

CHAPTER 7

APPOINTMENT OF A DECISION-MAKER

1. GROUNDS FOR APPOINTMENT

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 Certain powers will be withdrawn from the person and granted to the decision-maker.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.

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 4 of this Report and should clearly identify the matters to be proved before a decision-maker can be appointed.

(a) Existence of decision-making disability

In the Draft Report,⁵⁴⁷ the Commission expressed the view that appointment of a decision-maker should not depend on proof of the existence of a particular kind of disability.⁵⁴⁸ This approach is consistent with the Commission's belief that the legislative scheme proposed by the Commission should be based on the presumption of competence, and that the existence of a decision-making disability should never be assumed to cause impairment to the person's decision-making capacity.⁵⁴⁹

In the submissions received by the Commission in response to the Draft Report, there was considerable support for the Commission's approach. One respondent commented that the recommendation was particularly important because "it reinforces the fact that all people are different even if they share the same or similar condition."⁵⁵⁰

⁵⁴⁷ Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

⁵⁴⁸ At 35.

⁵⁴⁹ See pp 29-30 of this Report.

⁵⁵⁰ Submission No 73.

(b) Test of capacity

The Commission recommended that appointment of a decision-maker should be a two stage process.⁵⁵¹ The first stage of the process is to assess the decision-making capacity of the person concerned.

(i) Ability to understand and to reason

In the Draft Report, the test of capacity proposed by the Commission centred on the ability of the person concerned to understand the nature of a decision and to foresee the consequences of making it in a particular way.

The Commission noted that the crucial question is not the quality of a person's decisions. No-one makes "right" decisions all the time. The real issue is the level of understanding and reasoning which the person is able to bring to the decision-making process:

*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.*⁵⁵²

The Commission's recommendation was reflected in clause 82(1)(b) of the Draft Bill in Chapter 13 of the Draft Report, which provided that the tribunal may appoint a decision-maker if a person has impaired decision-making capacity for a decision; in clause 12 which provided that a person has "impaired decision-making capacity" for a decision if the person does not have decision-making capacity for the decision; and in clause 11(a) which provided that a person has "decision-making capacity" for a decision if, whether with or without assistance, the person is capable of understanding the nature and foreseeing the effects of the decision.

Of the submissions received by the Commission in response to the Draft Report, most which addressed this issue favoured the Commission's recommendation.

However, one submission expressed the view that there was "insufficient guidance offered to the Tribunal to competently and rationally assess the degree of disability required for a person to be suitable to be offered

⁵⁵¹ At 37.

⁵⁵² Public Guardian's Office Western Australia, *Annual Report 1992-1993*, 1.

assistance".⁵⁵³ The respondent, the Intellectually Disabled Citizens Council of Queensland, referred to the definition of an "intellectually disabled citizen" in section 4 of the *Intellectually Disabled Citizens Act 1985 (Qld)*.⁵⁵⁴ The section provides that an "intellectually disabled citizen" is a person whose functional competence is limited by reason of intellectual impairment resulting from one of a number of causes. "Functional competence" includes:

- (a) the competence to carry out the usual functions of daily living; and
- (b) the care and maintenance of oneself and one's home environment; and
- (c) the ability to perform civic duties; and
- (d) the ability to enter into contracts; and
- (e) the ability to make informed decisions concerning oneself.

In the light of this submission, the Commission considered whether the proposed legislative scheme should include any additional criteria for assessing a person's decision-making capacity.

The Commission's approach has been, in keeping with the principle of the least restrictive alternative, to focus attention on a particular decision or kind of decision with which a person with a decision-making disability may need assistance. The Commission is concerned that the inclusion of criteria may result in consideration of factors which are irrelevant to that decision or kind of decision. For example, a person's ability to perform civic duties would not be relevant to a consideration of whether or not the person is able to make decisions about his or her own health care.

The Commission is also concerned that an attempt to particularise the factors which should be taken into account in every situation may omit criteria which are relevant to the decision or kind of decision in question in an individual application.

On balance, the Commission is not persuaded that additional criteria should be included.

(ii) Relevance of person's condition

Submissions from the Intellectually Disabled Citizens Council and from the Public Trustee of Queensland commented that the information about the nature of a person's decision-making disability would be relevant to an

⁵⁵³ Submission No 52.

⁵⁵⁴ See p 13 of this Report.

assessment of the person's decision-making capacity, and should be presented to the tribunal.⁵⁵⁵

The Commission recognises the relevance of this kind of information. In the Draft Report, it stated:

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.

The Commission's view remains, however, that information about the cause of a person's decision-making disability, while relevant, is only one of a number of factors to be taken into account in assessing the person's decision-making capacity. It is particularly concerned that care should be taken to avoid the assumption that existence of a medically diagnosed condition automatically means that a person's decision-making capacity is impaired. It believes that the focus should be on the effect, if any, that the existence of the condition has on the person's ability to make the decisions necessary to ensure that the person's needs are met. This will depend on the circumstances of each particular case, including the nature and complexity of the decision which the person is required to make and the level of support available to help the person understand the issues involved and arrive at a conclusion.

(iii) Proof of psychiatric illness

Two submissions from organisations representing consumers of mental health services and their relatives and family carers argued that, in relation to psychiatric illness, there should be a requirement that a finding that a person's decision-making capacity is impaired be based on the opinion of two medical practitioners, one of whom should be a qualified psychiatrist.⁵⁵⁶

The Commission accepts the concerns which have arisen as a result of the notification procedures in the Fifth Schedule of the *Mental Health Act 1974 (Qld)*.⁵⁵⁷ However, the Commission believes that, under the scheme it is proposing, there will be sufficient protection for all people with a decision-

⁵⁵⁵ Submissions Nos 52, 71.

⁵⁵⁶ Submissions Nos 33, 53.

⁵⁵⁷ See Chapter 2 of this Report.

making disability, and that additional protection for people with a psychiatric illness will not be necessary. The Commission also believes that a specific requirement of proof of mental illness will re-inforce the widely held perception that existence of a particular condition automatically results in loss of decision-making capacity.

(iv) Ability to communicate

In the Draft Report, the Commission recommended that inability to communicate decisions by any means, even with assistance, should be a ground for appointment of a decision-maker.⁵⁵⁸

The Commission recognised that the manner in which a person communicates should not be the basis for determining that the person's decision-making capacity is impaired, and that if a person is able, with appropriate assistance and support, to make his or her decisions known and have them implemented, there is no need for a decision-maker. However, it also recognised that there may be situations in which the nature of or extent of a disability may prevent a person from conveying opinions or wishes, despite assistance to communicate.

The Commission's recommendation was reflected in clause 82(1)(b) of the Draft Bill in Chapter 13 of the Draft Report, which provided that the tribunal may appoint a decision-maker if a person has impaired decision-making capacity for a decision; in clause 12 which provided that a person has "impaired decision-making capacity" for a decision if the person does not have decision-making capacity for the decision; and in clause 11(b) which provided that a person has decision-making capacity for a decision if, in addition to being capable of understanding the nature and foreseeing the effects of the decision, the person is capable, whether with or without assistance, of communicating the decision in some way.

Of the submissions received by the Commission in response to the Draft Report, those which commented specifically on this issue supported the Commission's recommendations. The Public Guardian in Western Australia commented that:⁵⁵⁹

We have several examples of persons where it has not been possible to test the capacity of individuals because it has not been possible to communicate effectively with them. In real terms these people would not have been able to administer their own affairs.

⁵⁵⁸ At 35.

⁵⁵⁹ Submission No 25.

The Department of Family Services and Aboriginal and Islander Affairs⁵⁶⁰ proposed that consideration should be given to imposing a positive obligation on the tribunal to investigate all alternatives, such as sign boards and other means of facilitated communication, before concluding that a person is unable to communicate. The Commission accepts this proposal.

(c) Least restrictive alternative

The second stage of the process recommended by the Commission in the Draft Report is to consider whether the needs of the person concerned could be met by any other means less intrusive than appointment of a decision-maker.⁵⁶¹

The Commission recognised that, 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. The Commission expressed the view that informal arrangements may often be the simplest and most effective means of alternative decision-making for a person with impaired decision-making capacity.

The Commission's recommendation was reflected in clause 82(1)(d) of the Draft Bill in Chapter 13 of the Draft Report.

The recommendation is consistent with contemporary Australian legislation in relation to the appointment of decision-makers.⁵⁶² The submissions received by the Commission in response to the Draft Report supported the Commission's recommendation. A respondent with experience of the Victorian legislation commented:⁵⁶³

Quasi-judicial settings are not always the least restrictive alternative available to achieve positive outcomes for the people at issue and should as a matter of principle be of last resort.

⁵⁶⁰ Now the Department of Families, Youth and Community Care.

⁵⁶¹ At 36-37.

⁵⁶² See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 22(1)(c), 22(2); *Guardianship Act 1987 (NSW)* s 14(2); *Guardianship and Administration Act 1995 (Tas)* ss 20(2), 51(2). See also *Protection of Personal and Property Rights Act 1988 (NZ)* s 12(2)(b).

⁵⁶³ Submission No 68.

The Department of Family Services and Aboriginal and Islander Affairs⁵⁶⁴ identified the importance of minimising the potential for family disputes as a further reason for regarding the appointment of a decision-maker as a last resort. This submission stated that:⁵⁶⁵

the selection and appointment of a decision-maker will in many cases be the catalyst for family dispute. The avoidance of such disputes is another reason to ensure that decision-makers are appointed only on the basis of need.

Only two submissions expressed the view that all decision-makers should be formalised by the tribunal. The Intellectually Disabled Citizens Council commented that if proceedings are handled openly and sensitively, with minimal legalistic procedure, they are not perceived as being intrusive.⁵⁶⁶ Another respondent was concerned that informal decision-making does not offer sufficient protection for people with a decision-making disability.⁵⁶⁷

In the Draft Report, the Commission acknowledged that a system of informal decision-making would have potential for abuse. First, there would be no control over the decision-makers. Second, a person with impaired decision-making capacity may trust close relatives or members of support networks and the closeness of their relationship may make abuse of that trust difficult to detect.

The Commission regards any abuse of a person with a decision-making disability as unacceptable. However, it does not believe that a requirement that all decision-makers be formally appointed would prevent abuse. The Commission considers that the preferable approach is to make it easier to identify and to take steps to remedy abuse when it occurs, rather than to force an unwarranted intrusion into existing supportive relationships and to impose an additional burden on honest and caring families.

The Commission is not persuaded to change its recommendation.

⁵⁶⁴ Now the Department of Families, Youth and Community Care.

⁵⁶⁵ Submission No 74.

⁵⁶⁶ Submission No 52.

⁵⁶⁷ Submission No 10.

The Commission recommends that the legislation provide that a decision-maker be appointed for a person with a decision-making disability only if:

- . the person needs to make a decision, or is likely to make a decision which involves or is likely to involve substantial risk to the person's health, welfare or property; and**
- . the person is not capable, whether with or without assistance, of:**
 - . understanding the nature and foreseeing the effects of the decision; or**
 - . communicating the decision in some way even though all practicable methods of communicating with the person have been attempted; and**
- . without an appointment, the person's needs will not be adequately met or the person's interests will not be adequately protected.**

The Commission's recommendation is implemented by clause 117 of the Draft Bill in Volume 2 of this Report.

2. ONUS AND STANDARD OF PROOF

In Chapter 4 of this Report, 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 decision-making 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.⁵⁶⁸ In legal terms, this means that the applicant for a decision-making order should carry the onus of proof.

The question arises as to the standard of proof which the applicant should have to meet in order to rebut the presumption of competence. In the Draft Report, the Commission noted 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 decision-making disability.⁵⁶⁹

⁵⁶⁸ See pp 29-30 of this Report.

⁵⁶⁹ At 37.

An application to determine the decision-making capacity of a person with a decision-making 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.⁵⁷⁰ This allows appropriate weight to be given to the circumstances of each particular case.⁵⁷¹

In the Draft Report, the Commission expressed concern that the higher criminal standard may prevent necessary assistance being given in some circumstances. The Commission recommended that the civil standard should apply.⁵⁷²

The submissions received by the Commission in response to the Draft Report which considered this issue supported the Commission's approach.

The Commission recommends that the civil standard of proof should apply.

3. WHO MAY BE APPOINTED

In the Draft Report, the Commission noted that present Queensland legislation offers little choice in the appointment of a decision-maker for a person with a decision-making disability, concentrating decision-making authority primarily in the hands of public officers such as the Public Trustee and the Legal Friend.⁵⁷³

(a) The role of family

The Commission expressed the view that the existing provisions resulted, in many

⁵⁷⁰ *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Rejcek v McElroy* (1965) 112 CLR 517; *Re Pellitteri* [1991] 1 QdR 154.

⁵⁷¹ See for example *Blyth v Blyth* [1966] AC 643.

⁵⁷² 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 recommended that the standard of proof should be the standard of proof in civil proceedings. [Report No 231, *Mental Incapacity* (1995) 32.]

⁵⁷³ At 39.

instances, in the unnecessary intrusion of outside intervention into individual and family affairs. The Commission acknowledged that 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. It argued that 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.

The Commission recommended that relatives and close friends should be eligible to act as decision-makers for both personal and financial decisions, provided that they met the criteria for eligibility proposed by the Commission.⁵⁷⁴ This recommendation was reflected in clauses 85(a)(i) and 87(a)(i) of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's recommendations were strongly supported by the submissions received by the Commission in response to the Draft Report. A community organisation representing people with acquired brain injury and their families, commented:⁵⁷⁵

The recommendations bestow legitimacy on family participation in, and support of, decision-making for and by people with [a decision-making disability] and will reduce the stress and difficulty associated with performing this role ...

Another community organisation representing parents of people with a disability stated:⁵⁷⁶

The opportunity for supportive family members and close friends to be eligible as [substitute decision-makers] ... is a practical and sensitive change for the better.

Other submissions referred to the distress frequently experienced by families under the present system, which made them feel like "second class citizens".⁵⁷⁷

Some submissions, however, cautioned that it would not always be possible or

⁵⁷⁴ See pp 186-189 of this Report for a discussion of eligibility criteria.

⁵⁷⁵ Submission No 72.

⁵⁷⁶ Submission No 62.

⁵⁷⁷ For example, Submission No 45.

desirable to appoint family members as decision-makers.⁵⁷⁸ The Department of Family Services and Aboriginal and Islander Affairs⁵⁷⁹ expressed the view that:⁵⁸⁰

It is not correct, however, to assume that all families are inherently good decision-makers. The family connection is a useful means of providing an understanding of the person's needs but is not a guarantee that abuse will not occur.

The Intellectually Disabled Citizens Council argued that:⁵⁸¹

To respond only to the view of caring family members of persons with impaired decision-making, without taking into account those who are vulnerable because they do not have such a caring and competent family, is to ignore the reality of serious and widespread injustice.

The Commission recognised these concerns in the Draft Report. It stated:⁵⁸²

There will, of course, be situations in which it is not possible or appropriate for a relative or friend to be appointed ... 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 family members which it is impossible to resolve without outside intervention.

The Commission noted that at present in Queensland there was no statutory decision-maker of last resort in relation to decisions concerning lifestyle matters and personal welfare. To provide for such situations, the Commission recommended the creation of an independent statutory office to act as decision-maker for personal and lifestyle decisions where it is not possible or appropriate to appoint a relative, friend or other personal representative. The Commission proposed that this office, to be called the Office of the Adult Guardian, perform a number of additional functions.⁵⁸³ The Commission's recommendation concerning the appointment of the Adult Guardian as decision-maker was reflected

⁵⁷⁸ Submissions Nos 52, 72, 74.

⁵⁷⁹ Now the Department of Families, Youth and Community Care.

⁵⁸⁰ Submission No 74.

⁵⁸¹ Submission No 64.

⁵⁸² At 42-43.

⁵⁸³ See Chapter 12 of this Report for a discussion of the role of the Adult Guardian.

in clause 85(a)(iii) of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's recommendation was strongly supported by the submissions received in response to the Draft Report.

(b) Financial decisions

In relation to financial decisions, the Commission noted that, although the assistance given by the Public Trustee has been of benefit to many individuals, 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 expressed the belief 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.

The Commission recommended that the statutory preference given to the Public Trustee should be terminated and that, in addition to family members and other personal representatives, statutory trustee companies should be eligible for appointment.⁵⁸⁴ The Commission's recommendation was reflected in clause 87(a) of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's recommendation was strongly supported in the submissions received in response to the Draft Report.

The Commission further recommended that the Public Trustee should be decision-maker of last resort in relation to financial decisions.⁵⁸⁵ This recommendation was also strongly supported.

However, the submission made by the Public Trustee of Queensland suggested that excluding the Public Trustee and statutory trustee companies as decision-makers for personal matters will present problems in relation to effective financial management and put the client and the decision-maker at a disadvantage in relation to other decision-makers. It noted that decisions of a personal nature are more often than not intrinsically bound up in the financial responsibilities of caring for a person, and pointed out that the Public Trust Office has a strong network of social support and consultation mechanisms plus considerable experience in the

⁵⁸⁴ At 42.

⁵⁸⁵ At 43.

area of lifestyle decisions. The respondent argued that the Adult Guardian would be in no better position than the Public Trustee to make decisions of this kind.⁵⁸⁶

While the Commission acknowledges that some personal decisions have financial implications, it sees the division between the two decision-makers of last resort as more of a benefit than a disadvantage to the person with impaired decision-maker capacity, since it ensures that both the personal and financial aspects of a decision are independently addressed. The separation of the roles also ensures that there is no conflict of interest involved.

The Commission also recommends in this Report that, where different decision-makers are appointed for different decisions, they should be under an obligation to consult with each other so that the interests of the person with impaired decision-making capacity are not prejudiced.⁵⁸⁷ The Commission envisages that the offices of both the Public Trustee and the Adult Guardian would adopt a co-operative and constructive approach towards finding appropriate solutions for the person concerned.

The Commission recommends that the legislation provide that a person may be appointed as a decision-maker for a person with impaired decision-making capacity only if the person is:

- . a relation or a close friend of the person who is at least eighteen years of age; or**
- . another individual who is at least eighteen; or**
- . for a personal or health care decision, the Adult Guardian; or**
- . for a financial decision or a decision about a legal matter, a statutory trustee company or the Public Trustee.**

The Commission's recommendation is implemented by clauses 120-121 of the Draft Bill in Volume 2 of this Report.

⁵⁸⁶ Submission No 71.

⁵⁸⁷ See pp 284-286 of this Report.

4. CRITERIA FOR ELIGIBILITY

In the Draft Report, the Commission considered possible criteria for use in determining the eligibility of a person, other than the Public Trustee or the Adult Guardian, to act as a decision-maker for a person with impaired decision-making capacity.⁵⁸⁸

Two of the criteria included by the Commission - the wishes of the person whose decision-making capacity is impaired, and the desirability of preserving existing family or other close personal relationships - were restatements of the legislative principles binding on anyone who exercises a power or performs a function under the proposed legislation.⁵⁸⁹

The other criteria proposed by the Commission were:

- whether the proposed decision-maker will observe the principles set out in the legislation;
- the compatibility of the person whose decision-making capacity is impaired and the proposed decision-maker;⁵⁹⁰
- where it is proposed to appoint different people to make different decisions, the compatibility of those people with each other;⁵⁹¹
- the availability and accessibility of the proposed decision-maker to the person;⁵⁹²

⁵⁸⁸ At 43-45.

⁵⁸⁹ See Chapter 4 of this Report for a discussion of the legislative principles recommended by the Commission.

⁵⁹⁰ See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 23(2)(c), 47(2)(b); *Guardianship Act 1987 (NSW)* s 17(1)(a); *Adult Guardianship Act 1988 (NT)* s 14(2)(c); *Guardianship and Administration Act 1990 (WA)* ss 44(2)(b), 68(3)(a); *Guardianship and Management of Property Act 1991 (ACT)* s 10(4)(c); *Guardianship and Administration Act 1993 (SA)* s 50(1)(a); *Guardianship and Administration Act 1995 (Tas)* s 21(2)(c).

⁵⁹¹ See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 23(2)(c), 47(2)(b); *Adult Guardianship Act 1988 (NT)* s 14(2)(c); *Guardianship and Administration Act 1990 (WA)* ss 44(2)(b), 68(3)(a); *Guardianship and Administration Act 1995 (Tas)* s 21(2)(c).

⁵⁹² See for example *Guardianship and Administration Board Act 1986 (Vic)* s 23(2)(d); *Guardianship Act 1987 (NSW)* s 17(1)(c); *Adult Guardianship Act 1988 (NT)* s 14(2)(d); *Guardianship and Management of Property Act 1991 (ACT)* s 10(4)(e); *Guardianship and Administration Act 1993 (SA)* s 50(1)(d); *Guardianship and Administration Act 1995 (Tas)* s 21(2)(d).

the competence of the proposed decision-maker to carry out the duties and functions and exercise the powers under the order;⁵⁹³ and

whether the interests of the proposed decision-maker are likely to conflict with those of the person whose decision-making capacity is impaired.⁵⁹⁴

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.⁵⁹⁵ 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.

In the Draft Report, the Commission recommended 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, since such an assumption would automatically disqualify many of the people who would be the most appropriate decision-makers.⁵⁹⁶

The Commission's recommendations were reflected in clauses 88(1), 88(2) and 88(3) of the Draft Bill in Chapter 13 of the Draft Report.

⁵⁹³ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 47(1)(c)(iv); *Protection of Personal and Property Rights Act 1988 (NZ)* ss 12(5)(a), 31(5)(a); *Guardianship and Administration Act 1990 (WA)* ss 44(2)(d), 68(3)(c); *Guardianship and Management of Property Act 1991 (ACT)* s 10(4)(f); *Guardianship and Administration Act 1993 (SA)* s 50(1)(c); *Guardianship and Administration Act 1995 (Tas)* s 54(1)(d)(iv).

⁵⁹⁴ See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 23(1)(b), 47(1)(c)(ii); *Guardianship Act 1987 (NSW)* s 17(1)(b); *Adult Guardianship Act 1988 (NT)* s 14(1)(b); *Protection of Personal and Property Rights Act 1988 (NZ)* ss 12(5)(c), 31(6); *Guardianship and Administration Act 1990 (WA)* s 44(1)(b); *Guardianship and Management of Property Act 1991 (ACT)* s 10(4)(g); *Guardianship and Administration Act 1993 (SA)* s 50(1)(e); *Guardianship and Administration Act 1995 (Tas)* ss 21(1)(b), 54(1)(d)(ii).

⁵⁹⁵ See pp 34-37 of this Report.

⁵⁹⁶ At 45.

The Commission's recommendations were widely supported in the submissions received by the Commission in response to the Draft Report. However, some submissions commented on specific criteria proposed by the Commission:

The submission by the Public Trustee of Queensland argued that more detailed criteria should be applied to the determination of the competence of a proposed decision-maker where substantial assets are involved. The submission proposed that, in such a situation, the submission of a financial management plan and particulars of the experience of the applicant should be required.⁵⁹⁷

The Commission acknowledges that the level of competence required of a proposed decision-maker will depend on the kinds of decision which have to be made. Clearly, where the decision-making role involves the management of substantial amounts of money or property of substantial value, a high degree of competence will be necessary. However, the Commission does not believe that any change to the legislative scheme is needed. The tribunal proposed by the Commission will have the power to inform itself on relevant matters in any way it considers appropriate.⁵⁹⁸ This power would allow the tribunal, if it considered necessary, to request a proposed decision-maker to provide the information specified by the submission.

