scheme dealing with decision-making for people with impaired decision-making capacity.<sup>352</sup>

8.5.3 Some of the problems which the Commission identified in the existing legislation were the lack of a test of capacity to execute an enduring power of attorney; the lack of flexibility in the form used to create an enduring power and consequent uncertainty as to the scope of the authority which can be conferred by an enduring power and to the ability of a donor to defer the operation of the

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<sup>347</sup> *Property Law Act* 1974 (Qld) section 175I.

<sup>348</sup> *Property Law Act* 1974 (Qld) sections 175B, 175C(1).

<sup>349</sup> *Property Law Act* 1974 (Qld) sections 175C(2), 175G(1)(c).

<sup>350</sup> Queensland Law Reform Commission Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>351</sup> Discussion Paper pages 95-101.

<sup>352</sup> Discussion Paper page 100.

power; the need for greater protection of a donor; and the need for enduring powers executed in one State or Territory to be recognised in another State or Territory.<sup>353</sup>

8.5.4 The submissions received by the Commission supported the Commission's view and its proposals for reform.

## 8.6 RECOMMENDATIONS

### *Decisions which an attorney can be authorised to make*

8.6.1 An enduring power of attorney must be 'in or to the effect of' the prescribed form.<sup>354</sup> In such a situation it is not necessary that the exact wording of the form be used, as long as the variation does not involve any substantial change to the meaning.<sup>355</sup> The prescribed form states that the donor gives the attorney authority 'to do on my behalf anything that I may lawfully authorise an attorney to do'.<sup>356</sup>

8.6.2 Since the introduction of the Queensland enduring power of attorney legislation there has been uncertainty about the nature of the power which could be conferred on an attorney. Traditionally, powers of attorney have been used in a commercial or financial context. This is probably a reflection of the importance of property interests in the development of English law. However, there is nothing in the legislation to require that the operation of an enduring power be limited in this way.<sup>357</sup> At common law, the only restriction on an attorney's power was that it could not be used to do any thing which was required by statute to be done by the donor personally, or which demanded the exercise of the donor's own skill or discretion.<sup>358</sup> Unfortunately, there is little authority as to the extent to which an attorney can be authorised to make decisions about the personal welfare of the donor, as distinct from his or her property matters, unless authorised by statute to

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<sup>353</sup> Discussion Paper pages 91-94.

<sup>354</sup> *Property Law Act 1974* (Qld) section 175A.

<sup>355</sup> See for example *Clazy v The Registrar of Titles* [1920] WAR 113; *Drake v Templeton* (1913) 16 CLR 153; *Harris v Thallon* [1926] SR NSW 456; *Ex parte Taylor* [1980] QdR 253.

<sup>356</sup> *Property Law Act 1974* (Qld) Second Schedule Form 16A.

<sup>357</sup> But see the Second Reading Speech of the Hon Mr A G Eaton, Minister for Land Management, which refers to the 'management of affairs' in the event of incapacity: Hansard 20 March 1990, 477.

<sup>358</sup> *Halsbury's Laws of England*, Fourth Edition, Vol 1, para 3.



make such decisions.<sup>359</sup> There is no doubt that an enduring power of attorney would be a useful alternative to a decision-making order in relation to decisions about the personal lifestyle of a person whose decision-making capacity has become impaired.<sup>360</sup> This approach has already been adopted in legislation in some Australian and overseas jurisdictions.<sup>361</sup>

**8.6.3 The Commission recommends that the existing situation be clarified by legislation which expressly provides that the decisions which a donor may appoint an attorney to make are not confined to decisions about the donor's money and property.<sup>362</sup>**

8.6.4 In Chapter 6, the Commission argued that there are some decisions which are of such a personal nature that, if the person concerned is not able to make them, they should not be made by another person on his or her behalf. These decisions included voting for the person and consenting to the person's marriage.<sup>363</sup> There are also some forms of health care treatment for which special consent procedures should apply.<sup>364</sup> The Commission has recommended that the tribunal should not be able to confer power to make such decisions. It is of the view that a similar restriction should apply in relation to enduring powers of attorney.

**8.6.5 The Commission therefore recommends that the donor of an enduring power of attorney should not be able to give to his or her attorney authority to make a decision which the tribunal could not authorise a decision-maker to make.**

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<sup>359</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 154. See also M Fowler, 'Appointing an Agent to Make Medical Treatment Choices' (1984) 84 *Columbia Law Review* 985 at 1009-1012.

<sup>360</sup> The use of an enduring power of attorney in relation to medical treatment will be discussed in Chapter 9.

<sup>361</sup> See for example *Powers of Attorney Act 1956-1991* (ACT) section 13; *Guardianship and Administration Act 1993* (SA) section 25. See also *Protection of Personal and Property Rights Act 1988* (NZ) section 98; *Representation Agreement Act 1993* (British Columbia) sections 7, 9.

<sup>362</sup> See Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, Vol 2 page 903.

<sup>363</sup> See pages 63-66.

<sup>364</sup> See pages 145-159.

### ***Limitation of an attorney's authority***

8.6.6 Because an enduring power of attorney must be 'in or to the effect of' the prescribed form,<sup>365</sup> and because the form states that the attorney has authority to do anything that the donor may lawfully authorise an attorney to do,<sup>366</sup> there has been uncertainty as to whether the existing legislation allows a donor to place a limitation on the acts which an attorney is authorised to perform. It has been suggested that, since the critical clauses in the form relate to the appointment of the attorney and the intention of the donor that the power survive any future decision-making incapacity, rather than the delegation of a general authority to the attorney, a limited delegation may still be 'to the effect' of the form. On the other hand, it may be that the only permissible deviation from the form would be variations to the layout or format of the form.<sup>367</sup> In the Discussion Paper, the Commission expressed the view that a limited grant of authority may significantly alter the nature of the broad general scope of the power which the prescribed form gives to an attorney, and therefore may not be 'to the effect of' the prescribed form.<sup>368</sup> Clearly, however, situations may arise in which a donor does not wish to give an attorney unlimited power, or wishes to give particular instructions about the way in which the power is to be exercised. In the view of the Commission, it would be in keeping with the principles of self-determination and the least restrictive alternative to provide for these options.

8.6.7 **The Commission therefore recommends that enduring power of attorney legislation allow for a donor who chooses to do so to limit the power to be given to an attorney or to instruct the attorney about the exercise of the power.**<sup>369</sup>

### ***Deferring an attorney's authority***

8.6.8 As previously explained,<sup>370</sup> an ordinary power of attorney generally takes effect as soon as it is executed, unless it is apparent from the document that

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<sup>365</sup> *Property Law Act 1974 (Qld) section 175A.*

<sup>366</sup> *Property Law Act 1974 (Qld) Second Schedule Form 16A.*

<sup>367</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 137.

<sup>368</sup> Discussion Paper page 93.

<sup>369</sup> See for example *Powers of Attorney Act 1956-1991 (ACT) Schedule; Guardianship and Administration Act 1993 (SA) Schedule*. See also Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, Vol 2 page 903.

<sup>370</sup> See para 8.1.3.

it is intended to take effect in the future. The terms of the form prescribed for the execution of an enduring power of attorney<sup>371</sup> give no indication of an intention to defer the operation of the power. Because the power must be 'in or to the effect of' the prescribed form,<sup>372</sup> it is doubtful whether the donor of an enduring power of attorney is presently able to specify that the power is to come into operation at some time in the future. However, the purpose of an enduring power of attorney is to allow people to plan for the possibility of future incapacity. The execution of a power does not necessarily mean that the donor is ready to hand authority to the attorney immediately. The donor may wish to retain full control over his or her own affairs for as long as he or she is able to do so.

8.6.9 In the Discussion Paper, the Commission noted that difficulties were less likely to arise in relation to decisions about personal lifestyle and welfare decisions. It proposed that, in relation to decisions of a financial nature, enduring power of attorney legislation contain a triggering mechanism which would allow the power to come into effect at a time subsequent to its execution.<sup>373</sup> Alternative methods of doing this, and their relative merits and disadvantages, were discussed. There was substantial agreement in the submissions about the need for legislative change.

8.6.10 The Commission therefore recommends that enduring power of attorney legislation expressly provide that an enduring power of attorney for personal decisions<sup>374</sup> is not to have effect unless the donor has lost capacity to make the decision.<sup>375</sup> The Commission further recommends that in relation to decisions about the management of the donor's money or property, or about legal proceedings involving the donor or the donor's property, the donor be able to specify that the power is to come into effect immediately, or on a specified date, or when the donor loses capacity to decide.<sup>376</sup>

8.6.11 However, an enduring power of attorney should not be invalidated merely because a donor has failed to exercise the option to choose when the power comes into operation. The legislation should provide that if the donor fails to specify when the power is to commence it should come into effect immediately the document creating the power is executed.

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<sup>371</sup> *Property Law Act 1974 (Qld) Second Schedule Form 16A.*

<sup>372</sup> *Property Law Act 1974 (Qld) section 175A.*

<sup>373</sup> Discussion Paper pages 96-98.

<sup>374</sup> Powers of attorney for medical treatment are discussed in Chapter 9.

<sup>375</sup> See for example *Protection of Personal and Property Rights Act 1988 (NZ) section 98; Powers of Attorney Act 1956-1991 (ACT) section 13(2), Schedule.*

<sup>376</sup> See for example *Powers of Attorney Act 1956-1991 (ACT) Schedule.*

8.6.12 The Commission recognises that the onset of incapacity may be gradual and that, in some cases, there may be a period of uncertainty as to whether or not the power has become operative. However, the Commission believes that these problems can be overcome by providing that the attorney or any other person with a proper interest may apply to the tribunal for a declaration that the donor has lost capacity and that the power is in force.<sup>377</sup> The test of capacity used by the tribunal would be the same as that used in the determination of an application for the appointment of a decision-maker.<sup>378</sup>

### ***Appointment of more than one attorney***

8.6.13 At present, the prescribed form provides for more than one attorney to be appointed. They may be appointed jointly, or jointly and severally.<sup>379</sup> If they are appointed jointly, they must act together. If they are appointed severally, they may act independently of each other. In either case, because of the requirement that an enduring power be in the prescribed form,<sup>380</sup> and because the form gives an attorney power to do anything the donor may lawfully authorise an attorney to do, the attorneys acting together or independently will have all the powers the donor could lawfully grant. However, there may be situations where a donor wishes to appoint different attorneys for different purposes - for example, one attorney to make decisions about personal welfare and another to make decisions about business or property matters. Alternatively, a donor may wish to appoint an acting attorney to act if the nominated attorney is temporarily unavailable or successive attorneys to provide for the eventuality that an attorney may not be able to act when the power comes into operation, or that, at some time in the future, the attorney may be removed or cease to act. In the Discussion Paper, the Commission noted that the existing legislation would not allow for these possibilities.<sup>381</sup>

8.6.14 **The Commission recommends that legislation enable a donor, at the time the power is granted,<sup>382</sup> to appoint different attorneys for specific**

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<sup>377</sup> See for example *Guardianship and Administration Act 1990 (WA)* sections 104(1)(b)(ii), 106(2)(b).

<sup>378</sup> See pages 34-35.

<sup>379</sup> *Property Law Act 1974 (Qld)* Second Schedule Form 16A.

<sup>380</sup> *Property Law Act 1974 (Qld)* section 175A.

<sup>381</sup> Discussion Paper page 93.

<sup>382</sup> If the Commission's recommendations are implemented, subsequent appointment of an attorney would revoke an earlier power conferring the same decision-making authority on a different attorney. See para 8.6.28 49.

purposes<sup>383</sup> and to appoint an acting attorney or successive attorneys.<sup>384</sup>

### **Corporate attorneys**

8.6.15 The present enduring power of attorney legislation does not specifically provide for the eligibility for appointment of a corporate attorney. However, there may be some people who wish to make their own arrangements for the eventuality of future loss of capacity to make their own decisions but who do not wish or are not able to appoint a relative or friend to act on their behalf. If these people are not able to appoint a corporate attorney, they may be denied the advantages of the legislation. Eligibility of corporate attorneys would increase the accessibility of enduring power of attorney legislation.

8.6.16 The Commission is of the view that, in some situations, it should be possible for a donor to appoint a corporate attorney to act on his or her behalf under an enduring power of attorney. However, it would not be appropriate for all corporations to be eligible for appointment. Corporate service providers such as nursing home operators, for example, would inevitably be faced with a conflict of interest if they were appointed. There could also be problems with the standard of accountability for corporate attorneys.

8.6.17 **The Commission therefore recommends that eligibility for corporate attorneys should be restricted to the Public Trustee and to statutory trustee companies.** Either the Public Trustee or a trustee company may be appointed to act under an ordinary power of attorney.<sup>385</sup> Both are subject to strict standards of accountability as trustees and both are subject to further regulation by statute.<sup>386</sup> Neither the Public Trustee nor a statutory trustee company is likely to be affected by any conflict of interest.

8.6.18 The Commission has recommended<sup>387</sup> that the existing legislation be amended to allow a donor to confer on an attorney authority to make decisions about personal matters. The Commission envisages that the person entrusted with making these decisions will be someone close to the donor, who is familiar with the donor's lifestyle and values. The Commission believes that it would be inappropriate for authority to make decisions requiring sympathetic knowledge of

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<sup>383</sup> See for example *Guardianship and Management of Property Act 1991 (ACT) Schedule*.

<sup>384</sup> See for example *Protection of Personal and Property Rights Act 1988 (NZ) section 95(5)*.

<sup>385</sup> *Trustee Companies Act 1968 section 22(1); Public Trustee Act 1978 section 27(1)*.

<sup>386</sup> See *Trustee Companies Act 1968 (Qld); Public Trustee Act 1978 (Qld)*.

<sup>387</sup> See para 8.6.3 above.

personal preferences to be conferred on a corporate attorney.

**8.6.19** The Commission therefore recommends that the authority of the Public Trustee or a trustee company to act under an enduring power of attorney should be limited to exclude decisions about the donor's personal care and welfare.

***The level of capacity needed to grant an enduring power***

**8.6.20** The donor's level of understanding at the time the power is granted is of vital importance. Because the operation of an enduring power extends beyond the donor's loss of capacity and, consequently, the donor's ability to monitor the attorney's conduct and to change or revoke the power may be lost, it is necessary to have a test of capacity stringent enough to protect donors who may be vulnerable to manipulation. However, if the test is too strict, enduring powers of attorney will be available to fewer people, and their value as a method of enabling people to provide for the time when they may be unable to make their own decisions significantly diminished.

**8.6.21** The present legislation merely requires that the witness to the enduring power certify that, at the time the donor executed the power, he or she appeared to understand the nature and effect of the power.<sup>388</sup> The Commission is concerned that this test may not be adequate.

**8.6.22** The Commission recommends that legislation require the document creating the power to incorporate a series of prescribed notes explaining that, for the power to be valid, the donor must understand that:

**in relation to the management of the donor's money and property -**

- . unless the donor specifies otherwise, the attorney will have full control over the donor's affairs;
- . unless the donor specifies otherwise, the attorney will be able to do anything that the donor could have done with the property of the donor which is included in the power;
- . the attorney's authority will continue after the donor has lost the capacity to make his or her own decisions;
- . if the donor does lose the capacity to make his or her own decisions, the donor will not be able to monitor the attorney's exercise of the

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<sup>388</sup> *Property Law Act 1974* (Qld) section 175A(a)(ii), Second Schedule Form 16A.

power or to revoke the power;<sup>389</sup>

and, in relation to decisions about the donor's personal welfare<sup>390</sup> -

- unless the donor specifies otherwise, the attorney will have almost complete control over those personal aspects of the donor's life which the donor no longer has the capacity to manage.<sup>391</sup>

### *Protection for the donor*

8.6.23 An enduring power of attorney is a private arrangement. Neither its execution nor its use by the attorney is subject to any form of official supervision or monitoring. This creates significant potential for abuse. If the donor's mental faculties have begun to deteriorate, he or she may be easily persuaded that granting a power is in his or her best interests, and may be subject to undue pressure to grant the power, or may be manipulated into making it in a particular way. It is therefore essential that legislation contain safeguards to protect the interests of the donor. The Commission recommends that the existing provisions be strengthened in the following ways.

### *An independent witness*

8.6.24 The requirement of an independent witness is an essential safeguard for the donor. Elderly people, for example, may be susceptible to pressure to grant an enduring power to a particular person or in a particular way. The presence of an independent witness who must certify to the donor's capacity serves to lessen the risk of exploitation of this kind. The existing legislation in Queensland requires that the execution of the document be witnessed by a Justice of the Peace<sup>392</sup> or a legal practitioner, who certifies that the donor appeared to have the necessary capacity.<sup>393</sup> This provision emphasises the fact that the execution of an enduring power of attorney, although a relatively simple procedure, is a serious step with important legal consequences. **The Commission recommends that it should be retained.**

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<sup>389</sup> See *Re K* [1988] Ch 310.

<sup>390</sup> Powers of attorney for medical treatment are discussed in Chapter 9.

<sup>391</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) Schedule Part B.

<sup>392</sup> See paras 8.6.27-8.6.28 below.

<sup>393</sup> *Property Law Act 1974* (Qld) section 175A(a)(ii).

8.6.25 In the Discussion Paper, the Commission questioned whether further protection could be given to the donor.<sup>394</sup> **In order to ensure as far as possible that the witness is truly independent, the Commission recommends that legislation should provide that the witness not be related to either the donor or the attorney.<sup>395</sup> The legislation should also provide that, if the power of attorney gives power to make a health care decision,<sup>396</sup> a current health care provider should not be eligible to act as witness.**

8.6.26 In some jurisdictions, the legislation requires that a document creating an enduring power of attorney be signed by two witnesses.<sup>397</sup> The Commission has considered the desirability of including such a provision in Queensland enduring power of attorney legislation. The Commission acknowledges that it may increase the level of protection against exploitation or manipulation of the donor. On the other hand, for some people it would also significantly increase the difficulty in executing the document, and, in many cases, create an unnecessary barrier. On balance, the Commission is of the view that, in the majority of situations, sufficient protection would be provided by the additional requirement that the witness not be related to either the donor or the attorney. For those cases where this is insufficient, the Commission believes that the better approach is to make it easier for the operation of a power to be monitored and the conduct of an attorney challenged, rather than further restricting the availability of what is potentially, in responsible hands, an accessible, affordable and unintrusive alternative to formal intervention.

8.6.27 Since the enduring power of attorney legislation was enacted, there have been changes to Queensland legislation concerning Justices of the Peace. The *Justices of the Peace and Commissioners for Declarations Act 1991* created different levels of persons who are now authorised to exercise the powers previously conferred on a Justice of the Peace. The relevant categories of persons are now a Justice of the Peace and a Commissioner for Declarations. In one of the submissions received by the Commission in response to the Discussion Paper, some doubt was raised as to whether a Commissioner for Declarations would be authorised to witness an enduring power of attorney. It was suggested that the requirement that a witness to an enduring power of attorney certify as to the capacity of the donor may be outside the statutory power of a Commissioner for Declarations to 'attest any instrument or document'.<sup>398</sup>

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<sup>394</sup> Discussion Paper page 94.

<sup>395</sup> See for example *Powers of Attorney Act 1956-1991 (ACT)* section 13(2).

<sup>396</sup> Enduring powers of attorney for health care decisions are discussed in Chapter 9.

<sup>397</sup> See for example *Instruments Act 1958 (Vic)* section 115; *Guardianship and Administration Act 1990 (WA)* section 104(2)(a); *Powers of Attorney Act 1956-1991 (ACT)* section 12(1)(b).

<sup>398</sup> *Justices of the Peace and Commissioners for Declarations Act 1991 (Qld)* section 3.14(7)(b).



**8.6.28** The Commission recommends that, to remove any uncertainty, the enduring power of attorney legislation be amended to make it clear that a Commissioner for Declarations is authorised to witness an enduring power of attorney and to certify as to the capacity of the donor, and that the amendment should be retrospective to the date on which the *Justices of the Peace and Commissioners for Declarations Act* came into operation.

***Penalty for dishonestly inducing execution of an enduring power***

**8.6.29** An additional safeguard for the donor would be the inclusion of a provision making it an offence to dishonestly induce a person to grant an enduring power of attorney. In South Australia, for example, a person who, by dishonesty or undue influence, induces another to execute an enduring power of attorney is guilty of an offence.<sup>399</sup> The Commission is, however, concerned at the effect of including an element of undue influence in the offence. Such a provision would cover the situation of an overbearing adult child, for example, who might use undue influence to be appointed as attorney for an elderly parent. But it has the potential for a much wider operation. An elderly spouse, anxious for arrangements to be settled, might cajole an ailing partner into granting an enduring power while he or she still has capacity to do so. The Commission would not wish to subject such a person to allegations of undue influence.<sup>400</sup>

**8.6.30** The Commission therefore recommends that the scope of the offence should be limited to dishonest inducement. The penalty for the offence should include the forfeiture of any interest which the person might otherwise have had in the estate of the person induced to execute the instrument.<sup>401</sup> The severity of the penalty is intended as a deterrent. However, the Commission recommends that the court which hears the charge should have power to grant relief from forfeiture in an appropriate case.

***Appointment of a monitor***

**8.6.31** A recent development in Canada is intended to provide additional protection for the donor of an enduring power of attorney. In British Columbia, for

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<sup>399</sup> *Guardianship and Administration Act 1993 (SA) section 79(1).*

<sup>400</sup> Although there is authority that an interspousal relationship does not give rise to a presumption of undue influence, this is not to say that on the facts of particular cases there cannot be either actual undue influence or even a presumption of undue influence between the parties to such a relationship. See J Carter and D Harland, *Contract Law in Australia* (1991) 452.

<sup>401</sup> See for example *Medical Treatment Act 1988 (Vic) section 5F; Guardianship and Administration Act 1993 (SA) section 79(2).*

example, the appointment of an attorney may be accompanied by the appointment of a monitor. If the donor does not nominate someone to act as monitor or state in the document that a monitor is not required, the Public Trustee may appoint a monitor. The monitor's duty is to try to ensure that the attorney fulfils his or her statutory obligations. The monitor has power to visit and consult with the donor, and to require the attorney to produce accounting records or otherwise report to the monitor. The monitor may direct the attorney to comply with the statutory obligations and, if the attorney does not do so, the monitor must notify the Public Trustee.<sup>402</sup>

8.6.32 The Commission acknowledges that, in some circumstances, it may be useful for a donor to appoint a monitor. However, the Commission has a number of reservations about such a system. If, for example, there is tension over the donor's choice of a particular family member as an attorney, the situation may be exacerbated by the appointment of another family member as monitor. Potential attorneys may be deterred from accepting appointment by the prospect of having someone constantly looking over their shoulder. Provision for appointment of a monitor would also add to the complexity of the legislation and to the execution process. Further, it might be argued that since in British Columbia a court application, brought by or on the recommendation of the Public Trustee, must be made for the removal of an attorney who is suspected of acting improperly, there is greater need for supervision of attorneys in order to protect a donor who has lost capacity. Under the Commission's proposals, any person with a genuine interest in the welfare of the donor will be able to apply to the tribunal to have the attorney removed.<sup>403</sup>

8.6.33 **As this issue was not canvassed in the Discussion Paper, the Commission specifically invites submissions commenting on the desirability or otherwise of incorporating into its proposed scheme provision for the donor of an enduring power of attorney to appoint a monitor to supervise the exercise of the power by an attorney.**

### ***Signature by the donor***

8.6.34 At present, the form creating an enduring power of attorney has provision for signature by the donor.<sup>404</sup> A person who wishes to grant an enduring power and who has the necessary capacity may be prevented by physical disability from doing so. This situation is catered for by a provision

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<sup>402</sup> *Representation Agreement Act 1993 (BC)* sections 12, 20.

<sup>403</sup> The Commission has recommended at pages 196-197 of this Draft Report that there should be no application fee for bringing an application to the tribunal and that there should be no award of costs against a person for unsuccessfully making an application.

<sup>404</sup> See *Property Law Act 1974 (Qld)* Schedule 2, form 16 A.

allowing a power of attorney to be 'signed and sealed by, or by direction and in the presence of, the donor of the power.'<sup>405</sup> While the Commission acknowledges that such a provision does much to increase the accessibility of the enduring power of attorney mechanism, it is concerned that, given the potential for abuse of an enduring power, some restrictions should be placed on who can sign the power on the donor's behalf and that additional witnessing requirements should apply when the donor is unable to sign personally.

**8.6.35** The Commission therefore recommends that the proposed legislation should include provision for another person to sign the document on the donor's behalf. The person who signs on behalf of the donor should not be a witness or a person who is named in the document as an attorney. The witness should be required to certify that, in the witness' presence, the donor instructed the person to sign the document on the donor's behalf, that the person signed the document in the presence of the donor and the witness and that the donor appeared to the witness to understand the matters necessary to make an enduring power of attorney.

### *Revocation of an enduring power of attorney*

#### *Capacity to revoke*

**8.6.36** The existing legislation provides that, during a period of legal incapacity of the donor of an enduring power of attorney, the Supreme Court may, on the application of any person who in the opinion of the Court has a sufficient interest in the matter, revoke the power. However, as the degree of understanding needed to make a particular decision varies according to the nature and complexity of the decision, there is no fixed standard of 'legal incapacity' for all purposes. The legislation does not address the question of the extent to which a donor's decision-making capacity must be impaired before the donor is no longer able to revoke the power effectively.

**8.6.37** If, as the Commission has recommended, a statutory test of capacity to execute an enduring power of attorney is introduced, it would be consistent with this approach to consider the inclusion of a statutory test of capacity to revoke. Accordingly, the Commission has given serious consideration to the degree of capacity necessary for effective revocation of an enduring power of attorney.

**8.6.38** One view is that a person who has granted an enduring power of attorney should always be able to revoke it, whatever his or her level of capacity at the time of revocation. A donor whose decision-making capacity is impaired may, for example, no longer wish the nominated attorney to act on his or her behalf or

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<sup>405</sup> *Property Law Act 1974 (Qld) section 169(1).*

may object to decisions made by the attorney. However, there are difficulties in allowing a donor to revoke an enduring power of attorney regardless of his or her level of capacity. First, as a consequence of his or her impaired decision-making capacity, the donor may be confused. The wish to revoke may be prompted by the donor's distorted perceptions of his or her relationships with the people around him or her. Secondly, the donor may not have sufficient capacity to execute a new power. Consequently, a donor may dismiss an attorney who is acting in the donor's best interests, and not be able to appoint a replacement. This result would entirely defeat the purpose of the enduring power mechanism.

8.6.39 A second alternative is to allow a donor to revoke an enduring power if he or she is capable of understanding the nature and effect of the revocation.<sup>406</sup> This test corresponds to the test of capacity to grant an enduring power.<sup>407</sup> However, the Commission is concerned that the difficulties outlined above also apply to this option.

8.6.40 **The Commission therefore recommends that the legislative test of capacity to revoke an enduring power of attorney should be the same as that for executing an enduring power,<sup>408</sup> thus ensuring that a person who revokes an enduring power of attorney will be able to grant a new power if he or she chooses to do so.**

#### ***Method of revocation***

8.6.41 At common law, a power of attorney could be revoked informally.<sup>409</sup> While the Commission acknowledges that revocation of an enduring power should not be a complex procedure, it is concerned, however, that to allow oral revocation could lead to problems of proof and to consequent uncertainty. Moreover, revocation of the power has important legal consequences since, if the donor loses capacity to make a decision included in the power, there will be no-one with legal authority to make that decision on the donor's behalf.

8.6.42 **The Commission therefore recommends that revocation of an enduring power should be in writing and should be signed and witnessed in the same way as the power is executed. The Commission further recommends that the donor should be obliged to take reasonable steps to**

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<sup>406</sup> See also *Smith v Public Trustee of Queensland*, Writ No 42 of 1994 (Supreme Court unreptd), where Cullinane J rejected a submission that a 'minimal' understanding of the nature and effect of a power of attorney and the fact that it was being revoked was a sufficient test of capacity to revoke an enduring power of attorney.

<sup>407</sup> See for example Alberta Law Reform Institute, Report for Discussion No 7: *Enduring Powers of Attorney* (1990), 91.

<sup>408</sup> See pages 104-105.

<sup>409</sup> See para 8.1.4.

notify the attorney of the revocation.<sup>410</sup>

### ***Grounds for revocation***

8.6.43 The circumstances in which an enduring power of attorney will automatically be revoked are set out in the existing legislation.<sup>411</sup> The Commission is of the view that some additional grounds, which revoke a power of attorney at common law, should also be included.

#### ***Divorce***

8.6.44 People who make enduring powers of attorney often appoint their husband or wife as their attorney. However, if a couple later divorces, it is likely that the relationship has deteriorated to such an extent that it is no longer appropriate for either partner to continue to be nominated as the other's attorney.

8.6.45 If a person makes a will leaving property to his wife or her husband, or appointing the person's husband or wife as executor of the will, a subsequent divorce will invalidate the gift of property to the former spouse and revoke the appointment of the spouse as executor.<sup>412</sup>

8.6.46 **The Commission recommends that a similar provision should be enacted in relation to enduring powers of attorney, and that the legislation should state that the appointment of a person's husband or wife as attorney under an enduring power should be automatically revoked in the event of divorce.**

#### ***Marriage***

8.6.47 A will is also revoked by a subsequent marriage unless it was expressly made in contemplation of that marriage.<sup>413</sup> **The Commission recommends that a similar provision should be enacted in relation to enduring powers of attorney.**

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<sup>410</sup> See para 8.6.88-8.6.91 below.

<sup>411</sup> See para 8.4.6.

<sup>412</sup> *Succession Act* 1981 (Qld) section 18.

<sup>413</sup> *Succession Act* 1981 (Qld) section 17.

*Execution of subsequent document*

8.6.48 Confusion may arise if a donor who has appointed an attorney under an enduring power at a later time executes another enduring power conferring the same authority on a different attorney. There may be a dispute as to which of the attorneys is entitled to act on behalf of the donor. Similarly, if a donor who has appointed an attorney to make health care decisions under an enduring power of attorney subsequently executes an advance directive which includes the same decisions, there may be confusion about the attorney's authority.

8.6.49 **The Commission therefore recommends that an enduring power of attorney should also be revoked to the extent that a donor who has the necessary capacity to do so subsequently executes an enduring power which confers the same decision-making authority on a different attorney, or makes an advance directive for health care<sup>414</sup> which includes the same decisions.**

*Warning to donor and attorney*

8.6.50 **The Commission further recommends that the form for executing an enduring power of attorney should include a warning to both the donor and the attorney that the events in the preceding paragraphs operate to revoke the attorney's authority.**

*Substituted revocation*

8.6.51 Revocation of an enduring power of attorney is an extremely personal decision. In the view of the Commission, once a donor has lost the capacity necessary to revoke an enduring power of attorney, only the tribunal should be able to revoke the power.

8.6.52 **The Commission therefore recommends that revocation of an enduring power of attorney should be included in the decisions which a substitute decision-maker cannot be authorised to make on behalf of a person with impaired decision-making capacity.**

*Abuse of power by the attorney*

8.6.53 Once the donor of an enduring power of attorney has lost capacity, he or she may no longer be able to oversee the conduct of the attorney and will

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<sup>414</sup> See pages 161-166.

not be able to revoke the power. There is a need for a mechanism which protects a donor who has lost capacity against incompetence or neglect on the part of the attorney, or against exploitation by the attorney.

8.6.54 At present, the Public Trustee or any other person with a proper interest may apply to the Supreme Court for an order that the attorney provide records and accounts of all transactions involving the donor's property, that the records and accounts be audited, that the power be varied or revoked or that the attorney be removed. The Court may appoint an attorney to replace an attorney who has been removed.<sup>415</sup>

8.6.55 In the Discussion Paper, the Commission proposed that the power of scrutiny of the operation of an enduring power of attorney should be transferred, in the first instance, to the tribunal established to determine applications for the appointment of a decision-maker for a person whose decision-making capacity is impaired. The Commission noted that such a move would accord with the need for accessibility and with the development of a rational, integrated substituted decision-making mechanism.<sup>416</sup> Submissions received by the Commission in response to the Discussion Paper strongly supported this proposal.

8.6.56 **The Commission therefore recommends that power to revoke or vary the terms of an enduring power of attorney, or to appoint another attorney, be transferred from the Supreme Court to the tribunal. The Commission believes that the greater accessibility of the tribunal will prove to be stronger protection for a donor who may be vulnerable to abuse by an attorney than measures such as requiring a higher degree of capacity or more stringent witnessing procedures which would reduce the availability of an enduring power to a significant number of people.**

### ***The attorney's duties***

8.6.57 The duties imposed on an attorney by the existing legislation are explained in paras 8.4.2 and 8.4.3 above. The Commission believes that some of these duties require modification and that some additional duties should be imposed. In the view of the Commission, the attorney's duties should take account of the expanded scope which the Commission has recommended for an enduring power of attorney. They should also be consistent with the duties imposed on a decision-maker appointed by the tribunal.

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<sup>415</sup> *Property Law Act 1974 (Qld) section 175G.*

<sup>416</sup> *Discussion Paper pages 100-101.*

***Compliance with principle***

8.6.58 The Commission therefore recommends that the attorney should be required, at all times, to act in accordance with the principles of the decision-making legislation, which are set out in Chapter 2. They include consulting with the donor to the greatest possible extent to ascertain the donor's wishes, and acting in the way which is least restrictive of the donor's rights and freedoms, consistently with donor's proper care and protection. Failure to comply with these principles should be grounds for removal of an attorney.

8.6.59 There are, in the view of the Commission, further changes which should be made in relation to the duties of an attorney under the existing legislation.

They include:

***The duty to act honestly and with reasonable care***

8.6.60 The existing legislation requires the attorney to act honestly and with reasonable diligence to protect the interests of the donor.<sup>417</sup> **The Commission recommends that the word 'care' should be substituted for the word 'diligence'.** The test of whether an attorney has acted with reasonable care is an objective one. In other words, the attorney's conduct is measured against what a reasonable person of ordinary prudence would have done in the same circumstances. There is no allowance made for the limitations of an individual attorney. The requirement that an attorney act in accordance with an objectively reasonable standard of care is obviously intended as a protection for the donor. However, while the Commission recognises the necessity of providing adequate safeguards for the donor, it is concerned that the standard of care demanded of an attorney at present is too high.

8.6.61 The attorney will be someone well known to the donor. The donor is likely to be familiar with the attorney's strengths and weaknesses. The attorney, with his or her strengths and weaknesses, is the donor's choice as decision-maker should the need arise. Presumably, in making that choice, the donor has taken the attorney's limitations into account and is willing to accept them because the donor considers the attorney the most appropriate person to act on his or her behalf.

8.6.62 For example, a married couple may make enduring powers of attorney, each appointing the other to act as attorney in the event of future

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<sup>417</sup> *Property Law Act 1974 (Qld) section 175H.*



incapacity. They do so out of love and trust, wishing their lives to continue as normally as possible when one of them is no longer able to participate in making joint decisions. For the entire duration of their marriage, they may have kept their savings in the same bank account without giving any consideration to diversifying their investment, seeking a higher interest yield or the need for capital growth. If one spouse loses decision-making capacity and the enduring power of attorney appointing the other becomes operative, the attorney may leave the money in that account. It may not occur to the attorney that it would be wise to review arrangements which have been in place over many years. It would seem unduly harsh that such an attorney should incur legal liability for not acting as a reasonably prudent investor might act in the circumstances. On the other hand, if the person making the power of attorney chose to appoint a professional financial manager, he or she would no doubt expect, and should be entitled to, a higher standard of expertise, since '[t]hose who undertake work calling for special skill must not only exercise reasonable care but measure up to the standard of proficiency that can be expected from such professionals'.<sup>418</sup>

**8.6.63 The Commission therefore recommends that the standard of care demanded of an attorney be that the attorney act in a way that would be reasonable for a person of the attorney's experience and expertise.**

#### *Avoiding conflict of interest*

8.6.64 The existing legislation provides that an attorney must not use an enduring power of attorney to enter into any transaction where there is a possible conflict between his or her interests and the interests of the donor unless the power expressly authorises the transaction.<sup>419</sup> This means, for example, that an attorney is prohibited from buying the donor's house, since the donor's interest as seller of the house in obtaining the best possible price could conflict with the attorney's interest as purchaser in obtaining the property as cheaply as possible.

8.6.65 The Commission is concerned, however, that the concept of a potential conflict of interest may be too broad. Many donors appoint as attorney a relative who may be a beneficiary under the donor's will or entitled to a share of the donor's estate if the donor dies intestate. In such a case, almost every transaction which involves expending the donor's money will create a potential conflict of interest because it will result in a depletion of the donor's estate. The scope of the provision may therefore be far wider than intended.

**8.6.66 The Commission therefore recommends that an attorney who, on the death of the donor, will or might be a beneficiary of the donor's estate**

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<sup>418</sup> J G Fleming, *The Law of Torts* (8th ed, 1992) 108.

<sup>419</sup> *Property Law Act 1974* (Qld) section 175E.

**does not, for that reason alone, have a conflict of interest with the donor.**<sup>420</sup>

8.6.67 On the other hand, the Commission believes that the restriction on potential conflict transactions may be too narrow. The Commission is of the view that the prohibition should apply not only when there is a possible conflict between the interests of the attorney and those of the donor, but also when the interests of the attorney's spouse or a close associate of the attorney could conflict with those of the donor. For example, the existing provision would prevent the attorney from investing the donor's money in a business venture owned by the attorney. It may, however, allow the attorney to invest the donor's money in a business owned by the attorney's spouse.

8.6.68 **The Commission therefore recommends that an attorney should not be able to enter into a transaction in which the interests of the donor and the attorney, or a relation, business associate or close friend of the attorney, could conflict.**

8.6.69 **The Commission further recommends that an attorney should be able to enter a potential conflict if expressly authorised to do so by the terms of the power, or if approval for the transaction is given by the tribunal.**

### ***Gifts and benefits***

8.6.70 Although an attorney must at all times act in the interests of the donor of the power, situations may arise where the attorney is called upon to decide whether to act to benefit a person other than the donor. For example, the attorney may have to decide whether and to what extent the needs of any dependants of the donor should be met, or whether any gifts should be made from the donor's property. **The extent to which an attorney may act to benefit a person other than the donor should be spelt out in the legislation.**<sup>421</sup>

### ***Financial accountability***

8.6.71 At present, an attorney under an enduring power of attorney is required to keep accurate records and accounts of all dealings and transactions made under the power.<sup>422</sup> While the Commission fully acknowledges the need for an attorney to be accountable for financial decisions made in the exercise of the

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<sup>420</sup> See for example *Representation Agreement Act* 1993 (British Columbia) section 16(12).

<sup>421</sup> See for example *Protection of Personal and Property Rights Act* 1988 (NZ) section 107.

<sup>422</sup> *Property Law Act* 1974 (Qld) section 175D.

power, it is concerned that the existing account-keeping obligation may be unduly onerous in many situations and believes that the interests of the donor can be adequately protected in other ways. In relation to a financial decision-maker appointed by the tribunal the Commission has recommended that, if ordered to do so by the tribunal, the decision-maker should be required to present the tribunal with a summary of expenditure and receipts and that the tribunal have power to ask for more detailed accounts or to appoint an auditor when it considers necessary.<sup>423</sup> The appointed decision-maker must also, if required to do so by the tribunal, present a plan of management to the tribunal or its nominee.<sup>424</sup> The Commission is of the view that the imposition of corresponding duties on a decision-maker appointed by the donor under an enduring power of attorney would be sufficient protection for the donor.

**8.6.72 The Commission therefore recommends that, if ordered to do so by the tribunal, an attorney should be required to present the tribunal with a summary of receipts and expenditure or, if the tribunal considers necessary, more detailed accounts. The tribunal should have power to appoint an auditor. The attorney should also be required, if ordered by the tribunal, to present a plan of management to the tribunal or its nominee.**

**8.6.73 The Commission has also recommended<sup>425</sup> that the tribunal should have power to impose further obligations, such as the payment of a security, on an appointed decision-maker if, in the opinion of the tribunal, it is necessary to do so. The Commission recommends that the tribunal should also have power to impose additional obligations on an attorney under an enduring power if it considers it necessary in the circumstances of a particular case.**

#### *Other decision-makers*

**8.6.74 In Chapter 7, the Commission recommended that a decision-maker appointed by the tribunal should have to consult on a regular basis with any other decision-maker empowered to make a decision for a person with impaired decision-making capacity so as to ensure that the person's interests are not prejudiced by a breakdown in communications between them.<sup>426</sup> The Commission also recommended that, where decision-makers are appointed to exercise a power jointly, the power must be exercised unanimously and that, if unanimous exercise of the power becomes impracticable, any of the decision-**

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<sup>423</sup> See page 83.

<sup>424</sup> See page 82.

<sup>425</sup> See page 83-84.

<sup>426</sup> See page 82.

makers should have power to apply to the tribunal for directions about the exercise of the power.<sup>427</sup>

**8.6.75 The Commission recommends that similar provisions should also apply to decision-makers appointed by a donor under an enduring power of attorney.**

***Disqualification of professional care-giver***

8.6.76 In Chapter 5, the Commission recommended that a person who provides care, on a professional basis, to a person with impaired decision-making capacity should not be eligible to be appointed by the tribunal as a decision-maker for that person.<sup>428</sup> The reason for the Commission's recommendation was the inherent conflict of interest involved in such a situation. A similar conflict of interest arises if a professional care-giver is appointed to act under an enduring power of attorney.

**8.6.77 The Commission therefore recommends that a person who provides services on a professional basis should not be eligible for appointment as an attorney under an enduring power of attorney. However, the fact that a person receives a carer's pension should not make the person ineligible for appointment.**

**8.6.78 A person's current health care provider should not be eligible to act as that person's attorney.**

***Compensation for donor***

8.6.79 The existing legislation provides that an attorney who breaches the statutory obligations towards the donor of an enduring power of attorney may, in addition to any other liability, be required by the Supreme Court to compensate the donor for any loss caused by the failure to comply.<sup>429</sup> As noted above,<sup>430</sup> the Commission proposed in the Discussion Paper that, in accordance with the need for an accessible and integrated scheme of substituted decision-making, power to

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<sup>427</sup> See page 82.

<sup>428</sup> See page 48.

<sup>429</sup> *Property Law Act 1974* (Qld) section 175H(2).

<sup>430</sup> See para 8.6.55.

scrutinise the operation of an enduring power should be transferred to the tribunal.<sup>431</sup> This proposal was supported by the submissions.

**8.6.80 The Commission therefore recommends that power to order compensation for loss caused by the attorney's breach of his or her statutory obligations should also be transferred to the tribunal.**

### ***Power to excuse attorney***

8.6.81 At present, the Supreme Court may relieve an attorney from personal liability for breaching any of the obligations imposed by the enduring powers of attorney legislation, if it is satisfied that the attorney acted honestly and reasonably and ought fairly to be excused.<sup>432</sup> The Commission considered whether the power to excuse an attorney who has breached his or her statutory obligations should also be transferred to the tribunal.

8.6.82 The tribunal's power to order the attorney to compensate the donor for any loss caused by the attorney's breach of statutory obligation<sup>433</sup> would be discretionary. Specific tribunal power to excuse an attorney from paying compensation of this kind would therefore not be necessary. The power to impose liability would be exercised only if the tribunal considered that the attorney should have to reimburse the donor.

8.6.83 A donor may also be entitled to damages from the attorney. If the tribunal has ordered the attorney to compensate the donor, the attorney may be liable to pay both the tribunal ordered compensation and court awarded damages. In the view of the Commission it would be undesirable for an attorney to be exposed to a risk of double liability. However, the Commission believes it would not be appropriate for the tribunal to have power to excuse an attorney from further liability. Such a provision would confer on the tribunal a quasi-judicial authority beyond the scope of its intended operation.

**8.6.84 The Commission therefore recommends that if the tribunal has ordered an attorney to pay compensation, a court which finds an attorney liable to a donor for loss caused by the attorney should be required, in assessing damages, to take into account compensation which the attorney has paid the donor as a result of a tribunal order.**

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<sup>431</sup> Discussion Paper pages 100-101.

<sup>432</sup> *Property Law Act 1974 (Qld)* section 175I.

<sup>433</sup> See paras 8.6.79-8.6.80.

***Withdrawal by attorney***

8.6.85 Circumstances may arise in which an attorney is no longer willing or able to act. The Commission recognises, of course, that it would be pointless to insist that the appointment of an unwilling attorney continue. However, if the donor has lost capacity, he or she will not be able to appoint someone else to act in place of an attorney who wishes to withdraw. It is therefore necessary to ensure that the donor is not disadvantaged by the attorney's withdrawal. At present, an attorney must apply to the Supreme Court for leave to withdraw. If the court grants the application the enduring power of attorney is revoked.<sup>434</sup> The court may then appoint a new attorney.<sup>435</sup>

8.6.86 The Commission recommends that, consistently with its recommendations concerning the removal of an attorney for abuse of power, power to grant an attorney approval to withdraw should be transferred from the Supreme Court to the tribunal.

8.6.87 The Commission also recommends that, while the donor is still competent, the attorney should be able to withdraw by giving notice to the donor.

***Protection of attorney******Where power has been revoked***

8.6.88 An attorney may incur personal liability for acts done in reliance on an enduring power of attorney if the power was not in operation at the time. At present, the *Property Law Act* confers limited protection on an attorney who acts on a power of attorney which has been revoked if, at the time, the attorney did not know the power had been revoked.<sup>436</sup>

8.6.89 The extent of the knowledge which the attorney must possess to be deprived of the existing protection is not specified by the legislation. It has been suggested that the attorney must have actual knowledge of the revocation or of the occurrence of an event which has the effect of revoking the power before the

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<sup>434</sup> *Property Law Act 1974 (Qld)* section 175C(2)(a).

<sup>435</sup> *Property Law Act 1974 (Qld)* section 175G(3)(a).

<sup>436</sup> *Property Law Act 1974 (Qld)* section 174. See note 335 above.

protection is lost.<sup>437</sup> The Commission's recommendations that a donor who revokes an enduring power of attorney must take reasonable steps to notify the attorney of the revocation,<sup>438</sup> and that the form for executing an enduring power of attorney contain warnings for both donor and attorney of the events which will revoke the power,<sup>439</sup> will assist in ascertaining the state of the attorney's knowledge.

8.6.90 However, the Commission is concerned that an unscrupulous attorney may seek to avoid notification of revocation and may continue to use the power even though he or she is aware of the donor's intention to revoke it. The Commission does not believe that an attorney should be protected from personal liability in such a situation.

8.6.91 **The Commission therefore recommends that the statutory protection given to an attorney who acts on an enduring power which has been revoked should be restricted to an attorney who does not know or does not have reason to believe that the power has been revoked.**

***Where attorney relies on power executed in another jurisdiction***

8.6.92 The existing protection conferred by the *Property Law Act* applies only in the situation where the attorney acts in reliance on a power which has been revoked. In para 8.6.103 of this Draft Report, the Commission recommends that an enduring power of attorney executed in another jurisdiction in Australia should be recognised in Queensland, to the extent that it could have been validly made in Queensland, if it complies with the legislation in the jurisdiction where it was executed. However, the legislative requirements with respect to formalities of execution and the provisions relating to the extent of the authority which can lawfully be conferred on an attorney vary between jurisdictions. The Commission is concerned that it may impose an unduly onerous burden on an attorney to require the attorney to determine whether an enduring power of attorney executed in another jurisdiction complies with the legislation in that jurisdiction.

8.6.93 **The Commission therefore recommends that the protection given to an attorney should be extended to include the situation of an attorney who acts in reliance on an enduring power of attorney executed in another jurisdiction, provided that the attorney did not know or have reason to believe that the power did not comply with the legislation in the jurisdiction where it was executed.**

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<sup>437</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 179-180.

<sup>438</sup> See para 8.6.42.

<sup>439</sup> See para 8.6.50.

## ***Protection of third parties***

### ***Where power has been revoked***

8.6.94 At present, the interests of a third party who deals with an attorney whose authority has been revoked are also protected if the third party has acted without knowledge of the revocation.<sup>440</sup> Again, the extent of the knowledge required to deprive a third party of the statutory protection is not clear. It has been suggested that a third party may lose protection even if he or she does not have actual knowledge of the revocation.<sup>441</sup> This view is based on the fact that, since a third party is largely dependent on the bona fides of the attorney, a third party who has reason to doubt the authority of an attorney should safeguard his or her own position by making such enquiries as are reasonable in the circumstances. A third party who fails to take reasonable steps to protect his or her own interests should not be protected by the legislation.

8.6.95 **The Commission therefore recommends that a third party who does not know or have reason to believe that an enduring power of attorney has been revoked should be protected by the legislation.**

### ***Where third party relies on power executed in another jurisdiction***

8.6.96 The existing protection conferred by the *Property Law Act* applies only in the situation where a third party acts in reliance on a power which has been revoked. In para 8.6.103 of this Draft Report, the Commission recommends that an enduring power of attorney executed in another jurisdiction in Australia should be recognised in Queensland, to the extent that it could have been validly made in Queensland, if it complies with the legislation in the jurisdiction where it was executed. However, the legislative requirements with respect to formalities of execution and the provisions relating to the extent of the authority which can lawfully be conferred on an attorney vary between jurisdictions. The Commission is concerned that it would impose an unduly onerous burden on a third party to expect the third party to determine whether an enduring power of attorney executed in another jurisdiction complies with the legislation in that jurisdiction.

