

CHAPTER 10

HEALTH CARE DECISIONS

1. THE NEED FOR CONSENT

An essential element of the concept of individual autonomy is the right of every person to decide what happens to his or her own body. Any voluntary touching of another person is generally unlawful, unless the other person has consented to that touching. In the absence of consent, even the slightest degree of bodily contact may give rise to a civil claim for damages for assault or to a criminal assault charge.⁸⁸⁷

This general rule applies to the performance of health care procedures on a patient who has not given his or her consent.⁸⁸⁸ In the absence of a valid consent, treatment which involves any touching of the patient's body will constitute an assault even if the treatment is properly carried out. The requirement of consent is intended to ensure protection for the patient against unauthorised interference with his or her right to bodily integrity and for the health care provider against possible legal action.

2. WHAT IS CONSENT?

A valid consent for the purposes of an assault action, whether criminal or civil, must be "real".

A real consent is one which is based on a broad understanding of the proposed treatment and which is not induced by fraud or by misrepresentation as to the nature of the procedure.⁸⁸⁹ Failure on the part of a person to supply information about possible alternative forms of treatment or to disclose the existence of side-

⁸⁸⁷ *Collins v Wilcock* [1984] 1 WLR 1172, [1984] 3 All ER 374; *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*); *Criminal Code* s 245. (A new Criminal Code was enacted in 1995 but did not come into operation. As a result of a change of government in February 1996, it is likely that the new Code will be repealed.)

⁸⁸⁸ However, the medical superintendent of a hospital may consent to treatment which is necessary to save or prolong the life of a patient who is incapable of consenting: *Medical Act 1939 (Qld)* s 52. There is also protection against criminal responsibility for the performance in good faith and with reasonable care and skill of a surgical operation upon any person for his or her benefit, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case: *Criminal Code*, s 282. See pp 314-315 of this Report.

⁸⁸⁹ *Chatterton v Gerson* [1981] 1 QB 432, at 443; *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1984] 1 QB 493, at 511 (CA). This is the test for adults. In relation to consent to treatment of young people see Queensland Law Reform Commission, Working Paper No 44, *Consent to Medical Treatment of Young People*, May 1995, and the Commission's forthcoming Report on this topic.

effects or of risks associated with the treatment does not invalidate the consent.⁸⁹⁰

3. CAPACITY TO CONSENT

To give a legally valid consent a patient must be able to understand in broad terms the nature of the proposed treatment and its likely consequences. Existence of a decision-making disability does not automatically involve lack of capacity to consent. Whether or not a person has the capacity to consent will depend on the nature and the severity of the disability and on the complexity of what is being proposed.⁸⁹¹

4. WHERE A PERSON IS UNABLE TO CONSENT

Sometimes a person who needs treatment is not able to consent on his or her own behalf. This may be because the patient is unconscious, or it may be because the person has a decision-making disability of such a degree that he or she is not able to understand information about the proposed treatment or to make a reasoned judgment based on that information. In such a situation, some other person must be authorised to provide a substitute consent.

5. EXISTING QUEENSLAND CONSENT PROCEDURES

(a) *The Mental Health Act 1974 (Qld)*

Under the Fifth Schedule of the *Mental Health Act*, a committee of the person may be appointed for a person who is mentally ill and unable to manage his or her affairs.⁸⁹² A committee of the person has full guardianship powers, and can therefore make decisions about treatment of the person for whom the appointment was made. There is no express limitation on the nature of the procedures about which a committee is authorised to decide, nor are there any guiding principles in the legislation for the exercise of a committee's authority. However, although there is no statutory direction as to how the committee's authority is to be exercised, a

⁸⁹⁰ However, the patient may have a cause of action in negligence for breach of the health care provider's duty to provide material information: *Rogers v Whitaker* (1992) 175 CLR 479.

⁸⁹¹ See for example *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*).

⁸⁹² *Mental Health Act 1974 (Qld)* Fifth Schedule clause 4(2)(c).

guardian is expected to act at all times in the best interests of the person whose decision-making capacity is impaired.⁸⁹³

This Act also provides for involuntary admission to hospital of a person who is mentally ill. Mental illness is not defined in the Act. If the nature or severity of the illness requires the person to be hospitalised, and if hospitalisation is necessary to protect the person's own interests or to protect other people, the person concerned may be admitted to hospital for treatment of mental illness. The application for admission must be supported by a written recommendation from a medical practitioner.⁸⁹⁴ This provision authorises admission. It does not expressly authorise the giving of treatment to a patient if the patient refuses to consent.

(b) The *Intellectually Disabled Citizens Act 1985 (Qld)*

Once a person has been granted assistance under the Act,⁸⁹⁵ the Legal Friend⁸⁹⁶ may give consent to any medical, dental, surgical or other professional treatment or care.⁸⁹⁷ In exercising the power to give consent the Legal Friend must:⁸⁹⁸

- . take all reasonable steps to consult with relatives of the patient who provide ongoing care for the patient and give due consideration to their views;
- . take all reasonable steps to be as fully informed as possible on matters requiring consent;
- . inform the patient, to the extent that he or she is able to understand, about matters requiring consent and the options available; and
- . consent to the least restrictive option available, taking into account the health, well-being and expressed wishes, if any, of the patient.

⁸⁹³ R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 4-6, 4-7.

⁸⁹⁴ *Mental Health Act 1974 (Qld)* s 18.

⁸⁹⁵ See Chapter 2 of this Report.

⁸⁹⁶ The Legal Friend is a barrister or solicitor appointed under the Act to provide specialised assistance to intellectually disabled citizens. See *Intellectually Disabled Citizens Act 1985 (Qld)* s 4.

⁸⁹⁷ *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(3).

⁸⁹⁸ *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(5), 26(5A).

If the Legal Friend is of the opinion that the process of obtaining approval to grant assistance would cause unnecessary delay, the Legal Friend may consent to treatment for an intellectually disabled person who has not previously been granted assistance under the Act. If this situation arises, the Legal Friend must first obtain the approval of the Chairman of the Intellectually Disabled Citizens Council, and an application for assistance must be made to the Council as soon as possible. Emergency consents may only be given for treatment which is necessary to preserve the patient's life or to prevent significant illness or suffering.⁸⁹⁹

(c) *Parens patriae*

The Supreme Court has a protective jurisdiction to safeguard the interests of all those who cannot protect themselves.⁹⁰⁰ This *parens patriae* jurisdiction may be used to authorise medical treatment for a person who lacks capacity to consent on his or her own behalf. However, because the underlying principle of the jurisdiction is the welfare of the patient, it is usually exercised sparingly,⁹⁰¹ and consent is unlikely to be given unless the proposed treatment is clearly in the best interests of the patient.⁹⁰² The interests of other family members, particularly primary caregivers, will be a relevant consideration but, where there is a conflict, the interests of the patient will prevail.⁹⁰³

(d) *The Medical Act 1939 (Qld)*

If a patient is incapable of consenting to a surgical procedure because of a "mental disability" and if a relation of the patient is not available to consent, the medical superintendent of a hospital or institution may consent on behalf of the patient to a surgical procedure which is necessary to save or prolong the patient's life.⁹⁰⁴

⁸⁹⁹ *Intellectually Disabled Citizens Act 1985 (Qld) s 26(9)*.

⁹⁰⁰ See pp 21-22 of this Report for an explanation of the *parens patriae* jurisdiction.

⁹⁰¹ *Re Eve* [1986] 2 SCR 388.

⁹⁰² *Re Jane* (1988) 85 ALR 409.

⁹⁰³ *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*).

⁹⁰⁴ *Medical Act 1939 (Qld) s 52*. This section implies that next of kin may consent to medical treatment for a patient who is incapable of consenting. However, in the absence of specific legislation, the consent of a relative is insufficient to make lawful what would otherwise be an assault.

(e) **Criminal Code**

Under the provisions of the Criminal Code presently in operation,⁹⁰⁵ a person who, in good faith and with reasonable care and skill, carries out a surgical operation for the benefit of the patient, will not be criminally responsible for an assault if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.⁹⁰⁶ This provision gives a health care provider limited protection for treatment carried out on a person who is unable to consent. However, it does not include forms of treatment other than surgery.⁹⁰⁷ Nor will it relieve a health care provider from liability in a civil action for damages for assault.

A person who has charge of another who (because of age, sickness, unsoundness of mind, detention or any other reason) is unable to arrange the medical care which he or she requires, has a duty to provide that medical care.⁹⁰⁸ This would include the administrator of a hospital where patients were involuntarily detained under the *Mental Health Act*. However, there is a difference between a duty to provide medical care and the right to give it where the patient is not capable of giving consent or refuses to consent. It is likely that the duty to provide medical care would extend no further than making the care available. It is doubtful that it would authorise the forcible administration of treatment in the absence of consent.⁹⁰⁹

⁹⁰⁵ A new Criminal Code was enacted in 1995. It received assent on 16 June 1995, but did not come into operation. As a result of a change of government in February 1996, it is likely that the new Code will be repealed.

⁹⁰⁶ *Criminal Code* s 282. The protection conferred by this section is not restricted to medical practitioners but applies to any person who performs a surgical operation, provided that, in the circumstances, the person acts with reasonable care and skill.

⁹⁰⁷ S 82 of the new Criminal Code extended this protection to a person providing medical treatment. For the purposes of s 82 "medical treatment" included pain relief and "providing medical treatment" included withdrawing medical treatment. However, after a change of government in February 1996, it is likely that the new Code will be repealed.

⁹⁰⁸ *Criminal Code* s 285; *R v MacDonald and MacDonald* [1904] StRQd 151. S 285 was replaced by s 87 of the new Criminal Code, but there was no significant difference between the two. However, see note 905 above in relation to the new Code.

⁹⁰⁹ See s 187 of the Northern Territory *Criminal Code*, which excludes from the definition of "assault" force used in giving any medical treatment reasonably needed by the person to whom it is given or in restraining a person who needs to be restrained for his or her own protection or benefit.

(f) **Case law**

It is generally recognised that, even if there is no statutory protection for a health care provider, it should not be unlawful for emergency treatment to be given to a patient whose illness or injury makes it impossible for him or her to consent.⁹¹⁰

In the United Kingdom, this exception to the general rule that consent must be given for medical treatment has been extended to include treatment for people who lack the capacity to consent because they have a decision-making disability, provided that the treatment is in the best interests of the patient.⁹¹¹

There is no decided case law which would suggest that this represents the position in Queensland.

6. DEVELOPMENTS IN OTHER JURISDICTIONS

In recent years there have been significant developments concerning decision-making about health care for people with a decision-making disability which prevents them from making their own decision.

Legislation in other Australian jurisdictions now provides four methods of obtaining a legally authorised substituted decision about health care for a person who, because his or her decision-making capacity is impaired, is unable to make his or her own decision. The existing mechanisms are as follows:

- . a person who has the necessary degree of capacity may appoint another person to make decisions about his or her health care if, in the future, he or she loses the capacity to decide;
- . legislation may confer on certain people a statutory right to decide on behalf of another person;
- . a person may be appointed as a decision-maker with power to consent to health care treatment; and
- . the body which makes decisions about appointment of decision-makers may have power to decide about some forms of treatment.

⁹¹⁰ *Wilson v Pringle* [1987] 1 QB 237.

⁹¹¹ *In re F* [1990] 2 AC 1.

7. REFUSAL OF TREATMENT

(a) Where the patient is competent

The corollary of the requirement of consent is the right of a person who has the necessary degree of understanding to refuse to undergo treatment. It is generally accepted by the courts that the right of refusal extends to all forms of treatment, from relatively minor and routine procedures to measures which may save or prolong life.

The principle of self-determination means that a competent patient has a decisive role in the health care process, even if the decision may involve risks and is against the weight of professional opinion. A health care professional who treats a patient who has refused to consent or who continues to treat after consent has been withdrawn may be liable both civilly and criminally for assault.⁹¹² Provided the patient has been given sufficient information to make an informed decision, the wishes of the patient must be respected although the result of the decision is that the patient may die.⁹¹³

However, a health care professional has certain duties under the *Criminal Code*. Under the provisions currently in operation, a person having charge of another is required to provide that person with the necessaries of life if he or she is unable because of age, sickness, unsoundness of mind or any other cause to withdraw from such charge and is unable to provide such necessaries for himself or herself.⁹¹⁴ "Necessaries" may include medical treatment.⁹¹⁵ A person who undertakes to do an act is under a duty to perform that act if the omission to do so may be dangerous to human life or health.⁹¹⁶

⁹¹² See for example the decision of the Ontario Court of Appeal in *Malette v Schulman* (1990) 67 DLR (4th) 321, where a doctor's honest and justifiable belief that a blood transfusion was medically necessary did not relieve him from liability for performing an unauthorised procedure.

⁹¹³ See for example *Airedale NHS Trust v Bland* [1993] AC 789 at 858-859 per Lord Keith, at 864-865 per Lord Goff and at 891-892 per Lord Mustill.

⁹¹⁴ S 285. There is no significant difference between s 285 and s 87 of the new Code, which was enacted in 1995 but which did not come into operation. As a result of a change of government in February 1996, it is likely that the new Code will be repealed.

⁹¹⁵ *R v MacDonald and MacDonald* [1904] StRQd 151.

⁹¹⁶ S 290. There is no significant difference between s 290 and s 91 of the new Code, which was enacted in 1995 but which did not come into operation. See note 914 above.

There is an apparent conflict between the right of a patient, recognised by decided cases, to refuse treatment and the duties imposed by the Code to provide it.⁹¹⁷ This conflict, together with the legal uncertainties which may arise over whether something is an "act" or an "omission",⁹¹⁸ may result in both patients and health care providers being unclear about their legal position.

In some jurisdictions, the right to refuse treatment has been given statutory recognition. In Victoria, for example, a patient may sign a "Refusal of Treatment" form⁹¹⁹ and, in the Australian Capital Territory, a patient may make a direction refusing treatment.⁹²⁰ The advantage of such legislation is that it ensures that the patient's expressed wishes are legally binding on health care providers.⁹²¹ It also protects health care providers from criminal prosecution and from civil action for failing to perform or to continue treatment.⁹²² There is no equivalent legislation in Queensland at present.

In a recent English court case, some of the judges recognised that, unlike the situation in Victoria,⁹²³ the right to refuse treatment was not restricted to the time of treatment. They said that the same principle would apply if a person had given

⁹¹⁷ However, it is arguable that once consent to treatment has been withdrawn, the duty to provide such treatment no longer exists. See for example The Law Reform Commission of Western Australia, *Report on Medical Treatment for the Dying*, Project No 84 (1991) 4. Legislation recently passed in South Australia provides that a medical practitioner responsible for the treatment or care of a patient in the terminal phase of a terminal illness, or a person participating in the treatment or care of a patient under the medical practitioner's supervision, is under no duty, in the absence of an express direction to the contrary, to use or to continue to use, life sustaining measures in treating the patient if the effect of doing so would be merely to prolong life in a moribund state without any real prospect of recovery or in a persistent vegetative state. (*Consent to Medical Treatment and Palliative Care Act 1995 (SA)* s 17(2))

⁹¹⁸ See for example *Airedale NHS Trust v Bland* [1993] AC 789.

⁹¹⁹ *Medical Treatment Act 1988 (Vic)*. The patient may refuse treatment of a particular kind or treatment in general. To be effective, the refusal must relate to a condition which is in existence at the time when the form is signed. The patient must have been given and have understood sufficient information about his or her condition and alternative forms of treatment to allow him or her to decide whether to refuse treatment in general or of a particular kind for that condition. See s 5.

⁹²⁰ *Medical Treatment Act 1994 (ACT)*. A direction may be made in writing, orally or in any other way in which the patient can communicate. It may direct the refusal or withdrawal of treatment in general or of a particular kind for a current condition. Before complying with a direction in respect of a person who is still competent to make a rational judgment, a health professional must take reasonable steps to ensure the person has been informed about the nature of the condition, alternative forms of treatment, the consequences of those forms of treatment and the consequences of remaining untreated. See ss 6, 11.

⁹²¹ See for example *Medical Treatment Act 1988 (Vic)* s 6.

⁹²² See for example *Medical Treatment Act 1988 (Vic)* s 9; *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* s 16; *Medical Treatment Act 1994 (ACT)* s 22.

⁹²³ See note 919 above.

clear instructions that, if his or her state of health involved dependency on a life support system, treatment designed to sustain or prolong life should not be administered.⁹²⁴

There is some legislation in Australia which allows a person to give a direction in advance to the effect that, in the event that he or she becomes terminally ill, certain forms of treatment are not to be administered. The direction may be given at any time while the person has the necessary degree of understanding to do so, but it will not come into operation until the person becomes terminally ill.⁹²⁵ At present in Queensland there is no equivalent legislation.

(b) Where the patient lacks capacity to decide

A person who is authorised to give consent to health care treatment for a person with impaired decision-making capacity necessarily has some power to refuse treatment. Simply by choosing between two alternative forms of treatment, the decision-maker is refusing one of them.