Another submission commented that clause 88(2) of the Draft Bill may be interpreted to suggest that there is a presumption that there may be a conflict between the interests of the person with impaired decision-making capacity and those of a relation of the person.⁵⁹⁹ Clause 88(2) provided:

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.

The respondent was concerned that this does not place a relation of the person in a favourable position, and proposed that the clause should be expressed to reflect that a relation of a person with impaired decision-making capacity would in no way be excluded.

The Commission is not persuaded that the proposed change is necessary.

⁵⁹⁷ Submission No 71.

⁵⁹⁸ See Chapter 8 for a discussion of the tribunal's powers.

⁵⁹⁹ Submission No 49.

The Commission recommends that the legislation provide that, in deciding whether a person is appropriate for appointment as a decision-maker for a person whose decision-making capacity is impaired, the tribunal must consider the following matters:

- . the general principles and whether the proposed decision-maker is likely to comply with them;**
- . if the appointment is for a health care decision, the health care principle⁶⁰⁰ and whether the proposed decision-maker is likely to comply with it;**
- . whether the person's and the proposed decision-maker's interests are likely to conflict;**
- . whether the person and the proposed decision-maker are compatible;**
- . if more than one decision-maker is to be appointed, whether the proposed decision-makers are compatible;**
- . whether the proposed decision-maker would be available and accessible to the person;**
- . the proposed decision-maker's suitability and competence to perform functions and exercise powers under an appointment order.**

The Commission recommends that the legislation provide that:

- . the fact that a proposed decision-maker is a relation of the person does not, of itself, mean the proposed decision-maker's and the person's interests are likely to conflict; and**
- . the fact that, on a person's death, a proposed decision-maker may be a beneficiary of the person's estate does not, of itself, mean that the proposed decision-maker's and the person's interests are likely to conflict.**

The Commission's recommendation is implemented by clause 122 of the Draft Bill in Volume 2 of this Report.

⁶⁰⁰ See p 359 of this Report.

5. DISQUALIFICATION FROM APPOINTMENT

In the Draft Report, the Commission considered a number of factors which may indicate that a person should not be eligible for appointment as a decision-maker for a person whose decision-making capacity is impaired.

(a) Conviction of a criminal offence

The Commission had originally proposed that conviction of a criminal offence involving fraud, dishonesty or violence should make a person ineligible for appointment as a decision-maker.⁶⁰¹ The Commission was persuaded, however, that a blanket disqualification might operate against the interests of a person with impaired decision-making capacity in some circumstances. It accepted 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 a person's support network should not be automatically disqualified because they had committed a minor offence in the distant past. The Commission also accepted that the unequal 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 these communities.

After further consideration, the Commission concluded that the preferable approach would be to allow the tribunal a discretion to disqualify a nominated decision-maker on the basis of his or her criminal record. The Commission considered that this 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 also concluded 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.

In the Draft Report, the Commission recommended that a determination about the eligibility of a proposed decision-maker should take into account the nature and circumstances of any previous conviction, and the likelihood that the commission of the offence would adversely affect the person for whom the decision-maker is to be

⁶⁰¹ Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach* (1992), 74.

appointed.⁶⁰² The Commission's recommendation was reflected in clause 88(4)(a) of the Draft Bill in Chapter 13 of the Draft Report.

None of the submissions received by the Commission in response to the Draft Report supported automatic disqualification on the basis of previous criminal conviction, although one respondent argued that a person convicted of a criminal offence should be considered for appointment only as a last resort.⁶⁰³ However, a number of submissions strongly endorsed the Commission's recommendation that the existence of a previous conviction should be a factor to be taken into account in determining the suitability of a person to act as a decision-maker for a person whose decision-making capacity is impaired. The Department of Family Services and Aboriginal and Islander Affairs⁶⁰⁴ stated that a proposed decision-maker's criminal record:⁶⁰⁵

... should be assessed in terms of the type of crime, the length of time since the crime was committed, the person's subsequent record, and the relevance of the crime to the type of decision-making order being applied for.

In the Draft Report, the Commission noted that, in order for the tribunal proposed by the Commission to take into account the nature and circumstances of a person's criminal history, it will be necessary that the tribunal be informed about such matters.⁶⁰⁶ This could be achieved by a legislative requirement that the proposed decision-maker disclose to the tribunal whether he or she has ever been convicted of a criminal offence.⁶⁰⁷

However, the Commission also noted existing Queensland legislation 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.⁶⁰⁸ The underlying 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.⁶⁰⁹ The

⁶⁰² At 46.

⁶⁰³ Submission No 49.

⁶⁰⁴ Now the Department of Families, Youth and Community Care.

⁶⁰⁵ Submission No 74.

⁶⁰⁶ At 47-48.

⁶⁰⁷ See for example *Guardianship and Management of Property Act 1991 (ACT)* s 10(2)(a).

⁶⁰⁸ *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* ss 3, 6.

⁶⁰⁹ See Second Reading Speech of the Hon Mr N J Harper, Minister for Justice and Attorney-General: Hansard 12 March 1986.

Commission suggested that a requirement that a proposed decision-maker disclose whether he or she has ever been convicted of a criminal offence could be seen to be inconsistent with the spirit of this legislation. 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.⁶¹⁰ It would therefore be possible for the legislation proposed by the Commission to override the rehabilitation provisions.⁶¹¹

The Commission acknowledged the importance of giving past offenders the opportunity to create a new life, free from the stigma of previous conviction. It also acknowledged that the tribunal must be 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, and that a requirement of disclosure would allow the tribunal to assess the suitability of the proposed decision-maker in all the circumstances of the case. The Commission noted that disclosure to the tribunal of a person's criminal history would be subject to confidentiality requirements imposed by the legislation.⁶¹²

The Commission reached no concluded view on the issue in the Draft Report, but specifically sought submissions as to whether the legislation should require disclosure. Clause 88(5) of the Draft Bill in Chapter 13 of the Draft Report provided that a proposed decision-maker must advise the tribunal on oath or affirmation whether he or she has any criminal conviction or has been found guilty of a criminal offence although no conviction was recorded.

The submissions strongly supported a requirement of disclosure. An advocacy organisation for people with disability stated:⁶¹³

[The respondent] approaches this question by asking "who is potentially the more vulnerable, the person with impaired decision-making capacity, whose needs require meeting and interests protecting, or the person seeking appointment?". We believe that the interests of the person with impaired decision-making ability should take precedence over the interests of the person seeking

⁶¹⁰ *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) s 9.*

⁶¹¹ *See for example Adoption of Children Act 1964 (Qld) s 14B.*

⁶¹² *See pp 247-251 and 274-277 of this Report.*

⁶¹³ *Submission No 64.*

appointment. If such a person is genuinely committed to the legislation's purpose and principles, and to the person with impaired capacity, and if the disclosure is in confidence to the tribunal only, such a person should have little difficulty with such a disclosure requirement.

The Department of Family Services and Aboriginal and Islander Affairs⁶¹⁴ noted that the *Report on An Inquiry Conducted by the Honourable D G Stewart into Allegations of Official Misconduct at the Basil Stafford Centre* (the Stewart Report) recommended that the *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)* be amended to require applicants for positions within the Division of Intellectual Disability Services to disclose their criminal history. The Stewart Report stated that:⁶¹⁵

While such a disclosure requirement, to an extent, impinges upon an applicant's rights, the situation is one where those rights must not be placed before the rights of the vulnerable intellectually disabled.

The submission commented that a similar set of priorities would apply in relation to the appointment of a decision-maker for a person with a decision-making disability.

Two submissions considered that a requirement of disclosure would not, by itself, be sufficient.

The Department of Family Services and Aboriginal and Islanders Affairs⁶¹⁶ argued that:⁶¹⁷

... given the total control that a decision-maker may have over the life of a person who may be completely vulnerable it is appropriate that the tribunal have the power to seek complete details of a person's criminal record before appointing them as a decision-maker ... The type of person whom the tribunal would seek to disqualify from acting as a decision-maker might lie under oath. If it is intended that the tribunal should know of a person's criminal record then the only way to accomplish this is to give the tribunal authority to seek the information from the police.

The Commission accepts the views put forward in the submission.

⁶¹⁴ Now the Department of Families, Youth and Community Care.

⁶¹⁵ Criminal Justice Commission, *Report on An Inquiry Conducted by the Honourable D G Stewart into Allegations of Official Misconduct at the Basil Stafford Centre* (March 1995), 325.

⁶¹⁶ Now the Department of Families, Youth and Community Care.

⁶¹⁷ Submission No 74.

The Intellectually Disabled Citizens Council also noted the reference in the Stewart Report to the Public Sector Management Commission (PSMC) Standard for Criminal Charges and Convictions⁶¹⁸ and the Report's recommendation that the *Criminal Law (Rehabilitation of Offenders) Act* be amended.⁶¹⁹ The submission recommended that the legislation proposed by the Commission include a standard similar to that established by the PSMC; that the appointment of individual decision-makers be subject to the disclosure of all criminal convictions by applicants for appointment; and that a set of standards be developed for the assistance of the tribunal.

In the view of the Commission, clause 88(5) of the Draft Bill in Chapter 13 of the Draft Report achieves the same purpose as the amendment recommended by the Stewart Report. The PSMC standard is incorporated by clause 88(4) of the Draft Bill which provides that, in considering the suitability and competence of a proposed decision-maker, the tribunal must take into account the nature and circumstances of any criminal conviction, including the likelihood that the commission of the offence may adversely affect the person with impaired decision-making capacity. The Commission believes that it is preferable for these provisions to remain as part of the integrated scheme proposed by the Commission, rather than to be relocated to the *Criminal Law (Rehabilitation of Offenders) Act*.

⁶¹⁸ The PSMC Standard provides:

Agencies shall not discriminate against any employee or applicant for a position who has a criminal history, except where it is directly relevant to the requirements of the position or the organisation. In determining the relevance of any criminal history, consideration must be given to issues such as the nature and timing of the offences committed and their imputed effects on the outcomes required of the position in question.

⁶¹⁹ Submission No 52.

The Commission recommends that the legislation provide that:

- **in considering the suitability and competence of a person to act as decision-maker for a person with impaired decision-making capacity, the tribunal must have regard to the nature and circumstances of any criminal conviction of the person, including the likelihood that the commission of the offence may adversely affect the person with impaired decision-making capacity;**
- **a proposed decision-maker must advise the tribunal, in confidence, on oath or affirmation whether he or she has any criminal conviction;**
- **the Commissioner of the Police Service or a person delegated by the Commissioner for the purpose, upon request made by the tribunal, shall disclose to the tribunal the criminal history and convictions such as are contained in the Commissioner's records of a proposed decision-maker.**

The Commission's recommendations are implemented by clauses 122(4)(a), 123(1)(c) and 124(2) of the Draft Bill in Volume 2 of this Report.

(b) Bankruptcy

The Commission had originally proposed that a person should be ineligible to be appointed as a financial decision-maker for a person with impaired decision-making capacity if the person:

- had proved incompetent in managing the affairs of others;
- had been declared or had applied to become bankrupt;
- was unable to pay his or her debts or would be unable to pay them in the future; or
- had made an arrangement with creditors as to the payment of debts.⁶²⁰

⁶²⁰ Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach* (1992), 74.

However, after further consideration the Commission formed the view that this ground of disqualification may 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.

In the Draft Report, the Commission recommended 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.⁶²¹ The Commission's recommendation was reflected in clause 88(4)(b) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission which commented on this issue were evenly divided. Some submissions recognised that people facing bankruptcy proceedings may be in that position as a result of circumstances beyond their control. One submission, however, considered it unlikely that a person who was bankrupt or unable to repay debts would be able to manage the affairs of a person with a decision-making disability.⁶²² Two further submissions, from the Public Trustee of Queensland and the Queensland Council of the Trustee Corporations of Australia Association, based their argument on the temptation that access to the funds of another might place on a person in financial difficulties.⁶²³ On the other hand, another submission pointed out that temptation was not necessarily restricted to people facing bankruptcy. The respondent, an organisation of consumers of mental health services and of carers of people with mental illness, noted:⁶²⁴

... the financial history and circumstances of a proposed decision-maker should not necessarily disqualify that person from being appointed as a decision-maker. Conversely, there is no guarantee that a person who apparently has no financial management problems is going to be an honest manager of another person's finances. It may be that this person has never been subjected to the temptation of having access to somebody else's money and weakens under this temptation.

⁶²¹ At 46.

⁶²² Submissions No 21.

⁶²³ Submissions Nos 48, 71.

⁶²⁴ Submission No 53.

The Commission is mindful of the concerns expressed in the submissions. However, because of the difficulty in foreseeing every situation which might arise, the Commission is not convinced that a blanket prohibition is in the best interests of people with impaired decision-making capacity. It remains of the view that the preferable approach is to allow the tribunal a discretion to consider the merits of each individual situation and to impose such accountability requirements as it considers appropriate in the circumstances of each particular case.

The Commission recommends that the legislation provide that:

- . **in considering the suitability and competence of a person to act as a decision-maker for a person with impaired decision-making capacity the tribunal must, if the appointment is for a financial decision, have regard to:**
 - . **the nature and circumstances of any bankruptcy of the proposed decision-maker;**
 - . **the nature and circumstances of any insolvency of any company of which the person was, or is, a director, secretary or other principal officer; and**
- . **a proposed decision-maker must advise the tribunal on oath or affirmation, if the proposed appointment is for a financial decision, whether he or she:**
 - . **is, or has been, bankrupt; or**
 - . **is, or has been, a director, secretary or other principal officer of a company that is, or has been, insolvent.**

The Commission's recommendations are implemented by clauses 122(4)(c) and 123(1)(e) of the Draft Bill in Volume 2 of this Report.

(c) Removal from appointment

The Commission had originally proposed that a person who had been refused or removed from an appointment as a decision-maker in Queensland or elsewhere should not be eligible for appointment.⁶²⁵

However, after further consideration the Commission is 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 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.

In the Draft Report, the Commission recommended 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. The Commission's recommendation was reflected in clause 88(4)(c) of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation.

The Commission recommends that the legislation provide that:

- . **in considering the suitability and competence of a person to act as decision-maker for a person with impaired decision-making capacity, the tribunal must have regard to the nature and circumstances of any refusal of or removal from appointment whether in Queensland or elsewhere; and**
- . **a proposed decision-maker must advise the tribunal on oath or affirmation whether he or she has been refused or removed from appointment as decision-maker, whether in Queensland or elsewhere.**

The Commission's recommendations are implemented by clauses 122(4)(b) and 123(1)(d) of the Draft Bill in Volume 2 of this Report.

⁶²⁵ Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach* (1992), 74.

(d) Paid carers

In the Draft Report, 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,⁶²⁶ or whether a blanket prohibition might operate unfairly in some situations. The Commission concluded that, because of the scope of the potential for abuse arising from the inherent conflict of interest involved, a professional care provider should not be eligible for appointment as a decision-maker.⁶²⁷

However, the Commission recognised that, in some circumstances, a person who cares for a person with impaired decision-making capacity on a professional basis may, because of the carer's knowledge and understanding of the person and availability to the person, be the most appropriate person to act on his or her behalf.

The Commission recommended that if a 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 Guardian⁶²⁸ as statutory decision-maker of last resort. The Commission also recommended that the legislation should enable the Adult Guardian to delegate day-to-day decision-making power to a paid carer in appropriate circumstances. The Commission's recommendation was reflected in 234 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report, there was general acceptance of the Commission's recommendations.

The Commission recommends that the legislation provide that:

- a paid carer not be eligible for appointment as decision-maker for a person with impaired decision-making capacity; and
- the Adult Guardian have power to delegate day-to-day decision-making to a paid carer in appropriate circumstances.

⁶²⁶ See for example *Guardianship and Administration Act 1993 (SA)* s 29(5).

⁶²⁷ At 48.

⁶²⁸ See Chapter 12 of this Report for a discussion of the role of the Adult Guardian.

The Commission's recommendations are implemented by clauses 120(2), 121(2) and 286 of the Draft Bill in Volume 2 of this Report.

(e) Legal representatives

One submission raised the further question of whether, in an appropriate case, the legal representative of a person with impaired decision-making capacity could be appointed decision-maker for the limited purpose of certain legal proceedings. The Legal Aid Office (Qld) argued:⁶²⁹

*This office has had considerable experience in representing people whose capacity to make decisions about legal proceedings is impaired, for example by intellectual disability or mental illness. Some people with these conditions will be unable to fully understand or follow the legal proceedings, but with advice from their lawyers will be able to make clear decisions as to the outcome they seek. It seems that these people would not require the assistance of a decision-maker. In other cases ... court rules provide for the appointment of a suitable person as next friend or guardian ad litem to give instructions on behalf of a person who requires that assistance.*⁶³⁰

However, in other proceedings there are no such rules, and yet decisions on the conduct of the legal proceedings have to be made. Most notable under current legislation would be the proceedings before the Intellectually Disabled Citizens Council, the Mental Health Tribunal or the Patient Review Tribunal. In practice, from time to time lawyers representing people before bodies such as these will make decisions on behalf of their clients as to the conduct of the legal proceedings. Lawyers who find themselves having to do this will invariably take into account the wishes of their clients, as far as they can be ascertained, as well as an assessment (by the lawyer) of what is in the client's best interests.

Although acting in this way does not accord with conventional legal ethics (that is, that a lawyer can only act on the instructions of his or her client) it appears to work in practice. Rather than strictly giving effect to the client's instructions, where the client is incapable of giving instructions the role of the lawyer tends more towards safeguarding the client's legal rights and acting in the client's best interests.

⁶²⁹ Submission No 59.

⁶³⁰ See pp 76-77 of this Report.

In the view of the Commission there is significant potential for conflict of interest in many cases if a lawyer makes decisions for a person with impaired decision-making capacity in relation to legal proceedings in which the lawyer is representing the person. The Commission accepts that this is not the situation with the Legal Aid Office, since there is no ongoing financial relationship between that office and its clients.

Nevertheless, the Commission believes that it is preferable for the lawyer's role to be restricted to the provision of legal advice and for decisions about legal proceedings involving a person with impaired decision-making capacity to be made by a third party.

6. TYPES OF ORDER

In the Draft Report, the Commission considered the types of order which should be available in relation to an application for the appointment of a decision-maker. The Commission expressed the view that, consistently with the least restrictive alternative principle, the authority conferred by a decision-making order should be no greater than is required to meet the needs of the situation.⁶³¹

(a) Assisted decision-making

Decision-making is a largely inter-dependent process, often involving consultation with others to seek their opinions and advice. Many people with a decision-making disability 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.

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.

In the Draft Report, the Commission indicated that it did not intend to recommend any interference where such a situation exists and is to the person's advantage. However, the Commission expressed the view that there may be circumstances in

⁶³¹ At 61.

which the formal appointment of an assistant decision-maker may be a useful option.⁶³²

The Commission argued that if, for example, the person does not have a support network to assist on an informal basis, information and advice which the person needs may be able to be made available to the person by appointing the Adult Guardian⁶³³ or a community decision-maker⁶³⁴ as a decision-making assistant. 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 to wait 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.

The Commission recommended that the legislation should provide for the appointment of an assistant decision-maker to support and advise a person with a decision-making disability. 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.⁶³⁵

The Commission's recommendation was reflected in clauses 25 and 81 of the Draft Bill in Chapter 13 of the Draft Report.

Only seven of the submissions received by the Commission in response to the Draft Report referred specifically to the recommendation. Two submissions endorsed the Commission's recommendation.⁶³⁶ The Department of Family Services and Aboriginal and Islander Affairs⁶³⁷ commented:

The proposed concept of the appointment of a "decision-making assistant" is supported as being the least restrictive alternative and reflective of how conventional decision making priorities take place.

⁶³² At 62.

⁶³³ See Chapter 12 of this Report.

⁶³⁴ See pp 411-413 of this Report.

⁶³⁵ In Canada, provision for appointment of assistant decision-makers (called advisers) has existed for some years. See *Civil Code* Art. 335 (Quebec). British Columbia has recently enacted similar legislation for the appointment of associate decision-makers. See *Adult Guardianship Act* 1993 s 6(1)(a).

⁶³⁶ Submissions Nos 73, 74.

⁶³⁷ Now the Department of Families, Youth and Community Care.

A third submission, from the Public Guardian in Western Australia, expressed interest in the idea.⁶³⁸

This is in effect the appointment of an advocate, however, bringing into place accountability mechanisms on the advocates themselves.

Two submissions, from the Queensland Council of the Trustee Corporations Association of Australia and the Public Trustee of Queensland, were concerned about the degree of accountability of appointed assistant decision-makers.⁶³⁹ Under the Commission's proposals appointed assistants would perform a function under the legislation and would therefore be subject to the principles underlying the legislation.⁶⁴⁰ They would also be subject to the same requirements of eligibility,⁶⁴¹ the same selection criteria⁶⁴² and the same review process⁶⁴³ as appointed decision-makers.

Another submission, from a person with experience of the operation of the Office of the Public Advocate in Victoria, also commented on the similarity with an appointed advocate.⁶⁴⁴ This submission rejected the Commission's proposal:

It appears that to get an appointed assistant one needs to have presented before the tribunal and had a finding that one did not require an appointed decision-maker (ie one has the capacity to make a decision but needs a prompt in the right direction). This is a confusing idea. It sounds like the assistant acts as an advocate of best interests with no legal mandate to authorise a decision ... The question arises as to why it is necessary to have this notion of a Clayton's decision-maker when the role is more clearly that of independent advocate. I think it is dangerous to muddy the waters of decision-making by having a sliding scale of decision-makers prescribed in the legislation. The practical realities will be that assistants will make decisions on behalf of the client. They will act as "formalised" informal decision-makers.

⁶³⁸ Submission No 25.

⁶³⁹ Submissions Nos 48, 71.

⁶⁴⁰ See Chapter 4 of this Report for a discussion of these principles.

⁶⁴¹ See cl 120, cl 121 and cl 125 of the Draft Bill in Volume 2 of this Report.

⁶⁴² See cl 122 of the Draft Bill in Volume 2 of this Report.

⁶⁴³ See cl 126-130 of the Draft Bill in Volume 2 of this Report.

⁶⁴⁴ Submission No 28.

The Public Trustee and the Queensland Council of Trustee Corporations Association of Australia also pointed to the degree of influence which an appointed assistant could exert over a person with a decision-making disability and to the question of whether a decision made under the influence of another can be said to be the person's own decision. The Public Trustee also considered that the concept would present great potential for financial abuse.

However, since the formal appointment of an assistant decision-maker would be made by the tribunal, the tribunal would have the opportunity to assess each situation and to determine the appropriate course of action to take according to an individual's personal circumstances and degree of disability. The Commission remains of the view that the appointment of an assistant decision-maker is consistent with the principle of the least restrictive alternative, and provides an important option for people with a decision-making disability who need advice and support.

The Commission recommends that the legislation provide that the tribunal may appoint an assistant decision-maker to assist a person with a decision-making disability to make the person's own decision.

The Commission's recommendation is implemented by clauses 117 and 118 of the Draft Bill in Volume 2 of this Report.