8.6.97 **The Commission therefore recommends that the protection given to a third party should be extended to include the situation of a third party who acts in reliance on an enduring power of attorney executed in another jurisdiction, provided that the third party did not know or have reason to**

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<sup>440</sup> *Property Law Act* 1974 (Qld) section 174.

<sup>441</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 180, 195.



**believe that the enduring power did not comply with the legislation in the jurisdiction where it was executed.**

***Recognition of enduring power made in another jurisdiction***

8.6.98 In the Discussion Paper, the Commission noted that, under the present legislation, it may not be possible for an enduring power of attorney executed in another State or Territory in accordance with the law of that State or Territory to be recognised in Queensland.<sup>442</sup> However, a donor who lives in another jurisdiction may own property in Queensland. Further, the increasing mobility of the Australian population means that, if a donor loses capacity, he or she may no longer be living in the State or Territory where the enduring power was executed. If a new enduring power has not been executed in the State or Territory to which he or she has moved, loss of capacity will mean that it is no longer possible to grant an enduring power.

8.6.99 The Discussion Paper identified three ways in which powers of attorney executed elsewhere in Australia could be recognised and given effect to in Queensland.<sup>443</sup> They were:

- . by recognising an enduring power from another jurisdiction provided it satisfied the requirements of that jurisdiction;
- . by recognising an enduring power from another jurisdiction provided that it substantially complied with the Queensland legislation;
- . by developing, in co-operation with other States and Territories, a set of minimum requirements which would allow an enduring power of attorney to be recognised and implemented in any Australian jurisdiction.<sup>444</sup>

8.6.100 The problem with both the first and second alternatives is that the requirements for executing an enduring power of attorney are not the same in all jurisdictions. For example, whereas the Queensland legislation requires an enduring power to be witnessed by a legal practitioner or a Justice of the Peace,<sup>445</sup> this is not the case in all other States or Territories. This means that, under the first alternative, recognition may be given to an enduring power of attorney which was made by a donor who, at the time, had an arguably lower

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<sup>442</sup> Discussion Paper page 94.

<sup>443</sup> Discussion Paper page 98.

<sup>444</sup> See also R Creyke, 'Enduring Powers of Attorney: Cinderella Story of the 80s' (1991) 21 *University of Western Australia Law Review* 122.

<sup>445</sup> See para 8.4.1 above. See also paras 8.6.24-8.6.28.

standard of protection than that demanded by the Queensland provisions. Under the second alternative, recognition could not be given to a power of attorney properly executed in a jurisdiction where the requirements for execution were lower than in Queensland. The powers which can be granted under an enduring power of attorney also vary from jurisdiction to jurisdiction.

8.6.101 Ideally, the third alternative would be the most effective. In addition to allowing powers of attorney granted elsewhere in Australia to be recognised in Queensland if they complied with the agreed minimum requirements, it would allow enduring powers executed in Queensland to be recognised elsewhere in Australia.

8.6.102 The Commission acknowledges that a process of law reform involving the agreement of every State and Territory in Australia could be a slow and time-consuming exercise, but believes that this is the most appropriate course to pursue in the long term.

8.6.103 The Commission recommends that, in the meantime, an enduring power of attorney executed in another jurisdiction in Australia should be recognised in Queensland, to the extent that it could have been validly made in Queensland, if it complies with the requirements of the jurisdiction where it was executed.

***The relationship between an enduring power of attorney and an order made by the tribunal***

8.6.104 The present enduring power of attorney legislation in Queensland contains no mechanism for establishing priority between an enduring power and a decision-making order made under the existing provisions of the *Public Trustee Act* or the *Mental Health Act*.

8.6.105 In the Discussion Paper, the Commission considered ways in which priority could be allocated.<sup>446</sup> Approaches adopted in other jurisdictions vary. In some jurisdictions, a previously executed enduring power is revoked to the extent that it overlaps with a subsequent order,<sup>447</sup> or becomes subject to the order.<sup>448</sup> In the Commission's view, the problem with this approach is that it gives insufficient weight to the wishes expressed by the donor when he or she had the capacity to do so. Other jurisdictions provide that, to the extent of the overlap, the enduring

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<sup>446</sup> Discussion Paper pages 98-100.

<sup>447</sup> See for example *Powers of Attorney Act 1980* (NT) section 18.

<sup>448</sup> See for example *Protection of Personal and Property Rights Act 1988* (NZ) section 100.

power prevails over a later order.<sup>449</sup> This approach gives maximum effect to the autonomy of the donor. However, once the donor loses capacity, it would be part of the role of the tribunal to provide protection. The attorney should therefore be accountable to the tribunal.

**8.6.106** The Commission recommends that the tribunal should not make an order concerning decisions which are included in the authority granted to an attorney under an enduring power of attorney, unless it is shown that there has been abuse, incompetence or neglect on the part of the attorney or that, for any other reason, the enduring power should be terminated. There should also be a saving provision to validate the acts of a decision-maker appointed in ignorance of the existence of the enduring power.

8.6.107 The Discussion Paper also considered the position of a person for whom an order has been made by the tribunal.<sup>450</sup> It noted that, in some instances, a person who is subject to an order may regain sufficient capacity to make an enduring power. The situation could also arise where a person needs assistance with certain decisions, but has sufficient capacity to grant an enduring power of attorney in relation to other kinds of decisions.

8.6.108 The Commission therefore recommends that, if the tribunal has made a decision-making order for a person, the person should be entitled to make an enduring power of attorney over matters not included in the order. However, a person should not be able to appoint an attorney to make decisions which have been included in an order made by the tribunal while the order is in operation.

## 8.7 THE LEGISLATION

8.7.1 The recommendations made by the Commission in this Chapter are implemented by Chapters 5 and 9 of the Draft Bill contained in Chapter 13 of this Draft Report.

8.7.2 In Chapter 5 of the Draft Bill, clauses 40 to 48 deal with making an enduring power of attorney, clauses 49 to 52 deal with the exercise of power under an enduring power of attorney, and clauses 53 to 56 deal with varying and revoking an enduring power of attorney.

8.7.3 Chapter 9 imposes certain duties on decision-makers appointed under an enduring power of attorney.

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<sup>449</sup> See for example *Instruments Act 1958 (Vic)* section 117.

<sup>450</sup> Discussion Paper page 100.

## 8.8 THE FORM

8.8.1 Implementation of the Commission's recommendations will require a new form for the execution of an enduring power of attorney. Appendices 'A' and 'B' to this Draft Report contain two alternative proposals for consideration and comment by interested parties.<sup>451</sup>

8.8.2 The shorter form in Appendix 'A' groups together the kinds of decision which an attorney may be authorised to make. If the donor wished to appoint a different attorney for different kinds of decision, the form would have to be modified to meet the donor's needs. This form would be more appropriate for a donor who wished to give all the authority granted by the power to one attorney.

8.8.3 The form in Appendix 'B' is longer and appears, at first glance, to be more complicated. It consists of different sections for different kinds of decisions. The donor need complete only those sections which deal with the kinds of decision which the donor wishes to give the attorney authority to make. This form would be more appropriate for a donor who wished to appoint different attorneys to make different kinds of decisions.

8.8.4 Both forms contain notes to the donor and to the attorney, and a certificate to be completed by the witness. The form in Appendix 'B' requires each of the completed sections to be separately signed and witnessed.

8.8.5 **The Commission specifically seeks comments as to the suitability of the proposed forms.**

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<sup>451</sup> The current form, Form 16A, is under revision by officers of the Department of Justice and the Attorney-General. However, without amendment to the existing legislation, the changes which can be made to the form will be limited in scope.

## 9. HEALTH CARE TREATMENT

### 9.1 THE NEED FOR CONSENT

9.1.1 An essential element of the concept of individual autonomy is the right of every person to decide what happens to his or her own body. Any voluntary touching of another person is generally unlawful, unless the other person has consented to that touching. In the absence of consent, even the slightest degree of bodily contact may give rise to a civil claim for damages for assault or to a criminal assault charge.<sup>452</sup>

9.1.2 This general rule applies to the performance of health care procedures on a patient who has not given his or her consent.<sup>453</sup> In the absence of a valid consent, treatment which involves any touching of the patient's body will constitute an assault even if the treatment is properly carried out. The requirement of consent is intended to ensure protection for the patient against unauthorised interference with his or her right to bodily integrity and for the health care provider against possible legal action.

### 9.2 WHAT IS CONSENT?

9.2.1 A valid consent for the purposes of an assault action, whether criminal or civil, must be 'real'.

9.2.2 A real consent is one which is based on a broad understanding of the proposed treatment and which is not induced by fraud or by misrepresentation as to the nature of the procedure.<sup>454</sup> Failure on the part of a person to supply information about possible alternative forms of treatment or to disclose the existence of side-effects or of risks associated with the treatment does not

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<sup>452</sup> *Collins v Willcock* [1984] 1 WLR 1172, [1984] 3 All ER 374; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Re Marion*); *Criminal Code* section 245.

<sup>453</sup> However, the medical superintendent of a hospital may consent to treatment which is necessary to save or prolong the life of a patient who is incapable of consenting: *Medical Act* 1939 (Qld) section 52. There is also protection against criminal responsibility for the performance in good faith and with reasonable care and skill of a surgical operation upon any person for his or her benefit, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case: *Criminal Code*, section 282. See page 131.

<sup>454</sup> *Chatterton v Gerson* [1981] 1 QB 432, 443; *Sidaway v Board of Governors of Bethlem Royal Hospital* [1984] 1 QB 493, 511 (CA).

invalidate the consent.<sup>455</sup>

### 9.3 CAPACITY TO CONSENT

9.3.1 To give a legally valid consent a patient must be able to understand in broad terms the nature of the proposed treatment and its likely consequences. There is therefore no fixed standard of capacity.

9.3.2 Existence of an intellectual or mental disability does not automatically involve lack of capacity to consent. Whether or not a person has the capacity to consent will depend on the nature and the severity of the disability and on the complexity of what is being proposed.<sup>456</sup>

### 9.4 WHERE A PERSON IS UNABLE TO CONSENT

9.4.1 Sometimes a person who needs treatment is not able to consent on his or her own behalf. This may be because the patient is unconscious, or it may be because the person has an intellectual or mental disability of such a degree that he or she is not able to understand information about the proposed treatment or to make a reasoned judgment based on that information. In such a situation, some other person must be authorised to provide a substitute consent.

### 9.5 THE EXISTING LAW IN QUEENSLAND

#### ***The Mental Health Act***

9.5.1 Under the Fifth Schedule of the *Mental Health Act*, a committee of the person may be appointed for a person who is mentally ill and unable to manage his or her affairs.<sup>457</sup> A committee of the person has full guardianship powers, and can therefore make decisions about treatment of the person for whom the appointment was made. There is no express limitation on the nature of the procedures about which a committee is authorised to decide, nor are there any guiding principles in the legislation for the exercise of a committee's authority.

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<sup>455</sup> However, the patient may have a cause of action in negligence for breach of the health care provider's duty to provide material information: *Rogers v Whitaker* (1992) 175 CLR 479.

<sup>456</sup> See for example *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Re Marion*).

<sup>457</sup> *Mental Health Act* 1974 (Qld) Fifth Schedule clause 4(2)(c).

However, although there is no statutory direction as to how the committee's authority is to be exercised, a guardian is expected to act at all times in the best interests of the person whose decision-making capacity is impaired.<sup>458</sup>

9.5.2 This Act also provides for involuntary admission to hospital of a person who is mentally ill. Mental illness is not defined in the Act. If the nature or severity of the illness requires the person to be hospitalised, and if hospitalisation is necessary to protect the person's own interests or to protect other people, the person concerned may be admitted to hospital for treatment of mental illness. The application for admission must be supported by a written recommendation from a medical practitioner.<sup>459</sup> This provision authorises admission. It does not expressly authorise the giving of treatment to a patient if the patient refuses to consent.

### ***The Intellectually Disabled Citizens Act***

9.5.3 Once a person has been granted assistance under the Act,<sup>460</sup> the Legal Friend<sup>461</sup> may give consent to any medical, dental, surgical or other professional treatment or care.<sup>462</sup> In exercising the power to give consent the Legal Friend must:

- . take all reasonable steps to consult with relatives of the patient who provide ongoing care for the patient and give due consideration to their views;
- . take all reasonable steps to be as fully informed as possible on matters requiring consent;
- . inform the patient, to the extent that he or she is able to understand, about matters requiring consent and the options available; and
- . consent to the least restrictive option available, taking into account the health, well-being and expressed wishes, if any, of the patient.<sup>463</sup>

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<sup>458</sup> R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 4-6, 4-7.

<sup>459</sup> *Mental Health Act* 1974 (Qld) section 18.

<sup>460</sup> See page 31.

<sup>461</sup> The Legal Friend is a barrister or solicitor appointed under the Act to provide specialised assistance to intellectually disabled citizens. See *Intellectually Disabled Citizens Act* 1985 (Qld) section 4.

<sup>462</sup> *Intellectually Disabled Citizens Act* 1985 (Qld) section 26(3).

<sup>463</sup> *Intellectually Disabled Citizens Act* 1985 (Qld) section 26(5).

If the Legal Friend is of the opinion that the process of obtaining approval to grant assistance would cause unnecessary delay, the Legal Friend may consent to treatment for an intellectually disabled person who has not previously been granted assistance under the Act. If this situation arises, the Legal Friend must first obtain the approval of the Chairman of the Intellectually Disabled Citizens Council, and an application for assistance must be made to the Council as soon as possible. Emergency consents may only be given for treatment which is necessary to preserve the patient's life or to prevent significant illness or suffering.<sup>464</sup>

### ***Parens patriae***

9.5.4 The Supreme Court has a protective jurisdiction to safeguard the interests of all those who cannot protect themselves.<sup>465</sup> This *parens patriae* jurisdiction may be used to authorise medical treatment for a person who lacks capacity to consent on his or her own behalf. However, because the underlying principle of the jurisdiction is the welfare of the patient, it is exercised sparingly,<sup>466</sup> and consent will not be given unless the proposed treatment is clearly in the best interests of the patient.<sup>467</sup> The interests of other family members, particularly primary care-givers, will be a relevant consideration but, where there is a conflict, the interests of the patient will prevail.<sup>468</sup>

### ***The Medical Act***

9.5.5 If a patient is incapable of consenting because of a mental disability and if a relation of the patient is not available to consent, the medical superintendent of a hospital or institution may consent on behalf of the patient to a surgical procedure which is necessary to save or prolong the patient's life.<sup>469</sup>

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<sup>464</sup> *Intellectually Disabled Citizens Act 1985 (Qld) section 26(9).*

<sup>465</sup> See para 3.8.2.

<sup>466</sup> *Re Eve* [1986] 2 SCR 388.

<sup>467</sup> *Re Jane* (1988-89) 85 ALR 409.

<sup>468</sup> *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Re Marion*).

<sup>469</sup> *Medical Act 1939 (Qld) section 52.* This section implies that next of kin may consent to medical treatment for a patient who is incapable of consenting. However, in the absence of specific legislation, the consent of a relative is insufficient to make lawful what would otherwise be an assault.



## **Criminal Code**

9.5.6 A person who, in good faith and with reasonable care and skill, carries out a surgical operation for the benefit of the patient, will not be criminally responsible for an assault if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.<sup>470</sup> This provision gives a health-care provider limited protection for treatment carried out on a person who is unable to consent. However, it does not include forms of treatment other than surgery. Nor will it relieve a health-care provider from liability in a civil action for damages for assault.

9.5.7 A person who has charge of another who (because of age, sickness, unsoundness of mind, detention or any other reason) is unable to arrange the medical care which he or she requires, has a duty to provide that medical care.<sup>471</sup> This would include the administrator of a hospital where patients were involuntarily detained under the *Mental Health Act*. However, there is a difference between a duty to provide medical care and the right to give it where the patient is not capable of giving consent or refuses to consent. It is likely that the duty to provide medical care would extend no further than making the care available. It is doubtful that it would authorise the forcible administration of treatment in the absence of consent.<sup>472</sup>

## **Case law**

9.5.8 It is generally recognised that, even if there is no statutory protection for a health-care provider, it should not be unlawful for emergency treatment to be given to a patient whose illness or injury makes it impossible for him or her to consent.<sup>473</sup>

9.5.9 In the United Kingdom, this exception to the general rule that consent must be given for medical treatment has been extended to include treatment for

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<sup>470</sup> *Criminal Code* section 282. The protection conferred by this section is not restricted to medical practitioners but applies to any person who performs a surgical operation, provided that, in the circumstances, the person acts with reasonable care and skill.

<sup>471</sup> *Criminal Code* section 285; *R v MacDonald and MacDonald* [1904] StRQd 151.

<sup>472</sup> See Section 187 of the Northern Territory *Criminal Code*, which excludes from the definition of 'assault' force used in giving any medical treatment reasonably needed by the person to whom it is given or in restraining a person who needs to be restrained for his or her own protection or benefit.

<sup>473</sup> *Wilson v Pringle* [1987] 1 QB 237.

people who lack the capacity to consent because they have a mental or intellectual disability, provided that the treatment is in the best interests of the patient.<sup>474</sup>

9.5.10 There is no decided case law which would suggest that this represents the position in Queensland.

## 9.6 DEVELOPMENTS IN OTHER JURISDICTIONS

9.6.1 In recent years there have been significant developments concerning the provision of consent to health care treatment for an individual whose impaired decision-making capacity means that he or she is not able to consent personally.

9.6.2 Legislation in other Australian jurisdictions now provides four methods of obtaining a legally authorised substituted decision about health care for a person who, because his or her decision-making capacity is impaired, is unable to make his or her own decision. The existing mechanisms are as follows:

- . a person who has the necessary degree of capacity may appoint another person to make decisions about his or her health care if, in the future, he or she loses the capacity to decide;
- . legislation may confer on certain people a statutory right to decide on behalf of another person;
- . a person may be appointed as a decision-maker with power to consent to health care treatment; and
- . the body which makes decisions about appointment of decision-makers may have power to decide about some forms of treatment.

## 9.7 CRITERIA FOR MAKING HEALTH CARE DECISIONS

9.7.1 The purpose of legislation enabling the provision of substituted consent to treatment for a person whose decision-making capacity is impaired is to ensure that health care is available for people who are unable to consent on their own behalf while, at the same time, protecting them against unnecessary or inappropriate treatment.

9.7.2 Whatever mechanism is adopted for obtaining a legally authorised substituted decision about treatment, the authority to make health care decisions for another person must be exercised in accordance with that person's well-being.

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<sup>474</sup> *In re F* [1990] 2 AC 1.

The legislation should therefore specify the criteria which should be followed by any person or body exercising the authority to make health care decisions for another person.

**9.7.3 The Commission recommends that consent should be given only if the substitute decision-maker is satisfied that the proposed treatment is the most appropriate form of treatment for the purpose of promoting and maintaining the health and well-being of the patient.<sup>475</sup>**

**9.7.4** In order to make a decision about the appropriateness of the proposed treatment, a decision-maker will need to have information about the patient's condition and about available alternative forms of treatment.

**9.7.5 The Commission recommends that the legislation require the treatment provider to explain to the decision-maker:<sup>476</sup>**

- . **the nature of the patient's condition;**
- . **alternative courses of treatment available for that condition;**
- . **the general nature and effect of each of those courses of treatment;**
- . **the nature and degree of any significant risks associated with each of those forms of treatment; and**
- . **the reasons why it is proposed that any particular form of treatment should be carried out.**

**9.7.6** This requirement would extend to people who lack capacity to make decisions about their own health care the protection given to competent patients by the right to be informed of the material risks of any proposed form of treatment.<sup>477</sup>

**9.7.7 The Commission further recommends that, in making a decision about the treatment proposed, the decision-maker should be required to take into account the views (if any) of the patient and the factors referred to above.<sup>478</sup>**

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<sup>475</sup> But see para 9.7.8 below.

<sup>476</sup> See for example *Guardianship Act 1987* (NSW) section 40(2), section 42(2).

<sup>477</sup> *Rogers v Whitaker* (1992) 175 CLR 479.

<sup>478</sup> See for example *Guardianship Act 1987* (NSW) section 40(3).

9.7.8 Circumstances may arise in which it is proposed to perform procedures which are not directly for the benefit of the person whose decision-making capacity is impaired. To enable substituted consent to be given for such procedures would be inconsistent with the Commission's recommendation in para 9.7.3 above. The question thus arises as to whether exceptions can ever be justified to the principle that consent should only be given for treatment which is the most appropriate to promote the health and well-being of the person with impaired decision-making capacity. The issues involved in this question raise serious ethical dilemmas. The Commission has considered some of these issues in relation to consent to two kinds of procedure - tissue donation and experimental treatment and research. Tissue donation is discussed at pages 148-149 below and experimental treatment and research at pages 155-159.

9.7.9 The legislation should also provide for the situation where the patient indicates in any way, or has previously indicated, in similar circumstances, that he or she does not wish the proposed treatment to be carried out.<sup>479</sup> It is the view of the Commission that, generally, a consent given by a person who is authorised to make health care decisions on behalf of a person whose decision-making capacity is impaired should be ineffective if the treatment provider is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment.<sup>480</sup>

9.7.10 However, a patient with impaired decision-making capacity may have little or no understanding of what a proposed form of treatment involves. In such a situation, to give effect to the patient's objection may have the consequence that the patient is unable to obtain necessary treatment.

9.7.11 The Commission therefore recommends that, notwithstanding the objection of a patient who has little or no understanding of proposed treatment, the consent of an authorised decision-maker should be effective<sup>481</sup> if the treatment is likely to cause the patient no distress, or if it may cause the patient some degree of distress which is temporary and which is outweighed by the benefit of the treatment to the patient.

## 9.8 ENDURING POWER OF ATTORNEY FOR HEALTH CARE TREATMENT

9.8.1 Appointment by one person of another person to make health care decisions if, in the future, the person making the appointment should lose the capacity to make his or her own decisions is, in effect, an enduring power of

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<sup>479</sup> Involuntary treatment for psychiatric illness is discussed on page 171.

<sup>480</sup> See for example *Guardianship Act 1987* (NSW) sections 33(3), 46(2)(a).

<sup>481</sup> See for example *Guardianship Act 1987* (NSW) section 46(4).

attorney for health care treatment.

### ***The concept of an enduring power***

9.8.2 The concept of an enduring power of attorney was explained in Chapter 8. An ordinary power of attorney is a formal document in which one person (the donor of the power) authorises another (the donee or the attorney) to act on his or her behalf for certain purposes. In order to grant a power of attorney, the donor must have the necessary decision-making capacity. If, at any time after having granted the power of attorney, the donor loses the degree of understanding required, the power of attorney becomes invalid.<sup>482</sup>

9.8.3 An enduring power of attorney is a special kind of power which survives the subsequent incapacity of the donor. In other words, it is a mechanism which allows a donor to choose a person to make decisions for him or her when he or she no longer has the decision-making capacity to make them personally.<sup>483</sup>

### ***Decisions which an attorney can be authorised to make***

9.8.4 At present, the extent of the authority conferred on an attorney by an enduring power is not entirely clear in Queensland.<sup>484</sup> Under the existing legislation, it is unlikely that an attorney would be authorised to make health care decisions on behalf of a donor who no longer has sufficient decision-making capacity to decide about such matters personally. In the absence of specific legislation, a decision about health care would probably be considered too personal to be able to be delegated.<sup>485</sup>

9.8.5 In the Discussion Paper,<sup>486</sup> the Commission proposed that the question be put beyond doubt by the enactment of legislation allowing people, while they have the capacity to do so, to appoint the person whom they would like

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<sup>482</sup> See pages 92-94.

<sup>483</sup> See pages 95-97.

<sup>484</sup> See para 8.6.2.

<sup>485</sup> However, for a contrary view, see M Fowler, 'Appointing an Agent to Make Medical Treatment Choices' (1984) 84 *Columbia Law Review* 965 at 1009-1012.

<sup>486</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

to decide about their health care if they should ever lose the capacity to make such decisions for themselves.<sup>487</sup> Similar legislation currently exists in Victoria,<sup>488</sup> the Australian Capital Territory<sup>489</sup> and South Australia.<sup>490</sup> There was considerable support for this proposal in the submissions received by the Commission.

**9.8.6 The Commission therefore recommends the introduction of legislation to clarify and extend the scope of an enduring power of attorney by allowing a donor who wishes to do so to include in the decisions which an attorney is authorised to make, decisions about the health care of the donor.**

### ***Capacity to grant an enduring power of attorney for health care***

9.8.7 In order to grant an enduring power of attorney for health care, the donor must have the necessary degree of capacity. In Chapter 8 the Commission recommended that there should be a legislative test of capacity to execute an enduring power. The proposed test would require a donor to understand that subsequent loss of decision-making capacity would mean that he or she would not be able to monitor the attorney's exercise of the power or to revoke the power.<sup>491</sup>

**9.8.8 The Commission therefore recommends that, to be able to grant a valid enduring power of attorney for health care, a donor must be able to understand that the power authorises the attorney to make health care decisions which the donor is no longer able to make and that, once the donor has lost decision-making capacity, he or she will have no control over the decisions made by the attorney and will not be able to revoke the power.<sup>492</sup>**

### ***Independent witness***

9.8.9 The importance of an independent witness as a protection for the donor of an enduring power of attorney was discussed in Chapter 8. In that

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<sup>487</sup> Discussion Paper page 137.

<sup>488</sup> *Medical Treatment Act 1988* (Vic).

<sup>489</sup> *Powers of Attorney Act 1956-1991* (ACT).

<sup>490</sup> *Guardianship and Administration Act 1993* (SA).

<sup>491</sup> See pages 104-105.

<sup>492</sup> Capacity to revoke an enduring power of attorney for health care is discussed at para 9.8.18.

chapter, the Commission recommended that the legislation provide that the witness to an enduring power of attorney not be related to either the donor or the attorney.<sup>493</sup> In addition to that requirement, **the Commission recommends that, if an enduring power of attorney authorises an attorney to make health care decisions, a current health care provider should not be eligible to act as a witness.**

### ***Limitation of an attorney's authority***

9.8.10 In granting an enduring power of attorney for health care, some donors may wish their attorneys to have unlimited powers to make decisions on their behalf. Other people may wish to specify the forms of treatment for which the attorney is authorised to give consent, or to nominate forms of treatment to which the attorney may not consent.

9.8.11 One problem with the latter approach is that if a donor specifies treatment to which the attorney may or may not consent, there may be such significant advances in medical science and technology that, if the donor subsequently loses capacity, it may be inappropriate to give effect to the views expressed in entirely different circumstances. However, this difficulty could be overcome by giving the tribunal power to override the directions contained in the grant of power.<sup>494</sup> The Commission considers that this would allow the greatest degree of flexibility to donors in expressing their wishes, while minimising the possibility that the donor may be disadvantaged because events have overtaken the document in which his or her wishes are recorded.

9.8.12 **The Commission therefore recommends that the donor of an enduring power of attorney for health care be able to choose whether to authorise his or her attorney to make decisions about all aspects of his or her health care, or whether to specify certain forms of health care about which the attorney is not authorised to decide or about which the attorney must decide in accordance with the directions of the donor. The Commission further recommends that the tribunal be given power, if circumstances (including advances in medical science) have changed to such an extent that the power is no longer appropriate, to override the instructions given by a donor in an enduring power of attorney for health care.**

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<sup>493</sup> See para 8.6.25.

<sup>494</sup> See for example *Guardianship and Administration Act 1993 (SA)* section 25(6).

**Commencement of attorney's authority**

9.8.13 Unless legislation provides otherwise, an enduring power of attorney comes into operation immediately it is executed. However, it is unlikely that a donor who appoints an attorney to make health care decisions would want the attorney to have authority to make decisions which the donor is still capable of making. In Chapter 8 the Commission recommended, in relation to an enduring power of attorney for general lifestyle decisions, that the attorney's authority should not commence until the donor has lost the capacity to make the decision in question.<sup>495</sup> In the view of the Commission the legislation should contain a similar provision in relation to enduring powers of attorney for health care.

**9.8.14 The Commission therefore recommends that the authority of an attorney under an enduring power of attorney for health care should not commence until the donor has lost capacity to make the decision in question.**

9.8.15 In some situations, such as where the donor develops a progressively dementing illness, the authority of the attorney is likely to be continuous once it has come into operation. On the other hand, there are situations such as an episodic psychiatric illness, where, because the donor's incapacity may be only temporary, the authority of the attorney may be periodic. It would lapse when the donor regained sufficient capacity to make his or her own decisions, but would be re-activated by a recurrence of the illness which caused renewed loss of decision-making capacity.

9.8.16 The Commission noted, in the Discussion Paper, that if a patient is in extreme pain, or is drifting in and out of consciousness, it may be difficult to determine if he or she is able to make decisions about treatment or whether the power of attorney can come into operation.<sup>496</sup> In relation to decisions about other matters of personal welfare, the Commission has already recommended that any uncertainty about the donor's capacity to decide should be referred to the tribunal.<sup>497</sup> The Commission recognises that a determination about the donor's capacity to consent to treatment may need to be handled with a greater degree of urgency. However, the Commission envisages that the administrative arrangements of the tribunal would be such that it would be able to deal with urgent applications at short notice. Provision could be made for applications to be made by telephone and, if necessary, for tribunal members to visit the donor. The Commission is therefore not of the view that different procedures should be used to determine whether an enduring power of attorney for health care has come into effect.

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<sup>495</sup> See page 101.

<sup>496</sup> Discussion Paper page 138.

<sup>497</sup> See para 8.6.12.



9.8.17 The Commission recommends that, where doubt exists as to whether or not the donor of an enduring power of attorney for health care has capacity to make decisions about his or her own treatment, the matter should be referred to the tribunal to determine whether the enduring power is in operation.

### ***Revocation***

#### ***Capacity to revoke***

9.8.18 A donor who has the capacity to do so should be able to revoke an enduring power of attorney for health care. The question of the degree of capacity necessary for effective revocation of an enduring power of attorney was considered in Chapter 8.<sup>498</sup> In the view of the Commission, the test of capacity to revoke an enduring power of attorney for health care should be the same as for other forms of enduring power.

9.8.19 The Commission therefore recommends that a purported revocation should not be effective unless the donor has the capacity to execute a new power if he or she chooses to do so.

#### ***Method of revocation***

9.8.20 As the Commission has noted,<sup>499</sup> the revocation of an enduring power of attorney has important legal consequences. The Commission is therefore of the view that, while revoking an enduring power should not be a complicated process, the procedure involved should emphasise the seriousness of what is being undertaken.

9.8.21 The Commission recommends that revocation should be in writing and witnessed in the same way as the power is executed.

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<sup>498</sup> See pages 109-110.

<sup>499</sup> See para 8.6.41.

### ***Automatic expiration of power***

9.8.22 In the Discussion Paper,<sup>500</sup> the Commission considered whether, because of the length of time which may elapse between the grant of an enduring power of attorney for health care and the donor's subsequent loss of capacity, the power of attorney should automatically terminate after the expiration of a specified period unless, at the end of that period, the donor had already lost the capacity to make his or her own health care decisions.<sup>501</sup> The Commission was concerned that, if the power had been granted many years before it came into operation, it may no longer accurately reflect the donor's wishes.

9.8.23 However, after further consideration, the Commission is now of the view that the difficulty which it envisaged can be adequately dealt with in other ways. A donor who, while competent to do so, changed his or her mind about who should act as attorney, or about what forms of treatment the attorney should or should not be able to authorise, would be able to revoke the power and grant a new one.<sup>502</sup> In addition, the Commission has recommended that, if circumstances have changed to such an extent that the power is no longer appropriate, the tribunal should have power to override the wishes expressed by the donor in the enduring power.<sup>503</sup>

9.8.24 Moreover, automatic termination of a power after a certain period creates a risk that people will forget to renew an earlier power which has expired and that people who thought that they had provided for the event of their own loss of decision-making capacity would not in fact have done so. The Commission believes that any potential advantage to be gained by providing for enduring powers to expire after a certain period of time would be outweighed by this risk.

## **9.9 A STATUTORY POWER TO DECIDE**

9.9.1 In some jurisdictions, legislation confers on certain people an automatic power to make decisions about the health care of a person whose decision-making capacity is impaired.

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<sup>500</sup> Discussion Paper page 138-139.

<sup>501</sup> See for example *Californian Durable Power of Attorney Health Care Act 1983* section 2436.5.

<sup>502</sup> In Victoria, the execution of an enduring power of attorney which authorises the attorney to make decisions about medical treatment automatically revokes any such power previously granted. See *Medical Treatment Act 1988* (Vic) section 5A(3).

<sup>503</sup> See para 9.8.12.

9.9.2 In New South Wales, for example, a 'person responsible' may consent to all health care treatment except for procedures which are designated as 'special treatment'<sup>504</sup> and for which the consent of the Guardianship Board must be obtained.<sup>505</sup> The term 'person responsible' is defined in descending order of priority, each category displacing the categories below it. For a person who has not had a guardian appointed, the 'person responsible' would be a spouse<sup>506</sup> with whom the person whose decision-making capacity is impaired has a close, continuing relationship, a carer or a close friend or relative.<sup>507</sup>

9.9.3 'Carer' does not include a person who receives remuneration, other than a carer's pension, for providing services or support.<sup>508</sup> Where a person resides in an institution such as a hospital or nursing home, the person who had care of the person before he or she was admitted to the institution remains the carer of the person.<sup>509</sup>

9.9.4 To qualify as a 'close friend or relative' for the purpose of making health care decisions for a person whose decision-making capacity is impaired, a person must maintain a close personal relationship through frequent personal contact and must maintain a personal interest in the other person's welfare. Performing services related to personal care for remuneration is not sufficient.<sup>510</sup>

9.9.5 A similar scheme has been introduced in South Australia. Recently enacted legislation enables the 'appropriate authority' to consent to health care treatment other than a sterilisation procedure, a termination of pregnancy, or any other form of treatment prescribed by the regulations made under the legislation.<sup>511</sup> If a guardian has not been appointed, the 'appropriate authority' is either a relative of the person or the Guardianship Board.<sup>512</sup>

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<sup>504</sup> 'Special treatment' means a sterilisation procedure, or ethically contentious treatment, or any other kind of treatment declared by the regulations to be special treatment. See *Guardianship Act 1987* (NSW) section 33(1).

<sup>505</sup> *Guardianship Act 1987* (NSW) section 36(1).

<sup>506</sup> 'Spouse' includes a heterosexual de facto partner. See *Guardianship Act 1987* (NSW) section 3.

<sup>507</sup> *Guardianship Act 1987* (NSW) section 3A(1).

<sup>508</sup> *Guardianship Act 1987* (NSW) section 3A(3), section 3A(7).

<sup>509</sup> *Guardianship Act 1987* (NSW) section 3A(4).

<sup>510</sup> *Guardianship Act 1987* (NSW) section 3A(5).

<sup>511</sup> *Guardianship and Administration Act 1993* (SA) sections 3, 59(1).

<sup>512</sup> *Guardianship and Administration Act 1993* (SA) section 59(2).

9.9.6 A 'relative' is defined as a spouse,<sup>513</sup> a parent, a person other than an appointed guardian acting *in loco parentis*, a brother or sister aged eighteen years or over or a son or daughter aged eighteen years or over.<sup>514</sup>

9.9.7 On the other hand, the English Law Commission has recommended against a system of family statutory management,<sup>515</sup> preferring instead to give a statutory decision-making power for health care matters to treatment providers.

9.9.8 The Law Commission's provisional proposal was that 'a treatment provider should be given a statutory authority to carry out treatment which is reasonable in all the circumstances to safeguard and promote the best interests of an incapacitated person'.<sup>516</sup> The Commission based its recommendation on the fact that the treatment provider will inevitably have a major role in any decision-making and will be responsible for carrying out the treatment decided on.<sup>517</sup>

9.9.9 The Law Commission recognised that there would be considerable concern about leaving treatment decisions to a single professional, or even to the medical profession as a whole.<sup>518</sup> It noted 'the fundamental tension .... between the need to allow professionals scope to do their best for their patients, and the need to protect those who cannot protect themselves from treatment, however well-intentioned, which they may not want or need'.<sup>519</sup>

9.9.10 The Law Commission attempted to balance these competing considerations by imposing a number of limitations on the statutory power of a treatment provider. The limitations included that:

the statutory authority should not permit the carrying out of any treatment to which the person objects, unless such treatment is essential to prevent an immediate risk of serious harm to that person or others,<sup>520</sup> and

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<sup>513</sup> 'Spouse' includes a heterosexual de facto partner. See *Guardianship and Administration Act 1993 (SA)* section 3, *Family Relationships Act 1975 (SA)*.

<sup>514</sup> *Guardianship and Administration Act 1993 (SA)* section 3.

<sup>515</sup> The Law Commission, Consultation Paper No 128, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (1993) 8-9.

<sup>516</sup> The Law Commission, Consultation Paper No 129, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (1993) 49.

<sup>517</sup> *Id.*, 48.

<sup>518</sup> *Id.*, 48.

<sup>519</sup> *Id.*, 5.

<sup>520</sup> *Id.*, 51.

the statutory authority should not permit the taking of any step for which special consent procedures applied, unless that consent has been obtained.<sup>521</sup>

9.9.11 In its Discussion Paper, the Queensland Law Reform Commission considered whether there should be a statutory power to consent to health care treatment on behalf of a person who lacks capacity to make the decision personally. The Commission raised the issue in relation to 'primary carers'. It did not address the question of a statutory power to consent for health care providers.

9.9.12 The Commission proposed that primary carers should not have an automatic right to consent.<sup>522</sup> The reason for the Commission's proposal was a concern that any such automatic conferral of power might not adequately protect the rights and interests of the person for whom the treatment was proposed. Of the submissions received by the Commission, those which specifically addressed this issue were evenly divided on the question of whether or not primary carers should automatically be given authority to make health care decisions for a person with impaired decision-making capacity.

9.9.13 The Commission has given this matter a great deal of further consideration. It now believes that the proposed legislation should include a statutory consent scheme. The Commission has been persuaded by a number of factors.

9.9.14 One of the Commission's original concerns was that an automatic consent mechanism might displace the presumption of competence, thus eroding the fundamental right of the individual to autonomy and bodily inviolability. However, the statutory scheme would operate only if the person concerned lacked the capacity to decide personally. As at present, whether or not in any particular case the person concerned has sufficient capacity to make the decision in question will have to be determined by the health care provider. The Commission believes that the majority of health care providers approach this task responsibly and with integrity.

9.9.15 The Commission also accepts that, in many instances, the health care needs of a person with impaired decision-making capacity are best understood by the relatives or friends who make up that person's immediate support network.<sup>523</sup> Further, it recognises the dedication of the overwhelming majority of family members and believes that, if given the responsibility of making health care decisions, family members would act in what they genuinely considered to be the

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<sup>521</sup> *Id.*, 50.

<sup>522</sup> Discussion Paper page 119.

<sup>523</sup> See for example Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, Vol 1 pages 231, 458.

best interests of a loved one. To require an application to the tribunal merely to satisfy the technical legal requirement of consent seems, in most cases, an unwarranted intrusion and an unnecessary burden.

**9.9.16** The Commission therefore recommends that the legislation include a statutory consent mechanism. The people who should be authorised to consent are the spouse<sup>524</sup> of the person concerned, a parent, son or daughter, or a person who has a close personal relationship with the person concerned and maintains a personal interest in that person's welfare.

**9.9.17** However, the list should not be hierarchical. In the view of the Commission, this approach could lead to difficulties in identifying and locating the person authorised to consent. There may also be circumstances in which the hierarchical order would not reflect the reality of the person's support networks or the person's lifestyle.

**9.9.18** The Commission acknowledges that, in some cases, there may be more than one person who considers that he or she should be the authorised person. However, from the point of view of the treatment provider, the consent of any person on the list would be sufficient, and the treatment provider would be able to obtain consent from the person he or she considered most appropriate. In the event of a dispute between two or more authorised persons who believe themselves entitled to consent, application could be made to the tribunal to determine which, if any, is the most appropriate or whether the Adult Guardian<sup>525</sup> should be appointed to make health care decisions for the person concerned.

**9.9.19** The Commission further recommends that if a person represents to the treatment provider that he or she is authorised to give consent, and if the treatment provider does not know and could not reasonably be expected to know that the person does not have authority, the consent should be deemed to be effective.<sup>526</sup> It should be an offence for a person, knowing that he or she does not have the necessary authority to consent to treatment, to consent to treatment or to represent to a treatment provider that he or she is authorised to consent.<sup>527</sup>

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<sup>524</sup> The definition of 'spouse' should reflect the recommendations of the Commission in its Report No 42: *The Intestacy Rules*, Report No 44: *De Facto Relationships* and Report No 48: *De Facto Relationships (Wrongful Death)* and should include partners living in a de facto relationship. In Report No 44 a 'de facto relationship' was defined, at page 11, as 'the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple'.

<sup>525</sup> See pages 184-185.

<sup>526</sup> See for example *Guardianship and Administration Act 1993 (SA)* section 59(3)(b).

<sup>527</sup> See for example *Guardianship and Administration Act 1993 (SA)* section 60.

9.9.20 The Commission is not generally in favour of the proposal that treatment providers should be given an automatic statutory power of consent.<sup>528</sup> Even with safeguards, such a system involves a clear potential for a serious conflict of interests and for a lack of accountability.

9.9.21 The scheme proposed by the Commission, on the other hand, gives official recognition to the practice - often successfully adopted in the past, but with no legal basis - of decision-making on the basis of consultation between treatment providers and relatives or friends. Conferring formal legal authority on the existing practice is not mere window-dressing. It involves important legal consequences. By creating a statutory right for relatives or friends to be consulted and to make decisions, it ensures that the members of the person's support network are not by-passed in the decision-making process. More importantly, it requires that, in order to participate, the authorised decision-maker is given the information necessary to make a meaningful decision.<sup>529</sup>

## 9.10 AN APPOINTED DECISION-MAKER

9.10.1 If a decision-maker is appointed by the tribunal to make decisions about the personal welfare of a person with impaired decision-making capacity, the decision-maker's authority may include power to make health care decisions for the person concerned.

9.10.2 The Commission recommends that, in such a situation, the authority of the appointed decision-maker should take precedence over the statutory power of a relative or friend to make health care decisions, provided that the decision-maker is reasonably available and is willing to make a decision about the proposed treatment.<sup>530</sup>

## 9.11 SPECIAL CONSENT PROCEDURES

9.11.1 There are some forms of treatment which may require special consent procedures. In every Australian State or Territory which has introduced legislation about decision-making for people with impaired decision-making capacity, there are limitations on the authority of appointed decision-makers and of people who have a statutory power to make health care decisions.

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<sup>528</sup> Involuntary treatment for psychiatric illness is discussed at page 171.

<sup>529</sup> See paras 9.7.4-9.7.6.

<sup>530</sup> See for example *Guardianship Act 1987* (NSW) section 3A(1)(a); *Guardianship and Administration Act 1993* (SA) section 59(2)(a).

9.11.2 The reason for requiring special consent procedures is that some forms of treatment are particularly invasive or have particularly serious consequences, so that the results of making a wrong decision may be particularly grave. There are also situations where the emotional involvement of a family member or close friend may make it difficult for them to decide objectively.

9.11.3 In the Discussion Paper, the Commission identified a number of controversial treatments for which it considered a more stringent consent mechanism may be necessary.<sup>531</sup> These treatments included some forms of psychiatric treatment, transplantation of non-regenerative tissue, and sterilisation and abortion procedures. A further issue which, in the view of the Commission, requires consideration is consent to experimental treatment or medical research involving a person who lacks the necessary capacity to give his or her own consent.

### ***Psychiatric treatment***

9.11.4 Since publication of the Commission's Discussion Paper, there has been a significant review of mental health legislation in Queensland. The Minister for Health has released a number of Discussion Papers and a Green Paper dealing with issues arising as a result of the review. One of these issues is the need for special consent criteria for certain forms of treatment.

9.11.5 The initial review agreed with the Commission that there are certain forms of treatment for which special criteria should apply. Treatment procedures identified by the review included electroconvulsive therapy, psychosurgery, hormone therapies used for behavioural modification and experimental techniques.<sup>532</sup> The review proposed that:

*As a general principle, the authority of a legally appointed guardian or substitute decision maker to consent to the administration of mental health treatments should not extend to authorisation of non-standard treatments. These treatments are significantly restrictive or invasive of the patient, such that a third party may not be able to fully assess the impact of a proposed treatment as perceived by the individual. In addition, a guardian may be unwilling to accept responsibility for authorising the administration of such treatments to the patient. Alternative mechanisms are required to insure that the rights of*

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<sup>531</sup> Discussion Paper pages 120-136.

<sup>532</sup> Queensland Health, *Review of the Mental Health Act, Discussion Paper Number 3: Treatment of People with Mental Illness* (May 1993), 23.



*patients are maintained in the administration of these treatments.*<sup>533</sup>

9.11.6 These proposals were open for public comment prior to release of the Green Paper. The Green Paper includes the following proposals concerning special consent mechanisms for certain types of psychiatric treatment:

- . electroconvulsive therapy - to be administered only with the consent of the patient. However, in emergency situations of life threatening risk to the patient, ECT may be administered to an involuntary patient without consent, if two psychiatrists provide written opinion that all other options have been considered and that ECT is the best remaining treatment alternative. Approval must be obtained from the Director of Clinical/Medical Services of the treatment facility and reasonable attempts made to consult with the patient's next of kin or nominated person;<sup>534</sup>
- . psychosurgery - to be declared by the Governor in Council a proscribed treatment under the *Mental Health Act* and thereby prohibited in Queensland without the written approval of the Director of Mental Health;<sup>535</sup>
- . hormone therapies - to be administered to an involuntary patient or a patient in custody on the recommendation of two psychiatrists that the treatment constitutes the least restrictive alternative available, consent to be obtained from the patient and the treatment to be approved by the Director of Clinical/Medical services of the treatment facility;<sup>536</sup>

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<sup>533</sup> Id, 24.

<sup>534</sup> Queensland Health, *Review of the Mental Health Act 1974, Green Paper* (1994), 71.

<sup>535</sup> Id, 72.

<sup>536</sup> Id, 71.

- . insulin coma therapy - to be declared by the Governor in Council a proscribed treatment under the *Mental Health Act* and thereby prohibited in Queensland without the written approval of the Director of Mental Health;<sup>537</sup>
- . group therapy - to be regulated by the issuing of guidelines by the Director of Mental Health and the Mental Health Review Committee which reports to the Health Rights Commissioner;<sup>538</sup>

9.11.7 The proposals in the Green Paper are not a statement of government policy. They have been put forward to encourage public comment before the formulation of legislation. The Commission therefore does not intend to comment further at this stage.

#### ***Donation of tissue***

9.11.8 The donation of non-regenerative tissue involves the removal of tissue or of an organ such as a kidney, for which the body cannot produce a replacement, for the purposes of donating it to another person. In Queensland, the *Transplantation and Anatomy Act 1979* provides criteria for the removal of non-regenerative tissue from adults who have the capacity to consent to such a procedure.<sup>539</sup>

9.11.9 In the Discussion Paper, the Commission expressed the view that, because of the serious nature and consequences of the donation of non-regenerative tissue, there should be strict controls on the performance of such a procedure on a person who lacks the capacity to consent. The Commission considered whether there should be a prohibition on the giving of substitute consent for the donation of non-regenerative tissue by a person whose impaired decision-making capacity prevents him or her from making a personal decision on the matter. However, the Commission acknowledged that prohibition may prevent the life of a family member being saved if the person whose decision-making capacity is impaired is the only compatible donor available. The Commission concluded that it may be more appropriate to allow consent to be given, subject to

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<sup>537</sup> Id, 72.

<sup>538</sup> Id, 72.

<sup>539</sup> *Transplantation and Anatomy Act 1979* (Qld) section 11.

stringent legislative safeguards.<sup>540</sup>

9.11.10 All but one of the submissions which commented on this issue supported the Commission's conclusion. The submission which did not agree argued that it should never be possible to delegate authority to make a decision about tissue or organ donation. The argument was founded on the belief that tissue or organ removal could not ever be for the benefit of the person from whom the tissue or organ was removed but would always be done for the benefit of another person, and that there would be a real danger of the disabled becoming a 'source of spare parts'.

9.11.11 The Commission recognises the need for protection against this kind of abuse. However, it considers that to evaluate 'benefit' to the donor only in medical terms may be to ignore the importance of the donor's emotional well-being. If the result of the donation is to save the life of someone who occupies a significant place in the donor's relationships, it may be of 'benefit' to the donor.