Circumstances may arise in which it is necessary to make decisions about whether to continue treatment for a person who lacks the necessary capacity to decide on his or her own behalf. Such a situation may occur, for example, because a terminally ill patient has reached a point where there is no longer any treatment which will effect a cure or prevent the progress of the disease towards the person's death, or because the person is, as a result of irreversible brain damage, in a state of persistent or permanent unconsciousness.⁹²⁶

Some Australian jurisdictions have enacted legislation dealing with substituted refusal of treatment which is intended to sustain or prolong life. In Victoria

⁹²⁴ *Airedale NHS Trust v Bland* [1993] AC 789 at 857 per Lord Keith and at 864 per Lord Goff. However, these remarks were *obiter*, as there was no evidence that the patient in the case had ever actually expressed any views about the kind of treatment he would or would not wish to receive. In any event, decisions of English courts, while persuasive, are not binding in Australia.

⁹²⁵ *Natural Death Act 1988 (NT) ss 3, 4; Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 7.*

⁹²⁶ In its Draft Report (Working Paper No 43, *Assisted and Substituted Decisions*, February 1995), the Commission used the expression "persistent vegetative state" as a recognised medical term. However, one submission (Submission No 64) objected to its use. The respondent, an advocacy organisation for people with disability, argued:

... it appears to assume that a person who is, or appears to be, in a state of permanent unconsciousness is therefore less than human, a mere "vegetable".

That this is a term widely used in medical fields does not render it acceptable. Rather it offers a sad commentary on the attitudes and values of health professionals. If there is a need for a description of this condition, we suggest "persistent or permanent unconsciousness".

The respondent's suggestion has been adopted by the Commission. See Chapter 5 of this Report.

legislation specifically allows a substitute decision-maker to refuse consent to such treatment.⁹²⁷ In the Australian Capital Territory the powers conferred on a decision-maker under an enduring power of attorney may, if the instrument creating the power expressly provides, include the power to give consent to the withholding or withdrawal of medical treatment.⁹²⁸ Legislation recently passed in South Australia provides for appointment of a medical agent with authority to "make decisions ... about medical treatment".⁹²⁹

A person who lacks capacity to make his or her own decision about treatment may previously have given instructions that he or she would not want life-sustaining treatment if he or she were terminally ill or in a state of persistent or permanent unconsciousness. Although there is some doubt about the legal status of such instructions in the absence of legislation to give them binding force,⁹³⁰ there have been recent indications in other jurisdictions that courts may be willing to recognise them.⁹³¹

In the Draft Report,⁹³² the Commission considered the issue of legislation concerning withdrawal of treatment in this type of situation.⁹³³

The Commission expressed the view that the issues it raised in relation to the right to refuse or terminate life-sustaining treatment need to be addressed. It considered that the fact that legislation has been introduced in a number of Australian jurisdictions indicates that there is a problem with the present situation,

⁹²⁷ Treatment, apart from reasonable medical procedures for the relief of pain, suffering or discomfort or the reasonable provision of food or water, may be refused if the treatment would cause unreasonable distress to the patient or there are reasonable grounds for believing that the patient, if competent, and after giving serious consideration to his or her health and well-being, would consider the treatment unwarranted. See *Medical Treatment Act 1988 (Vic)* ss 3, 5B.

⁹²⁸ *Powers of Attorney Act 1956 (ACT)* s 13(1)(b)(iii). A decision-maker with authority to consent to the refusal or withdrawal of treatment may also be appointed under the *Medical Treatment Act 1994 (ACT)*.

⁹²⁹ *Consent to Medical Treatment and Palliative Care Act 1995 (SA)* s 8(1). An agent may not refuse the natural provision or natural administration of food and water, the administration of drugs to relieve pain and distress, or medical treatment that would allow the person who had made the appointment to regain capacity to make decisions about treatment, unless that person is in the terminal phase of a terminal illness. [S 8(7)(b)]

⁹³⁰ See pp 348-351 of this Report.

⁹³¹ See for example *Malette v Schulman* (1990) 67 DLR (4th) 321; *Airedale NHS Trust v Bland* [1993] AC 789; *In re C* [1994] 1 WLR 290.

⁹³² Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

⁹³³ At 168-170.

which leaves both health care providers and patients uncertain as to their position.⁹³⁴ However, the Commission recognised that the question of legislation dealing with withdrawal of treatment intended to sustain or prolong life for a person who lacks capacity to make his or her own decision on the matter, while closely linked to a scheme of assisted and substituted decision-making, involves much wider moral and ethical dilemmas and requires extensive public consultation and debate. The definition of "health care decision" recommended by the Commission therefore excluded decisions of this kind.⁹³⁵ The Commission's approach was reflected in clause 16(2) of the Draft Bill in Chapter 13 of the Draft Report.

The submissions which discussed this issue agreed with the Commission.

The Commission remains of the view that the present state of the law in this area is unsatisfactory and should be comprehensively reviewed. The review should include a process of wide public consultation.

8. WHO SHOULD DECIDE

In the Draft Report, the Commission considered, in the light of developments in other jurisdictions, the question of who should make health care decisions for a person who does not have the capacity to make the decision personally.

(a) Decision-maker chosen by enduring power of attorney for health care

Appointment by one person of another person to make health care decisions if, in the future, the person making the appointment should lose the capacity to make his or her own decisions is, in effect, an enduring power of attorney for health care treatment.

(i) The concept of an enduring power of attorney

The concept of an enduring power of attorney was explained in Chapter 6 of this Report. An ordinary power of attorney is a formal document in which one person authorises another to act on his or her behalf for certain purposes. In order to grant a valid power of attorney, the person who makes the power must have the necessary decision-making capacity. If, at

⁹³⁴ Legislation exists in four-fifths of the United States jurisdictions. (D Lanham and B Fehlberg, "Living Wills and the Right to Die With Dignity" (1991) 18 *Melbourne University Law Review* 329.) In the United Kingdom, the Law Commission has recommended legislation enabling a competent adult with the necessary capacity to make an advance refusal of treatment, refusing any medical, surgical or dental treatment or other procedure, and intended to have effect at any subsequent time when he or she may be without capacity to give or refuse consent. (The Law Commission, Report No 231, *Mental Incapacity* (1995) 71-73.)

⁹³⁵ See Chapter 5 of this Report for a discussion of the definition of "health care decision".

any time after having granted the power of attorney, he or she loses the degree of understanding required, the power of attorney becomes invalid.⁹³⁶

An enduring power of attorney is a special kind of power which survives the subsequent incapacity of the person who granted the power. In other words, it is a mechanism which allows a person to choose someone to make decisions for him or her when he or she no longer has the decision-making capacity to make them personally.⁹³⁷

(ii) Advantages of an enduring power of attorney

An enduring power of attorney offers a number of significant advantages. It allows a person to plan for the future and to choose whom he or she would like to make decisions if he or she became incapable of making those decisions personally. It is a private arrangement, which can be changed or revoked at any time while the person who granted it has capacity to do so. It therefore enhances individual autonomy and provides a far less intrusive solution than appointment of a decision-maker.

The advance appointment of a decision-maker chosen by the person concerned also removes the need which may otherwise arise for a hearing to determine whether a decision-maker should be appointed. Such hearings almost inevitably involve some inconvenience and anxiety and, no matter how sensitively they are handled, there may also be some degree of embarrassment or distress.

An enduring power of attorney is also a relatively simple and inexpensive procedure and, because it eliminates the need for a decision-maker to be appointed, it reduces demand on the system for appointing decision-makers and hence the cost to government.⁹³⁸

(iii) Terminology

Traditionally, a person who is nominated as a decision-maker under an enduring power of attorney is referred to as the "donee" of the power or the "attorney". The person who makes the enduring power of attorney is called the "donor" of the power.

⁹³⁶ See pp 79-81 of this Report.

⁹³⁷ See pp 81-83 of this Report.

⁹³⁸ R Creyke, "Privatising Guardianship - the EPA Alternative" (1993) 15 *Adelaide Law Review* 79.

In the Draft Bill in Volume 2 of this Report a decision-maker who derives his or her authority from an enduring power of attorney is referred to as a "chosen decision-maker". Accordingly, the latter expression has been used in this Chapter.

(iv) Decisions which an enduring power of attorney may authorise

At present, the extent of the authority which may be conferred on a chosen decision-maker by an enduring power of attorney is not entirely clear in Queensland.⁹³⁹ Under the existing legislation, it is unlikely that an enduring power of attorney could be used to authorise health care decisions on behalf of a person who no longer has sufficient decision-making capacity to decide about such matters. In the absence of specific legislation, a decision about health care would probably be considered too personal to be able to be delegated to another person by an enduring power of attorney.⁹⁴⁰

In the Draft Report, the Commission recommended the introduction of legislation to clarify and extend the scope of an enduring power of attorney by allowing a person who wishes to do so to include in the decisions authorised by an enduring power of attorney, decisions about the person's health care.⁹⁴¹ Similar legislation currently exists in Victoria,⁹⁴² the Australian Capital Territory,⁹⁴³ South Australia⁹⁴⁴ and Tasmania.⁹⁴⁵

The Commission's recommendation was reflected in clauses 40(3) and 106 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.⁹⁴⁶

⁹³⁹ See pp 89-91 of this Report.

⁹⁴⁰ However, for a contrary view, see M Fowler, "Appointing an Agent to Make Medical Treatment Choices" (1984) 84 *Columbia Law Review* 985 at 1009-1012.

⁹⁴¹ At 136.

⁹⁴² *Medical Treatment Act 1988 (Vic)*.

⁹⁴³ *Powers of Attorney Act 1956 (ACT)*.

⁹⁴⁴ *Guardianship and Administration Act 1993 (SA)*; *Consent to Medical Treatment and Palliative Care Act 1995 (SA)*.

⁹⁴⁵ *Guardianship and Administration Act 1995 (Tas)*.

⁹⁴⁶ Submissions Nos 5, 14, 25, 27, 28, 33, 37, 59, 64, 66, 70, 73, 74, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 109, 110.

The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may include in the decisions authorised by the enduring power of attorney decisions about the person's future health care.

The Commission's recommendation is implemented by clauses 15(1) and 34(2)(b) of the Draft Bill in Volume 2 of this Report.

(v) Limitation of chosen decision-maker's authority

A person who makes an enduring power of attorney for health care may wish to give his or her chosen decision-maker wide power to make decisions about his or her health care.⁹⁴⁷ Alternatively, the person making the enduring power of attorney may wish to specify particular forms of treatment to which the chosen decision-maker may or may not consent.

In the Draft Report, the Commission recognised that if a person who makes an enduring power of attorney for health care specifies particular kinds of treatment to which his or her chosen decision-maker may or may not consent, there may be such significant advances in medical science and technology that, if the person subsequently loses capacity, it may be inappropriate to give effect to views expressed in entirely different circumstances.⁹⁴⁸ The Commission considered that this difficulty could be overcome by giving the tribunal power to override the directions contained in the grant of power in such a situation.⁹⁴⁹

The Commission recommended that a person who makes an enduring power of attorney for health care be able to choose whether to authorise the chosen decision-maker to make decisions about all aspects of his or her health care, or whether to specify certain kinds of health care to which the chosen decision-maker may or may not consent, or about which the chosen decision-maker must decide in accordance with directions given in the power. The Commission also recommended that the tribunal be given power to override instructions given by a person who makes an enduring power of attorney for health care, if circumstances, including advances in

⁹⁴⁷ There are some decisions which a person who makes an enduring power of attorney for health care may not delegate to a chosen decision-maker. See Chapter 5 of this Report.

⁹⁴⁸ At 137.

⁹⁴⁹ See for example *Guardianship and Administration Act 1993 (SA)* s 25(6); *Guardianship and Administration Act 1995 (Tas)* s 32(6).

medical science, have changed to such an extent that the power would no longer be appropriate.

The Commission's recommendations were reflected in clauses 41 and 53(2)(b) of the Draft Bill in Chapter 13 of the Draft Report.

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

However, the Public Trustee expressed concern that there should be more guidance given to people who choose to identify forms of treatment to which their chosen decision-makers may or may not consent, so as to lessen any risk of uncertainty and ambiguity in the directions given. The submission stated:⁹⁵⁰

Whilst it would be undesirable to create a prescriptive situation, without some guidance for the donor on the type of instruction that should be given there would be a likely risk that the terms of the document would lead to uncertainty and ambiguity. By providing for such things as level of care (palliative/limited/surgical/intensive) and intervention (no CPR) in given circumstances, together with explanations of what is intended by these measures, some of these problems may be reduced.

In the view of the Commission this concern could be adequately dealt with by an explanatory note directing the attention of the person making the enduring power of attorney for health care to the kinds of treatment which may be proposed.

(vi) Commencement of chosen decision-maker's authority

Unless legislation provides otherwise, an enduring power of attorney comes into operation immediately it is executed. However, it is unlikely that a person who makes an enduring power of attorney for health care would want his or her chosen decision-maker to have authority to make health care decisions which he or she is still able to make.

In the Draft Report, the Commission recommended that, consistently with its recommendations about enduring powers of attorney for general lifestyle decisions, the authority of a chosen decision-maker under an enduring

⁹⁵⁰ Submission No 71.

power of attorney for health care should not come into operation unless the person who made the power has lost the capacity to make the decision in question.⁹⁵¹

The Commission noted that, in many situations, the authority of a chosen decision-maker is likely to be continuous once it has come into operation. However, the Commission acknowledged that there would be other situations - for example, where the person who made the enduring power of attorney has an episodic psychiatric illness - where the incapacity of the person who made the enduring power of attorney may be only temporary, and the authority of the chosen decision-maker may be periodic, lapsing when the person who made the power regains sufficient capacity to make his or her own decisions and becoming re-activated if a recurrence of the illness causes the person to lose capacity again.

The Commission also acknowledged that, in some circumstances, it may be difficult to determine if a person who has made an enduring power of attorney for health care is able to make decisions about treatment, or whether the enduring power of attorney can come into operation.

The Commission recommended that, where doubt exists as to whether or not a person who made an enduring power of attorney for health care has capacity to make decisions about his or her own treatment, the matter should be referred to the tribunal to determine whether the power is in operation.⁹⁵²

The Commission's recommendations were reflected in clauses 47 and 50 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.

⁹⁵¹ At 138.

⁹⁵² At 139.

The Commission recommends that the legislation provide that:

- . the authority of a chosen decision-maker under an enduring power of attorney for health care should not come into operation unless the person who made the power has lost capacity to make the decision in question;**
- . where doubt exists as to whether or not a person who made an enduring power of attorney for health care has capacity to make decisions about his or her own treatment, the matter should be referred to the tribunal to determine whether the enduring power of attorney is in operation.**

The Commission's recommendations are implemented by clauses 45 and 64 of the Draft Bill in Volume 2 of this Report.

(vii) Other issues

In the Draft Report, the Commission considered a number of other issues relating to enduring powers of attorney for health care. They included capacity to grant an enduring power of attorney for health care, witnessing requirements, and revocation of the power.⁹⁵³ The Commission concluded that these issues should be dealt with in the same way as for other enduring powers of attorney.

The Commission has made its recommendations about these issues in Chapter 6 of this Report.

However, one submission expressed the view that the formal requirements recommended by the Commission for the revocation of an enduring power of attorney were too stringent in relation to an enduring power of attorney authorising a chosen decision-maker to make health care decisions. The respondent, who is involved in a major study of end of life decision-making - with input from many sectors of the community, including older people, young people, general community members and care providers - noted that people who give instructions about their future health care while they are in

⁹⁵³ At 136-139.

good health may, if they become ill, feel differently about what they have previously written, and may wish to revoke the document. The respondent argued.⁹⁵⁴

However, the very fact that they are becoming progressively more ill may mean that they can no longer write, or dictate, or sign, a revocation order. They may be able to say that they have changed their minds - and that should be enough.

The submission drew the Commission's attention to Victorian legislation, under which a refusal of treatment certificate may be revoked "by the person who gave the certificate clearly expressing or indicating to a medical practitioner or another person a decision to cancel the certificate." The legislation further provides that a person may clearly express or indicate a decision in writing, orally or in any other way in which the person can communicate.⁹⁵⁵

The respondent concluded:

I would strongly urge the Commission to consider the benefit of such a position, both in terms of the possibility of the revocation being given orally, and also of the decision being expressed to "a medical practitioner or another person". After all, if a very ill person who has refused treatment should afterwards decide that s/he now does want such treatment, the most likely person that will be available to be told this is the person's current health-care provider.

The Commission has given careful consideration to this submission. It wishes to emphasise that an enduring power of attorney is an important legal document and that people who make them have a responsibility, for as long as they are able to do so, to review them periodically to ensure that the instructions they contain continue to reflect the maker's current wishes. The Commission acknowledges that it is undesirable that a person who wants to change previous instructions about his or her health care should be prevented from doing so by excessively onerous formal requirements. However, it remains concerned that the method of revocation should not create problems of proof and consequent uncertainty,⁹⁵⁶ nor the opportunity for well-intentioned but unwanted intervention.

⁹⁵⁴ Submission No 9.

⁹⁵⁵ Medical Treatment Act 1988 (Vic) s 7.

⁹⁵⁶ See pp 131-132 of this Report.