(b) Recommendations

In the Draft Report, the Commission recommended that 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.⁶⁴⁵

The Commission also recommended that the tribunal should be able to make such recommendations whether or not it makes an order; that, if the tribunal decides to make recommendations instead of an order, the tribunal should also have power to adjourn or to formally dismiss the application; and that 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

⁶⁴⁵ At 63.

would not have the force of an order of the tribunal, and would not be binding on the parties.⁶⁴⁶

The Commission expressed the view that, while not legally enforceable, tribunal recommendations would provide useful guidelines for carers and service providers and that their moral authority may be of assistance in obtaining services for the person whose decision-making capacity is impaired. It was hoped that 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.

The Commission's recommendation was reflected in clause 207 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

The Commission recommends that the legislation provide that:

- . **if an application has been made to the tribunal, the tribunal may make recommendations it considers appropriate about action that should be taken by a participant;**
- . **if the tribunal makes a recommendation it may -**
 - (a) continue with the application;**
 - (b) adjourn the application;**
 - (c) dismiss the application;**
 - (d) reserve leave for a participant to apply to the tribunal for directions about implementing the recommendation.**

The Commission's recommendations are implemented by clause 232 of the Draft Bill in Volume 2 of this Report.

⁶⁴⁶ See for example *Protection of Personal and Property Rights Act 1988 (NZ)* s 13.

(c) Decision-making orders

In the Draft Report, the Commission recommended that the tribunal should 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.⁶⁴⁷ The Commission envisaged that in most cases it would not be necessary for the tribunal to make an order conferring unlimited decision-making authority. Nonetheless, the Commission considered that the tribunal should have power to make such an order should the need arise in the circumstances of a particular case.

The Commission's recommendation was reflected in clauses 82 and 91(2) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. However, one submission expressed concern that the draft legislation did not appear to encourage the tribunal to limit and focus its appointments so that a decision-maker is not given authority beyond that which is necessary.⁶⁴⁸

Clause 82 of the Draft Bill set out the criteria for appointing a decision-maker to make a decision for a person whose capacity is impaired. Clause 91(2) then provided that, if the tribunal is satisfied that the criteria have been met, the tribunal may appoint a decision-maker to make the decision. The respondent, an advocacy organisation for people with disability in Queensland, commented:

In our view, the legislation should set out a process which the tribunal must follow in deciding which (and which not) decisions to include in the appointment authority. Without this, the tribunal may too easily form the practice of deciding which of the defined categories of decision (eg "personal", "health care", etc) it should include in the appointment, but fail to distinguish between areas of decision-making within those categories. Thus, authority to make "personal decisions" would cover all that comes within that definition, when the only decision for which an appointment needed to be made was one which covered where a person with impaired decision-making [capacity] was to live.

However, in the view of the Commission, the wording of the Draft Bill is sufficiently focused on the capacity of a person to make a particular decision, and the person's need to have a decision-maker appointed for that decision.

⁶⁴⁷ At 63.

⁶⁴⁸ Submission No 64.

The Commission recommends that the legislation provide that the tribunal may appoint an appointed decision-maker for a decision for a person on terms considered appropriate by the tribunal.

The Commission's recommendation is implemented by clause 117 of the Draft Bill in Volume 2 of this Report.

(d) Appointment of more than one decision-maker

In the Draft Report, the Commission noted that circumstances might arise in which the tribunal may wish to appoint more than one decision-maker.⁶⁴⁹ For example, the tribunal may wish to appoint one person to make decisions about personal matters and a different person to make financial decisions. It may also wish to appoint two decision-makers who have concurrent powers. This would allow the parents of an adult son or daughter whose decision-making capacity is impaired to act together with equal authority.

The Commission recommended that the tribunal should have power to appoint different decision-makers to make different decisions or joint decision-makers with concurrent power.

The Commission's recommendations were reflected in clause 92(2) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions which the Commission received in response to the Draft Report generally supported the Commission's recommendations.

One submission, however, opposed the appointment of joint decision-makers as "a recipe for constant conflict, and unrealistic".⁶⁵⁰ Another, from an association of medical practitioners, foreshadowed difficulty in identifying decision-makers.⁶⁵¹

The Commission is not persuaded by either of these arguments. First, one of the factors which the tribunal must consider when appointing more than one decision-

⁶⁴⁹ At 69-70.

⁶⁵⁰ Submission No 54.

⁶⁵¹ Submission No 77.

maker is the compatibility of the decision-makers with each other.⁶⁵² If conflict does occur between decision-makers and the decision-makers are unable to come to an agreement, then an application may be made to the tribunal proposed by the Commission in Chapter 8 of this Report to resolve the situation. Second, in relation to identification of decision-makers, appointed decision-makers will be given appropriate documentation by the tribunal as proof of their authority.

The Commission recommends that the legislation provide that the tribunal may appoint different decision-makers for different decisions or types of decision, or joint or joint and several decision-makers for a decision or type of decision.

The Commission's recommendation is implemented by clause 119(b), 119(f) and 119(g) of the Draft Bill in Volume 2 of this Report.

(e) Appointment of alternative decision-makers

In the Draft Report, the Commission noted that, where the tribunal has decided that appointment of a decision-maker is necessary for a person with impaired decision-making capacity, it may become impossible for the person appointed to continue to act.⁶⁵³ 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.

The Commission recommended that, in addition to appointing a decision-maker, the tribunal should be able to appoint an alternative decision-maker to act in a temporary capacity if the appointed decision-maker is unable to act.⁶⁵⁴

The Commission's recommendation was reflected in clause 92(2) of the Draft Bill in Chapter 13 of the Draft Report, which provided for the appointment of alternative appointees so power is given to a particular appointee only in stated circumstances and for the appointment of successive appointees so power is given to a particular appointee only when the power of a previous appointee ends.

⁶⁵² See p 189 of this Report.

⁶⁵³ At 68-69.

⁶⁵⁴ At 69. See also, for example, *Guardianship and Administration Board Act 1986 (Vic)* ss 34, 35; *Guardianship Act 1987 (NSW)* s 20; *Guardianship and Administration Act 1990 (WA)* s 43(1)(d); *Guardianship and Administration Act 1995 (Tas)* s 22.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

In the Draft Report, the Commission did not consider the question of whether an alternative or successive decision-maker should be required to notify the tribunal that he or she has taken over the decision-making role. In the view of the Commission, there would be many situations where an alternative decision-maker would be acting only on a short-term basis and where notification to the tribunal would not be necessary. However, if an alternative or successive appointee is acting on a more permanent basis, the tribunal would need to be informed of the change for the purposes of reviewing the appointment.

The Commission recommends that the legislation provide that:

- . the tribunal may appoint -**
 - . alternative appointees so power is given to a particular appointee only in stated circumstances; or**
 - . successive appointees so power is given to a particular appointee only when the power of a previous appointee ends; and**
- . if an alternative appointee takes over as decision-maker for a period in excess of six weeks, the alternative decision-maker must notify the tribunal that he or she is acting in place of the original decision-maker; and**
- . if a successive appointee takes over as decision-maker because the authority of a previous decision-maker has ended, the successive decision-maker must notify the tribunal that he or she has become decision-maker.**

The Commission's recommendation is implemented by clauses 119(d), 119(e), 177 and 178 of the Draft Bill in Volume 2 of this Report.

(f) Ratifying acts of informal decision-makers

The Commission has recognised that, in many cases, a person whose decision-making capacity is impaired will have a support network which substantially reduces the impact of the incapacity and that the person's needs may, to a large extent, be met on an informal basis by the people who are closest to the person

and who are in the best position to know and understand the person's preferences.⁶⁵⁵

However, in the Draft Report the Commission noted that people who act as decision-makers on an informal basis may incur personal liability to third parties for the decisions they make on behalf of a person whose decision-making capacity is impaired. The Commission expressed concern that the risk of such liability may deter people from acting as informal decision-makers, leaving no alternative other than the more intrusive option of a formal appointment. While the Commission did not see the protection of decision-makers as the primary purpose of its proposed legislation, it was of the view that a protective mechanism may facilitate meeting the decision-making needs of people with impaired capacity without resort to formal measures which are otherwise unnecessary.⁶⁵⁶

The Commission recommended that the tribunal be able to ratify the acts of an informal decision-maker who has acted in good faith, and that an informal decision-maker whose acts have been ratified by the tribunal should be protected from personal liability.⁶⁵⁷

The Commission's recommendation was reflected in clause 208 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. However, after further consideration, the Commission has come to the view that the conduct of informal decision-makers should be judged according to the same standard as that required of appointed and chosen decision-makers.⁶⁵⁸

⁶⁵⁵ See pp 182-184 of this Report.

⁶⁵⁶ At 36-37, 78.

⁶⁵⁷ At 78.

⁶⁵⁸ See pp 281-282 of this Report.

The Commission recommends that the legislation provide that:

- . an informal decision-maker may apply to the tribunal for approval or ratification of a decision proposed to be made or made by the informal decision-maker for a person with impaired decision-making capacity;**
- . the tribunal may approve or ratify the decision if it considers that the informal decision-maker proposes to act or has acted honestly and with a degree of care that would be reasonable for a person of the decision-maker's expertise and experience;**
- . if the tribunal approves or ratifies the decision, the informal decision-maker is protected from any personal liability that he or she would otherwise incur or have incurred to either the person with impaired decision-making capacity or a third party as a result of making or having made the decision.**

The Commission's recommendation is implemented by clause 243 of the Draft Bill in Volume 2 of this Report.

7. REVIEW OF APPOINTMENT

(a) The need for a review procedure

For many people, the extent to which their decision-making capacity is impaired by a decision-making 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.

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 Persons⁶⁵⁹ and of the Principles for the Protection of Persons with Mental Illness.⁶⁶⁰

(b) The nature of the review process

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.

In the Draft Report, the Commission expressed the view that the nature and extent of the review should be a matter of discretion for the tribunal.⁶⁶¹ The Commission's recommendation was implemented by clause 97(1) of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report, there was general acceptance of the Commission's recommendation.

The Commission recommends that the legislation provide that the tribunal may conduct a review in the way it considers appropriate.

The Commission's recommendation is implemented by clause 130(1) of the Draft Bill in Volume 2 of this Report.

(c) The review period

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

⁶⁵⁹ Resolution 2856 (XXVI), 20 December, 1971. Article 7 provides that:

Whenever 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 authorities.

⁶⁶⁰ Principle 1(6).

⁶⁶¹ At 56.

review period, the greater the burden on the time and resources of the tribunal. Provisions in other jurisdictions vary considerably.⁶⁶²

The Commission considers that the mandatory period of five years which is contained in some legislation⁶⁶³ 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 months⁶⁶⁴ may be administratively and financially unrealistic.

In the Draft Report, the Commission identified alternative mechanisms for triggering a review.⁶⁶⁵

One approach considered by the Commission was to provide 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.

Another approach would be 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, unless it is satisfied that there are proper grounds for the order or orders remaining in place.⁶⁶⁶

In the Draft Report, the Commission recommended 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

⁶⁶² See for example *Guardianship and Administration Board Act 1986 (Vic)* s 61; *Guardianship Act 1987 (NSW)* ss 18, 25; *Guardianship and Administration Act 1990 (WA)* s 84; *Guardianship and Management of Property Act 1991 (ACT)* s 19; *Guardianship and Administration Act 1993 (SA)* s 57; *Guardianship and Administration Act 1995 (Tas)* ss 67,68.

⁶⁶³ See for example *Intellectually Disabled Citizens Act 1985 (Qld)* s 28; *Guardianship and Administration Act 1990 (WA)* s 84.

⁶⁶⁴ See for example *Guardianship Act 1987 (NSW)* s 18.

⁶⁶⁵ At 57-58.

⁶⁶⁶ See for example *Guardianship and Administration Act 1993 (SA)* s 57.

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.

The Commission also recommended that 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 person for whom the order was made. The Commission's recommendations were reflected in clauses 93, 95, 96, 97, 98 and 99 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report, there was general acceptance of the Commission's recommendations.

However, two submissions suggested that the tribunal should have power to set the review period at the time an appointment is made, based on the circumstances of the particular case.⁶⁶⁷ Although the Commission did not make a specific recommendation on this issue in the Draft Report, clause 93(2) of the Draft Bill provided that:

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 two years.

(d) Who can apply for a review

Two submissions raised the question of eligibility to make an application for review of an appointment. One of these submissions, from an organisation of consumers of mental health services and of carers for people with mental illness, suggested that the Commission's recommendation that the tribunal have power to review an order at any time on its own initiative or on the application of an interested person should be extended to allow the person who is the subject of the order to apply.⁶⁶⁸ This proposal is consistent with legislation in several other Australian jurisdictions.⁶⁶⁹

⁶⁶⁷ Submissions Nos 48, 72.

⁶⁶⁸ Submission No 53.

⁶⁶⁹ *Guardianship and Administration Board Act 1986 (Vic) s 61(3); Guardianship Act 1987 (NSW) s 25(3); Guardianship and Administration Act 1990 (WA) s 86(1)(b); Guardianship and Management of Property Act 1991 (ACT) s 19(1); Guardianship and Administration Act 1995 (Tas) s 67(b).*

The other submission suggested that an interested person who wished to make an application for a review should have to demonstrate substantive reasons why the review should take place.⁶⁷⁰ This proposal is similar to a provision in the Western Australian legislation which requires any person other than the person who is the subject of the order or an appointed decision-maker to request the Guardianship and Administration Board for leave to apply for a review.⁶⁷¹ The Board may grant leave if it is satisfied that a review should be held because of a change of circumstances or for any other reason.⁶⁷²

In the view of the Commission, the tribunal should be as accessible as possible. It does not believe that the incidence of unmeritorious applications for review would be sufficient to warrant making procedures more complicated.

⁶⁷⁰ Submission No 54.

⁶⁷¹ *Guardianship and Administration Act 1990 (WA)* s 87(1).

⁶⁷² *Guardianship and Administration Act 1990 (WA)* s 87(5)(b).

The Commission recommends that the legislation provide that:

- . **the tribunal must periodically review an appointment;**
- . **the tribunal may, on making an appointment, order that -**
 - . **if the tribunal considers that the need for an appointment will continue for more than two years and the need for the tribunal to review the appointment will be very limited, the appointment be reviewed within a period of three years; or**
 - . **if the tribunal considers it appropriate, the appointment be reviewed in less than two years;**
- . **the tribunal may review an appointment at any time on its own initiative or on the application of the person for whom the order was made or of an interested person;**
- . **the first review of an appointment must take place within two years after the appointment is made or within the time specified by the tribunal at the time the appointment is made;**
- . **at the end of a review of an appointment, the tribunal must revoke the appointment unless it is satisfied that it would make another appointment if a new application for an appointment were to be made;**
- . **if the tribunal is satisfied that there are appropriate grounds for an appointment to continue, it may -**
 - . **continue the order making the appointment; or**
 - . **change the order making the appointment;**
- . **after the first review, an appointment must be reviewed within three years of the most recent review.**

The Commission's recommendations are implemented by clauses 126-130 of the Draft Bill in Volume 2 of this Report.

8. WHERE DECISION-MAKER CHOSEN UNDER AN ENDURING POWER OF ATTORNEY

In the Draft Report, the Commission acknowledged the possibility that a tribunal order may be made in ignorance of the existence of an enduring power of attorney. It recommended that the legislation should include a saving provision to validate the acts of a decision-maker appointed by the tribunal in such a situation.⁶⁷³ The Commission's recommendation was reflected in clause 101 of the Draft Bill in Chapter 13 of the Draft Report, which also conferred a similar protection on a person who, without knowledge of the enduring power of attorney, deals with a decision-maker appointed by the tribunal.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation.

The Commission recommends that the legislation provide that if a person makes an enduring power of attorney and the tribunal subsequently, without reference to the enduring power of attorney, appoints a decision-maker with the same power as a decision-maker chosen under the enduring power of attorney, the appointed decision-maker and a person who, without knowledge of the enduring power of attorney, deals with the appointed decision-maker should be protected.

The Commission's recommendation is implemented by clause 139 of the Draft Bill in Volume 2 of this Report.

⁶⁷³ At 125.

CHAPTER 8

THE TRIBUNAL

1. THE NEED FOR A TRIBUNAL

In Chapter 7 of this Report, the Commission acknowledged that, in many cases, a person who has a decision-making disability will have a loving and supportive family or alternative form of support network which substantially reduces the impact of the disability. 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. The Commission believes that informal arrangements may often be the simplest and most effective means of substituted decision-making for a person with impaired decision-making capacity.

However, the Commission acknowledges that, for a number of reasons, informal decision-making may not always be possible or appropriate. Circumstances will arise in which it is necessary to consider the need for formal appointment of a decision-maker.

The mechanisms which currently exist under Queensland law for determining whether a decision-maker should be appointed for a person whose decision-making capacity is impaired are described in Chapter 2 of this Report. In the view of the Commission the existing procedures are inadequate to meet the needs of a significant number of members of our community. The need for reform is discussed in Chapter 3.

In the Draft Report,⁶⁷⁴ the Commission considered an alternative method of appointing decision-makers. The Commission's aim was to develop procedures which are easier than the court system for ordinary members of the community to understand and to use, and which involve minimum cost and delay, whilst at the same time ensuring that the rights and interests of people with a decision-making disability are protected. The Commission recommended the establishment of an independent statutory tribunal.⁶⁷⁵

The Commission identified a number of advantages which the creation of an independent tribunal would offer.

For example, 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

⁶⁷⁴ Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

⁶⁷⁵ At 18.

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. This may mean that the judge does not have access to all the relevant information.

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 ensure that the information necessary to achieve the most appropriate solution is available.

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 decision-making 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 a person's individual decision-making needs. In addition to meeting community needs, specialised communication skills and understanding on the part of members may contribute to public confidence in tribunal decisions.

In canvassing the advantages of a tribunal, the Commission also considered whether its less formal procedures would provide the same degree of protection for the rights of people with a decision-making disability as the traditional court system.⁶⁷⁶

The Commission noted that a tribunal, although not bound by formal legalistic procedures, may be subject to the rules of natural justice and to minimum standards of procedural fairness. Failure to observe these requirements would then be grounds for a review of the tribunal's determination.⁶⁷⁷

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 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.

⁶⁷⁶ At 16-17.

⁶⁷⁷ See for example *Moore v Guardianship and Administration Board* [1990] VR 902.

The Commission expressed the view 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.⁶⁷⁸ 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.⁶⁷⁹

The Commission also expressed the view that the ability of a tribunal to adopt an active rather than a passive role may not only be compatible with achieving the same goals as the legal system but may also actually improve the thoroughness of investigation of the issues involved and the quality of the outcome for the person concerned.

The Commission's recommendation that a tribunal be established was reflected in clause 141 of the Draft Bill in Chapter 13 of the Draft Report. Under the scheme proposed by the Commission the tribunal would perform a number of functions in addition to considering applications for the appointment of a decision-maker. The tribunal would also perform certain functions in relation to enduring powers of attorney,⁶⁸⁰ make orders about the functions of decision-makers, review appointment orders,⁶⁸¹ and make certain special consent health care decisions.⁶⁸² The tribunal's proposed functions were reflected in clause 142 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report strongly supported the Commission's recommendation. Only one submission, from the Public Trustee, favoured the retention of a judicial model. The submission also commented:⁶⁸³

⁶⁷⁸ See also M Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure" (1991) 13 *Sydney Law Review* 377.

⁶⁷⁹ T Carney, "Guardianship Boards in Australia: Accessible and Accountable Justice?", A paper presented at the XVIIIth International Congress on Law and Mental Health, Vancouver, Canada, June 1992.

⁶⁸⁰ See Chapter 6 of this Report.

⁶⁸¹ See pp 211-216 of this Report.

⁶⁸² See pp 370-393 of this Report.

⁶⁸³ Submission No 71.

The development of procedures which are easier for members of the general public to understand and to use and which involve minimum cost must be viewed in the context of the effect which the establishment of such a regime will have on the number of applications to formalise decision-making authority which is currently carried out informally ... the proposed regime will result in an explosion of applications.

The Commission cannot emphasise strongly enough that the entire thrust of its recommendations is not to interfere in informal arrangements unless there is a need to do so in the interests of the person whose decision-making capacity is impaired.⁶⁸⁴ In fact, the effect of the Commission's recommendations would be, in many instances, to legitimise existing arrangements which may not be legally effective. In any event, the Commission cannot accept the argument that reform which increases access to much needed assistance should not take place because of the extent to which the system would be used.

Almost every other Australian jurisdiction⁶⁸⁵ has adopted the tribunal model, which has resulted in increased rather than diminished rights for people with impaired decision-making capacity.

⁶⁸⁴ See Chapter 7 of this Report.

⁶⁸⁵ 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.

The Commission recommends that legislation provide that:

- . an independent tribunal be established;**
- . the functions of the tribunal include -**
 - . considering applications for appointment of decision-makers;**
 - . appointing decision-makers where necessary;**
 - . performing certain functions in relation to enduring powers of attorney;**
 - . making orders about the functions of, and giving directions to, appointed decision-makers;**
 - . making declarations about a person's decision-making capacity;**
 - . making certain special consent health care decisions.**

The Commission's recommendation is implemented by clauses 263 and 264 of the Draft Bill in Volume 2 of this Report.

2. MEMBERSHIP OF THE TRIBUNAL

In the Draft Report, the Commission recommended that the tribunal should consist of a small number of full-time members⁶⁸⁶ and a larger pool of part-time members.

The Commission expressed the view that the appointment of part-time members would give the tribunal the flexibility to provide expertise in particular areas of disability, and would also help to overcome some of the problems of distance experienced by regional and remote communities by allowing appointment of members from those communities.

The Commission's recommendation was reflected in clause 145(2) of the Draft Bill in Chapter 13 of the Draft Report.

⁶⁸⁶ At 19.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

The Commission recommends that the legislation provide that members of the tribunal may be appointed as full-time or part-time members.

The Commission's recommendation is implemented by clause 270(2) of the Draft Bill in Volume 2 of this Report.

3. ELIGIBILITY FOR MEMBERSHIP

(a) Proposed categories of membership

In the Draft Report, the Commission recommended the following categories of membership of the tribunal:⁶⁸⁷

- people with legal qualifications, combined with training or experience which makes the person suitable for appointment to the tribunal;⁶⁸⁸
- people with qualifications and expertise in health care or other professions which involve special knowledge in various areas of mental and intellectual disability;⁶⁸⁹ and
- people with personal experience in working with or caring for a person with a mental or intellectual disability.⁶⁹⁰

The Commission's recommendation was reflected in clause 145(3) of the Draft Bill in Chapter 13 of the Draft Report.

⁶⁸⁷ At 20-21.

⁶⁸⁸ See for example *Family Law Act 1975 (Cth)* s 22(2)(b); *Guardianship Act 1987 (NSW)* s 49(3)(a).

⁶⁸⁹ See for example *Intellectually Disabled Citizens Act 1985 (Qld)* s 8(2); *Guardianship Act 1987 (NSW)* s 49(3)(b); *Guardianship and Management of Property Act 1991 (ACT)* s 58(4); *Guardianship and Administration Act 1993 (SA)* s 8(1); *Guardianship and Administration Act 1995 (Tas)* s 7(3), Sched 1 cl 2.