9.11.12 The Commission has also considered the question of consent to the removal and donation of regenerative tissue from a person who lacks capacity to consent.<sup>541</sup> It may be argued that the consequences of such a procedure are less severe for the donor, since the tissue removed is capable of regrowth or repairing itself. However, as there will inevitably be some degree of risk for the donor and as performance of the procedure will be intended to benefit a person other than the donor, the Commission believes that similar consent requirements should apply.

9.11.13 The Commission therefore recommends that consent to the donation of tissue from a donor who lacks capacity to give his or her own consent should only be able to be given by the tribunal. The tribunal should not consent if the proposed donor objects in any way to the procedure. The legislation should specify the factors to be taken into account by the tribunal in determining whether consent should be given. The tribunal should not consent unless risk to the proposed donor is small, the risk of failure of the donation is low, the life of the recipient would be in danger without the donation, and there is no other reasonably available donor who is likely to be compatible. The tribunal should also consider the closeness of the personal relationship between the proposed donor and the recipient.<sup>542</sup>

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<sup>540</sup> Discussion Paper page 132.

<sup>541</sup> Criteria for the removal of regenerative tissue from adults who have capacity to consent are provided in section 10 of the *Transplantation and Anatomy Act 1979* (Qld).

<sup>542</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) section 70.

**Sterilisation**

9.11.13 In recent years there has been increasing debate about medical treatment involving the sexuality and fertility of people who, because of impaired decision-making capacity, are unable to give their own consent to such treatment. Much of the discussion has centred on decisions concerning medical interventions for young women with an intellectual disability who lack the capacity to decide for themselves about proposals concerning contraceptive or menstrual management measures. Sterilisation procedures may also be proposed for men with impaired decision-making capacity.

9.11.14 The sexual development and awareness of young adults with an intellectual disability may be normal for their chronological age, although their mental age may only be that of a small child. As a result a young adult may experience sexual feelings but be incapable of understanding the possible consequences of a sexual relationship. A young woman, for example, may be distressed by menstruation, and there may be associated behavioural and hygiene problems. In such a situation, parents (who are often the primary carers) and health care professionals may believe that medical intervention is appropriate and that to prevent intervention may be to deny a lifestyle choice available to other women.

9.11.15 There is, however, a growing community awareness about the importance of safeguards against inappropriate use of these forms of intervention, particularly sterilisation procedures.

9.11.16 In the Discussion Paper, the Commission proposed that there should be legislation to ensure that surgical procedures for the purpose of menstrual management and fertility control are not carried out unnecessarily. It suggested that only the tribunal should be authorised to consent to such procedures and that the proposed legislation should include criteria for the granting of consent.<sup>543</sup>

9.11.17 Not surprisingly, the submissions received by the Commission were divided on these issues. There was considerable support for the Commission's proposals. However, there was also a strongly expressed view that such decisions should be left to the parents of the person concerned in consultation with relevant medical practitioners.

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<sup>543</sup> Discussion Paper page 129.

9.11.18 The Commission believes that, in the overwhelming majority of cases where carers consent, they act with integrity in what they consider to be the best interests of their child. They decide only after extensive medical consultation and give the matter a great deal of thought. They do not make the decision lightly.

9.11.19 However, research involving small groups of women with high support needs reports positive outcomes in teaching menstrual management skills to these women. Medical practitioners may not encounter, and therefore may not be aware of the existence of, women with high support needs and their families who are managing menstruation and fertility control through non-medical means. Moreover, the training of health care professionals may not reflect the contemporary change of direction in services for people with impaired decision-making capacity away from a medical model towards a more educational approach and a more normalised lifestyle. Some medical practitioners may therefore not have an accurate knowledge of current practices in services to people with an intellectual disability on which to base predictions and advice about menstrual and fertility management.<sup>544</sup>

9.11.20 The Commission is concerned that insufficient information may be available to parents or other carers about alternatives to medical solutions. As a result, it may be difficult for parents to make a truly informed choice. With access to counselling, more information and practical support, it is possible that different choices may be made.<sup>545</sup> The Commission envisages the role of the tribunal as providing an accessible and independent forum in which the full range of options can be explored in a non-adversarial manner.

9.11.21 In all Australian States and Territories where there is comprehensive legislation dealing with decision-making for people whose decision-making capacity is impaired, authority to consent to sterilisation procedures on adults is restricted.<sup>546</sup> The High Court has also held, in relation to the performance of sterilisation procedures on minors, that authority to consent is restricted.<sup>547</sup> In the view of the Commission it is desirable that its recommendations should be consistent with developments in this area of the law elsewhere in Australia.

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<sup>544</sup> Wilson et al, *Menstrual Management and Fertility Management for Women Who Have an Intellectual Disability: An Analysis of Australian Policy* (1992) 1-13.

<sup>545</sup> In Victoria, the experience of the Office of the Public Advocate has been that 'applications for sterilisation usually reflect not a need for sterilisation but a lack of support services .... services such as education programs in menstrual management or human relations, therapist's advice re design of bathrooms, home help services and such like. If these matters are given attention... then not infrequently the family's perception that their daughter needs a sterilisation is altered.' Letter from the Deputy Public Advocate dated 10 September 1993.

<sup>546</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 37; *Guardianship Act 1987* (NSW) sections 33(1), 36(1); *Adult Guardianship Act 1988* (NT) section 21; *Guardianship and Administration Act 1990* (WA) section 57; *Guardianship and Management of Property Act 1991* (ACT) sections 4, 70.

<sup>547</sup> *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Re Marion*).

**9.11.22 The Commission therefore recommends that only the tribunal should be able to consent to the performance of a sterilisation procedure on an adult who lacks capacity to consent.<sup>548</sup>**

**9.11.23 In the Discussion Paper, the Commission also proposed a set of criteria which the tribunal would have to take into account in determining an application for the performance of a sterilisation procedure.<sup>549</sup> The Commission remains of the view that sterilisation procedures should not be authorised unless all other possible programs and procedures have been considered, and found to be inappropriate or more restrictive.**

**9.11.24 The Commission therefore recommends that before consenting to a sterilisation procedure the tribunal must be satisfied that:**

- . the procedure is medically necessary; or**
- . the person concerned is, or is likely to be, fertile and sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or**
- . if the person on whom it is proposed to perform the procedure is female, cessation of menstruation by sterilisation is the only practicable way of overcoming demonstrated problems associated with menstruation;**

**and that:**

- . the treatment cannot reasonably be postponed; and**
- . the person concerned is not likely, in the foreseeable future, to develop the capacity to decide.<sup>550</sup>**

**9.11.25 The Commission further recommends that the tribunal be required to take into account:**

- . alternative forms of treatment which are presently available, or likely to become available in the foreseeable future;**

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<sup>548</sup> In the Discussion Paper (at page 129) the Commission suggested that, in relation to consent for certain medical procedures, the jurisdiction of the tribunal might be extended to include people with impaired decision-making capacity aged sixteen years and over. However, since the Discussion Paper was published, the Commission has undertaken a reference concerning consent by young people under the age of eighteen years to medical treatment. The Commission considers that this matter is more appropriately dealt with in the context of that reference.

<sup>549</sup> Discussion Paper pages 129-130.

<sup>550</sup> See for example *Guardianship and Administration Act 1993 (SA)* section 61(2).

**the nature and extent of any significant risks associated with the proposed treatment and with any available alternative forms of treatment, including other sterilisation procedures; and**

9.11.26 The Commission is aware that implementation of its recommendations requires a commitment to the provision of services.<sup>551</sup> The Commission believes that people whose decision-making capacity is impaired have a right to appropriate education,<sup>552</sup> training and behavioural programs to assist their sexual development, and that their families are entitled to home help and respite services which allow them a quality of life equal to that enjoyed by other families in the community.

9.11.27 There is, at present, some doubt about the legality of sterilisation procedures performed in Queensland, even if a valid consent has been obtained. The uncertainty hinges on whether or not a sterilisation procedure which is carried out for contraceptive or other non-therapeutic purposes can ever be for the patient's benefit.<sup>553</sup> There are judicial decisions in other jurisdictions which suggest that a non-therapeutic sterilisation procedure may not be for the patient's benefit.<sup>554</sup>

9.11.28 The Criminal Code Review Committee has recommended amendment to the Code to make it clear that sterilisation procedures performed with a legally valid consent are not unlawful.<sup>555</sup> However, if this recommendation is not implemented, it is the view of the Commission that its proposed legislation should provide that a sterilisation procedure performed in accordance with the requirements of the legislation would not be unlawful.

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<sup>551</sup> See sections 9 and 24 of the *Disability Services Act* 1992 (Qld) which provide, respectively, that people with disabilities are entitled to 'services that support their attaining a reasonable quality of life in a way that supports their family unit and their full participation on society', and that programs and services should be designed and implemented to recognise and take into account the implications for and demands on the families of people with disabilities.

<sup>552</sup> The Intellectual Disability Services Division of the Department of Family Services and Aboriginal and Islander Affairs has recently produced, in conjunction with the Menstrual Management Team from the Department of Social Work and Social Policy, University of Queensland, a resource kit including a booklet entitled '*Managing Menstruation*', for use by consumers, families, support staff and agencies.

<sup>553</sup> Section 282 of the *Criminal Code* provides protection from criminal liability to a person who performs a surgical operation in good faith and for the 'benefit' of the patient.

<sup>554</sup> *Bravery v Bravery* [1954] 1 WLR 1169 per Denning LJ; *Re Eve* [1986] 2 SCR 388.

<sup>555</sup> *Final Report of the Criminal Code Review Committee* (1992) 53, 191; *Draft Criminal Code Bill* (1994) section 53(2). A similar recommendation was made in the *Report and Recommendations of the Commission of Inquiry into the Status of Women in Queensland* (1973) 10-11. See also *Crimes Act* (NZ) section 61A(2).

### **Termination of pregnancy**

9.11.29 If a woman whose decision-making capacity is impaired becomes pregnant, the question may arise as to whether or not the pregnancy should be terminated. Her family and medical advisers may consider that giving birth may be a frightening experience for her, that she would be unable to care for the child or that she would be distressed if the child were taken away from her to be given up for adoption, or that continuing the pregnancy would have a seriously adverse effect on her physical or mental health.

9.11.30 In some Australian jurisdictions, special consent provisions apply to termination of pregnancy.<sup>556</sup> The Commission is of the view that, because of the serious consequences of a termination procedure, similar provisions should be introduced in Queensland.

9.11.31 **The Commission therefore recommends that only the tribunal should be authorised to consent to a termination of pregnancy for a woman unable to give her own consent because her decision-making capacity is impaired.**

9.11.32 At present, in Queensland, it is an offence to unlawfully procure a miscarriage.<sup>557</sup> However, a person will not be criminally liable if the abortion was procured by means of a surgical operation performed in good faith with reasonable care and skill, provided that the operation was necessary for the preservation of the mother's life and its performance was reasonable in all the circumstances of the case.<sup>558</sup> 'Preservation of the mother's life' includes prevention of serious danger to her physical or mental health.<sup>559</sup>

9.11.33 Recently, there have been calls for the law in Queensland relating to abortion to be changed. Such a proposal is outside the scope of this reference. However, if the law remains unchanged, **the legislation proposed by the Commission should provide that the authority of the tribunal to consent to a termination of pregnancy is limited to situations where the procedure would**

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<sup>556</sup> See for example *Adult Guardianship Act 1988* (NT) section 21(4)(b)(ii); *Guardianship and Administration Board (Vic) Annual Report 1989-1990*, 38; *Disability Services and Guardianship (General Regulation) 1989* (NSW) clause 5; *Guardianship and Management of Property Act 1991* (ACT) sections 4, 70; *Guardianship and Administration Act 1993* (SA) sections 3, 61.

<sup>557</sup> *Criminal Code* section 224.

<sup>558</sup> *Criminal Code* section 282.

<sup>559</sup> See *R v Bourne* [1939] 1 KB 687; *R v Ross and McCarthy* [1955] StRQd 48; *K v T* [1983] 1 QdR 396; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8. It has been suggested that it might be sufficient to avoid liability under section 282 of the *Criminal Code* if the abortion was performed in good faith and with reasonable care and skill for the benefit of the mother, and if its performance was reasonable in the circumstances, but that it is unlikely that the clear trend of the authorities would be reversed. See R O'Regan, 'Surgery and Criminal Responsibility under the Code' (1990) 14 *Criminal Law Journal*, 73.



otherwise be lawful.<sup>560</sup> The test should be that the tribunal is satisfied that performance of the termination is necessary to preserve the mother from a serious danger to her life or to her physical or mental health. The legislation should also provide that a termination of pregnancy is lawful if it is performed with the consent of the tribunal.

### ***Experimental treatment and research***

9.11.34 As far as the Commission is aware, there is no legislation in Queensland regulating human participation in experimental treatment and medical research.<sup>561</sup> The National Health and Medical Research Council has issued ethical guidelines for the conduct of such research.<sup>562</sup> Compliance with these guidelines is usually required for approval for research conducted within an institution<sup>563</sup> and for funding purposes.<sup>564</sup> It is also the policy of the Australian Medical Association.<sup>565</sup>

9.11.35 The guidelines provide that, before research is undertaken, the free consent of the subject should be obtained.<sup>566</sup> They further provide that '[s]pecial care must be taken in relation to consent, and to safeguarding individual rights and welfare where the research involves children, the mentally ill and those in dependant relationships or comparable situations'.<sup>567</sup> In the case of a subject who, as a result of 'mental illness', lacks the capacity to consent 'consent should also be obtained from the person who stands legally in the position of guardian, next friend, or the like'.<sup>568</sup>

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<sup>560</sup> See for example *Guardianship and Management of Property Act 1991* (ACT) section 70; *Guardianship and Administration Act 1993* (SA) section 61.

<sup>561</sup> Cf *Animals Protection Act 1925* (Qld) and *Animals Protection (Use of Animals for Scientific Experiments) Regulations 1991*.

<sup>562</sup> National Health and Medical Research Council, *Statement on Human Experimentation and Supplementary Notes* (1992).

<sup>563</sup> *Statement on Human Experimentation and Supplementary Notes*, Supplementary Note 1 (1992).

<sup>564</sup> See for example *National Health and Medical Research Council Act 1992* section 51(3).

<sup>565</sup> Australian Medical Association, *Handbook of Resolutions* (1993) Annexure E.

<sup>566</sup> *Statement on Human Experimentation*, clause 8.

<sup>567</sup> *Id.*, clause 10.

<sup>568</sup> *Id.*, Supplementary Note 2 (1992).

9.11.36 The guidelines appear to assume that a legally appointed 'guardian' has authority to consent to all forms of experimental treatment or research. The Commission is not persuaded that this is so.

9.11.37 Research and experimental treatment can be broadly categorised as being either therapeutic or non-therapeutic. Therapeutic research or experimentation is designed and conducted for the benefit of the subject, either to diagnose or treat illness. Non-therapeutic research, on the other hand, refers to an experiment designed not to benefit the research subject directly but to gain knowledge that can be used in the treatment of other persons.<sup>569</sup>

9.11.38 The provisions which currently exist in Queensland for giving substitute consent to treatment of a person who lacks the capacity to give his or her own consent were discussed on pages 128-131. If an application is made to the Supreme Court in the exercise of its *parens patriae* jurisdiction, the Court will apply the test of what is in the best interests of the person with impaired decision-making capacity.<sup>570</sup> If a committee has been appointed under the *Mental Health Act 1974*, he or she will also be under a duty to act in the best interests of the person concerned.<sup>571</sup> If an application is made to the Legal Friend for consent to treatment of a person who is an assisted person under the *Intellectually Disabled Citizens Act 1985*, the Legal Friend can consent to treatment which is for the benefit of the person and which is the least restrictive option available.<sup>572</sup>

9.11.39 In the view of the Commission, application of these tests would preclude a substitute consent being given for a person with impaired decision-making capacity to participate in non-therapeutic research or experimentation. It may also prevent valid authorisation of participation in therapeutic research or experimental treatment.

9.11.40 The Commission therefore believes that the National Health and Medical Research Council guidelines about consent to participation in medical research and experimentation, although important, are insufficient and that legislation should be enacted to clarify the position.

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<sup>569</sup> A Varga, *The Main Issues in Bioethics* (1984) 155.

<sup>570</sup> See para 3.8.2.

<sup>571</sup> R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 4-6, 4-7.

<sup>572</sup> See para 9.5.3.

### ***Therapeutic***

9.11.41 The principle underlying the Commission's recommendations in relation to substituted health care decisions is the adoption of the most appropriate form of treatment for the purpose of promoting and maintaining the health and well-being of a person who lacks capacity to consent.<sup>573</sup> Circumstances may arise in which conventional methods of treatment have failed and in which the only hope of improvement lies in research to gain further information about the patient's condition or in treatment which is still at an experimental stage. While the Commission recognises the need for safeguards to protect the person's interests in such a situation, it is also of the view that a person should not be denied a potential benefit merely because he or she is unable to give consent.

9.11.42 The Commission therefore recommends that only the tribunal should be able to consent for a person who lacks the capacity to make his or her own decision about the matter to take part in research or to be given experimental treatment which is intended for the person's benefit.

9.11.43 The tribunal should not consent unless it is satisfied that:

- . the research or treatment relates to a condition which affects the patient; and
- . the research or treatment involves minimal risk to the person; and
- . the research or treatment has been approved by a relevant ethics committee; and
- . the research or treatment may result in significant benefit to the person; and
- . the benefit cannot be achieved without the research or treatment.

9.11.44 The tribunal should also refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment.

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<sup>573</sup> See para 9.7.3.

### ***Non-therapeutic***

9.11.45 By definition, non-therapeutic research will not ever be able to comply with the criteria proposed by the Commission for consent to performance of a medical procedure on a person with impaired decision-making capacity, since it is not for the purpose of promoting or maintaining the health and well-being of the person who is the subject of the research.<sup>574</sup>

9.11.46 However, while some non-therapeutic research may involve procedures such as a general anaesthetic which carry a significant degree of known risk, other non-therapeutic research may involve minimal risk to a person who is the subject of the research. For example, it may merely require the taking of a blood sample. Further, research which is not immediately of direct benefit to a person who is the subject of the research, but which may contribute to the development of knowledge about impaired decision-making capacity and may, in the future, significantly benefit the person or other people affected by a particular condition, may not be possible without the participation of people with that condition.

9.11.47 After careful consideration, the Commission is of the view that, in some circumstances, consent for a person with impaired decision-making capacity to participate in non-therapeutic research may be justified, provided that the rights, dignity and well-being of vulnerable members of our society are adequately protected.

9.11.48 The Commission therefore recommends that only the tribunal should be able to grant consent for a person who lacks the capacity to make his or her own decision about the matter to take part in research or to be given experimental treatment intended to gain further knowledge about the patient's condition.

9.11.49 The tribunal should not consent unless it is satisfied that:<sup>575</sup>

- . the research relates to a condition which affects the person; and
- . the research involves minimal risk to the person; and
- . the research has been approved by a relevant ethics committee;  
and

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<sup>574</sup> See paras 9.7.3, 9.11.37.

<sup>575</sup> See for example Scottish Law Commission, Discussion Paper No 94, *Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances* (1991) 128-129; The Law Commission, Consultation Paper No 129, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (1993) 111.

- . the research may result in significant benefit to the person or other people affected by the same condition as the person; and
- . the research cannot be carried out without the participation of a person or persons affected by that condition.

**9.11.50** The tribunal should also refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment.

#### ***Additional forms of treatment***

**9.11.51** As a result of developments in technology and research, treatments once regarded as experimental may become normal procedures. They would therefore no longer require the consent of the tribunal. However, there may be some other reason - such as, for example, their invasive nature or possible consequences - why the consent of the tribunal should still be obtained. Over time, accepted standards of practice may change, or additional forms of treatment for which special consent procedures should apply may be identified.

**9.11.52** The Commission therefore recommends that the proposed legislation include a power for additional forms of treatment to be specified by regulation made under the legislation as requiring special consent procedures.

## **9.12 TREATMENT WITHOUT CONSENT**

**9.12.1** In certain situations, it may be appropriate or necessary for treatment to be given without consent. Unless legislation makes provision for this to happen, the health care provider risks liability for assault.<sup>576</sup> However, in order to protect a person who is unable to give his or her own consent, the circumstances in which treatment may lawfully be given without consent should be clearly described.

**9.12.2** If a person with impaired decision-making capacity needs to be treated urgently, there may not be time for the health care provider to identify and locate a person who has authority to decide about health care treatment for the person or to obtain the consent of the tribunal. This would obviously be the case where emergency treatment was required to save the person's life or to prevent

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<sup>576</sup> See paras 9.1.1-9.1.2.

serious damage to his or her health. Even if the proposed treatment is not life-saving, there may be situations where delay in obtaining consent would cause unreasonable and unnecessary pain or distress to the patient. In the view of the Commission, a health care provider should be able to administer treatment to a patient in such a situation without risking exposure to either criminal or civil liability.

**9.12.3 The Commission therefore recommends that the proposed legislation should state that where the treatment provider believes that treatment is necessary to meet imminent risk to the person's life<sup>577</sup> or health,<sup>578</sup> the treatment may be given even though consent has not been obtained. The Commission also recommends that the legislation should provide that treatment may be administered without consent if the treatment provider believes that the treatment should be given urgently to prevent significant pain or distress.<sup>579</sup>**

**9.12.4 However, the legislation should also state that the treatment provider is not authorised to give treatment if the person objects to the treatment or if the treatment provider is aware that the person, at a time when he or she was capable of making his or her own health care decisions, refused treatment of the kind proposed.<sup>580</sup>**

**9.12.5 The Commission further recommends that the legislation should provide that it is an offence to administer treatment to a person who lacks capacity to consent to that treatment unless consent for the treatment has been given in accordance with the requirements of the legislation or of any other Act,<sup>581</sup> or the legislation authorises performance of the treatment without consent, or the treatment is given in accordance with an order of the Supreme Court in its *parens patriae* jurisdiction.<sup>582</sup>**

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<sup>577</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 36(3); *Guardianship Act 1987* (NSW) section 39(1)(a); *Adult Guardianship Act 1988* (NT) section 21(1); *Guardianship and Administration Act 1993* (SA) section 62(2)(a).

<sup>578</sup> See for example *Guardianship Act 1987* (NSW) section 39(1)(b); *Guardianship and Administration Act 1993* (SA) section 62(2)(a).

<sup>579</sup> See for example *Guardianship Act 1987* (NSW) section 39(1)(c). The Commission recognises that close consideration will need to be given to the relationship between this recommendation and proposed requirements for special consent procedures as a result of the review of the *Mental Health Act*. (See pages 146-148 of this Draft Report). Consideration will also need to be given to the relationship between this recommendation and section 52 of the *Medical Act 1939* (Qld). (See page 130 above). The *Medical Act* is also currently under review. The Commission will liaise with Queensland Health in relation to both these issues.

<sup>580</sup> See paras 9.7.10, 9.7.11. Refusal of treatment is discussed on pages 166-170.

<sup>581</sup> For example, the *Mental Health Act 1984* (Qld).

<sup>582</sup> See for example *Guardianship Act 1987* (NSW) section 35(1). Treatment in compliance with the special consent procedures proposed by the current review of the *Mental Health Act* would also be exempted from the effect of this provision.

## 9.13 AN ALTERNATIVE CONSENT MECHANISM

9.13.1 In the Discussion Paper, the Commission expressed the view that the principle of self-determination should be promoted by enabling a person who has the necessary legal capacity to make arrangements for decisions about his or her health care to be made if he or she should lose that capacity in the future.<sup>583</sup> This proposal was generally supported by the submissions received.

### *The concept of an advance directive*

9.13.2 One way in which such arrangements can be made is by an enduring power of attorney for health care, by which one person appoints another to make decisions on his or her behalf in the event that he or she should lose the capacity to decide.<sup>584</sup> An alternative is to allow a person to give instructions which would be directly binding on health care professionals in the event of subsequent loss of capacity. Some people may prefer this alternative, either because they do not have a close friend or relative whom they wish to appoint to make decisions on their behalf, or because they do not want to burden another person with the responsibility of making their decisions.

9.13.3 In the Discussion Paper the Commission considered the question of advance directives only in the context of terminal or irreversible conditions. However, there are other situations in which it would be of benefit for a person to be able to exercise control over future health care decisions.

9.13.4 One such situation, for example, is a person who suffers from an episodic mental illness. Such a person would be able to plan for times when he or she may be incapable of making decisions about health or personal care. In Canada, a type of directive known as a 'Ulysses agreement' has been developed. The agreement can be used to identify the symptoms of the person's mental illness, the action which the person would like taken if he or she displays those symptoms and the people who have agreed to be involved in carrying out that action.<sup>585</sup>

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<sup>583</sup> Discussion Paper page 148.

<sup>584</sup> The Commission's recommendations on enduring powers of attorney for health care are on pages 134-140.

<sup>585</sup> See paras 9.15.10-9.15.12.

### **Legal recognition of advance directives**

9.13.5 There is some doubt about the legal status of an advance health care directive in the absence of legislation to give it binding force. It is generally regarded as uncertain whether a health care provider would be bound to carry out the terms of the directive, or whether the directive is merely an indication of the wishes of the person concerned, which may or may not have a persuasive effect on the person's family and health care providers.<sup>586</sup>

9.13.6 The Commission therefore recommends that legislation be introduced to enable a person with the necessary degree of decision-making capacity to make an advance directive containing information and instructions about his or her future health care. The legislation should provide that when such a directive becomes operative, it is as effective as if the person made the decision at the time it needed to be made and had the capacity to make the decision at that time.

### **Execution of an advance directive**

9.13.7 As with enduring powers of attorney for health care, the legislation should contain provisions for executing and revoking an advance directive and for safeguarding the rights and interests of the maker of the directive.

9.13.8 It has been observed that:<sup>587</sup>

*...[F]ormalities of execution serve a number of important functions. They protect the maker from undue influence and fraud, they provide reliable and permanent evidence of the intentions of the maker, and they impress upon the maker the significant consequences of the document. However, ....health care directives should be as accessible as possible to everyone who wishes to make one. Accordingly, the method of execution of health care directives should be as simple as possible, and should involve formalities only to the extent that is absolutely necessary.*

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<sup>586</sup> See for example D Lanham and B Fehlberg, 'Living Wills and the Right to Die with Dignity' (1991) 18 *Melbourne University Law Review* 329 at 331. But see also *Malette v Schulman* (1990) 67 DLR (4th) 321; *Fleming v Reid* (1991) 82 DLR (4th) 298; *Airedale NHS Trust v Bland* (1993) AC 789.

<sup>587</sup> Manitoba Law Reform Commission, Report #74, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (1991) 12.



**9.13.9** The Commission believes that the procedures set out in Chapter 8 for the execution of an enduring power of attorney adequately achieve the desired balance, and that similar procedures should be adopted for the execution of an advance directive.

**9.13.10** The Commission therefore recommends that:

- **an advance directive should be in writing and signed by or on behalf of the person making it;**
  - **an advance directive should be witnessed;**
  - **the witness should be a Justice of the Peace, a Commissioner for Declarations or a legal practitioner;**
  - **the witness should not be related to or a current health care provider for the maker of the advance directive;**
- and**
- **if the advance directive is signed by another person on behalf of the maker of the directive, the person who signs the directive should not be a witness or a person whom the maker of the directive has appointed as a decision-maker.**

**9.13.11** The Commission also considered a requirement that the directive must include a certificate from a medical practitioner to the effect that the practitioner has discussed with the person making the directive the instructions which the person has given in the directive. The purpose of this requirement would be to promote communication between patients and practitioners about future health care in the event of a patient's loss of decision-making capacity and to help ensure that patients are aware of the medical implications of the instructions they have given. In the view of the Commission, knowledge that the contents of the directive had been discussed with a practitioner would be likely to increase the willingness of other health care providers to comply with the directive. These advantages would have to be weighed against the difficulties involved in implementing such a proposal. For example, if the completion of the certificate is not contemporaneous with the execution of the directive, there will be no guarantee that the contents of the directive are in fact what was discussed with the practitioner. However, to make the certificate part of the execution process may make the procedure more complex.

**9.13.12** The Commission's provisional proposal is to recommend that any form developed for the creation of an advance directive should advise about the desirability of including such a certificate in the directive and should make provision for this to be done, but that the certificate should not be a mandatory requirement for valid execution of the directive.

9.13.13 These issues were not raised in the Discussion Paper. There will obviously be a need for the Commission to consult with the medical profession about them before formulating its final recommendations. **The Commission specifically invites submissions from other interested parties.**

***Use of a prescribed form***

9.13.14 In the Discussion Paper, the Commission raised the issue of whether a health care directive should be in a prescribed form.<sup>588</sup> The Commission noted that a requirement of compliance with a form set out in the legislation may result in inflexibility and in directives being invalidated on technical grounds. The Commission agrees with the approach taken by the Manitoba Law Reform Commission, which recommended that individuals should be able to use any form and any words which clearly express their wishes for future medical treatment, but that it would be useful if there was an approved form which could be used for guidance.<sup>589</sup> The Commission envisages the participation of health care providers in designing suitable forms.

***Appointing a health care decision-maker in an advance directive***

9.13.15 If the maker of a health care directive is allowed to use any form of words, he or she may not give directions which are meaningful for health care professionals. The directions may lack sufficient clarity or may fail to anticipate the circumstances which actually arise. This problem can be overcome to a certain extent by encouraging makers of health care directives to consult and involve their health care professionals in the preparation and execution of the health care directive. In the Discussion Paper, the Commission proposed that, in addition to giving instructions about future health care, the maker of a health care directive should also be able to appoint a decision-maker to act on his or her behalf if the instructions were inadequate.<sup>590</sup> In such a situation, the person appointed would become an attorney for health care decisions and would be subject to the same duties and obligations as if he or she had been appointed under an enduring power of attorney.

9.13.16 **The Commission therefore recommends that the maker of an advance directive for health care be able to appoint another person or persons to make decisions on his or her behalf if the instructions in the**

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<sup>588</sup> Discussion Paper pages 146-147.

<sup>589</sup> Report #74, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (1991) 15.

<sup>590</sup> Discussion Paper page 149.

**directive are inadequate or unclear. A person who is not eligible to be an attorney under an enduring power of attorney for health care should not be eligible for appointment under an advance directive.<sup>591</sup>**

### ***Revocation***

#### ***Capacity***

**9.13.17** A person who has the capacity to revoke an advance directive should be able to do so. The test of capacity should be the equivalent of that for capacity to revoke an enduring power of attorney for health care.<sup>592</sup>

**9.13.18** The Commission therefore recommends that the test of capacity to revoke an advance directive for health care should be whether the person has sufficient capacity to make a new directive.

#### ***Method***

**9.13.19** The Commission acknowledges that revocation of an advance directive should not be a complicated process. However, to allow oral revocation would inevitably lead to problems of proof. Further, revocation involves important legal consequences.

**9.13.20** The Commission therefore recommends that revocation of an advance directive for health care should be in writing and signed and witnessed in the same way as the execution of the directive.

**9.13.21** An advance directive should also be revoked by the execution of a subsequent directive to the extent that the subsequent directive relates to the same health care decisions or appoints a different decision-maker, provided that at the time the later directive was executed, the maker had sufficient capacity. A later enduring power of attorney should also revoke an earlier advance directive to the extent that the enduring power of attorney authorises an attorney to make a decision included in the advance directive or appoints someone other than the person nominated in the advance directive to make decisions on the donor's behalf.

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<sup>591</sup> See page 118.

<sup>592</sup> See page 139.

### **Preservation of common law rights**

9.13.22 Although, as explained earlier, there is some uncertainty whether advance directives are binding at common law,<sup>593</sup> there have been recent indications of growing acceptance by the courts.<sup>594</sup> Although the Commission is not aware of any relevant Australian authority, the Commission does not intend that the expressed wishes of a patient should be ignored because they do not conform to the legislative requirements, if they would be given effect to at common law.

9.13.23 It has been suggested that this approach might lead to unnecessary uncertainty and could undermine any restrictions which legislation attempted to impose.<sup>595</sup> In the view of the Commission, the purpose of the statutory limitations is to protect the maker of the advance directive. A court would be unlikely to give effect to an informal directive unless there was clear evidence that the directive did in fact represent the true wishes of the patient. The Commission considers that court scrutiny of the evidence should provide adequate protection. Such an approach would not increase uncertainty, but would rather maximise the opportunity for people to exercise control over their future medical treatment.

9.13.24 **The Commission therefore recommends that the legislation should also provide that its provisions about advance directives do not detract from any existing common law rights.**<sup>596</sup>

## **9.14 REFUSAL OF TREATMENT**

### ***The general law***

9.14.1 The corollary of the requirement of consent is the right of a person who has the necessary degree of understanding to refuse to undergo treatment. It is generally accepted that the right of refusal extends to all forms of treatment, from relatively minor and routine procedures to measures which may save or prolong life. The principle of self-determination means that a competent patient has a decisive role in the health care process, even if the decision may involve risks and

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<sup>593</sup> See page 162.

<sup>594</sup> See for example *Malette v Schulman* (1990) 67 DLR (4th) 321; *Airedale NHS Trust v Bland* [1993] AC 789; *In re C* [1994] 1 WLR 290.

<sup>595</sup> The Law Commission, Consultation Paper No 129, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (1993) 35.

<sup>596</sup> See for example Manitoba Law Reform Commission, Report #74, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (1991) 11.

is against the weight of professional opinion. A health care professional who treats a patient who has refused to consent or who continues to treat after consent has been withdrawn may be liable both civilly and criminally for assault.<sup>597</sup> Provided the patient has been given sufficient information to make an informed decision, the wishes of the patient must be respected although the result of the decision is that the patient may die.<sup>598</sup>

9.14.2 On the other hand, a health care professional has certain duties under the *Criminal Code*. Section 285 of the *Code* requires a person having charge of another to provide that person with the necessaries of life if he or she is unable because of age, sickness, unsoundness of mind or any other cause to withdraw from such charge and is unable to provide such necessaries for himself or herself. 'Necessaries' may include medical treatment.<sup>599</sup> Section 290 imposes a duty to perform an act, the omission of which may be dangerous to human life or health.

9.14.3 It is arguable that once consent to treatment has been withdrawn, the duty to provide such treatment no longer exists.<sup>600</sup> However, the apparent conflict between the two principles and the legal uncertainties which may arise over whether something is an 'act' or an 'omission'<sup>601</sup> may result in both patients and health care providers being unclear about their legal position.

9.14.4 In some jurisdictions, the right to refuse treatment has been given statutory recognition. In Victoria, for example, a patient may sign a 'Refusal of Treatment' form.<sup>602</sup> The advantage of such legislation is that it ensures that the

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<sup>597</sup> See for example the decision of the Ontario Court of Appeal in *Malette v Schulman* (1990) 67 DLR (4th) 321, where a doctor's honest and justifiable belief that a blood transfusion was medically necessary did not relieve him from liability for performing an unauthorised procedure.

<sup>598</sup> See for example *Airedale NHS Trust v Bland* [1993] AC 789 at 858-859 per Lord Keith, at 864-865 per Lord Goff and at 891-892 per Lord Mustill.

<sup>599</sup> *R v MacDonald and MacDonald* [1904] StRQd 151.

<sup>600</sup> See for example The Law Reform Commission of Western Australia, *Report on Medical Treatment for the Dying*, Project No 84 (1991) 4. Legislation proposed in South Australia would, if enacted, provide that a doctor is under no duty, in the absence of an express direction to the contrary, to use or to continue to use, extraordinary measures in treating the patient if the effect of doing so would be merely to prolong life in a moribund state without any real prospect of recovery. (*Consent to Medical Treatment and Palliative Care Bill 1994* (SA) clause 16(2).)

<sup>601</sup> See for example *Airedale NHS Trust v Bland* [1993] AC 789.

<sup>602</sup> *Medical Treatment Act 1988* (Vic). The patient may refuse treatment of a particular kind or treatment in general. To be effective, the refusal must relate to a condition which is in existence at the time when the form is signed. The patient must have been given and have understood sufficient information about his or her condition and alternative forms of treatment to allow him or her to decide whether to refuse treatment in general or of a particular kind for that condition. See section 5.

patient's expressed wishes are legally binding on health care providers.<sup>603</sup> It also protects health care providers from criminal prosecution and from civil action for failing to perform or to continue treatment.<sup>604</sup> There is no equivalent legislation in Queensland at present.

9.14.5 In a recent English court case, some of the judges recognised that, unlike the situation in Victoria,<sup>605</sup> the right to refuse treatment was not restricted to the time of treatment. They said that the same principle would apply if a person had given clear instructions that, if his or her state of health involved dependency on a life support system, treatment designed to sustain or prolong life should not be administered.<sup>606</sup>

9.14.6 There is some legislation in Australia which allows a person to give a direction in advance to the effect that, in the event that he or she becomes terminally ill, extraordinary measures that prolong or are intended to prolong life are not to be administered. The direction may be given at any time while the person has the necessary degree of understanding to do so, but it will not come into operation until the person becomes terminally ill.<sup>607</sup> At present in Queensland there is no equivalent legislation.

### ***Where the patient lacks capacity to decide***

9.14.7 A person who is authorised to give consent to health care treatment for a person with impaired decision-making capacity necessarily has some power to refuse treatment. Simply by choosing between two alternative forms of treatment, the decision-maker is refusing one of them.

9.14.8 In relation to treatment which is intended to sustain or prolong life, Victoria is, at present, the only jurisdiction in Australia where legislation specifically

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<sup>603</sup> See for example *Medical Treatment Act 1988 (Vic)* section 6.

<sup>604</sup> See for example *Medical Treatment Act 1988 (Vic)* section 9.

<sup>605</sup> See note 602 above.

<sup>606</sup> *Airedale NHS Trust v Bland* [1993] AC 789 at 857 per Lord Keith and at 864 per Lord Goff. However, these remarks were *obiter*, as there was no evidence that the patient in the case had ever actually expressed any views about the kind of treatment he would or would not wish to receive. In any event, decisions of English courts, while persuasive, are not binding in Australia.

<sup>607</sup> *Natural Death Act 1983 (SA)* section 3; *Natural Death Act 1988 (NT)* section 3. It is proposed to repeal the South Australian legislation and to replace it with a *Consent to Medical Treatment and Palliative Care Act*, which is intended to provide for the appointment of medical agents by those who desire to do so to make decisions about their medical treatment when they are unable to make such decisions for themselves, and to protect the dying from medical treatment that is intrusive, burdensome and futile.

allows a substitute decision-maker to refuse consent to such treatment.<sup>608</sup> In the Australian Capital Territory the donor of an enduring power of attorney for medical treatment may specify any forms of treatment - for example, a blood transfusion - to which the attorney is not to have authority to consent.<sup>609</sup> However, it is arguable that this does not constitute an unequivocal right to refuse the specified treatment on behalf of the donor. Legislation proposed in South Australia would, if enacted, enable an agent appointed under a medical power of attorney to refuse, subject to any conditions stated in the power of attorney, consent to intrusive or burdensome medical treatment if the person who grants the power is incapable of making the decision on his or her own behalf.<sup>610</sup>

9.14.9 Circumstances may arise in which it is necessary to make decisions about whether to continue treatment for a person who lacks the necessary capacity to decide on his or her own behalf. Such a situation may occur, for example, because a terminally ill patient has reached a point where there is no longer any treatment which will effect a cure or prevent the progress of the disease towards the person's death, or because the person is, as a result of irreversible brain damage, in a persistent vegetative state.

9.14.10 A person who lacks capacity to make his or her own decision about treatment in such circumstances may previously have given instructions that he or she would not want life-sustaining treatment if he or she were terminally ill or in an irreversible vegetative state. Although there is some doubt about the legal status of such instructions in the absence of legislation to give them binding force,<sup>611</sup> there have been recent indications in other jurisdictions that courts may be willing to recognise them.<sup>612</sup>

9.14.11 In the Discussion Paper, the Commission considered the issue of legislation concerning withdrawal of treatment in this type of situation.<sup>613</sup> The Commission raised the possibility of the use of an enduring power of attorney to authorise a person to make decisions about cessation of treatment for a person who was unable to decide, or of an advance directive to specify that the person

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<sup>608</sup> Treatment, apart from reasonable medical procedures for the relief of pain, suffering or discomfort or the reasonable provision of food or water, may be refused if the treatment would cause unreasonable distress to the patient or there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to his or her health and well-being, would consider the treatment unwarranted. See *Medical Treatment Act 1988* (Vic) sections 3, 5B.

<sup>609</sup> See *Powers of Attorney (Amendment) Act 1989* (ACT) Schedule.

<sup>610</sup> *Consent to Medical Treatment and Palliative Care Bill 1994* (SA) clause 7. An agent may not refuse the natural provision or natural administration of food and water or the administration of drugs to relieve pain or distress.

<sup>611</sup> See page 162.

<sup>612</sup> See note 594 above.

<sup>613</sup> Discussion Paper 142-149.

did not wish to be subjected to treatment intended to prolong or sustain life.

9.14.12 The submissions received by the Commission were divided. While there was considerable support for the concept of developing a mechanism for allowing a competent person to make provision for the eventuality that he or she may one day be in such a situation, there was also some strong opposition to it.

9.14.13 Much of the opposition centred on a view that there had been insufficient opportunity for community input on such an important and complex topic. Another argument was that the right to refuse or terminate life sustaining treatment was of such a personal nature that it could not be transferred, and therefore could not be conferred on any substitute decision-maker. It was also argued that the limitations of medical treatment should not override the fundamental issue of the sanctity of life.

9.14.14 The Commission believes that the issues it raised in relation to the right to refuse or terminate life-sustaining treatment need to be addressed. The fact that legislation has been introduced in a number of Australian jurisdictions indicates that there is a problem with the present situation, which leaves both health care providers and patients uncertain as to their position.<sup>614</sup> However, the Commission recognises that the question of legislation dealing with withdrawal of treatment intended to sustain or prolong life for a person who lacks capacity to make his or her own decision on the matter, while closely linked to a scheme of assisted and substituted decision-making, involves much wider moral and ethical dilemmas and requires extensive public consultation and debate. The Commission therefore does not propose to make any recommendations about legislation of this kind at present.

## 9.15 CONSENT TO TREATMENT FOR MENTAL ILLNESS

9.15.1 In the Discussion Paper, the Commission noted that decisions about treatment for mental illness may differ from other health care decisions for a person whose decision-making capacity is impaired because, in the case of mental illness, the illness itself may cause the incapacity to decide.<sup>615</sup> The nature of mental illness is such that some people with serious mental illness may be deprived of

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<sup>614</sup> Legislation exists in four-fifths of the United States jurisdictions. (D Lanham and B Fehlberg, 'Living Wills and the Right to Die With Dignity' (1991) 18 *Melbourne University Law Review* 329.) Legislative action has also been recommended in the United Kingdom and Canada. (The Law Commission, Consultation Paper No 129, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (1993) 30-31.)

<sup>615</sup> Discussion Paper page 135.



their capacity to be aware of and assess their need for treatment.<sup>616</sup>

9.15.2 The *Mental Health Act* provides for involuntary admission to hospital of a person who is mentally ill. The term 'mental illness' is not defined in the Act. In the Discussion Paper, the Commission outlined some of the arguments in favour of and against attempting to formulate a statutory definition.<sup>617</sup> The issue forms part of the current review of the *Mental Health Act*.<sup>618</sup> The Commission therefore does not intend to comment further pending the outcome of the review.

9.15.3 If the nature or severity of a patient's mental illness requires the person to be hospitalised, and if hospitalisation is necessary to protect the person's own interests or to protect other people, the person concerned may be admitted to hospital for treatment of mental illness.<sup>619</sup> In the Discussion Paper, the Commission noted that this provision did not expressly authorise the giving of treatment to a patient if the patient refuses to consent. The Commission commented that, if the intention of the Act is to take away the patient's right to refuse treatment, this should be unambiguously stated.<sup>620</sup>

9.15.4 Apart from this reservation, which the Commission hopes will be addressed in the current review of the *Mental Health Act*, the Commission agrees that the *Mental Health Act* is the most appropriate place for provisions dealing with involuntary treatment. There is an inevitable tension between the need to protect mentally ill patients by providing procedures to regulate the use of treatment where the patient does not consent because the nature of the illness has affected his or her capacity to make rational decisions, and the need to ensure that those well-intentioned protective measures do not obstruct the alleviation of the suffering of the severely mentally ill. A delicate balance is required to meet the two sometimes seemingly conflicting aims. It is doubtful whether such a balance can be achieved within the broader framework of a comprehensive legislative scheme for assisted and substituted decision-making.

9.15.5 **The Commission therefore recommends that procedures relating to involuntary treatment for mental illness be contained in the *Mental Health Act*, and that there be no provision for substituted consent for involuntary**

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<sup>616</sup> Queensland Health, *Review of the Mental Health Act, Discussion Paper No 3: Treatment of People with Mental Illness*, 2; Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, Vol 1 page 458.

<sup>617</sup> Discussion Paper pages 113-114.

<sup>618</sup> See Queensland Health, *Review of the Mental Health Act, Discussion Paper No 2: Defining Mental Illness* (May 1993); *Review of the Mental Health Act, Green Paper* (1994).

<sup>619</sup> *Mental Health Act* 1984 (Qld) section 18.

<sup>620</sup> Discussion Paper pages 109, 115.

**psychiatric care.**<sup>621</sup>

9.15.6 There are other psychiatric patients whose condition is not so severe as to warrant involuntary treatment. These patients may also, because of the nature of their illness, lack capacity to consent to necessary treatment. In such a situation, it will be necessary for a substitute consent to be obtained.

9.15.7 As part of the review of mental health legislation in Queensland, Queensland Health's Discussion Paper No 3 stated:<sup>622</sup>

*Substitute decision-making mechanisms should ensure that treatment can occur without undue formality and without unnecessary delay. They should also be sufficiently flexible to accommodate the fluctuations in the level of impairment of cognitive ability which can occur as a result of mental illness.*

*For adults who are unable to provide a valid consent, substitute decision-making mechanisms, such as may be provided under mainstream assisted decision-making legislation, may be appropriate.*

9.15.8 The Commission believes that the recommendations set out in this Chapter meet these requirements.

9.15.9 **The Commission therefore recommends that a person authorised to consent to health care treatment for a mentally ill person whose decision-making capacity is impaired, should be able to consent to standard psychiatric treatment<sup>623</sup> for that person, unless the person's condition is such that he or she meets the criteria for treatment as an involuntary patient.**

9.15.10 Although the Commission does not recommend provision of substituted consent for involuntary psychiatric care, it recognises the potential value of an advance directive<sup>624</sup> in the treatment of some patients who are mentally ill. A person with an episodic mental illness would be able, during a lucid period, to enter into an agreement with his or her treatment providers and members of his or her support network, setting out the symptoms of the person's illness and the

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<sup>621</sup> But see para 9.15.10 for a method of allowing some mentally ill patients to provide in advance for periods of incapacity, thus avoiding the need for involuntary treatment.

<sup>622</sup> Queensland Health, *Review of the Mental Health Act, Discussion Paper No 3: Treatment of People with Mental Illness* (May 1993), 3. This approach was subsequently endorsed in the Green Paper released by the Minister for Health: Queensland Health, *Review of the Mental Health Act 1974 Green Paper* (1994), 20.

<sup>623</sup> 'Standard psychiatric treatment' would not include any of the forms of treatment identified in para 9.11.6.

<sup>624</sup> See page 161.

action which the person would like taken when those symptoms are displayed. If, for example, the illness involves symptoms of mania, the agreement might provide for arrangements for the person to be taken to hospital if necessary. It could also give instructions about administration of drugs to the person and about notification of family members of the person's illness. By specifying that the instructions in the agreement override refusal of treatment at a time when the person's capacity is affected by his or her illness, it could provide an effective consent for treatment and thus avoid the need for the person to be made an involuntary patient.

9.15.11 The availability of an advance directive in such a situation has a number of advantages. It would empower the patient,<sup>625</sup> by enabling the patient to participate in and contribute to the planning of his or her own psychiatric treatment.<sup>626</sup> The directive could be customised to meet the individual needs of particular patients.<sup>627</sup> It could, with the patient's prior consent, enable intervention at an earlier stage in the development of the illness<sup>628</sup> than the provisions for involuntary treatment allow.<sup>629</sup> It would also foster co-operation and trust between the patient and his or her treatment providers and supporters and would promote continuity of an agreed treatment plan.<sup>630</sup>

9.15.12 The Commission therefore recommends, in appropriate cases, the use of advance directives as an alternative to involuntary treatment of patients with mental illness.

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<sup>625</sup> 'Over time, many (patients) learn to recognise the early warning signs and prepare for the symptoms. For some this means they gain a degree of control over their lives as they develop an understanding of their illness.' (Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 1 page 442.)

<sup>626</sup> The Human Rights and Equal Opportunity Commission observed:

'The Inquiry heard from many consumers with a history of multiple hospitalisations who knew from previous experience which drugs suited them, which they were allergic to, and which had the most pronounced primary effects and side effects. However, their views (on treatment) were generally not sought.' (*Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 1 page 240.)