In the view of the Commission, written rather than oral revocation should be required. However, the Commission acknowledges that, in the context of an enduring power of attorney for health care, a reduction in the level of formality recommended in the Draft Report may be appropriate. The requirements for revocation of an enduring power of attorney were set out in clause 54(2) of the Draft Bill in Chapter 13 of the Draft Report. Clause 54(2) provided that a revocation of an enduring power of attorney must:

- . be in the approved form;
- . be signed by the person revoking it or, if the person instructs, for the person and in the person's presence by an individual who is at least 18 and not the witness or a chosen decision-maker for the person;
- . be signed and dated by a witness who is -
 - . a justice, commissioner for declarations or lawyer;
 - . not a chosen decision-maker for the person;
 - . not a relation of the person or a chosen decision-maker; and
 - . if the revocation revokes power to make a health care decision - not a current health care provider for the adult.

After further consideration, the Commission is now of the view that, while it should still be necessary for a revocation to be in writing, it should not be necessary for the document to be in any particular form. For example, words such as "I revoke my enduring power of attorney for health care" clearly indicate the intention to revoke and should be sufficient to do so. It should not be necessary for the revocation to be typed or printed or to be written in the person's own handwriting.

The Commission believes that revocation of an enduring power of attorney for health care should be independently witnessed, but also accepts that, for a person who may be confined to bed or hospitalised, the requirements set out in its original recommendations may be too difficult to achieve. The Commission is now of the view that it should not be necessary for the witness to be a justice of the peace, commissioner for declarations or lawyer. However, the Commission is not persuaded that it would be appropriate for a current health care provider, a relation or chosen decision-maker to act as a witness.

The Commission's original recommendation required the witness to certify that the revocation was signed in the presence of the witness and that the person revoking the enduring power of attorney appeared to the witness to have sufficient capacity to do so. The Commission is now of the view that,

since the revocation is no longer required to be in a particular form, this provision may be too onerous, as failure to comply would invalidate the revocation. However, a statement by the witness would be valuable evidence of the revocation.

The Commission acknowledges that a person who wishes to revoke a previous enduring power of attorney for health care may be too frail to sign a written document of revocation. The Commission's original recommendation provided for someone else to sign on behalf of a person who was unable to sign personally. The recommendation also required the witness to certify that, in the presence of the witness, the person revoking the power instructed the other person to sign and that the other person signed the document in the presence of both the person revoking the power and the witness. The Commission is persuaded that this provision may also be too onerous, although a statement by the witness would be valuable evidence of revocation.

The Commission recommends that the legislation provide that:

- . **a revocation of an enduring power of attorney for health care must:**
 - . **be in writing;**
 - . **be signed by the person revoking it or, if the person instructs, for the person and in the person's presence, by another person who is at least 18 and who is not the witness or a chosen decision-maker for the person;**
 - . **be signed and dated by a witness who is -**
 - . **not a chosen decision-maker for the person;**
 - . **not a relation of the person or a chosen decision-maker;**
and
 - . **not a current health care provider for the person.**
- . **a revocation of an enduring power of attorney for health care may include, as evidence of the revocation, a statement by the witness that:**
 - . **the person revoking the power appeared to the witness to have the necessary degree of capacity;**
 - . **the person revoking the power signed the revocation in the presence of the witness; or**
 - . **if the revocation is signed by another person -**
 - . **the person revoking the power instructed, in the presence of the witness, the other person to sign; and**
 - . **the other person signed the revocation in the presence of both the person revoking the power and the witness.**

The Commission's recommendations are implemented by clause 49 of the Draft Bill in Volume 2 of this Report.

(b) Statutorily authorised health care decision-makers

(i) The concept

During the consultation process carried out with a wide cross section of members of the community in the preparation of this Report, the Commission has become aware of a commonly held perception that the next of kin of a person who is unable to make decisions about his or her own health care treatment has authority to consent to treatment on that person's behalf. There is, in fact, no legal basis for this belief. If an adult is unable to consent, no one else - no matter how closely related - can give a substituted consent unless there is legislation which confers authority to do so.

In some Australian jurisdictions, legislation authorises certain people to make decisions about the health care of a person whose decision-making capacity is impaired.

In New South Wales, for example, a "person responsible" may consent to all health care treatment except for procedures which are designated as "special treatment"⁹⁵⁷ and for which the consent of the Guardianship Board must be obtained.⁹⁵⁸ The term "person responsible" is defined in descending order of priority, each category displacing the categories below it.⁹⁵⁹ For a person who has not had a guardian appointed, the "person responsible" would be a spouse⁹⁶⁰ with whom the person whose decision-making capacity is impaired has a close, continuing relationship, a carer⁹⁶¹ or a close friend or relative.⁹⁶²

⁹⁵⁷ "Special treatment" means a sterilisation procedure, or ethically contentious treatment, or any other kind of treatment declared by the regulations to be special treatment. See *Guardianship Act 1987 (NSW)* s 33(1).

⁹⁵⁸ *Guardianship Act 1987 (NSW)* s 36(1).

⁹⁵⁹ *Guardianship Act 1987 (NSW)* s 3A(1).

⁹⁶⁰ "Spouse" includes a heterosexual de facto partner. See *Guardianship Act 1987 (NSW)* s 3.

⁹⁶¹ "Carer" does not include a person who receives remuneration, other than a carer's pension, for providing services or support. Where a person resides in an institution such as a hospital or nursing home, the person who had care of the person before he or she was admitted to the institution remains the carer of the person. See *Guardianship Act 1987 (NSW)* s 3A(3), 3A(4), 3A(7).

⁹⁶² To be a "close friend or relative" for the purpose of making health care decisions for a person whose decision-making capacity is impaired, a person must maintain a close personal relationship through frequent personal contact and must maintain a personal interest in the other person's welfare. Performing services related to personal care for remuneration is not sufficient. *Guardianship Act 1987 (NSW)* s 3A(5).

The New South Wales provisions are reflected in recent Tasmanian legislation.⁹⁶³

In South Australia, legislation enables the "appropriate authority" to consent to health care treatment other than a sterilisation procedure, a termination of pregnancy, or any other form of treatment prescribed by the regulations made under the legislation.⁹⁶⁴ If a guardian has not been appointed, the "appropriate authority" is either a relative of the person or the Guardianship Board.⁹⁶⁵

A similar scheme is under consideration in Victoria.⁹⁶⁶

In Queensland, legislation confers authority on the Legal Friend⁹⁶⁷ and on the medical superintendent of a hospital⁹⁶⁸ to consent, in specified circumstances, to treatment for a person who is unable to make his or her own decision. However, at present there is no legislation in Queensland equivalent to that in New South Wales, South Australia and Tasmania, which authorises a relative or other member of a person's immediate support network to make decisions about the health care of a person with impaired decision-making capacity.

In its Draft Report, the Commission recommended that there should be a statutory power to consent to health care treatment, other than treatment requiring special consent procedures,⁹⁶⁹ on behalf of a person who lacks capacity to make the decision personally.

The Commission acknowledged that, in many instances, the health care needs of a person with impaired decision-making capacity are best understood by the relatives or friends who make up that person's immediate

⁹⁶³ *Guardianship and Administration Act 1995 (Tas)* ss 4, 39(1).

⁹⁶⁴ *Guardianship and Administration Act 1993 (SA)* ss 3, 59(1).

⁹⁶⁵ *Guardianship and Administration Act 1993 (SA)* s 59(2). A "relative" is defined as a spouse, a parent, a person other than an appointed guardian acting *in loco parentis*, a brother or sister aged eighteen years or over or a son or daughter aged eighteen years or over. See *Guardianship and Administration Act 1993 (SA)* s 3. "Spouse" includes a heterosexual de facto partner. See *Guardianship and Administration Act 1993 (SA)* s 3; *Family Relationships Act 1975 (SA)*.

⁹⁶⁶ Guardianship and Administration Board, *Annual Report 1994-1995*, 1.

⁹⁶⁷ See pp 19-20, 313-314 of this Report.

⁹⁶⁸ See p 314 of this Report.

⁹⁶⁹ See Chapter 5 of this Report.

support network.⁹⁷⁰ Further, it recognised the dedication of the overwhelming majority of family members and expressed the view that, if given the responsibility of making health care decisions, family members would act in what they genuinely considered to be the best interests of a loved one. The Commission considered that to require an application to the tribunal merely to satisfy the technical legal requirement of consent seems, in most cases, an unwarranted intrusion and an unnecessary burden.⁹⁷¹

The Commission's recommendation was reflected in clauses 108(2)(b) and 113 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, from a person with experience of the Victorian legislation, commended the Commission's "common sense approach to the issue of health care consents which will accommodate the vast majority of the community to access needed and non-controversial treatments with a minimum of fuss and 'hurdle jumping'".⁹⁷²

(ii) Who should be a statutorily authorised decision-maker

In the Draft Report, the Commission recommended that the following people should be authorised to make health care decisions for a person with impaired decision-making capacity:

- . the spouse⁹⁷³ of the person concerned;
- . a parent;
- . a son or daughter; or

⁹⁷⁰ See Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) Vol 1 at 231, 458; J Blackwood, *Substitute Consent for Medical Treatment: A Statutory Model*, a Paper presented at the Fourth Annual Guardianship and Administration Conference (October 1995).

⁹⁷¹ At 143-144.

⁹⁷² Submission No 68.

⁹⁷³ The definition of "spouse" in the Draft Bill in Chapter 13 of the Draft Report reflected the recommendations of the Commission in its Report No 42: *The Intestacy Rules*, Report No 44: *De Facto Relationships* and Report No 48: *De Facto Relationships: Claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death* and included partners living in a de facto relationship. In Report No 44 a "de facto relationship" was defined, at page 11, as "the relationship between two persons (whether of a different or the same gender) who, although they are not legally married to each other, live in a relationship like the relationship between a married couple".

a person who has a close personal relationship with the person concerned and maintains a personal interest in that person's welfare.

The Commission's recommendation differed from the statutory consent schemes in the New South Wales, South Australian and Tasmanian legislation in that the Commission proposed that the list should not be hierarchical. The Commission considered that this approach could lead to difficulties in identifying and locating the person authorised to consent and that there may also be circumstances in which the hierarchical order would not reflect the reality of the person's support networks or the person's lifestyle.⁹⁷⁴

The Commission acknowledged that, in some cases, there may be more than one person who considers that he or she should be the authorised person. However, from the point of view of the health care provider, the consent of any person on the list would be sufficient, and the health care provider would be able to obtain consent from the person he or she considered most appropriate. In the event of a dispute between two or more authorised persons who believe themselves entitled to decide, application could be made to the tribunal if the dispute cannot be resolved in any other way to determine which, if any, is the most appropriate decision-maker or whether the Adult Guardian⁹⁷⁵ should be appointed to make health care decisions for the person concerned.

The Commission also recommended that if a person represents to the health care provider that he or she is authorised to give consent, and if the health care provider does not know and could not reasonably be expected to know that the person does not have authority, the consent should be deemed to be effective.⁹⁷⁶ The Commission further recommended that it should be an offence for a person, knowing that he or she does not have the necessary authority to consent to treatment, to consent to treatment or to represent to a health care provider that he or she is authorised to consent.⁹⁷⁷

The Commission's recommendations were reflected in clauses 28, 121 and 122 of the Draft Bill in Chapter 13 of the Draft Report.

⁹⁷⁴ At 144.

⁹⁷⁵ See Chapter 12 of this Report.

⁹⁷⁶ See for example *Guardianship and Administration Act 1993 (SA)* s 59(3)(b).

⁹⁷⁷ See for example *Guardianship and Administration Act 1993 (SA)* s 60.

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

In particular, the submissions welcomed the recognition given to the role played by family members in the health care of a person with impaired decision-making capacity.⁹⁷⁸ A support group of relatives and family carers of people with schizophrenia described the statutory consent mechanism as "necessary and desirable".⁹⁷⁹ A joint submission from two community organisations dedicated to serving the needs of people in North Queensland stated:⁹⁸⁰

The authors particularly support the Commission's acknowledgement that in many instances, the health care needs of a person with impaired decision-making capacity are best understood by the relatives and friends who make that person's immediate support network. The recognition directed to family members is well placed.

World estimates suggest that between 50% and 80% of people with a psychiatric disability live with their family. Instead of being blamed, it is refreshing to see legislation which supports family networks and ensures relatives and friends are consulted in the decision-making process. After all, they will be the ones most likely to be caring for a person with a decision-making disability.

However, some submissions, while supporting the Commission's recommendations, proposed some refinements to them.

An advocacy organisation for people with disability in Queensland commented:⁹⁸¹

We note that the definition of "family" does not include brothers and sisters. While there may be good reasons for this restriction, for many older people with impaired decision-making capacity, the only close family that they will have will be siblings.

⁹⁷⁸ For example Submission Nos 33, 53, 64, 73, 74.

⁹⁷⁹ Submission No 33.

⁹⁸⁰ Submission No 73.

⁹⁸¹ Submission No 64.

The Commission accepts the validity of this concern and agrees that, if a person with impaired decision-making capacity does not have a spouse, parent or adult child to act - or reasonably available to act - as statutorily authorised health care decision-maker, the person's siblings should be regarded as "family" for the purposes of the statutory consent mechanism.

The same submission also proposed that, where a current health care provider for the person comes within the definition of "statutorily authorised health care decision-maker", the health care provider should be excluded from having statutory authority to consent.⁹⁸²

The Commission agrees with this proposal.

On the other hand, some submissions strongly opposed the Commission's recommendations.

Three submissions highlighted the potential for abuse. The parent of an adult intellectually disabled son commented that the Commission's recommendation "[does] not protect the most vulnerable people" and "also provides an easy out for the health care provider".⁹⁸³ The Legal Friend stated:⁹⁸⁴

Within such an automatic system, protection from abuse will depend even more on whistle blowers than does the existing system in Queensland. The difference will be that if there are no advocates an innocent but ignorant (of the law) doctor may perform procedures on a person unable to object at the request of family.

The Legal Friend also said:⁹⁸⁵

The existing system protects (profoundly intellectually disabled adults) by ensuring that those persons receive appropriate treatment. I am concerned that under an essentially automatic system of empowerment of relatives as Statutorily Authorised Decision Makers many such persons may refuse to provide necessary treatment, relying on the statutory authority to be such a decision-maker.

⁹⁸² Submission No 64.

⁹⁸³ Submission No 10.

⁹⁸⁴ Submission No 76.

⁹⁸⁵ Submission No 76A.

...

What will be the position if a person requires dental treatment but the Statutorily Authorised Decision Maker has done nothing to authorise it, or get things done? The ultimate outcome may well be the removal of that incapacitated person's teeth, when earlier action could have saved them through restorative treatment.

For the Intellectually Disabled Citizens Council:⁹⁸⁶

The issue of "statutorily appointed decision-makers" who will assume decision-making capacities on behalf of their relatives and close friends, is an issue of great concern to the Council.

The Council illustrated its concern with the following examples:

- (1) *... a recent case of a person residing in a nursing home in a remote area involved a dilemma as to who was the next of kin. Numerous "relatives" of the person were presenting themselves on pension days and requesting the person's money, claiming to be the financial decision-makers.*
- (2) *Another case involved a person with no known relatives, who was being privately cared for by close friends. It was alleged by long term friends of the person, that the present carers were preventing any communication between themselves and the person, despite their best efforts, and were not acting in the best interests of the person.*

However, in the view of the Commission, the concerns raised by the Council are unfounded. The Commission's recommendations for statutorily authorised decision-makers apply only for decisions about the health care of a person with impaired decision-making capacity and, in the Council's first example, would not enable access to the person's money. The Commission's recommendations would also allow the "long term friends" in the second example to make an application to the tribunal to resolve the situation.

⁹⁸⁶ Submission No 52.

The Council also queried whether a "statutorily authorised decision-maker" could include a paid carer. The respondent submitted.⁹⁸⁷

The Council views with some alarm the prospect that a person employed to care for a person with impaired decision-making capacity, [who] may have little or [no] previous existing knowledge or concern for the personal needs of that person, could be put in the privileged position of family members and close personal friends of persons with impaired decision-making capacity.

However, the Commission's definition of "statutorily authorised decision-maker" includes only certain close family members and close friends who have a close personal relationship with the person concerned and a personal interest in the person's welfare. An employee with "little previous knowledge or concern for the person" would clearly not come within the definition. The Commission believes that the Council's concerns on this issue are also unfounded.

In relation to family members having statutory recognition as health care decision-makers, the Council said:

While the Council acknowledges that it is a heartfelt and common concern of relatives and carers of persons with an intellectual disability that their responsibility in the area of decision-making ceases when the loved one becomes an adult, we are concerned at the opportunities for abuse by such persons of their charges. It is the experience of the Council who have dealt with over 6,000 cases over the last decade, that a significant proportion of these cases have involved potential injustice and/or lack of objectivity by family members and/or carers.

The Council believes that all decision-makers should be appointed by the Tribunal ... and that a register of such appointees should be kept. Our experience ... has been that if such proceedings are handled openly and sensitively, with minimal legalistic procedure, then such proceedings are not perceived as being intrusive.

The Commission wishes to emphasise that it regards any incidence of abuse as unacceptable. However, it is not persuaded that a requirement that all decision-makers be formally appointed by the tribunal would prevent abuse or inappropriate decision-making. Nor would formal appointment avoid the

⁹⁸⁷ Submission No 52.

problem raised by the Legal Friend of family members neglecting to obtain treatment, since appointment concerns only legal authority to consent to treatment and would not ensure that treatment was sought. In the view of the Commission the preferable approach is to facilitate to the greatest extent possible the responsibilities undertaken by caring family members, while providing effective safeguards for those people with a decision-making disability who have no family or who have family members who act inappropriately. The Commission believes that ease of access to the tribunal by any person who has a genuine interest in the welfare of the person concerned,⁹⁸⁸ together with the protective role of the Adult Guardian and the systemic role of the Public Advocate,⁹⁸⁹ will provide as much security for people with a decision-making disability as would a system of compulsory appointment and registration.