⁶⁹⁰ See for example *Intellectually Disabled Citizens Act 1985 (Qld)* s 8(2); *Guardianship Act 1987 (NSW)* s 49(3)(c); *Guardianship and Management of Property Act 1991 (ACT)* s 58(4); *Guardianship and Administration Act 1993 (SA)* s 8(2); *Guardianship and Administration Act 1995 (Tas)* s 7(3), Sched 1 cl 2.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. A group of service providers commented that:⁶⁹¹

... inclusion of full time carers in the independent tribunal will give recognition and value to the commitment and importance of the family in the caring of those persons with a mental or intellectual disability.

An organisation of relatives and family carers of people with schizophrenia also welcomed the inclusion of health care professionals with special knowledge of mental disability.⁶⁹²

However, a number of submissions argued for modification of the Commission's recommendation to make it even more responsive to community needs. Two submissions also proposed changes to the second category of membership based on professional qualifications.

(b) Representation of particular communities

Two submissions, from community based Aboriginal organisations, submitted that there should be appropriate Aboriginal or Islander representation on the tribunal when it considers an application concerning a community member with a decision-making disability so that relevant information about cultural issues which may affect the outcome of the application is available to the tribunal.⁶⁹³

The Commission made no specific reference to Aboriginal cultural issues in the Draft Report. It intended that its recommendation that the importance of maintaining the cultural and linguistic environments of a person with a decision-making disability should be taken into account should apply to members of all ethnic minority groups. However, these submissions considered that Aboriginal people, as the original indigenous population of the country, are a special case and should be treated differently from other minority groups.

⁶⁹¹ Submission No 37.

⁶⁹² Submission No 33.

⁶⁹³ Submissions Nos 60, 78.

In recognition of this point, the Commission has now altered its recommended legislative principles to include specific reference to the importance of maintaining the cultural and linguistic environment and values of a person who is a member of an Aboriginal or Islander community.⁶⁹⁴

The Department of Family Services and Aboriginal and Islander Affairs⁶⁹⁵ also submitted that the background of tribunal members may require further consideration when considering how best the tribunal could assist Aboriginal and Islander communities and ethnic communities. The Department emphasised the need for the tribunal system to be appropriate to the needs of varying cultures and special interest groups. The submission commented that "it would seem desirable that some tribunal members be drawn from special interest groups such as older people and Aboriginal and ethnic communities". It noted:⁶⁹⁶

The involvement of older adults ... should be strongly encouraged to provide balanced representation of the community. The involvement of highly respected and competent older citizens is highly valued when aged citizens appear before the tribunal. At least sixty percent of the persons presently assisted by the Intellectually Disabled Citizens Council are older people and it is likely that the majority of applications to the tribunal will relate to older people. It is the experience of the Office of the Ageing that older people feel more confident and comfortable dealing with other older people because they believe that other older people will better understand their concerns.

An organisation representing the interests of older people also submitted that tribunal membership should include older people.⁶⁹⁷

A further submission also commented that diversity of membership can only have positive results.⁶⁹⁸

Although the third category of tribunal membership proposed by the Commission was intended to provide for community participation in the operation of the tribunal, it would not extend to representatives of particular communities simply on the basis of their membership of that community. It applies to community members with

⁶⁹⁴ See pp 38-40.

⁶⁹⁵ Now the Department of Families, Youth and Community Care.

⁶⁹⁶ Submission No 74.

⁶⁹⁷ Submission No 27.

⁶⁹⁸ Submission No 73.

personal experience in caring for or working with people with a decision-making disability.

The Commission recognises the importance of the issues raised in the submissions and has given serious consideration to them. It recommends that the third category of membership proposed by the tribunal be amended to:

people with personal experience of, or in working with or caring for, a person with a mental or intellectual disability.

The Commission believes that this would considerably widen eligibility for membership by allowing the appointment of people who are not actually carers and who do not work with people with a decision-making disability, but who have personal experience of some kind with decision-making disability - whether as a relative, friend, member of a particular community or as a person who has been affected by a decision-making disability.

The Commission also believes that the legislation should include a provision requiring the membership of the tribunal to reflect, to the greatest extent practicable, the social and cultural diversity of the general community.

However, the Commission is not persuaded of the desirability of making specific provision for representation of particular community groups. In the view of the Commission, the objective of ensuring that the tribunal has at its disposal adequate information about cultural or social issues which may affect the outcome of an application can best be achieved by other means. For example, on pages 259-263 of this Report the Commission makes recommendations about advocacy on behalf of a person with a decision-making disability before the tribunal. This support and advocacy role could be used to great advantage to inform the tribunal on relevant cultural issues. On pages 252-253 of this Report the Commission also makes recommendations concerning the power of the tribunal to make enquiries of people with special expertise to assist the tribunal in matters before it, including matters involving the needs or problems of particular social or cultural groups.

(c) Consumers of mental health services

One submission, from an organisation representing people who are presently or have in the past been consumers of mental health services and carers of people with mental illness, proposed that consumers should be included in the third category of those eligible for membership of the tribunal. The respondents stated:⁶⁹⁹

⁶⁹⁹ Submission No 53.

Consumers who have themselves been subject to, or who have spent considerable time with people who have been subject to substituted decision-making procedures, have knowledge and experience of the effects of these processes that is unique. Consumers who are subject to episodic illness are capable of fulfilling such functions when they are well.

The recommendation made above in relation to the third category of membership would answer this submission.

(d) Specialist qualifications

An association of medical practitioners submitted that it should be mandatory for a medical practitioner to be a member of the tribunal.⁷⁰⁰ An association representing statutory trustee companies in Queensland proposed that the composition of the tribunal should also be extended to include a member with financial/investment expertise.⁷⁰¹

In relation to these submissions, the Commission believes that the recommendations in the Draft Report would allow the tribunal to ensure that it has access to all the relevant information necessary to determine a particular application.

The Commission is not persuaded to change its recommendation.

⁷⁰⁰ Submission No 77.

⁷⁰¹ Submission No 48.

The Commission recommends that the legislation provide for the following categories of membership of the tribunal:

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

The Commission recommends that the legislation provide that the membership of the tribunal should reflect to the greatest extent possible the social and cultural diversity of the general community.

The Commission's recommendation is implemented by clauses 270(3) and 270(4) of the Draft Bill in Volume 2 of this Report.

4. APPOINTMENT OF MEMBERS

In the Draft Report, the Commission recommended that:⁷⁰²

- positions on the tribunal should be advertised;
- the Minister should consult with key organisations;
- for other members there should be a selection committee chaired by the President of the tribunal;
- the selection committee should advise the Minister;
- all appointments should be by the Governor in Council on the recommendation of the Minister.

⁷⁰² At 21.

The Commission's recommendations were reflected in clauses 145(1) and 146 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

The Commission recommends that the legislation provide that:

- . **the President, Deputy President and members of the tribunal be appointed by the Governor in Council;**
- . **for selecting a person for recommendation for appointment as President, Deputy President or member, the Minister must advertise for applications from suitably qualified persons to be considered for selection.**

The Commission's recommendation is implemented by clauses 270(1) and 271 of the Draft Bill in Volume 2 of this Report.

The Commission recommends that:

- . **before making a recommendation to the Governor in Council about the appointment of the President and the Deputy President the Minister should consult with key organisations;**
- . **recommendations about the appointment of members should be based on the advice of a selection committee chaired by the President of the tribunal.**

5. DURATION OF APPOINTMENT

(a) Term of office

Clause 147(1) of the Draft Bill in Chapter 13 of the Draft Report provided that the President and Deputy President of the tribunal hold office for a term of not longer than five years. Clause 147(2) provided that a member of the tribunal other than the President or Deputy President hold office for a term of not longer than three years.

All members would be eligible for reappointment.⁷⁰³

In the view of the Commission, the longer period of appointment for the President and Deputy President reflects the responsibility of these positions and ensures continuity in the operation of the tribunal.

The submissions received by the Commission in response to the Draft Report generally supported this approach.

(b) Resignation

Clause 147(3) of the Draft Bill in Chapter 13 of the Draft Report provided that the office of President, Deputy President or member becomes vacant if the holder of the office resigns by signed notice of resignation given to the Minister.

The submissions received by the Commission in response to the Draft Report generally supported this approach.

(c) Removal from office

In the Draft Report, the Commission recommended that the Governor in Council should have power to terminate the appointment of the President, the Deputy President or a member of the tribunal because of:⁷⁰⁴

- . 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.

The Commission's recommendation was reflected in clause 147(4) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

⁷⁰³ *Acts Interpretation Act 1954 (Qld)* s 25(1)(c).

⁷⁰⁴ At 22.

(d) Effect of ceasing to be President or Deputy President

Clause 144(4) of the Draft Bill in Chapter 13 of the Draft Report provided that a person ceases to be a member of the tribunal if the person ceases to be President or Deputy President.

The submissions received by the Commission generally supported this approach. However, one submission commented that the President or Deputy President should not necessarily cease to be a member of the tribunal if one or other ceases in that office. The Intellectually Disabled Citizens Council commented that:⁷⁰⁵

... it is not necessary to deprive the Tribunal of the considerable experience which such office-bearers would hold after some time directing the operations of the Tribunal and that retiring presidents and deputy presidents should be given the option of remaining on the Tribunal as full- or part-time members.

In the view of the Commission, the recommendation reflects the difference in nature between the role of full and part-time members of the Commission. A retiring President or Deputy President would, of course, be eligible for re-appointment as an ordinary member of the tribunal if there were a vacancy on the tribunal. However, allowing a President or Deputy President the option of electing to remain a member of the tribunal could cause practical difficulties if there is a statutory limit on the membership of the tribunal. It would also be entirely inappropriate for a President or Deputy President to be able to elect to remain a member of the tribunal if the President or Deputy President had been removed from office.

⁷⁰⁵ Submission No 52.

The Commission recommends that the legislation provide that:

- . **the President and Deputy President be appointed for a period of not longer than five years;**
- . **members of the tribunal be appointed for a period of not longer than three years;**
- . **the office of President, Deputy President or member becomes vacant if the holder of the office resigns by signed notice of resignation;**
- . **the Governor in Council have power to terminate the appointment of the President, Deputy President or a member because of:**
 - . **physical or mental incapacity to carry out official duties satisfactorily;**
 - . **neglect of duty;**
 - . **dishonourable conduct;**
 - . **conviction of an offence that makes the person unsuitable to carry out official duties;**
- . **if a person ceases to be President or Deputy President, the person ceases to be a member of the tribunal.**

The Commission's recommendations are implemented by clauses 267(4) and 272 of the Draft Bill in Volume 2 of this Report.

6. CONSTITUTION OF PANELS

In the Draft Report, the Commission considered the question of how the tribunal should be constituted for a hearing.⁷⁰⁶

⁷⁰⁶ At 19-20.

The Commission acknowledged concerns that hearings conducted by a single member of the tribunal might not adequately protect the rights of a person with a decision-making disability and that, if the legislation provided the flexibility to hold single member hearings, resource implications might result in such hearings becoming the norm rather than the exception.

The Commission also recognised 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 members. It expressed the view that, to gain the acceptance of the community which it is designed to serve, the tribunal must be socially responsive and must have both community and professional participation.

The Commission recommended that all applications should be heard by a panel of three members, with one member from each of the three proposed categories of membership.

The Commission's recommendation was reflected in clause 156 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. Three submissions specifically endorsed the concept of three member panels for all hearings.⁷⁰⁷ One submission suggested that the flexibility to convene smaller panels in situations where investigation has indicated no conflict exists may be of benefit if resources are limited, but maintained the view that panels should be comprised of at least three members.⁷⁰⁸ Three submissions proposed that single member sittings in "more routine",⁷⁰⁹ "nondeterminative",⁷¹⁰ "simple and straight forward"⁷¹¹ applications may be more cost effective. The Public Trustee commented that "in reality, a significant proportion of cases ... will be non-contentious and ... will involve circumstances not warranting detailed consideration by a tribunal".⁷¹²

⁷⁰⁷ Submissions Nos 25, 64, 70.

⁷⁰⁸ Submission No 74.

⁷⁰⁹ Submission No 68.

⁷¹⁰ Submission No 73.

⁷¹¹ Submission No 30.

⁷¹² Submission No 71.

The Commission is not persuaded that it would be preferable to provide for single member hearings. The Commission adopts the reasoning of the Office of the Public Guardian in Western Australia:⁷¹³

One of the great strengths of Australian legislation [about assisted and substituted decisions] is the capacity to bring to effect the multi-disciplinary approach. This breadth of "accumulated wisdom" to inform decision-making has long been proven a preferable approach.

However, there is some debate about the construction of Tribunals and we are sure that the Commission will receive submissions in support of single member tribunals. Indeed, in Western Australia, the Guardianship and Administration Board operates under a flexible system which allows either three member or single member hearing. Notwithstanding this, the Public Guardian's Office remains firmly committed to the principle that all applications should be heard by a Tribunal of three members. For the reasons outlined above, we believe this strengthens the decision making and allows the intermingling of relevant bodies of information to inform the final decision and outcome which should be in the best interests of the person concerned. The further recommendation that a Tribunal should be established with a member from each of the three groups has, we believe, significant advantages.

The Commission therefore remains of the view that, in terms of cost effectiveness, the advantages of a three member panel far outweigh the savings to be gained from single member hearings, even in matters which at first glance appear to be straightforward and non-contentious.

The Commission recommends that the legislation provide that hearings of the tribunal be conducted by three member panels constituted by one member from each of three recommended categories of membership.

The Commission's recommendation is implemented by clause 195 of the Draft Bill in Volume 2 of this Report.

⁷¹³ Submission No 25.

7. PRESIDING MEMBER

The Draft Bill in Chapter 13 of the Draft Bill provided, in clause 158, that at a hearing of the tribunal, the President, the Deputy President or the member of the panel with legal qualifications must preside.

This provision reflected the Commission's concern with ensuring procedural fairness in the conduct of proceedings. It is consistent with legislation in other Australian jurisdictions.⁷¹⁴

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. However, two submissions opposed the Commission's recommendation.⁷¹⁵ The Intellectually Disabled Citizens Council commented:⁷¹⁶

The Council accepts that, if there are a number of lawyers who are full-time and part-time members of the Tribunal, a lawyer should be a member of each panel for each proceedings. We do not believe, however, that a legal member should necessarily chair the proceedings on every occasion. We bring to the attention of the Commission that other bodies for instance, the Social Security Appeals Tribunal has adopted as its practice, the rotation of the chair of meetings among all of its members.

The Council argued that, by rotating the chair between legal and non-legal members, applicants and other members of the public, including the person who is the subject of the application, will view the tribunal as a less legalistic, more informal body.

The Commission is mindful of the need for the tribunal to be as user friendly as possible. However, it is also concerned that emphasis on informality should not be allowed to override the need for the tribunal to act lawfully. Part of the role of a presiding member is to ensure that proceedings are conducted in accordance with the requirements of the legislation and in accordance with the rules of procedural fairness. In the view of the Commission, lawyers are by training and experience well placed to carry out this role.

⁷¹⁴ See for example *Guardianship and Administration Board Act 1986 (Vic)* Sched 2 cl 1(4); *Guardianship Act 1987 (NSW)* s 51(3); *Guardianship and Management of Property Act 1991 (ACT)* s 59(1). See also *Administrative Appeals Tribunal Act 1975 (Cth)* s 22.

⁷¹⁵ Submissions Nos 10, 52.

⁷¹⁶ Submission No 52.

The Commission recommends that the legislation provide that, at a hearing of the tribunal, the President, Deputy President or member of the panel with legal qualifications should preside.

The Commission's recommendation is implemented by clause 196 of the Draft Bill in Volume 2 of this Report.

8. DISQUALIFICATION FROM HEARING

In the Draft Report, the Commission acknowledged that situations may occur in which a member of the tribunal has a personal or financial interest in a matter before the tribunal.⁷¹⁷ The Commission considered whether a member should be automatically disqualified from hearing such a matter,⁷¹⁸ but concluded that, because of the variety of circumstances which may arise, not every situation would necessarily involve a conflict of interest. The Commission recommended that members of the tribunal be required 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.

The Commission's recommendation was reflected in clause 157 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

⁷¹⁷ At 21.

⁷¹⁸ See for example *Guardianship and Administration Act 1993 (SA)* s 6(6).

The Commission recommends that the legislation provide that, if a member of the tribunal has a personal or financial interest in a matter before the tribunal and the interest could conflict with the proper performance of the member's duties on the matter:

- . the member must give written notice of the nature of the interest to the President as soon as practicable;**
- . if the President has a relevant interest, the President must give written notice of the nature of the interest to the Deputy President;**
- . the member giving notice must not be present when the tribunal considers the matter or take part in a tribunal decision about the matter, unless the person to whom notice is given decides the interest is not of a material nature.**

The Commission's recommendation is implemented by clause 280 of the Draft Bill in Volume 2 of this Report.

9. THE ROLE OF THE TRIBUNAL

In the Draft Report, the Commission acknowledged that its proposed legislative scheme must define the role of the tribunal it establishes by incorporating the duties to be imposed on the tribunal and the powers to be given to it and by providing for administrative and procedural matters relating to the operation of the tribunal and the conduct of the tribunal's proceedings.

(a) Observance of principle

In the Draft Report, the Commission drew attention to the absence of underlying principle in the existing legislation. It stated its belief that all persons given duties, powers or functions by its proposed legislation should be bound to perform those duties, powers or functions in accordance with a set of principles identified by the Commission, and recommended that this obligation should extend to members of

the tribunal.⁷¹⁹ This recommendation was consistent with legislative requirements in a number of other Australian jurisdictions.⁷²⁰

The submissions received by the Commission in response to the Draft Report strongly supported the Commission's recommendation.

The Commission recommends that the legislation impose on members of the tribunal an obligation to observe the principles set out in the legislation.

The Commission's recommendation is implemented by clause 21 in Volume 2 of this Report.

(b) Notification of hearing of an application

In the Draft Report, the Commission commented that, when an application concerning a person whose decision-making capacity is alleged to be impaired is made to the tribunal, an outcome which is both fair to that person and acceptable to the people closest to the person is more likely to be achieved if everyone with a proper interest in the person's welfare is given an opportunity to attend the hearing of the application and put forward their point of view.⁷²¹ The Commission recommended that the tribunal should be required 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;
- . a primary carer other than the relatives listed above;

⁷¹⁹ At 50-51. The existing legislation is explained in Chapter 2 of this Report. The recommended legislative principles are set out in Chapter 4.

⁷²⁰ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 4(2); *Guardianship Act 1987 (NSW)* s 4; *Guardianship and Administration Act 1990 (WA)* s 4; *Guardianship and Management of Property Act 1991 (ACT)* s 3; *Guardianship and Administration Act 1993 (SA)* s 5; *Guardianship and Administration Act 1995 (Tas)* s 6.

⁷²¹ At 51.

- . 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.

The Commission's recommendation was reflected in clause 185(1) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

One submission⁷²² noted that the draft legislation, in contrast to the Commission's recommendation, did not specifically refer to a statutory decision-maker of last resort. Clause 185(1) provided for the tribunal to give notice to the person concerned and, as far as practicable, to the following people:

- (a) the applicant;
- (b) the members of the person's family;⁷²³
- (c) any primary carer of the person (other than a family member);
- (d) all current substitute decision-makers for the person;
- (e) anyone else the tribunal considers should be notified.

Clause 185(1)(e) would allow the tribunal to decide whether, in an appropriate case, to notify the relevant decision-maker of last resort. However, the Public Guardian in Western Australia commented:

⁷²² Submission No 25.

⁷²³ The Dictionary in the Schedule to the Draft Bill defined the "family" of a person as consisting of the following members:

- (a) the person's spouse;
- (b) each of the person's children who is eighteen or older;
- (c) each of the person's parents.

In Western Australia, as indeed in all other jurisdictions, the Public Guardian or Public Advocate is at least given notice of all hearings and copies of all applications. This then allows them to determine whether or not their intervention is warranted.

A similar argument would apply to the Public Trustee in relation to decisions of a financial nature.

The Commission is persuaded that notification to the Adult Guardian or the Public Trustee may be an important safeguard for the person who is the subject of the application. It may also assist in the identification of systemic issues which need to be addressed.

The fact that the Adult Guardian or Public Trustee is notified of the hearing of an application does not mean that the decision-maker of last resort would be appointed where an appropriate family member was available, as the tribunal would be bound by the legislative principles recommended by the Commission, including the least restrictive alternative and the importance of maintaining existing supportive relationships.⁷²⁴

Another submission proposed expanding the category of family members to whom the tribunal is required to give notice of the hearing of an application.⁷²⁵ The respondents argued for the inclusion of "brothers and sisters or other surviving family members, particularly when there are no parents or adult children".

The Commission acknowledges that there will be circumstances when it is appropriate for siblings or other family members to be notified of the hearing of an application. In many cases, the person who is the subject of the application may have no other close relatives. In such a situation, the tribunal would be able to give notification to any other person it considered appropriate, including relatives other than those specified.⁷²⁶ However, there may also be cases where automatic notification of siblings would be counter-productive - for example, if there has been an estrangement between the person and his or her siblings. The Commission is therefore not persuaded that the category of family members to whom the tribunal should be required to give notification in every case should be expanded.

⁷²⁴ See Chapter 4 of this Report.

⁷²⁵ Submission No 53.

⁷²⁶ Cl 185(1)(e) of the Draft Bill in Chapter 13 of the Draft Report.

The Commission recommends that the legislation provide that the tribunal must give notice of the hearing of an application to the person who is the subject of the application and, as far as practicable, to the following:

- . **the applicant;**
- . **the members of the person's family;**
- . **any primary carer of the person other than a family member;**
- . **all current assistant and substitute decision-makers for the person;**
- . **if the application concerns a personal or health care decision, the Adult Guardian;**
- . **if the application concerns a financial decision or decision about a legal matter, the Public Trustee;**
- . **anyone else the tribunal considers should be notified.**

The Commission's recommendation is implemented by clause 212 of the Draft Bill in Volume 2 of this Report.

(c) Dispensing with notification

In the Draft Report, the Commission considered whether or not the duty to notify should be accompanied by a power to dispense with notification.⁷²⁷

(i) The subject of the application

In relation to the person who is the subject of the application, the Commission acknowledged that there may be circumstances where the person may be distressed by the application, or may not be able to understand it. On the other hand, the Commission also recognised that the need to protect the interests of a person who may be vulnerable to exploitation may be so strong that dispensation with notice to the person could never be justified.

⁷²⁷ At 52-53.

The Commission recommended that notice to the person who is the subject of the application should not be able to be dispensed with. The Commission's recommendation was reflected in clause 185(4) of the Draft Bill in Chapter 13 of the Draft Report.

Although the submissions received by the Commission generally supported the Commission's approach, a number of them highlighted the opposing factors outlined above. The Public Guardian in Western Australia noted:⁷²⁸

On the one hand family feel it is "patently ridiculous" to have someone serve notice on an individual who has had dementia for over 10 years and has not communicated meaningfully with anyone in excess of 5 of those years. Equally, the Tribunal is then reliant upon the word of others about the individual's condition, unless the Tribunal is going to be resourced to enquire of it themselves. There have been examples in any number of jurisdictions where the very event of notification has triggered a response on the part of other carers who had otherwise not known of the application. In one WA case, this led to the realisation that the "proposed represented person" had much higher levels of competency than previously thought.