<sup>627</sup> According to the Human Rights and Equal Opportunity Commission, 'It is now well established that individualised assessment and therapy programs providing education and support, medication as appropriate, and suitable rehabilitation regimes will enhance recovery and lessen the risk of future episodes.' (*Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 2 page 857.)

<sup>628</sup> The importance of early intervention has been recognised by the Human Rights and Equal Opportunity Commission. See *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, Chapter 27.

<sup>629</sup> Before a person can be admitted as an involuntary patient, he or she must be suffering from mental illness of a nature or to a degree that warrants detention in hospital and detention must be necessary in the interests of the person's own welfare or for the protection of other persons. (*Mental Health Act 1974* section 18(2).) The purpose of this provision is to protect patients against unwarranted detention. However, there is some concern among relatives and practitioners that it prevents intervention until the patient's illness has reached a critical state.

<sup>630</sup> The Human Rights and Equal Opportunity Commission also noted the importance of continuity of care. (*Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 1 page 300.)

**9.16 THE LEGISLATION**

**9.16.1** Provisions relating to health care decisions and special health care decisions are contained in Chapter 8 of the draft Bill in Chapter 13 of this Draft Report.

**9.16.2** Provisions relating to enduring powers of attorney are contained in Chapter 5 of the Draft Bill.

**9.16.3** Provisions relating to advance health care directives are contained in Chapter 6 of the Draft Bill.

## 10. APPEALS

### 10.1 THE NEED FOR AN APPEAL MECHANISM

10.1.1 Orders about decision-making for a person whose capacity is impaired impact significantly on the rights of the person concerned. They may also affect the interests of other people, including the person's relatives or other members of his or her support network, carers and service providers. An appeal mechanism which allows such orders to be challenged must therefore be provided.

10.1.2 The appeal process serves three functions. First, it is an avenue of possible remedy for those who are not satisfied with the result of a hearing. Second, it promotes the accountability of the body which determines the application. The existence of an open, fair and independent system of review is likely to result in greater public confidence in, and acceptance of, such determinations. Third, it provides a method of establishing guidelines about the way in which determinations should be made, thereby improving the quality of the determinations.

### 10.2 WHO SHOULD HEAR THE APPEAL

10.2.1 In the Discussion Paper,<sup>631</sup> the Commission considered the nature of a determination made by the tribunal under the Commission's proposed legislation.<sup>632</sup> It concluded that it should be classified as an administrative decision, even though the body making the determination would be required to act judicially.

10.2.2 On this basis the Commission recommended that the power of review should be given to an Administrative Appeals Tribunal, if one is introduced in Queensland.<sup>633</sup> The majority of the submissions received by the Commission strongly supported this proposal. The Commission remains of the view that such an approach would offer advantages over a court in terms of cost and accessibility.

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<sup>631</sup> Queensland Law Reform Commission, Discussion Paper No. 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>632</sup> Discussion Paper pages 153-154.

<sup>633</sup> Discussion Paper page 155. The Electoral and Administrative Review Commission has recommended the establishment of an independent body, to be known as the Queensland Independent Commission for Administrative Review (QICAR), to provide a review system applicable to a wide range of administrative decisions. (*Report on Review of Appeals from Administrative Decisions*, August 1993.)

10.2.3 However, the Commission is concerned that, given the expertise of the tribunal members who make the decision, a system of review by a general body with a broad ranging jurisdiction may not be appropriate. The Electoral and Administrative Review Commission noted:<sup>634</sup>

*The combination of expert decision-making with an open decision-making process may make a decision inappropriate for a merits review.*<sup>635</sup>

*Review on the merits of such a decision combining an expert body and an open decision-making process may be, it is argued, at best a poor use of resources and at worst liable to do more harm than good.*

10.2.4 Even if the review body did have members with a degree of expertise which matched that of the tribunal members,<sup>636</sup> such a system would merely result in a duplication of the role of the tribunal, with the opinion of one set of experts subject to replacement by the opinion of another set of experts. In the view of the Commission this outcome would be undesirable in terms of efficiency and cost-effectiveness, with no countervailing benefit of greater fairness, accountability or impartiality.

10.2.5 The Commission now considers that these disadvantages outweigh the advantages of review within an administrative review system, and that the availability of judicial review would be sufficient.

10.2.6 If, as the Commission has now proposed, review of a tribunal decision by an administrative appeals body is inappropriate, the choice of forum lies within the existing court structure. In the Discussion Paper, the Commission considered whether an appeal from a decision of the tribunal should be heard by the Supreme Court or by the District Court. Although the District Court has the advantages of greater accessibility<sup>637</sup> and lower costs, the Discussion Paper

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<sup>634</sup> Report on Review of Appeals from Administrative Decisions, August 1993, vol 1 para 6.180 at page 167.

<sup>635</sup> See page 178 for an explanation of the term 'merits review'.

<sup>636</sup> See Electoral and Administrative Review Commission, Report on Review of Appeals from Administrative Decisions, August 1993, vol 1 para 3.140 at page 62.

<sup>637</sup> There are District Court judges permanently located in Cairns, Maroochydore, Southport, Rockhampton and Townsville. Judges make circuit visits to the following centres: Bowen, Bundaberg, Charleville (includes Roma and Cunnamulla), Charters Towers (includes Hughenden), Clermont (includes Emerald), Cloncurry (includes Mt Isa), Dalby, Gladstone, Goondiwindi, Gympie, Innisfail, Ipswich, Kingaroy, Longreach, Mackay, Maroochydore, Maryborough, Stanthorpe, Toowoomba and Warwick. There are judges of the Supreme Court permanently based in Townsville and Rockhampton. Supreme Court judges make circuit visits to Cairns, Longreach, Mackay, Maryborough/Bundaberg, Mt Isa, Roma and Toowoomba.

identified a number of factors in favour of the Supreme Court.<sup>638</sup>

10.2.7 At present the Supreme Court has power to make orders under the *Mental Health Act* and the *Public Trustee Act*<sup>639</sup> or under the *parens patriae*<sup>640</sup> jurisdiction. The District Court does not have power to make orders under the *Mental Health Act* and has no *parens patriae* jurisdiction. The Supreme Court would therefore have more experience in determining applications concerning decision-making for people with impaired capacity. In addition, the Supreme Court previously had power to review administrative decisions by virtue of a complicated set of remedies known collectively as the prerogative writs. This power has now been replaced by a statutory power under the *Judicial Review Act* to review decisions of an administrative character which are made in carrying out functions conferred by legislation.<sup>641</sup> Most of the submissions expressed the view that, in the absence of an Administrative Appeals Tribunal, appeals should be to the Supreme Court rather than the District Court.

10.2.8 The Commission therefore recommends that appeal against a determination of the tribunal should lie to a judge of the Supreme Court of Queensland.

### 10.3 GROUNDS FOR APPEAL

10.3.1 In the Discussion Paper, the Commission considered a number of alternative bases for review of a determination by the tribunal.<sup>642</sup> The options included the grounds for a review under the *Judicial Review Act* 1991, a full merits review, and an intermediate alternative.

10.3.2 The grounds for review set out in the *Judicial Review Act* do not allow the Supreme Court to decide if the challenged decision was right or wrong in the circumstances of the particular case. They are limited to an examination of the validity and legality of the decision. The Court must consider whether the body which made the decision had statutory power to do so, whether the prescribed procedures were followed, and whether the power to make the decision was exercised fairly.<sup>643</sup> If fair procedures were followed, and the decision was within

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<sup>638</sup> Discussion Paper page 152.

<sup>639</sup> See pages 13-14.

<sup>640</sup> See pages 22-23.

<sup>641</sup> *Judicial Review Act* 1991 sections 3,4 and 20(1).

<sup>642</sup> Discussion Paper pages 155-156.

<sup>643</sup> *Judicial Review Act* 1991 (Qld) section 20(2).

power and not obviously unreasonable, the decision would stand.

10.3.3 A full merits review, on the other hand, places the body hearing the appeal in the position of the body which made the decision. It reviews the actual decision that was made, rather than the process of arriving at the decision. The right to such a review does not depend on showing unreasonableness or procedural unfairness on the part of the body which made the decision. A decision can be challenged simply on the basis that a preferable alternative was available, and the appeal body can, if it wishes, substitute its own view of the merits of the case for that of the body which made the decision. Because a full merits review is wider in scope than a review under the *Judicial Review Act* it is usually a lengthier and more expensive procedure.

10.3.4 The intermediate alternative would be for the legislation which establishes the tribunal to set out the grounds on which its determinations could be challenged. This right of appeal would be additional to any available under the *Judicial Review Act*.<sup>644</sup>

10.3.5 In the Discussion Paper, the Commission expressed the tentative view that the additional expense of a full merits review could not be justified, particularly in the light of the expertise which specialist panel members would bring to the determinations of the tribunal.<sup>645</sup> The submissions received by the Commission were evenly divided. Some considered the grounds for review under the *Judicial Review Act* to be adequate, but others regarded anything less than a full merits review as insufficient.

10.3.6 The Commission is not persuaded that a full merits review would be warranted in every case. However, it acknowledges that the grounds for review under the *Judicial Review Act* may be too narrow.

10.3.7 The Commission therefore recommends that there should be an appeal as of right on a question of law. There should also be provision for an appeal on other grounds which the Court considers sufficient to justify a review of the decision.<sup>646</sup> This would allow a decision to be reviewed on the basis that the tribunal was mistaken in the view which it took of the facts, but only if the Court considered such a review appropriate in the circumstances of the case.

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<sup>644</sup> *Judicial Review Act* 1991 (Qld) section 10.

<sup>645</sup> Discussion Paper page 156.

<sup>646</sup> See for example *Guardianship Act* 1987 (NSW) section 67; *Guardianship and Administration Act* 1990 (WA) section 21; *Guardianship and Management of Property Act* 1991 (ACT) section 56.



## 10.4 SCOPE OF THE REVIEW

10.4.1 A number of submissions commented that the chapter of the Discussion Paper dealing with appeals made no provision for appealing against a decision made by an appointed decision-maker. These submissions recommended that the legislative appeal procedure should allow the Supreme Court to review the conduct of decision-makers.

10.4.2 However, in the Discussion Paper, the Commission considered the question of the accountability of appointed decision-makers in the chapter which dealt with the powers of the tribunal.<sup>647</sup> The Commission suggested that the tribunal should have power to remove a decision-maker if there is evidence of incompetence, neglect or abuse and, if necessary, to appoint a replacement.<sup>648</sup> The Commission has now recommended that the tribunal be given this power.<sup>649</sup>

10.4.3 An appeal to the Supreme Court would be more complex and more expensive than an application to the tribunal. The Commission does not believe that the suggestion put forward in the submissions would provide any greater protection for a person with impaired decision-making capacity against inappropriate behaviour by a decision-maker, and may actually make the review mechanism less accessible. Of course, the decision of the tribunal on an application to remove a decision-maker would itself be subject to review by the Supreme Court.

## 10.5 NATURE OF THE REVIEW

10.5.1 In the Discussion Paper, the Commission considered whether the powers of the body which hears the appeal should be limited to a review of the material before the tribunal, or whether it should have power to allow the parties to present new evidence and to inform itself of relevant issues.<sup>650</sup> The Commission noted that restricting the appeal body to a consideration of the evidence before the tribunal would require evidence given at the tribunal hearing to be recorded, which would increase the costs of the proceedings and which may also require a more formal approach to the hearing. On the other hand, allowing the parties to an appeal to duplicate evidence which has already been presented to the tribunal or to introduce new evidence at the appeal stage would add considerably to the

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<sup>647</sup> Discussion Paper Chapter 5.

<sup>648</sup> Discussion Paper page 54.

<sup>649</sup> See page 77.

<sup>650</sup> Discussion Paper pages 157, 158.

expense of the appeal process.

10.5.2 The Commission expressed the tentative view that the additional complexity and cost of presenting evidence in all cases was not warranted. Nonetheless, the Commission would not wish to prevent evidence being given in appropriate circumstances. Submissions to the Commission were divided on the issue.

**10.5.3 After further consideration, the Commission recommends that the appeal body should be given a discretionary power to decide whether, in the circumstances of a particular case, the presentation of evidence is justified.**

## **10.6 WHO SHOULD HAVE THE RIGHT TO APPEAL**

10.6.1 In the Discussion Paper, the Commission proposed that the categories of people entitled to appeal against a decision of the tribunal be specified in the legislation.<sup>651</sup> The Commission suggested that the right of appeal could be limited those people entitled to be notified of the hearing of an application to appoint a decision-maker, rather than a more general entitlement such as 'any person whose interests would be affected by the decision'.

10.6.2 Although most of the submissions on this issue were in favour of the former option, there were some which preferred the wider approach. No specific reasons were advanced for this view. Presumably, it is based on a concern that a specific list of people entitled to appeal may, in some situations, exclude a person genuinely affected by the decision.

10.6.3 The Commission remains of the view that the interests of certainty are better served by specifying the people who have a right to appeal. However, it now believes that the proposal in the Discussion Paper would be inappropriate for two reasons.

10.6.4 First, the tribunal will be able to hear applications for other kinds of orders - for example, an application to revoke an enduring power of attorney.

10.6.5 Second, the list of people entitled to appeal against an order of the tribunal should be consistent with the list of people entitled to be notified of the reasons for the tribunal's decision. The Commission has, in this Draft Report, modified its original proposals regarding entitlement to notification of the tribunal's decision and the reasons for the decision. The Commission has now recommended that the tribunal's obligation to notify of the decision should be limited to persons appearing as parties to the application and other persons, if any,

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<sup>651</sup> Discussion Paper page 159.

actually notified of the hearing.<sup>652</sup> It has also recommended that, because of the sensitive material which may be contained in the reasons for a decision, the reasons should not generally be available to a person who was not a party to the hearing.<sup>653</sup>

**10.6.6** The Commission therefore recommends that the person who is the subject of an application and any other party to the application should be entitled to appeal against an order of the tribunal, and that the appeal body should have a discretionary power to allow any other person to appeal if, in its opinion, that person should be entitled to do so.

## **10.7 POWERS OF THE APPEAL BODY**

**10.7.1** In the Discussion Paper, the Commission considered the powers which could be given to the appeal body to resolve an appeal.<sup>654</sup> The Commission's proposals on this issue were generally supported by those of the submissions which referred to them.

**10.7.2** The Commission therefore recommends that the appeal body have power to:

- . affirm the decision of the tribunal;
- . vary the decision of the tribunal;
- . set aside the decision of the tribunal and either
  - make any other decision which the tribunal could have made; or
  - remit the matter to the tribunal for reconsideration in accordance with any directions or recommendations of the appeal body.

## **10.8 THE ROLE OF THE TRIBUNAL**

**10.8.1** In one of the submissions received, a further matter was brought to the attention of the Commission. Many of the people who will make or be the

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<sup>652</sup> See para 6.2.21.

<sup>653</sup> See para 6.2.27. However, the Commission has also recommended that the tribunal should have a discretion to give notification of the reasons for a decision to any other person to whom, in the opinion of the tribunal, it would be appropriate.

<sup>654</sup> Discussion Paper page 158, 159.

subject of applications to the tribunal will have a limited disposable income. Rarely will they be able to bear the cost of an appeal to the Supreme Court. The result is that, if legal aid is not available and if one party is determined to appeal, the other parties often will not have the resources or the capacity to oppose the appeal. Consequently, there may be no one to defend the original decision made by the tribunal.

10.8.2 It was suggested to the Commission that, in appropriate cases, the tribunal should be able to defend its decisions. However, it is generally not regarded as proper for a tribunal to take an active part in subsequent proceedings about its own decisions, because to do so could endanger its appearance of impartiality if a matter were remitted to it for further consideration.<sup>655</sup> It would therefore require a statutory provision to enable the tribunal to put forward substantive arguments in favour of its own decision before an appeal body.

10.8.3 The Commission gave serious consideration to this proposal. It agreed that it is not in the public interest for a judge hearing an appeal against a decision of the tribunal to be presented with an unbalanced perspective of the situation. However, the Commission is not persuaded that it would be appropriate for the tribunal to advocate in favour of its own exercise of power. The view of the Commission is that adequate provision should be made for appeals in appropriate cases to be funded through the Legal Aid Office.

## 10.9 COSTS OF AN APPEAL

10.9.1 The general rule is that, on an appeal, the costs of the appeal will follow the event. In other words, the successful party will, in the absence of special circumstances, be awarded costs against the unsuccessful party.

10.9.2 The Commission is concerned that application of the general rule could deter people from appealing against a decision of the tribunal or from defending an appeal. Because of the potentially far-reaching effects of a tribunal decision, the Commission believes that the appeal system should be as accessible as possible.

10.9.3 **The Commission therefore recommends that the parties to an appeal against a decision of the tribunal should bear their own costs, and should not have to run the risk of having costs awarded against them. However, the Court should have a discretion to award costs if it considers that the appeal was frivolous or vexatious, that a party has not been given reasonable prior notice of intention to apply for an adjournment of an appeal or that a party has incurred costs because another party has defaulted in**

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<sup>655</sup> *The Queen v The Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 35-36; *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 3)* (1987) 77 ALR 609.

procedural requirements.<sup>656</sup>

## 10.10 THE LEGISLATION

10.10.1 The provisions relating to an appeal from a decision of the tribunal are contained in clauses 220 to 224 in Part 8 of Chapter 12 of the Draft Bill in Chapter 13 of this Draft Report.

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<sup>656</sup> See for example *Local Government (Planning and Environment ) Act 1990 (Qld)* section 7.6.

## 11. THE ADULT GUARDIAN AND THE PUBLIC ADVOCATE

### 11.1 INTRODUCTION

11.1.1 The Discussion Paper<sup>657</sup> proposed the creation of a statutory office to be called the Adult Guardian.<sup>658</sup> Similar statutory offices exist in other Australian jurisdictions which have a comprehensive system of legislation concerning decision-making for people whose capacity to decide is impaired. In Victoria and South Australia, the statutory office is called the Public Advocate. In New South Wales, the Northern Territory and Western Australia, it is called the Public Guardian. In the Australian Capital Territory, it is called the Community Advocate.

11.1.2 In each of the jurisdictions where a statutory office has been established, the office fulfils a number of functions. These functions were considered in the Discussion Paper, and suggestions were made about the possible role of the Adult Guardian. For the reasons set out on page 194, the Commission is of the view that a second statutory office, to be called the Public Advocate, should also be established and that the functions proposed for the Adult Guardian should be divided between the two. The proposed functions of the Adult Guardian are set out below, together with comments made in submissions received by the Commission and the recommendations of the Commission.

### 11.2 ADULT GUARDIAN

#### *Decision-maker of last resort*

11.2.1 The need for a statutory decision-maker of last resort was discussed earlier in Chapter 5 of this Draft Report.<sup>659</sup> The need may arise from a number of causes. For example, the person with impaired decision-making capacity may not have a relative or close friend who is able or willing to act as a decision-maker. In some circumstances, the tribunal may not consider the appointment of a close relative or friend appropriate.

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<sup>657</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992.

<sup>658</sup> Discussion Paper Chapter 13.

<sup>659</sup> See pages 42-43 above.

11.2.2 For questions of financial management, this role can be taken by the Public Trustee. However, there is at present no equivalent to the Public Trustee to make decisions about matters of personal welfare.

11.2.3 The Commission proposed that the Adult Guardian should, if the tribunal considers necessary, act as decision-maker of last resort in relation to decisions about the personal welfare of a person with impaired decision-making capacity.<sup>660</sup> This proposal was strongly supported in the submissions received by the Commission.

**11.2.4 The Commission therefore recommends the creation of an office of the Adult Guardian to act as decision-maker of last resort for decisions about personal welfare issues. The Commission further recommends that the Adult Guardian be able to delegate decision-making authority to another person.<sup>661</sup>**

### ***Supporting community decision-makers***

11.2.5 In the Discussion Paper, the Commission noted that, because of the geography of the State, people in regional areas of Queensland may encounter difficulties when the services of the Adult Guardian are required. The Commission proposed, as a possible solution, the appointment of volunteer decision-makers from the community where the person with impaired decision-making capacity lives.<sup>662</sup>

11.2.6 The advantages of such a scheme were identified as including the encouragement of community responsibility for helping meet the needs of people with impaired decision-making capacity, the development of one to one personal relationships between a decision-maker and the person for whom he or she is acting, the contribution of varying experiences by community decision-makers, and the highlighting of problems encountered by people with impaired decision-making capacity within their own community. On the other hand, disadvantages such as difficulty in recruiting suitable candidates to act as decision-makers were foreshadowed. However, it was argued that such difficulties could be overcome by an effective programme of community education, training of decision-makers and monitoring of their performance.<sup>663</sup>

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<sup>660</sup> Discussion Paper pages 160-161.

<sup>661</sup> See page 48.

<sup>662</sup> Discussion Paper page 162.

<sup>663</sup> Discussion Paper pages 162-163.

11.2.7 The Commission proposed that the office of the Adult Guardian should have responsibility for promoting a scheme of community decision-makers, and for recruiting, training and supporting volunteers and monitoring their performance. A similar scheme is in operation in Victoria, where community guardians are selected and supported by the Office of the Public Advocate. They are accountable for their actions as decision-makers to the Public Advocate and to the Guardianship Board through the review process.<sup>664</sup> The Commission's proposal received substantial support in the submissions received in response to the Discussion Paper.

11.2.8 The Commission therefore recommends the creation of a community decision-makers scheme, under the control of the Adult Guardian.

### ***Education and research***

11.2.9 During its review of the laws concerning decision-making for people whose capacity to make their own decisions is impaired, the Commission has been concerned at the lack of public understanding of and available information about the existing legislation and how it works. In the Discussion Paper, the Commission proposed that one of the functions of the Adult Guardian should be to promote awareness and understanding of matters such as how a decision-maker is appointed, the powers and duties of a decision-maker, the rights of people with impaired decision-making capacity and the need to protect such people from abuse and exploitation.<sup>665</sup>

11.2.10 The Commission also proposed that the role of the Adult Guardian could include initiating and conducting investigative research projects to promote the rights and dignity of people whose decision-making capacity is impaired.<sup>666</sup>

11.2.11 In addition, the Commission proposed that the Adult Guardian offer an advisory service which would provide general information about the tribunal and would act as a kind of filtering mechanism by directing people to appropriate service provision agencies where a person's needs could be met in this way rather than by an application to the tribunal.<sup>667</sup> Most of the submissions were

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<sup>664</sup> B Carter (Co-ordinator, Community Guardian Program, Office of the Public Guardian), *Private Guardians: Selection, Support, Education, Accountability*, A Paper presented to the Second Annual Conference of Guardianship Jurisdictions, Sydney, July 1993.

<sup>665</sup> Discussion Paper page 168.

<sup>666</sup> Discussion Paper page 169. In Victoria, for example, the Office of the Public Advocate has undertaken research projects concerning people with intellectual disabilities as victims of crime (*Silent Victims*, 1988) and effective advocacy for people with disabilities (*A Stands for Advocacy*, 1990).

<sup>667</sup> Discussion Paper page 169.



supportive of such a role for the Adult Guardian.

**11.2.12 The Commission therefore recommends that the role of the Adult Guardian include an advisory service and an educational and research function.**

### ***Investigations***

11.2.13 The Discussion Paper identified two kinds of investigation which could be undertaken by the Adult Guardian.<sup>668</sup> These were the preparation of pre-hearing reports for the tribunal and the investigation of allegations or complaints about the infringement of the rights of a person with impaired decision-making capacity.

#### ***Pre-hearing reports***

11.2.14 The advantages of pre-hearing reports include the availability to the tribunal of comprehensive and relevant information and the opportunity to identify issues of a systemic nature and to enable them to be dealt with appropriately. In Victoria, the Northern Territory, Western Australia and the Australian Capital Territory this type of investigation is undertaken by the equivalent of the Adult Guardian.<sup>669</sup> In New South Wales, these investigations are carried out by the staff of the Guardianship Board.

11.2.15 Some of the submissions supported the concept of pre-hearing investigations being conducted by the Adult Guardian. Others, however, commented on the potential for tension between the tribunal and the Adult Guardian over allocation of resources and priorities. These submissions favoured the New South Wales approach, giving control of such matters directly to the tribunal.

**11.2.16 The Commission agrees that it would be more effective for the preparation of pre-hearing reports to be carried out by members of the tribunal staff. Therefore, it does not recommend that this function should be given to the Adult Guardian.** However, administrative arrangements should ensure that the investigative staff are allowed to perform their role in an independent manner.

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<sup>668</sup> Discussion Paper page 170.

<sup>669</sup> *Guardianship and Administration Board Act 1986* (Vic) section 16(1)(d); *Adult Guardianship Act 1988* (NT) section 5(2)(b); *Guardianship and Administration Act 1990* (WA) section 97(1)(b); *Community Advocate Act* (ACT) section 14(2).

### ***Investigation of complaints***

11.2.17 The protection of the rights of people with impaired decision-making capacity often depends on the existence of an independent complaint mechanism. Allegations or complaints by the person or by his or her family or close friends may place the person in a vulnerable situation. For example, the person may face eviction from where he or she is living if a complaint is made about his or her living conditions. Complaints about service delivery may also involve the fear of repercussions. There is therefore a need for an independent body to investigate allegations that a person with impaired decision-making capacity is being exploited or abused or is in need of assistance or that a carer or decision-maker is acting inappropriately, and to take any necessary action on behalf of the person. For example, the Adult Guardian may, after investigation, wish to initiate a review of the appointment of a decision-maker, or to refer a matter to another agency such as the Health Department or the Human Rights Commission. Investigative mechanisms of this kind exist in other Australian jurisdictions.<sup>670</sup>

11.2.18 The submissions received by the Commission favoured such an investigative and reporting role being given to the Adult Guardian.

11.2.19 In the Discussion Paper, the Commission also noted that although in some situations it may be in the public interest for the Adult Guardian to disclose information about investigations carried out, the information may be highly sensitive and disclosure may have serious consequences.<sup>671</sup> The Commission therefore proposed safeguards to ensure fairness to both those who make complaints and those against whom complaints are made.<sup>672</sup>

11.2.20 The submissions which considered this issue were generally supportive of the Commission's proposals.

11.2.21 **The Commission therefore recommends that the Adult Guardian be given power to investigate complaints and allegations and to take appropriate action in response to its investigations, and that the legislation include guidelines for the disclosure of information about any investigations conducted by the Adult Guardian.**

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<sup>670</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 16 (1)(h); *Guardianship and Administration Act 1990* (WA) section 97(1)(c) and *Community Advocate Act 1991* (ACT) section 14(1).

<sup>671</sup> Discussion Paper page 171.

<sup>672</sup> See for example *Community Advocate Act 1991* (ACT) section 20.

### **Community visitors**

11.2.22 In the Discussion Paper, the Commission proposed that the Adult Guardian be given responsibility for the recruitment and training of volunteer community visitors.<sup>673</sup>

11.2.23 The role of the community visitors would be to protect the rights of people with impaired decision-making capacity who are living in residential care and who may have no-one to safeguard their individual interests. The community visitors would be able to inquire into issues such as the adequacy and standard of services provided and the care and treatment received by residents.<sup>674</sup>

11.2.24 A community visitors scheme operates in Victoria. A similar scheme is currently being established in New South Wales.

11.2.25 The Commission proposed that the community visitors should have certain statutory duties and powers. The suggested duties included an obligation to visit the facility on a regular basis, to investigate complaints about care and treatment and to provide the Adult Guardian with the results of any investigation. The powers included gaining access to the facility, obtaining information from staff of the facility and examining documents.

11.2.26 The submissions which considered this issue commented upon the need for such a system to safeguard the rights of vulnerable individuals. There was considerable support for the establishment of a community visitors scheme under the control of the Adult Guardian.

11.2.27 **The Commission therefore recommends the establishment of a community visitors scheme. The type of scheme which is recommended is discussed below.**

### **Payment**

11.2.28 The Discussion Paper outlined the problems which may face a community visitors scheme which relies on a pool of volunteers.<sup>675</sup> These included difficulties in recruiting suitable volunteers; public resistance to the idea of unpaid workers entering residential care facilities; and the perception held by

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<sup>673</sup> Discussion Paper pages 166-167.

<sup>674</sup> Office of the Public Advocate, *Annual Report 1990*, 75. See also *Guardianship and Administration Board Act 1986* (Vic) section 15(b); *Community Advocate Act 1991* (ACT) section 13(1).

<sup>675</sup> Discussion Paper page 166.

some members of the public that community visitors lack any official status and so their views should not be taken into account.

**11.2.29** The Commission is of the view that the problems outlined above in relation to a community visitors scheme may affect the overall effectiveness of the scheme. In the scheme presently being established in New South Wales, it is anticipated that community visitors will be paid a fee and reasonable out of pocket expenses. **The Commission supports the New South Wales initiative and therefore recommends that community visitors be paid for their services.**

### *Duties and powers*

**11.2.30** The Commission recommends that community visitors should have the statutory duties and powers proposed in the Discussion Paper.<sup>676</sup> They should also have the following statutory duties and powers -

#### *Duties*

- . before questioning staff of a care facility or inspecting any document, the community visitor must take all reasonable steps to ascertain, and must have regard to (but is not bound by) the wishes of the resident to whom the document relates;<sup>677</sup>
- . a community visitor in exercising his or her functions must act in such a manner which preserves, as far as possible, the privacy of a resident.<sup>678</sup>

#### *Powers*

- . to confer alone with the resident.<sup>679</sup>

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<sup>676</sup> See para 11.2.25 above.

<sup>677</sup> See for example *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) section 8(2).

<sup>678</sup> See for example *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) section 8(3).

<sup>679</sup> See for example *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) section 8(1)(6).

11.2.31 At present, an Official Visitor Scheme exists to provide an independent overview of the care provided within designated psychiatric inpatient facilities, and within private hospitals providing inpatient psychiatric treatment.<sup>680</sup> Some of the submissions received by the Commission suggested that the proposed community visitor scheme should subsume and replace the existing Official Visitor scheme under the *Mental Health Act*.

11.2.32 Obviously, the quality of protection afforded to a resident in any institution should not depend on the nature of the institution. However, incorporating a monitoring role for the mental health system into the community visitors program would impact significantly on the workload of the program and would have to be adequately resourced.

11.2.33 The current role of the Official Visitors is under review as part of the review of the *Mental Health Act*.<sup>681</sup> The Commission therefore proposes to maintain a process of close consultation and liaison with this review.

### ***Volunteer Friends Programme***

11.2.34 Under the *Intellectually Disabled Citizens Act* the Intellectually Disabled Citizens Council may appoint a 'volunteer friend' to provide friendly personal support to a person who is an assisted citizen under the Act.<sup>682</sup> This support may take on various forms - for example, providing companionship, going on outings, assistance with personal shopping and letter-writing. The volunteer friend is matched with the person granted assistance. The volunteer friends program is limited to people who the Council has determined are in need of assistance. Other people with impaired decision-making capacity who are not assisted citizens cannot access the programme.

11.2.35 Submissions received by the Commission suggested that the volunteer friends scheme should continue and expand as a program within the Department of Family Services and Aboriginal and Islander Affairs. The Commission recognises the value of the service provided by the program, and considers that the service should be extended.

**11.2.36 The Commission therefore recommends that the volunteer friends program should continue within the Department. The program should be expanded to include any person with impaired decision-making capacity who**

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<sup>680</sup> *Mental Health Act 1974 (Qld)* sections 12, 13.

<sup>681</sup> Queensland Health, *Review of the Mental Health Act, Discussion Paper No 3: Treatment of People with Mental Illness* (May 1993), 33-34; *Review of the Mental Health Act 1974, Green Paper* (1994), 106-108.

<sup>682</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* section 37. A similar scheme has been set up to serve federally funded nursing homes.

**needs personal support and friendship, whether or not the person is subject to a decision-making order.**

***Power of entry and removal***

11.2.37 Situations may arise where, if there is reason to believe that the welfare of a person with impaired decision-making capacity is at risk, it may be necessary to gain entry to premises to investigate and, if appropriate, remove the person to safety. In Chapter 6 of this Draft Report, the Commission has recommended that the tribunal have power to make orders concerning entry to premises and removal of a person to safety.<sup>683</sup> Issues related to the exercise of this power include who should be able to apply for such an order, and who should have authority to carry it out.

11.2.38 Family members, friends or service providers may be aware that a person needs assistance, but may be reluctant to become personally involved. In the Discussion Paper,<sup>684</sup> the Commission referred to emergency provisions in other jurisdictions<sup>685</sup> and proposed that the Adult Guardian be given a power of entry and removal. Most of the submissions received by the Commission agreed with the proposal that the Adult Guardian should have power to apply to the tribunal for an order authorising entry to premises and, if necessary, removal of a person to a place of safety.

11.2.39 **The Commission therefore recommends that the Adult Guardian be given power to apply to the tribunal for an order authorising entry into premises where it is believed that a person with impaired decision-making capacity may be at risk, and removal of the person from those premises if necessary for the well-being of the person.**<sup>686</sup>

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<sup>683</sup> See page 75-76 above.

<sup>684</sup> Discussion Paper page 172.

<sup>685</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 27; *Guardianship and Administration Act 1990* (WA) section 49; *Community Advocate Act 1991* (ACT) section 68.

<sup>686</sup> See pages 75-76.

## 11.3 THE PUBLIC ADVOCATE

### **Advocacy**

11.3.1 In the Discussion Paper, the Commission outlined possible advocacy roles for the Adult Guardian.<sup>687</sup> Advocacy has been defined as speaking out on behalf of another person - for example, a person who is at risk of being socially devalued - in such a way as to vigorously promote that person's interests or cause, to involve an element of personal cost to the advocate and to be as free as possible from conflict of interest.<sup>688</sup> The aim of advocacy for people with impaired decision-making capacity is to enable them to strive for justice and to achieve their potential.<sup>689</sup> The Discussion Paper considered involvement of the Adult Guardian in both community and systemic advocacy.

11.3.2 Community advocacy involves members of the community who volunteer to represent and advance the interests of a person with impaired decision-making capacity as if those interests were their own. The advocates are backed up by an independent organisation which co-ordinates their activities and offers support. The advocates give friendship and emotional support, assist in overcoming day-to-day problems and act as 'watchdogs' of service provision agencies. The Commission suggested that the Adult Guardian could promote and support such independent community advocacy organisations.<sup>690</sup>

11.3.3 Systemic advocacy, on the other hand, is not concerned with individual grievances, but with patterns of problems, difficulties, shortcomings and class needs.<sup>691</sup> It focuses on deficiencies in policies and programmes, and on the need for changes in both public and private organisations.<sup>692</sup> This may involve activities such as reporting on and making recommendations about inadequacies in procedure, government policies and legislation affecting people whose decision-making capacity is impaired. The Commission proposed that the Adult Guardian should have such a role.

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<sup>687</sup> Discussion Paper pages 164-165.

<sup>688</sup> W Wolfensberger, *A Balanced Multi-Component Advocacy Protection Schema* (1977) 18-21.

<sup>689</sup> Office of the Public Advocate, *Annual Report 1990*, 92 (Victoria).

<sup>690</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 15(b)(i); *Community Advocate Act 1991* (ACT) section 13(1)(h).

<sup>691</sup> W Wolfensberger, note 688 above, 59.

<sup>692</sup> Office of the Public Advocate, note 689 above, 25.

11.3.4 The submissions received by the Commission emphasised the importance of advocacy in creating public awareness of the needs of people with impaired decision-making capacity and in protecting their rights. However, there were two major reservations about the Commission's proposals.

11.3.5 First, in relation to participation by the Adult Guardian in community advocacy programmes, there was concern that the Adult Guardian would become the central source of advice to government on advocacy development, funding and accountability and that, as a consequence, the independence of existing community based advocacy organisations could be threatened.

11.3.6 Second, there was concern about the range of different functions proposed for the Adult Guardian. It was pointed out that true advocacy should never be mixed with other activities because of the risk of conflict of interest. The potential for conflict of interest was acknowledged in the Discussion Paper.<sup>693</sup> There was also concern that, because of the number of differing roles proposed for the Adult Guardian, there would be competition among the various functions for available resources and that the advocacy role would be overshadowed by other tasks which were either more urgent or more straightforward.

11.3.7 Several of the submissions therefore recommended that the proposed advocacy function of the Adult Guardian should be separated from the other roles, and that a separate statutory office should be created to handle only the systemic advocacy aspect of the functions suggested by the Commission in the Discussion Paper. This course has not been adopted in any other Australian jurisdiction.

11.3.8 It is the view of the Commission that the reason that advocacy and other functions have, in other jurisdictions, been combined in the one statutory office is an economic one. The Commission is, of course, mindful of resource implications. However, in the Commission's view, minimisation of the potential for conflict of interest would require separation of the advocacy and other functions within the one office. The Commission considers that the additional financial impact of a formal as opposed to a de facto delineation would be minimal. The Commission is persuaded by the arguments put forward in the submissions that the advocacy component should be separate from the other proposed functions of the Adult Guardian.

11.3.9 **The Commission therefore recommends the establishment of an independent advocacy office to be constituted by the statutory advocate and a small support staff to advocate for measures which will promote and protect the interests of people with impaired decision-making capacity.** The need for an independent office to take such a role has been highlighted in Queensland by the Ward 10B Inquiry and the recent investigation of the Basil Stafford Centre.

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<sup>693</sup> Discussion Paper page 167.



## **11.4 FURTHER RECOMMENDATIONS**

**11.4.1** The Commission further recommends that the positions of Adult Guardian and Public Advocate be created as independent statutory offices, not subject to the direction or control of a particular Minister in performing their functions. For administrative purposes, the offices should be within the responsibility of the Minister for Justice and the Attorney-General. They should each be required to present an annual report to the Minister for tabling in Parliament. The positions should be advertised and appointments should be made by the Governor-in-Council. They should be for a fixed term and should be renewable.

## **11.5 THE LEGISLATION**

**11.5.1** The provisions concerning the establishment and the functions and powers of the Office of the Adult Guardian are set out in clauses 229 to 244 in Chapter 13 of the Draft Bill contained in Chapter 13 of this Draft Report.

**11.5.2** The provisions concerning the establishment and the functions and powers of the Office of the Public Advocate are set out in clauses 245 to 257 of Chapter 14 of the Draft Bill contained in Chapter 13 of this Draft Report.

## 12. OTHER MATTERS

### 12.1 INTRODUCTION

12.1.1 A comprehensive scheme of legislation dealing with assisted or substituted decision-making for people whose capacity to make some or all of their own decisions is impaired would raise a number of other issues. Some of these issues were considered in the Discussion Paper.<sup>694</sup> Others were raised in the submissions received by the Commission. They include:

- . costs of an application brought before the tribunal;
- . immunity of tribunal members and people taking part in a tribunal hearing;
- . the effect of a decision-making order on other areas of law;
- . interjurisdictional recognition of orders for assisted or substituted decision-making;
- . administrative responsibility for the proposed legislation; and
- . coronial inquests.

### 12.2 COSTS

12.2.1 Under existing Queensland legislation, in some circumstances it is necessary for an application to be made to the Supreme Court to enable a person to be appointed as a decision-maker for a person whose decision-making capacity is impaired.<sup>695</sup>

12.2.2 In the Discussion Paper the Commission noted that, for many people with the responsibility of caring for a person with impaired decision-making capacity, the expense involved in such an application means that it is not a viable option.<sup>696</sup>

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<sup>694</sup> Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach*, July 1992, Chapter 14.

<sup>695</sup> See pages 13-14, 29-31, 39-40.

<sup>696</sup> Discussion Paper page 173.

**12.2.3** The Commission expressed the view that the purpose of establishing a system which was financially accessible to those who need to use it would be defeated if the cost of making an application prevented people from doing so. It argued that the principle of 'user pays' is not appropriate in the context of determinations about assisted or substituted decision-making for people with impaired decision-making capacity, and that the cost of protecting the interests of such people is one which should be borne by the community as a whole.<sup>697</sup>

**12.2.4** The Commission further suggested that a party who chose to have legal representation at the hearing of an application should be responsible for the costs of that representation.<sup>698</sup>

**12.2.5** The submissions received by the Commission strongly supported the Commission's proposals.

**12.2.6** The Commission therefore recommends that there be no fee for making an application to the tribunal and that there be no award of costs against a person for unsuccessfully making or opposing an application, unless the tribunal considers that there are circumstances which justify making an order for costs.

### **12.3 IMMUNITY FROM BEING SUED**

**12.3.1** In the Discussion Paper the Commission pointed out that, to protect the independence of the judiciary, a judge cannot be sued for defamation for any thing said during the course of a trial.<sup>699</sup> In order to encourage frankness, this protection extends to any person taking part in the court proceedings.<sup>700</sup> It was the Commission's view that similar protection should be conferred on the tribunal and on people taking part in tribunal hearings.

**12.3.2** The Commission also considered that members of the tribunal should be protected from liability for their decisions provided that they acted in good faith.

**12.3.3** The Commission recommends that tribunal members and any person who appears at a hearing of an application before the tribunal should be immune from liability for defamation for anything said during the tribunal

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<sup>697</sup> Discussion Paper pages 173-174.

<sup>698</sup> Discussion Paper page 174. On page 73 of this Draft Report the Commission has recommended that, if the tribunal exercises its power to appoint legal representation for a person with impaired decision-making capacity, the cost of such representation should be met by Legal Aid.

<sup>699</sup> Discussion Paper page 184. See *Anderson v Gorrie* [1895] 1 QB 668; *Criminal Code* section 372.

<sup>700</sup> *Criminal Code* section 372.

proceedings. Members of the tribunal should be protected from any other kind of legal liability for the way in which they carry out their functions under the legislation, provided that they act in good faith.

## 12.4 EFFECT OF A DECISION-MAKING ORDER ON OTHER AREAS OF LAW

12.4.1 In the Discussion Paper, the Commission raised the question of the effect of a decision-making order in two other areas of the law - contractual capacity and will-making.<sup>701</sup>

### *Contractual capacity*

12.4.2 The Commission expressed the view that a person for whom a financial decision-making order has been made should not automatically lose capacity to enter into contracts.<sup>702</sup> The Commission considered that statutory removal of contractual capacity would be inconsistent with the principle of presumption of competence. It also recognised that statutory removal of capacity would not necessarily prevent a person from entering into a contractual arrangement.<sup>703</sup>

12.4.3 The Commission proposed that the tribunal should be given limited powers in relation to contracts made by a person subject to a financial decision-making order. It suggested, firstly, that the tribunal should have power to decide whether a person had capacity to make a contract, or whether the contract was invalid because of the person's lack of capacity. The Commission also suggested that the remedies available under the existing law are inadequate to fairly dispose of disputes involving a party with impaired decision-making capacity, since at present one party must bear the whole of any loss which results if a contract is enforced or set aside. For example, a person with dementia or a psychiatric illness may, as a result of impaired decision-making capacity caused by the illness, undertake to buy an expensive item such as a car. The person's illness may not be apparent to the other party to the contract, who may have no reason to suspect the person's lack of capacity. In such a situation, to enforce the contract may cause considerable financial hardship to the person and the person's family. To set aside the contract would mean that the seller had to bear any resulting losses. The Commission therefore proposed a power for a court or for the tribunal to

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<sup>701</sup> Discussion Paper pages 174-183.

<sup>702</sup> Discussion Paper page 177. Cf *Mental Health Act 1974 (Qld) Fifth Schedule clause 13(4)*; *Public Trustee Act 1978 (Qld) section 83*.

<sup>703</sup> Discussion Paper page 177.

adjust the rights of parties to a transaction so that the loss is able to be distributed between the parties in a way which is fair in the circumstances of the case. The Commission envisaged that the tribunal's power in relation to contractual capacity and the power to adjust transactions would be additional to the powers and remedies already available within the existing court structure and that it would be possible to transfer matters from a court to the tribunal and vice versa.<sup>704</sup>

12.4.4 Very few of the submissions received by the Commission considered these issues. Among those which did, the responses were divided. Most recognised that the existing law may result in injustice. However, the weight of opinion was against giving the tribunal power to decide whether a contract is invalid on the grounds of incapacity and to adjust the rights of parties.

12.4.5 After consideration of the submissions, the Commission is itself unable to come to a unanimous conclusion.

12.4.6 The majority now has reservations about the proposals made in the Discussion Paper. It believes that, if a financial decision-maker is appointed for a person, the person should be deemed incapable of exercising any of the powers given to the decision-maker in relation to any property to which the decision-maker's powers extend,<sup>705</sup> or of becoming liable under any contract without an order of the tribunal or the written consent of the decision-maker. However, a transaction made by the person for adequate consideration or, if the person gives the consideration, for consideration which is not excessive, with or to or in favour of any other person who proves that he or she acted in good faith and did not know or could not reasonably have known that the property was subject to a decision-making order, should not be invalidated.<sup>706</sup>

12.4.7 The majority considers that a non-judicial tribunal is an inappropriate forum for resolving contractual disputes. It also believes that existing remedies are adequate and that, even if they are not, there should not be special rules for particular groups of people.

12.4.8 The minority is unable to agree with the recommendations of the majority. In the minority view, it is the function of the law to protect those who are unable to look after their own interests. Laws and procedures which fail to do this should be changed. Nor is the minority persuaded by the argument that there should not be special rules to meet the needs of members of the community who are particularly vulnerable. There are, for example, numerous laws for the protection of children.

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<sup>704</sup> Discussion Paper pages 178-179.

<sup>705</sup> See for example *Protection of Personal and Property Rights Act 1988* (NZ) section 53(1).

<sup>706</sup> See for example *Guardianship and Administration Board Act 1986* (Vic) section 52.

12.4.9 In hearing applications for decision-making orders, the tribunal will constantly be required to assess the extent of a person's ability to understand the nature and consequences of a decision or type of decision. The minority believes that, since contractual capacity depends on the ability to understand the transaction in question, the expertise and experience of tribunal members would make the tribunal ideally suited to determine this issue. It is therefore logical that the tribunal, if it finds that a person lacks contractual capacity, have power to declare the contract invalid on that basis and to make an order which is as fair as possible to both parties to the dispute. The tribunal would also provide a far more accessible forum for people who are unlikely to be able to afford the expense of litigation in court.

12.4.10 The minority therefore remains of the view that the proposals put forward in the Discussion Paper<sup>707</sup> should be implemented. Similar provisions were enacted in the Australian Capital Territory in 1991 and the Commission is not aware of any problems which have arisen as a result.

12.4.11 **As a result of these differing views, the Commission does not propose to put forward a recommendation in this Draft Report. However, it specifically invites submissions on the issues outlined above.**

### ***Will-making***

12.4.12 In the Discussion Paper, the Commission considered whether testamentary capacity should be automatically displaced by the making of a decision-making order. The Commission was of the view that whether a person has a sufficient degree of understanding should be determined on the facts of each case. It acknowledged that the fact that a person with impaired decision-making capacity needed assistance to make some decisions about personal care or financial management would not necessarily mean that the person lacked the degree of understanding required to effectively dispose of property by will. It expressed the view that existing rules about testamentary capacity should not be affected by legislation providing for assisted and substituted decision-making.<sup>708</sup>

12.4.13 The submissions received by the Commission did not oppose this proposal. The Commission therefore recommends that the making of a decision-making order should not automatically displace testamentary capacity.

12.4.14 The Commission also raised the question of whether legislation should authorise another person to make a will for a person with impaired

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<sup>707</sup> See para 12.4.3.

<sup>708</sup> Discussion Paper page 181.

decision-making capacity.<sup>709</sup> This question raises wide issues. It presupposes that neither an existing will, if any, nor intestacy rules, nor family provision legislation, can do justice in certain circumstances. An example may be where the person who lacks testamentary capacity has been abandoned by his or her family and it is right that a will should be made in favour of a person who has no rights upon intestacy or under family provision legislation, most probably a person who has cared gratuitously or beyond the call of duty for the incapacitated person, whether a member of the family or not.

12.4.15 In the United Kingdom and New Zealand, a substitute decision-maker may make a will on behalf of a person who lacks sufficient understanding to make his or her own will.<sup>710</sup> Recommendations for legislation providing a statutory will-making power have been made in Victoria<sup>711</sup> and New South Wales.<sup>712</sup> However, to allow courts to make a will for a person who lacks testamentary capacity may be seen as inconsistent with the policy underlying family provision legislation, which is concerned not with the will which a competent testator might make, but with making adequate provision for the proper maintenance and support of the persons entitled to make application under the legislation. It may be justifiable to do this in the case where the person concerned cannot make a will at all because of incapacity. Nevertheless this question does abut upon the possibility of reconsidering the underlying policy of family provision legislation.

12.4.16 The submissions which considered this issue were divided in their response. There was a clearly expressed view that it is not appropriately characterised as a decision-making issue and that reform of the law, if any, should be undertaken in the context of a review of the law of succession.

12.4.17 **The Commission is presently taking a leading role in a comprehensive review of succession law throughout Australia, with a view to achieving uniform legislation. The Commission believes that the question of a statutory power to make a will for a person who lacks testamentary capacity is better dealt with in the wider context of that review, and therefore does not propose to consider the issue further in this paper.**

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<sup>709</sup> Discussion Paper pages 181-183.