The scheme proposed by the Commission gives official recognition to the practice - often successfully adopted in the past, but with no legal basis - of decision-making on the basis of consultation between treatment providers and relatives or friends, but provides additional safeguards. Conferring formal legal authority on the existing practice is not mere window-dressing. It involves important legal consequences. By creating a statutory right for relatives or friends to be consulted and to make decisions, it ensures that the members of the person's support network are not by-passed in the decision-making process. More importantly, it requires that, in order to participate, the authorised decision-maker is given the information necessary to make a meaningful decision.⁹⁹⁰

The Commission acknowledges that a system of statutorily authorised decision-makers places an added responsibility on both health care providers and decision-makers to ensure that the treatment proposed is appropriate for promoting and maintaining the health and well-being of the patient.⁹⁹¹ However, the Commission believes that compliance with this objective will be better achieved by educating the community about the rights of people with a decision-making disability and the responsibility of decision-makers and service providers rather than by formal appointment of decision-makers.

⁹⁸⁸ This would include, for example, a health care provider who believed proposed treatment to be in the person's best interests but was unable to obtain consent from a statutorily authorised decision-maker.

⁹⁸⁹ See Chapter 12 of this Report.

⁹⁹⁰ See pp 360-361 of this Report.

⁹⁹¹ See p 359 of this Report.

One submission, from an association of medical practitioners, criticised the scheme proposed by the Commission on the basis that it did not make clear who would have decision-making authority.

In the Draft Report, the Commission acknowledged that, in some cases, there may be more than one person who considers that he or she should be the authorised person.⁹⁹² However, from the point of view of the health care provider, the consent of any person on the list would be sufficient, and the health care provider would be able to obtain consent from the person he or she considered most appropriate. In the event of a dispute between two or more authorised persons who believe themselves entitled to consent, application could be made to the tribunal by any of the potential decision-makers or by the health care provider to determine who is the most appropriate decision-maker or whether the Adult Guardian⁹⁹³ should be appointed to make health care decisions for the person concerned.

The Commission recommended that if a person represents to a health care provider that he or she is authorised to give consent, and if the health care provider does not know and could not reasonably be expected to know that the person does not have authority, the consent should be deemed to be effective.⁹⁹⁴ The Commission also recommended that it should be an offence for a person, knowing that he or she does not have the necessary authority to consent to treatment, to consent to treatment or to represent to a health care provider that he or she is authorised to consent.⁹⁹⁵

In the view of the Commission these provisions provide sufficient protection for health care providers.

(iii) Where there is no "statutorily authorised decision-maker"

One submission considered that the Commission's proposals were not sufficiently far-reaching. The respondent argued:⁹⁹⁶

⁹⁹² At 144.

⁹⁹³ See Chapter 12 of this Report.

⁹⁹⁴ See for example *Guardianship and Administration Act 1993 (SA)* s 59(3)(b); *Guardianship and Administration Act 1995 (Tas)* s 39(3).

⁹⁹⁵ See for example *Guardianship and Administration Act 1993 (SA)* s 60; *Guardianship and Administration Act 1995 (Tas)* s 42.

⁹⁹⁶ Submission No 68.

... there will also be a significant number of people with intellectual disability, chronic mental illness, head injury and drug and alcohol related brain damage who, because of the type of disability, will be marginalised socially and economically and isolated from their families. In other words, there will be no family member readily available or interested in the decision making role.

As I understand the draft, this implies the intervention of the tribunal and likelihood of the appointment of a "decision-maker of last resort" ... Differential treatment on the basis of social circumstances (not on the basis of the presenting problem) raises questions as to whose interests are being met.

When a person is not objecting to a treatment and the treatment is necessary and non-controversial then consent should be seen as "implied" and therefore for the purposes of the legislation lawful.

Legislation in New South Wales and in Tasmania provides that where it is proposed to carry out any treatment (other than special treatment) on a person with impaired decision-making capacity and there is no "person responsible"⁹⁹⁷ for that person, treatment may be carried out without consent if the treatment is necessary and the form of treatment that will most successfully promote that person's health and well-being and the person does not object to the treatment.⁹⁹⁸

The Commission accepts that, where the Adult Guardian is appointed health care decision-maker for a person who does not have someone to act as a "statutorily authorised decision-maker", the Adult Guardian will consent to treatment which is clearly indicated in the best interests of the person concerned. The Commission also concedes that, in such a situation, there is little to be gained from insisting on an application to the tribunal which, for the person concerned, is likely to result in anxiety, loss of privacy and unnecessary delay in receiving the treatment and which is not likely to benefit the person. Moreover, the requirement to make a tribunal application in each such situation is likely to be "highly resource draining for minimal patient benefit" and may also involve high levels of non-compliance.⁹⁹⁹

⁹⁹⁷ See pp 332-333 of this Report.

⁹⁹⁸ *Guardianship Act 1987 (NSW) s 37; Guardianship and Administration Act 1995 (Tas) s 41.*

⁹⁹⁹ J Blackwood, *Substitute Consent for Medical Treatment: A Statutory Model*, a paper presented at the Fourth Annual Guardianship and Administration Conference (October 1994), citing the New South Wales Guardianship Board, Annual Report 1993.

The Commission is persuaded that there are some circumstances in which it should not be necessary for an application to have to be made to the tribunal for the appointment of the Adult Guardian to make health care decisions on behalf of a person whose decision-making capacity is impaired and for whom there is no statutorily authorised decision-maker existing or readily available. In coming to this conclusion, the Commission is mindful of the view expressed in the Draft Report that its proposals should ensure that people who are unable to make decisions about their own health care are not deprived of access to necessary treatment because of their lack of capacity to decide.¹⁰⁰⁰

The Commission is also mindful of the corresponding need to ensure that people who lack capacity to make decisions about their own health care are protected against unnecessary or inappropriate treatment. For this reason, the Commission believes that criteria additional to those in the New South Wales and Tasmanian legislation should be included to specify the circumstances in which treatment may be given although no application has been made to the tribunal for the appointment of the Adult Guardian as a decision-maker of last resort. In the view of the Commission, the legislation should state that treatment may be given only if the form of treatment proposed is non-controversial and if there is no dispute (for example between the health care provider and other service providers) about the giving of the treatment or about the person's capacity to make his or her own decision on the matter.

The Commission acknowledges that, where there is no independent third person interposed between the health care provider and the patient, there is a need for increased accountability on the part of the health care provider. The Commission believes that this can be achieved by requiring health care providers to certify in the patient's clinical records relating to the treatment that the treatment is necessary and is the form of treatment that will most successfully promote the patient's health and well-being and that the patient does not object to the treatment.¹⁰⁰¹ In the view of the Commission, such a requirement would not be an unreasonable burden on health care providers, since the keeping of accurate clinical records is an essential part of their common law duty of care and an incident of best practice.

A further safeguard would be to provide that the regulations may specify treatment which may not be carried out without consent.¹⁰⁰²

¹⁰⁰⁰ At 132.

¹⁰⁰¹ See for example *Guardianship and Administration Act 1995 (Tas)* s 41(3).

¹⁰⁰² See for example *Guardianship and Administration Act 1995 (Tas)* s 41(2).

The Commission recommends that the legislation provide that:

- . **the following people are statutorily authorised decision-makers for a person with impaired decision-making capacity for a health care decision:**
 - . **the person's spouse;**
 - . **each of the person's adult children;**
 - . **each of the person's parents;**
 - . **if a person does not have a spouse, adult child or parent reasonably available and willing to act, but the person does have a brother or sister who is over the age of eighteen, each of the person's adult brothers and sisters;**
 - . **a close friend of the person;**
- . **a statutorily authorised decision-maker be able to make health care decisions, other than special consent health care decisions, for a person with impaired decision-making capacity;**
- . **to the extent that a health care provider complies with a health care decision made by a person who represented to the health care provider that the person had the right to make the decision, the health care provider is taken to have the consent of the person with impaired decision-making capacity, unless the health care provider knew, or could reasonably have been expected to have known, that the person did not have the right to make the decision;**
- . **where there is no statutorily authorised decision-maker, it is lawful for a health care provider to carry out health care treatment, other than special consent treatment, without consent if -**
 - . **in the opinion of the health care provider -**
 - . **the treatment is necessary; and**
 - . **the treatment is the form of treatment that will most successfully promote the patient's health and well-being;**
 - . **the treatment is not controversial;**

- . there is no dispute among interested parties about the giving of the treatment or about the capacity of the person to make his or her own decision about the treatment;
- . the patient does not object to the treatment;
- . a treatment provider must certify in the person's clinical records that such treatment given without consent is the form of treatment that will most successfully promote the patient's health and well-being and that the patient does not object to the carrying out of the treatment;
- . the regulations may specify treatment that may not be given without a valid consent.

The Commission's recommendations are implemented by clauses 147, 148, 155, 166 and the Dictionary in Schedule 2 of the Draft Bill in Volume 2 of this Report.

(c) Decision-maker appointed by the tribunal

Situations may arise in which it is necessary for the tribunal to appoint a decision-maker to make health care decisions for a person with impaired decision-making capacity.

In the Draft Report, the Commission recommended that, if a decision-maker is appointed by the tribunal to make health care decisions on behalf of a person whose decision-making capacity is impaired, the authority of the appointed decision-maker should take precedence over the statutory power of a relative or friend to make health care decisions, provided that the decision-maker is reasonably available and is willing to make a decision about the proposed treatment.¹⁰⁰³

The Commission's recommendation was reflected in clauses 108(2)(b) and 113 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.

¹⁰⁰³ See for example *Guardianship Act 1987 (NSW)* s 3A(1)(a); *Guardianship and Administration Act 1993 (SA)* s 59(2)(a); *Guardianship and Administration Act 1995 (Tas)* s 4(1)(c).

The Commission recommends that the legislation provide that:

- . **if a person has impaired decision-making capacity for a health care decision, the tribunal may appoint a decision-maker for the decision if there is no statutorily authorised health care decision-maker or the tribunal considers it impracticable or inappropriate for a statutorily authorised health care decision-maker to make the decision;**
- . **the authority of a decision-maker appointed by the tribunal takes precedence over a statutorily authorised decision-maker's power to make health care decisions.**

The Commission's recommendations are implemented by clauses 117 and 153(2) of the Draft Bill in Volume 2 of this Report.

(d) Instructions given in an advance directive

(i) The concept of an advance directive

An alternative source of authority for decisions about the health care of a person whose decision-making capacity is impaired could be provided by allowing a person, at a time when he or she has the necessary degree of capacity, to give written instructions about his or her health care in the event of future loss of decision-making capacity. This procedure would differ from an enduring power of attorney in that it would speak directly to the health care provider, whereas an enduring power of attorney appoints another person to act as decision-maker. In the Draft Report, the Commission recognised that some people may prefer the alternative of an advance directive, either because they do not have a close friend or relative whom they wish to appoint to make decisions on their behalf, or because they do not want to burden another person with the responsibility of making their decisions.

(ii) Scope of an advance directive

Advance directives are often associated with the issue of "dying with dignity" and with what are popularly called "living wills". A living will is a document in which a person gives instructions about the kind of treatment which the person wishes, or does not wish to receive, if the person becomes terminally ill and unable to make decisions or if the person falls into a state of persistent or permanent unconsciousness.

However, the definition of "health care decision" in Chapter 5 of this Report excludes decisions about withholding or withdrawing treatment which is aimed at artificially maintaining or prolonging the life of a person who is terminally ill or in a state of permanent or persistent unconsciousness.¹⁰⁰⁴ Accordingly, an advance directive which attempted to provide for "end of life" decision-making in such a situation would not be within the scope of the scheme proposed by the Commission.

Nonetheless, there are other situations in which an advance directive would assist a person to exercise control over future health care decisions in the event of any future impairment to the person's decision-making capacity. One important example is people who suffer from episodic mental illness. An advance directive would allow such a person, in the intervals between episodes, to plan for times when he or she may be incapable of making decisions about his or her own treatment. In North America, a type of directive known as a "Ulysses agreement" has been developed. The directive may be used to identify the symptoms of the person's mental illness, the action which the person would like taken if he or she displays those symptoms and the people who have agreed to be involved in carrying out that action.

In the Draft Report, the Commission recognised the value of the availability of an advance directive as an alternative to involuntary treatment, in the treatment of some patients with mental illness. It would empower the patient,¹⁰⁰⁵ by enabling the patient to participate in and contribute to the planning of his or her own psychiatric treatment.¹⁰⁰⁶ The directive could be customised to meet the individual needs of particular patients.¹⁰⁰⁷ It could, with the patient's prior consent, enable intervention at an earlier stage

¹⁰⁰⁴ See pp 53-57 of this Report.

¹⁰⁰⁵ Over time, many [patients] learn to recognise the early warning signs and prepare for the symptoms. For some this means they gain a degree of control over their lives as they develop an understanding of their illness.' (Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 1 p 442.)

¹⁰⁰⁶ The Human Rights and Equal Opportunity Commission observed:

The Inquiry heard from many consumers with a history of multiple hospitalisations who knew from previous experience which drugs suited them, which they were allergic to, and which had the most pronounced primary effects and side effects. However, their views [on treatment] were generally not sought.

(*Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 1 p 240.)

¹⁰⁰⁷ According to the Human Rights and Equal Opportunity Commission, "It is now well established that individualised assessment and therapy programs providing education and support, medication as appropriate, and suitable rehabilitation regimes will enhance recovery and lessen the risk of future episodes." (*Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 2 p 857.)

in the development of the illness¹⁰⁰⁸ than the provisions for involuntary treatment allow.¹⁰⁰⁹ It would also foster co-operation and trust between the patient and his or her health care providers and supporters and would promote continuity of an agreed treatment plan.¹⁰¹⁰

(iii) Legal effect of an advance directive

There is some doubt about the legal status of an advance health care directive in the absence of legislation to give it binding force. It has generally been regarded as uncertain whether a health care provider would be bound to carry out the terms of the directive, or whether the directive is merely an indication of the wishes of the person concerned, which may or may not have a persuasive effect on the person's family and health care providers.¹⁰¹¹

In the Draft Report, the Commission recommended that legislation be introduced to enable a person with the necessary degree of decision-making capacity to make an advance directive containing information and instructions about his or her future health care, excluding the kind of "end of life" decisions referred to above.¹⁰¹² The Commission recommended that the legislation should provide that when such a directive becomes operative, it is as effective as if the person made the decision at the time it needed to be made and had the capacity to make the decision at that time.¹⁰¹³

¹⁰⁰⁸ The importance of early intervention has been recognised by the Human Rights and Equal Opportunity Commission. See *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, Chapter 27.

¹⁰⁰⁹ Before a person can be admitted as an involuntary patient, he or she must be suffering from mental illness of a nature or to a degree that warrants detention in hospital and detention must be necessary in the interests of the person's own welfare or for the protection of other persons. (*Mental Health Act 1974 (Qld)* s 18(2).) The purpose of this provision is to protect patients against unwarranted detention. However, there is some concern among relatives and practitioners that it prevents intervention until the patient's illness has reached a critical state. The *Mental Health Act* is presently under review.

¹⁰¹⁰ The Human Rights and Equal Opportunity Commission also noted the importance of continuity of care. (*Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, vol 1 p 300.)

¹⁰¹¹ See for example D Lanham and B Fehiberg, "Living Wills and the Right to Die with Dignity" (1991) 18 *Melbourne University Law Review* 329 at 331. But see also *Malette v Schulman* (1990) 67 DLR (4th) 321; *Fleming v Reid* (1991) 82 DLR (4th) 298; *Airedale NHS Trust v Bland* [1993] AC 789.

¹⁰¹² At 162.

¹⁰¹³ Not all instructions given by a competent patient to a health care provider are binding on the provider. For example, a health care provider is not bound to give treatment if, on a reasonable and responsible clinical assessment, that particular form of treatment is not called for because it would be futile or inappropriate. An advance directive would not enable a patient to demand that he or she receive, when not competent, treatment which a health care provider would not have been obliged to give when the patient was competent.

The Commission's recommendations were reflected in clauses 62, 69, 107 and 108(2)(a) of the Draft Bill in Chapter 13 of the Draft Report.

The Health Rights Commission has also recommended legal recognition of the right to make a written advance directive about health care.¹⁰¹⁴

A number of submissions received by the Commission in response to the Draft Report commented on advance directives only in the context of "end of life" decisions. As explained above, such decisions are not included in the legislative scheme proposed by the Commission.

There was, however, significant support for the recommendations made by the Commission in the Draft Report.¹⁰¹⁵ The recommendations were endorsed particularly by mental health support groups and by representatives of older members of the community. One respondent, for example, commented:¹⁰¹⁶

Psychiatric illnesses are often characterised by a lack of insight when the person is unwell, which makes obtaining treatment very difficult. An advance directive would mean that the person concerned could discuss with carers or health professionals what they would like done if they become unwell. This would mean that the person has control even when they are sick, which is usually the time when they have least control.