The Public Trustee proposed the following solution to this dilemma.⁷²⁹

Notification to the person who is the subject of the application could be dispensed with in situations where a medical practitioner certifies that the person does not understand the nature meaning and effect of documents. This is the practice currently adopted by the Court. It is considered that the rights of the person concerned would not be compromised if the Tribunal were to be given this discretion. Properly exercised, potential stress to the person concerned would be avoided.

An advocacy group for people and families of people with intellectual disability also proposed a way to find a balance between protecting the rights of the person concerned and ensuring that the question of notification is handled sensitively:⁷³⁰

⁷²⁸ Submission No 25.

⁷²⁹ Submission No 71.

⁷³⁰ Submission No 13.

Some provision must be made, within the law, to ensure that the [notice], if unable to be served on the person with the decision-making disability, can be handed to someone acting in a proxy capacity.

The Commission is concerned that provision for service on a proxy could erode the principle of the presumption of competence. It could also present practical difficulties to the tribunal in identifying an appropriate proxy. However, the Commission is also concerned that notification to the person who is the subject of the application should be given in a sensitive manner. The Commission believes that the draft legislation in the Draft Report would, in its present form, provide for this.⁷³¹

(ii) Persons other than the subject of the application

In the Draft Report, the Commission acknowledged that it may not always be possible or appropriate for the tribunal to notify all the prescribed people about the hearing of an application.⁷³² For example, it may be difficult for the tribunal to locate or contact a person specified on the list. If 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, giving notice to the abuser may put the person who is the subject of the application at even greater risk.

The Commission recommended that the tribunal's duty to notify persons other than the subject of the application should be accompanied by a power of dispensation. The Commission's recommendation was reflected in clause 185(4) of the Draft Bill in Chapter 13 of the Draft Report.

Only one of the submissions received by the Commission in response to the Draft Report objected to the Commission's recommendation.⁷³³ The submission argued that the tribunal should be required to notify the specified people "so far as they are practically contactable" but should have no other discretionary power to dispense with notification.

However, the Commission remains of the view that, while notification should take place in the majority of occasions, the tribunal should have sufficient flexibility to ensure the protection of the person about whom the application is made.

⁷³¹ Clause 185(2) provided that notice to the person concerned must be given in the way the tribunal considers most appropriate having regard to the person's needs.

⁷³² At 53.

⁷³³ Submission No 54.

The Commission recommends that the legislation provide that:

- . the tribunal have power to dispense with the requirement of notice to all or any of the people specified above other than the person who is the subject of the application;**
- . notice to the person who is the subject of the application must be given in the way the tribunal considers most appropriate having regard to the person's needs.**

The Commission's recommendation is implemented by clauses 212(2) and 212(4)(a) of the Draft Bill in Volume 2 of this Report.

(d) Effect of failure to give notice

(i) To the subject of the application

Because of the great significance the person's involvement in the hearing could have, the Commission is of the strong opinion that if the person has not been notified of the tribunal hearing, the hearing should be postponed until such time as the person has been notified. A hearing which proceeds without the person having been notified should be considered invalid.

However, the legislation should also provide protection for a person who acts in reliance on a tribunal order which is invalid because of failure to notify the subject of the application, provided that the person did not know or have reason to believe that the subject of the application had not been notified.

(ii) To persons other than the subject of the application

If a hearing proceeds despite a failure to notify a prescribed person other than the subject of the application and the tribunal has not dispensed with notification to the person, the Commission is of the view that the proceeding should not be invalidated by the failure to give notice.

The Commission recommends that the legislation provide that:

- . **failure to comply with the requirement to give notice to all or any of the people listed above, other than the subject of the application, does not affect the validity of a hearing or the tribunal's decision about an application;**
- . **failure to notify the person who is the subject of the application invalidates the hearing;**
- . **a person who acts in reliance on a tribunal order which is invalid because of failure to notify the person who is the subject of the application should be protected to the extent that he or she did not know or have reason to believe that the subject of the application had not been notified.**

The Commission's recommendation is implemented by clauses 212(5), 212(6) and 213 of the Draft Bill in Volume 2 of this Report.

(e) Informality

In the Draft Report, the Commission noted that proceedings of the tribunal should be as informal as possible so as to minimise the stress caused by the hearing of an application, but that, in exceptional circumstances, the tribunal may need the flexibility to adopt a more formal approach.⁷³⁴

The Commission recommended 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.⁷³⁵ The Commission's recommendation was reflected in clause 162 of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's recommendation was supported by the submissions received in response to the Draft Report. One respondent commented:⁷³⁶

⁷³⁴ At 53.

⁷³⁵ See for example *Guardianship Act 1987 (NSW)* s 55(2); *Guardianship and Administration Act 1990 (WA)* s 15; *Guardianship and Management of Property Act 1991 (ACT)* s 37(2); *Guardianship and Administration Act 1993 (SA)* s 12(3); *Guardianship and Administration Act 1995 (Tas)* s 11(2).

⁷³⁶ Submission No 25.

Informal proceedings paying due regard to natural justice ensure a balanced approach and ... allow all concerned to discuss what is undeniably a very personal matter in a less threatening environment without foregoing the right to due process.

The Commission recommends that the legislation provide that:

- **a proceeding before the tribunal must be conducted as simply and quickly as the legislative requirements and an appropriate consideration of the matters before the tribunal allow;**
- **the tribunal is not bound by the rules of evidence and may inform itself on a matter in any way it considers appropriate.**

The Commission's recommendation is implemented by clause 200 of the Draft Bill in Volume 2 of this Report.

(f) Procedural fairness

In the Draft Report, the Commission noted that, because the legal rules which govern a court hearing would not apply to the proceedings of the tribunal, the tribunal should be under a duty to act fairly.⁷³⁷

The Commission recommended that the tribunal should be required to act in accordance with the rules of natural justice and procedural fairness.⁷³⁸ The Commission's recommendation was reflected in clause 165 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report supported the Commission's recommendation.

The Commission recommends that the legislation provide that the tribunal must observe the rules of procedural fairness.

⁷³⁷ At 54.

⁷³⁸ See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 10(1)(a), 10(1)(b); *Guardianship and Administration Act 1990 (WA)* s 15; *Guardianship and Management of Property Act 1991 (ACT)* s 37(3); *Guardianship and Administration Act 1993 (SA)* s 12(3); *Guardianship and Administration Act 1995 (Tas)* s 11(2).

The Commission's recommendation is implemented by clause 201 of the Draft Bill in Volume 2 of this Report.

(g) Nature of hearing

In the Draft Report, the Commission canvassed the question of whether the proceedings of the tribunal should be open or closed.⁷³⁹ 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.⁷⁴⁰ 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.

The Commission also recognised that in making a determination about an application the tribunal should, wherever possible, obtain the views of the person who is the subject of the application. However, the Commission noted that the person may feel under considerable pressure and may be reluctant to communicate frankly in front of relatives or carers.⁷⁴¹

The Commission recommended 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.⁷⁴² The Commission further recommended that the tribunal should have power to exclude any other person from the hearing while the person's views are sought.⁷⁴³ The Commission's recommendations were reflected in clause 163 of the Draft Bill in Chapter 13 of the Draft Report.

⁷³⁹ At 70.

⁷⁴⁰ See for example *Social Security Act 1991 (Cth)* s 1271; *Veterans' Entitlements Act 1986 (Cth)* s 150.

⁷⁴¹ At 71.

⁷⁴² See for example *Guardianship and Administration Board Act 1986 (Vic)* s 7; *Guardianship Act 1987 (NSW)* s 56; *Guardianship and Administration Act 1990 (WA)* s 17, Sched 1 Part B cl 11; *Guardianship and Management of Property Act 1991 (ACT)* s 37(1); *Guardianship and Administration Act 1993 (SA)* s 14(10), 14(11); *Guardianship and Administration Act 1995 (Tas)* s 12.

⁷⁴³ See for example *Guardianship and Administration Act 1993 (SA)* s 14(11).

The submissions received by the Commission in response to the Draft Report highlighted the delicate balance between the need for scrutiny of the tribunal's operation and the need for privacy and confidentiality. The majority of submissions generally supported the Commission's recommendations. A number of submissions, however, argued strongly that proceedings of the tribunal should be closed.⁷⁴⁴ One submission commented that the requirement for the tribunal to have open hearings:⁷⁴⁵

... will deprive a vulnerable and impaired person of privacy by revealing in public intimate and private matters relating to their mental illness or incapacity, home and family life [and] financial affairs.

A joint study by the Privacy Commissioner and the Victorian Office of the Public Advocate of the operations of existing guardianship tribunals in New South Wales, Victoria and the Australian Capital Territory in relation to privacy matters also referred to the potential conflict between the principles of natural justice and privacy.⁷⁴⁶ The study pointed to a need for boards and tribunals, particularly those which work with people with a disability, to develop written guidelines and training processes for members and staff to assist in increasing awareness of privacy issues and finding an appropriate balance between privacy principles and public interest considerations. In the view of the Commission, these are administrative matters which can be adequately dealt with within the legislative framework proposed by the Commission.

The draft legislation contained in the Draft Report gave the tribunal power to:⁷⁴⁷

- . direct that a hearing or part of a hearing take place in private and give directions about the persons who may be present; and
- . give directions prohibiting or restricting the publication of information given before the tribunal.

It was the view of the Commission that these powers, together with the experience and expertise of the tribunal members in exercising the discretion to close proceedings where appropriate, would prevent an unnecessary invasion of the privacy of parties involved in tribunal hearings.

⁷⁴⁴ Submissions Nos 10, 19, 33, 53.

⁷⁴⁵ Submission No 19.

⁷⁴⁶ Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (May 1995).

⁷⁴⁷ Cl 163(2)(a), cl 163(2)(b).

After further consideration, and in the light of the submissions received, the Commission has come to the view that, rather than information given before the tribunal being available for publication unless the tribunal makes an order restricting publication, there should be a general prohibition on publication of information about a proceeding before the tribunal, unless the tribunal orders otherwise. However, the Commission believes that it would be appropriate for the tribunal to allow publication of information about a proceeding if it is satisfied that publication would be in the public interest. For example, if a proceeding reveals information of systematic abuse of people with a decision-making disability, it may be in the public interest for that information to be published so as to assist in preventing further abuse. It may also be in the public interest for information about proceedings to be published, in such a way as to protect the identity of the people involved, so as to promote public awareness about the tribunal and the operation of the legislation.

Only three submissions referred specifically to the recommendation that the tribunal be able to exclude other persons while the views of the person who is the subject of the application are sought. One of these respondents submitted that, while exclusion from proceedings could not be ruled out, it should only occur in the last resort.⁷⁴⁸ Another warned:⁷⁴⁹

Intellectually disabled people are very easily coerced by strangers - the person's ability to evaluate a question can lead to opposing answers when a question is presented in different ways. While some are intimidated by [family members] being present at all times, thus precluding a response reflecting their personal wishes, one needs to be cautious in allowing private interviews with unfamiliar people.

The Public Guardian in Western Australia, however, strongly supported the recommendation and noted that, when such a situation occurs in Western Australia, the person is usually accompanied by a member of the Public Guardian's Office.⁷⁵⁰ The draft legislation in the Draft Report would, in its present form, allow a similar procedure to be adopted. The Commission believes that the presence of an independent third party, together with the experience and expertise of the tribunal members would provide a sufficient safeguard against the potential problem identified by the former respondent.

⁷⁴⁸ Submission No 10.

⁷⁴⁹ Submission No 63.

⁷⁵⁰ Submission No 25.

One submission, from the Department of Family Services and Aboriginal and Islander Affairs⁷⁵¹ proposed that the powers given to the tribunal should be extended. The submission suggested that:⁷⁵²

The tribunal's power ... to order a private hearing and give directions as to who may be present should be extended to allow the tribunal to exclude or evict a person from the forum of the usual public hearing where that person is disrupting the hearing or presents a danger to the safety of any other person present at the hearing. The tribunal should also have the power to exclude a person from a public hearing where the mere presence of that person would represent an undue influence or intimidation of, for example, a person with an intellectual disability giving evidence.

The Commission accepts this proposal.

⁷⁵¹ Now the Department of Families, Youth and Community Care.

⁷⁵² Submission No 74.

The Commission recommends that the legislation provide that:

- . **a hearing by the tribunal of a proceeding must be open;**
- . **if the tribunal is satisfied that it is desirable to do so, the tribunal may exclude a person from an open hearing;**
- . **if the tribunal is satisfied that it is desirable to do so because of the confidential nature of any information or for any other reason, the tribunal may -**
 - (a) direct that a hearing or part of a hearing take place in private and give directions about who may be present;**
 - (b) give directions prohibiting or restricting the disclosure to some or all of the participants in a proceeding of information given before the tribunal;**
- . **a person must not publish information about a proceeding unless the tribunal, by order, permits such publication;**
- . **if the tribunal is satisfied that publication of oral or documentary evidence given at a proceeding of the tribunal is in the public interest, the tribunal may, by order, permit publication of that information;**
- . **if the tribunal is satisfied that disclosure of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit the disclosure of the person's identity.**

The Commission's recommendations are implemented by clauses 202 and 206 of the Draft Bill in Volume 2 of this Report.

(h) Joining parties

In the Draft Report, the Commission acknowledged that, 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.⁷⁵³ The Commission recommended that the tribunal should have power, for the purpose of furthering a

⁷⁵³ At 71.

particular application, 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. The Commission's recommendation was reflected by clause 166(2)(a) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

The Commission recommends that the legislation provide that the tribunal may join a person as a party to a proceeding before the tribunal.

The Commission's recommendation is implemented by clause 203(2)(a) of the Draft Bill in Volume 2 of this Report.

(i) Assistance for the tribunal

In the Draft Report, the Commission recommended that the tribunal should have power to engage people with appropriate professional expertise - for example, medical specialists or interpreters - to assist in any proceedings before the tribunal.⁷⁵⁴

The Commission's recommendation was reflected in clause 166(2)(b) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. However, the Commission is now of the view that its recommendation should not be limited to people with professional experience or expertise. There will be situations where it will be necessary for the tribunal to obtain information about the cultural and social needs of a member of a particular group within the community or to evaluate information which has been given to it about such matters. The appropriate person to provide that kind of assistance will be a person with a deep understanding of the issues involved rather than any particular professional qualification. For example, if the person who is the subject of the application is a member of an Aboriginal or Islander community the tribunal should be able to obtain the assistance of an appropriate member of that community.

⁷⁵⁴ At 73. See for example *Guardianship and Administration Act 1986 (Vic)* s 11(1); *Guardianship and Management of Property Act 1991 (ACT)* s 40; *Guardianship and Administration Act 1993 (SA)* s 13; *Guardianship and Administration Act 1995 (Tas)* s 10.

One of the submissions received by the Commission in response to the Draft Report proposed that the legislation should state that assistance for the tribunal should include the use of appropriately qualified interpreters and that the tribunal should pay the costs of such interpreters and other assistance.⁷⁵⁵

The Commission agrees that the legislation should specifically include the use of interpreters in the kind of expert assistance which the tribunal is able to obtain.

On the issue of responsibility for the cost of obtaining special assistance, it is the view of the Commission that the tribunal should bear the cost of obtaining the assistance it requires. However, the Commission considers that the question of costs may be better dealt with by regulation rather than by inclusion in the legislation.

The Commission recommends that the legislation provide that the tribunal may appoint a person with appropriate knowledge or expertise, including appropriate communication skills, to assist the tribunal in a proceeding before it.

The Commission's recommendation is implemented by clause 203(2)(b) of the Draft Bill in Volume 2 of this Report.

(j) Attendance of person at hearing

In the Draft Report, the Commission recommended that the tribunal should have power to require that the person who is the subject of the proceedings be brought before the tribunal or to visit the person if the person is unable to attend the hearing.⁷⁵⁶ The Commission also recommended that the tribunal should have power to order a medical or other examination of the person who is the subject of the application.⁷⁵⁷

The Commission's recommendations were reflected in clauses 166(2)(c), 166(2)(d) and 169 of the Draft Bill in Chapter 13 of the Draft Report.

⁷⁵⁵ Submission No 64.

⁷⁵⁶ At 73.

⁷⁵⁷ See for example *Guardianship and Management of Property Act 1991 (ACT)* s 39(1).

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

The Commission recommends that the legislation provide that the tribunal may:

- **require the person who is the subject of the proceeding to be brought before the tribunal;**
- **require the person who is the subject of the proceeding to undergo a medical or other examination;**
- **conduct a proceeding or part of a proceeding at any place in Queensland.**

The Commission's recommendations are implemented by clauses 203(2)(c) and (d) and 207 of the Draft Bill in Volume 2 of this Report.

(k) Obtaining information

(i) Tribunal's power to obtain

In the Draft Report, the Commission noted that, because of the sensitive nature of matters discussed at the hearing of an application, 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 Commission recommended that the tribunal should have power to require witnesses to attend and give evidence,⁷⁵⁸ to require the production of documents,⁷⁵⁹ and to obtain information from government departments or service organisations.⁷⁶⁰

⁷⁵⁸ *Guardianship and Administration Board Act 1986 (Vic)* s 10(7); *Guardianship Act 1987 (NSW)* ss 60(1), 61(1); *Guardianship and Administration Act 1990 (WA)* s 17, Sched 1 Part B cl 7(1)(a), cl 7(1)(d); *Guardianship and Management of Property Act 1991 (ACT)* s 38(4)(a); *Guardianship and Administration Act 1993 (SA)* s 14(1)(a), s 14(1)(e); *Guardianship and Administration Act 1995 (Tas)* ss 11(8), 11(9).

⁷⁵⁹ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 10(7); *Guardianship Act 1987 (NSW)* s 60(1); *Guardianship and Administration Act 1990 (WA)* s 17, Sched 1 Part B cl 7(1)(b); *Guardianship and Management of Property Act 1991 (ACT)* s 38(4)(b); *Guardianship and Administration Act 1993 (SA)* s 14(1)(b); *Guardianship and Administration Act 1995 (Tas)* s 11(8).

⁷⁶⁰ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 11(2); *Guardianship and Administration Act 1995 (Tas)* s 11(11).

The Commission's recommendations were reflected in clauses 198, 199 and 200(1) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations. However, the Intellectually Disabled Citizens Council expressed concern that "accessibility to the system may be reduced because of the emphasis on legalistic procedure."⁷⁶¹ The Commission remains of the view that, while proceedings of the tribunal should be conducted in as informal a manner as possible, it is still essential for the tribunal to have the legal authority necessary to enable it to obtain the information it requires in order to ensure that the interests of people with a decision-making disability are properly safeguarded. Access to the system will prove meaningless if the tribunal does not have the powers it needs to perform its role properly.

An association of medical practitioners submitted that the tribunal should be required to reimburse witnesses for their time and associated costs in attending the tribunal hearing. The respondents stated:⁷⁶²

If costs are not to be reimbursed to witnesses, the legislation is likely to be less effective, because there would be a resistance to the spirit of the tribunal.

The Commission envisages that the majority of information to be given by medical practitioners could be presented to the tribunal in the form of written reports which would be obtained by the relevant parties to proceedings. The cost of such reports would be the responsibility of the person seeking to present the information. It would also be possible for medical practitioners to give information to the tribunal by telephone. In the view of the Commission, it is only in exceptional circumstances that a medical practitioner would have to be physically present at a tribunal hearing.

However, the Commission agrees that, if the tribunal requires a witness to attend a hearing in person, the witness should be reimbursed for reasonable costs of attending.⁷⁶³

⁷⁶¹ Submission No 52.

⁷⁶² Submission No 77.

⁷⁶³ See for example *Guardianship Act 1987 (NSW)* s 63.

The Commission recommends that the legislation provide that where the tribunal requires a witness to appear in person to give evidence to the tribunal, the tribunal may make an order as to fees and expenses to be paid to the witness.

The Commission's recommendation is implemented by clause 229 of the Draft Bill in Volume 2 of this Report.

(ii) Use of information in subsequent proceedings

In the Draft Report, the Commission noted that a person may be reluctant to reveal to the tribunal information which indicates that the person may have acted wrongfully. The Commission also recognised that it is essential for the tribunal to be able to obtain information necessary to protect the interests of people at risk because of impaired decision-making capacity since, without access to such information, the tribunal 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.⁷⁶⁴

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 generally admissible against the person in subsequent court proceedings.⁷⁶⁵ 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.

The Commission expressed the view that circumstances might arise which would warrant the use against a person of evidence given to the tribunal by that person. The Commission was concerned that if, for example, 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.

⁷⁶⁴ At 74.

⁷⁶⁵ See for example *Guardianship Act 1987 (NSW)* s 61; *Guardianship and Management of Property Act 1991 (ACT)* s 50; *Guardianship and Administration Act 1995 (Tas)* s 11(7).

However, 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 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.⁷⁶⁶

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, might be held to be a wrongful or unlawful dismissal. Perhaps even more importantly than what would be, in those circumstances, an obvious injustice to the employer, is the possibility that the Industrial Commission could make an order requiring the employer to reinstate the employee.⁷⁶⁷ Such an order would expose people in the employer's care to a continuing risk of abuse.

Accordingly, the Commission favoured a limited use of incriminating evidence. It expressed the view that an employer should be entitled to use the incriminating evidence given by an employee in proceedings brought by or on behalf of⁷⁶⁸ the employee against the employer. This exception to the general prohibition on the use of incriminating evidence was, 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 was 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.

The Commission recommended that the legislation include a provision making such information inadmissible, save for certain limited exceptions, against the person in subsequent court proceedings.

The Commission's recommendation was reflected in clause 200(4) of the Draft Bill in Chapter 13 of the Draft Report.

⁷⁶⁶ See *Industrial Relations Act 1990 (Qld)* ss 295-301.

⁷⁶⁷ *Industrial Relations Act 1990 (Qld)* s 297(2).

⁷⁶⁸ For example, s 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.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

After further consideration, the Commission is of the view that there is a further circumstance in which information which might tend to incriminate a person should be admissible in evidence against the person who gave that information to the tribunal.

The information given to the tribunal could well be relevant to the person's suitability to obtain or maintain professional registration, for example, as a medical practitioner, or to obtain or maintain approval, registration or licensing as the proprietor or operator of an institution or facility involved in the care of people with an impaired decision-making capacity. The second exception recommended by the Commission in the Draft Report would not, however, be wide enough to permit the incriminating information given by the person to the tribunal to be admitted into evidence in proceedings concerning any of these matters.

It is possible that the a person's conduct could be such that it would not only justify the person's dismissal from his or her employment, but could warrant the person's professional deregistration or suspension, or revocation of any approval, registration, or licensing of that person as the proprietor or operator of an institution or facility involved in the care of people with an impaired decision-making capacity.

For example, if a medical practitioner informed the tribunal that he or she had regularly and knowingly performed special consent health care procedures without the necessary consent of the tribunal, that information might be regarded as highly relevant to that practitioner's continued registration under the *Medical Act 1939 (Qld)*. The deregistration of that medical practitioner, which might be wholly dependent on the admissibility of the incriminating information in proceedings about the person's registration, might be the only means of protecting persons with an impaired decision-making capacity, especially where the medical practitioner is self-employed, in which case there will not be an employer who is responsible for the practitioner's conduct.

The Commission is mindful that this exception would constitute a further encroachment on its principal recommendation that the incriminating information should not be admitted in subsequent criminal or civil proceedings against the person who gave it. However, the Commission is of the view that the further exception now proposed by it is based on the same rationale as, and is consistent with, the preliminary recommendation in the Draft Report which would permit the evidence to be admitted in proceedings brought by or for the person against the person's employer. In both cases, the protection of people with an impaired decision-making capacity, who are otherwise at risk of abuse or exploitation by persons who

have demonstrated their unsuitability to treat or care for them, is the paramount consideration.