<sup>710</sup> See for example *Mental Health Act 1983* (UK) sections 96, 97; *Protection of Personal and Property Rights Act 1988* (NZ) section 55.

<sup>711</sup> Chief Justice's Law Reform Committee, *Wills for Mentally Disordered Persons* (1985); Law Reform Committee, *Reforming the Law of Wills* (1994).

<sup>712</sup> New South Wales Law Reform Commission, Report No 65, *Wills for Persons Lacking Will-Making Capacity* (1992).

### **Acting as a trustee**

12.4.18 A person who has been appointed as a trustee may subsequently lose capacity to make some or all of the decisions required to be made in fulfilling the role of trustee. The *Trusts Act* makes some provision for the appointment of a new trustee in such a situation. Where a trustee is incapable of acting, then the person nominated in the instrument creating the trust for the purpose of appointing new trustees or, in default of such a person, a surviving or continuing trustee or the personal representative of the last surviving trustee, may appoint a new trustee to replace the incapacitated trustee.<sup>713</sup> The Supreme Court also has power to appoint a new trustee if it is expedient to do so.<sup>714</sup> The effect of these provisions is that if the incapacitated trustee is the sole trustee, and if the instrument creating the trust makes no provision for the appointment of new trustees, it is necessary to apply to the Supreme Court to have a new trustee appointed. For many small family trusts, the cost of such an application may not be warranted.

12.4.19 The Commission considers that there may be some advantage in the tribunal having power to appoint a new trustee in such a situation. This approach would remove the need for an application to the Supreme Court. However, there may be opposition to the appointment of a proposed new trustee. This problem could be resolved by requiring all contested applications for the appointment of a new trustee to be heard by the Supreme Court. An alternative solution would be to provide that a person who opposed an application to the tribunal for the appointment of a new trustee should be entitled to have the proceedings transferred to the Supreme Court. The tribunal itself should also have power to transfer proceedings if it considers that the matter should be heard in the Supreme Court.

12.4.20 **As the Commission has not reached a concluded view on these matters, it does not propose to make any recommendation in relation to them. However, it specifically invites submissions on the issues outlined above.**

## **12.5 INTERJURISDICTIONAL RECOGNITION OF ORDERS**

12.5.1 In the Discussion Paper, the Commission referred to problems which may arise as a result of Australia's federal system of government.<sup>715</sup> Because people move from one jurisdiction to another to meet work or family commitments and because it is not uncommon for a person who lives in one state or territory to

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<sup>713</sup> *Trusts Act 1973 (Qld)* section 12.

<sup>714</sup> *Trusts Act 1973 (Qld)* section 80.

<sup>715</sup> Discussion Paper pages 185-188.



own property in another state or territory, a decision-maker may be required to act in one state or territory on behalf of a person who lives or owns property in a different state or territory. However, laws about assisted and substituted decision-making are not uniform throughout Australia and, as a result, there may be doubt about the power of an adjudicating body such as the proposed tribunal to make an order affecting a person or property in another jurisdiction and to have that order recognised and enforced.

**12.5.2** The Commission noted that much of the uncertainty and inconvenience which presently exists could be avoided by a scheme of reciprocal recognition of orders made in other Australian jurisdictions.<sup>716</sup> The submissions which considered the issue were supportive of this approach.

**12.5.3** The Commission therefore recommends that the legislation provide for a decision-making order made in another state or territory to be recognised and enforced in Queensland as though it were an order of the tribunal.

## **12.6 CORONIAL INQUESTS**

**12.6.1** A further matter which was brought to the notice of the Commission by one of the submissions it received relates to the adequacy of existing laws providing for an independent inquiry into the death of a person with impaired decision-making capacity. Mechanisms for pursuing an inquiry into a person's death are contained in the *Coroner's Act* 1958 (Qld) and, in certain circumstances, the *Health Rights Commission Act* 1991 (Qld).

**12.6.2** The submission expressed concern that the duty of a coroner to hold an inquiry into the death of a person who dies while detained in a prison or mental hospital<sup>717</sup> is too limited and that an inquiry is rarely held into the death of a person in any other kind of institution such as a nursing home or public hospital. The submission also argued that the statutory list of people who may request an inquest is too limited, particularly in view of the number of people with impaired decision-making capacity who do not have relatives or close friends to advocate on their behalf.

**12.6.3** The Commission acknowledges the importance of the issues raised by the submission. However, it is the view of the Commission that such issues should be dealt with in the *Coroner's Act* rather than in the Commission's proposed legislation for assisted and substituted decision-

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<sup>716</sup> See for example *Guardianship and Management of Property Act* 1991 (ACT) section 12; *Guardianship and Administration Act* 1993 (SA) sections 34, 48.

<sup>717</sup> *Coroners Act* 1958 (Qld) section 7(1)(b).

making. The Commission notes that the *Coroners Act* is currently under review. The Commission does not intend to comment further on this matter pending the outcome of the review.

## 12.7 ADMINISTRATIVE RESPONSIBILITY

12.7.1 In the Discussion Paper, the Commission considered the question of administrative responsibility for its proposed legislation and for the tribunal which it has recommended be established.<sup>718</sup> The Commission noted the inconsistency, lack of co-ordination and unnecessary duplication of resources which resulted from the present situation in which the existing legislation is administered by three different government departments.<sup>719</sup> The Commission expressed the view that administrative responsibility for the management of the tribunal should be in the hands of a single department, and tentatively recommended that the responsibility should be given to the Department of Family Services and Aboriginal and Islander Affairs.

12.7.2 The reason for the Commission's recommendation was that it classified the function of the tribunal as being of a welfare nature and therefore believed that the Department should have a greater understanding of the relevant issues than other departments. The submissions received by the Commission overwhelmingly rejected the welfare classification. They argued strongly that the provision of decision-making assistance to people with impaired decision-making capacity is not a welfare issue, but rather a rights issue. They argued, further, that as the Department of Family Services and Aboriginal and Islander Affairs is a major service provider for people whose decision-making capacity is impaired, a significant conflict of interest could arise if it were responsible for the management of the tribunal.

12.7.3 After further consideration, the Commission is persuaded by these arguments. It recommends that the Department of Justice and Attorney-General, which has administrative responsibility for the court system and for other legislation with a rights perspective - for example the *Anti-Discrimination Act* and the *Dispute Resolution Centres Act* - should be responsible for the tribunal.

12.7.4 The purpose of departmental administrative responsibility is to facilitate the provision of administrative and resource needs to the tribunal and to ensure that the management and operation of the tribunal is accountable to the public. It is, however, essential that the tribunal be allowed

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<sup>718</sup> Discussion Paper pages 188-189.

<sup>719</sup> Queensland Health (*Mental Health Act*), Department of Justice and the Attorney-General (*Public Trustee Act*) and Department of Family Services and Aboriginal and Islander Affairs (*Intellectually Disabled Citizens Act*).

**to function as an entirely independent body. Funding arrangements and staff appointments should not be used to intervene in the operations of the tribunal. Accordingly, the Commission recommends that the tribunal be given financial autonomy with a complete budget covering all its needs, and the right to make appointments to the staff of the tribunal.**

## **12.8 THE LEGISLATION**

**12.8.1** Provisions relating to fees and costs are contained in Chapter 12 of the Draft Bill in Chapter 13 of this Draft Report.

**12.8.2** Protection for participants in a tribunal hearing is given by clause 217.

**12.8.3** Recognition of orders from tribunals in other Australian jurisdictions is provided for by clauses 225 to 228.

## 13. DRAFT LEGISLATION

### ASSISTED AND SUBSTITUTED DECISION MAKING BILL

The legislation which the Commission proposes be enacted to implement its recommendations is set out, in draft form, below. The Commission is grateful for the assistance of the Office of Parliamentary Counsel in preparing the proposed Bill, which reflects the current legislative drafting style used in that Office.

#### 13.1 FORMAT

The legislation, as presently drafted, is divided into 15 Chapters, each dealing with an aspect of the Commission's recommendations. It is envisaged that, in its final form, the legislation will include, or be accompanied by, technical provisions relating to consequential amendments to existing legislation and to transitional arrangements for facilitating the changeover from the existing legislation to the new scheme proposed by the Commission. These provisions have not yet been drafted.

*Chapters 1-3* contain preliminary material explaining the purpose of the legislation and defining the terms used in it.

*Chapter 4* sets out the principles underlying the Commission's recommendations. These principles provide the philosophical framework for the scheme proposed by the Commission.

*Chapter 5* deals with enduring powers of attorney. It clarifies the scope of the authority which a donor may give to an attorney by expressly providing that a donor may confer on an attorney power to make decisions about the donor's health care and personal welfare as well as about the donor's financial affairs and property. It specifies the criteria for capacity to make an enduring power, the requirements for executing a power and the duties of an attorney. It also gives the tribunal created by the legislation certain powers in relation to enduring powers of attorney.

*Chapter 6* makes provision for advance health care directives. An advance health care directive differs from an enduring power of attorney for health care in that it gives instructions about future care directly to a person's health care providers.

However, the proposed legislation also allows a person making an advance directive for health care to nominate someone to make decisions on his or her behalf if the instructions in the directive are inadequate in the circumstances which arise.

*Chapter 7* is concerned with the appointment of assistant or substitute decision-makers. It confers power on the tribunal to make an appointment and specifies the criteria for the tribunal to take into account in determining whether an appointment should be made and who should be appointed. It also sets out the procedural steps to be taken to have a decision-making assistant or a substitute decision-maker appointed, and makes provision for the review of appointment orders.

*Chapter 8* deals with health care decisions. It states who can make a health care decision for an individual who lacks the capacity to make the decision personally, and the factors which a decision-maker must take into account. It also identifies certain procedures which cannot be authorised by a substitute decision-maker and about which a decision may be made only by the tribunal.

*Chapter 9* imposes certain duties on substitute decision-makers, whether they are chosen by a person in an enduring power of attorney or appointed by the tribunal.

*Chapters 10-12* deal with the tribunal. Chapter 10 creates the tribunal and sets out its functions and powers. It also contains provisions relating to the selection and appointment of tribunal members. Chapters 11 and 12 are concerned with the operation and procedure of the tribunal.

*Chapters 13-14* provide for the establishment of the independent statutory offices of the Adult Guardian and the Public Advocate, and for their functions and powers.

*Chapter 15* contains a number of miscellaneous provisions dealing with matters such as the interrelationship between a conferral of decision-making authority by an individual and a tribunal order concerning that individual, preservation of confidentiality and the power to make regulations under the Act.

## **13.2 TERMINOLOGY**

The draft legislation uses a number of terms which have not been used in the text of this Draft Report. In order to assist readers, some of these terms are explained below.

### 13.2.1 Capacity

The legislation recognises two categories of capacity:

- . *decision making capacity*; and
- . *impaired decision making capacity*.

*Decision-making capacity* means that a person is capable, whether with or without assistance, of understanding the nature and foreseeing the effects of a decision and of communicating the decision in some way.

*Impaired decision-making capacity* means that a person does not have decision-making capacity.

### 13.2.2 Types of decision maker

The legislation categorises decision makers as:

- . *decision making assistants*; or
- . *substitute decision makers*.

*A decision making assistant* may be:

- . *an appointed assistant* appointed by the tribunal; or
- . *an informal assistant* who is a member of the person's support network and not appointed by the tribunal.

*Substitute decision maker* includes:

- . *a chosen decision maker* appointed by a person under an enduring power of attorney<sup>720</sup> or an advance health care directive;
- . *a statutorily authorised health care decision maker*, who is given power by the legislation to make certain types of health care decisions for an individual who lacks capacity to make his or her own decision;

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<sup>720</sup> In the existing legislation and in the text of this Draft Report this type of decision maker is called an 'attorney'.

- . an *appointed decision maker*, appointed by the tribunal to make a decision or type of decision for a person.

### 13.2.3 Types of decision

The legislation categorises decisions as:

- . *personal decisions*
- . *excluded personal decisions*
- . *health care decisions*
- . *special consent health care decisions*
- . *financial decisions*
- . *litigation related decisions*

*Personal decisions* are decisions about a person's care or welfare, but do not include *excluded personal decisions*, *health care decisions* or *special consent health care decisions*.

*Excluded personal decisions* are decisions which cannot be made for a person by a substitute decision maker. They include making or revoking a will or an enduring power of attorney, voting, consenting to adoption of a person's child and consenting to a person's marriage.

A *health care decision* is a decision consenting, refusing to consent or withdrawing consent to health care, other than a decision to withhold or withdraw life sustaining treatment. It does not include a *special consent health care decision*.

A *special consent health care decision* is one which only the tribunal can make for a person who lacks capacity to make his or her own decision. Special consent procedures include removal of tissue for donation to another person, sterilisation, termination of pregnancy, participation in research or experimental treatment and certain forms of psychiatric treatment.

A *financial decision* is a decision about the management of a person's financial affairs and includes a decision, other than a *litigation related decision*, about the possession, custody, control or management of the person's property.

A *litigation related decision* is a decision about a legal matter of a civil or criminal nature involving a person or a person's property.

#### **13.2.4 Other terms**

Other words which have been used in a particular way in the legislation are defined in the Dictionary which is located in the Schedule appended to the Draft Bill.

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Queensland



**ASSISTED AND SUBSTITUTED  
DECISION-MAKING BILL 1995**

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251	Appointment .....	122
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252	Selection .....	122
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256	Acting Public Advocate .....	124
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**1995**

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**A BILL**

**FOR**

**An Act facilitating the decision-making of and for adults with  
impaired decision-making capacity because of a mental or  
intellectual impairment, and for other purposes**

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<b>The Parliament of Queensland enacts—</b>	1
<b>CHAPTER 1—SHORT TITLE AND EXPLANATION</b>	2 3
<b>Short title</b>	4
1. This Act may be cited as the <i>Assisted and Substituted Decision-making Act 1995</i> .	5 6
<b>Acknowledgments</b>	7
2. This Act acknowledges the following—	8
(a) an adult's right to make decisions is fundamental to the adult's inherent dignity;	9 10
(b) the right to make decisions includes the right to make decisions with which others may not agree;	11 12
(c) the decision-making capacity of an adult with a mental or intellectual impairment may differ according to—	13 14
(i) the nature and extent of the impairment; and	15
(ii) the complexity of the decision to be made; and	16
(iii) the support available from members of the adult's existing support network;	17 18
(d) the right of an adult with a mental or intellectual impairment to make decisions should be restricted, and interfered with, as little as possible;	19 20 21
(e) an adult with a mental or intellectual impairment has a right to adequate and appropriate support about decision-making.	22 23
<b>Purpose to achieve balance</b>	24
3. This Act seeks to strike a balance between—	25

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(a) the right of an adult with a mental or intellectual impairment to the greatest possible degree of autonomy in decision-making; and	1 2
(b) the adult's right to adequate and appropriate support about decision-making.	3 4
<b>Way purpose achieved</b>	5
<b>4. This Act—</b>	6
(a) provides that an adult is presumed to be capable of making a decision unless there is evidence to rebut the presumption; and	7 8
(b) provides a comprehensive scheme to facilitate decision-making by an adult needing a decision-making assistant and for an adult needing a substitute decision maker; and	9 10 11
(c) states principles to be observed by anyone performing a function or exercising a power under the scheme; and	12 13
(d) encourages involvement in decision-making of the members of the adult's existing support network; and	14 15
(f) reforms the law about enduring powers of attorney; and	16
(g) establishes an independent tribunal to administer certain aspects of the scheme; and	17 18
(h) recognises the Public Trustee is available as a possible substitute decision maker for financial and litigation related decisions; and	19 20
(i) establishes an office of the Adult Guardian to be available for appointment as a possible substitute decision maker for personal decisions and for other purposes; and	21 22 23
(j) establishes an office of the Public Advocate to carry out systemic advocacy for adults with a mental or intellectual impairment.	24 25



<b>CHAPTER 2—OPERATION OF ACT</b>	1
<b>Act binds all persons</b>	2
5. This Act binds all persons, including the State, and, so far as the legislative power of the Parliament permits, the Commonwealth and the other States.	3 4 5
<b>Parens patriae jurisdiction not affected</b>	6
6. This Act does not affect the parens patriae jurisdiction <sup>1</sup> of the Supreme Court.	7 8
<b>Next friend and guardian ad litem process not affected</b>	9
7. This Act does not affect rules of court of the Supreme Court, District Courts or Magistrates Court about a person with impaired decision-making capacity suing by a 'next friend', or defending proceedings by a 'guardian ad litem', appointed by the relevant court. <sup>2</sup>	10 11 12 13
<b>Sanction of settlement requirement not affected</b>	14
8. This Act does not affect section 59 of the <i>Public Trustee Act 1978</i> . <sup>3</sup>	15

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<sup>1</sup> This jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint decision-makers for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

<sup>2</sup> The Commission recommends the repeal of the *Mental Health Act 1974*, Schedule 5. This will require consequential amendments of the court rules and section 7 will then be made subject to these amendments. However, no consequential amendments have been drafted for the purposes of including this Bill in the Commission's draft report.

<sup>3</sup> Settlement of claims for money or damages must be sanctioned by the Public Trustee or the appropriate court. It does not matter whether proceedings have been started.

<b>CHAPTER 3—INTERPRETATION</b>	1
<b>PART 1—DEFINITIONS AND DICTIONARY</b>	2
<b>Definitions and dictionary</b>	3
9.(1) The dictionary <sup>4</sup> in Schedule 1 defines particular words used in this Act.	4 5
(2) This Chapter also contains certain definitions in separate sections and these definitions are signposted <sup>5</sup> in the dictionary.	6 7
<b>PART 2—TYPES OF CAPACITY</b>	8
<b>Explanation</b>	9
10. This Act categorises capacity for a decision as follows—	10
• decision-making capacity (section 11)	11
• impaired decision-making capacity (section 12).	12
<b>Meaning of “decision-making capacity”</b>	13
11. An adult has “ <b>decision-making capacity</b> ” for a decision if, whether with or without assistance, the adult is capable of—	14 15
(a) understanding the nature and foreseeing the effects of the decision; and	16 17
(b) communicating the decision in some way.	18

<sup>4</sup> In some Acts, definitions are contained in a dictionary that appears as the last schedule and forms part of the Act—*Acts Interpretation Act 1954*, section 14.

<sup>5</sup> The signpost definitions in the dictionary alert the reader to the terms defined elsewhere in the Act and tell the reader where these definitions can be found. For example, the definition ‘“decision-making capacity” see section 11’ tells the reader that the term “decision-making capacity” is defined in section 11.

<b>Meaning of “impaired decision-making capacity”</b>	1
12. An adult has “impaired decision-making capacity” for a decision if the adult does not have decision-making capacity for the decision.	2 3
<b>PART 3—TYPES OF DECISION</b>	4
<b>Explanation</b>	5
13. This Act categorises decisions as follows—	6
• personal decisions (section 14)	7
• excluded personal decisions (section 15)	8
• health care decisions (section 16)	9
• special consent health care decisions (section 18)	10
• financial decisions (section 23)	11
• litigation related decisions (section 24).	12
<b>Meaning of “personal decision”</b>	13
14. A “personal decision” of, or for, an adult is a decision about the adult’s care or welfare (other than an excluded personal decision, health care decision or special consent health care decision), including, for example, a decision about 1 or more of the following—	14 15 16 17
(a) where the adult will live;	18
(b) with whom the adult will live;	19
(c) whether the adult will work and, if so, the kind and place of work and the employer;	20 21
(d) what education or training the adult will undertake;	22
(e) whether the adult will apply for a licence or permit;	23
(f) day-to-day issues, including, for example, diet and dress.	24

<b>Meaning of “excluded personal decision”</b>	1
<b>15.</b> An “ <b>excluded personal decision</b> ” of an adult is a decision about 1	2
or more of the following—	3
(a) making or revoking the adult’s will;	4
(b) making or revoking an enduring power of attorney or advance	5
health care directive of the adult;	6
(c) exercising the adult’s right to vote in a local government, State or	7
Commonwealth election;	8
(d) consenting to adoption of an individual who is under 18 and a	9
child of the adult;	10
(e) consenting to marriage of the adult.	11
<b>Meaning of “health care decision”</b>	12
<b>16.(1)</b> A “ <b>health care decision</b> ” of, or for, an adult is a decision about	13
health care (other than special consent health care) of the adult.	14
<b>(2)</b> However, if an adult is terminally ill or in a persistent vegetative state,	15
a health care decision of, or for, the adult does not include a decision to	16
withhold or withdraw health care intended to sustain or prolong the adult’s	17
life.	18
<b>(3)</b> Subsection (2) does not affect any common law right to have health	19
care withheld or withdrawn.	20
<b>Meaning of “health care”</b>	21
<b>17.(1)</b> “ <b>Health care</b> ” of an adult is any care, treatment, service or	22
procedure—	23
(a) to maintain, diagnose or treat the adult’s physical or mental	24
condition; and	25
(b) carried out by, or under the supervision of, a health care provider.	26
<b>(2)</b> However, “ <b>health care</b> ” does not include—	27
(a) the administration of a pharmaceutical drug if—	28
(i) a prescription is not needed to obtain the drug; and	29

- (ii) the drug is normally self-administered; and 1
- (iii) the administration is for a recommended purpose and at a 2  
recommended dosage level; and 3
- (b) first aid treatment of the adult; and 4
- (c) a nonintrusive examination made for diagnostic purposes. 5

*Example of subsection (2)(c)—* 6

A visual examination of an adult's mouth, throat, nasal cavity, eyes or ears. 7

**Meaning of "special consent health care decision"** 8

18. A "special consent health care decision" of, or for, an adult is a 9  
decision consenting to special consent health care of the adult. 10

**Meaning of "special consent health care"** 11

19. "Special consent health care" of an adult is— 12

- (a) removal of tissue from the adult for donation to someone else; or 13
- (b) sterilisation of the adult; or 14
- (c) termination of a pregnancy of the adult; or 15
- (d) participation by the adult in research or experimental health care; 16  
or 17
- (e) psychiatric health care of the adult prescribed under the 18  
regulations;<sup>6</sup> or 19
- (f) other health care of the adult prescribed under the regulations. 20

**Meaning of "removal of tissue for donation"** 21

20.(1) "Removal of tissue from an adult for donation" to someone 22  
else includes removal of tissue from the adult so that laboratory reagents, or 23

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<sup>6</sup> The Commission does not intend to make recommendations about the psychiatric health care to be prescribed pending the outcome of a departmental review of mental health legislation, including a review of the need for special consent criteria for certain forms of psychiatric health care.

reference and control materials, derived completely or partly from pooled human plasma may be given to the other person. 1  
2

(2) “Tissue” is— 3

(a) an organ, blood or part of a human body; or 4

(b) a substance that may be extracted from an organ, blood or part of a human body. 5  
6

**Meaning of “sterilisation”** 7

21. “Sterilisation” is a surgical procedure— 8

(a) performed on an adult who is, or is reasonably likely to be, fertile; and 9  
10

(b) intended, or reasonably likely, to make the adult, or ensure the adult is, permanently infertile. 11  
12

**Meaning of “object” to health care** 13

22.(1) An adult is taken to “object” to health care if— 14

(a) the adult indicates the adult does not wish to have the health care; or 15  
16

(b) the adult previously indicated, in similar circumstances, the adult did not then wish to have the health care and since then the adult has not indicated otherwise. 17  
18  
19

(2) An indication may be given in an enduring power of attorney or advance health care directive or in another way, including, for example, orally or by conduct. 20  
21  
22

**Meaning of “financial decision”** 23

23.(1) A “financial decision” of, or for, an adult includes a decision (other than a litigation related decision) about the possession, custody, control or management of the adult’s property. 24  
25  
26

(2) A “financial decision” includes a decision about 1 or more of the following— 27  
28

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(a) paying maintenance and accommodation expenses for the adult and the adult's dependants;	1 2
(b) paying the adult's debts;	3
(c) to the extent that the decision is not a litigation related decision, receiving and recovering money payable to the adult;	4 5
(d) discharging a mortgage over the adult's property;	6
(e) paying rates, taxes, insurance premiums or other outgoings for the adult's property;	7 8
(f) insuring the adult or the adult's property;	9
(g) otherwise preserving or improving the adult's estate;	10
(h) carrying on any trade or business of the adult;	11
(i) performing contracts entered into by the adult;	12
(j) buying or selling real property for the adult;	13
(k) investing for the adult in authorised investments;	14
(l) with the tribunal's approval, investing for the adult in investments that are not authorised investments;	15 16
(m) taking up rights to issues of new shares, or options for new shares, to which the adult becomes entitled by the adult's existing shareholding (whether or not the shares are an authorised investment).	17 18 19 20
<b>Meaning of "litigation related decision"</b>	21
24.(1) A "litigation related decision" of, or for, an adult is a decision about a legal matter of a civil or criminal nature involving the adult or the adult's property, including, for example, a decision to agree to a settlement of a claim. <sup>7</sup>	22 23 24 25
(2) Subsection (1) applies whether or not a proceeding has been started.	26

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<sup>7</sup> However, section 59 of the *Public Trustee Act 1978* will require certain settlements to be sanctioned by the Public Trustee or appropriate court.

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**PART 4—APPOINTED ASSISTANT AND  
SUBSTITUTE DECISION MAKER**

**Meaning of “appointed assistant”** 3

25. An “appointed assistant” for a decision of an adult is a person appointed<sup>8</sup> by the tribunal to assist the adult to make the adult’s own decision. 4  
5  
6

**Meaning of “substitute decision maker”** 7

26.(1) A “substitute decision maker” for a decision for an adult is a person who makes the decision for the adult. 8  
9

(2) This Act categorises substitute decision makers as follows— 10

- chosen decision makers (section 27) 11
- statutorily authorised health care decision makers (section 28) 12
- appointed decision makers (section 29). 13

**Meaning of “chosen decision maker”** 14

27. A “chosen decision maker” is a substitute decision maker chosen by an adult in an enduring power of attorney<sup>9</sup> or advance health care directive.<sup>10</sup> 15  
16  
17

**Meaning of “statutorily authorised health care decision maker”** 18

28. Each member of an adult’s family or a close friend of the adult is a “statutorily authorised health care decision maker” for the adult.<sup>11</sup> 19  
20

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<sup>8</sup> An appointed assistant may be appointed under Chapter 7.

<sup>9</sup> Chapter 5 deals with enduring powers of attorney.

<sup>10</sup> Chapter 6 deals with advance health care directives.

<sup>11</sup> A statutorily authorised health care decision maker may make a health care decision for an adult with impaired decision-making capacity for the decision if the decision is not made under an enduring power of attorney, tribunal order or advance health care directive of the adult—section 108(2)(b).



<b>Meaning of “appointed decision maker”</b>	1
<b>29.</b> An “appointed decision maker” is a substitute decision maker appointed by the tribunal. <sup>12</sup>	2 3
<b>CHAPTER 4—GENERAL PRINCIPLES</b>	4
<b>PART 1—WAY GENERAL PRINCIPLES TO BE USED</b>	5
<b>General principles must be complied with by all</b>	6
<b>30.</b> The principles in Part 2 (the “general principles”) must be complied with by a person or other entity who performs a function or exercises a power under this Act.	7 8 9
<b>General application and promotion by community</b>	10
<b>31.</b> The community is encouraged to apply and promote the general principles.	11 12
<b>PART 2—LIST OF GENERAL PRINCIPLES</b>	13
<b>Presumption of capacity to make decisions</b>	14
<b>32.</b> An adult is presumed to have the capacity to make the adult’s own decisions.	15 16

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<sup>12</sup> An appointed decision maker may be appointed under Chapter 7.

<b>Valued social role</b>	1
33. The adult's valued social role must be recognised and taken into account.	2 3
<b>Participation in community life</b>	4
34.(1) The importance of encouraging and supporting an adult to live, as fully as practicable, a life in the general community must be taken into account.	5 6 7
(2) The importance of encouraging and supporting an adult to take part, as fully as practicable, in activities enjoyed by the general community must also be taken into account.	8 9 10
<b>Encouragement of self-reliance</b>	11
35. The importance of encouraging and supporting the adult to achieve the adult's maximum potential and to become as self-reliant as practicable must be taken into account.	12 13 14
<b>Minimal limitations on right to make decisions</b>	15
36.(1) The importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.	16 17
(2) This means, for example, that, to the greatest extent practicable—	18
(a) the adult's views and wishes are to be sought and taken into account; and	19 20
(b) if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be—a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes; and	21 22 23 24 25
(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way that is least restrictive of the adult's rights but consistent with the adult's proper care and protection.	26 27 28 29

(3) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.	1 2
<b>Maintenance of existing supportive relationships</b>	3
37. The importance of maintaining the existing supportive relationships of which the adult is part must be taken into account.	4 5
<b>Maintenance of environment and values</b>	6
38. The importance of maintaining the adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.	7 8 9
<b>Appropriate to circumstances</b>	10
39. Assistance given to an adult to make a decision and a decision made for or about an adult should be appropriate to the adult's characteristics and needs.	11 12 13
<b>CHAPTER 5—DECISION MAKER CHOSEN BY ENDURING POWER OF ATTORNEY</b>	14 15
<b>PART 1—MAKING AN ENDURING POWER OF ATTORNEY</b>	16 17
<i>Division 1—Benefit of an enduring power of attorney</i>	18
<b>Overview</b>	19
40.(1) An adult who understands the matters <sup>13</sup> necessary to make an	20

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<sup>13</sup> See section 42.

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enduring power of attorney may make an enduring power of attorney choosing 1 or more decision makers to make decisions for the adult.	1 2
(2) Division 3 deals with who may be chosen as a decision maker by an enduring power of attorney.	3 4
(3) Power to make personal decisions, health care decisions, financial decisions and litigation related decisions may be given by an enduring power of attorney.	5 6 7
(4) However, power to make excluded personal decisions or special consent health care decisions may not be given by an enduring power of attorney.	8 9 10
(5) Division 4 deals with when the power of attorney begins to operate.	11
(6) An enduring power of attorney is not revoked by the adult becoming an adult with impaired decision-making capacity.	12 13
<b>What an enduring power of attorney may do</b>	14
41. In an enduring power of attorney, an adult may—	15
(a) give a chosen decision maker power to make all types, or a particular type, of decision (other than an excluded personal decision or special consent health care decision); and	16 17 18
(b) limit the power given to a chosen decision maker; and	19
(c) state instructions for a chosen decision maker to apply when making decisions; and	20 21
(d) for financial decisions or litigation related decisions—state when the power begins (for example, immediately, on a stated day or only if the adult becomes an adult with impaired decision-making capacity).	22 23 24 25
 <i>Division 2—Formal matters</i>	 26
<b>When an enduring power of attorney may be made</b>	27
42. An adult may make an enduring power of attorney only if the adult understands the following matters—	28 29

- 
- (a) in the power of attorney, the adult may specify or limit the power to be given to a chosen decision maker and instruct a chosen decision maker about the exercise of the power; 1  
2  
3
  - (b) when the power will begin; 4
  - (c) if the power for a type of decision begins, the chosen decision maker will make, and have full control over, all the adult's decisions of the type unless limitations or instructions are included in the power of attorney; 5  
6  
7  
8
  - (d) the power the adult has given will continue even if the adult becomes an adult with impaired decision-making capacity; 9  
10
  - (e) the adult may revoke the power of attorney at any time the adult is capable of making another enduring power of attorney; 11  
12
  - (f) at any time the adult is not capable of revoking the enduring power of attorney, the adult will not be able to oversee the use of the power. 13  
14  
15

### **How to make an enduring power of attorney** 16

- 43.(1) An adult's enduring power of attorney must—** 17
- (a) be in the approved form;<sup>14</sup> and 18
  - (b) be signed by the adult or, if the adult instructs, for the adult and in the adult's presence by a person who is at least 18 and not the witness or a chosen decision maker for the adult; and 19  
20  
21
  - (c) be signed and dated by a witness who is— 22
    - (i) a justice,<sup>15</sup> commissioner for declarations or lawyer;<sup>16</sup> and 23
    - (ii) not a chosen decision maker of the adult; and 24

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<sup>14</sup> Forms recommended by the Queensland Law Reform Commission are included in this report.

<sup>15</sup> "[J]ustice" means justice of the peace—*Acts Interpretation Act 1954*, section 36.

<sup>16</sup> "[L]awyer" means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory—*Acts Interpretation Act 1954*, sections 33A and 36.

- |  |                |
|--|----------------|
| (iii) not a relation of the adult or a chosen decision maker; and  | 1              |
| (iv) if the power of attorney gives power to make a health care decision—not a current health care provider of the adult.  | 2<br>3         |
| (2) If the enduring power of attorney is signed by the adult, it must include a certificate signed by the witness stating that the adult—  | 4<br>5         |
| (a) signed the enduring power of attorney in the witness' presence; and  | 6<br>7         |
| (b) at the time, appeared to the witness to understand the matters necessary to make an enduring power of attorney. <sup>17</sup>  | 8<br>9         |
| (3) If the enduring power of attorney is signed by a person for the adult, it must include a certificate signed by the witness stating that—   | 10<br>11       |
| (a) in the witness' presence, the adult instructed the person to sign the enduring power of attorney for the adult; and  | 12<br>13       |
| (b) the person signed it in the presence of the adult and witness; and   | 14             |
| (c) at the time, the adult appeared to the witness to understand the matters necessary to make an enduring power of attorney.  | 15<br>16       |
| (4) The power of attorney is only effective to give power to a chosen decision maker if the chosen decision maker has signed the power of attorney acknowledging the power has been given. | 17<br>18<br>19 |

***Division 3—Who may be a chosen decision maker*** 20

**Eligibility—personal or health care decision** 21

- |  |                |
|--|----------------|
| 44. A person may be chosen by an enduring power of attorney as a chosen decision maker for a personal decision or health care decision for an adult only if the person is— | 22<br>23<br>24 |
| (a) an individual who is at least 18; and  | 25             |
| (b) not a paid carer, or current health care provider, for the adult.  | 26             |

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<sup>17</sup> “[M]atters necessary to make an enduring power of attorney” means the matters in section 42—see Dictionary.

<b>Eligibility—financial or litigation related decision</b>	1
45. A person may be chosen by an enduring power of attorney as a chosen decision maker for a financial decision or litigation related decision only if the person is—	2 3 4
(a) an individual who is at least 18, the Public Trustee or a trustee company under the <i>Trustee Companies Act 1968</i> ; and	5 6
(b) not a paid carer, or current health care provider, for the adult.	7
<b>More than 1 decision maker may be chosen</b>	8
46. By an enduring power of attorney, an adult may choose—	9
(a) 1 chosen decision maker for a decision or type of decision or for all decisions; and	10 11
(b) joint or joint and several chosen decision makers for a decision or type of decision or for all decisions; and	12 13
(c) different chosen decision makers for different decisions or types of decision; and	14 15
(d) a person to act as a chosen decision maker for a decision or type of decision in a circumstance stated in the power of attorney; and	16 17
(e) alternative chosen decision makers for a decision or type of decision so that power is given to a particular chosen decision maker only in a circumstance stated in the power of attorney; and	18 19 20
(f) successive chosen decision makers for a decision or type of decision or for all decisions so that power is given to a particular chosen decision maker only when power given to another chosen decision maker ends.	21 22 23 24
 <b><i>Division 4—When power exercisable</i></b>	 25
<b>Personal or health care decision-making</b>	26
47.(1) Power to make a personal decision or health care decision under an adult's enduring power of attorney—	27 28
(a) begins when (if ever) the adult has impaired decision-making	29

capacity for the decision; and	1
(b) cannot begin before then.	2
(2) However, the power is exercisable only while the adult has impaired decision-making capacity for the decision.	3 4
<b>Financial or litigation related decision-making</b>	5
48.(1) If an adult's power of attorney gives power to make a financial decision or litigation related decision and does not state a time when, or occasion on which the power to make the decision begins, power to make the decision begins when the power of attorney is made.	6 7 8 9
(2) If the power of attorney states a time when or occasion on which the power to make the decision begins, power to make the decision begins at the earlier of—	10 11 12
(a) the stated time or occasion; and	13
(b) when (if ever) the adult has impaired decision-making capacity for the decision.	14 15
(3) However, if the stated time or occasion has not happened, the power is exercisable only while the adult has impaired decision-making capacity for the decision.	16 17 18

## **PART 2—USING AN ENDURING POWER OF ATTORNEY**

### *Division 1—Chosen decision maker*

<b>Chosen decision maker's power</b>	22
49.(1) When an adult's enduring power of attorney for a decision begins, it gives the chosen decision maker for the decision power to do, for the adult, anything the adult could lawfully authorise someone else to do in relation to the decision if the adult had decision-making capacity for the	23 24 25 26



decision. 1  
 (2) Functions and powers are also given to the chosen decision maker by 2  
 this Act.<sup>18</sup> 3

*Division 2—Assistance from tribunal* 4

**Declaration of impaired decision-making capacity** 5

50.(1) A chosen decision maker or another interested person may apply 6  
 to the tribunal for a declaration that— 7

(a) the adult who made the enduring power of attorney has become 8  
 an adult with impaired decision-making capacity for all decisions 9  
 or a particular decision or type of decision (an “**impaired** 10  
**capacity declaration**”); or 11

(b) a power given by the power of attorney has begun (a 12  
**commencement declaration**). 13

(2) In this section— 14

“**interested person**”, for an application about power to make a health care 15  
 decision under an adult’s enduring power of attorney, includes a health 16  
 care provider for the adult. 17

**Advice and directions about exercise of power** 18

51.(1) A chosen decision maker or another interested person may apply 19  
 to the tribunal for advice or directions about the exercise of a power under 20  
 the enduring power of attorney or the interpretation of its terms. 21

(2) In this section— 22

“**interested person**”, for an application about power to make a health care 23  
 decision under an adult’s enduring power of attorney or the 24  
 interpretation of the enduring power of attorney’s terms about a health 25  
 care decision, includes a health care provider for the adult. 26

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<sup>18</sup> Chapter 9 states the functions and powers given to substitute decision makers. A chosen decision maker must exercise power as required by the terms of the enduring power of attorney under which the person is appointed—section 127.

<b>Removal</b>	1
<b>52.(1)</b> If there is power to make a decision under an enduring power of attorney, an interested person may apply to the tribunal for an order—	2 3
(a) removing a chosen decision maker and appointing a substitute decision maker to replace the removed chosen decision maker; and	4 5 6
(b) removing a power from a chosen decision maker and giving the removed power to a substitute decision maker.	7 8
<b>(2)</b> The substitute decision maker mentioned in the application may be another chosen decision maker under the enduring power of attorney or a substitute decision maker to be appointed by the tribunal.	9 10 11
<b>(3)</b> The tribunal may only make an order under subsection (1) if the tribunal considers that—	12 13
(a) a relevant interest of the adult who made the enduring power of attorney has not been, or is not being, adequately protected; and	14 15
(b) if the order removes a chosen decision maker—the chosen decision maker failed to act, is unfit to act or incapable of acting; and	16 17 18
(c) if the order removes a power from a chosen decision maker—the chosen decision maker failed to act, is unfit to act or incapable of acting, in relation to the power. <sup>19</sup>	19 20 21
<b>(4)</b> The tribunal may make an order stated in subsection (1) on its own initiative.	22 23

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<sup>19</sup> “[F]ail” includes refuse—*Acts Interpretation Act 1954*, section 36.

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**PART 3—CHANGING AND REVOKING AN  
ENDURING POWER OF ATTORNEY**

**Change or revocation by tribunal**

**53.(1)** An interested person may, when there is power to make a decision under an enduring power of attorney, apply to the tribunal for an order—

- (a) changing the terms of the power; or
- (b) revoking the power.

**(2)** The tribunal may only make an order under subsection (1) if the tribunal considers—

- (a) a relevant interest of the adult who made the enduring power of attorney has not been, or is not being, adequately protected; or
- (b) circumstances (including, for a power to make a health care decision, advances in medical science) have changed to the extent that the terms of the power or the power itself is inappropriate.

**(3)** An enduring power of attorney is changed if the tribunal makes an order changing its terms.

**(4)** An enduring power of attorney is revoked to the extent that the tribunal makes an order revoking it.

**(5)** If the tribunal changes or revokes an adult's enduring power of attorney,<sup>20</sup> the tribunal must take reasonable steps to advise the adult and all chosen decision makers under the enduring power of attorney of the change or revocation.

**(6)** The tribunal may make an order under subsection (1) on its own initiative.

**Formal revocation by adult who made it**

**54.(1)** An adult's enduring power of attorney is revoked if the adult

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<sup>20</sup> The tribunal can remove and replace a decision maker under section 52 on its own initiative. This allows the tribunal to do so as part of hearing an application for change or revocation of the enduring power of attorney.

- revokes the enduring power of attorney under this section when the adult understands the matters necessary for making the same enduring power of attorney<sup>21</sup>. 1  
2  
3
- (2) A revocation under this section of an enduring power of attorney by the adult who made it must— 4  
5
- (a) be in the approved form; and 6
- (b) be signed by the adult revoking it or, if the adult revoking it instructs, for the adult and in the adult's presence by an individual who is at least 18 and not the witness or a chosen decision maker for the adult; and 7  
8  
9  
10
- (c) be signed and dated by a witness who is— 11
- (i) a justice,<sup>22</sup> commissioner for declarations or lawyer;<sup>23</sup> and 12
- (ii) not a chosen decision maker for the adult; and 13
- (iii) not a relation of the adult or a chosen decision maker; and 14
- (iv) if the revocation revokes power to make a health care decision—not a current health care provider of the adult. 15  
16
- (3) If the revocation is signed by the adult, it must include a certificate signed by the witness stating that the adult— 17  
18
- (a) signed the revocation in the witness' presence; and 19
- (b) at the time, appeared to the witness to understand the matters necessary to make the same enduring power of attorney. 20  
21
- (4) If the revocation is signed by a person for the adult, it must include a certificate signed by the witness stating that— 22  
23
- (a) in the witness' presence, the adult instructed the person to sign the revocation for the adult; and 24  
25

<sup>21</sup> “[M]atters necessary to make an enduring power of attorney” means the matters in section 42—see Dictionary.

<sup>22</sup> “[J]ustice” means justice of the peace—*Acts Interpretation Act 1954*, section 36.

<sup>23</sup> “[L]awyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—*Acts Interpretation Act 1954*, sections 33A and 36.

- (b) the person signed it in the presence of the adult and witness; and 1
- (c) at the time, the adult appeared to the witness to understand the 2  
matters necessary to make the same enduring power of attorney. 3
- (5) If the adult revokes an enduring power of attorney under this section, 4  
the adult must take reasonable steps to advise all chosen decision makers 5  
under the enduring power of attorney of the revocation. 6
- Revocation by other action of adult** 7
- 55.(1) In this section— 8
- “affecting document” means an enduring power of attorney or advance 9  
health care directive. 10
- (2) An adult’s enduring power of attorney is also revoked— 11
- (a) to the extent it gives a particular power to a chosen decision 12  
maker, if the adult includes the decision in a later advance health 13  
care directive or gives the particular power to a different chosen 14  
decision maker by a later affecting document; or 15
- (b) unless it was made in express contemplation of the marriage, if 16  
the adult who made it marries after making it; or 17
- (c) to the extent it gives power to the married spouse of the adult, if 18  
they become divorced; or 19
- (d) if the adult who made it dies. 20
- Revocation by action of chosen decision maker** 21
- 56.(1) An adult’s enduring power of attorney is also revoked to the 22  
extent it gives power to a chosen decision maker for a decision, if the 23  
chosen decision maker— 24
- (a) withdraws with the tribunal’s leave;<sup>24</sup> or 25

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<sup>24</sup> The tribunal may give leave under section 140(1).

*Assisted and Substituted Decision-making*

- (b) withdraws by notice given to the adult under this Act;<sup>25</sup> or 1
- (c) is a paid carer for the adult; or 2
- (d) is a health care provider for the adult; or 3
- (e) has impaired decision-making capacity for the decision; or 4
- (f) dies. 5
- (2) An enduring power of attorney is also revoked to the extent it gives 6  
power to make a financial decision or litigation related decision to a chosen 7  
decision maker, if the chosen decision maker becomes bankrupt or 8  
insolvent. 9
- Example—* 10
- Under an enduring power of attorney, chosen decision maker, XYZ exercises 11  
power to make all financial decisions. XYZ becomes bankrupt. Therefore, the 12  
enduring power of attorney is revoked to the extent it gives power to XYZ to make 13  
financial decisions. 14
- If XYZ was a joint chosen decision maker with ABC, the enduring power of 15  
attorney is revoked to the extent it gives power to XYZ and ABC to make financial 16  
decisions. If XYZ was a joint and several decision maker with ABC, the enduring 17  
power of attorney is only revoked to the extent it gives power to XYZ and ABC can 18  
continue to exercise the power. 19
- If XYZ was not a joint and several chosen decision maker and the enduring power 20  
of attorney provides an alternative or successive decision maker for financial 21  
decisions, the alternative or next chosen decision maker is then able to make 22  
financial decisions under it. Otherwise, no one is able to make financial decisions 23  
under the enduring power of attorney. 24

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<sup>25</sup> If an adult who has given a chosen decision maker power to make a decision has decision-making capacity for the decision, the chosen decision maker may withdraw by signed notice given to the adult—section 140(3).

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**PART 4—OTHER MATTERS**
**Offence to dishonestly induce the making of enduring power of attorney**

**57.(1)** A person must not dishonestly induce an adult to make an enduring power of attorney.

**Maximum penalty—**

**(2)** A person found guilty of an offence under subsection (1) loses an interest the person might otherwise have had in the estate of the adult.

*Examples of a lost interest—*

1. If the offender is a beneficiary under the will of the adult who made the enduring power of attorney—the offender's interest in the adult's estate.

2. If the offender would be entitled to an interest in the estate of the adult who made the enduring power of attorney on the death intestate of the adult—the offender's interest in the adult's estate.

3. If the offender has an interest under an instrument under which the adult who made the enduring power of attorney is the donor, settlor or grantor—the offender's interest under the instrument.

**(3)** However, the court may, if it considers it fair, completely or partly relieve a forfeiture under subsection (2).

**Application of Property Law Act**

**58.** The following provisions of the *Property Law Act 1974* apply to an enduring power of attorney—

- section 169(2) (Execution of powers of attorney)
- section 171 (Registration of powers and instruments revoking powers)
- section 172 (Execution of instruments etc. by donee of power of attorney)
- section 175 (Proof of instruments creating powers).