The Department of Family Services and Aboriginal and Islander Affairs¹⁰¹⁷ stated:¹⁰¹⁸

An advance health care directive, like an enduring power of attorney, provides a mechanism for people to plan for their own future. The Office of Ageing advises that older people have consistently supported this proposal because it will empower them to make plans for their own future.

¹⁰¹⁴ Health Rights Commission, *Code of Health Rights and Responsibilities*, 1995.

¹⁰¹⁵ Submissions Nos 4, 9, 10, 33, 53, 66, 73, 74, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 111.

¹⁰¹⁶ Submission No 73.

¹⁰¹⁷ Now the Department of Families, Youth and Community Care.

¹⁰¹⁸ Submission No 74.

Only one submission voiced disagreement with the Commission's recommendations. An advocacy group for people with disability in Queensland expressed the following concerns:¹⁰¹⁹

- . the mechanism focuses on wishes expressed at an earlier time and, as it is unable to take into account changes in attitudes and values occurring after the directive is signed, the apparent enhancement of individual autonomy is illusory;
- . even if made after counselling or advice from a medical practitioner, an advance directive will not be based on information which takes account of all relevant current circumstances;
- . there is no provision for obtaining a second opinion or for an independent third person to stand between the patient and the health care provider;
- . were advanced directives to be given legislative sanction, it would be a relatively easy task for a Parliament at a later date to extend their coverage to include "end of life" decisions.

The draft legislation which accompanied the Draft Report contained a number of provisions intended as safeguards for the interests of a person who makes an advance directive. It allowed for revocation of an advance directive by the person who made it.¹⁰²⁰ It provided that an advance directive would be revoked by a subsequent directive dealing with the same subject matter or by a subsequent enduring power of attorney appointing a chosen decision-maker to make a decision included in the directive.¹⁰²¹ It allowed for any interested person to apply to the tribunal for advice about the contents of a person's advance directive.¹⁰²² It also allowed the tribunal to revoke or change the terms of an advance directive if the circumstances which exist at the time when treatment is needed have changed to such an extent since the directive was made that the terms of the directive are no longer appropriate.¹⁰²³

The accessibility of the tribunal is an additional safeguard.

¹⁰¹⁹ Submission No 64.

¹⁰²⁰ Cl 77. In this Report, the Commission recommends a simplified procedure for revocation of enduring powers of attorney for health care and for advance directives. See pp 327-331 and 354 of this Report.

¹⁰²¹ Cl 78.

¹⁰²² Cl 73.

¹⁰²³ Cl 74.

The legislative scheme proposed by the Commission offered people with capacity to make an advance directive a choice as to how they would like decisions about their health care to be made in the event of future loss of capacity to make those decisions personally. If they wished to give legally effective instructions to health care providers about their future care, they would be able to do so within the protection provided by the legislation. The Commission sees significant benefit for some people in this approach. However, people who share the concerns expressed above would be able to adopt a different approach.

The Commission recommends that the legislation provide that:

- . **a person who has the necessary degree of capacity may make an advance directive including decisions about the person's future health care;**
- . **if the person loses capacity for a decision included in the directive, the directive is as effective as if the person had made the decision when it needed to be made and had the capacity to make the decision at that time.**

The Commission's recommendations are implemented by clauses 76, 87, 152 and 153 of the Draft Bill in Volume 2 of this Report.

(iv) Choosing a decision-maker in an advance directive

In the Draft Report, the Commission acknowledged that the directions given in an advance directive may lack sufficient clarity to guide health care professionals or may fail to anticipate the circumstances that actually arise. To help overcome this potential difficulty, the Commission recommended that:¹⁰²⁴

- . the maker of an advance directive be able to appoint another person or persons to make health care decisions on his or her behalf if the instructions in the directive are inadequate or unclear;
- . a person so appointed would be under the same duties and obligations as if he or she had been appointed a chosen decision-maker under an enduring power of attorney; and

¹⁰²⁴
At 164-165.

a person who is not eligible to be a chosen decision-maker under an enduring power of attorney for health care should not be eligible for appointment under an advance directive.

The Commission's recommendations were reflected in clauses 62(3)(b), 63 and 67 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. Only one submission, from an advocacy organisation for people with disability in Queensland, considered the Commission's recommendation insufficient, since the person nominated as decision-maker by an advance directive would be consulted only if the instructions in the directive are inadequate to deal with the situation which has arisen.

This perceived insufficiency was intentional. The Commission intended the advance directive mechanism to provide an alternative to an enduring power of attorney for health care, where the authority of a chosen decision-maker comes into operation when the person who made the enduring power of attorney loses capacity to make the decision in question. Under the Commission's recommendations the instructions given in an advance directive would be given effect unless a change in circumstances had made them inappropriate, or unless they were inadequate to authorise the proposed treatment. If the instructions were inadequate, the advance directive would be legally ineffective unless the person who made it had nominated a person to make decisions in such a situation. The authority of a decision-maker under an advance directive would not commence unless the instructions given by the person who made the directive could not be implemented, and the directive would otherwise fail.

The Commission recommends that:

- **the maker of an advance directive be able to appoint another person or persons to make health care decisions on his or her behalf if the instructions in the directive are inadequate or unclear;**
- **a person so appointed would be under the same duties and obligations as if he or she had been appointed a chosen decision-maker under an enduring power of attorney; and**
- **a person who is not eligible to be a chosen decision-maker under an enduring power of attorney for health care should not be eligible for appointment under an advance directive.**

The Commission's recommendations are implemented by clauses 11 and 76 and Chapter 8 of the Draft Bill in Volume 2 of this Report.

(v) Requirements for making and revoking an advance directive

In the Draft Report, the Commission also considered the requirements which should apply to the execution and revocation of an advance directive. The Commission acknowledged that, as with enduring powers of attorney, the legislation should contain provisions for executing and revoking an advance directive and for safeguarding the rights and interests of the maker of the directive.¹⁰²⁵

The Commission noted the observations of the Manitoba Law Reform Commission:¹⁰²⁶

...[F]ormalities of execution serve a number of important functions. They protect the maker from undue influence and fraud, they provide reliable and permanent evidence of the intentions of the maker, and they impress upon the maker the significant consequences of the document. However, ... health care directives should be as accessible as possible to everyone who wishes to make one. Accordingly, the method of execution of health care directives should be as simple as possible, [and] should involve formalities only to the extent that is absolutely necessary.

The Commission expressed the view that the procedures which it proposed in relation to enduring powers of attorney achieved the desired balance and that similar provisions should be adopted in relation to advance directives.

The Commission recommended that:¹⁰²⁷

- an advance directive should be in writing and signed by or on behalf of the person making it;
- an advance directive should be witnessed;
- the witness should be a Justice of the Peace, a Commissioner for Declarations or a legal practitioner;

¹⁰²⁵ At 162-163, 165.

¹⁰²⁶ Manitoba Law Reform Commission, Report #74, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (1991) 12.

¹⁰²⁷ At 163-165.

- . the witness should not be related to or a current health care provider for the maker of the advance directive;
- . if the advance directive is signed by another person on behalf of the maker of the directive, the person who signs the directive should not be a witness or a person whom the maker of the directive has appointed as a decision-maker;
- . that revocation of an advance directive should be in writing and signed and witnessed in the same way as the execution of the directive;
- . an advance directive should be revoked by the execution of a subsequent directive to the extent that the subsequent directive relates to the same health care decisions or appoints a different decision-maker, provided that at the time the later directive was executed, the maker had sufficient capacity; and
- . a later enduring power of attorney should also revoke an earlier advance directive to the extent that the enduring power of attorney authorises a chosen decision-maker to make a decision included in the advance directive or appoints someone other than the person nominated in the advance directive to make decisions on the maker's behalf.

The Commission's recommendations were reflected in clauses 66, 77 and 78 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, one submission expressed the view that the formal requirements recommended by the Commission for the revocation of an advance directive were too stringent.¹⁰²⁸

The issues raised by the submission, and the Commission's response, are set out on pages 327 to 331 of this Report.

¹⁰²⁸ Submission No 9.

For the reasons set out earlier in this Report¹⁰²⁹ in relation to enduring powers of attorney, the Commission is of the view that an advance directive should be revoked by the same actions of the person as would revoke an enduring power of attorney for health care.

The Commission recommends that the legislation provide that the same requirements should apply to the making and revocation of an advance directive for health care as apply to the making and revocation of an enduring power of attorney which gives authority to make health care decisions.

The Commission's recommendation is implemented by clauses 79-84 and 91-103 of the Draft Bill in Volume 2 of this Report.

(vi) Use of a prescribed form

In the Draft Report, the Commission raised the issue of whether a health care directive should be in a prescribed form.¹⁰³⁰ The Commission noted that a requirement of compliance with a form set out in the legislation may result in inflexibility and in directives being invalidated on technical grounds. The Commission agreed with the approach taken by the Manitoba Law Reform Commission, which recommended that individuals should be able to use any form and any words which clearly express their wishes for future medical treatment, but that it would be useful if there was an approved form which could be used for guidance.¹⁰³¹ The Commission envisaged the participation of health care providers in designing suitable forms.

The submissions received by the Commission in response to the Draft Report generally accepted the Commission's approach.

¹⁰²⁹ At pp 131-137 of this Report.

¹⁰³⁰ At 164.

¹⁰³¹ Report #74, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (1991) 15. A similar conclusion was reached in a Joint Report of the Alberta Law Reform Institute and the Health Law Institute (Report No 64, *Advance Directives and Substitute Decision-Making in Personal Healthcare* (1993) 17):

To include a recommended form in the legislation might well give the misleading impression that it is the only form (or the preferred form) of healthcare directive, and thus might be adopted regardless of the particular individual's needs and circumstances. A healthcare directive should be tailored to fit the wishes and needs of the individual, and we would not wish the legislation to imply that there is a "boilerplate" version which can be used in all cases. Moreover, to the extent that it may be useful to develop some standard forms of healthcare directive, we would anticipate that various organisations will undertake this.

The Commission recommends that the legislation does not include a prescribed form of advance directive, but that relevant consumer and professional organisations co-operate in the development of a form or forms appropriate for use as guides.

(vii) Certificate from medical practitioner

The Commission also considered in the Draft Report whether the legislation should require an advance directive to include a certificate from a medical practitioner to the effect that the practitioner has discussed with the person making the directive the instructions which the person has given in the directive.¹⁰³² In the view of the Commission, the advantage of such a requirement would be to promote communication between patients and practitioners about future health care in the event of a patient's loss of decision-making capacity and to help ensure that patients are aware of the medical implications of the instructions they have given. Further, knowledge that the contents of the directive had been discussed with a practitioner would be likely to increase the willingness of other health care providers to comply with the directive. On the other hand, the Commission recognised that these advantages would have to be weighed against the difficulties involved in implementing such a proposal. For example, if the completion of the certificate is not contemporaneous with the execution of the directive, there will be no guarantee that the contents of the directive are in fact what was discussed with the practitioner. However, to make the certificate part of the execution process may make the procedure more complex.

The Commission made no recommendation on this issue but provisionally proposed that any form developed for the creation of an advance directive should advise about the desirability of including such a certificate in the directive and should make provision for this to be done, but that the certificate should not be a mandatory requirement for valid execution of the directive. The Commission specifically invited comment from interested parties.

Of the submissions received by the Commission in response to the Draft Report, only a few addressed this issue. All the submissions which referred to the question recognised the benefit of consultation with health care professionals in the preparation of an advance directive.¹⁰³³ However,

¹⁰³² At 163.

¹⁰³³ Submissions Nos 10, 18, 19, 25.

only two submissions considered that inclusion of a certificate from a medical practitioner should be a requirement for execution of an advance directive.¹⁰³⁴ None of the submissions suggested a workable procedure for including a certificate. An association of medical practitioners endorsed the Commission's view that health care directives should be as simple as possible and should involve formalities only to the extent that is absolutely necessary. The respondents expressed concern that requiring a certificate from a practitioner "would add considerably to the formalities and bureaucratic processes involved".¹⁰³⁵

On balance, the Commission remains of the view that a certification procedure, while desirable, should not be mandatory.

The Commission recommends that the legislation should not include a requirement that an advance directive must include a certificate from a medical practitioner to the effect that the person making the directive has discussed the contents of the directive with the medical practitioner.

(viii) Preservation of common law rights

A further issue considered by the Commission in the Draft Report concerned the relationship between the legislative scheme proposed by the Commission and the common law.¹⁰³⁶ Although there is some uncertainty as to whether advance directives are binding at common law,¹⁰³⁷ there have been recent indications of growing acceptance by the courts in other common law jurisdictions.¹⁰³⁸ The Commission, while not aware of any relevant Australian authority, did not intend its recommendations to have the result that the wishes of a patient would be disregarded because they were not expressed in the way required by the proposed legislation, if those wishes would be given effect to at common law.

¹⁰³⁴ Submissions Nos 18, 54.

¹⁰³⁵ Submission No 77A.

¹⁰³⁶ At 166.

¹⁰³⁷ See p 348 of this Report.

¹⁰³⁸ See for example *Malette v Schulman* (1990) 67 DLR (4th) 321; *Airedale NHS Trust v Bland* [1993] AC 789; *In re C* [1994] 1 WLR 290.

The Commission recommended that the legislation should state that its provisions about advance directives do not detract from any right which a patient may have at common law to have previously expressed wishes about health care respected by health care providers.¹⁰³⁹

It had been suggested that this kind of approach might lead to unnecessary uncertainty and could undermine any restrictions which the legislation attempted to impose.¹⁰⁴⁰ The Commission, however, expressed the view that preservation of common law rights, rather than increasing uncertainty, would maximise the opportunity for people to exercise control over their future medical treatment. The Commission considered that, since a court would be unlikely to give effect to an informal directive unless there was clear evidence that the directive did in fact represent the true wishes of the patient, there should be adequate protection for patients.

The Commission's recommendations were reflected in clause 64 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 common law recognition of instructions about health care that are not given in an advance health care directive made under the legislation is not affected by the legislation.

The Commission's recommendation is implemented by clause 78 of the Draft Bill in Volume 2 of this Report.

9. CRITERIA FOR MAKING HEALTH CARE DECISIONS

In the Draft Report, the Commission expressed the view that legislation providing for substituted decisions about the health care of a person with impaired decision-making capacity should specify the criteria to be followed in making those decisions. The Commission gave consideration to the criteria which should apply.

¹⁰³⁹ See for example Manitoba Law Reform Commission, Report #74, *Self-Determination in Health Care: Living Wills and Health Care Proxies* (1991) 11.

¹⁰⁴⁰ The Law Commission, Consultation Paper No 129, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (1993) 35.

(a) Health care principle

The Commission expressed the view that the legislative scheme it proposed should ensure that people who are unable to make decisions about their own health care do not miss out on necessary treatment because of a lack of valid consent, and should also protect them against unnecessary or inappropriate treatment. The Commission recommended that a substitute decision-maker should consent to treatment for a person whose decision-making capacity is impaired only if the substitute decision-maker is satisfied that the proposed treatment is the most appropriate form of treatment for the purpose of promoting and maintaining the health and well-being of the patient.¹⁰⁴¹

The Commission's recommendation was reflected in clauses 103, 111 and 112 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 is of the view that the recommendation should be modified slightly to allow for the situation where there may be more than one appropriate form of treatment.

The Commission recommends that the legislation:

- . **acknowledge the need to strike a balance between -**
 - . **ensuring that a person with impaired decision-making capacity is not deprived of necessary health care merely because the person lacks capacity to consent; and**
 - . **ensuring that health care given to the person is only for the purpose of promoting and maintaining the person's health and well-being;**
- . **provide that a health care decision should be made for a person with impaired decision-making capacity for the decision only if the decision is appropriate to promote and maintain the person's health and well-being.**

¹⁰⁴¹ At 132-133.

The Commission's recommendations are implemented by clauses 142 and 144(1) of the Draft Bill in Volume 2 of this Report.

(b) Information to be given by health care provider

In the Draft Report, the Commission recognised that, in order to make a decision about the appropriateness of the proposed treatment, a decision-maker will need to have information about the patient's condition and about available alternative forms of treatment.

The Commission recommended that the legislation require the treatment provider to explain the proposed treatment to the decision-maker and to provide the decision-maker with relevant information about the decision. The Commission also recommended that the decision-maker be required to take the information into account in making a decision.¹⁰⁴²

The purpose of the Commission's recommendations was to extend to people who lack capacity to make decisions about their own health care the protection given to competent patients by the right to be informed of the material risks of any proposed form of treatment.¹⁰⁴³

The Commission's recommendations were reflected in clauses 112(2) and 120 of the Draft Bill in Chapter 13 of the Draft Report.

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

¹⁰⁴²At 133. See also for example *Guardianship Act 1987 (NSW)* ss 40(2), 40(3), 42(2), 44(2).

¹⁰⁴³*Rogers v Whitaker* (1992) 175 CLR 479.

The Commission recommends that the legislation provide that:

- **the treatment provider be required to give the decision-maker the following information:**
 - **the nature of the patient's condition;**
 - **the alternative forms of health care available, or likely to be available in the foreseeable future for the condition;**
 - **the general nature and effect of each form of health care;**
 - **the nature and the degree of any significant risks associated with each form of health care;**
 - **the reasons why it is proposed that a particular form of health care should be carried out;**
- **in deciding whether a decision is appropriate to promote and maintain the patient's health and well-being, the decision-maker must take into account the above information.**

The Commission's recommendations are implemented by clauses 144(2)(b) and 165 of the Draft Bill in Volume 2 of this Report.