For that reason, the Commission is of the view that the use of incriminating information given by a person to the tribunal should be extended to permit its admission in proceedings about the person's professional registration, or about the person's approval, registration or licensing as proprietor or operator of an institution or facility involved in the care of people with an impaired decision-making capacity.

The Commission recommends that the legislation provide that if a person gives to the tribunal information that might tend to incriminate the person, the information is not admissible in evidence against the person in a civil or criminal proceeding except in a proceeding -

- . for certain offences relating to giving false information to the tribunal;**
- . brought by or for the person against the person's employer;**
- . about the person's professional registration, or about the person's approval, registration or licensing as proprietor or operator of an institution or facility involved in the care of people with an impaired decision-making capacity.**

The Commission's recommendation is implemented by clause 230(6) of the Draft Bill in Volume 2 of this Report.

(I) Representation

In the Draft Report, the Commission expressed the view 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.⁷⁶⁹

⁷⁶⁹ At 71.

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.⁷⁷⁰ In others, the adjudicating body has a power to appoint someone to represent the person.⁷⁷¹

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 purpose of the application. Other relatives or close friends whose interests may be affected by the tribunal's decision may also have a legitimate claim to representation.

The Commission recognised the need to safeguard the rights of the person who is the subject of the application where necessary by appropriate representation. However, the Commission expressed reservations about the desirability of automatic entitlement to legal representation before the tribunal. It acknowledged arguments that an automatic right 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. After careful consideration, the Commission concluded that the interests of all participants in the tribunal's proceedings may be adequately protected if non-legal representatives were allowed to speak on their behalf.⁷⁷²

The Commission recommended 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 also recommended that the tribunal 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 and that there should be provision for the costs of such representation to be met by Legal Aid. The Commission further recommended that funding to the Legal Aid Commission should be increased to compensate for the costs of this representation.⁷⁷³ The Commission's recommendations were reflected in clauses 189, 190 and 191 of the Draft Bill in Chapter 13 of the Draft Report.

⁷⁷⁰ See for example *Protection of Personal and Property Rights Act 1988 (NZ)* s 65(1); *Adult Guardianship Act 1988 (NT)* s 13(2).

⁷⁷¹ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 12(3); *Guardianship and Administration Act 1990 (WA)* s 17, Sched 1 Part B cl 13(4); *Guardianship and Management of Property Act 1991 (ACT)* s 36(4); *Guardianship and Administration Act 1995 (Tas)* s 73(3).

⁷⁷² At 72.

⁷⁷³ At 72-73.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

However, three submissions disagreed. One respondent wished to "keep lawyers and legalistic juggling out of hearings".⁷⁷⁴ The other two respondents both argued that the interests of justice and the protection of the person who is the subject of the application require a right to legal representation before the tribunal.

The Legal Aid Office (Queensland), based on experience in representing people before the Mental Health Tribunal and the Patient Review Tribunal,⁷⁷⁵ stated:⁷⁷⁶

[In] our experience of [these tribunals], we believe that with rare exceptions the presence of lawyers has tended to assist rather than impede the process. Lawyers who regularly appear in these tribunals do not take an obstructionist or unduly adversarial approach.

The principal argument against the right to legal representation appears to be the fear that lawyers could in effect sabotage the operation of a simple, effective and accessible tribunal. We believe that in reality this is most unlikely and that the powers of the tribunal itself (including its investigative powers) could effectively prevent this.

An advocacy organisation representing people with a disability in Queensland endorsed this view.⁷⁷⁷

We think it unlikely that the tribunal would be inundated with lawyers. We have not noticed an overwhelming interest by the legal profession in people with an impaired decision-making capacity, or issues of importance to them. We think a more likely scenario is that a few lawyers within specialist agencies, such as the Legal Aid Office and Community Legal Centres, may appear with some frequency, but would soon learn what the informal processes of the tribunal expected and demanded of them.

Notwithstanding these submissions, the Commission is concerned that an automatic right to legal representation would encourage the involvement of lawyers in situations where it is not warranted and that such involvement would create the potential for a more adversarial atmosphere and add to the expense of tribunal

⁷⁷⁴ Submission No 54.

⁷⁷⁵ Tribunals established to perform functions under the *Mental Health Act 1974 (Qld)*.

⁷⁷⁶ Submission No 59.

⁷⁷⁷ Submission No 64.

proceedings. The Commission remains of the view that the interests of justice would be adequately served by giving the tribunal power to allow legal representation in an appropriate case.

The advocacy organisation expressed the view that there should also be an automatic right to non-legal representation. The Legal Aid Office commented:⁷⁷⁸

On the question of non-legal advocates, we believe that this is an area where they should be actively encouraged provided that they are competent to fulfil that function. We believe that there should be a right to representation by a non-legal advocate if requested, subject to a power in the tribunal to exclude such persons for good reason.

The assistance of a non-legal advocate may provide valuable support for the person who is the subject of the application or for other persons involved in the proceedings. For example, cultural differences may make the support and advocacy provided by such representation essential for some Aboriginal and Islander people and for some members of other ethnic communities. However, the Commission remains of the view that the tribunal should have a discretion to allow non-legal representation in the light of the circumstances of a particular case.

The submissions generally supported the Commission's recommendation concerning the tribunal's power to appoint a representative and the provision of legal aid to meet the cost of such an appointment.

⁷⁷⁸ Submission No 59.

The Commission recommends that the legislation provide that:

- . **a participant in a proceeding before the tribunal:**
 - . **may appear in person;**
 - . **may, with the tribunal's leave, be represented by a lawyer or agent;**
 - . **if, in a proceeding about a person:**
 - . **the person is not represented in the proceeding; or**
 - . **the person is represented in the proceeding by a representative whom the tribunal considers to be unsuitable to represent the person**
- the tribunal may appoint a representative to represent the person's views, wishes and interests.**

The Commission's recommendations are implemented by clauses 215, 216 and 217 of the Draft Bill in Volume 2 of this Report.

(m) Notification of decision

In the Draft Report, the Commission considered the question of the people to whom the tribunal should be required to give notice of its decision.⁷⁷⁹ The Commission was concerned to protect the privacy of the person who is the subject of the application by ensuring that notification of the decision was not distributed more widely than necessary, and also to avoid imposing an unduly onerous task on the tribunal.

The Commission recommended that the tribunal should be required to give notice of its decision to the person who is the subject of the application, those persons appearing as parties to the application and those notified of the hearing. The Commission's recommendation was reflected in clauses 211 and 213(1) of the Draft Bill in Chapter 13 of the Draft Report.

⁷⁷⁹ At 54-55.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

The Commission recommends that the legislation provide that the tribunal must, within a reasonable time after an application is heard, give a copy of its decision on an application about a matter to:

- . the person who is the subject of the application; and**
- . each participant in the proceeding; and**
- . each person given notice of the hearing of the application.**

The Commission's recommendation is implemented by clauses 246 and 248 of the Draft Bill in Volume 2 of this Report.

(n) Notification of reasons for decision

(i) Provision of written reasons

In the Draft Report, the Commission identified a number of advantages which it believed would flow from requiring the tribunal to record written reasons for its decisions in every case.⁷⁸⁰ Those advantages were:

- . contributing to the quality of tribunal decisions, by demanding that the tribunal focus on all the relevant issues which must be considered before a determination can be made;**
- . providing guidelines for members of the tribunal in the determination of future applications, thereby contributing to the consistency of tribunal decisions;**
- . promoting the accountability of the tribunal and enhancing its public acceptance;**
- . helping decision-makers understand their role;**

⁷⁸⁰ At 55.

assisting in the review process by explaining why an order was made and the expectations of the tribunal at the time of the making of the order.

The Commission acknowledged the resource implications of providing written reasons in all cases, but expressed the view that it would be consistent with United Nations principles concerning the rights of people with a decision-making disability.⁷⁸¹ The Commission concluded that the advantages of written reasons would outweigh the disadvantage to such an extent that the provision of written reasons would be more cost-effective in the long term.

The Commission recommended 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. The Commission's recommendation was reflected in clause 212 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report strongly supported the Commission's recommendation. One submission noted that a further advantage of the provision of written reasons is that, even though a tribunal hearing is conducted as sensitively and informally as possible, it is nonetheless often a traumatic experience, and key parties to the event, usually family, may not be able to clearly recall the tribunal's reasons at a later date.⁷⁸²

The Commission recommends that the legislation provide that the tribunal must, within twenty-eight days after giving its decision, prepare a written statement of reasons which refers to the evidence and includes findings on material questions of fact.

The Commission's recommendation is implemented by clause 247 of the Draft Bill in Volume 2 of this Report.

⁷⁸¹ For example, *Declaration on the Rights of Mentally Retarded Persons and Principles for the Protection of Persons with Mental Illness*.

⁷⁸² Submission No 25.

(ii) Entitlement to copy of reasons

In the Draft Report, the Commission considered the extent to which the tribunal should be required to distribute the written reasons for a tribunal decision.⁷⁸³ Because of the sensitive nature of the material which may be contained in the reasons, and the issues of privacy which may arise, the Commission was concerned that the reasons should not be circulated more widely than necessary.

The Commission recommended 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. The Commission's recommendation was reflected in clause 213(2) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation.

The Commission recommends that the legislation provide that:

- . **the tribunal must give a copy of its reasons for its decision on an application about a matter to -**
 - . **the person who is the subject of the application; and**
 - . **each participant in the proceeding;**
- . **the tribunal may also give a copy of its reasons to any other person to whom the tribunal considers appropriate.**

The Commission's recommendation is implemented by clause 248 of the Draft Bill in Volume 2 of this Report.

(o) Deferred orders

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

⁷⁸³ At 56.

decisions which their children do not have a sufficient degree of understanding to make for themselves.⁷⁸⁴

However, in the Draft Report the Commission expressed concern that, 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.⁷⁸⁵

The Commission recommended that within the six months prior to the eighteenth birthday of a person whose decision-making capacity is impaired, the tribunal should have power to make a deferred order.⁷⁸⁶ The Commission also recommended that 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 and that, in making such an order, the tribunal should be required to take into account the likelihood of any change in the person's capacity.⁷⁸⁷

The Commission's recommendations were reflected in clause 84 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

⁷⁸⁴ However, the High Court of Australia has held that there are some decisions which a parent may not make on behalf of a child. See *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*) and *P v P* (1994) 181 CLR 583.

⁷⁸⁵ At 57.

⁷⁸⁶ See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 19(1), 43(1); *Guardianship and Management of Property Act 1991 (ACT)* s 7(4).

⁷⁸⁷ At 67-68.

The Commission recommends that the legislation provide that:

- . the tribunal may make an advance appointment of a decision-maker for a person who is at least seventeen and a half years old but not yet eighteen;**
- . in making such an order the tribunal must consider whether there is a reasonable likelihood that, when the person turns eighteen, the person will have impaired decision-making capacity;**
- . the appointment begins when the person turns eighteen;**
- . the appointment ends when the person turns nineteen unless the tribunal orders that the appointment is for a longer period;**
- . the tribunal may, if it considers that the need for the appointment will continue for a period longer than one year with limited need for review, order the appointment for a period of up to three years, after which time the appointment must be reviewed.⁷⁸⁸**

The Commission's recommendations are implemented by clause 118 of the Draft Bill in Volume 2 of this Report.

(p) Emergency orders

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 the Draft Report, the Commission recognised that, 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 Commission recommended that the tribunal should have power to make short

⁷⁸⁸ See pp 211-216 of this Report for a discussion of review procedures.

term emergency orders to allow necessary measures to be taken to protect the interests of the person concerned.⁷⁸⁹ However, the Commission acknowledged the need for safeguards to ensure that 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 recommended that emergency orders should be able to be made for short periods only and not be renewable more than once before a full hearing is conducted.⁷⁹⁰

The Commission's recommendation was reflected in clause 192 of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's recommendation was generally supported by the submissions received in response to the Draft Report. A number of submissions highlighted the need for the tribunal to be able to make orders quickly in emergency situations in order to prevent physical or financial abuse or to protect a person with impaired decision-making capacity against the consequences of financial decisions.⁷⁹¹ The need for the tribunal to be accessible outside normal working hours was also stressed.

After further consideration, the Commission is now of the view that there should be no restriction on the number of times an emergency order can be renewed. One short period emergency order may be sufficient in many cases to protect the interests of the person until a full hearing can be conducted. However, there will be situations where further time is required. For example, it may be difficult to obtain a specialist medical report in the short term and the hearing could not proceed without the report. Similarly, a vital witness or the person with impaired decision-making capacity may be ill or otherwise unable to attend the hearing in the short term. Nevertheless, it may be necessary to protect the interests of the person with impaired decision-making capacity until the hearing can be conducted.

⁷⁸⁹ See for example *Intellectually Disabled Citizens Act 1985 (Qld)* ss 26(9), 32(1A); *Guardianship and Administration Board Act 1986 (Vic)* ss 33, 60; *Guardianship Act 1987 (NSW)* s 18(2); *Adult Guardianship Act 1988 (NT)* s 19; *Guardianship and Administration Act 1990 (WA)* s 65; *Guardianship and Management of Property Act 1991 (ACT)* s 67; *Guardianship and Administration Act 1993 (SA)* s 14(7); *Guardianship and Administration Act 1995 (Tas)* s 65.

⁷⁹⁰ At 66-67.

⁷⁹¹ Submissions Nos 19, 25, 71, 74.

The Commission recommends that the legislation provide that:

- . **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 usual procedural requirements;**
- . **an interim order may be renewed;**
- . **an interim order has effect for the period, not exceeding ten days, stated in the order.**

The Commission's recommendations are implemented by clause 222 of the Draft Bill in Volume 2 of this Report.

(q) Entry and removal

In the Draft Report, the Commission considered whether the tribunal should have an express legislative power to order protective action to be taken 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.⁷⁹²

The Commission acknowledged the coercive nature of a power to order entry to premises and removal of a person to another place, and expressed the view that such a power should be exercised sparingly and 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 values of cleanliness and tidiness.

However, the Commission also recognised that 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.

The Commission recommended 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:

⁷⁹² At 75-76. See for example *Guardianship and Administration Board Act 1986 (Vic)* s 27; *Guardianship Act 1987 (NSW)* ss 11, 12; *Guardianship and Administration Act 1990 (WA)* s 49; *Guardianship and Management of Property Act 1991 (ACT)* s 68; *Guardianship and Administration Act 1995 (Tas)* s 30.

- . the tribunal should have power to order entry to the premises and, if necessary, removal of the person to a place of safety;
- . the Adult Guardian⁷⁹³ 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;
- . 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;⁷⁹⁴
- . 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;
- . 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.

The Commission's recommendations were reflected in clause 210 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations. Most of the submissions which addressed the issue recognised the need to provide for speedy action to be

⁷⁹³ See Chapter 12 of this Report.

⁷⁹⁴ See for example *Guardianship and Management of Property Act 1991 (ACT)* s 68.

taken where a vulnerable person is at risk, but were concerned that adequate safeguards should exist against misuse of such a provision. One submission, for example, stressed that the power of removal should be regarded only as a last resort⁷⁹⁵ and another emphasised the importance of holding an inquiry as soon as possible into the condition and circumstances of a person who has been taken to a place of safety as a result of such an order.⁷⁹⁶

Only one submission opposed the recommendation. The respondent, a solicitor, argued.⁷⁹⁷

This is not compatible with human rights provisions expected in a democratic society with its numerous other existing protections against the possibility of abuse by unauthorised officials. The criteria for intervention must be infinitely stronger than a mere suspicion and even when reasonable grounds may exist, a warrant issued by a Supreme Court Justice authorising the Police, not a tribunal to intervene is more appropriate.

There are several points to be made in relation to this submission. First, the Commission's recommendation does not provide for intervention by "unauthorised officials". Second, the Commission's recommendation would not allow the tribunal to grant an order on "a mere suspicion". Third, the tribunal would not intervene itself, but may grant an order authorising the Adult Guardian,⁷⁹⁸ with the assistance of the Police Service if necessary, to intervene in circumstances where the tribunal was satisfied that the extent of the immediate risk warranted such action. Fourth, an approach to the Supreme Court could be made under the Court's *parens patriae* jurisdiction. However, the tribunal would offer a more accessible alternative for many people concerned with the care and welfare of people with decision-making disability.

The Commission remains of the view that its recommendations provide an appropriate balance between ensuring that emergency situations can be dealt with effectively and protecting against arbitrary and unwarranted interference.

⁷⁹⁵ Submission No 56.

⁷⁹⁶ Submission No 33.

⁷⁹⁷ Submission No 58.

⁷⁹⁸ See Chapter 12 of this Report.

The Commission recommends that the legislation provide that where the tribunal is satisfied 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;**
- . the Adult Guardian⁷⁹⁹ 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;**
- . 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;**
- . 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;**
- . after a person has been removed to a place of safety, the Adult Guardian should apply to the tribunal 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;**

⁷⁹⁹ See Chapter 12 of this Report.

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.

The Commission's recommendations are implemented by clause 245 of the Draft Bill in Volume 2 of this Report.

(r) Non-disclosure of confidential information

In the Draft Report, the Commission recognised that members of the tribunal and other people acting in the administration of the proposed legislation would come into possession of material containing sensitive information about the person who is the subject of an application and, in some cases, about other people involved in the hearing of the application.⁸⁰⁰

The Commission recommended a duty of non-disclosure of confidential information.⁸⁰¹ However, the Commission also recognised a need for the duty of non-disclosure to be displaced in certain circumstances. For example, it may be necessary for information to be disclosed to relatives, service providers or health care professionals during the course of investigating and making a determination about the decision-making needs of a person with a decision-making disability.

The Commission recommended that the duty of non-disclosure be qualified in the following situations:

- where the consent of the person has been obtained;⁸⁰²
- where disclosure is required in carrying out the functions of the tribunal;⁸⁰³

⁸⁰⁰ At 59-60.

⁸⁰¹ See for example *Intellectually Disabled Citizens Act 1985 (Qld)* s 42; *Guardianship and Administration Board Act 1986 (Vic)* s 9(1); *Guardianship Act 1987 (NSW)* s 101; *Guardianship and Administration Act 1990 (WA)* s 113; *Guardianship and Management of Property Act 1991 (ACT)* s 66(1); *Guardianship and Administration Act 1993 (SA)* s 80(1); *Guardianship and Administration Act 1995 (Tas)* s 86.

⁸⁰² See for example *Guardianship Act 1987 (NSW)* s 101(a); *Guardianship and Administration Act 1990 (WA)* s 113(1)(c); *Guardianship and Management of Property Act 1991 (ACT)* s 66(3).

⁸⁰³ See for example *Intellectually Disabled Citizens Act 1985 (Qld)* s 42(1); *Guardianship and Administration Board Act 1986 (Vic)* s 9(1); *Guardianship Act 1987 (NSW)* s 101(b); *Guardianship and Administration Act 1990 (WA)* s 113(1)(b); *Guardianship and Administration of Property Act 1991 (ACT)* s 66(2).

- . where disclosure is required by any other law or is otherwise excused by law;⁸⁰⁴
- . where disclosure involves statistical or other information that could not reasonably be expected to lead to the identification of the person to whom it relates;⁸⁰⁵ 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.

The Commission did not consider that the tribunal should be exempt from the operation of the *Freedom of Information Act 1992 (Qld)*. It argued that the personal affairs exemption⁸⁰⁶ and the exemption which applies to matter communicated in confidence⁸⁰⁷ 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*.⁸⁰⁸

The Commission's recommendations were reflected in clause 260 of the Draft Bill in Chapter 13 of the Draft Report.

⁸⁰⁴ See for example *Guardianship Act 1987 (NSW)* s 101(d), 101(e); *Guardianship and Administration Act 1990 (WA)* s 113(1)(b); *Guardianship and Administration Act 1993 (SA)* s 80(2)(a).

⁸⁰⁵ See for example *Guardianship and Administration Act 1990 (WA)* s 113(2); *Guardianship and Administration Act 1993 (SA)* s 80(2)(b).

⁸⁰⁶ *Freedom of Information Act 1992 (Qld)* s 44.

⁸⁰⁷ *Freedom of Information Act 1992 (Qld)* s 46.

⁸⁰⁸ 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 of the matter might have."

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations. However, one submission, from a group of relatives and family carers of people with mental illness, commented:⁸⁰⁹

The right to confidentiality is an issue about which people with mental illness would argue most strongly. Any disclosures should be backed by very strong reasons and should certainly require the consent of the person.

Another submission, from a group of consumers of mental health services and carers of people with mental illness, proposed that the reference to disclosure with the person's consent be qualified to provide a requirement of "informed" consent.⁸¹⁰ The respondents argued that:

This places a responsibility on the person/s seeking consent to disclosure of confidential information to ensure that the consumer is fully aware of the nature and consequences of the decision they are making.

In the view of the Commission, it is not possible or desirable to require that the person's consent be obtained in every case. If the person is unable to give consent, for example, such a requirement may disadvantage the person, or even place him or her at risk, because relevant information about the person would not be able to be disclosed to allow the tribunal's purpose to be carried out.

There may also be other circumstances where disclosure of information about a person can be justified, provided that the information does not identify the person concerned.⁸¹¹ For example, part of the process of educating the community about the role of the tribunal, the Adult Guardian and the Public Advocate may be more effectively carried out if case studies are able to be used.

⁸⁰⁹ Submission No 33.

⁸¹⁰ Submission No 53.

⁸¹¹ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 8; *Guardianship and Administration Act 1995 (Tas)* s 13.

The Commission recommends that the legislation provide that:

- . a person who gains information through involvement in the administration of the legislation must not make a record of or disclose the information unless:**
 - . the consent of the person has been obtained;**
 - . disclosure is required in carrying out the functions of the tribunal;**
 - . disclosure is required by 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 personal safety of a member of the public.**

The Commission's recommendation is implemented by clause 319 of the Draft Bill in Volume 2 of this Report.

(s) Reporting requirements

In the Draft Report, the Commission expressed the view that, as a publicly funded body, the tribunal should be required to submit an annual report to ensure that it is accountable and operating within its legislative framework. The Commission considered that the tribunal should report to a particular Minister, who would be able to make representations on behalf of the tribunal about any recommendations made in the report and to address issues which may arise from the report.

The Commission recommended that the tribunal should report to the Minister who is given administrative responsibility for the tribunal, and that the Minister should be required to table the report in Parliament.⁸¹² The Commission's recommendation was reflected in clause 214 of the Draft Bill in Chapter 13 of the Draft Report.

⁸¹² At 61.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. However, one submission, from an advocacy organisation representing people with disability in Queensland, highlighted problems which could arise if the relevant Minister does not support the tribunal's recommendations. The submission suggested that, in circumstances where a Minister wished to avoid parliamentary scrutiny of a tribunal's criticism of, for example, matters such as the Minister's handling of resourcing issues, Ministerial influence could jeopardise the tribunal's independence. The submission proposed that the legislation should require the tribunal to report directly to Parliament, rather than through a particular Minister.

On balance, however, the Commission is not persuaded that the obligation of the Minister to table the report, thus making it a public document, is not a sufficient safeguard for the independence of the tribunal. Direct reporting to Parliament would also remove the advantage of the support of a sympathetic Minister.