<b>Recognition of enduring powers of attorney made in other States</b>	1
<b>59. If—</b>	2
(a) an enduring power of attorney is made by an adult in another State; and	3 4
(b) the enduring power of attorney complies with the requirements in the other State in relation to an enduring power of attorney;	5 6
then, to the extent the enduring power of attorney could validly have been made in Queensland, it must be treated as if it had been made in Queensland and complied with the requirements in this Chapter.	7 8 9
<b>Protection against change or revocation</b>	10
<b>60.(1)</b> If a power under an adult's enduring power of attorney has been changed or revoked, a chosen decision maker who—	11 12
(a) purports to exercise the power; and	13
(b) does not know the power has been changed or revoked;	14
does not incur any liability (either to the adult or anyone else) because of the variation or revocation.	15 16
<b>(2)</b> If—	17
(a) a power under an adult's enduring power of attorney has been changed or revoked; and	18 19
(b) a person deals with a chosen decision maker who purports to exercise the power; and	20 21
(c) the person does not know the power has been changed or revoked;	22 23
the transaction between them is, in favour of the person, as valid as if the power had not been changed or revoked.	24 25
<b>(3)</b> Knowledge of change or revocation includes—	26
(a) knowledge of the happening of an event <sup>26</sup> having the effect of	27

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<sup>26</sup> For example, an adult's enduring power of attorney is revoked if the adult dies (section 55) or the chosen decision maker becomes a health care provider for the adult (section 56(1)(d)).



changing or revoking; and	1
(b) having reason to believe change or revocation has happened.	2
<b>Protection against noncompliance with interstate enduring power of attorney</b>	3
	4
61.(1) If an adult's enduring power of attorney has been made in another State and does not comply with the other State's requirements in relation to an enduring power of attorney, a chosen decision maker who—	5
	6
	7
(a) purports to exercise power under the enduring power of attorney; and	8
	9
(b) does not know of the noncompliance;	10
does not incur any liability (either to the adult or anyone else) because of the noncompliance.	11
	12
(2) If—	13
(a) an adult's enduring power of attorney has been made in another State and does not comply with the other State's requirements in relation to an enduring power of attorney; and	14
	15
	16
(b) a person deals with a chosen decision maker who purports to exercise power under the enduring power of attorney; and	17
	18
(c) the person does not know of the noncompliance;	19
the transaction between them is, in favour of the person, as valid as if the enduring power of attorney complied with the other State's requirements in relation to an enduring power of attorney.	20
	21
	22
(3) Knowledge of noncompliance includes—	23
(a) knowledge of the happening of an event having the effect of noncompliance; and	24
	25
(b) having reason to believe there is noncompliance.	26

<b>CHAPTER 6—ADVANCE HEALTH CARE DIRECTIVES</b>	1 2
<b>PART 1—MAKING AN ADVANCE HEALTH CARE DIRECTIVE</b>	3 4
<i>Division 1—Benefit of advance health care directive</i>	5
<b>Overview</b>	6
62.(1) An adult who understands the matters necessary to make an advance health care directive <sup>27</sup> may make an advance health care directive including decisions about the adult’s future health care.	7 8 9
(2) An advance health care directive may include health care decisions and special consent health care decisions of the adult.	10 11
(3) It may also—	12
(a) include information relevant to a future health care or special consent health care decision of, or for, the adult; and	13 14
(b) choose 1 or more decision makers to make future health care decisions for the adult if the decisions included in the directive are inadequate.	15 16 17
(4) A chosen decision maker may not make a special consent health care decision for the adult.	18 19
(5) Section 68 deals with when the directive begins.	20
(6) The advance health care directive is not revoked by the adult becoming an adult with impaired decision-making capacity for a decision.	21 22
<b>Chosen decision maker to supplement advance health care directive</b>	23
63. Chapter 5 applies to a chosen decision maker chosen by an adult in	24

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<sup>27</sup> “[M]atters necessary to make an advance health care directive” means the matters in section 65—see Dictionary.

an advance health care directive as if the chosen decision maker were  
chosen by the adult in an enduring power of attorney. 1  
2

**Common law not affected** 3

64. This Act does not affect common law recognition of instructions  
about health care given by an adult that are not given in an advance health  
care directive made under this Act. 4  
5  
6

***Division 2—Formal matters*** 7

**When an advance health care directive may be made** 8

65. An adult may make an advance health care directive including a  
health care or special consent health care decision only if the adult is capable  
of understanding the nature and foreseeing the likely effects of the decision  
and understands the following— 9  
10  
11  
12

- (a) the directive will continue to operate even if the adult becomes an  
adult with impaired decision-making capacity; 13  
14
- (b) the adult may revoke the directive at any time the adult is capable  
of making another advance health care directive; 15  
16
- (c) at any time the adult is not capable of revoking the directive, the  
adult will not be able to oversee the implementation of the  
directive. 17  
18  
19

**How to make an advance health care directive** 20

66.(1) An advance health care directive of an adult must— 21

- (a) be written; and 22
- (b) be signed by the adult or, if the adult instructs, for the adult and in  
the adult's presence by a person who is at least 18 and not the  
witness or a chosen decision maker for the adult; and 23  
24  
25
- (c) be signed and dated by a witness who is— 26

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- 
- |  |                      |
|--|----------------------|
| (i) a justice, <sup>28</sup> commissioner for declarations or lawyer; <sup>29</sup> and  | 1                    |
| (ii) not a chosen decision maker of the adult; and   | 2                    |
| (iii) not a relation of the adult or a chosen decision maker; and  | 3                    |
| (iv) not a current health care provider of the adult.  | 4                    |
| (2) The directive may be in the approved form.   | 5                    |
| (3) If the directive is signed by the adult, it must include a certificate signed by the witness stating that the adult—   | 6<br>7               |
| (a) signed the advance health care directive in the witness' presence; and   | 8<br>9               |
| (b) at the time, appeared to the witness to understand the matters necessary to make an advance health care directive  | 10<br>11             |
| (4) If the directive is signed by a person for the adult, it must include a certificate signed by the witness stating that—  | 12<br>13             |
| (a) in the witness' presence, the adult instructed the person to sign the advance health care directive on the adult's behalf; and   | 14<br>15             |
| (b) the person signed the advance health care directive in the presence of the adult and witness; and  | 16<br>17             |
| (c) at the time, the adult appeared to the witness to understand the matters necessary to make an advance health care directive.   | 18<br>19             |
| (5) If the directive chooses 1 or more decision makers to make future health care decisions, it is only effective to give power to a chosen decision maker if the chosen decision maker has signed the directive acknowledging the power has been given. | 20<br>21<br>22<br>23 |

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<sup>28</sup> “[J]ustice” means justice of the peace—*Acts Interpretation Act 1954*, section 36.

<sup>29</sup> “[L]awyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—*Acts Interpretation Act 1954*, sections 33A and 36.

<b><i>Division 3—Who may be a chosen decision maker</i></b>	1
<b>Eligibility—personal or health care decision</b>	2
67. A person may be chosen by an advance health care directive as a chosen decision maker for a health care decision for an adult only if the person is—	3 4 5
(a) an individual who is at least 18; and	6
(b) not a paid carer, or current health care provider, for the adult.	7
<b><i>Division 3—When directive exercisable</i></b>	8
<b>Exercise of directive</b>	9
68.(1) An adult's advance health care directive about a health care decision or special consent health care decision—	10 11
(a) begins when (if ever) the adult has impaired decision-making capacity for the decision; and	12 13
(b) cannot begin before then.	14
(2) However, the directive is exercisable only while the adult has impaired decision-making capacity for the decision.	15 16
 <b>PART 2—USING A HEALTH CARE DIRECTIVE</b>	 17
<b><i>Division 1—Effect of directive</i></b>	18
<b>Advance decision effective when needed</b>	19
69. When an advance health care directive begins, a health care or special consent health care decision included in the directive is as effective as if—	20 21

*Assisted and Substituted Decision-making*

- (a) the adult made the decision when it needed to be made; and 1  
 (b) the adult had capacity to make the decision then. 2

*Division 2—Health care provider* 3**Protection if unaware of directive** 4

70. A health care provider is not affected by an advance health care 5  
 directive to the extent that the health care provider does not know, or have 6  
 reason to believe, that an adult has an advance health care directive— 7

- (a) containing a health care or special consent health care decision; or 8  
 (b) choosing 1 or more chosen decision makers to make future health 9  
 care decisions for the adult if the decisions included in the 10  
 directive are inadequate. 11

**Protection if unaware of change or revocation** 12

71. A health care provider is not affected by a change or revocation of an 13  
 advance health care directive to the extent that the health care provider does 14  
 not know, or have reason to believe, that an adult has changed or revoked an 15  
 advance health care directive. 16

*Division 3—Assistance from tribunal* 17**Declaration of impaired decision-making capacity** 18

72. A chosen decision maker, a health care provider for an adult or 19  
 another interested person may apply to the tribunal for a declaration (an 20  
 “impaired capacity declaration”) that the adult who made the advance 21  
 health care directive has become an adult with impaired decision-making 22  
 capacity for all health care decisions and special consent health care 23  
 decisions or a particular decision or type of decision. 24

<b>Advice and directions about exercise of power</b>	1
73. A chosen decision maker, a health care provider for an adult or another interested person may apply to the tribunal for advice or directions about a decision, information or something else included in the adult's advance health care directive or the interpretation of the directive's terms.	2 3 4 5
<b>PART 3—CHANGING AND REVOKING AN ADVANCE HEALTH CARE DIRECTIVE</b>	6 7
<b>Change and revocation by tribunal</b>	8
74.(1) An interested person may apply to the tribunal for an order—	9
(a) changing the terms of an adult's advance health care directive; or	10
(b) revoking the directive.	11
(2) The tribunal may only make an order under subsection (1) if the tribunal considers circumstances (including advances in medical science) have changed to the extent that the terms of the advance health care directive are inappropriate.	12 13 14 15
(3) The tribunal may make an order under subsection (1) on its own initiative.	16 17
<b>Effect of tribunal change or revocation</b>	18
75.(1) An advance health care directive is changed if the tribunal makes an order changing its terms.	19 20
(2) An advance health care directive is revoked to the extent the tribunal makes an order revoking it.	21 22
<b>Duty to advise of tribunal change or revocation</b>	23
76. If the tribunal changes or revokes an adult's advance health care directive, the tribunal must take reasonable steps to advise the adult of the change or revocation.	24 25 26

**Formal revocation by adult**

- 1
- 2 **77.(1)** An adult's advance health care directive is revoked if the adult  
3 revokes it under this section when the adult understands the matters  
4 necessary for making the same advance health care directive.<sup>30</sup>
- 5 **(2)** A revocation under this section of an advance health care directive by  
6 the adult who made it must—
- 7 (a) be written; and
- 8 (b) be signed by the adult revoking it or, if the adult revoking it  
9 instructs, for the adult and in the adult's presence by an individual  
10 who is at least 18 and not the witness or a chosen decision maker  
11 for the adult; and
- 12 (c) be signed and dated by a witness who is—
- 13 (i) a justice,<sup>31</sup> commissioner for declarations or lawyer;<sup>32</sup> and
- 14 (ii) not a chosen decision maker of the adult; and
- 15 (iii) not a relation of the adult or a chosen decision maker; and
- 16 (iv) not a current health care provider for the adult.
- 17 **(3)** If the revocation is signed by the adult, it must include a certificate  
18 signed by the witness stating that the adult—
- 19 (a) signed the revocation in the witness' presence; and
- 20 (b) at the time, appeared to the witness to understand the matters  
21 necessary to make the same advance health care directive.
- 22 **(4)** If the revocation is signed by a person for the adult, it must include a  
23 certificate signed by the witness stating that—
- 24 (a) in the witness' presence, the adult instructed the person to sign the  
25 revocation for the adult; and

<sup>30</sup> "[M]atters necessary to make an advance health care directive" means the matters in section 65—see Dictionary.

<sup>31</sup> "[J]ustice" means justice of the peace—*Acts Interpretation Act 1954*, section 36.

<sup>32</sup> "[L]awyer" means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—*Acts Interpretation Act 1954*, sections 33A and 36.



- (b) the person signed the revocation in the presence of the adult and witness; and 1  
2
- (c) at the time, the adult appeared to the witness to understand the matters necessary to make the same advance health care directive. 3  
4
- (5) A revocation of an advance health care directive may be in the approved form. 5  
6
- Revocation by other action of adult** 7
- 78.(1) In this section— 8
- “affecting document” means an enduring power of attorney or advance health care directive. 9  
10
- (2) An adult’s advance health care directive is also revoked, to the extent it includes a particular decision, if the adult— 11  
12
- (a) includes the decision in a later advance health care directive; or 13
- (b) gives a chosen decision maker power in a later affecting document to make the decision. 14  
15
- (3) An adult’s advance health care directive is also revoked to the extent it chooses a particular decision maker to make a particular decision if the adult— 16  
17  
18
- (a) includes the decision in a later advance health care directive; or 19
- (b) gives a different chosen decision maker power in a later affecting document to make the decision. 20  
21
- Revocation by action of chosen decision maker** 22
79. An adult’s advance health care directive is also revoked, to the extent it gives power to a chosen decision maker for a decision, if the chosen decision maker— 23  
24  
25
- (a) withdraws with the tribunal’s leave;<sup>33</sup> or 26

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<sup>33</sup> The tribunal may give leave under section 140(1).

(b) withdraws by notice given to the adult under this Act; <sup>34</sup> or	1
(c) is a paid carer for the adult; or	2
(d) is a health care provider for the adult; or	3
(e) has impaired decision-making capacity; or	4
(f) dies.	5
<b>CHAPTER 7— APPOINTED ASSISTANT OR</b>	6
<b>APPOINTED DECISION MAKER APPOINTED BY</b>	7
<b>TRIBUNAL</b>	8
<b>PART 1—EXPLANATION</b>	9
<b>Explanation of Chapter</b>	10
80.(1) This Chapter allows the tribunal to appoint an appointed assistant or appointed decision maker.	11 12
(2) Part 2 states when an appointment may be made.	13
(3) Part 3 states whom the tribunal may appoint.	14
(4) Part 4 states the steps needed to have an appointment made.	15

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<sup>34</sup> If an adult, who has given a chosen decision maker power to make a decision, has decision-making capacity for the decision, the chosen decision maker may withdraw by signed notice given to the adult—section 140(3).

**PART 2—WHEN APPOINTMENT MAY BE MADE****General—appointment of appointed assistant**

**81.(1)** The tribunal may appoint an appointed assistant for a decision for an adult if—

- (a) the adult—
  - (i) needs to make the decision; or
  - (ii) is likely to make the decision and the decision involves, or is likely to involve, substantial risk to the adult's health, welfare or property; and
- (b) the adult would have decision-making capacity for the decision with the assistance of an appointed assistant; and
- (c) there is an appropriate person available for appointment; and
- (d) without an appointment—
  - (i) the adult's needs cannot be adequately met; or
  - (ii) the adult's interests cannot be adequately protected.

(2) The appointment may be on terms considered appropriate by the tribunal.

**General—appointment of appointed decision maker**

**82.(1)** The tribunal may appoint an appointed decision maker for a decision for an adult if—

- (a) the adult—
  - (i) needs to make the decision; or
  - (ii) is likely to make the decision and the decision involves, or is likely to involve, substantial risk to the adult's health, welfare or property; and
- (b) the adult has impaired decision-making capacity for the decision; and
- (c) there is an appropriate person available for appointment; and

- 
- (d) without an appointment— 1
- (i) the adult's needs cannot be adequately met; or 2
- (ii) the adult's interests cannot be adequately protected. 3
- (2) The appointment may be on terms considered appropriate by the 4  
tribunal. 5
- Advance appointment of appointed assistant** 6
- 83.(1)** The tribunal may make an advance appointment of an appointed 7  
assistant for a decision for an individual who is at least 17½ but not 18 if— 8
- (a) there is a reasonable likelihood that, when the individual turns 18, 9  
the individual— 10
- (i) will need to make the decision; or 11
- (ii) is likely to make the decision and the decision involves, or is 12  
likely to involve, substantial risk to the individual's health, 13  
welfare or property; and 14
- (b) there is a reasonable likelihood that, when the individual turns 18, 15  
the individual will have decision-making capacity for the decision 16  
only with the assistance of an appointed assistant; and 17
- (c) there is an appropriate person available for appointment; and 18
- (d) there is a reasonable likelihood that, without an appointment, 19  
when the individual turns 18— 20
- (i) the individual's needs could not be adequately met; or 21
- (ii) the individual's interests could not be adequately protected. 22
- (2) The appointment begins when the individual turns 18. 23
- (3) The appointment ends when the individual turns 19 unless the 24  
tribunal orders that the appointment is for a longer period. 25
- (4) The tribunal may order the appointment for a longer period only if the 26  
tribunal considers— 27
- (a) the need for an appointment will continue for the longer period; 28  
and 29
- (b) the need for the tribunal to review the appointment is very limited. 30

(5) The longer period may be up to 3 years.	1
(6) The appointment may be on terms considered appropriate by the tribunal.	2 3
<b>Advance appointment of appointed decision maker</b>	4
84.(1) The tribunal may make an advance appointment of an appointed decision maker for a decision for an individual who is at least 17½ but not 18 if—	5 6 7
(a) there is a reasonable likelihood that, when the individual turns 18, the individual—	8 9
(i) will need to make the decision; or	10
(ii) is likely to make the decision and the decision involves, or is likely to involve, substantial risk to the individual's health, welfare or property; and	11 12 13
(b) there is a reasonable likelihood that, when the individual turns 18, the individual will have impaired decision-making capacity for the decision; and	14 15 16
(c) there is an appropriate person available for appointment; and	17
(d) there is a reasonable likelihood that, without an appointment, when the individual turns 18—	18 19
(i) the individual's needs could not be adequately met; or	20
(ii) the individual's interests could not be adequately protected.	21
(2) The appointment begins when the individual turns 18.	22
(3) The appointment ends when the individual turns 19 unless the tribunal orders that the appointment is for a longer period.	23 24
(4) The tribunal may order the appointment for a longer period only if the tribunal considers—	25 26
(a) the need for an appointment will continue for the longer period; and	27 28
(b) the need for the tribunal to review the appointment is very limited.	29
(5) The longer period may be up to 3 years.	30

(6) The appointment may be on terms considered appropriate by the tribunal. 1  
2

### **PART 3—WHO MAY BE APPOINTED** 3

#### *Division 1—Eligibility* 4

##### **Eligibility—personal or health care decision** 5

85. A person may be appointed as an appointed assistant, or appointed decision maker, for a personal decision or health care decision of, or for, an adult only if the person— 6  
7  
8

- (a) is— 9
  - (i) a relation of the adult, or close friend of the adult, who is at least 18; or 10  
11
  - (ii) another individual who is at least 18; or 12
  - (iii) the Adult Guardian; and 13
- (b) is not a paid carer, or current health care provider, for the adult; and 14  
15
- (c) is considered by the tribunal as appropriate for appointment having regard to the appropriateness considerations.<sup>35</sup> 16  
17

##### **Eligibility—excluded personal or special consent health care decision** 18

86.(1) A person may be appointed as an appointed assistant for an excluded personal decision, or special consent health care decision, of an adult only if the person— 19  
20  
21

- (a) is— 22
  - (i) a relation of the adult, or close friend of the adult, who is at 23

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<sup>35</sup> See section 88.

least 18; or	1
(ii) another individual who is at least 18; or	2
(iii) the Adult Guardian; and	3
(b) is not a paid carer, or current health care provider, for the adult;	4
and	5
(c) is considered by the tribunal as appropriate for appointment	6
having regard to the appropriateness considerations. <sup>36</sup>	7
(2) No-one may be appointed as an appointed decision maker for an	8
excluded personal decision or special consent health care decision.	9
<b>Eligibility—financial or litigation related decision</b>	10
87. A person may be appointed as an appointed assistant or appointed	11
decision maker for a financial decision or litigation related decision of, or	12
for, an adult only if the person—	13
(a) is—	14
(i) a relation of the adult, or close friend of the adult, who is at	15
least 18; or	16
(ii) another individual who is at least 18; or	17
(iii) a trustee company under the <i>Trustee Companies Act 1968</i> ;	18
or	19
(iv) the Public Trustee; and	20
(b) is not a paid carer, or current health care provider, for the adult;	21
and	22
(c) is considered by the tribunal as appropriate for appointment	23
having regard to the appropriateness considerations.	24

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<sup>36</sup> See section 88.

<b><i>Division 2—Appropriateness considerations</i></b>	1
<b>Tribunal to consider</b>	2
<b>88.(1)</b> In deciding whether a person is appropriate for appointment for an adult, the tribunal must consider the following matters (“ <b>appropriateness considerations</b> ”)—	3 4 5
(a) the general principles and whether the person is likely to comply with them;	6 7
(b) if the appointment is for a health care decision—the health care principle and whether the person is likely to comply with it;	8 9
(c) whether the adult’s and person’s interests are likely to conflict;	10
(d) whether the adult and person are compatible;	11
(e) if more than 1 person is to be appointed—whether the persons are compatible;	12 13
(f) whether the person would be available and accessible to the adult;	14
(g) the person’s suitability and competence to perform functions and exercise powers under an appointment order.	15 16
<b>(2)</b> The fact that a person is a relation of the adult does not, of itself, mean the adult’s and person’s interests are likely to conflict.	17 18
<b>(3)</b> Also, the fact that, on the adult’s death, a person may be a beneficiary of the adult’s estate does not, of itself, mean the adult’s and person’s interests are likely to conflict.	19 20 21
<b>(4)</b> In considering the person’s suitability and competence, the tribunal must have regard to the following—	22 23
(a) the nature and circumstances of any criminal conviction of the person including the likelihood that the commission of the offence may adversely affect the adult;	24 25 26
(b) if the person’s appointment is for a financial decision or litigation related decision and the person is an individual—	27 28
(i) the nature and circumstances of any bankruptcy; and	29
(ii) the nature and circumstances of any insolvency of any company of which the person was, or is, a director, secretary	30 31



or other principal officer; and	1
(c) the nature and circumstances of any refusal of, or removal from, appointment (whether in Queensland or elsewhere) as—	2 3
(i) a person assisting someone else to make decisions; or	4
(ii) a person making decisions for someone else.	5
(5) An individual who has agreed to proposed appointment must advise <sup>37</sup> the tribunal on oath or affirmation whether he or she—	6 7
(a) is under 18; or	8
(b) is a paid carer or current health care provider for the adult; or	9
(c) has any criminal conviction; or	10
(d) if the proposed appointment is for a financial or litigation related decision—	11 12
(i) is, or has been, bankrupt; or	13
(ii) is, or has been, a director, secretary or other principal officer of a company that is, or has been, insolvent; or	14 15
(e) has been (whether in Queensland or elsewhere) refused, or removed from, appointment as—	16 17
(i) a person assisting someone else to make decisions; or	18
(ii) a person making decision for someone else.	19
(6) In this section—	20
“conviction” includes being found guilty.	21

## **PART 4—STEPS FOR APPOINTMENT**

<b>Step 1—Apply for appointment</b>	23
<b>89.(1)</b> An adult or another interested person may apply to the tribunal for	24

<sup>37</sup> Section 260 (Preservation of confidentiality) applies to the advice.

- the appointment of an appointed assistant or appointed decision maker for the adult. 1  
2
- (2) The application must be written and filed with the tribunal. 3
- (3) The application must include the following— 4
- (a) the reasons for the application; 5
- (b) to the best of the applicant's knowledge, information about the following people— 6  
7
- (i) the applicant; 8
- (ii) the adult if the adult is not the applicant; 9
- (iii) the appointee proposed by the applicant; 10
- (iv) the members of the adult's family; 11
- (v) any primary carer of the adult (other than a family member); 12
- (vi) all current appointed assistants and substitute decision makers for the adult; 13  
14
- (c) the written agreement of the appointee proposed by the applicant to appointment; 15  
16
- (d) other information prescribed under the regulations. 17
- (4) The information required under subsection (3)(b) is to enable the tribunal to give notice of the hearing and must consist of— 18  
19
- (a) each person's name; and 20
- (b) either— 21
- (i) details the applicant knows of the person's address and telephone and facsimile number; or 22  
23
- (ii) if the applicant does not know the details—a way known to the applicant of contacting the person. 24  
25

**Step 2—Tribunal advises people concerned of hearing** 26

- 90.(1)** At least 7 days before the hearing of an application, the tribunal must give notice of the hearing to the adult for whom the applicant asks that an appointment be made and, as far as practicable, to the following— 27  
28  
29

(a) the applicant;	1
(b) the appointee proposed by the applicant;	2
(c) the members of the adult's family;	3
(d) any primary carer of the adult (other than a family member);	4
(e) all current appointed assistants and substitute decision makers for the adult;	5 6
(f) anyone else the tribunal considers should be notified.	7
(2) Notice to the adult must be given in the way the tribunal considers most appropriate having regard to the person's needs.	8 9
<i>Example—</i>	10
If the tribunal is aware that the adult is not literate in English but is literate in another language, the notice must be given in the other language.	11 12
(3) However, the adult's failure to understand the notice does not affect its validity.	13 14
(4) The tribunal may—	15
(a) dispense with the requirement to give notice to all or any of the people listed in subsection (1) other than the adult; and	16 17
(b) reduce the time stated in subsection (1).	18
(5) Failure to comply with the requirement to give notice to all or any of the people listed in subsection (1), other than the adult, does not affect the validity of a hearing or the tribunal's decision about an application.	19 20 21
<b>Step 3—Satisfy tribunal appointment needed</b>	22
91.(1) If the tribunal is satisfied of the matters in section 81(1), it may appoint an appointed assistant for the decision of the adult.	23 24
(2) If the tribunal is satisfied of the matters in section 82(1), it may appoint an appointed decision maker for the decision for the adult.	25 26
<b>Step 4—Tribunal decides who should be appointed</b>	27
92.(1) If an appointment is to be made, the tribunal then decides who should be appointed.	28 29

(2) The tribunal may appoint—	1
(a) a single appointee for a decision or type of decision; or	2
(b) joint or joint and several appointees for a decision or type of decision; or	3
decision; or	4
(c) different appointees for different decisions or types of decision; or	5
(d) alternative appointees for a decision or type of decision so power is given to a particular appointee only in stated circumstances; or	6
is given to a particular appointee only in stated circumstances; or	7
(e) successive appointees for a decision or type of decision so power is given to a particular appointee only when the power of a previous appointee ends.	8
	9
	10
<b>Step 5—Tribunal decides whether to change review period</b>	11
<b>93.(1) If an appointment is to be made<sup>38</sup> and the tribunal considers—</b>	12
(a) the need for an appointment will continue for more than 2 years;	13
and	14
(b) the need for the tribunal to review the appointment is very limited;	15
the tribunal may order a period of up to 3 years as the first review period <sup>39</sup>	16
for the appointment.	17
(2) If an appointment is to be made and the tribunal considers it appropriate, the tribunal may order that the first review period for the appointment is a period less than 2 years.	18
	19
	20
(3) An order under this section is an “ <b>order changing the review period</b> ”.	21
	22
<b>Certain steps also apply to advance appointments</b>	23
<b>94.(1) Steps 1, 2 and 4 apply, with necessary changes, to the advance appointment of an appointed assistant or appointed decision maker for an</b>	24
	25

<sup>38</sup> The tribunal must give its decision within a reasonable time (section 211), give written reasons for its decision (section 212) and generally give a copy of its decision and reasons to each participant (section 213).

<sup>39</sup> Normally 2 years—see section 95.

individual who is at least 17½ but not 18.	1
(2) If the tribunal is satisfied of the matters in section 83(1), instead of step 3, it may make an advance appointment of an appointed assistant for the decision for the individual.	2 3 4
(3) If the tribunal is satisfied of the matters in section 84(1), it may make an advance appointment of an appointed decision maker for the decision for the individual.	5 6 7
<b>PART 5—REVIEW OF APPOINTMENT</b>	8
<b>Periodic automatic review</b>	9
95. The tribunal must periodically review an appointment.	10
<b>Other review</b>	11
96. The tribunal may review an appointment at any time on its own initiative or on the application of an interested person.	12 13
<b>Type of review</b>	14
97.(1) The tribunal may conduct a review in the way it considers appropriate.	15 16
(2) At the end of a review of an appointment, the tribunal must revoke its order making the appointment unless it is satisfied that it would make another appointment if a new application for an appointment were to be made.	17 18 19 20
(3) If the tribunal is satisfied there are appropriate grounds for an appointment to continue, it may either—	21 22
(a) continue its order making the appointment; or	23
(b) change its order making the appointment, including, for example, by—	24 25
(i) changing the terms of the appointment; or	26

(ii) removing an appointed decision maker; or	1
(iii) making a new appointment; or	2
(iv) making an order, or further order, changing the review period <sup>40</sup> .	3 4
(4) However, the tribunal may make an order removing an appointed decision maker only if the tribunal considers—	5 6
(a) a relevant interest of the adult has not been, or is not being, adequately protected; or	7 8
(b) the appointed decision maker is no longer suitable or competent to act as substitute decision maker; or	9 10
(c) the appointed decision maker has neglected the appointed decision maker's duties or abused the appointed decision maker's powers; or	11 12 13
(d) the appointed decision maker has otherwise contravened this Act.	14
<b>First automatic review</b>	15
98.(1) The first review of an appointment must happen before the first review period ends.	16 17
(2) In this section—	18
<b>“first review period”</b> for an appointment (including an appointment made when changing an earlier order making an appointment) means—	19 20
(a) 2 years after the first mentioned appointment is made; or	21
(b) the period stated in an order changing the review period. <sup>41</sup>	22
<b>Subsequent automatic review</b>	23
99. A review of an appointment (other than the first review) must happen no more than 3 years after the most recent review.	24 25

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<sup>40</sup> See section 93.

<sup>41</sup> See section 93.

**PART 6—OTHER MATTERS****Automatic ending of appointment**

**100.** If an appointed assistant, or appointed decision maker, for an adult becomes a paid carer, or health care provider, for the adult, the appointment ends.

**Protection of appointed decision maker—decision maker already chosen**

**101.(1)** In this section—

“**document**” means an enduring power of attorney or advance health care directive.

(2) If—

- (a) a power is given to a chosen decision maker under a document of an adult; and
- (b) after the document was made but without reference to it, the tribunal gives the power to an appointed decision maker; and
- (c) the appointed decision maker uses the power and does not know the power is given to a chosen decision maker;

the appointed decision maker does not incur any liability (either to the adult or anyone else) because of power having been given to the chosen decision maker.

(3) If—

- (a) a power is given to a chosen decision maker under a document of an adult; and
- (b) after the document was made but without reference to it, the tribunal gives the power to an appointed decision maker; and
- (c) a person deals with the appointed decision maker who purports to exercise the power given by the tribunal; and
- (c) the person does not know the power is given to a chosen decision maker;

the transaction between them is, in favour of the person, as valid as if the power had not been given to the chosen decision maker. 1  
2

(4) Knowledge of the power having been given to a chosen decision maker includes having reason to believe the power has been given to a chosen decision maker. 3  
4  
5

**Protection of appointed decision maker—decision already made by advance health care directive** 6  
7

**102.(1) If—** 8

(a) a decision about an issue is included in an adult's advance health care directive; and 9  
10

(b) after the directive was made but without reference to it, the Tribunal appoints an appointed decision maker to make a decision about the issue; and 11  
12  
13

(c) the appointed decision maker makes a decision about the issue and does not know a decision about the issue is included in the adult's advance health care directive; 14  
15  
16

the appointed decision maker does not incur any liability (either to the adult or anyone else) because of a decision about the issue being included in the adult's advance health care directive. 17  
18  
19

**(2) If—** 20

(a) a decision about an issue is included in an adult's advance health care directive; and 21  
22

(b) after the directive was made but without reference to it, the Tribunal appoints an appointed decision maker to make a decision about the issue; and 23  
24  
25

(c) a person deals with the appointed decision maker who purports to exercise power given by the Tribunal; and 26  
27

(d) the person does not know a decision about the issue is included in the adult's advance health care directive; 28  
29

the transaction between them is, in favour of the person, as valid as if a decision about the issue had not been included in the adult's advance health care directive. 30  
31  
32



- (3) Knowledge of a decision about the issue being included in the adult's advance health care directive includes having reason to believe the issue is included in the adult's advance health care directive. 1  
2  
3

## **CHAPTER 8—HEALTH CARE DECISIONS AND SPECIAL CONSENT HEALTH CARE DECISIONS** 4 5

### **PART 1—OVERVIEW** 6

#### *Division 1—Purpose* 7

#### **Purpose to achieve balance** 8

**103.** This Chapter seeks to strike a balance between— 9

- (a) ensuring an adult is not deprived of necessary health care merely because the adult is an adult with impaired decision-making capacity for a health care or special consent health care decision; and 10  
11  
12  
13
- (b) ensuring health care given to the adult is only for the purpose of promoting and maintaining the adult's health and wellbeing. 14  
15

#### *Division 2—Health care with consent* 16

#### **Who decides for health care requiring consent** 17

**104.** This division deals with who may consent to health care. 18

#### **Adult with decision-making capacity** 19

**105.** If an adult has decision-making capacity for a health care decision or special consent health care decision, only the adult may make the decision. 20  
21

<b>Adult may make enduring power of attorney</b>	1
<b>106.(1)</b> An adult who understands the matters <sup>42</sup> necessary to make an enduring power of attorney may make an enduring power of attorney for health care decisions. <sup>43</sup>	2 3 4
<b>(2)</b> However, power to make a special consent health care decision may not be given by enduring power of attorney.	5 6
<b>Adult may make advance health care directive</b>	7
<b>107.</b> An adult who understands the matters <sup>44</sup> necessary to make an advance health care directive may make an advance health care directive, including health care decisions and special consent health care decisions, about the adult's future health care. <sup>45</sup>	8 9 10 11
<b>Adult with impaired decision-making capacity—health care decisions</b>	12
<b>108.(1)</b> In this section—	13
“ <b>document</b> ” means an enduring power of attorney or advance health care directive.	14 15
<b>(2)</b> If an adult has impaired decision-making capacity for a health care decision, the decision is to be made—	16 17
(a) in accordance with the adult's most recent document (if any) dealing with the decision; <sup>46</sup> or	18 19
(b) if paragraph (a) does not apply—	20
(i) by a statutorily authorised health care decision maker; or	21
(ii) if there is no statutorily authorised health care decision maker or the tribunal considers it impracticable or	22 23

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<sup>42</sup> See section 42.

<sup>43</sup> See Chapter 5 about enduring powers of attorney.

<sup>44</sup> See section 65.

<sup>45</sup> See Chapter 6 about advance health care directives.

<sup>46</sup> A later document prevails over an earlier document to the extent of an inconsistency—section 259.

inappropriate for a statutorily authorised health care decision maker to make the decision—by the appointed decision maker authorised to make the decision.	1 2 3
<b>Adult with impaired decision-making capacity—special consent health care decisions</b>	4 5
<b>109.</b> If an adult has impaired decision-making capacity for a special consent health care decision, the decision is to be made—	6 7
(a) by the adult in accordance with the adult’s most recent advance health care directive (if any) containing the decision; or	8 9
(b) if paragraph (a) does not apply—by the tribunal.	10
 <i>Division 3—Health care without consent</i>	 11
<b>Adult with impaired decision-making capacity—urgency</b>	12
<b>110.(1)</b> Health care of an adult may be carried out without consent if—	13
(a) the adult has impaired decision-making capacity for a decision about the health care; and	14 15
(b) a health care provider considers the health care should be urgently carried out—	16 17
(i) to meet imminent risk to the adult’s life or health; or	18
(ii) to prevent significant pain or distress to the adult.	19
<b>(2)</b> Subsection (1) does not apply if the adult objects to the health care unless—	20 21
(a) the adult has minimal or no understanding of what the health care involves; and	22 23
(b) the health care is likely to cause the adult—	24
(i) no distress; or	25
(ii) temporary distress that is outweighed by the benefit to the adult of the proposed health care.	26 27

<b>PART 2—RELEVANT PRINCIPLES</b>	1
<b>Principles to be complied with when making health care or special consent health care decision</b>	2 3
<b>111.(1)</b> In making a health care decision for an adult, or assisting an adult to make a health care decision or special consent health care decision, a person must comply with the general principles <sup>47</sup> and health care principle. <sup>48</sup>	4 5 6 7
<b>(2)</b> In making a special consent health care decision for an adult, the tribunal must comply with the general principles and health care principle.	8 9
<b>Health care principle—most appropriate decision</b>	10
<b>112.(1)</b> A health care or special consent health care decision for an adult should be made only if the decision is the most appropriate decision to promote and maintain the adult's health and well-being. This principle is the "health care principle".	11 12 13 14
<b>(2)</b> In deciding whether a decision is the most appropriate decision, the tribunal or relevant person must, to the greatest extent practicable—	15 16
(a) seek the adult's views and wishes and take them into account; and	17
(b) take the information given to the person or tribunal under section 120 into account.	18 19
<b>(3)</b> Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.	20 21

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<sup>47</sup> See section 30.

<sup>48</sup> See section 112.

<b>PART 3—STATUTORILY AUTHORISED HEALTH CARE DECISION MAKERS</b>	1 2
<b>Power</b>	3
<b>113. If—</b>	4
(a) an adult has impaired decision-making capacity for a health care decision; and	5 6
(b) the tribunal has not appointed a decision maker for the decision; and	7 8
(c) it is not possible to make the decision in accordance with a tribunal order or an advance health care directive, or enduring power of attorney, of the adult;	9 10 11
a statutorily authorised health care decision maker for the adult may make the decision. <sup>49</sup>	12 13
<b>PART 4—TRIBUNAL'S POWER TO MAKE SPECIAL CONSENT HEALTH CARE DECISIONS</b>	14 15
<b>Donation of tissue</b>	16
<b>114.(1)</b> The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to removal of tissue from the adult for donation to another person only if the tribunal is satisfied that—	17 18 19
(a) the risk to the adult is small; and	20
(b) the risk of failure of the donated tissue is low; and	21
(c) the life of the proposed recipient would be in danger without the donation; and	22 23
(d) no other compatible donor is reasonably available; and	24

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<sup>49</sup> If statutorily authorised health care decision makers disagree about a health care decision, an application should be made to the tribunal.

- (e) there is, or has been, a close personal relationship between the adult and proposed recipient. 1  
2
- (2) The tribunal may not consent if the adult objects<sup>50</sup> to the health care. 3
- (3) If the tribunal consents to removal of tissue for donation, the tribunal's order must specify the proposed recipient. 4  
5

### **Sterilisation**

115.(1) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to sterilisation of the adult only if the tribunal is satisfied that— 6  
7  
8  
9

- (a) 1 of the following applies— 10
- (i) sterilisation is medically necessary; 11
- (ii) the adult is, or is likely to be, sexually active and there is no method of contraception that could reasonably be expected to be successfully applied; 12  
13  
14
- (iii) if the adult is female—the adult has problems with menstruation and cessation of menstruation by sterilisation is the only practicable way of overcoming the problems; and 15  
16  
17
- (b) sterilisation cannot reasonably be postponed; and 18
- (c) the adult is unlikely, in the foreseeable future, to have decision-making capacity for a decision about sterilisation. 19  
20

*Examples of paragraph (1)(a)(i)—* 21

1. Sterilisation may be medically necessary if the adult has uterine cancer, bilateral testicular cancer or cryptorchidism. 22  
23

2. Sterilisation may also be medically necessary if the adult has a severe psychiatric depressive illness that is likely to make the adult suicidal if the adult becomes pregnant. 24  
25  
26

(2) Also, in deciding whether to consent for the adult to a sterilisation procedure, the tribunal must take into account— 27  
28

- (a) alternative forms of health care (including other sterilisation 29

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<sup>50</sup> Section 119 (which effectively enables an adult's objection to be overridden in some cases) does not apply.

procedures) presently available or likely to become available in the foreseeable future; and	1 2
(b) the nature and extent of any significant risk associated with the proposed procedure and available alternative forms of health care (including other sterilisation procedures).	3 4 5
(3) If the tribunal consents to sterilisation, the adult's sterilisation is not unlawful. <sup>51</sup>	6 7
<b>Termination of pregnancy</b>	8
116.(1) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to termination of the adult's pregnancy only if the tribunal is satisfied that the termination is necessary to preserve the adult from serious danger to her life or physical or mental health.	9 10 11 12 13
(2) If the tribunal consents to termination, the termination is not unlawful.	14 15
<b>Research and experimental health care</b>	16
117.(1) The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to the adult's participation in research or experimental health care to diagnose or treat the adult only if the tribunal is satisfied about the following matters—	17 18 19 20
(a) the research or health care is approved by an appropriate ethics committee;	21 22
(b) the risk to the adult is small;	23
(c) the research or health care relates to a condition the adult has;	24
(d) the research or health care may result in significant benefit to the adult;	25 26
(e) the potential benefit cannot be achieved in any other way.	27
(2) The tribunal may consent, for an adult with impaired	28

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<sup>51</sup> Whether this subsection is necessary depends on the proposed new Criminal Code.

decision-making capacity for the decision, to the adult's participation in research or experimental health care treatment intended to gain knowledge that can be used in the diagnosis or treatment of a condition affecting the adult only if the tribunal is satisfied about the following matters—	1 2 3 4
(a) the research or treatment is approved by an appropriate ethics committee;	5 6
(b) the risk to the adult is small;	7
(c) the research or health care relates to a condition the adult has;	8
(d) the research or health care may result in significant benefit to the adult or other persons with the condition;	9 10
(e) the research or health care cannot be carried out without a person with the condition taking part.	11 12
(3) The tribunal may not consent if the adult objects <sup>52</sup> to the research or health care.	13 14

### **Prescribed psychiatric or other health care** 15

118. The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to the adult having psychiatric health care, or other health care, prescribed under the regulations only if the tribunal is satisfied of the matters prescribed under the regulations.	16 17 18 19
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## **PART 5—OTHER MATTERS** 20

### **Objection by adult** 21

119. If an adult objects to having health care—	22
(a) the health care decision or special consent health care decision (other than consent to removal of tissue for donation or research or experimental health care) is effective despite the adult's	23 24 25

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<sup>52</sup> Section 119 (which effectively enables an adult's objection to be overridden in some cases) does not apply.



objection if—	1
(i) the adult has minimal or no understanding of what the health care entails; and	2 3
(ii) the proposed health care is likely to cause the adult—	4
(A) no distress; or	5
(B) temporary distress that is outweighed by the benefit to the adult of the proposed health care; and	6 7
(b) in other cases—the health care decision or special consent health care decision is ineffective to give consent to the health care if the health care provider is aware, or ought reasonably to be aware, that the adult objects to the health care.	8 9 10 11
<b>Health care providers to give information</b>	12
<b>120.(1)</b> A health care provider who is treating an adult must give information—	13 14
(a) to a person who may assist an adult to make a health care decision or make a health care decision for the adult; or	15 16
(b) to the tribunal if the tribunal is considering making a special consent health care decision for the adult.	17 18
<b>(2)</b> The information to be given is information about the following—	19
(a) the nature of the adult's condition;	20
(b) the alternative forms of health care available, or likely to be available in the foreseeable future, for the condition;	21 22
(c) the general nature and effect of each form of health care;	23
(d) the nature and degree of any significant risks associated with each form of health care;	24 25
(e) the reasons why it is proposed that a particular form of health care should be carried out.	26 27
<b>Protection of health care provider</b>	28
<b>121.(1)</b> To the extent a health care provider complies with a purported	29

health care decision made by a person who represented to the health care provider that the person had the right to make the decision, the health care provider is taken to have the adult's consent to the decision. 1  
2  
3

(2) Subsection (1) does not apply if the health care provider knew, or could reasonably be expected to have known, that the person did not have the right to make the decision. 4  
5  
6

#### **Offence to make decision for adult if no right to do so** 7

122. It is an offence for a person who knows the person has no right to make a health care decision for an adult, or who is recklessly indifferent about whether the person has a right to make a health care decision for an adult, to— 8  
9  
10  
11

(a) purport to make the health care decision; or 12

(b) represent to a health care provider for the adult that the person has a right to make the health care decision. 13  
14

Maximum penalty— 15

#### **Offence to carry out health care** 16

123.(1) It is an offence for a person to carry out special consent health care of an adult with impaired decision-making capacity unless— 17  
18

(a) this Act provides that the health care may be carried out without consent;<sup>53</sup> or 19  
20

(b) consent to the health care is given under this or another Act;<sup>54</sup> or 21

(c) the health care is authorised by an order of the Supreme Court made in its *parens patriae* jurisdiction.<sup>55</sup> 22  
23

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<sup>53</sup> See section 110 (Adult with impaired decision-making capacity—urgency).

<sup>54</sup> A medical superintendent or medical practitioner may consent to a surgical procedure in certain cases under the *Medical Act 1939*, section 52.

<sup>55</sup> This jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It allows the Supreme Court to appoint decision-makers for people who, because of mental illness, intellectual disability, illness, accident or old age, are unable to adequately safeguard their own interests.

Maximum penalty—	1
(2) It is an offence for a person to carry out other health care of an adult with impaired decision-making capacity unless—	2 3
(a) this Act provides that the health care may be carried out without consent; <sup>56</sup> or	4 5
(b) consent to the health care is given under this Act or another Act; <sup>57</sup> or	6 7
(c) the health care is authorised by an order of the Supreme Court made in its <i>parens patriae</i> jurisdiction.	8 9
Maximum penalty—	10
(3) This section does not affect the application of section 282 of the Criminal Code. <sup>58</sup>	11 12
<b>Other liability not affected</b>	13
124. This Chapter does not affect liability for health care given to an adult to which a person would have been subject if—	14 15
(a) the adult had been capable of consenting to the health care; and	16
(b) the health care had been given with the adult's consent.	17

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<sup>56</sup> See section 110 (Adult with impaired decision-making capacity—urgency).

<sup>57</sup> A medical superintendent or medical practitioner may consent to a surgical procedure in certain cases under the *Medical Act 1939*, section 52.

<sup>58</sup> **'Surgical operations**  
**282.** A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable having regard to the patient's state at the time and to all the circumstances of the case.' (Criminal Code, section 282)

<b>CHAPTER 9—SUBSTITUTE DECISION MAKER</b>	1
<b>PART 1—GENERAL FUNCTIONS AND POWERS</b>	2
<b>Comply with principles</b>	3
125.(1) A substitute decision maker must comply with the general principles.	4 5
(2) In making a health care decision, a substitute decision maker must also comply with the health care principle.	6 7
<b>Act honestly and reasonably</b>	8
126. A substitute decision maker who may make a decision for an adult must exercise the power honestly and with the degree of care that is reasonable for a person having the substitute decision maker's experience and expertise.	9 10 11 12
Maximum penalty—	13
<b>Act as required by terms of power</b>	14
127. A substitute decision maker who may make a decision for an adult must, when exercising the power, exercise it as required by the terms of the power.	15 16 17
<i>Example—</i>	18
A decision maker chosen under an enduring power of attorney must exercise power as required by the terms of the enduring power of attorney.	19 20
<b>Consult with adult's other substitute decision makers</b>	21
128. A substitute decision maker who may make a decision for an adult must consult on a regular basis with another substitute decision maker who may make a decision for the adult to ensure that the adult's interests are not prejudiced by a breakdown in communication between them.	22 23 24 25

<b>Act together with joint substitute decision makers</b>	1
129.(1) Substitute decision makers who may make a decision jointly for an adult must exercise the power unanimously.	2 3
(2) If it is impracticable or impossible to exercise the power unanimously, 1 or more of the joint substitute decision makers may apply to the tribunal for directions.	4 5 6
<b>Comply with other tribunal requirement</b>	7
130.(1) The tribunal may impose a requirement, including a requirement about giving security, on a substitute decision maker or a person who is to become a substitute decision maker.	8 9 10
(2) A substitute decision maker or person who is to become a substitute decision maker must comply with the requirement.	11 12
<b>PART 2—FUNCTIONS AND POWERS FOR FINANCIAL AND LITIGATION RELATED DECISIONS</b>	13 14 15
<b>Present management plan if asked</b>	16
131. A substitute decision maker who may make a financial decision or litigation related decision for an adult must, if ordered by the tribunal, present a plan of management to the tribunal or its nominee for approval.	17 18 19
<b>Keep records</b>	20
132. A substitute decision maker who may make a financial decision or litigation related decision for an adult must keep sufficient records to enable the substitute decision maker to comply with an order under	21 22 23

section 209(1). <sup>59</sup>	1
Maximum penalty—	2
<b>Keep property separate</b>	3
133.(1) A substitute decision maker who may make a financial decision for an adult must keep the substitute decision maker's property separate from the adult's property.	4 5 6
(2) Subsection (1) does not affect another obligation imposed by law.	7
(3) Subsection (1) does not apply to property owned jointly by the adult and substitute decision maker.	8 9
<b>Get approval for unauthorised investments</b>	10
134. A substitute decision maker who may invest for an adult may invest in investments that are not authorised investments only with the tribunal's approval.	11 12 13
<b>Avoid potential conflict transaction</b>	14
135.(1) A substitute decision maker who may make a financial decision or litigation related decision for an adult must not enter into a potential conflict transaction.	15 16 17
(2) However, a substitute decision maker may enter into a potential conflict transaction if—	18 19
(a) the transaction provides for a person's needs and—	20
(i) the adult might reasonably be expected to provide for the needs; and	21 22
(ii) what is provided is not more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances; or	23 24 25

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<sup>59</sup> An order under section 209 may require a substitute decision maker to file a summary of receipts and expenditure or more detailed accounts of dealings and transactions.