(c) The patient's wishes

In the Draft Report, the Commission recommended that, in making a decision about the health care of a patient with impaired decision-making capacity for the decision, the decision-maker should be required to take into account the views (if any) of the patient.¹⁰⁴⁴

The Commission also expressed the view that the legislation should provide for the situation where the patient indicates in any way, or has previously indicated, in similar circumstances, that he or she does not wish the proposed treatment to be carried out. The Commission considered that, generally, a consent given under its proposed legislation on behalf of a person whose decision-making capacity is

¹⁰⁴⁴At 133-134.

impaired should be ineffective if the treatment provider is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment.¹⁰⁴⁵

However, the Commission recognised that a patient with impaired decision-making capacity may have little or no understanding of what a proposed form of treatment involves and that, in such a situation, to give effect to the patient's objection may have the consequence that the patient is unable to obtain necessary treatment.

The Commission recommended that, notwithstanding the objection of a patient who has little or no understanding of proposed treatment, the consent of an authorised decision-maker should be effective if the treatment is likely to cause the patient no distress, or if it may cause the patient some degree of distress which is temporary and which is outweighed by the benefit of the treatment to the patient.¹⁰⁴⁶

The Commission's recommendations were reflected in clauses 112(2) and 119 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, some issues were raised which require further consideration.

(i) Guidance as to priorities

One respondent, an association of medical practitioners, criticised the Commission's recommendations as confusing and offering a doctor no guidance as to priorities.¹⁰⁴⁷

Clause 119 of the Draft Bill provided that where a patient objects to proposed treatment, the substituted consent of a decision-maker is effective despite the patient's objection, if the patient has minimal or no understanding of what the health care entails and if the proposed treatment is likely to cause the patient no distress, or temporary distress which is outweighed by the benefit of the treatment to the patient. In all other situations the substituted consent is ineffective if the patient objects.

A doctor would have to consider, firstly, whether the patient had more than a minimal understanding of the proposed treatment. If so, the patient's objection would override substituted consent given by a decision-maker, and

¹⁰⁴⁵ See for example *Guardianship Act 1987 (NSW)* ss 33(3), 46(2)(a).

¹⁰⁴⁶ See for example *Guardianship Act 1987 (NSW)* s 46(4).

¹⁰⁴⁷ Submission No 77.

the consent would be ineffective. If not, the doctor would then have to consider whether the proposed treatment would be likely to cause the patient distress. If the proposed treatment would be likely to cause the patient a degree of distress that would be more than temporary or that would outweigh the benefit of the proposed treatment to the patient, the patient's objection would override the substituted consent given by a decision-maker, and the consent would be ineffective.

In other words, where a patient objects to proposed treatment, a substituted consent for that treatment will be effective only if the patient has minimal or no understanding of what the health care entails and if the proposed treatment is likely to cause the patient no distress or only a degree of temporary distress which is outweighed by the benefit of the treatment to the patient.

The Commission considers the recommendation to be sufficiently clear.

(ii) "Minimal or no understanding"

One submission, from Queensland Health, considered the test of "minimal or no understanding of what the health care involves" to be unduly restrictive and to create problems where decision-making capacity is impaired by a psychiatric condition causing a deluded or disordered understanding of the need for intervention.¹⁰⁴⁸

The submission proposed that the words "understanding of what the health care involves" be amended to include a reference to understanding of the condition for which treatment is required.

The Commission accepts the proposal.

(iii) The use of force

A number of submissions raised the question of the use of force to carry out treatment when a patient whose decision-making capacity for the decision is impaired is objecting to treatment. One submission, from a medical practitioner specialising in emergency medicine, stated:¹⁰⁴⁹

¹⁰⁴⁸ Submission No 19.

¹⁰⁴⁹ Submission No 7.

It is quite common for an intellectually disabled person to object clearly and vociferously to the prospect of blood tests or injection of local anaesthetic or even administration of gaseous anaesthetics by gas mask ... At present, minors are physically restrained in order to be subjected to unpleasant procedures, with the consent of their parents ... It would be best if the situation were the same for an intellectually impaired adult.

An organisation representing consumers of mental health services and carers of people with mental illness also recommended that, where the consent of an authorised decision-maker is effective notwithstanding the patient's objection, the legislation should allow the decision-maker to approve the use of a minimum amount of force in administering the health care treatment to the patient.¹⁰⁵⁰

The Commission accepts that, in some situations, it may be necessary for a patient to be restrained in order for treatment to be given. However, the Commission believes that the use of force should only be allowed where the consent of an authorised decision-maker has been obtained, and that the degree of force which may be used should be restricted to the minimum amount of force which is reasonably necessary for the administration of the proposed treatment.

The Commission recommends that the legislation provide that where a patient's objection to treatment is overridden by the consent of an authorised decision-maker, the use of the minimum amount of force necessary for the administration of the proposed treatment should be allowed.

The Commission's recommendations are implemented by clauses 163 and 164 of the Draft Bill in Volume 2 of this Report.

10. URGENTLY NEEDED TREATMENT

In the Draft Report, the Commission recognised that, if a person with impaired decision-making capacity needs to be treated urgently, there may not be time for the health care provider to identify and locate a person who has authority to decide about health care treatment for the person or to obtain the consent of the tribunal.

¹⁰⁵⁰ Submission No 53.

This would obviously be the case where emergency treatment was required to save the person's life or to prevent serious damage to his or her health. The Commission expressed the view that, even if the proposed treatment is not life-saving, there may be situations where delay in obtaining consent would cause unreasonable and unnecessary pain or distress to the patient.¹⁰⁵¹

The Commission acknowledged that, unless legislation makes provision for the administration of treatment without consent, health care providers risk liability for assault.¹⁰⁵² The Commission concluded that, in order to protect a person who is unable to give his or her own consent, the circumstances in which treatment may lawfully be given without consent should be clearly described.

The Commission recommended that the legislation should provide that:

- where the treatment provider believes that treatment is necessary to meet imminent risk to the person's life¹⁰⁵³ or health,¹⁰⁵⁴ the treatment may be given even though consent has not been obtained;
- treatment may be administered without consent if the treatment provider believes that the treatment should be given urgently to prevent significant pain or distress;¹⁰⁵⁵
- the treatment provider is not authorised to give treatment if the person objects to the treatment or if the treatment provider is aware that the person, at a time when he or she was capable of making his or her own health care decisions, refused treatment of the kind proposed;
- it is an offence to administer treatment to a person who lacks capacity to consent to that treatment unless consent for the treatment has been given in accordance with the requirements of the legislation or of any other

¹⁰⁵¹ At 159-160.

¹⁰⁵² See p 311 of this Report.

¹⁰⁵³ See for example *Guardianship and Administration Board Act 1986 (Vic) s 36(3); Guardianship Act 1987 (NSW) s 37(1)(a); Adult Guardianship Act 1988 (NT) s 21(1); Guardianship and Administration Act 1993 (SA) s 62(2)(a); Guardianship and Administration Act 1995 (Tas) s 40(a).*

¹⁰⁵⁴ See for example *Guardianship Act 1987 (NSW) s 37(1)(b); Guardianship and Administration Act 1993 (SA) s 62(2)(a); Guardianship and Administration Act 1995 (Tas) s 40(b).*

¹⁰⁵⁵ See for example *Guardianship Act 1987 (NSW) s 37(1)(c); Guardianship and Administration Act 1995 (Tas) s 40(c).*

Act,¹⁰⁵⁶ or the legislation authorises performance of the treatment without consent, or the treatment is given in accordance with an order of the Supreme Court in its *parens patriae* jurisdiction.¹⁰⁵⁷

The Commission's recommendations were reflected in clauses 110 and 123 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 Public Guardian in Western Australia commented:¹⁰⁵⁸

[The recommendations] elucidate important principles and clarify that the medical practitioner will ensure treatment in an emergency or situations that would lead to an emergency or risk the patient. In particular [the] recommendation ... allowing the prevention or relief of significant pain or distress is important when dealing with, for example, early stages of gangrene. Whilst not yet life threatening it is inevitable that gangrene left untreated will kill. It is also a very painful condition. We are aware of examples where a debate raged amongst medical practitioners as to whether a guardian was needed or not. By the time the matter was drawn to the attention of the statutory Guardian the person concerned had no doubt been in considerable pain for some time. This sort of ambiguity is unacceptable and we believe the provision in the draft legislation adequately covers the problem.

However, some respondents expressed concern about the Commission's recommendations. One submission commented that treatment without consent "is wide open to abuse and not very protective of people with ID".¹⁰⁵⁹ The Department of Family Services and Aboriginal and Islander Affairs¹⁰⁶⁰ noted the similarity between the Commission's recommendation and section 26(9A)(b) of the *Intellectually Disabled Citizens Act 1985* which is the section dealing with the Legal Friend's power to give consent for emergency treatment, with the difference that, under the Commission's recommendation, emergency procedures will no longer require consent and the test will become a subjective one determined by the health

¹⁰⁵⁶ For example, the *Mental Health Act 1984 (Qld)*.

¹⁰⁵⁷ See for example *Guardianship Act 1987 (NSW) s 35(1)*.

¹⁰⁵⁸ Submission No 25.

¹⁰⁵⁹ Submission No 10.

¹⁰⁶⁰ Now the Department of Families, Youth and Community Care.

care provider:¹⁰⁶¹

This is a matter of some concern because it leaves decision making for the most vulnerable group in society in the hands of the service provider. It is desirable to require the health care provider to liaise with someone because lack of accountability by any service provider creates a conflict of interest which will always lead to the interests of the patient being prejudiced in some cases.

The [recommendation] will put persons who do not have the capacity to consent in a different category to those who can consent in that persons who can consent will not have treating health care providers making decisions for them where they are in significant pain or distress.

The Commission notes these concerns. However, it draws attention to the purpose of its proposed legislation as expressed in clause 103 of the Draft Bill in Chapter 13 of the Draft Report. Clause 103 provided:

This Chapter seeks to strike a balance between -

- (a) ensuring an adult is not deprived of necessary health care merely because the adult is an adult with impaired decision-making capacity for a health care or special consent health care decision; and*
- (b) ensuring health care given to the adult is only for the purpose of promoting and maintaining the adult's health and well-being.*

The Commission recognises the importance of consent given by a third party as a safeguard for the rights of people with impaired decision-making capacity in ensuring that they are not subjected to inappropriate or unnecessary treatment.

However, the Commission also recognises that the inflexibility of insisting on such a rule in every case could operate to the detriment of the health of a person with impaired decision-making capacity. The common law recognises that it should not be unlawful for emergency treatment to be given to a patient whose illness or injury makes it impossible for him or her to consent. In the United Kingdom, this exception to the general rule has been extended to include treatment for people who lack the capacity to consent because they have a decision-making disability, provided that the treatment is in the best interests of the patient.¹⁰⁶² In the view of the Commission, this exception, which has not been adopted by courts in

¹⁰⁶¹Submission No 74.

¹⁰⁶²*In Re F* [1990] 2 AC 1.

Australia, is too wide. The Commission's recommendation was based on a provision which has been in operation in New South Wales for some time, and the Commission is not aware that it has been used to the disadvantage of people with a decision-making disability. A similar provision has also been implemented in Tasmania.¹⁰⁶³

The Commission gave consideration to South Australian legislation which requires that:

- (a) a second opinion about the urgency of the proposed treatment be obtained, unless it is not reasonably practicable to do so having regard to the imminence of the risk to the person's life or health;¹⁰⁶⁴
- (b) the appropriate authority for giving consent (ie a guardian where one has been appointed with authority to make health care decisions, or otherwise a statutorily authorised health care decision-maker) is not reasonably available or, if available, has been requested to give consent but has failed to respond to the request.¹⁰⁶⁵

The Commission is not in favour of a requirement to obtain a second opinion since, even where time would allow that opinion to be obtained, there are many areas of regional and rural Queensland where a second opinion would not be available. However, the Commission accepts that, before treatment is given without consent, reasonable attempts should be made to obtain consent from an authorised decision-maker.

Subject to this qualification, the Commission believes that, on balance, the potential benefit of a provision allowing urgently needed treatment to be given without consent, as illustrated in the example given in the submission made by the Public Guardian in Western Australia, significantly outweighs the real likelihood of risk.

The Department of Family Services and Aboriginal and Islander Affairs¹⁰⁶⁶ indicated that its concern related principally to the second category of exception recommended by the Commission - that is, treatment required urgently to prevent significant pain and distress. The respondent argued:¹⁰⁶⁷

¹⁰⁶³ *Guardianship and Administration Act 1995 (Tas)* s 40.

¹⁰⁶⁴ *Guardianship and Administration Act 1993 (SA)* s 62(2)(b).

¹⁰⁶⁵ *Guardianship and Administration Act 1993 (SA)* s 62(2)(c).

¹⁰⁶⁶ Now the Department of Families, Youth and Community Care.

¹⁰⁶⁷ Submission No 74.

In practice people who might be considered to be in significant pain or distress, such as a person with a fractured neck of femur, are not operated on as emergency patients and will often wait for a day or two before undergoing surgery. There is no reason why the health care provider can't be expected to attempt to contact the next of kin in such circumstances to inform them of the procedure and obtain consent.

The Commission is now of the view that the legislation should provide that treatment should not proceed without consent unless it is not reasonably practicable to obtain consent.

However, while the Commission agrees that the time-frame of "a day or two" is sufficient to allow an authorised consent to be obtained, it does not accept that where treatment is needed urgently to prevent pain or distress, the legal position of either patient or health care provider should depend on delays or inadequacies in the public health system.

After further consideration, the Commission has come to the view that the recommendation in the Draft Report was too widely drawn. The draft legislation, in its original form, included in the procedures which a health care provider could, in prescribed circumstances, perform without consent, procedures which involved a "special consent health care decision". "Special consent health care decisions" are discussed in Chapter 5 and on pages 370 to 396 of this Report. They are decisions about forms of treatment which are particularly invasive or have particularly serious consequences, so that the results of making a wrong decision may be particularly grave, or which involve emotional issues requiring an independent arbiter. Because of the nature of "special consent health care decisions" the Commission considers that the recommended consent procedures should always be adhered to, and that it should not be lawful for treatment requiring a special consent health care decision to be given without consent under any circumstances.¹⁰⁶⁸

¹⁰⁶⁸ This qualification is consistent with existing legislation in New South Wales and Tasmania. See note 1055 above.

The Commission recommends that the legislation provide that, if a person has impaired decision-making capacity for a decision, health care other than special consent health care may be carried out without consent if:

- . it is not reasonably practicable to obtain consent; and**
- . a health care provider considers that the health care should be urgently carried out -**
 - . to meet imminent risk to the person's life or health; or**
 - . to prevent or relieve significant pain or distress to the person.**

The Commission's recommendation is implemented by clause 146 of the Draft Bill in Volume 2 of this Report.

11. SPECIAL CONSENT PROCEDURES

There are some forms of treatment which may require special consent procedures. In every Australian State or Territory which has introduced legislation about decision-making for people with impaired decision-making capacity, there are limitations on the authority of appointed decision-makers and of people who have a statutory power to make health care decisions.

The reason for requiring special consent procedures is that some forms of treatment are particularly invasive or have particularly serious consequences, so that the results of making a wrong decision may be particularly grave. There are also situations where the emotional involvement of a family member or close friend may make it difficult for them to decide objectively.

In the Draft Report, the Commission identified a number of forms of treatment for which it recommended the imposition of special consent requirements.¹⁰⁶⁹ In this Report, decisions about those forms of treatment requiring special consent procedures are referred to as "special consent health care decisions". The meaning of a "special consent health care decision" is discussed in Chapter 5 of this Report.

¹⁰⁶⁹
At 145-159.

The procedure and additional criteria, if any, for making each of the identified "special consent health care decisions" are set out below.

(a) Removal of tissue for donation

In the Draft Report, the Commission recognised the need for stringent legislative safeguards to protect people with impaired decision-making capacity from abuse by removal of tissue for donation to another person.

The Commission recommended that:¹⁰⁷⁰

- . only the tribunal should be able to make a decision about the removal of tissue from a person whose decision-making capacity for the decision is impaired, for the purpose of donating the tissue to another person;
- . the tribunal should not consent to such a procedure unless:
 - . the risk to the proposed donor is small;
 - . the risk of failure of the donation is low;
 - . the life of the recipient would be in danger without the donation;
 - . there is no other reasonably available donor who is likely to be compatible;
- . the tribunal should also consider the closeness of the personal relationship between the proposed donor and the recipient;¹⁰⁷¹
- . the tribunal should not consent if the proposed donor objects in any way to the procedure.

The Commission's recommendations were reflected in clause 114 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.¹⁰⁷²

¹⁰⁷⁰ At 149.

¹⁰⁷¹ See for example *Guardianship and Management of Property Act 1991 (ACT)* s 70.

¹⁰⁷² However, three submissions argued that tissue should never be removed from a person with impaired decision-making capacity for the decision for the purpose of donation to another person. See Chapter 5 of this Report.

However, one submission, from an association of medical practitioners, queried the need for the tribunal's involvement. The submission stated:¹⁰⁷³

While we appreciate the interests of the patient being protected, this is one area which requires the expertise of a medical practitioner.