The Commission recommends that the legislation provide that:

- . as soon as practicable after each financial year, the tribunal must:**
 - . prepare a report of its operations during the year; and**
 - . give a copy of the report to the Minister;**
- . the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives the report.**

The Commission's recommendation is implemented by clause 277 of the Draft Bill in Volume 2 of this Report.

(t) Appointment of staff

In the Draft Report, the Commission noted that the tribunal would require the power to appoint staff to perform 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. The Commission recommended that staff should be appointed by the tribunal and should be responsible to and subject to the direction of the President of the tribunal.⁸¹³ The staff of the tribunal in

⁸¹³ At 78.

carrying out these tasks would be performing a function or exercising a power under the legislation and would therefore also be subject to the principles on which the legislation is based.⁸¹⁴

The Commission's recommendation was reflected in clause 151 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.

The Commission recommends that the legislation provide that:

- . **the registrar of the tribunal, and other staff necessary to enable the tribunal to exercise its functions, are to be appointed under the *Public Service Management and Employment Act 1988*;**
- . **the President of the tribunal has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit made up of the registrar and staff, as if -**
 - (a) **the unit were a department within the meaning of the *Public Service Management and Employment Act 1988*; and**
 - (b) **the President were the chief executive of the department.**

The Commission's recommendation is implemented by clause 276 of the Draft Bill in Volume 2 of this Report.

⁸¹⁴ See Chapter 4 of this Report.

CHAPTER 9

DUTIES AND POWERS OF DECISION-MAKERS

1. INTRODUCTION

In the Draft Report, the Commission put forward the view that the proposed legislative scheme for decision-making by and for people with a decision-making disability should address the issues of the duties to be imposed and the powers to be conferred on decision-makers.⁸¹⁵

The Commission adopted the approach in the Draft Report that the duties and powers of decision-makers appointed by the tribunal should parallel those of decision-makers chosen under an enduring power of attorney. This approach was reflected in Chapter 9 of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's final recommendations, made after further consultation with interested groups and individuals, and in the light of submissions received, are set out below.

The Commission's recommendations apply to all decision-makers, whether appointed by the tribunal or chosen under an enduring power of attorney.

2. GENERAL FUNCTIONS AND POWERS

(a) To comply with principles

In the Draft Report, the Commission recommended that the primary duty of a decision-maker should be to observe the principles embodied in the legislation.⁸¹⁶ The Commission's recommendation was reflected in clause 125 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report were generally in favour of the Commission's recommendation.

The Commission recommends that the legislation provide that a decision-maker must comply with the principles set out in the legislation.

⁸¹⁵ Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

⁸¹⁶ At 80, 114. See Chapter 4 of this Report for a discussion of the legislative principles.

The Commission's recommendation is implemented by clauses 21 and 170 of the Draft Bill in Volume 2 of this Report.

(b) To act honestly and with care

In the Draft Report, the Commission recommended that decision-makers 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.⁸¹⁷

In making this recommendation, the Commission rejected the idea that a decision-maker should be required to act in accordance with an objectively reasonable standard of care. The Commission's approach was influenced by the widely varying circumstances in which the assistance of decision-makers will be required, and by the range of qualifications and experience which individual decision-makers will bring to the task.

For example, a married couple may, for the entire duration of their lengthy marriage, have made a joint decision to keep 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 other becomes decision-maker, the decision-maker may leave the longstanding jointly decided arrangements in place. It seems unduly harsh to the Commission that, in such a situation, the decision-maker should incur legal liability for not acting as a reasonably prudent investor might have acted in the circumstances. On the other hand, if the decision-maker were a professional financial manager, a higher standard of expertise would be expected, 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".⁸¹⁸

The Commission's recommendation was reflected in clause 126 of the Draft Bill in Chapter 13 of the Draft Report.

Five of the submissions received by the Commission in response to the Draft Report specifically addressed the issue of the standard of care which should be required of a decision-maker.

⁸¹⁷ At 82, 115.

⁸¹⁸ J G Fleming, *The Law of Torts* (8th ed, 1992) 108.

Three submissions supported the Commission's approach.⁸¹⁹ One of these submissions, from the Public Guardian in Western Australia, commented that:⁸²⁰

The requirement of decision-makers to act under a statutory duty of ... care reasonable for the person's experience and expertise is an important statement of principle but also recognises the varying capacities of all people to deal with certain situations.

However, two submissions opposed the Commission's recommendation.⁸²¹ One submission, from the Trustee Corporations Association of Australia Queensland Council, expressed strong disagreement "with a standard of care which is referenced to the appointee's own experience and expertise", and argued that the standard of care should be consistent for all decision-makers.⁸²² The respondent advocated that, particularly in relation to financial decisions, the "prudent person" standard should apply. The submission explained that:

The prudent person standard may be described as a standard which requires the decision-maker to exercise a degree of care, skill and diligence which an ordinary prudent person of business would apply in managing the affairs of others.

The Commission is not persuaded that it is appropriate to measure the performance of a private decision-maker against the performance that would be expected of a "person of business". The Commission believes that the test proposed would provide sufficient flexibility to allow for committed but less experienced decision-makers whilst demanding a higher standard of care and skill from a decision-maker who is exercising professional judgment. The Commission also believes that a uniform standard should apply to all kinds of decisions and that the "person of business" test would not lend itself to decisions relating to the personal care and welfare of a person whose decision-making capacity is impaired.

The Commission recommends that the legislation provide that a decision-maker who may make a decision for a person with impaired decision-making capacity must exercise the power honestly and with the degree of care that is reasonable for a person having the decision-maker's experience and expertise.

⁸¹⁹ Submissions Nos 25, 64, 73.

⁸²⁰ Submission No 25.

⁸²¹ Submissions Nos 48, 56.

⁸²² Submission No 48.

The Commission's recommendation is implemented by clause 171 of the Draft Bill in Volume 2 of this Report.

(c) To act as required by the terms of the power

In the Draft Report, the Commission recommended that the tribunal should have power to grant to a decision-maker authority to make specified kinds of decisions for such time as the tribunal considers necessary.⁸²³ The Commission also recommended that a person who makes an enduring power of attorney should be able to specify the powers to be granted to a decision-maker, and to give instructions about how the decision-maker's authority is to be exercised.⁸²⁴

It follows from these recommendations that a decision-maker should be obliged, when exercising decision-making power, to exercise it as required by the terms of the power. This approach was reflected in clause 127 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of this approach.

The Commission recommends that the legislation provide that a decision-maker who may make a decision for a person with impaired decision-making capacity must, when exercising the power, exercise it as required by the terms of the power.

The Commission's recommendation is implemented by clause 172 of the Draft Bill in Volume 2 of this Report.

(d) To seek advice and directions

Circumstances may arise in which a decision-maker needs advice about the terms of the decision-making authority granted by a tribunal order or an enduring power of attorney. A decision-maker may also need advice about the manner in which a decision-making power should be exercised. For example, a decision-maker may wish to seek clarification as to whether an intended transaction involves a conflict of interest.

⁸²³ At 63.

⁸²⁴ At 100.

In the Draft Report, the Commission recommended that in such a situation, a decision-maker should be able to approach the tribunal for advice and directions, and that a decision-maker who acts in accordance with the advice or a direction of the tribunal should be taken to have acted properly. The Commission further recommended that it should be an offence for a decision-maker, without reasonable excuse, to contravene a direction of the tribunal about the exercise of the decision-maker's power or the performance of the decision-maker's duties.⁸²⁵ The Commission's recommendations were reflected in clauses 51, 173 and 207 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendations.

The Commission recommends that the legislation provide that:

- . a decision-maker may apply to the tribunal for advice or directions about the exercise of a power or the interpretation of its terms;
- . a decision-maker who acts on the tribunal's advice or directions is to be taken to have complied with the legislation unless the decision-maker knowingly gave the tribunal false or misleading information relevant to the tribunal's advice or directions;
- . if the tribunal gives directions to a decision-maker the decision-maker must not contravene them unless the decision-maker has a reasonable excuse.

The Commission's recommendations are implemented by clauses 209 and 232 of the Draft Bill in Volume 2 of this Report.

(e) To consult with other decision-makers

In the Draft Report, the Commission recommended that, if different people have power to make different kinds of decisions for a person with impaired decision-making capacity, the decision-makers should be required to consult with each other regularly to ensure that the person's interests are not jeopardised in any way

⁸²⁵ At 89. See also *Guardianship and Administration Board Act 1986 (Vic)* ss 30(1), 55(1); *Guardianship Act 1987 (NSW)* ss 26, 28, 30; *Protection of Personal and Property Rights Act 1988 (NZ)* ss 18(6), 43(3); *Guardianship and Administration Act 1990 (WA)* ss 47(1), 74(1); *Guardianship and Management of Property Act 1991 (ACT)* ss 16, 18; *Guardianship and Administration Act 1993 (SA)* s 74; *Guardianship and Administration Act 1995 (Tas)* ss 31, 61, 78.

by lack of communication between the decision-makers.⁸²⁶ The Commission's recommendation was reflected in clause 128 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation.

However, one submission raised a further issue in relation to the obligations of decision-makers appointed to make different kinds of decisions for a person whose decision-making capacity is impaired.⁸²⁷ The respondent, an advocacy organisation for people with disability, noted the Commission's recommendation that decision-makers appointed jointly should be required to make an application to the tribunal for directions when they are unable to act unanimously.⁸²⁸ The submission pointed out that disagreement between different decision-makers could cause similar problems. For example, a decision-maker with authority to decide where a person should live may believe that a move to a residential care facility would be against the person's interests, and that the person should remain at home with in-house support. Another decision-maker with authority over financial matters may not be prepared to authorise the expenditure for that support because it is estimated to be more expensive. The submission proposed that, if decision-makers for different kinds of decisions cannot resolve the situation, they should be able to apply to the tribunal to ensure that the interests of the person with impaired decision-making capacity are not put at risk.

The Commission agrees with this approach.

The Commission recommends that the legislation provide that:

- **a decision-maker who may make a decision for a person whose decision-making capacity is impaired must consult on a regular basis with another decision-maker who may make a decision for the person to ensure that the person's interests are not prejudiced by a breakdown in communication between different decision-makers; and**
- **if decision-makers for different kinds of decisions are unable to agree, one or more of the decision-makers may apply to the tribunal for directions.**

⁸²⁶ At 82. See for example *Protection of Personal and Property Rights Act 1988 (NZ)* ss 18(5), 43(6). The appointment of different decision-makers for different purposes is discussed at pp 207-208 of this Report.

⁸²⁷ Submission No 64.

⁸²⁸ At 82.

The Commission's recommendation is implemented by clause 174 of the Draft Bill in Volume 2 of this Report.

(f) To act unanimously if appointed as joint decision-makers

In the Draft Report, the Commission recommended that where joint decision-makers are appointed, they should be required to act unanimously or, where this is not possible, to apply to the tribunal for directions.⁸²⁹ The Commission's recommendation was reflected in clause 129 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation.

The Commission recommends that the legislation provide that:

- . decision-makers who may make a decision jointly must exercise the power unanimously; and**
- . if it is impracticable or impossible to exercise the power unanimously, one or more of the joint decision-makers may apply to the tribunal for directions.**

The Commission's recommendation is implemented by clause 175 of the Draft Bill in Volume 2 of this Report.

(g) To withdraw as decision-maker

Circumstances may arise in which a decision-maker is no longer willing or able to act. In the Draft Report, the Commission acknowledged that it would be pointless to insist that the appointment of an unwilling decision-maker continue. However, it recognised the need to ensure to the greatest extent possible that a person with impaired decision-making capacity is not disadvantaged by the decision-maker's withdrawal.⁸³⁰

⁸²⁹ At 82. See for example *Guardianship and Administration Act 1990 (WA)* s 53.

⁸³⁰ At 120.

At present, an attorney appointed under an enduring power of attorney must apply to the Supreme Court for leave to withdraw. If the Court grants the application the enduring power of attorney is revoked.⁸³¹ The Court may then appoint a new attorney.⁸³²

The intention of these provisions is obviously to try to ensure continuity of decision-making for the person who made the enduring power of attorney. However, the Commission questions whether it is fair, or even realistic, to expect a decision-maker to bear the expense of a Supreme Court application to secure release from an obligation, perhaps entered into many years previously, which he or she is no longer able or prepared to undertake.

In the Draft Report, the Commission recommended that power to grant a chosen decision-maker approval to withdraw should be transferred from the Supreme Court to the proposed tribunal.⁸³³ The Commission's recommendation was reflected in clause 140 of the Draft Bill in Chapter 13 of the Draft Report, which applied to decision-makers appointed by the tribunal as well as to decision-makers chosen under an enduring power of attorney.

The Commission also recommended that, if a person who made an enduring power of attorney still has capacity to make a decision included in the power, a chosen decision-maker for that decision should be able to withdraw by giving notice to the person.⁸³⁴ The Commission's recommendation was reflected in clause 140(3) of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendations.

The Commission has recommended in this Report that the proposed legislation should confer concurrent jurisdiction on the Supreme Court and the tribunal in relation to enduring powers of attorney.⁸³⁵

⁸³¹ *Property Law Act 1974 (Qld) s 175C(2)(a).*

⁸³² *Property Law Act 1974 (Qld) s 175G(3)(a).*

⁸³³ At 120.

⁸³⁴ At 120.

⁸³⁵ See pp 87-89 of this Report and cl 312 of the Draft Bill in Volume 2 of this Report.

The Commission recommends that the legislation provide that:

- . a decision-maker may, with the tribunal's leave, withdraw as decision-maker for a decision or type of decision the decision-maker has been given power to make;**
- . if the tribunal gives leave for a decision-maker to withdraw, the tribunal may appoint a replacement decision-maker;**
- . if a person 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 giving written notice to the person.**

The Commission's recommendations are implemented by clause 194 of the Draft Bill in Volume 2 of this Report.

3. FUNCTIONS AND POWERS FOR FINANCIAL DECISIONS

In the Draft Report, the Commission recognised the need for additional safeguards to protect the financial security of a person with impaired decision-making capacity. However, the Commission also acknowledged the 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.⁸³⁶ In its recommendations, the Commission attempted to establish a balance between the dual objectives of providing adequate protection whilst at the same time enabling conscientious decision-makers to carry out their task with as little interference as possible.

The Commission's final recommendations, made after further consultation with interested groups and individuals and in the light of submissions received, are set out below.

(a) To present management plan

In the Draft Report, the Commission recommended that, if required to do so by the tribunal, a financial decision-maker should be obliged to present to the tribunal or to a person nominated by the tribunal a plan of management to be approved by

⁸³⁶ At 82.

the tribunal or its nominee.⁸³⁷ The Commission's recommendation was reflected in clause 131 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation. The Public Guardian in Western Australia commented:⁸³⁸

The requirement that a proposed [financial decision-maker] present a plan of management ... forces [financial decision-makers] to squarely confront the requirements of the task. Whilst we are strong supporters of families being enabled to take on this role, it is our experience ... that they rarely understand the breadth, scope and accountability of the role. If proposed [financial decision-makers] are required to provide a plan, it not only strengthens the decision-making process but allows for family and friends to determine whether they are able to undertake this role or to arrange for another party ... to undertake it for them.

Two submissions, from the Queensland Law Society Inc and from an organisation of consumers of mental health services and carers of people with mental illness, proposed that a plan of management should be required in all cases.⁸³⁹ The Commission shares the concerns of these respondents that financial decision-makers should be accountable for their actions, and that there should be adequate protection for people who are prevented by a decision-making disability from managing their own affairs. However, the Commission is not persuaded that submission of a plan of management would be warranted in every case. The Commission remains of the view that the preferable approach is to allow the tribunal to assess the circumstances of each individual situation, and to give it a discretionary power to order presentation of a plan where it considers necessary, or to rely on other accountability mechanisms where appropriate.

The Commission recommends that the legislation provide that a decision-maker who is authorised to make financial decisions must, if ordered by the tribunal, present a plan of management to the tribunal or its nominee for approval.

⁸³⁷ At 82, 117.

⁸³⁸ Submission No 25.

⁸³⁹ Submissions Nos 49, 53.

The Commission's recommendation is implemented by clause 182 of the Draft Bill in Volume 2 of this Report.

(b) To keep records

In the Draft Report, the Commission considered the nature of reporting requirements which should be imposed on financial decision-makers. The Commission considered the possibility of imposing on decision-makers a statutory requirement to file, on an annual basis⁸⁴⁰ or as directed by the tribunal,⁸⁴¹ with the Public Trustee⁸⁴² or with the tribunal,⁸⁴³ a statement of accounts in a prescribed form.

The Commission recommended that a financial decision-maker be required, if ordered to do so by the tribunal, 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 considered necessary. The Commission also recommended that the tribunal should have power to require the accounts to be audited.⁸⁴⁴ The Commission's recommendations were reflected by clauses 132 and 209 of the Draft Bill in Chapter 13 of the Draft Report.

The Commission's recommendations were based on the need to find a balance between providing a mechanism to ensure the accountability of financial decision-makers and imposing unduly demanding account-keeping procedures in situations where they were unwarranted.

The difficulty of achieving this objective is demonstrated by the diverging views expressed in two of the submissions received by the Commission in response to the Draft Report.

⁸⁴⁰ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 58(1); *Protection of Personal and Property Rights Act 1988 (NZ)* s 45(2)(b).

⁸⁴¹ See for example *Guardianship and Administration Act 1990 (WA)* s 80(1); *Guardianship and Administration Act 1993 (SA)* s 44(1); *Guardianship and Administration Act 1995 (Tas)* s 63(1).

⁸⁴² See for example *Guardianship and Administration Board Act 1986 (Vic)* s 58(1); *Guardianship and Administration Act 1993 (SA)* s 44(1).

⁸⁴³ See for example *Guardianship and Administration Act 1990 (WA)* s 80(1); *Guardianship and Administration Act 1995 (Tas)* s 63(1).

⁸⁴⁴ At 83, 117.

The Department of Family Services and Aboriginal and Islander Affairs⁸⁴⁵ considered that the requirements proposed by the Commission were too great.⁸⁴⁶ The respondent commented:

The requirement for financial managers to keep records sufficient to satisfy an audit will be a huge disincentive to many relatives and carers undertaking this role.

In relation to an elderly married couple where one spouse has lost decision-making capacity and the other spouse is making financial decisions on his or her behalf, the submission stated:

... the other will be required to keep receipts and records of all expenditure of their spouse's money. Their spouse's lifetime of trust in their partner will mean nothing to an auditor ... The decision-maker will have to separate their bank accounts and be mindful at all times of whose money is being used. Allocating the grocery bill might be a difficult task. Receipts for maintenance of joint assets such as the house and car would have to be kept and apportioned. There are questions of whose account to use when writing cheques for joint expenses ...

To an accountant these questions are easily answered but to an older person the requirements imposed upon them to alter their lifetime routines at a time when their spouse is ill would probably seem insurmountable and unfair.

On the other hand, an organisation of consumers of mental health services and of carers of people with mental illness considered that the requirements proposed by the Commission were not sufficiently strict.⁸⁴⁷ The respondents recommended that:⁸⁴⁸

... all appointed decision-makers be required to maintain financial records with substantiating documentation and that these records must be forwarded on a regular basis to the tribunal. These records must be audited and checked for irregularities, inconsistencies and unusual expenditure.

⁸⁴⁵ Now the Department of Families, Youth and Community Care.

⁸⁴⁶ Submission No 74.

⁸⁴⁷ Submissions Nos 53, 56.

⁸⁴⁸ Submission No 53.

The respondent also argued that the requirement to report on this basis would provide a safeguard for honest financial decision-makers in that it would lessen the possibility of unjustifiable accusations being made against them.

The other submissions received by the Commission generally supported the Commission's recommendations.

After further consideration, the Commission is not persuaded that a full audit would always be necessary, or that it should always be necessary for a decision-maker to keep sufficient records to satisfy an audit. It shares the concern of the first respondent that such a requirement would impose an unreasonable and unnecessary burden on caring relatives in many instances. It is also concerned that mandatory auditing procedures would divert the tribunal's resources from areas of greater need. In the view of the Commission, the extent of record keeping required will vary from case to case, depending on the nature and extent of the property involved and the kinds of decisions which need to be made.

In relation to enduring powers of attorney, the present legislation requires the holder of an enduring power of attorney to "keep and preserve accurate records and accounts of all dealings and transactions under the power".⁸⁴⁹ For the reasons already outlined, the Commission is now persuaded that, in many situations, such a requirement would not be necessary to provide adequate protection for the person whose decision-making capacity is impaired and would be unreasonably demanding on the decision-maker.

Enduring powers of attorney are essentially private arrangements. It is the view of the Commission that they should remain so unless it appears that the decision-maker is not acting in the best interests of the person who made the power.

However, this does not mean that a decision-maker under an enduring power of attorney should be unaccountable. In the view of the Commission, a chosen decision-maker should be required to keep such documentation as is reasonable in the circumstances. This would mean, for example, that it would not be necessary to keep records of ordinary day to day household expenses which were reasonable for the income and lifestyle of the person with impaired decision-making capacity, but that records should be kept of all dealings involving assets of significant value in relation to the person's estate and all items of major expenditure.

Where a decision-maker is appointed by the tribunal, the decision-maker should also have to keep such records as are reasonable in the circumstances.

In addition, the legislation should enable the tribunal, in its discretion, to require presentation of such explanatory documentation at such intervals as the tribunal

⁸⁴⁹ *Property Law Act 1974 (Qld)* s 175D.

considers appropriate. For example, the tribunal may wish to require a decision-maker to file in the tribunal a summary of receipts and expenditure, or to file more detailed accounts of transactions and dealings or to present accounts to be audited by an auditor appointed by the tribunal.

The Commission recommends that the legislation provide that:

- . a decision-maker who may make a financial decision for a person with impaired decision-making capacity for the decision must keep such records as are reasonable in the circumstances;**
- . the tribunal have power to require a decision-maker to:**
 - . produce reasonable records of dealings and transactions involving the person's property;**
 - . keep such records as the tribunal considers appropriate;**
 - . produce those records for inspection at a time and in a manner as determined by the tribunal.**

The Commission's recommendation is implemented by clause 183 of the Draft Bill in Volume 2 of this Report.

(c) To keep property separate

Under the existing enduring power of attorney legislation in Queensland, a person who is authorised to make decisions about the property of the person who made the power must keep his or her own property separate from the property of the person who made the power, unless the property is jointly owned by the decision-maker and the person who made the power.⁸⁵⁰

In the Draft Report, the Commission recommended that a similar obligation should be imposed on a decision-maker appointed by the tribunal.⁸⁵¹ The Commission's recommendation was reflected in clause 133 of the Draft Bill in Chapter 13 of the Draft Report.

⁸⁵⁰ *Property Law Act 1974 (Qld) s 175E(1)(b).*

⁸⁵¹ At 83. See *Guardianship and Management of Property Act 1991 (ACT) s 14(4)(b).*

There was general acceptance of the Commission's recommendation in the submissions received by the Commission in response to the Draft Report.

A further question may arise in relation to the requirement that a financial decision-maker keep his or her own property separate from the property of the person with impaired decision-making capacity.

Under the existing enduring power of attorney legislation and under the scheme proposed by the Commission in the Draft Report, the exception to the duty to keep the decision-maker's property separate from the property of the person with impaired decision-making capacity applies only to property which is owned jointly by the decision-maker and the person.