(b) the substitute decision maker obtains the tribunal's consent; or	1
(c) for a chosen decision maker empowered by an enduring power of attorney—the enduring power of attorney includes the adult's consent to the conflict transaction.	2 3 4
(3) The needs mentioned in subsection (2)(a) may include the substitute decision maker's needs.	5 6
(4) This section does not affect another obligation imposed by law.	7
(5) In this section—	8
<b>“potential conflict transaction”</b> is a transaction in which there could be conflict between—	9 10
(a) the interests and duty of the adult in relation to the transaction; and	11
(b) the interests and duty of the substitute decision maker or a relation, business associate or close friend of the substitute decision maker in relation to the transaction.	12 13 14
(6) The fact that a person is a relation of the adult does not, in itself, mean the adult's and person's interests could conflict.	15 16
(7) Also, the fact that on the adult's death, a person may be a beneficiary of the adult's estate does not, in itself, mean the adult's and person's interests could conflict.	17 18 19
<i>Example—</i>	20
A potential conflict transaction happens if a substitute decision maker who may make financial decisions for an adult buys the adult's car. The sale price does not have to be less than market value for the sale to be a potential conflict transaction.	21 22 23
<b>Gifts</b>	24
<b>136.(1)</b> A substitute decision maker who may make a financial decision for an adult may give away the adult's property only if—	25 26
(a) the gift is to a relation or close friend of the adult and is of a seasonal nature or because of a special event (including, for example, a birth or marriage); or	27 28 29
(b) the gift is in the nature of a donation that the adult made or might reasonably be expected to make;	30 31

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances. 1  
2

(2) The relation or close friend mentioned in subsection (1)(a) may include the substitute decision maker if the substitute decision maker is a relation or close friend of the adult. 3  
4  
5

(3) The recipient of the gift in the nature of a donation may include a charity with which the substitute decision maker has a connection. 6  
7

(4) The application of this section may be changed by the terms of the power given. 8  
9

#### **Maintain adult's dependants** 10

137.(1) A substitute decision maker who may make a financial decision for an adult may provide from the adult's estate for the needs of a person who is completely or mainly dependent on the adult. 11  
12  
13

(2) However, what is provided must not be more than what is reasonable having regard to all the circumstances and, in particular, the adult's financial circumstances. 14  
15  
16

(3) The application of this section may be changed by the terms of the power given. 17  
18

### **PART 3—MISCELLANEOUS** 19

#### **Power to excuse failure** 20

138. If a substitute decision maker is prosecuted in a court for a failure to comply with this Chapter, the court may, if it considers it fair, completely or partly excuse the failure. 21  
22  
23

#### **Compensation for failure to comply** 24

139.(1) A substitute decision maker who may make a decision for an adult may be required by the tribunal to compensate the adult (or, if the adult has died, the adult's estate) for a loss caused by the substitute decision 25  
26  
27



maker's failure to comply with this Chapter.	1
(2) Compensation paid under a tribunal order must be taken into account in assessing damages in a later civil proceeding in relation to the substitute decision maker's exercise of the power.	2 3 4
<b>Withdrawal of appointed assistant or substitute decision maker</b>	5
140.(1) A person may, with the tribunal's leave, withdraw as appointed assistant or substitute decision maker for a decision or type of decision the person has been given power to make.	6 7 8
(2) If the tribunal gives leave for an appointed assistant or substitute decision maker to withdraw for a decision or type of decision, the tribunal may appoint someone else to replace the withdrawing person for the decision or type of decision.	9 10 11 12
(3) If an adult who has given a chosen decision maker power to make a decision has decision-making capacity for the decision, a person may also withdraw as the chosen decision maker for the decision by signed notice given to the adult.	13 14 15 16

## **CHAPTER 10—TRIBUNAL**

### **PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS**

<b>Tribunal</b>	20
141.(1) An Assisted and Substituted Decisions Tribunal is established.	21
(2) It consists of the president, deputy president and members.	22
<b>Tribunal's functions</b>	23
142.(1) The tribunal has the functions given to it by this Act, including the following functions—	24 25

(a) performing certain functions in relation to enduring powers of attorney;	1 2
(b) considering applications for appointment of appointed assistants and appointed decision makers;	3 4
(c) making orders appointing, about the functions of, and giving directions to, appointed assistants and substitute decision makers;	5 6
(d) making declarations about the decision-making capacity of an adult, appointed assistant or substitute decision maker;	7 8
(e) reviewing appointment orders;	9
(f) making special consent health care decisions for adults with impaired decision-making capacity for the decisions.	10 11
(2) The tribunal also has the other functions given to it by another Act.	12
<b>Tribunal's powers</b>	13
143.(1) The tribunal has the powers given under this Act.	14
(2) The tribunal also may do all things necessary or convenient to be done for performing the tribunal's functions.	15 16
 <b>PART 2—ADMINISTRATIVE PROVISIONS</b>	 17
 <b>Appointment of president and deputy president</b>	 18
144.(1) There are to be a president and deputy president of the tribunal appointed on a full-time basis by the Governor in Council.	19 20
(2) The president and deputy president are members of the tribunal.	21
(3) A person is eligible for appointment under this section only if the	22

person is a lawyer<sup>60</sup> of at least 5 years standing whose training or experience, in the Governor in Council's opinion, makes the person suitable to be the president or deputy president. 1  
2  
3

(4) A person ceases to be a member if the person ceases to be the president or deputy president. 4  
5

### **Appointment of members** 6

145.(1) The members are to be appointed by the Governor in Council. 7

(2) Members may be appointed as full-time or part-time members. 8

(3) A person is eligible for appointment as a member only if the person is— 9  
10

(a) a lawyer<sup>61</sup> of at least 5 years standing whose training or experience, in the Governor in Council's opinion, makes the person suitable to be a member (a **“person eligible for appointment because of a legal background”**); or 11  
12  
13  
14

(b) in the Governor in Council's opinion, a person with extensive knowledge or experience in the professional assessment or treatment of persons with a mental or intellectual impairment (a **“person eligible for appointment because of a professional background”**); or 15  
16  
17  
18  
19

(c) in the Governor in Council's opinion, a person with extensive knowledge or experience in working with, or caring for, a person with a mental or intellectual impairment (a **“person eligible for appointment because of contact”**). 20  
21  
22  
23

### **Selection** 24

146.(1) For selecting a person for recommendation for appointment as president, deputy president or a member, the Minister must advertise for 25  
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<sup>60</sup> “[L]awyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—*Acts Interpretation Act 1954*, sections 33A and 36.

<sup>61</sup> See footnote 60.

applications from suitably qualified persons to be considered for selection. 1

(2) The Governor in Council may appoint a president, deputy president 2  
or member only if subsection (1) has been complied with for the 3  
appointment. 4

### **Duration of appointment** 5

147.(1) The president or deputy president hold office for a term of not 6  
longer than 5 years.<sup>62</sup> 7

(2) A member holds office for a term of not longer than 3 years.<sup>63</sup> 8

(3) The office of president, deputy president or a member becomes 9  
vacant if the holder of the office resigns by signed notice of resignation 10  
given to the Minister. 11

(4) The Governor in Council may remove the president, deputy president 12  
or a member from office for— 13

(a) physical or mental incapacity to perform official duties 14  
satisfactorily; or 15

(b) neglect of duty; or 16

(c) dishonourable conduct; or 17

(d) being found guilty of an offence that, in the Governor in 18  
Council's opinion, makes the person unsuitable to perform 19  
official duties. 20

### **Terms of appointment** 21

148.(1) The Governor in Council may decide the remuneration and 22  
allowances payable to the president, deputy president, and other full-time 23  
and part-time members. 24

(2) The president, deputy president and other full-time and part-time 25  
members are to be paid the remuneration and allowances decided by the 26

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<sup>62</sup> The president or deputy president may be reappointed—*Acts Interpretation Act 1954*, section 25(1)(c).

<sup>63</sup> A member may be reappointed—*Acts Interpretation Act 1954*, section 25(1)(c).

<b>Governor in Council.</b>	1
(3) To the extent this Act does not state the terms on which a president, deputy president or other member holds office, the person holds office on the terms set by the Governor in Council.	2 3 4
<b>Leave of absence</b>	5
149. The Minister may give the president, deputy president or another member leave of absence on the terms the Minister considers appropriate.	6 7
<b>Acting appointment</b>	8
150.(1) The Governor in Council may appoint a person to act as president or deputy president—	9 10
(a) for any period the office is vacant; or	11
(b) for any period, or all periods, when the president or deputy president is absent from duty or Australia or cannot, for another reason, perform the duties of the office.	12 13 14
(2) The Governor in Council may appoint a person to act as a member—	15
(a) while the office is vacant; or	16
(b) for a period when 1 of the members is absent from duty or Australia or cannot, for another reason, perform the duties of the office.	17 18 19
<b>Registrar and tribunal staff</b>	20
151.(1) The registrar of the tribunal, and other staff necessary to enable the tribunal to exercise its functions, are to be appointed under the <i>Public Service Management and Employment Act 1988</i> .	21 22 23
(2) The registrar may hold another office in the public service at the same time.	24 25
(3) The president has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisation unit made up of the registrar and tribunal staff, as if—	26 27 28
(a) the unit were a department within the meaning of the <i>Public</i>	29

<i>Service Management and Employment Act 1988; and</i>	1
(b) the president were the chief executive of the department.	2
<b>PART 3—PRESIDENT’S ROLE</b>	3
<b>Rule making power</b>	4
<b>152.(1)</b> The president may make rules (“ <b>tribunal rules</b> ”) about the practices and procedure of the tribunal or the tribunal registry.	5 6
<b>(2)</b> A rule is subordinate legislation.	7
<b>President may delegate to deputy president</b>	8
<b>153.</b> The president may delegate the president’s powers under this Act to the deputy president.	9 10
<b>Training</b>	11
<b>154.(1)</b> It is the duty of the president to ensure members are adequately and appropriately trained to enable the tribunal to perform its functions effectively and efficiently.	12 13 14
<b>(2)</b> The president may direct a member to attend at, and take part in, a training program stated in the direction.	15 16
<b>(3)</b> A member must not, without reasonable excuse, fail to comply with a direction given under subsection (2).	17 18

<b>CHAPTER 11—INTERNAL OPERATION OF</b>	1
<b>TRIBUNAL</b>	2
<b>Arrangement of business</b>	3
<b>155.(1)</b> The president is responsible for ensuring the quick and efficient discharge of the tribunal's business.	4
	5
<b>(2)</b> For example, the president may give directions ("presidential directions") about—	6
	7
<b>(a)</b> the arrangement of the tribunal's business; and	8
<b>(b)</b> the members who are to constitute the tribunal for a particular proceeding; and	9
	10
<b>(c)</b> the places where the tribunal is to sit; and	11
<b>(d)</b> the tribunal's procedure.	12
<b>(3)</b> Directions under subsection (2) may be of general or limited application.	13
	14
<b>Members constituting tribunal</b>	15
<b>156.</b> At a hearing, the tribunal must be constituted by 3 members as follows—	16
	17
<b>(a)</b> the president, deputy president or a member who was a person eligible for appointment because of a legal background; <sup>64</sup>	18
	19
<b>(b)</b> a member who was a person eligible for appointment because of a professional background; <sup>65</sup>	20
	21
<b>(c)</b> a member who was a person eligible for appointment because of contact. <sup>66</sup>	22
	23

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<sup>64</sup> See section 145(3)(a).

<sup>65</sup> See section 145(3)(b).

<sup>66</sup> See section 145(3)(c).

<b>Disqualification from hearing</b>	1
<b>157.(1)</b> This section applies if—	2
(a) the president, deputy president or other member has a personal interest, or a direct or indirect financial interest, in a matter before the tribunal; and	3 4 5
(b) the interest could conflict with the proper performance of the member's duties on the matter	6 7
<b>(2)</b> If this section applies for the president, the president must give written notice of the nature of the interest to the deputy president as soon as practicable after the relevant facts come to the president's attention.	8 9 10
<b>(3)</b> If this section applies for the deputy president or another member, the deputy president or member must give written notice of the nature of the interest to the president as soon as practicable after the relevant facts come to the deputy president's or member's attention.	11 12 13 14
<b>(4)</b> The person giving notice must not—	15
(a) be present when the tribunal considers the matter; or	16
(b) take part in a tribunal decision about the matter.	17
<b>(5)</b> Subsection (4) does not apply to the person giving notice if the person to whom notice is given decides the interest is not of a material nature.	18 19 20
<b>Presiding member</b>	21
<b>158.</b> At the hearing of a proceeding before the tribunal, the president, deputy president or member who was a person eligible for appointment because of a legal background <sup>67</sup> must preside.	22 23 24
<b>Way procedure to be decided</b>	25
<b>159.</b> In a proceeding before the tribunal, procedure is within the presiding member's discretion if it is not provided for by—	26 27
(a) this Act; or	28

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<sup>67</sup> See section 145(3)(a).



(b) tribunal rules; <sup>68</sup> or	1
(c) presidential directions. <sup>69</sup>	2
<b>Way question of law to be decided</b>	3
<b>160.</b> A question of law arising in a proceeding before the tribunal is to be decided according to the presiding member's opinion.	4 5
<b>Way other question to be decided</b>	6
<b>161.</b> If the members constituting the tribunal for a particular proceeding are divided in opinion about the decision to be made on a question (other than a question of law)—	7 8 9
(a) if there is a majority of the same opinion—the question is decided according to the majority opinion; or	10 11
(b) in other cases—the question is decided according to the opinion of the presiding member.	12 13
<b>CHAPTER 12—EXTERNAL OPERATION OF TRIBUNAL</b>	14 15
<b>PART 1—GENERAL PROCEDURE</b>	16
<b>Informal</b>	17
<b>162.(1)</b> A proceeding before the tribunal must be conducted as simply and quickly as the requirements of this Act and an appropriate consideration of the matters before the tribunal allow.	18 19 20

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<sup>68</sup> See section 152.

<sup>69</sup> See section 155(2).

(2) The tribunal is not bound by the rules of evidence and may inform itself on a matter in any way it considers appropriate. 1  
2

**Open** 3

**163.(1)** A hearing by the tribunal of a proceeding must be in public. 4

(2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of any information or matter or for another reason, the tribunal may, by order (“**confidentiality order**”)— 5  
6  
7

(a) direct that a hearing or part of a hearing take place in private and give directions about the persons who may be present; and 8  
9

(b) give directions prohibiting or restricting the publication of information given before the tribunal (whether in public or in private), or of matters contained in documents filed with, or received by, the tribunal; and 10  
11  
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13

(c) give directions prohibiting or restricting the disclosure to some or all of the participants in a proceeding of information given before the tribunal or of matters contained in documents filed with, or received by, the tribunal. 14  
15  
16  
17

(3) The tribunal may make the order on its own initiative or on the application of a participant. 18  
19

(4) A person must not contravene an order under this section unless the person has a reasonable excuse. 20  
21

Maximum penalty— 22

**Anonymity** 23

**164.(1)** If the tribunal is satisfied that the preservation of anonymity of a person involved in a proceeding is necessary to protect the work security, privacy or human rights of the person, the tribunal may make an order prohibiting the disclosure of the person’s identity. 24  
25  
26  
27

(2) A person must not contravene an order under this section unless the person has a reasonable excuse. 28  
29

Maximum penalty— 30

(3) In this section, a reference to involvement in a proceeding includes—	1
(a) making an application to the tribunal; and	2
(b) being a person about whom an application is made; and	3
(c) being a participant in the hearing of a proceeding; and	4
(d) giving information or documents to a person who is performing a function under this Act; and	5 6
(e) appearing as a witness at the hearing of a proceeding; and	7
(f) involvement in a prosecution for an offence against this Act.	8
<b>Procedural fairness</b>	9
165.(1) The tribunal must observe the rules of procedural fairness.	10
(2) Each participant in a proceeding must be given a reasonable opportunity to present the participant's case, and in particular, to inspect a document to which the tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions about the document.	11 12 13 14
(3) However, the tribunal may displace the right to inspect in a confidentiality order. <sup>70</sup>	15 16
<b>Directions</b>	17
166.(1) Directions about the procedure to be followed for a proceeding before the tribunal may be given—	18 19
(a) if the directions are of general application or apply to a class of proceeding—by the president; or	20 21
(b) if the directions apply to a particular proceeding that has started—by the president or presiding member.	22 23
(2) Without limiting subsection (1), a direction may—	24
(a) join a person as a party to a proceeding before the tribunal; or	25

<sup>70</sup> Section 163(2) allows the tribunal to impose a prohibition or restriction on inspection of a document if this is desirable because of its confidential nature or for another reason.

(b)	appoint assessors to assist the tribunal in a proceeding; or	1
(c)	require a person to undergo a medical examination; or	2
(d)	require the person the subject of the proceeding to be brought before the tribunal.	3 4
(3)	A direction may be changed or revoked by a person who has power to give the direction.	5 6
<b>Use of technology</b>		7
167.(1)	The tribunal may allow a person to take part in a proceeding by using technology (“ <b>participation using technology</b> ”), including—	8 9
(a)	telephone conferencing; or	10
(b)	video conferencing; or	11
(c)	another form of telecommunication, including, for example, fax or computer .	12 13
(2)	A person who takes part in a proceeding under subsection (1) is taken to have attended in person at the proceeding.	14 15
<b>Tribunal may change procedure</b>		16
168.	If the tribunal considers it in the interests of justice for a proceeding, the tribunal may, by order, change a procedure under this Act.	17 18
(2)	The tribunal may act on its own initiative or on the application of a participant in a proceeding.	19 20
<i>Example—</i>		21
Despite the requirement in section 184(1) that an application be written, the tribunal may accept an oral application if it considers it in the interests of justice.		22 23
<b>Location</b>		24
169.	A proceeding before the tribunal or a part of the proceeding may be conducted at any place in Queensland.	25 26

<b>No fee payable</b>	1
<b>170.</b> A fee is not payable to the tribunal for anything under this Act.	2
<b>PART 2—APPLICATIONS</b>	
3	
<b>Tribunal's jurisdiction</b>	4
<b>171.</b> The tribunal may make—	5
(a) a declaration about decision-making capacity; or	6
(b) an order, direction or recommendation about an enduring power of attorney or related matter; or	7 8
(c) an order, direction or recommendation about an advance health care directive or related matter; or	9 10
(d) an order, direction or recommendation about the appointment of an appointed assistant, appointed decision maker or related matter; or	11 12 13
(e) an order, direction or recommendation about a health care decision, a special consent health care decision or related matter; or	14 15 16
(f) an order, direction or recommendation otherwise provided for by this Act.	17 18
<b>Scope of applications</b>	19
<b>172.</b> An application may be made to the tribunal for a declaration, order, direction or recommendation.	20 21
<b>Persons entitled to apply—enduring power of attorney</b>	22
<b>173.(1)</b> A chosen decision maker under an enduring power of attorney or another interested person may apply to the tribunal for—	23 24

(a) an impaired capacity declaration; <sup>71</sup> or	1
(b) a commencement declaration; <sup>72</sup> or	2
(c) advice or directions about the exercise of a power under the enduring power of attorney or the interpretation of its terms. <sup>73</sup>	3 4
(2) An interested person may apply to the tribunal about—	5
(a) removing a chosen decision maker and appointing a replacement; <sup>74</sup> or	6 7
(b) removing power from a chosen decision maker and giving it to a replacement; <sup>75</sup> or	8 9
(c) changing or revoking an enduring power of attorney. <sup>76</sup>	10
(3) The following persons may apply to the tribunal about another matter related to an adult's enduring power of attorney—	11 12
(a) the adult;	13
(b) a member of the adult's family;	14
(c) a chosen decision maker under the enduring power of attorney;	15
(d) if the matter also concerns a health care decision of an adult—the Adult Guardian, a health care provider of the adult or a statutorily authorised health care decision maker;	16 17 18
(e) if the matter also concerns a personal decision of an adult—the Adult Guardian;	19 20
(f) if the matter also concerns a financial or litigation related decision of an adult—the Public Trustee;	21 22
(g) another interested person.	23

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<sup>71</sup> See section 50(1)(a).

<sup>72</sup> See section 50(1)(b).

<sup>73</sup> See section 51(1).

<sup>74</sup> Section 52(1)(a)

<sup>75</sup> Section 52(1)(b)

<sup>76</sup> Section 53

<b>Persons entitled to apply—advance health care directive</b>	1
<b>174.(1)</b> A chosen decision maker under an adult’s advance health care directive, a health care provider of the adult or another interested person may apply to the tribunal for—	2 3 4
(a) an impaired capacity declaration; <sup>77</sup> or	5
(b) advice or directions about a decision, information or something else included in the directive or the interpretation of its terms. <sup>78</sup>	6 7
<b>(2)</b> An interested person may apply to the tribunal about—	8
(a) removing a chosen decision maker and appointing a replacement; <sup>79</sup> or	9 10
(b) removing power from a chosen decision maker and giving it to a replacement; <sup>80</sup> or	11 12
(c) changing or revoking an advance health care directive. <sup>81</sup>	13
<b>(3)</b> The following persons may apply to the tribunal about another matter related to an adult’s advance health care directive—	14 15
(a) the adult;	16
(b) a member of the adult’s family;	17
(c) a chosen decision maker under the advance health care directive;	18
(d) the Adult Guardian;	19
(e) a health care provider of the adult;	20
(f) a statutorily authorised health care decision maker;	21
(g) if the matter also concerns a financial or litigation related decision of an adult—the Public Trustee;	22 23
(h) another interested person.	24

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<sup>77</sup> See section 72.

<sup>78</sup> See section 73.

<sup>79</sup> See section 52(1)(a) which applies because of section 63.

<sup>80</sup> See section 52(1)(b) which applies because of section 63.

<sup>81</sup> See section 77.

<b>Persons entitled to apply—appointed assistant or appointed decision maker</b>	1 2
175.(1) An adult or anyone else may apply for the appointment of an appointed assistant or appointed decision maker for the adult.	3 4
(2) The adult or an interested person may apply for review of an appointment.	5 6
<b>Persons entitled to apply—appeals</b>	7
176. The following persons may appeal against a tribunal order, direction or decision—	8 9
(a) the adult concerned in the tribunal’s proceeding;	10
(b) a participant in the tribunal’s proceeding;	11
(c) a person given leave to appeal by the Supreme Court.	12
<b>Persons entitled to apply—registration of foreign order</b>	13
177. Anyone may apply for registration of an order made in another State or a foreign country prescribed under the regulations.	14 15
<b>Persons entitled to apply—entry and removal order</b>	16
178. The Adult Guardian or an interested person may apply for an entry and removal order.	17 18
<b>Persons entitled to apply—other cases about personal decision</b>	19
179. If the matter otherwise concerns a personal decision of an adult or a related matter, the Adult Guardian may apply to the tribunal.	20 21
<b>Persons entitled to apply—other cases about health care decision</b>	22
180. If the matter otherwise concerns a health care decision of an adult or a related matter, the following persons may apply to the tribunal—	23 24
(a) the Adult Guardian;	25



(b) a health care provider of the adult;	1
(c) a statutorily authorised health care decision maker for the adult.	2
<b>Persons entitled to apply—other cases about special consent health care decision</b>	3
	4
181. If the matter otherwise concerns a special consent health care decision of an adult or a related matter, a health care provider of the adult or the Adult Guardian may apply to the tribunal.	5
	6
	7
<b>Persons entitled to apply—other cases about financial or litigation related decision</b>	8
	9
182. If the matter otherwise concerns a financial decision or litigation related decision of an adult or a related matter, the Public Trustee may apply to the tribunal.	10
	11
	12
<b>Persons entitled to apply—other cases</b>	13
183. An interested person may apply to the tribunal in other cases.	14
<b>How to apply</b>	15
184.(1) An application must be written <sup>82</sup> and filed with the tribunal.	16
(2) The application must include the following—	17
(a) the reasons for the application;	18
(b) to the best of the applicant's knowledge, information about the following people—	19
	20
(i) the applicant;	21
(ii) the adult concerned in the application;	22
(iii) the members of the adult's family;	23

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<sup>82</sup> However, the tribunal may change a procedure (including, for example, by accepting an oral application) if it considers it in the interests of justice—section 168.

(iv) any primary carer of the adult (other than a family member);	1
(v) all current appointed assistants and substitute decision makers for the adult;	2 3
(c) other information prescribed under the regulations.	4
(3) The information required under subsection (2) is to enable the tribunal to give notice of the hearing and must consist of—	5 6
(a) each person's name; and	7
(b) either—	8
(i) details the applicant knows of the person's address and telephone and facsimile number; or	9 10
(ii) if the applicant does not know the details—a way known to the applicant of contacting the person.	11 12
<b>Tribunal advises people concerned of hearing</b>	13
<b>185.(1)</b> At least 7 days before the hearing of an application about a matter, the tribunal must give notice of the hearing to the adult concerned in the matter and, as far as practicable, to the following—	14 15 16
(a) the applicant;	17
(b) the members of the adult's family;	18
(c) any primary carer of the adult (other than a family member);	19
(d) all current appointed assistants and substitute decision makers for the adult;	20 21
(e) anyone else the tribunal considers should be notified.	22
(2) Notice to the adult must be given in the way the tribunal considers most appropriate having regard to the person's needs.	23 24
<i>Example—</i>	25
If the tribunal is aware the adult is not literate in English but is literate in another language, the notice must be given in the other language.	26 27
(3) However, the adult's failure to understand the notice does not affect its validity.	28 29
(4) The tribunal may—	30

- (a) dispense with the requirement to give notice to all or any of the people listed in subsection (1), other than the adult; and 1  
2
- (b) reduce the time stated in subsection (1). 3
- (5) Failure to comply with the requirement to give notice to all or any of the people listed in subsection (1), other than the adult, does not affect the validity of a hearing or the tribunal's decision about an application. 4  
5  
6

**Withdrawal of application** 7

**186.(1)** An applicant may withdraw the application at any time by written notice filed with the tribunal. 8  
9

**(2)** On the notice being filed, the tribunal is taken to have dismissed the application. 10  
11

**PART 3—PARTICIPANTS** 12

**Participants** 13

**187.(1)** The following persons have the right to take part in a proceeding before the tribunal about an adult's enduring power of attorney— 14  
15

- (a) the adult; 16
- (b) the applicant; 17
- (c) a chosen decision maker under the enduring power of attorney; 18
- (d) the Adult Guardian (to the extent the proceeding concerns power to make a personal decision or health care decision); 19  
20
- (e) the Public Trustee (to the extent the proceeding concerns— 21
- (i) power to make a financial decision or litigation related decision; or 22  
23
- (ii) the adult's property); 24
- (f) a person joined as a party to the proceeding; 25
- (g) an interested person. 26

(2) The following persons have the right to take part in a proceeding about an adult's advance health care directive—	1 2
(a) the adult;	3
(b) the applicant;	4
(c) a chosen decision maker under the directive;	5
(d) the Adult Guardian;	6
(e) an interested person.	7
(3) The following persons have the right to take part in a proceeding about the appointment of an appointed assistant or a substitute decision maker for an adult—	8 9 10
(a) the adult;	11
(b) the applicant;	12
(c) the appointee proposed by the applicant;	13
(d) the members of the adult's family;	14
(e) any primary carer of the adult (other than a family member);	15
(f) all current appointed assistants and substitute decision makers for the adult;	16 17
(g) the Adult Guardian (to the extent the proceeding concerns power to make a personal decision, health care decision or special consent health care decision);	18 19 20
(h) the Public Trustee (to the extent the proceeding concerns—	21
(i) power to make a financial decision or litigation related decision; or	22 23
(ii) the adult's property);	24
(i) an interested person;	25
(j) another person the tribunal considers should be notified.	26

**Tribunal to decide who are interested persons** 27

**188.(1)** If it is necessary to decide whether a person is an interested person under this Act, the tribunal may decide whether the person has a 28  
29

relevant appropriate interest.	1
(2) If the tribunal decides a person does not have a relevant appropriate interest, the tribunal must give the person written reasons for its decision.	2 3

<b>PART 4—APPEARANCE AND REPRESENTATION OF PARTICIPANT</b>	4 5
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<b>Right of participant to appear</b>	6
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189.(1) A participant in a proceeding before the tribunal may appear in person.	7 8
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(2) If the participant is a corporation, the corporation may appear through an officer of the corporation.	9 10
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<b>Representative may be used with tribunal's leave</b>	11
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190.(1) A participant may, with the tribunal's leave, be represented by a lawyer <sup>83</sup> or agent.	12 13
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(2) A person summoned to appear at a hearing may, with the tribunal's leave, be represented by a lawyer or agent.	14 15
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<b>Representative may be appointed</b>	16
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191.(1) If in a proceeding before the tribunal about an adult—	17
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(a) the adult is not represented in the proceeding; or	18
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(b) the adult is represented in the proceeding by a representative whom the president or presiding member considers to be unsuitable to represent the adult's interests;	19 20 21
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<sup>83</sup> “[L]awyer” means a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court of the Supreme Court of a State (including the Australian Capital Territory and the Northern Territory)—*Acts Interpretation Act 1954*, sections 33A and 36.

the president or the presiding member may appoint a representative to represent the adult's views, wishes and interests. 1  
2

(2) A proceeding may be adjourned to allow the appointment to be made. 3

## **PART 5—TRIBUNAL'S GENERAL POWERS** 4

### **Interim order** 5

192.(1) If the tribunal is satisfied that urgent action is required, it may make an interim order in a proceeding without hearing and deciding the proceeding or otherwise complying with the requirements of this Act. 6  
7  
8

(2) An interim order may be renewed only once. 9

(3) An interim order has effect for the period stated in the order. 10

### **Tribunal to ensure it has all relevant material** 11

193. To hear and decide a matter in a proceeding, the tribunal must ensure, as far as it considers it practicable, that it has all the relevant material. 12  
13  
14

### **Proceed without further information** 15

194.(1) If the tribunal considers urgent or special circumstances justify it doing so, the tribunal may proceed to decide a matter on the information before it without receiving further information. 16  
17  
18

(2) If all the participants in a proceeding agree, the tribunal may also proceed to decide a matter to which the proceeding relates on the information before it when the agreement was reached without receiving further information. 19  
20  
21  
22

(3) Before the participants agree, the tribunal must ensure they are aware of the material on which the matter will be decided. 23  
24

<b>Tribunal may proceed in absence of participant</b>	1
<b>195.</b> The tribunal may proceed in the absence of a participant who has had reasonable notice of a proceeding.	2 3
<b>Tribunal may adjourn proceeding</b>	4
<b>196.</b> The tribunal may adjourn a proceeding.	5
<b>Report by tribunal staff</b>	6
<b>197.(1)</b> The tribunal may—	7
(a) receive in evidence in a proceeding a written report by tribunal staff on a matter in the proceeding; and	8 9
(b) have regard to the matter contained in the report.	10
<b>(2)</b> If the tribunal receives the report in evidence in a proceeding, the adult concerned in the proceeding and each participant in the proceeding must be given a copy of the report.	11 12 13
<b>(3)</b> However, the tribunal may displace the right to be given a copy in a confidentiality order. <sup>84</sup>	14 15
<b>Witnesses</b>	16
<b>198.(1)</b> To hear and decide an application, the tribunal may receive information on oath or affirmation.	17 18
<b>(2)</b> In a proceeding, the president or the member who is to preside, or presides, at the hearing, may summon a person to appear at the hearing to give information and to produce the documents (if any) stated in the summons.	19 20 21 22
<b>(3)</b> The member presiding at a hearing—	23
(a) may require a person appearing at the hearing to give information either to take an oath or make an affirmation; and	24 25

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<sup>84</sup> Section 163(2) allows the tribunal to impose a prohibition or restriction on access to a report if this is desirable because of the report's confidential nature or for another reason.

- (b) may administer an oath or affirmation to a person appearing at the hearing; and 1  
2
- (c) in the case of participation by technology<sup>85</sup>—may make arrangements that appear to the member to be appropriate in the circumstances for administering an oath or affirmation to the person. 3  
4  
5  
6
- (4) The presiding member may allow a person appearing as a witness at the hearing to give information by tendering a written statement, verified, if the member directs, by oath or affirmation. 7  
8  
9

**Failure of witness to attend** 10

199. A person served under the regulations with a summons to appear as a witness at a proceeding under this Act must not, without reasonable excuse— 11  
12  
13

- (a) fail<sup>86</sup> to attend as required by the summons; or 14
- (b) fail to appear from time to time in the course of the proceeding as required by the presiding member. 15  
16

Maximum penalty— 17

**Failure of witness to be sworn or answer questions etc.** 18

200.(1) A person appearing as a witness at a proceeding under this Act must not, without reasonable excuse— 19  
20

- (a) fail<sup>87</sup> to be sworn or to make an affirmation; or 21
- (b) fail to answer a question that the person is required to answer by the presiding member; or 22  
23
- (c) fail to produce a document the person was required to produce by a summons served under the regulations on the person. 24  
25

Maximum penalty— 26

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<sup>85</sup> See section 167.

<sup>86</sup> “[F]ail” includes refuse—*Acts Interpretation Act 1954*, section 36.

<sup>87</sup> See footnote 86.



(2) It is not a reasonable excuse for a person to fail to answer a question because answering the question might tend to incriminate the person. 1  
2

(3) It is not a reasonable excuse for a person to fail to produce a document because producing the document might tend to incriminate the person. 3  
4  
5

(4) However, a person's answer that might tend to incriminate the person, or a person's production of a document that might tend to incriminate the person, is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding— 6  
7  
8  
9

(a) for an offence against section 202 or 203;<sup>88</sup> or 10

(b) for another offence about the falsity of the answer or document; or 11  
12

(c) brought by or for the person against the person's employer. 13

#### **Fabricating evidence** 14

201. The tribunal is a tribunal for the purposes of section 126 of the Criminal Code.<sup>89</sup> 15  
16

#### **False or misleading information** 17

202.(1) A person appearing as a witness at a proceeding under this Act must not knowingly give false or misleading information. 18  
19

Maximum penalty— 20

(2) A person giving information to the tribunal, including, by filing<sup>90</sup> a 21

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<sup>88</sup> Section 202 deals with false or misleading information. Section 203 deals with influencing participants.

<sup>89</sup> **'Fabricating evidence'**  
126.(1) Any person who, with intent to mislead any tribunal in any judicial proceeding—  
(a) fabricates evidence by any means other than perjury or counselling or procuring the commission of perjury; or  
(b) knowingly makes use of such fabricated evidence; is guilty of a crime.' (Criminal Code, section 126)

<sup>90</sup> "[F]ile" includes lodge—*Acts Interpretation Act 1954*, section 36.

document or giving information to the tribunal staff, must not knowingly give false or misleading information.	1 2
Maximum penalty—	3
<b>Influencing participants</b>	4
203. A person must not improperly influence a person in relation to the person's participation in a proceeding (whether as a member of the tribunal or as a witness) to act other than in the course of the person's duty in relation to the proceeding.	5 6 7 8
Maximum penalty—	9
<b>Contempt of tribunal</b>	10
204. A person must not, without reasonable excuse—	11
(a) insult a member in relation to the performance of the member's functions as a member; or	12 13
(b) interrupt a tribunal proceeding; or	14
(c) create a disturbance, or take part in creating or continuing a disturbance, in or near a place where the tribunal is sitting; or	15 16
(d) do anything that would, if the tribunal were a court of record, be a contempt of court.	17 18
Maximum penalty—	19
<b>Obstructing tribunal</b>	20
205. A person must not obstruct or improperly influence the conduct of a tribunal proceeding or attempt to do so.	21 22
Maximum penalty—	23
<b>Tribunal may dismiss frivolous etc. applications</b>	24
206.(1) The tribunal may dismiss an application if the tribunal is satisfied the application is—	25 26

(a) frivolous or vexatious; or	1
(b) misconceived or lacking in substance.	2
(2) If the tribunal considers it appropriate, the tribunal may also direct that the applicant must not, without the tribunal's leave, make a subsequent application to the tribunal of a type stated in the direction.	3 4 5
(3) The tribunal may discharge or change a direction under subsection (2).	6 7
 <b>Advice, directions and recommendations</b>	 8
207.(1) Once an application about a matter has been made to the tribunal, the tribunal may—	9 10
(a) give advice or directions about the matter it considers appropriate; or	11 12
(b) make recommendations it considers appropriate about action that should be taken by a participant.	13 14
(2) If the tribunal gives advice or a direction or makes a recommendation, it may do any of the following—	15 16
(a) continue with the application;	17
(b) adjourn the application;	18
(c) dismiss the application;	19
(d) reserve leave for a participant to apply to the tribunal for directions about implementing the recommendation.	20 21
(3) A substitute decision maker who acts under the tribunal's advice, directions or recommendations is taken to have complied with this Act unless the substitute decision maker knowingly gave the tribunal false or misleading information relevant to the tribunal's advice, directions or recommendations.	22 23 24 25 26
(4) If the tribunal gives directions to a substitute decision maker, the substitute decision maker must not contravene them unless the substitute decision maker has a reasonable excuse.	27 28 29

<b>Ratification of decision of informal decision maker</b>	1
<b>208.(1)</b> An informal decision maker may apply to the tribunal for approval or ratification of a decision made by the informal decision maker for an adult with impaired decision-making capacity for the decision.	2 3 4
<b>(2)</b> The tribunal may approve or ratify the decision if it considers the informal decision maker proposes to act, or has acted, in good faith.	5 6
<b>(3)</b> If the tribunal approves or ratifies the decision, the informal decision maker is protected from personal liability for the decision.	7 8
<b>(4)</b> In this section—	9
<b>“informal decision maker”</b> , for an adult’s decision, means a person who makes the decision for the adult and is—	10 11
<b>(a)</b> a member of the adult’s support network (including, for example, a relation or close friend); and	12 13
<b>(b)</b> not a substitute decision maker for the decision.	14
<b>Records and audit</b>	15
<b>209.(1)</b> If a substitute decision maker has power to make a financial decision or litigation related decision for an adult, an interested person may apply to the tribunal for an order that—	16 17 18
<b>(a)</b> the substitute decision maker file in the tribunal and serve on the applicant a summary of receipts and expenditure under the power; or	19 20 21
<b>(b)</b> the substitute decision maker file in the tribunal, and serve on the applicant, more detailed accounts of dealings and transactions under the power; or	22 23 24
<b>(c)</b> the accounts be audited by an auditor appointed by the tribunal and that a copy of the auditor’s report be given to the tribunal and the applicant.	25 26 27
<b>(2)</b> The tribunal may make an order stated in subsection (1) on its own initiative.	28 29
<b>(3)</b> The tribunal may make an order under subsection (1) only if the tribunal suspects on reasonable grounds that a relevant interest of the adult has not been, or is not being, adequately protected.	30 31 32

- (4) The tribunal may make an order about payment of the auditor's costs. 1
- Entry and removal order** 2
- 210.(1)** If the Adult Guardian or an interested person considers that an adult without decision-making capacity is at risk of neglect, exploitation or abuse, the Adult Guardian or interested person may apply to the tribunal for an entry and removal order. 3  
4  
5  
6
- (2) The tribunal may make an entry and removal order if the tribunal considers that there is cogent evidence that— 7  
8
- (a) the adult does not have decision-making capacity; and 9
  - (b) there is an immediate danger to the adult because of neglect, exploitation or abuse. 10  
11
- (3) An entry and removal order authorises the Adult Guardian to take the action stated in it. 12  
13
- (4) An entry and removal order must state— 14
- (a) the purpose for which it is issued; and 15
  - (b) the place, and hours during which, it authorises the Adult Guardian to enter; and 16  
17
  - (c) the adult whose removal it authorises; and 18
  - (d) whether the Adult Guardian is authorised to be accompanied by police officers who may use necessary and reasonable force; and 19  
20
  - (e) the day when it ceases to have effect. 21
- (5) An entry and removal order has effect for a maximum of 7 days from the day it is made. 22  
23
- (6) A person must not obstruct the Adult Guardian or a police officer acting under an entry and removal order. 24  
25
- Maximum penalty— 26
- (7) As soon as practicable after an adult has been removed under an entry and removal order, the applicant for the order must apply to the tribunal— 27  
28
- (a) if there is no appointed assistant or substitute decision maker for the adult—to decide whether an appointed assistant or appointed 29  
30

decision maker should be appointed; and	1
(b) if there is an appointed assistant or substitute decision maker for the adult—to decide whether another order, direction, advice or recommendation should be made or given.	2 3 4
<b>PART 6—DECISION</b>	5
<b>Decision within reasonable time</b>	6
211. The tribunal must give its decision on a matter involved in a proceeding within a reasonable time after the matter is heard.	7 8
<b>Written reasons for decision</b>	9
212. The tribunal must give written reasons for its decision within a reasonable time after giving its decision. <sup>91</sup>	10 11
<b>Decision and reasons to each participant etc.</b>	12
213.(1) The tribunal must give a copy of its decision on an application about a matter to—	13 14
(a) the adult concerned in the matter; and	15
(b) each participant in the proceeding; and	16
(c) each person given notice of the hearing of the application.	17
(2) The tribunal must give a copy of its reasons for its decision on an application about a matter to—	18 19

<sup>91</sup> *Acts Interpretation Act 1954*, section 27B provides as follows—

**‘Content of statement of reasons for decision**

27B. If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression ‘reasons’, ‘grounds’ or another expression is used), the instrument giving the reasons must also—

- (a) set out the findings on material questions of fact; and
- (b) refer to the evidence or other material on which those findings were based.

- (a) the adult concerned in the matter; and 1
- (b) each participant in the proceeding. 2
- (3) However, the tribunal may displace the requirement to give copies of its decision or reasons in a confidentiality order.<sup>92</sup> 3  
4
- (4) The tribunal may also give a copy of its decision or its reasons to anyone else in accordance with a tribunal order. 5  
6

## **PART 7—OTHER MATTERS**

- Annual report** 8
- 214.(1) As soon as practicable after each financial year, the tribunal must— 9  
10
- (a) prepare a report on its operations during the year; and 11
- (b) give a copy of the report to the Minister. 12
- (2) The Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives the report. 13  
14
- Nonapplication of Supreme Court of Queensland Act 1991, s 75** 15
215. Section 75 of the *Supreme Court of Queensland Act 1991*<sup>93</sup> does not apply to the tribunal. 16  
17
- Proof of orders and decisions** 18
216. A document purporting to be certified by the registrar and to be a 19

<sup>92</sup> Section 163(2) allows the tribunal to impose a prohibition or restriction on access to its decision or reasons if this is desirable because of their confidential nature or for another reason.

<sup>93</sup> Section 75 of the *Supreme Court of Queensland Act 1991* allows the Litigation Reform Commission to make reports and recommendations about courts and certain tribunals.

copy of an order or decision of the tribunal, is, in a proceeding (whether or not before the tribunal), prima facie evidence of the order or decision.	1 2
<b>Protection of members, representatives and witnesses</b>	3
217.(1) A member has, in the honest performance of the member's duties as a member, the same protection and immunity as a Supreme Court Judge.	4 5 6
(2) A person representing a participant in a proceeding under this Act has the same protection and immunity as a barrister has in appearing for a party in a proceeding in the Supreme Court.	7 8 9
(3) A person summoned to attend or appearing at a proceeding under this Act has the same protection and immunity as a witness in a proceeding in the Supreme Court.	10 11 12
<b>Costs</b>	13
218.(1) Each participant in a proceeding is to bear the participant's own costs of the proceeding.	14 15
(2) However, the tribunal may order an applicant to pay a participant's costs in exceptional circumstances, including, for example, if the tribunal considers the application is frivolous or vexatious.	16 17 18
(3) A costs order may be registered in a court having jurisdiction for the recovery of debts up to the amount ordered to be paid.	19 20
(4) Proceedings for the enforcement of a costs order may be taken as if the order were a judgement of the court in which the order is registered.	21 22
<b>Assistance</b>	23
219.(1) A person who—	24
(a) has made, or proposes to make, an application to the tribunal; or	25
(b) is a participant in a proceeding before the tribunal;	26
may apply to the Minister for legal, financial or other assistance for the proceeding.	27 28
(2) The Minister may grant assistance for the proceeding if the Minister	29



- is satisfied that— 1
- (a) it would involve hardship to the applicant for assistance if the application were refused; and 2  
3
  - (b) it is reasonable that the application for assistance be granted. 4
- (3) The grant of assistance may be conditional or unconditional. 5

## PART 8—APPEALS 6

### **Tribunal may suspend decision pending appeal 7**

220.(1) If the tribunal considers it appropriate, it may suspend the operation of a decision made by it pending the starting or deciding of an appeal against the decision. 8  
9  
10

(2) If the tribunal considers it appropriate, it may stay the operation of a decision made by anyone under this Act pending the starting or deciding of a proceeding about the decision. 11  
12  
13

### **Appeal against tribunal decision 14**

221.(1) An eligible person dissatisfied with a tribunal order, direction or decision may appeal to the Supreme Court. 15  
16

(2) The Supreme Court's leave is not required for an appeal only on a question of law. 17  
18

(3) However, the Supreme Court's leave is required for an appeal on another question. 19  
20

(4) An appeal must be begun— 21

- (a) within 28 days after the day on which the appellant becomes aware of the tribunal's order, direction or decision; or 22  
23

- (b) within the further time allowed by the Supreme Court. 24

(5) In this section— 25

**“day on which the appellant becomes aware of the tribunal's order, 26**

<b>direction or decision</b> ", for an appellant who is given a copy of the tribunal's decision under section 213, means the day on which the appellant is given the copy.	1 2 3
<b>"eligible person"</b> means—	4
(a) the adult concerned in the tribunal's proceeding; or	5
(b) a participant in the tribunal's proceeding; or	6
(c) a person given leave to appeal by the Supreme Court.	7
<b>Nature of appeal</b>	8
<b>222.</b> The Supreme Court may decide the appeal on—	9
(a) the material before the tribunal; and	10
(b) further evidence (if any) the Court considers appropriate to receive.	11 12
<b>Appeal powers</b>	13
<b>223.</b> In deciding an appeal against a tribunal order, direction or decision, the Supreme Court may—	14 15
(a) confirm or change the order, direction or decision; or	16
(b) set aside the order, direction or decision and, if the Court considers it appropriate—	17 18
(i) substitute its own order, direction or decision (being one the tribunal could have made); or	19 20
(ii) remit the subject matter of the appeal to the tribunal for further consideration or for reconsideration in accordance with directions or recommendations of the Court.	21 22 23
<b>Appeal costs</b>	24
<b>224.(1)</b> Each party to an appeal is to bear the party's own costs of the appeal.	25 26
<b>(2)</b> However, the Supreme Court may order a party to an appeal to pay costs to another party if the Supreme Court considers—	27 28

- |   |        |
|---|--------|
| (a) the appeal was frivolous or vexatious; or   | 1      |
| (b) the participant has not been given reasonable prior notice of intention to apply for an adjournment; or | 2<br>3 |
| (c) the participant has incurred costs because the appellant defaulted in the procedural requirements.      | 4<br>5 |

## **PART 9—RECOGNITION OF ORDER MADE UNDER ANOTHER LAW**

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7

### **Application**

8

225. A person may apply to the tribunal to register an order made in another State or a foreign country prescribed under the regulations.

9  
10

### **Registration**

11

226. The tribunal must register the order only if—

12

- |   |                |
|---|----------------|
| (a) the order was made under a provision of a law of another State or a prescribed country that substantially corresponds to a provision of this Act; and | 13<br>14<br>15 |
| (b) the original order or a certified copy of the order has been filed with it.   | 16<br>17       |

### **Effect of registration**

18

227. On registration of an order, the order becomes a recognised order and is treated as if it were made by the tribunal.

19  
20

### **Notice of registration etc. to original maker**

21

228.(1) As soon as reasonably practicable after registering an order, the tribunal must advise the entity that originally made the order of the registration.

22  
23  
24

(2) As soon as reasonably practicable after the tribunal takes any subsequent action about the order (including, for example, making a further order or changing or revoking the order), the tribunal must advise the entity that originally made the order of the action.

## **CHAPTER 13—ADULT GUARDIAN** 5

### **PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS** 6 7

#### **Adult Guardian** 8

**229.** There is to be an Adult Guardian. 9

#### **Functions** 10

**230.** The Adult Guardian has the functions given to the Adult Guardian by this Act, including the following functions— 11  
12

- (a) protecting from neglect, exploitation or abuse— 13
  - (i) adults with decision-making capacity only with assistance; 14  
or 15
  - (ii) adults with impaired decision-making capacity; 16
- (b) acting as an appointed assistant or appointed decision maker for personal and health care decisions if appointed by the tribunal; 17  
18
- (c) establishing and administering a community appointees scheme that involves— 19  
20
  - (i) recruiting and training people suitable for appointment as an appointed assistant or appointed decision maker; and 21  
22
  - (ii) supporting and monitoring people recruited under the scheme who are appointed; 23  
24
- (d) establishing and administering a community visitors scheme that 25

involves—	1
(i) recruiting and training people suitable for allocation as a community visitor for a hospital or care facility in which an adult with a mental or intellectual impairment lives; and	2 3 4
(ii) supporting and monitoring people recruited under the scheme who are allocated for a hospital or care facility;	5 6
(e) educating and advising people about, and conducting research into, the operation of this Act;	7 8
(f) seeking assistance for an adult with a mental or intellectual impairment from a government department, institution, welfare organisation or the provider of a service or facility;	9 10 11
(g) other functions given to the Adult Guardian by another Act;	12
(h) taking action incidental or conducive to discharging the functions.	13
<b>Powers</b>	14
231.(1) The Adult Guardian has the powers given under this Act.	15
(2) The Adult Guardian also may do all things necessary or convenient to be done for performing the Adult Guardian's functions.	16 17
<b>Not under Ministerial control</b>	18
232. In performing the Adult Guardian's functions and exercising the Adult Guardian's powers, the Adult Guardian is not under the control or direction of the Minister.	19 20 21
<b>Delegation</b>	22
233. The Adult Guardian may delegate the Adult Guardian's powers to a member of the Adult Guardian's staff.	23 24
<b>Delegation as appointed assistant or appointed decision maker</b>	25
234. If the Adult Guardian is appointed as an appointed assistant or	26

appointed decision maker for an adult, the Adult Guardian may delegate <sup>94</sup> the powers given to the Adult Guardian by the appointment.	1 2
<b>Community visitor</b>	3
<b>235.(1)</b> To safeguard the interests of adults with a mental or intellectual impairment living in a hospital or care facility, the Adult Guardian may allocate a community visitor for the hospital or care facility.	4 5 6
<b>(2)</b> A community visitor for a hospital or care facility must—	7
(a) act in a way that preserves, as far as possible, the privacy of each adult with a mental or intellectual impairment living there (a “resident”); and	8 9 10
(b) regularly visit the adult residents; and	11
(c) investigate complaints about the care or treatment of a resident; and	12 13
(d) must give the Adult Guardian the results of an investigation.	14
<b>(3)</b> A community visitor for a hospital or care facility may do all things necessary or convenient to be done for performing the community visitor’s functions mentioned in subsection (2), including, for example—	15 16 17
(a) entering the hospital or care facility at a reasonable time or at the time necessary to investigate a complaint; and	18 19
(b) conferring alone with a resident; and	20
(c) requiring a staff member of the hospital or care facility to answer questions and produce documents about the care or treatment of a resident; and	21 22 23
(d) examining, taking extracts from, or making copies of, a document about the care or treatment of a resident.	24 25
<b>(4)</b> To the greatest extent practicable, a community visitor for a hospital or care facility must seek and take into account the views and wishes of a resident before—	26 27 28
(a) asking a staff member of the hospital or care facility a question	29

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<sup>94</sup> Section 27A of the *Acts Interpretation Act 1954* applies to the delegation.

about the care or treatment of the resident; or	1
(b) examining a document about the care or treatment of the resident.	2
(5) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.	3 4
(6) However, regardless of the resident's views and wishes, the community visitor must act in a way consistent with the resident's proper care and protection.	5 6 7
(7) Community visitors may be paid by the Adult Guardian the fees and allowances decided by the Governor in Council.	8 9
<b>Investigate complaints</b>	10
236. The Adult Guardian may investigate a complaint or allegation that an adult with impaired decision-making capacity or decision-making capacity only with assistance—	11 12 13
(a) is being neglected, exploited or abused; or	14
(b) has inappropriate decision-making arrangements; or	15
(c) needs decision-making arrangements to be made under this Act.	16
<b>Annual report</b>	17
237.(1) The Adult Guardian must, as soon as practicable after each financial year—	18 19
(a) prepare a report on the exercise of the Adult Guardian's functions during the year; and	20 21
(b) give a copy of the report to the Minister.	22
(2) The Minister must table a copy of the report in the Legislative Assembly within 14 days after receiving the report.	23 24

**PART 2—ADMINISTRATIVE PROVISIONS****Appointment**

**238.(1)** The Adult Guardian is to be appointed on a full-time basis by the Governor in Council.

(2) A person is eligible for appointment as Adult Guardian only if the person has demonstrated commitment to the rights and welfare of people with a mental or intellectual impairment.