The Commission acknowledges the important role of medical expertise in such a decision, but is not persuaded that, by itself, it offers sufficient protection for the rights of a proposed donor. In the Commission's view, the involvement of the tribunal as an independent arbiter is an essential safeguard.

The draft legislation contained in the Draft Report provided that an objection by the proposed donor to the removal of tissue could not be overridden on the grounds that the proposed donor lacks capacity to understand what the procedure involves.¹⁰⁷⁴ One submission, from the Legal Friend, expressed the view that "the objection of the donor should be an informed objection".¹⁰⁷⁵ The Commission's recommendation was based on the recognition that, although the removal of tissue from a person with impaired decision-making capacity for donation to another person may contribute indirectly to the proposed donor's emotional security, it would never be performed for the direct benefit of the proposed donor and so constituted an exception to the general principle that consent should only be given for treatment which is appropriate to promote the health and well-being of a person whose decision-making capacity is impaired. The Commission concluded that removal of tissue could never be justified if the proposed donor objected, regardless of whether or not the proposed donor had the capacity to understand the procedure. The Commission is not persuaded to change its view on this issue.

The Legal Friend also commented:

As regards the power of the tribunal to provide consent to certain medical treatment, as the role of Adult Guardian¹⁰⁷⁶ includes making certain medical or allied health decisions of last resort, I am curious as to why the Adult Guardian is not making such decisions as opposed to the Tribunal. Is this not an example of the tribunal moving from its role of authoriser of others, to authorising itself to be a decision-maker?

¹⁰⁷³ Submission No 77.

¹⁰⁷⁴ CI 119(a).

¹⁰⁷⁵ Submission No 76.

¹⁰⁷⁶ See Chapter 12 of this Report.

The Commission is not persuaded that the decision should be made by the Adult Guardian rather than by the tribunal. The Commission's view is based on a number of factors. First, since the threshold question in every application requiring consent for the performance of health care requiring a special consent procedure will be the capacity of the person concerned to make his or her own decision about the matter, the experience and expertise of tribunal members provides an important safeguard. Second, the tribunal has better access to relevant expert opinion and the membership of the tribunal ensures a multi-disciplinary approach to the issues involved. Third, authorising the Adult Guardian to make decisions about special consent health care procedures could involve a conflict of interest, since one of the roles proposed for the Adult Guardian is to investigate allegations of inappropriate decision-making.¹⁰⁷⁷

The Commission recommends that the legislation should provide that:

- . **the tribunal may consent, for a person with impaired decision-making capacity for the decision, to removal of tissue from the person for donation to another person only if the tribunal is satisfied that -**
 - . **the risk to the donor is small;**
 - . **the risk of the failure of the donated tissue is low;**
 - . **the life of the proposed recipient would be in danger without the donation;**
 - . **no other compatible donor is reasonably available;**
 - . **there is, or has been, a close personal relationship between the proposed donor and the proposed recipient;**
- . **the tribunal may not consent if the proposed donor objects;**
- . **the proposed donor's objection is effective whether or not the proposed donor has capacity to understand what the procedure involves;**
- . **if the tribunal consents to the removal of tissue for donation, the tribunal's order must specify the proposed recipient.**

¹⁰⁷⁷ See Chapter 12 of this Report.

The Commission's recommendation is implemented by clause 157 of the Draft Bill in Volume 2 of this Report.

(b) Sterilisation

In the Draft Report, the Commission recommended that only the tribunal should be able to consent to the performance of a sterilisation procedure on an adult who lacks the capacity to make his or her own decision about the matter. The Commission considered the criteria which should apply to protect people with a decision-making disability in the determination of an application for the performance of a sterilisation procedure.¹⁰⁷⁸

The Commission recommended that before consenting to a sterilisation procedure the tribunal must be satisfied that:

- . the procedure is medically necessary; or
- . the person concerned is, or is likely to be, fertile and sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or
- . if the person on whom it is proposed to perform the procedure is female, cessation of menstruation by sterilisation is the only practicable way of overcoming demonstrated problems associated with menstruation;

and that:

- . the treatment cannot reasonably be postponed; and
- . the person concerned is not likely, in the foreseeable future, to develop the capacity to decide.¹⁰⁷⁹

The Commission further recommended that the tribunal be required to take into account:

- . alternative forms of treatment which are presently available, or likely to become available in the foreseeable future; and
- . the nature and extent of any significant risks associated with the proposed treatment and with any available alternative forms of treatment, including other sterilisation procedures.

¹⁰⁷⁸ At 152-153.

¹⁰⁷⁹ See for example *Guardianship and Administration Act 1993 (SA)* s 61(2)(b)(i).

The Commission noted that implementation of its recommendations requires a commitment to the provision of services.¹⁰⁸⁰ The Commission expressed its belief that people whose decision-making capacity is impaired have a right to appropriate education,¹⁰⁸¹ training and behavioural programs to assist their sexual development, and that their families are entitled to home help and respite services which allow them a quality of life equal to that enjoyed by other families in the community.

The Commission's recommendations were reflected in clause 115 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report generally approved of the approach taken by the Commission. Only one submission, from an association of medical practitioners, opposed the Commission's recommendation. The respondent expressed the view that:¹⁰⁸²

... the patient's parents and medical practitioner are in the best position to make decisions on these issues rather than an anonymous tribunal.

The Commission is unable to agree with this view. The Commission assumes that by "anonymous" the respondent means that members of the tribunal will have no personal involvement with the person for whom the application has been made. However, it is precisely this absence of personal involvement which the Commission considers essential in order for an objective decision to be made about sensitive and often highly emotive matters. Lack of personal involvement does not mean lack of understanding of relevant issues. Tribunal members will include people with personal experience of the needs of people with a decision-making disability, as well as members with professional expertise and experience. The Commission believes that the composition of the tribunal will allow a multi-disciplinary as opposed to a purely medical approach to finding the most positive outcome for the person concerned. The tribunal will also have power to engage people with professional expertise to assist it.¹⁰⁸³

¹⁰⁸⁰ See ss 9 and 24 of the *Disability Services Act 1992 (Qld)* which provide, respectively, that people with disabilities are entitled to "services that support their attaining a reasonable quality of life in a way that supports their family unit and their full participation in society", and that programs and services should be designed and implemented to recognise and take into account the implications for and demands on the families of people with disabilities.

¹⁰⁸¹ The Intellectual Disability Services Division of the Department of Family Services and Aboriginal and Islander Affairs (now the Department of Families, Youth and Community Care) has recently produced, in conjunction with the Menstrual Management Team from the Department of Social Work and Social Policy, University of Queensland, a resource kit including a booklet entitled *'Managing Menstruation'*, for use by consumers, families, support staff and agencies.

¹⁰⁸² Submission No 77.

¹⁰⁸³ See pp 252-253 of this Report.

The Commission remains of the view that the consent of the tribunal should be required for the performance of a sterilisation procedure on a person who lacks capacity to consent on his or her own behalf.

Some issues raised by the submissions require further consideration.

(i) The need for legislative criteria

One respondent, with extensive experience of the issues involved in applications for the sterilisation of girls and women with intellectual disability, described the Commission's recommendations as "invasive and resource intensive".¹⁰⁸⁴ The respondent argued that the Commission's recommendations would not ensure the protection of the rights and protection of the best interests of vulnerable people:

... in matters as grave and serious as sterilisation there are many difficult questions to which, I believe, there are no clear cut answers, but what is fundamental to the protection of the rights of vulnerable persons is a willingness to engage in discussion directed at striking a more appropriate balance than prescriptive criteria.

What is needed is a consultative and co-operative contribution to the preparation of appropriate guidelines for medical practitioners and specialists which describe the circumstances in which it is appropriate to seek the authorisation of the tribunal in special medical procedures of this sort.

The Commission recognises the need for a co-operative approach to ensure the best possible outcome for the person for whom the procedure is proposed. It commends the development of guidelines for dealing with applications for special medical procedures involving sterilisation of and other medical treatment in respect of an intellectually disabled child.¹⁰⁸⁵ The objectives of these guidelines between the Family Court of Australia (Northern Region), the Department of Families, Youth and Community Care and the Legal Aid Office (Queensland) include promoting the opportunity for intending applicants and other interested parties to discuss the condition which is sought to be remedied or addressed with the approval of the Court and, if appropriate, to trial less restrictive options for the child; promoting positive outcomes for the child; and ensuring that a court hearing of an application should occur only after all other options have failed to produce a satisfactory outcome for the parties.

¹⁰⁸⁴ Submission No 68.

¹⁰⁸⁵ Family Court of Australia (Northern Region) Practice Note - 3/95.

The Commission envisages similar administrative protocols being developed in relation to special consent procedures for adults with a decision-making disability so that a determination by the tribunal is necessary only as a last resort. Nonetheless, the Commission remains of the view that it is preferable that the criteria for determining applications which come before the tribunal should be clearly set out in the legislation. These criteria in the Draft Report follow the same direction as those which have been adopted in every other Australian State or Territory, even though in some Australian jurisdictions the criteria exist as guidelines rather than as part of the legislation.¹⁰⁸⁶ The Public Guardian in Western Australia commented:¹⁰⁸⁷

... some might argue that the proposed Bill is overly prescriptive however it must be remembered that this jurisdiction needs to be accessed by non-legally qualified nor experienced people. We favour the inclusionary nature of this document if for no other reason that it sends a clear message to people who might otherwise be operating on a different set of assumptions.

The Commission is not persuaded to change its approach to the inclusion of legislative criteria.

(ii) The scope of the proposed criteria

A. "Medically necessary"

An advocacy group for people with disability in Queensland submitted that the term "medically necessary" needs clarification.¹⁰⁸⁸ The respondent suggested the adoption of criteria such as those which are contained in the New South Wales legislation, namely, that the proposed procedure should be necessary to save the patient's life or to prevent serious damage to the patient's health.¹⁰⁸⁹ Similarly, the members of a project team researching menstrual management in young women with intellectual disability submitted that the words "medically necessary" should be replaced by the expression

¹⁰⁸⁶ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 37, which requires the consent of the Board for a "major medical procedure". S 37(3) provides that the Board may issue guidelines specifying major medical procedures for the purpose of the section.

¹⁰⁸⁷ Submission No 25.

¹⁰⁸⁸ Submission No 64.

¹⁰⁸⁹ *Guardianship Act 1987 (NSW)* s 45(2).

"necessary to treat a physical disorder that is life-threatening, would permanently impair a person's physical health and would be carried out if the person did not have a disability".¹⁰⁹⁰

However, another respondent argued that procedures to treat or eliminate a disease or organic malfunction should not require a special consent application to the tribunal.¹⁰⁹¹ The respondent claimed that the need for a tribunal application would offer little extra protection to the person for whom the treatment is proposed and would involve significant disadvantages including loss of privacy and dignity for the patient, delay in obtaining treatment, frustration and resentment at bureaucratic intervention which is perceived to be unnecessary, a poor public image of the tribunal, and diversion of resources which could be better employed in protecting the rights of vulnerable people.

This argument is based on a distinction between the nature of a procedure and the purpose for which it is performed. It holds that only the latter should be relevant to public policy considerations concerning the circumstances in which tribunal consent should be required.

In *Marion's Case* Brennan J said, in relation to consent to medical treatment for children:¹⁰⁹²

... if the child is incompetent to give consent, whether by reason of age, illness, accident or intellectual disability, the parents have the responsibility and power to authorize the administration of therapeutic medical treatment, whether or not that treatment involves sterilization. Such a power is exercised without question when the treatment does not involve sterilization and there is no reason to distinguish treatment that does involve sterilization when the sterilization is merely a necessary incident of therapy ...

The majority decision also reflected the distinction made by Brennan J.¹⁰⁹³

¹⁰⁹⁰ Submission No 55.

¹⁰⁹¹ Submission No 68.

¹⁰⁹² (1992) 175 CLR 218 at 278.

¹⁰⁹³ At 250.

... it is necessary to make clear that, in speaking of sterilization in this context, we are not referring to sterilization which is a by-product of surgery appropriately carried out to treat some malfunction or disease.

After further consideration, the Commission is persuaded that there is little to be gained by requiring an application to be made to the tribunal to obtain consent for a procedure the purpose of which is to protect health by treating organic malfunction or disease. The Commission agrees that, where serious or irreversible damage is likely to result to the person's physical health if the procedure is not carried out, the procedure should be regarded as necessary medical treatment and should not require special consent.¹⁰⁹⁴

B. Contraception

Members of a project team researching menstrual management in young women with intellectual disability submitted that sterilisation of a person who is or is likely to be fertile and sexually active should be authorised for contraceptive purposes only if "all previous attempts at contraception have been trialled extensively".¹⁰⁹⁵

However, there may be situations where it is not advisable to attempt other methods of contraception because of, for example, the risk of adverse effects of contraceptive treatment on other vital medication. In such a situation it is not reasonable, in the Commission's view, that other methods of contraception should be required to be "triated extensively".

Two submissions expressed the view that sterilisation solely for the purpose of contraception could not ever be justified.¹⁰⁹⁶ The Department of Family Services and Aboriginal and Islander Affairs¹⁰⁹⁷ commented:¹⁰⁹⁸

The person may not be able to care for the child once it is born but this is no reason to consent to intrusive surgical intervention in the case of a healthy person.

¹⁰⁹⁴ See for example *Guardianship and Administration Act 1990 (WA)* s 56.

¹⁰⁹⁵ Submission No 55.

¹⁰⁹⁶ Submissions Nos 64, 74.

¹⁰⁹⁷ Now the Department of Families, Youth and Community Care.

¹⁰⁹⁸ Submission No 74.

It is totally unacceptable to consent to sterilisation of a healthy person based on the potential care needs of a child that may be born.

The Department argued that the Commission's recommendation represented an extension of the position advocated by the High Court of Australia.¹⁰⁹⁹ A majority decision of that Court has held that:¹¹⁰⁰

... in the case of a young woman, regard will necessarily be had to the various measures now available for menstrual management and the prevention of pregnancy. And, if authorization is given, it will not be on account of the convenience of sterilization as a contraceptive measure, but because it is necessary to enable her to lead a life in keeping with her needs and capacities.

In the view of the Commission, the passage quoted above does not mean, as suggested by the submission, that a sterilisation procedure can never be performed for contraceptive purposes but rather that a decision about sterilisation for contraceptive purposes should be based on an assessment of what is best for the person concerned, not on the convenience of family or carers.

One of the judges of the High Court said:¹¹⁰¹

Those who are charged with responsibility for the care and control of an intellectually disabled girl - whether parents, guardians or the staff of institutions - have a duty to ensure that the girl is not sexually exploited or abused. If her disability inclines her to sexual promiscuity, they have a duty to restrain her from exposing herself to exploitation. It is unacceptable that an authority be given for the girl's sterilisation in order to lighten the burden of that duty, much less to allow for its neglect.

The Commission also believes that people with a decision-making disability must be protected from abuse and exploitation, and that surgical intervention such as sterilisation procedures should not be used in an attempt to abrogate that duty.

¹⁰⁹⁹ *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*).

¹¹⁰⁰ *Marion's Case* (1992) 175 CLR 218 at 259.

¹¹⁰¹ *Per Brennan J* at 276.

However, it may also be argued that the extent of supervision required to ensure that sexual activity does not take place constitutes a greater restriction of ability to live as normal a lifestyle as possible and may, in that sense, be more intrusive than, for example, a day procedure for tubal ligation. Such a degree of supervision may also deprive a person who is sexually active, but unable to understand the relationship between sexual activity and pregnancy, of the enjoyment of sexual activity. On this view, an assertion that sterilisation procedures can never be justified for contraceptive purposes could be said to ignore the personal circumstances and needs of individuals.

The Commission is not persuaded to change its recommendation.

C. Menstrual management

Members of a project team researching menstrual management in young women with intellectual disability referred to a number of studies which reported positive outcomes in teaching menstrual management skills to young women with high support needs.¹¹⁰² The respondents submitted that the teaching of complete independence in self care skills and/or the development of each young woman's acceptance of menstruation should be regarded as acceptable menstrual management approaches. They queried:

Why is assisting women who are dependent for toileting and bathing more acceptable than assisting with menstrual tasks?

The respondents recommended that the criteria proposed by the Commission should be more restrictive. However, while the Commission agrees that sterilisation should not be approved for the convenience of carers, it considers that the preferable approach is to allow the tribunal sufficient flexibility to deal with the needs of particular individuals.

The Director-General of Education commented:¹¹⁰³

While reporting positive outcomes from research into teaching management skills ... , it should be indicated in the Report that such training programs are provided by staff with specific expertise and skills in dealing with these issues, and therefore not easily accessible to all women with decision-making disabilities and their families.

¹¹⁰² Submission No 55.

¹¹⁰³ Submission No 69.

The Commission has already referred to the initiative of the Department of Family Services and Aboriginal and Islander Affairs¹¹⁰⁴ in developing a resource kit including a booklet entitled *Managing Menstruation*, for use by consumers, families, support staff and agencies.¹¹⁰⁵

However, the Commission acknowledges the need for practical support services. There is an obligation under the *Disability Services Act* for the State Government to provide support programs and services.¹¹⁰⁶ In the view of the Commission it would be inappropriate to recognise menstrual management difficulties as a ground for performing a sterilisation procedure on the basis that insufficient services were available.