However, there are likely to be cases where property which, in strict legal terms, is the property of the person with impaired decision-making capacity only, has customarily been treated as the property of both the person and the decision-maker. For example, where two people have been in a longstanding relationship in which one partner was the sole income earner, that partner's income may always have been banked in a joint account, treated as joint property and used for the benefit of both partners. After the income earner retired, income may have continued to be received on a periodic basis from investments or from a superannuation scheme and banked, as previously, in a joint account and treated as belonging to both. The income earner may subsequently lose decision-making capacity and the partner become decision-maker, either under an enduring power of attorney or by appointment.

Under the existing legislation and under the proposals put forward by the Commission in the Draft Report, it would be necessary for the decision-maker to keep any future income separate from his or her own property even though, in the past, that income had been treated as belonging to them both. The need to keep it separate could cause significant disruption to existing family arrangements.

The Commission considered whether the exception to the requirement for a decision-maker to keep his or her own property separate from the property of the person with impaired decision-making capacity should be extended to include property which, while legally the property of the person whose capacity is impaired, has customarily been treated as joint property. There are clearly situations where this extension would be justified.

However, the reason for the requirement of separation is to prevent a decision-maker from misusing the property of a person made vulnerable by impaired decision-making capacity. The wider the exception to the requirement, the greater the potential for abuse. In the view of the Commission, the increased risk outweighs any inconvenience arising from the need to keep the property separate. The Commission is therefore not persuaded that the exception should be extended at this stage.

The Commission recommends that the legislation provide that a decision-maker who may make a financial decision must keep the decision-maker's property separate from the property of the person whose decision-making capacity is impaired, unless the property is owned jointly by the person and the decision-maker.

The Commission's recommendation is implemented by clause 184 of the Draft Bill in Volume 2 of this Report.

(d) To avoid conflict transaction

The existing enduring power of attorney legislation in Queensland provides that, unless expressly authorised by the terms of the power, a decision-maker appointed under an enduring power of attorney must not use the power to enter into any transaction where the interests and duty of the decision-maker in relation to the transaction could conflict with the interests of the person who made the power.⁸⁵²

In the Draft Report, the Commission recommended that an obligation to avoid transactions which could involve a conflict of interest should also apply to decision-makers appointed by the tribunal, unless the transactions were authorised by the tribunal.⁸⁵³

The Commission further expressed the view that the existing provision required modification in two ways.⁸⁵⁴

First, the Commission argued that the scope of the provision may be broader than intended. It noted that, in many instances, a financial decision-maker for a person with impaired decision-making capacity would be a friend or relative who may be a beneficiary under the person's will or entitled to a share of the person's estate if the person died intestate. In such a case, almost every transaction which involved spending the person's money could create a conflict of interest because it would result in a depletion of the available estate. The Commission recommended that the legislation provide that the fact that a decision-maker for a person with impaired decision-making capacity might, on the person's death, be a beneficiary of the person's estate does not, of itself, create a conflict of interest.

⁸⁵² *Property Law Act 1974 (Qld) s 175E(1)(a).*

⁸⁵³ At 82-83. See also *Guardianship and Management of Property Act 1991 (ACT) s 14(4)(a).*

⁸⁵⁴ At 115-116.

Second, the Commission proposed that the prohibition should extend to transactions which could involve a conflict between the interests of the person with impaired decision-making capacity and the interests of a relative or close associate of the decision-maker. The Commission noted that, for example, while the existing provision would prevent a decision-maker from investing the person's money in a business venture owned by the decision-maker, it may allow the decision-maker to invest the person's money in a business owned by the decision-maker's spouse.

The Commission's recommendations were reflected in clause 135 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendations.

However, two divergent points of view emerged as to the extent to which a decision-maker should be authorised to enter into a transaction which may involve a conflict of interest.

One submission⁸⁵⁵ noted that clause 135 of the Draft Bill provided that a decision-maker may enter into a transaction which may involve a conflict of interest if:

- (b) *the decision-maker obtains the tribunal's consent; or*
- (c) *for a chosen decision-maker under an enduring power of attorney - the enduring power of attorney includes the consent (of the person who made the enduring power of attorney) to the conflict transaction.*

This submission, from a firm of solicitors, commented that the provision appeared to be limited to consent to a specifically contemplated transaction. It argued that:

Particularly in the case where the decision-maker is a spouse or co-owner there is a high probability of potential conflict, yet it is difficult to foresee in advance what particular conflict transactions may arise.

Another solicitor enclosed a standard precedent for an enduring power of attorney containing an optional clause conferring general authority on the decision-maker appointed under the power to enter into conflict transactions.⁸⁵⁶

On the other hand, the Trustee Corporations Association of Australia Queensland Council argued that any authorisation to enter transactions involving a conflict of

⁸⁵⁵ Submission No 31.

⁸⁵⁶ Submission No 1.

interest should be referenced to specific assets.⁸⁵⁷

It is the view of the Commission that a blanket authority for a decision-maker to enter into conflict transactions is incompatible with the decision-maker's fiduciary duty to the person for whom he or she is acting. The Commission acknowledges, however, that allowing a decision-maker authority to enter only a single specified transaction may be too limiting in a situation which involves a class of transactions or a series of related transactions.

⁸⁵⁷ Submission No 48.

The Commission recommends that the legislation provide that:

- . a decision-maker who may make a financial decision for a person with impaired decision-making capacity must not enter into a conflict transaction;**
- . a "conflict transaction" is a transaction in which there is or could be conflict between:**
 - . the duty of the decision-maker towards the person with impaired decision-making capacity and the interests of the decision-maker or a relation, business associate or close friend of the decision-maker in connection with the transaction; or**
 - . the duty of the decision-maker towards the person with impaired decision-making capacity and any duty to some other person which the transaction would impose on the decision-maker in relation to the transaction;**
- . a decision-maker may enter into a specific conflict transaction or a class of conflict transactions or a series of related conflict transactions if:**
 - . the decision-maker obtains the tribunal's consent; or**
 - . for a chosen decision-maker empowered by an enduring power of attorney - the enduring power of attorney includes the adult's consent to the transaction or to the class or series of transactions;**
- . the fact that a person is related to the person with impaired decision-making capacity does not, in itself, mean that their interests could conflict;**
- . the fact that a person may be a beneficiary of the estate of the person with impaired decision-making capacity does not, in itself, mean that their interests could conflict.**

The Commission's recommendations are implemented by clauses 188 and 189 of the Draft Bill in Volume 2 of this Report.

(e) To make gifts

In the Draft Report, the Commission acknowledged that, although a decision-maker for a person with impaired decision-making capacity is under a general obligation to act in the interests of that person, there may be times when the decision-maker is called upon to decide whether to act to benefit some other person.

The Commission recognised that giving gifts, for example, is a normal and important incident of family life to mark anniversaries, special personal occasions, particular seasons or religious celebrations. Many people also make regular gifts to charity.

The Commission noted that a statutory prohibition on the power of a decision-maker to make gifts or donations on behalf of a person with impaired decision-making capacity may prevent that person from engaging in a highly valued activity. However, the Commission expressed the view that, in order to protect a person with impaired decision-making capacity, 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, and that the extent to which a decision-maker may act to benefit another person should be spelt out in legislation.⁸⁵⁸

The Commission recommended 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.⁸⁵⁹ The Commission's recommendation was reflected in clause 136 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation. Two submissions specifically welcomed the Commission's approach, stating that it would provide greater flexibility⁸⁶⁰ and describing it as a "reasonable approach to a difficult and often abused aspect of informal decisionmaking",⁸⁶¹ while two

⁸⁵⁸ At 88, 116.

⁸⁵⁹ At 88.

⁸⁶⁰ Submission No 25.

⁸⁶¹ Submission No 71.

other submissions stressed the need for decision-makers to be accountable for acts to benefit another person.⁸⁶²

The Commission recommends that the legislation provide that a decision-maker who may make a financial decision for a person whose decision-making capacity is impaired may give away the person's property only if:

- . the gift is to a relation or close friend of the person whom the person might reasonably have been expected to benefit and is of a seasonal nature or because of a special event (including, for example, a birth or marriage); or**
- . the gift is in the nature of a donation that the person had previously made or might reasonably be expected to make;**

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the person's financial circumstances.

The Commission's recommendation is implemented by clause 190 of the Draft Bill in Volume 2 of this Report.

(f) To maintain dependants

In the Draft Report, the Commission recognised that the extent to which a decision-maker is authorised to benefit a person other than the person with impaired decision-making capacity should include power to act in the interests of the person's dependants.

The Commission recommended that the extent to which a decision-maker may act to benefit another person should be spelt out in the legislation. The Commission also recommended that the powers which may be given to a financial decision-maker should include paying maintenance and accommodation expenses for the dependants of a person whose decision-making capacity is impaired.⁸⁶³ The Commission's recommendations were reflected in clauses 23(2)(a) and 137 of the Draft Bill in Chapter 13 of the Draft Report.

⁸⁶² Submissions Nos 54, 56.

⁸⁶³ At 87, 116.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendations.

The Public Trustee of Queensland noted that under the existing legislation, the Public Trustee is bound to fulfil the financial obligations of a person whose affairs are being managed, and that this would include, first and foremost, the person's obligations to a spouse.⁸⁶⁴ The submission commented that the scheme proposed by the Commission did not specifically require a decision-maker to address this issue when making financial management decisions.

Because of the wide variety of circumstances which may exist, the Commission is not persuaded that there should be an unqualified duty on a decision-maker to maintain dependants of a person with impaired decision-making capacity. Such a duty may be inappropriate, for example, in a situation where the dependant had been abusive towards the person whose capacity is impaired. However, the Commission acknowledges that, where the person whose capacity is impaired would have been under a legal duty to provide for the maintenance of another person if not for his or her impaired capacity,⁸⁶⁵ the decision-maker should be under the same duty.

The Commission recommends that the legislation provide that a financial decision-maker must maintain any person whom the person with impaired decision-making capacity would have had a legal duty to maintain if his or her decision-making capacity had not been impaired.

The Commission's recommendation is implemented by clause 191 of the Draft Bill in Volume 2 of this Report.

4. ADDITIONAL DUTIES

Some of the submissions received by the Commission in response to the Draft Report proposed additional duties which had not been considered by the Commission in the Draft Report.

⁸⁶⁴ Submission No 71.

⁸⁶⁵ For example, s 285 of the Criminal Code imposes a duty to provide the necessities of life in certain circumstances.

(a) To consult with relatives

The Intellectually Disabled Citizens Council proposed that decision-makers should have to take reasonable steps to consult with relatives and relevant professionals if necessary.⁸⁶⁶ The respondents referred to the existing requirement that the Legal Friend take all reasonable steps to consult with and take into account the views of relatives who are providing ongoing care and, for the purposes of making an informed decision, consult with care providers, appropriate professional persons and relatives with a proper interest in the wellbeing of the person whose decision-making capacity is impaired.⁸⁶⁷

Although the Commission made no specific recommendation on this issue in the Draft Report, the Commission recommended that anyone exercising a power or performing a function under the legislation should be required to comply with the principles set out in the legislation. One of these principles was that the importance of maintaining a person's existing supportive relationships be taken into account.⁸⁶⁸

The provision referred to by the respondents is necessary in the present legislative scheme where there is little opportunity for relatives to become decision-makers. However, under the scheme proposed by the Commission, statutory decision-makers would be appointed only as a last resort where it would not be possible or appropriate for a family member to act. In such cases, consultation with relatives, even if possible, may not always be desirable in the interests of the person whose decision-making capacity is impaired. In the view of the Commission the preferable approach is to maintain the flexibility allowed by the Draft Report.

(b) To provide financial information

Two submissions raised the question of access by a person with a decision-making disability to information about the person's financial situation. One submission, from the Department of Education, proposed that a financial decision-maker should be required to keep the person with a decision-making disability as informed as possible about the person's financial status.⁸⁶⁹ Another, from an

⁸⁶⁶ Submission No 52.

⁸⁶⁷ *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(5). See Chapter 2 of this Report for a discussion of the role of the Legal Friend.

⁸⁶⁸ At 10.

⁸⁶⁹ Submission No 69.

organisation of consumers of mental health services and carers of mentally ill people, proposed that access to financial records kept by a financial decision-maker must be available to the person concerned.⁸⁷⁰

The Commission agrees that the person should be entitled to information about his or her financial situation and that, if the decision-maker does not provide the information sought, the person or someone else on his or her behalf should be able to apply to the tribunal for an order that the information be provided.

The Commission recommends that the legislation provide that, if a decision-maker has power to make a financial decision for a person whose decision-making capacity is impaired, the person or another interested person may apply to the tribunal for an order that the decision-maker provide to the person, in a manner appropriate to the person's needs, information about the person's financial status.

(c) To minimise conflict of interest

An advocacy organisation for people with disability submitted that the legislation should include a specific duty, extending beyond financial decisions, to minimise any conflict between the interests of the decision-maker and those of the person with impaired decision-making capacity. The duty proposed by the submission would require a decision-maker to act at all times in the interests of the person whose capacity is impaired, to the exclusion of the interests of any other person, including the decision-maker, and where there is a potential or actual conflict, to attempt, honestly and in a manner reasonable for the decision-maker's experience and expertise, to minimise the impact of that conflict. The respondents argued that the imposition of such a duty would require decision-makers to consider the existence of a possible or actual conflict of interest every time they exercised their powers.⁸⁷¹

The Commission acknowledges that it is important for decision-makers to be aware of the potential for conflicts of interest to arise and to take steps to minimise the impact of such conflicts. However, the Commission is not persuaded that the inclusion of a specific duty is the most effective way to achieve this objective. In the view of the Commission, such a duty would be difficult to enforce, since it would often be impossible to show that a decision-maker had not considered the possibility of the existence of a conflict of interest.

⁸⁷⁰ Submission No 53.

⁸⁷¹ Submission No 64.

(d) Real property transactions

In Chapter 5 of this Report, the Commission considered the circumstances in which it should be possible for a decision-maker chosen by an enduring power of attorney or a decision-maker appointed by the tribunal to have authority to conduct real estate transactions on behalf of someone who lacks capacity to carry out the transaction in person.⁸⁷²

Where a decision-maker has authority to carry out a real estate transaction, certain other considerations arise.

(i) Registration

In Queensland, real property transactions take place under the Torrens system of land title. The fundamental principle of the system is that title to land and interests in land depend upon registration. The purpose of registration is:⁸⁷³

... to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

The *Property Law Act* provides that a power of attorney must be registered if the power is to be used to deal with interests in real property.⁸⁷⁴ The need to register a power of attorney in that situation derives from the principle and purpose of the Torrens system as expressed above.

The Draft Bill in Chapter 13 of the Draft Report applied the *Property Law Act* provision to an enduring power of attorney made under the scheme proposed by the Commission.⁸⁷⁵ However, neither the Draft Report nor the Draft Bill made reference to the question of registration of tribunal orders appointing a decision-maker with authority to carry out a real estate transaction.

⁸⁷² See pp 72-75 of this Report.

⁸⁷³ *Gibbs v Messer* [1891] AC 248, at 254 per Lord Watson (PC).

⁸⁷⁴ *Property Law Act 1974 (Qld)* s 171(2).

⁸⁷⁵ Cl 58.

In the view of the Commission, to ensure consistency with the Torrens system, tribunal orders authorising real estate transactions should also be required to be registered. Such a requirement would also be consistent with the Commission's policy that the duties and powers of decision-makers appointed by the tribunal should parallel those of decision-makers chosen by enduring power of attorney.

The Commission recommends that the legislation provide that any dealing with land purporting to take effect under the exercise of an enduring power of attorney or of an order of the tribunal shall have no force or validity until the instrument creating the power or the tribunal order is registered, but upon registration any such disposition shall take effect as if the instrument creating the power or the tribunal order had been registered before the instrument purporting to give effect to such dealing.

(ii) Termination of registration

In Chapter 6 of this Report the Commission discusses termination of registration of an enduring power of attorney which confers power to deal with land. Similar provisions should also apply in relation to a registered order of the tribunal.

5. CONSEQUENCES OF BREACH OF DUTY

(a) Removal of decision-maker

The Draft Bill in Chapter 13 of the Draft Report provided grounds for the removal of a chosen decision-maker⁸⁷⁶ and a decision-maker appointed by the tribunal.⁸⁷⁷

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendations.

⁸⁷⁶ Cl 52.

⁸⁷⁷ Cl 97.

However, the grounds provided for removal of a chosen decision-maker did not co-incide exactly with those provided for removal of a decision-maker appointed by the tribunal. The Commission is now of the view that, consistently with its approach that the duties and powers of decision-makers appointed by the tribunal should parallel those of decision-makers chosen under an enduring power of attorney, the grounds for removal should be the same. After further consideration, the Commission prefers the grounds provided in the Draft Bill in Chapter 13 of the Draft Report for the removal of an appointed decision-maker.

One submission to the Draft Report proposed that the grounds should be simply that the decision-maker's obligations to the person on whose behalf the decision-maker is acting have been breached.⁸⁷⁸ The submission considered that the criteria recommended by the Commission would be more difficult to prove.

The Commission remains of the view, however, that the grounds put forward in the Draft Report are more satisfactory. It is concerned that it may be difficult to establish that, for example, a decision-maker who was unable to act because of incapacity had breached his or her obligations to the person. Further, the grounds proposed by the submission would not allow the tribunal to assess a situation where a decision-maker engaged in behaviour which indicated unsuitability to act, but which did not directly affect the person concerned.

The Commission recommends that the legislation provide that the tribunal have power to remove power from or to replace a decision-maker for a person if:

- . a relevant interest of the person has not been, or is not being, adequately protected; or**
- . the decision-maker is no longer suitable or competent to act as substitute decision-maker; or**
- . the decision-maker has neglected the decision-maker's duties or abused the decision-maker's powers; or**
- . the decision-maker has otherwise contravened the provisions of the legislation.**

⁸⁷⁸ Submission No 48.

The Commission's recommendations are implemented by clauses 66 and 130 of the Draft Bill in Volume 2 of this Report.

(b) Compensation for loss caused by breach

In the Draft Report, the Commission noted that the existing enduring power of attorney legislation provides that a decision-maker under the power who breaches the decision-maker's statutory obligations to the person who made the enduring power of attorney may be required by the Supreme Court, in addition to any other liability, to compensate the person who made the power for any loss caused by the failure to comply.⁸⁷⁹

The approach of the Commission in the Draft Report was that the obligations of a decision-maker appointed by the tribunal should parallel those of a decision-maker appointed under an enduring power of attorney.

The Commission recommended that the tribunal should be given power to order compensation for loss caused by breach of a decision-maker's statutory obligations.⁸⁸⁰

The Commission also noted that a decision-maker may become liable to pay court-awarded damages in addition to compensation ordered by the tribunal. The Commission expressed the view that it would be undesirable for a decision-maker to be exposed to the risk of double liability. The Commission recommended that if the tribunal has ordered the payment of compensation, a court which finds the decision-maker liable to the person who made the enduring power of attorney for loss caused by the decision-maker should, in assessing damages, take into account compensation already paid as a result of the tribunal order.

The Commission's recommendations were reflected in clause 139 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's recommendation.

However, a solicitor noted that, under the existing power of attorney legislation, a review of the exercise of a power could be sought only "during a period of legal incapacity" of the person who made the power.⁸⁸¹ The respondent commented that this provision would preclude the making of an application after the death of

⁸⁷⁹ At 118. *Property Law Act 1974 (Qld)* s 175H(2).

⁸⁸⁰ At 119.

⁸⁸¹ *Property Law Act 1974 (Qld)* s 175G(1).

the person, and strongly recommended that the legislative scheme proposed by the Commission should allow an application for review to be made after the person with impaired decision-making capacity has died.⁸⁸²

Although the Draft Report did not specifically refer to applications made after the death of the person with impaired capacity, clause 139(1) of the Draft Bill in Chapter 13 of the Draft Report provided for the tribunal to require a decision-maker to compensate the person or, if the person has died, the person's estate for any loss caused by the decision-maker's breach of duty. The Commission accepts the proposal that the legislation should also provide that an application for compensation may be brought after the death of the person concerned.

The submission argued further that, in order to protect executors or administrators who distribute the estate of the person after the person's death, there should be a time limit of six months from the death of the person in which an application should be brought.⁸⁸³ The Commission accepts this proposal also, with the modification that the legislation include a discretion to extend the period in which an application may be brought.

The situation may also arise where a decision-maker who has breached his or her obligations dies before an application is made for compensation for loss caused by the breach. In such a case, it is the view of the Commission that a claim should be able to be made on behalf of the person, or if the person has also died, on behalf of the person's estate, against the estate of the deceased decision-maker.

Again the same six months time limit for bringing an application should be imposed, subject to a discretion to extend that period.

The Commission has recommended in this Report that the proposed legislation confer concurrent jurisdiction on the Supreme Court and the tribunal in relation to enduring powers of attorney.⁸⁸⁴

⁸⁸² Submission No 2.

⁸⁸³ A time limit of six months would be consistent with s 44(3) of the *Succession Act 1981 (Qld)*, which protects an executor or administrator from liability for distributing an estate if the distribution was properly made after the expiration of six months from the death of the deceased.

⁸⁸⁴ See pp 87-89 of this Report and cl 312 of the Draft Bill in Volume 2 of this Report.

The Commission recommends that the legislation provide that:

- . a decision-maker who may make a decision for a person with impaired decision-making capacity may be required by the tribunal to compensate the person (or, if the person has died, the person's estate) for a loss caused by the decision-maker's failure to comply with the obligations imposed by the legislation;**
- . an application for compensation may be brought within six months, or such longer period as the tribunal allows, of the death of the person or of the decision-maker;**
- . compensation paid under a tribunal order must be taken into account in assessing damages in any later civil proceeding in relation to the decision-maker's exercise of the power.**

The Commission's recommendation is implemented by clause 193 of the Draft Bill in Volume 2 of this Report.

(c) Excusing failure to comply

In the Draft Report, the Commission noted that at present the Supreme Court may relieve a decision-maker under an enduring power of attorney from personal liability for breaching any of the decision-maker's statutory obligations, if the Court is satisfied that the decision-maker acted honestly and reasonably and ought fairly to be excused.⁸⁸⁵ The Commission considered whether the power to excuse a decision-maker should be transferred to the tribunal.

The Commission concluded that the power to excuse a decision-maker should be conferred on a court of relevant jurisdiction, since it would not be appropriate for the tribunal to have a quasi-judicial authority beyond the scope of its intended operation.⁸⁸⁶

The approach of the Commission in the Draft Report was that the obligations of a decision-maker appointed by the tribunal should parallel those of a decision-maker appointed under an enduring power of attorney and that similar provisions should apply in relation to excuse for failure to comply with the decision-maker's statutory

⁸⁸⁵ *Property Law Act 1974 (Qld)* s 175l.

⁸⁸⁶ At 119.

obligations.

The Commission's recommendation was reflected in clause 138 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission generally accepted the Commission's recommendation.

The Commission recommends that the legislation provide that if a decision-maker is prosecuted in a court for a failure to comply with the statutory obligations, the court may, if it considers fair, completely or partly excuse the failure.

The Commission's recommendation is implemented by clause 192 of the Draft Bill in Volume 2 of this Report.