(3) The Public Advocate is not eligible for appointment as Adult Guardian.

**Selection**

**239.(1)** For selecting a person for recommendation for appointment as Adult Guardian, the Minister must advertise for applications from suitably qualified persons to be considered for selection.

(2) The Governor in Council may appoint a person as Adult Guardian only if subsection (1) has been complied with for the appointment.

**Duration of appointment**

**240.(1)** The Adult Guardian holds office for a term of not longer than 5 years.<sup>95</sup>

(2) The office of Adult Guardian becomes vacant if the Adult Guardian resigns by signed notice of resignation given to the Minister.

(3) The Governor in Council may remove the Adult Guardian from office for—

- (a) physical or mental incapacity to perform official duties satisfactorily; or
- (b) neglect of duty; or
- (c) dishonourable conduct; or

<sup>95</sup> The Adult Guardian may be reappointed—*Acts Interpretation Act 1954*, section 25(1)(c).



(d) being found guilty of an offence that, in the Governor in Council's opinion, makes the person unsuitable to perform official duties.	1 2 3
<b>Terms of appointment</b>	4
241.(1) The Governor in Council may decide the remuneration and allowances payable to the Adult Guardian.	5 6
(2) The Adult Guardian is to be paid the remuneration and allowances decided by the Governor in Council.	7 8
(3) To the extent this Act does not state the terms on which the Adult Guardian holds office, the Adult Guardian holds office on the terms decided by the Governor in Council.	9 10 11
<b>Leave of absence</b>	12
242. The Minister may give the Adult Guardian leave of absence on the terms the Minister considers appropriate.	13 14
<b>Acting Adult Guardian</b>	15
243. The Governor in Council may appoint a person to act as the Adult Guardian—	16 17
(a) for any period the office is vacant; or	18
(b) for any period, or all periods, when the Adult Guardian is absent from duty or Australia or cannot, for another reason, perform the duties of the office.	19 20 21
<b>Staff</b>	22
244. Staff necessary to enable the Adult Guardian to perform the Adult Guardian's functions are to be appointed under the <i>Public Service Management and Employment Act 1988</i> .	23 24 25

<b>CHAPTER 14—PUBLIC ADVOCATE</b>	1
<b>PART 1—ESTABLISHMENT, FUNCTIONS AND POWERS</b>	2 3
<b>Public advocate</b>	4
245. There is to be a Public Advocate.	5
<b>Functions—systemic advocacy</b>	6
246. The Public Advocate has the following functions—	7
(a) protecting the rights of adults with a mental or intellectual impairment;	8 9
(b) promoting the protection of the adults and their rights from neglect, exploitation or abuse;	10 11
(c) encouraging the development of programs to assist the adults to reach the greatest practicable degree of autonomy;	12 13
(d) promoting the provision of services and facilities for the adults;	14
(e) monitoring and reviewing the delivery of services and facilities to the adults.	15 16
<b>Powers</b>	17
247. The Public Advocate may do all things necessary or convenient to be done for performing the Public Advocate's functions.	18 19
<b>Not under Ministerial control</b>	20
248. In performing the Public Advocate's functions and exercising the Public Advocate's powers, the Public Advocate is not under the control or direction of the Minister.	21 22 23

<b>Delegation</b>	1
249. The Public Advocate may delegate the Public Advocate's powers to a member of the Public Advocate's staff.	2 3
<b>Annual report</b>	4
250. The Public Advocate must, as soon as practicable after each financial year—	5 6
(a) prepare a report on the exercise of the Public Advocate's functions during the year; and	7 8
(b) give a copy of the report to the Minister.	9
(2) The Minister must table a copy of the report in the Legislative Assembly within 14 days after receiving the report.	10 11
 <b>PART 2—ADMINISTRATIVE PROVISIONS</b>	 12
<b>Appointment</b>	13
251.(1) The Public Advocate is to be appointed on a full-time basis by the Governor in Council.	14 15
(2) A person is eligible for appointment as Public Advocate only if the person has demonstrated commitment to advocacy for people with a mental or intellectual impairment.	16 17 18
(3) The Adult Guardian is not eligible for appointment as Public Advocate.	19 20
<b>Selection</b>	21
252.(1) For selecting a person for recommendation for appointment as Public Advocate, the Minister must advertise for applications from suitably qualified persons to be considered for selection.	22 23 24
(2) The Governor in Council may appoint a person as Public Advocate only if subsection (1) has been complied with for the appointment.	25 26

<b>Duration of appointment</b>	1
<b>253.(1)</b> The Public Advocate holds office for a term of not longer than 5 years. <sup>96</sup>	2 3
<b>(2)</b> The office of Public Advocate becomes vacant if the Public Advocate resigns by signed notice of resignation given to the Minister.	4 5
<b>(3)</b> The Governor in Council may remove the Public Advocate from office for—	6 7
<b>(a)</b> physical or mental incapacity to perform official duties satisfactorily; or	8 9
<b>(b)</b> neglect of duty; or	10
<b>(c)</b> dishonourable conduct; or	11
<b>(d)</b> being found guilty of an offence that, in the Governor in Council's opinion, makes the person unsuitable to perform official duties.	12 13 14
<b>Terms of appointment</b>	15
<b>254.(1)</b> The Governor in Council may decide the remuneration and allowances payable to the Public Advocate.	16 17
<b>(2)</b> The Public Advocate is to be paid the remuneration and allowances decided by the Governor in Council.	18 19
<b>(3)</b> To the extent this Act does not state the terms on which the Public Advocate holds office, the Public Advocate holds office on the terms decided by the Governor in Council.	20 21 22
<b>Leave of absence</b>	23
<b>255.</b> The Minister may give the Public Advocate leave of absence on the terms the Minister considers appropriate.	24 25

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<sup>96</sup> The Public Advocate may be reappointed—*Acts Interpretation Act 1954*, section 25(1)(c).

<b>Acting Public Advocate</b>	1
<b>256.</b> The Governor in Council may appoint a person to act as the Public Advocate—	2 3
(a) for any period the office is vacant; or	4
(b) for any period, or all periods, when the Public Advocate is absent from duty or Australia or cannot, for another reason, perform the duties of the office.	5 6 7
 <b>Staff</b>	 8
<b>257.</b> Staff necessary to enable the Public Advocate to perform the Public Advocate's functions may be appointed under the <i>Public Service Management and Employment Act 1988</i> .	9 10 11
 <b>CHAPTER 15—MISCELLANEOUS</b>	 12
 <b>Interrelationship between tribunal order and document</b>	 13
<b>258.(1)</b> In this section—	14
“document” means an enduring power of attorney or advance health care directive.	15 16
(2) A document prevails over a later tribunal order (other than an order about the document).	17 18
(3) A tribunal order about power to make a decision prevails over a later document about power to make the decision.	19 20
 <b>Interrelationship between documents</b>	 21
<b>259.(1)</b> In this section—	22
“document” means an enduring power of attorney or advance health care directive.	23 24

(2) A later document of an adult prevails over an earlier document of the adult to the extent of an inconsistency. 1  
2

**Preservation of confidentiality** 3

260.(1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (3). 4  
5  
6  
7

Maximum penalty— 8

(2) A person gains information through involvement in the administration of this Act if the person gains the information because of being, or an opportunity given by being— 9  
10  
11

(a) the president, deputy president or another member of the tribunal; 12  
or 13

(b) the registrar or a member of the tribunal staff; or 14

(c) the Adult Guardian or a member of the Adult Guardian's staff; or 15

(d) the Public Advocate or a member of the Public Advocate's staff; 16  
or 17

(e) an appointed assistant or substitute decision maker; or 18

(f) a community visitor. 19

(3) A person may make a record of confidential information, or disclose it to someone else— 20  
21

(a) under this Act; or 22

(b) to discharge a function under another law; or 23

(c) if the record is made for disclosure to a court or relevant tribunal; 24  
or 25

(d) if the disclosure is to a court or relevant tribunal; or 26

(e) if authorised under a regulation or another law; or 27

(f) if authorised by the person to whom the information relates; or 28

(g) if authorised by the tribunal in the public interest because a person's life or physical safety could otherwise reasonably be 29  
30

expected to be endangered.	1
(4) In this section—	2
“confidential information” includes information about a person’s affairs but does not include—	3 4
(a) information already publicly disclosed unless further disclosure of the information is prohibited under a law; or	5 6
(b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.	7 8 9
<b>Disclosure of information about investigations</b>	10
261.(1) Section 260 <sup>97</sup> does not prevent the Adult Guardian from disclosing information to a person or to members of the public about an issue the subject of an investigation by the Adult Guardian if the Adult Guardian is satisfied the disclosure is necessary and reasonable in the public interest.	11 12 13 14 15
(2) However, the Adult Guardian must not make the disclosure if it is likely to prejudice the investigation.	16 17
(3) In a disclosure under subsection (1), the Adult Guardian—	18
(a) may express an opinion expressly or impliedly critical of an entity only if the Adult Guardian has given the entity an opportunity to answer the criticism; and	19 20 21
(b) may identify the complainant, directly or indirectly, only if it is necessary and reasonable.	22 23
<b>Chief executive may approve forms</b>	24
262. The chief executive may approve forms for use under this Act.	25

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<sup>97</sup> Section 260 prohibits the improper recording or disclosure of confidential information.

**Regulation making power**

1

**263.** The Governor in Council may make regulations under this Act.

2

Draft



<b>SCHEDULE</b>	1
<b>DICTIONARY</b>	2
section 9 of this Act	3
<b>“appointed assistant”</b> see section 25.	4
<b>“appointed decision maker”</b> see section 29.	5
<b>“appointment order”</b> means an order of the tribunal appointing an appointed assistant or appointed decision maker.	6 7
<b>“approved form”</b> means a form approved by the chief executive.	8
<b>“authorised investment”</b> has the same meaning as in the <i>Trusts Act 1973</i> .	9
<b>“bankruptcy”</b> includes taking advantage of the laws of bankruptcy as a debtor.	10 11
<b>“chosen decision maker”</b> see section 27.	12
<b>“close friend”</b> of an adult means a person who has a close personal relationship with the adult and a personal interest in the adult’s welfare.	13 14
<b>“commencement declaration”</b> see section 50(1)(b).	15
<b>“commissioner for declarations”</b> has the same meaning as in the <i>Justices of the Peace and Commissioners for Declarations Act 1991</i> .	16 17
<b>“confidentiality order”</b> see section 163(2).	18
<b>“decision-making capacity”</b> see section 11.	19
<b>“de facto partner”</b> means a person who lives in a de facto relationship.	20
<b>“de facto relationship”</b> means a relationship between 2 persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple.	21 22 23 24
<b>“deputy president”</b> means the deputy president of the tribunal.	25
<b>“excluded personal decision”</b> see section 15.	26

## SCHEDULE (continued)

<b>“family”</b> of an adult consists of the following members—	1
(a) the adult’s spouse;	2
(b) each of the adult’s children who is 18 or more;	3
(c) each of the adult’s parents.	4
<b>“financial decision”</b> see section 23.	5
<b>“health care”</b> see section 17.	6
<b>“health care decision”</b> see section 16(1).	7
<b>“health care principle”</b> see section 112.	8
<b>“health care provider”</b> means a person who provides health care in the ordinary course of business or the practice of a profession.	9 10
<b>“impaired capacity declaration”</b> , for an enduring power of attorney, see section 50(1)(a).	11 12
<b>“impaired capacity declaration”</b> , for an advance health care directive, see section 72.	13 14
<b>“impaired decision-making capacity”</b> see section 12.	15
<b>“interested person”</b> means—	16
(a) for an application or proceeding about an enduring power of attorney or related matter—a person who, in the tribunal’s opinion, has an appropriate interest in the application; or	17 18 19
(b) for another type of application or proceeding—a person who, in the tribunal’s opinion, has an appropriate interest in the adult who is the subject of the application.	20 21 22
<b>“insolvent”</b> includes—	23
(a) having a provisional liquidator, liquidator, administrator or controller appointed; and	24 25
(b) being ordered to be wound up.	26
<b>“litigation related decision”</b> see section 24(1).	27
<b>“matters necessary to make an advance health care directive”</b> means	28

## SCHEDULE (continued)

the matters in section 65.	1
<b>“matters necessary to make an enduring power of attorney”</b> means the matters in section 42.	2 3
<b>“member”</b> means a member of the tribunal.	4
<b>“object”</b> to health care, see section 22.	5
<b>“paid carer”</b> , for an adult, means someone who—	6
(a) performs services for the adult’s care; and	7
(b) receives remuneration from any source for the services, other than—	8 9
(i) a carer’s pension; or	10
(ii) remuneration attributable to the principle <sup>98</sup> that damages may be awarded by a court for voluntary services performed for the adult’s care.	11 12 13
<b>“participation using technology”</b> see section 167.	14
<b>“person eligible for appointment because of a legal background”</b> see section 145(3)(a).	15 16
<b>“person eligible for appointment because of a professional background”</b> see section 145(3)(b).	17 18
<b>“person eligible for appointment because of contact”</b> see section 145(3)(c).	19 20
<b>“personal decision”</b> see section 14.	21
<b>“president”</b> means the president of the tribunal.	22
<b>“presidential directions”</b> see section 155(2).	23
<b>“primary carer”</b> of an adult who lives in a hospital or care facility is the person in charge of the hospital or care facility.	24 25

<sup>98</sup> This principle was established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161—see Queensland Law Reform Commission Report No. 45, *The assessment of damages in personal injury and wrongful death litigation*, *Griffiths v Kerkemeyer*, Section 15C Common Law Practice Act 1867, October 1993.

## SCHEDULE (continued)

<b>“relation”</b> of a person means—	1
(a) a spouse of the first person; or	2
(b) a person who is related to the first person by blood, marriage, affinity or adoption; or	3 4
(c) a person on whom the first person is completely or mainly dependent; or	5 6
(d) a person who is completely or mainly dependent on the first person; or	7 8
(e) a person who is a member of the first person’s household.	9
<b>“removal of tissue for donation”</b> see section 20(1).	10
<b>“special consent health care decision”</b> see section 18.	11
<b>“spouse”</b> includes a de facto partner.	12
<b>“statutorily authorised health care decision maker”</b> see section 28.	13
<b>“sterilisation”</b> see section 21.	14
<b>“substitute decision maker”</b> see section 26(1).	15
<b>“term”</b> includes condition, limitation and instruction.	16
<b>“tissue”</b> see section 20(2).	17
<b>“tribunal”</b> means the Assisted and Substituted Decisions Tribunal.	18
<b>“tribunal rules”</b> see section 152.	19
	20



## APPENDIX A

# ENDURING POWER OF ATTORNEY

<p style="text-align: center;"><b>IMPORTANT NOTICE TO ADULT MAKING THIS ENDURING POWER OF ATTORNEY</b></p>
--

This document will allow your chosen decision maker or chosen decision makers to make decisions and do things for you.

## **Type of decision, limits and instructions**

You may give a chosen decision maker power to make a personal decision, health care decision, financial decision or litigation related decision. You may limit the power given to a chosen decision maker and state instructions for a chosen decision maker to apply when making a decision.

## **When power begins**

Power to make a personal decision or health care decision will only begin when (if ever) even with assistance you are not capable of understanding the nature and foreseeing the effects of the decision and communicating the decision. You may nominate when power to make a financial decision or litigation related decision will begin. If you do not nominate when power to make a financial decision or litigation related decision will begin, it will begin immediately.

## **Effect of power**

Once the power of a chosen decision maker to make a decision begins, your chosen decision maker will make, and have full control over, that decision unless limitations or instructions are included in this document.

## **Continuation of power**

A chosen decision maker's power to make a decision continues if you become incapable, even with assistance, of understanding the nature and foreseeing the effects of the decision and communicating the decision.

## **Formal revocation and overseeing power**

You may revoke your enduring power of attorney at any time you have capacity to make the same enduring power of attorney. However, at any time you do not have the capacity to make the same enduring power of attorney, you will not be able to oversee the use of the power or to revoke it.

<p>ADDITIONAL NOTICE TO ADULT MAKING THIS ENDURING POWER OF ATTORNEY</p>
--

*Formal revocation*

If you change or revoke your enduring power of attorney, you must advise your chosen decision maker(s) of this.

*Assistance from Tribunal*

While (if ever) you lack capacity to oversee the use of your enduring power of attorney, the Assisted and Substituted Decisions Tribunal has power to protect your interests. It may order a chosen decision maker to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove a chosen decision maker or change or revoke your enduring power of attorney if your interests are not adequately protected.

*Other actions by you that revoke your enduring power of attorney*

Apart from formal revocation of your enduring power of attorney, certain things you may do after signing this document may also revoke it. If you make another enduring power of attorney giving power to a chosen decision maker, your earlier enduring power of attorney is revoked to the extent it gives the same power to a different chosen decision maker. If you marry, your enduring power of attorney is revoked unless it was made in express contemplation of the marriage. If you divorce, your enduring power of attorney is revoked to the extent it gives power to your former spouse. If you die, your enduring power of attorney is revoked in its entirety.

*Chosen decision maker's actions that revoke your enduring power of attorney*

Certain things a chosen decision maker may do after you sign this document may also revoke your enduring power of attorney. While you are capable of using the power you have given to a chosen decision maker, the chosen decision maker may withdraw by giving you a signed notice. Alternatively, a chosen decision maker may get the Tribunal's leave to withdraw. If a chosen decision maker is your paid carer or health care provider, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power. Also, if a chosen decision maker becomes incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision and communicating the decision, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power. Finally, if a chosen decision maker dies, your enduring power of attorney is also revoked to the extent it gives the chosen decision maker power.



<b>IMPORTANT NOTICE TO PEOPLE EXECUTING THIS ENDURING POWER OF ATTORNEY</b>
---

**Advice**

The Adult Guardian or a solicitor can advise about this enduring power of attorney, including its contents, a chosen decision maker's responsibilities under it and how to execute it.

**Adult**

The adult making this enduring power of attorney must sign this document after clause 7 or instruct another person to sign for the adult and in the adult's presence. If another person signs for the adult, the person must be 18 or more and may not also be the witness or a chosen decision maker for the adult.

**Witness**

The witness must be a justice, commissioner for declarations or lawyer. The witness must not be a chosen decision maker for the adult; relation of the adult or a chosen decision maker. If this enduring power of attorney gives power to make a health care decision, the witness must not be a current health care provider of the adult.

The witness must sign and date this document after clause 7.

The witness must also sign the certificate in clause 8.

**Chosen decision maker**

The chosen decision maker must be at least 18 and not a paid carer or current health care provider for the adult. Alternatively, for a financial or litigation related decision, the Public Trustee or a trustee company may be the chosen decision maker.

The chosen decision maker, or each chosen decision maker if more than one is given power, must sign the acceptance in clause 9.

## PART 1—CHOOSING CHOSEN DECISION MAKER

### Nature of power of attorney

1. This is an enduring power of attorney.

### Chosen decision maker and decision

2. I, <print your full name here> (the “adult”)  
of <print your address here>  
choose <print your chosen decision maker’s full name here>  
of <print your chosen decision maker’s address here>  
as my chosen decision maker for—
  - <print description of decision>
  - <print description of type of decision>
  - personal decisions
  - health care decisions
  - financial decisions
  - litigation related decisions
  - all decisions

#### [Notes—

1. • Cross out what does not apply.
2. You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision-making Act 1994, section 46. This clause may be modified or repeated as appropriate.]

### Limits

3. The power given to the chosen decision maker in clause 2 is subject to the following limits—

<print any limits>

#### [Notes—

1. For example “The chosen decision maker must not sell my shares in ABC Pty Ltd” or “The chosen decision maker must not consent to a blood transfusion”.
2. If you do not wish to specify any limits, cross out clause 3.]

### Instructions

4. The power given to the chosen decision maker in clause 2 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example “The chosen decision maker may use the following assets of mine for his/her own personal use—<list the assets>.”

2. If you do not wish to specify any instructions, cross out clause 4.]

### When power begins

5. The power given to the chosen decision maker in clause 2 begins—

- immediately
- from <print date>
- if <print occasion>
- when (if ever) I become an adult with impaired decision making capacity for the decision

[Notes—

1. • Cross out what does not apply.

2. Completion of this clause is unnecessary for a power to make personal decision or health care decision. Such a power begins when (if ever) you become an adult with impaired decision making capacity for the decision. It cannot begin before that time regardless of what clause 5 says.

3. If you do not complete clause 5, power to make a financial decision or litigation related decision begins immediately. If you complete clause 5 by inserting a date or occasion, but you become an adult with impaired decision making capacity for the decision before that date or occasion happens, the power begins when you become an adult with impaired decision making capacity.]

### Payment

6. The chosen decision maker in clause 2 may draw from my money or income payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision make, cross out clause 6.

2. *If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]*

**Statement of understanding**

7.(1) I fully understand that by signing this document, I give power to make the decision mentioned in clause 2 to the chosen decision maker mentioned in clause 2.

(2) I also fully understand this gives the chosen decision maker power to do, for me, anything I could lawfully authorise another person to do in relation to the decision subject to the limitations mentioned in clause 3 and instructions mentioned in clause 4.

.....

- Signature of adult giving the power
- or
- Signature of person directed by adult
- to sign for adult

.....

Signature of witness

.....

Date\*

[Notes—

1. • Cross out what does not apply.
2. \* To be completed by witness.]

**PART 2—WITNESS’ CERTIFICATE**

**Witness’ certificate**

**8. I, <print your full name here>**

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker of the adult
- a relation of the adult or a chosen decision maker of the adult
- a current health care provider of the adult

(c)\* the adult signed this enduring power of attorney in my presence

(c)\* in my presence, the adult instructed a person to sign this enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this enduring power of attorney, the adult appeared to me to understand the matters mentioned in the ‘Important notice to adult making this enduring power of attorney’.

.....

Signature of witness

.....

Date\*\*

[Notes—

1. • Cross out what does not apply.
2. Being a current health care provider of the adult only disqualifies a witness if the power of attorney gives power to make a health care decision.

3. *\* Cross out the paragraph (c) that does not apply.*
4. *\*\* To be completed by witness.]*

IMPORTANT NOTICE TO CHOSEN DECISION MAKER(S)
--

**Responsibilities**

If you accept this power of attorney, you will be taking on serious responsibilities. Failure to observe these responsibilities could result in you being convicted of an offence, required to pay compensation or removed as chosen decision maker.

You should take particular note of the responsibilities imposed by the *Assisted and Substituted Decision-making Act 1994*, Chapter 9. Here is a summary of some of the chapter—

*General duty*

You must exercise the given power honestly and with reasonable care. It is an offence not to do so and you may also be required to compensate the adult.

You must comply with the terms of the enduring power of attorney, any other tribunal requirement and the Act's general principles, including—

- maintenance of the adult's existing supportive relationships
- maintenance of the adult's ethnic and cultural environment and the adult's values
- decisions being appropriate to the adult's characteristics and needs.

You must also make a health care decision only if it is the most appropriate decision to promote and maintain the adult's health and well-being.

If the adult has other substitute decision makers, you must consult with them on a regular basis. If you are a joint decision maker, you may only exercise your power unanimously.

*Duty to keep records*

You must keep sufficient records of all dealings and transactions made under the power. It is an offence not to do so and the Tribunal may require you to produce them.

*Duty to keep property separate*

You must keep your property separate from the adult's property unless you and the adult jointly own the property.

*Duty to present management plan and get approval for unauthorised investments*

If you may make a financial or litigation related decision, you must present a plan of management to the tribunal if required by the tribunal. You must also get approval for unauthorised investments.

*Duty to avoid conflict transaction*

You must not enter into transactions in which the adult's interests and your interests (or those of your relation, business associate or close friend) could conflict. For example, if it is necessary to sell some of the adult's property, it may be a breach of your duty to sell it to your business associate.

However, you may enter a conflict transaction authorised by this power of attorney or by the Tribunal or a conflict transaction that provides for the needs of a person the adult might reasonably be expected to provide for.

*Duty about gifts*

You must not give away the adult's property except where the adult would have been likely to do so, for example, giving a marriage gift to a relation of the adult or a donation to the adult's favourite charity.

*Power to maintain adult's dependants*

You may give reasonable maintenance to the adult's dependants.

**When power begins**

Power to make a personal or health care decision will only begin when (if ever) the adult is not capable, even with assistance, of understanding the nature and foreseeing the effects of the decision and communicating the decision. The adult may nominate when power to make a financial or litigation related decision will begin (see clause 5). If the adult does not nominate when power to make a financial or litigation related decision will begin, it begins immediately.

**When power ends**

*Your actions*

Certain things you may do after the adult signs this document may also revoke the enduring power of attorney. While the adult is capable of using the power given to you, you may withdraw by giving the adult a signed notice. Alternatively, you may get the Tribunal's leave to withdraw. If you are the adult's paid carer or health care provider, the adult's enduring power of attorney is revoked to the extent it gives you power. Also, if you become incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision or of communicating the decision, the enduring power of attorney is revoked to the extent it gives you power. Finally, if



you die, the adult's enduring power of attorney is also revoked to the extent it gives you power.

*Adult's actions*

The adult may change or revoke the enduring power of attorney and is required to advise you of any change or revocation.

Apart from formal revocation of the enduring power of attorney, certain other things the adult may do after signing this document may also revoke it. If the adult makes another enduring power of attorney giving your power to another chosen decision maker, this enduring power of attorney is revoked to that extent. If the adult marries, the enduring power of attorney is revoked unless it was made in express contemplation of the marriage. If the adult divorces, the enduring power of attorney is revoked to the extent it gives power to the adult's former spouse. If the adult dies, the enduring power of attorney is revoked in its entirety.

You may become personally liable if you use the enduring power of attorney knowing it has been changed or revoked or knowing of an event that effectively changes or revokes it. Personal liability may also happen if you use the enduring power of attorney having reason to believe change or revocation has happened.

*Assisted and Substituted Decisions Tribunal*

The Assisted and Substituted Decisions Tribunal has power to protect the adult's interests. It may order you to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove you or change or revoke the enduring power of attorney if the adult's interests are not adequately protected.

**PART 3—CHOSEN DECISION MAKER'S  
ACCEPTANCE**

**Chosen decision maker's acceptance**

**9. I, <print your full name here>**

state that—

- (a) I am at least 18
- (b) I am not—
  - a paid carer of the adult
  - a current health care provider of the adult
- (c) I have read this enduring power of attorney
- (d) I understand that by signing this document, I take on the responsibility of exercising the power that I have been given by the document
- (e) I also understand that I must exercise the power in accordance with the *Assisted and Substituted Decision-making Act 1994*.

.....  
Signature of chosen decision maker

[Note—

*1. Clause 9 must be repeated for each chosen decision maker.]*

## APPENDIX B



# ENDURING POWER OF ATTORNEY

<p style="text-align: center;"><b>IMPORTANT NOTICE TO ADULT MAKING THIS ENDURING POWER OF ATTORNEY</b></p>
--

This document will allow your chosen decision maker or chosen decision makers to make decisions and do things for you.

## **Type of decision, limits and instructions**

You may give a chosen decision maker power to make a personal decision, health care decision, financial decision or litigation related decision. You may limit the power given to a chosen decision maker and state instructions for a chosen decision maker to apply when making a decision.

## **When power begins**

Power to make a personal decision or health care decision will only begin when (if ever) you are not capable even with assistance of understanding the nature and foreseeing the effects of the decision or of communicating the decision. You may nominate when power to make a financial decision or litigation related decision will begin. If you do not nominate when power to make a financial decision or litigation related decision will begin, it will begin immediately.

## **Effect of power**

Once the power of a chosen decision maker to make a decision begins, your chosen decision maker will make, and have full control over, that decision unless limitations or instructions are included in this document.

## **Continuation of power**

A chosen decision maker's power to make a decision continues if you become incapable, even with assistance, of understanding the nature and foreseeing the effects of the decision or of communicating the decision.

## **Formal revocation and overseeing power**

You may revoke your enduring power of attorney at any time you have capacity to make the same enduring power of attorney. However, at any time you do not have the capacity to make the same enduring power of attorney, you will not be able to oversee the use of the power or to revoke it.

<p style="text-align: center;"><b>ADDITIONAL NOTICE TO ADULT MAKING THIS ENDURING POWER OF ATTORNEY</b></p>
---

**Advice of formal revocation**

If you change or revoke your enduring power of attorney, you must advise your chosen decision maker(s) of this.

**Assistance from Tribunal**

While (if ever) you lack capacity to oversee the use of your enduring power of attorney, the Assisted and Substituted Decisions Tribunal has power to protect your interests. It may order a chosen decision maker to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove a chosen decision maker or change or revoke your enduring power of attorney if your interests are not adequately protected.

**Other actions by you that revoke your enduring power of attorney**

Apart from formal revocation of your enduring power of attorney, certain things you may do after signing this document may also revoke it. If you make another enduring power of attorney giving power to a chosen decision maker, your earlier enduring power of attorney is revoked to the extent it gives the same power to a different chosen decision maker. If you marry, your enduring power of attorney is revoked unless it was made in express contemplation of the marriage. If you divorce, your enduring power of attorney is revoked to the extent it gives power to your former spouse. If you die, your enduring power of attorney is revoked in its entirety.

**Chosen decision maker's actions that revoke your enduring power of attorney**

Certain things a chosen decision maker may do after you sign this document may also revoke your enduring power of attorney. While you are capable of using the power you have given to a chosen decision maker, the chosen decision maker may withdraw by giving you a signed notice. Alternatively, a chosen decision maker may get the Tribunal's leave to withdraw. If a chosen decision maker is your paid carer or health care provider, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power. Also, if a chosen decision maker becomes incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision and communicating the decision, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power. Finally, if a chosen decision maker dies, your enduring power of attorney is also revoked to the extent it gives the chosen decision maker power.

<p style="text-align: center;"><b>IMPORTANT NOTICE TO PEOPLE EXECUTING THIS ENDURING POWER OF ATTORNEY</b></p>
--

**Advice**

The Adult Guardian or a solicitor can advise about this enduring power of attorney, including its contents, a chosen decision maker's responsibilities under it and how to execute it.

**Adult**

If you wish to give power to make a personal decision, Part 2 must be completed and you must sign after clause 7.

If you wish to give power to make a health care decision, Part 3 must be completed and you must sign after clause 14.

If you wish to give power to make a financial decision, Part 4 must be completed and you must sign after clause 21.

If you wish to give power to make a litigation related decision, Part 5 must be completed and you must sign after clause 28.

**Person signing for adult**

The adult may instruct another person to sign for the adult and in the adult's presence. If another person signs for the adult, the person must be 18 or more and may not also be the witness or a chosen decision maker for the adult.

**Witness**

The witness must be a justice, commissioner for declarations or lawyer. The witness must not be a chosen decision maker for the adult; relation of the adult or a chosen decision maker. If witnessing the adult's signature in Part 3 dealing with health care decisions, the witness must not be a current health care provider of the adult.

The person witnessing the adult's signature in a Part must sign and date this document where indicated after the adult's signature. The witness must also sign the certificate at the end of the Part.

**Chosen decision maker**

The chosen decision maker must be at least 18 and not a paid carer or current health care provider for the adult. Alternatively, for a financial or

litigation related decision, the Public Trustee or a trustee company may be the chosen decision maker.

The chosen decision maker, or each chosen decision maker if more than one is given power, must sign the acceptance in clause 30.



## PART 1—PRELIMINARY

### Adult making enduring power of attorney

1. I, <print your full name here> (the “adult”)  
of <print your address here>  
make this enduring power of attorney.

## PART 2—CHOSEN DECISION MAKER FOR PERSONAL DECISIONS

### Chosen decision maker for personal decisions

2. I choose <print full name of your chosen decision maker for personal decisions here>  
of <print the chosen decision maker’s address here>  
as my chosen decision maker for—
- personal decisions
  - <print description of personal decision>
  - <print description of type of personal decision>

#### [Notes—

1. This Part will allow your chosen decision maker to make a personal decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a personal decision for you, cross out Part 2 entirely.
2. A personal decision could be a decision about where and with whom you will live, whether you will work or undertake education or training, whether you will apply for a licence or permit, and day-to-day issues like diet and dress. A personal decision cannot be a decision about your will or enduring power of attorney, voting at elections, or consenting to adoption or marriage.
3. • Cross out what does not apply.
4. You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision-making Act 1994, section 46. This clause may be modified or repeated as appropriate.]

**Limits**

3. The power given to the chosen decision maker in clause 2 is subject to the following limits—

<print any limits>

[Notes—

1. For example "The chosen decision maker must not require me to move away from my home."
2. If you do not wish to specify any limits, cross out clause 3.]

**Instructions**

4. The power given to the chosen decision maker in clause 2 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "<If I need frail aged care, I want you to try the XYZ Nursing Home first.>."
2. If you do not wish to specify any instructions, cross out clause 4.]

**When power begins**

5. I understand that because of the Act the power given to the chosen decision maker in clause 2 begins when (if ever) I become an adult with impaired decision making capacity for the decision.

[Note—

1. Power to make personal decisions cannot begin before you become an adult with impaired decision making capacity for the decision regardless of what you say in this document.]

**Payment**

6. The chosen decision maker in clause 2 may draw from my money or income payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision make, cross out clause 6.

2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

**Statement of understanding**

7.(1) I fully understand that by signing this Part, I give power to make the decision mentioned in clause 2 to the chosen decision maker mentioned in clause 2.

(2) I also fully understand this gives the chosen decision maker power to do, for me, anything I could lawfully authorise another person to do in relation to the decision subject to the limitations mentioned in clause 3 and instructions mentioned in clause 4.

.....

• Signature of adult giving the power

or

• Signature of person directed by adult to sign for adult

.....

Signature of witness

.....

Date\*

[Notes—

1. • Cross out what does not apply.

2. \* To be completed by witness.]

**Witness' certificate**

8. I, <print your full name here>  
state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a chosen decision maker

(c)\* the adult signed this part of the enduring power of attorney in my presence

(c)\* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters mentioned in the 'Important notice to adult making this enduring power of attorney'.

.....

Signature of witness

.....

Date\*\*

[Notes—

1. • Cross out what does not apply.
2. \* Cross out the paragraph (c) that does not apply.
3. \*\* To be completed by witness.]

## PART 3—CHOSEN DECISION MAKER FOR HEALTH CARE DECISIONS

### Chosen decision maker for health care decisions

9. I choose <print full name of your chosen decision maker for health care decisions here>

of <print the chosen decision maker's address here>

as my chosen decision maker for—

- health care decisions
- <print description of health care decision>
- <print description of type of health care decision>

*[Notes—*

*1. This Part will allow your chosen decision maker to make a health care decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a health care decision for you, cross out Part 4 entirely.*

*2. A health care decision could be a decision consenting, refusing to consent or withdrawing consent to health care for you. However, health care does not cover donation of tissue, sterilisation, pregnancy termination, research or experimental health care or certain psychiatric or other health care prescribed by the regulations. Also a health care decision about an adult who is terminally ill or in a persistent vegetative state cannot be a decision to withhold or withdraw life-sustaining health care.*

*3. • Cross out what does not apply.*

*4. You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision-making Act 1994, section 46. This clause may be modified or repeated as appropriate.]*

### Limits

10. The power given to the chosen decision maker in clause 9 is subject to the following limits—

<print any limits>

*[Notes—*

*1. For example "The chosen decision maker must not consent to a blood transfusion."*

*2. If you do not wish to specify any limits, cross out clause 10.]*

### Instructions

11. The power given to the chosen decision maker in clause 9 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "If I need hospitalisation, I wish to be admitted to the XYZ Hospital."
2. If you do not wish to specify any instructions, cross out clause 11.]

### When power begins

12. I understand that because of the Act the power given to the chosen decision maker in clause 9 begins when (if ever) I become an adult with impaired decision making capacity for the decision.

[Note—

1. Power to make health care decisions cannot begin before you become an adult with impaired decision making capacity for the decision regardless of what you say in this document.]

### Payment

13. The chosen decision maker in clause 9 may draw from my money or income payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 13.
2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

### Statement of understanding

14.(1) I fully understand that by signing this Part, I give power to make the decision mentioned in clause 9 to the chosen decision maker mentioned in clause 9.

(2) I also fully understand this gives the chosen decision maker power to do, for me, anything I could lawfully authorise another person to do in

relation to the decision subject to the limitations mentioned in clause 10 and instructions mentioned in clause 11.

.....

- Signature of adult giving the power

or

- Signature of person directed by adult to sign for adult

.....

Signature of witness

.....

Date\*

*[Notes—*

- 1. • Cross out what does not apply.*
- 2. \* To be completed by witness.]*

**Witness' certificate**

15. I, <print your full name here>

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a chosen decision maker
- a current health care provider of the adult

(c)\* the adult signed this part of the enduring power of attorney in my presence

(c)\* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters mentioned in the 'Important notice to adult making this enduring power of attorney'.

.....

Signature of witness

.....

Date\*\*

[Notes—

1. • Cross out what does not apply.
2. \* Cross out the paragraph (c) that does not apply.
3. \*\* To be completed by witness.]



## PART 4—CHOSEN DECISION MAKER FOR FINANCIAL DECISIONS

### Chosen decision maker for financial decisions

16. I choose <print full name of your chosen decision maker for financial decisions here>

of <print the chosen decision maker's address here>

as my chosen decision maker for—

- financial decisions
- <print description of financial decision>
- <print description of type of financial decision>

[Notes—

1. *This Part will allow your chosen decision maker to make a financial decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a financial decision for you, cross out Part 4 entirely.*

2. *A financial decision could be a decision about the possession, custody, control or management of your property, for example, a decision to sell your home.*

3. • *Cross out what does not apply.*

4. *You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision-making Act 1994, section 46. This clause may be modified or repeated as appropriate.]*

### Limits

17. The power given to the chosen decision maker in clause 16 is subject to the following limits—

<print any limits>

[Notes—

1. *For example "The chosen decision maker must not sell my shares in ABC Pty Ltd."*

2. *If you do not wish to specify any limits, cross out clause 17.]*

### Instructions

18. The power given to the chosen decision maker in clause 16 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example “The chosen decision maker may buy my house at a fair market valuation.”
2. If you do not wish to specify any instructions, cross out clause 18.]

### **When power begins**

19. The power given to the chosen decision maker in clause 16 begins—

- immediately
- from <print date>
- if <print occasion>
- when (if ever) I become an adult with impaired decision making capacity for the decision

[Notes—

1. • Cross out what does not apply.
2. If you do not complete clause 19, power to make a financial decision begins immediately. If you complete clause 19 by inserting a date or occasion, but you become an adult with impaired decision making capacity for the decision before that date or occasion happens, the power begins when you become an adult with impaired decision making capacity.]

### **Payment**

20. The chosen decision maker in clause 16 may draw from my money or income payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 20.
2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

### **Statement of understanding**

21.(1) I fully understand that by signing this Part, I give power to make the decision mentioned in clause 16 to the chosen decision maker mentioned in clause 16.

(2) I also fully understand this gives the chosen decision maker power to do, for me, anything I could lawfully authorise another person to do in relation to the decision subject to the limitations mentioned in clause 17 and instructions mentioned in clause 18.

.....

- Signature of adult giving the power
- or
- Signature of person directed by adult to sign for adult

.....

Signature of witness

.....

Date\*

[Notes—

1. • Cross out what does not apply.
2. \* To be completed by witness.]

**Witness' certificate**

22. I, <print your full name here>

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a chosen decision maker

(c)\* the adult signed this part of the enduring power of attorney in my presence

(c)\* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters mentioned in the 'Important notice to adult making this enduring power of attorney'.

.....

Signature of witness

.....

Date\*\*

[Notes—

1. • Cross out what does not apply.
2. \* Cross out the paragraph (c) that does not apply.
3. \*\* To be completed by witness.]

## PART 5—CHOSEN DECISION MAKER FOR LITIGATION RELATED DECISIONS

### Chosen decision maker for litigation related decisions

23. I choose <print full name of your chosen decision maker for litigation related decisions here>

of <print the chosen decision maker's address here>

as my chosen decision maker for—

- litigation related decisions
- <print description of litigation related decision>
- <print description of type of litigation related decision>

[Notes—

1. *This Part will allow your chosen decision maker to make a litigation related decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a litigation related decision for you, cross out Part 5 entirely.*

2. *A litigation related decision is a decision about a legal dispute of a civil or criminal nature involving you or your property. It does not matter whether proceedings have been started.*

3. • *Cross out what does not apply.*

4. *You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision-making Act 1994, section 46. This clause may be modified or repeated as appropriate.]*

### Limits

24. The power given to the chosen decision maker in clause 23 is subject to the following limits—

<print any limits>

[Note—

1. *If you do not wish to specify any limits, cross out clause 24.]*

### Instructions

25. The power given to the chosen decision maker in clause 23 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "I want Ms ABC to act as my solicitor."
2. If you do not wish to specify any instructions, cross out clause 25.]

### **When power begins**

26. The power given to the chosen decision maker in clause 23 begins—

- immediately
- from <print date>
- if <print occasion>
- when (if ever) I become an adult with impaired decision making capacity for the decision

[Notes—

1. Cross out what does not apply.
2. If you do not complete clause 26, power to make a financial decision begins immediately. If you complete clause 26 by inserting a date or occasion, but you become an adult with impaired decision making capacity for the decision before that date or occasion happens, the power begins when you become an adult with impaired decision making capacity.]

### **Payment**

27. The chosen decision maker in clause 23 may draw from my money or income payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 27.
2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

### **Statement of understanding**

28.(1) I fully understand that by signing this Part, I give power to make the decision mentioned in clause 23 to the chosen decision maker

mentioned in clause 23.

(2) I also fully understand this gives the chosen decision maker power to do, for me, anything I could lawfully authorise another person to do in relation to the decision subject to the limitations mentioned in clause 24 and instructions mentioned in clause 25.

.....

- Signature of adult giving the power

or

- Signature of person directed by adult to sign for adult

.....

Signature of witness

.....

Date\*

[Notes—

1. • Cross out what does not apply.
2. \* To be completed by witness.]

**Witness' certificate**

**29. I, <print your full name here>**

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a chosen decision maker

(c)\* the adult signed this part of the enduring power of attorney in my presence

(c)\* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters mentioned in the 'Important notice to adult making this enduring power of attorney'.

.....

Signature of witness

.....

Date\*\*

[Notes—

1. • Cross out what does not apply.
2. \* Cross out the paragraph (c) that does not apply.
3. \*\* To be completed by witness.]



<b>IMPORTANT NOTICE TO CHOSEN DECISION MAKER(S)</b>
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**Responsibilities**

If you accept this power of attorney, you will be taking on serious responsibilities. Failure to observe these responsibilities could result in you being convicted of an offence, required to pay compensation or removed as chosen decision maker.

You should take particular note of the responsibilities imposed by the *Assisted and Substituted Decision-making Act 1994*, Chapter 9. Here is a summary of some of the chapter—

*General duty*

You must exercise the given power honestly and with reasonable care. It is an offence not to do so and you may also be required to compensate the adult.

You must comply with the terms of the enduring power of attorney, any other tribunal requirement and the Act's general principles, including—

- maintenance of the adult's existing supportive relationships
- maintenance of the adult's ethnic and cultural environment and the adult's values
- decisions being appropriate to the adult's characteristics and needs.

You must also make a health care decision only if it is the most appropriate decision to promote and maintain the adult's health and well-being.

If the adult has other substitute decision makers, you must consult with them on a regular basis. If you are a joint decision maker, you may only exercise your power unanimously.

*Duty to keep records*

You must keep sufficient records of all dealings and transactions made under the power. It is an offence not to do so and the Tribunal may require you to produce them.

*Duty to keep property separate*

You must keep your property separate from the adult's property unless you and the adult jointly own the property.

*Duty to present management plan and get approval for unauthorised investments*

If you may make a financial or litigation related decision, you must present a plan of management to the tribunal if required by the tribunal. You must also get approval for unauthorised investments.

*Duty to avoid conflict transaction*

You must not enter into transactions in which the adult's interests and your interests (or those of your relation, business associate or close friend) could conflict. For example, if it is necessary to sell some of the adult's property, it may be a breach of your duty to sell it to your business associate.

However, you may enter a conflict transaction authorised by this power of attorney or by the Tribunal or a conflict transaction that provides for the needs of a person the adult might reasonably be expected to provide for.

*Duty about gifts*

You must not give away the adult's property except where the adult would have been likely to do so, for example, giving a marriage gift to a relation of the adult or a donation to the adult's favourite charity.

*Power to maintain adult's dependants*

You may give reasonable maintenance to the adult's dependants.

**When power begins**

Power to make a personal or health care decision will only begin when (if ever) the adult is not capable, even with assistance, of understanding the nature and foreseeing the effects of the decision or of communicating the decision. The adult may nominate when power to make a financial or litigation related decision will begin (see clauses 19 and 26). If the adult does not nominate when power to make a financial or litigation related decision will begin, it begins immediately.

**When power ends***Your actions*

Certain things you may do after the adult signs this document may also revoke the enduring power of attorney. While the adult is capable of using the power given to you, you may withdraw by giving the adult a signed notice. Alternatively, you may get the Tribunal's leave to withdraw. If you are the adult's paid carer or health care provider, the adult's enduring power of attorney is revoked to the extent it gives you power. Also, if you become incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision or of communicating the decision, the enduring power of attorney is revoked to the extent it gives you power. Finally, if

you die, the adult's enduring power of attorney is also revoked to the extent it gives you power.

*Adult's actions*

The adult may change or revoke the enduring power of attorney and is required to advise you of any change or revocation.

Apart from formal revocation of the enduring power of attorney, certain other things the adult may do after signing this document may also revoke it. If the adult makes another enduring power of attorney giving your power to another chosen decision maker, this enduring power of attorney is revoked to that extent. If the adult marries, the enduring power of attorney is revoked unless it was made in express contemplation of the marriage. If the adult divorces, the enduring power of attorney is revoked to the extent it gives power to the adult's former spouse. If the adult dies, the enduring power of attorney is revoked in its entirety.

You may become personally liable if you use the enduring power of attorney knowing it has been changed or revoked or knowing of an event that effectively changes or revokes it. Personal liability may also happen if you use the enduring power of attorney having reason to believe change or revocation has happened.

*Assisted and Substituted Decisions Tribunal*

The Assisted and Substituted Decisions Tribunal has power to protect the adult's interests. It may order you to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove you or change or revoke the enduring power of attorney if the adult's interests are not adequately protected.

**PART 6—CHOSEN DECISION MAKER'S  
ACCEPTANCE**

**Chosen decision maker's acceptance**

**30. I, <print your full name here>**

state that—

- (a) I am 18 or more
- (b) I am not—
  - a paid carer for the adult
  - a current health care provider of the adult
- (c) I have read this enduring power of attorney
- (d) I understand that by signing this document, I take on the responsibility of exercising the power that I have been given by the document
- (e) I also understand that I must exercise the power in accordance with the *Assisted and Substituted Decision-making Act 1994*.

.....

Signature of chosen decision maker

[Note—

*1. Clause 30 must be repeated for each chosen decision maker.]*