The Commission is not persuaded to change its recommendation.

D. Additional criteria

The members of a project team researching menstrual management in young women with intellectual disability recommended that the following criteria should also be included:¹¹⁰⁷

- . the procedure is not being performed to prevent sexual abuse or for eugenic reasons;
- . the nature and extent of any significant short-term and long-term health risk associated with the proposed intervention;
- . alternative interventions, such as education and behaviour management have been trialled extensively.

The Commission agrees that it would be appropriate to include the first of these criteria.

The criteria originally proposed by the Commission referred to "the nature and extent of any significant risks" associated with the proposed procedure. However, the Commission agrees that it would be appropriate to refer specifically to both short and long term risks as suggested in the second of the above criteria.

¹¹⁰⁴ Now the Department of Families, Youth and Community Care.

¹¹⁰⁵ See note 1081 above.

¹¹⁰⁶ See note 1080 above.

¹¹⁰⁷ Submission No 55.

The Commission considers that the third of the suggested criteria is already covered by its proposal that the tribunal should consent to a sterilisation procedure which is performed for menstrual management only if "cessation of menstruation by sterilisation is the only practicable way of overcoming demonstrated problems associated with menstruation".

The Commission recommends that the legislation provide that:

- . it is not necessary to obtain the consent of the tribunal for the performance of a procedure the primary purpose of which is to treat organic malfunction or disease which is likely to cause serious or irreversible damage to the person's physical health if it is not treated;**

and that, before consenting to a sterilisation procedure the primary purpose of which is not to treat organic malfunction or disease, the tribunal must be satisfied that:

- . the person concerned is, or is likely to be, fertile and sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or**
- . if the person on whom it is proposed to perform the procedure is female, cessation of menstruation by sterilisation is the only practicable way of overcoming demonstrated problems associated with menstruation;**

and that:

- . the person concerned is not likely, in the foreseeable future, to develop the capacity to decide; and**
- . the procedure cannot reasonably be postponed; and**
- . the procedure is not being performed to remove the risk of pregnancy resulting from sexual abuse or for eugenic reasons;**

and that the tribunal be required to take into account:

- . alternative forms of treatment which are presently available, or likely to become available in the foreseeable future; and**
- . the nature and extent of any significant long or short term risks associated with the proposed procedure and with any available alternative forms of treatment, including other sterilisation procedures.**

The Commission's recommendation is implemented by Schedule 1 clause 13 and clauses 158(1), 158(2) and 158(3) of the Draft Bill in Volume 2 of this Report.

(iii) The legality of sterilisation procedures

In the Draft Report, the Commission noted that some doubt existed about the legality of sterilisation procedures performed in Queensland, even if a valid consent has been obtained.¹¹⁰⁸ The uncertainty hinged on whether or not a sterilisation procedure which is carried out for contraceptive or other non-therapeutic purposes can ever be for the patient's benefit.¹¹⁰⁹ Judicial decisions in other jurisdictions suggest that a non-therapeutic sterilisation procedure may not be for the patient's benefit.¹¹¹⁰

The Criminal Code Review Committee recommended amendment to the Code to make it clear that sterilisation procedures performed with a legally valid consent are not unlawful.¹¹¹¹ The Commission recommended that, if the Code Review Committee's recommendation was not implemented, the Commission's proposed legislation should provide that a sterilisation procedure performed in accordance with the requirements of the legislation would not be unlawful.

The Commission's recommendation was reflected in clause 115(3) of the Draft Bill in Chapter 13 of the Draft Report.

A new Criminal Code was enacted in 1995, but did not come into operation. Section 82(2) of the new Code provides:

Surgical or medical treatment to sterilise a patient, performed with the patient's consent, is taken to be for the patient's benefit.

However, this provision would not apply to the situation where the patient lacks capacity to make his or her own decision.¹¹¹²

¹¹⁰⁸ At 153.

¹¹⁰⁹ S 282 of the *Criminal Code* provides protection from criminal liability to a person who performs a surgical operation in good faith and for the "benefit" of the patient.

¹¹¹⁰ *Bravery v Bravery* [1954] 1 WLR 1169 per Denning LJ at 1180; *Re Eve* [1986] 2 SCR 388.

¹¹¹¹ *Final Report of the Criminal Code Review Committee* (1992) 53, 191. A similar recommendation was made in the *Report and Recommendations of the Commission of Inquiry into the Status of Women in Queensland* (1973) 10-11. See also *Crimes Act (NZ)* s 61A(2).

¹¹¹² As a result of a change of government in Queensland in February 1996 it is likely that the new Code will be repealed.

In the view of the Commission it remains necessary for the legislation proposed by the Commission to provide that a sterilisation procedure is not unlawful if it is performed in accordance with the requirements of the legislation.

The Commission recommends that the legislation provide that if the tribunal consents to sterilisation, the sterilisation is not unlawful.

The Commission's recommendation is implemented by clause 158(4) of the Draft Bill in Volume 2 of this Report.

(c) Termination of pregnancy

In the Draft Report, the Commission expressed the view that, because of the serious consequences of a termination procedure, special consent requirements should apply to a decision to carry out the procedure.¹¹¹³

The Commission noted that, in Queensland, it is an offence to unlawfully procure a miscarriage.¹¹¹⁴ However, a person will not be criminally liable if an abortion was procured by means of a surgical operation performed in good faith with reasonable care and skill, provided that the operation was necessary for the preservation of the mother's life and its performance was reasonable in all the circumstances of the case.¹¹¹⁵ "Preservation of the mother's life" includes prevention of serious danger to her physical or mental health.¹¹¹⁶

¹¹¹³ At 154-155.

¹¹¹⁴ *Criminal Code* s 224. In the new *Criminal Code*, which was enacted in 1995 but which did not come into operation, s 224 is replaced by s 294 which is not significantly different from s 224. However, as a result of a change of government in Queensland in February 1996 it is likely that the new Code will be repealed.

¹¹¹⁵ *Criminal Code* s 282. In the new *Criminal Code*, which was enacted in 1995 but which did not come into operation, s 282 was replaced by s 82. The changes which have been made to s 82 do not affect its application in this context. However, as a result of a change of government in Queensland in February 1996 it is likely that the new Code will be repealed.

¹¹¹⁶ See *R v Bourne* [1939] 1 KB 687; *R v Ross and McCarthy* [1955] StRQd 48; *K v T* [1983] 1 QdR 396; *R v Bayliss and Cullen* (1986) 9 Qld Lawyer Reps 8. It has been suggested that it might be sufficient to avoid liability under s 282 of the *Criminal Code* if the abortion was performed in good faith and with reasonable care and skill for the benefit of the mother, and if its performance was reasonable in the circumstances, but that it is unlikely that the clear trend of the authorities would be reversed. See R S O'Regan, "Surgery and Criminal Responsibility under the Queensland Criminal Code" (1990) 14 *Criminal Law Journal*, 73.

The Commission recommended that:

- . only the tribunal should be able to make a decision about a termination of pregnancy for a woman who is unable to make her own decision because her decision-making capacity is impaired;
- . the tribunal should not consent to a termination unless it is satisfied that the termination is necessary to preserve the mother from serious danger to her life or to her physical or mental health;
- . a termination is lawful if it is performed with the consent of the tribunal.

The Commission's recommendations were reflected in clause 116 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.¹¹¹⁷

However, after further consideration, and consistently with its recommendation about consent for a medically necessary procedure which results in the sterilisation of the person concerned, the Commission is now of the view that it should not be necessary to obtain the consent of the tribunal for the performance of a procedure which is medically necessary but which results in termination of pregnancy. Such a situation may occur, for example, if it became necessary to perform abdominal surgery on a pregnant woman as a result of injuries sustained in an accident.

¹¹¹⁷ However, two submissions argued that it should not be possible for the tribunal to authorise a termination of pregnancy. See Chapter 5 of this Report.

The Commission recommends that the legislation provide that:

- . the consent of the tribunal is not necessary for the performance of a procedure which is medically necessary and which results in termination of a person's pregnancy;**
- . the tribunal may consent, for a person with impaired decision-making capacity for the decision, to termination of the person's pregnancy;**
- . the tribunal may consent only if it is satisfied that the termination is necessary to preserve the person from serious danger to her life or physical or mental health;**
- . if the tribunal consents to a termination, the termination is not unlawful.**

The Commission's recommendations are implemented by Schedule 1 clause 14 and clause 159 of the Draft Bill in Volume 2 of this Report.

(d) Participation in experimental treatment or research

The principle underlying the Commission's recommendations in relation to substituted health care decisions is the adoption of appropriate treatment for the purpose of promoting and maintaining the health and well-being of a person who lacks capacity to make a decision about his or her own health care.¹¹¹⁸

Research and experimental health care can be broadly categorised as being either therapeutic or non-therapeutic. Therapeutic research or experimentation is designed and conducted for the benefit of the subject, either to diagnose or treat a condition which the person has. Non-therapeutic research, on the other hand, refers to an experiment designed not to benefit the research subject directly, but to gain knowledge that might be used in the treatment of other persons.¹¹¹⁹

¹¹¹⁸ See p 359 of this Report.

¹¹¹⁹ A Varga, *The Main Issues in Bioethics* (1984) 155.

(i) Therapeutic

In the Draft Report, the Commission acknowledged that circumstances may arise in which conventional methods of treatment have failed and in which the only hope of improvement lies in research to gain further information about the patient's condition or in treatment which is still at an experimental stage. The Commission recognised the need for safeguards to protect the person's interests in such a situation, but also expressed the view that a person should not be denied a potential benefit merely because he or she is unable to give consent.¹¹²⁰

The Commission recommended that:

- . only the tribunal should be able to consent for a person who lacks the capacity to make his or her own decision about the matter to take part in research or to be given experimental treatment which is intended for the person's benefit;
- . the tribunal should not consent unless it is satisfied that:
 - . the research or treatment relates to a condition which affects the patient;
 - . the research or treatment involves minimal risk to the person;
 - . the research or treatment has been approved by a relevant ethics committee;
 - . the research or treatment may result in significant benefit to the person; and
 - . the benefit cannot be achieved without the research or treatment.
- . the tribunal should refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment.

The Commission's recommendation was reflected in clause 117(1) and 117(3) of the Draft Bill in Chapter 13 of the Draft Report.

¹¹²⁰At 157.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations.¹¹²¹

However, after further consideration, the Commission is now of the view that the factors which the tribunal must take into account should include an assessment of not only the risk to the person's health, but also the extent to which the person's convenience and quality of life is likely to be adversely affected.

The Commission recommends that the legislation provide that:

- . **the tribunal may consent, for a person with impaired decision-making capacity for the decision, to the person's participation in research or experimental health care to diagnose and treat the person;**
- . **the tribunal may not consent unless it is satisfied that:**
 - . **the research or health care is approved by an appropriate ethics committee;**
 - . **the research or health care relates to a condition which the person has;**
 - . **the research or health care may result in significant benefit to the person;**
 - . **any risk or inconvenience to the person and the person's quality of life is outweighed by the potential benefit;**
 - . **the potential benefit cannot be achieved in any other way;**
- . **the tribunal may not consent if the person objects to the research or health care.**

The Commission's recommendations are implemented by clauses 160(1) and 160(3) of the Draft Bill in Volume 2 of this Report.

¹¹²¹ However, three submissions expressed the view that research involving people with impaired decision-making capacity should never be permitted. See Chapter 5 of this Report.

(ii) Non-therapeutic

By definition, non-therapeutic research will not ever be able to comply with the criteria proposed by the Commission for consent to performance of a medical procedure on a person with impaired decision-making capacity, since it is not for the purpose of directly promoting or maintaining the health and well-being of the person who is the subject of the research.

However, in the Draft Report, the Commission expressed the view that, while some non-therapeutic research may involve procedures such as a general anaesthetic which carry a significant degree of known risk, other non-therapeutic research may involve minimal risk to a person who is the subject of the research. For example, it may merely require the taking of a blood sample. Further, research which is not immediately of direct benefit to a person who is the subject of the research, but which may contribute to the development of knowledge about impaired decision-making capacity and may, in the future, significantly benefit the person or other people affected by a particular condition, may not be possible without the participation of people with that condition.

After careful consideration, the Commission concluded that, in some circumstances, consent for a person with impaired decision-making capacity to participate in non-therapeutic research may be justified, provided that the rights, dignity and well-being of vulnerable members of society are adequately protected.

The Commission recommended that:

- . only the tribunal should be able to grant consent for a person who lacks the capacity to make his or her own decision about the matter to take part in research or to be given experimental treatment intended to gain further knowledge about the patient's condition;
- . the tribunal should not consent unless it is satisfied that:¹¹²²
 - . the research relates to a condition which affects the person;
 - . the research involves minimal risk to the person;
 - . the research has been approved by a relevant ethics committee;

¹¹²²

See for example Scottish Law Commission, Report No 151, *Report on Incapable Adults* (1995) 78-81; The Law Commission, Consultation Paper No 129, *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (1993) 111.

- . the research may result in significant benefit to the person or other people affected by the same condition as the person; and
- . the research cannot be carried out without the participation of a person or persons affected by that condition.
- . the tribunal should also refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment.

The Commission's recommendations were reflected in clause 117(2) and 117(3) 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.¹¹²³

However, after further consideration, the Commission is now of the view that the legislative criteria should include reference to additional factors such as the degree of invasiveness of the proposed procedure and the privacy of the individual concerned.

¹¹²³ But see note 1121 above.

The Commission recommends that the legislation provide that:

- . **the tribunal may consent, for a person with impaired decision-making capacity for the decision, to the person's participation in research or experimental health care treatment intended to gain knowledge that can be used in the diagnosis or treatment of a condition affecting the person;**
- . **the tribunal may not consent unless it is satisfied that:**
 - . **the research or health care is approved by an appropriate ethics committee;**
 - . **the risk and inconvenience to the person and to the person's quality of life is small;**
 - . **the research or health care relates to a condition the person has or has had;**
 - . **the research or health care may result in significant benefit to the person or other persons with the condition;**
 - . **the research or health care cannot be carried out without a person with or who has had the condition taking part;**
 - . **the research or health care will not unduly interfere with the person's privacy.**
- . **the tribunal may not consent if the person objects to the research or health care.**

The Commission's recommendations are implemented by clauses 160(2) and 160(3) of the Draft Bill in Volume 2 of this Report.

(e) Psychiatric treatment

In the Draft Report, the Commission noted that existing mental health legislation in Queensland was being reviewed.¹¹²⁴ The review is discussed in Chapter 5 of this Report.

¹¹²⁴At 146-148.

Clause 118 of the Draft Bill in Chapter 13 of the Draft Report provided:

The tribunal may consent, for an adult with impaired decision-making capacity for the decision, to the adult having psychiatric health care, or other health care prescribed under the regulations only if the tribunal is satisfied of the matters prescribed under the regulations.

However, the Commission is now of the view that matters relating to special consent procedures for certain forms of psychiatric treatment should be contained in mental health legislation.

The Commission therefore makes no recommendation about special consent procedures for treatment of mental illness.

(f) Continuing special consent health care

Legislation in New South Wales and Tasmania enables the relevant tribunal in each jurisdiction, when giving consent to the carrying out of special treatment, to authorise a decision-maker appointed by the tribunal to consent to the continuation of the treatment or to the carrying out of further special treatment of a similar nature. The tribunal may at any time impose conditions or give directions as to the exercise of such an authority or may revoke such an authority.¹¹²⁵ In New South Wales, the decision-maker, in considering a request for consent to continuing or similar special treatment, must have regard to the views, if any, of the patient and to the objects of the health care provisions.

In the view of the Commission, the inclusion of a provision of this nature would protect the person with impaired decision-making capacity by requiring the initial consent to be given by the tribunal. It would also facilitate continuation of approved treatment by enabling the tribunal, in an appropriate case, to appoint a decision-maker to consent to the continued treatment, subject to any conditions imposed by the tribunal.

¹¹²⁵ Guardianship Act 1987 (NSW) s 45A; Guardianship and Administration Act 1995 (Tas) s 46.

The Commission recommends that the legislation provide that:

- . if, on an application for the tribunal's consent to special consent health care for a person with impaired decision-making capacity for the decision, the tribunal considers that there will be a need for the treatment to continue or for further special consent health care of a similar nature:**
 - . the tribunal may appoint a decision-maker to consent to the continuation or the carrying out of the health care;**
 - . the tribunal may at any time impose conditions or give directions as to the exercise of the decision-maker's authority;**
 - . the tribunal may at any time revoke the decision-maker's authority;**

and that:

- . the decision-maker, in considering a request for consent to continuing or further similar health care, must have regard to the views, if any, of the person, and to the legislative principles.**

The Commission's recommendation is implemented by clause 162 of the Draft Report in Volume 2 of this Report.

(g) Additional forms of treatment

In the Draft Report, the Commission recommended that the legislation include a regulation making power which would allow additional forms of treatment to be identified as requiring special consent procedures.

The Commission's recommendation was reflected in clauses 118 and 263 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 approach.¹¹²⁶

¹¹²⁶ Some submissions identified additional procedures which, in the view of the respondents, should require special consent procedures. These procedures included total dental clearances, hormonal therapy and certain kinds of behavioural management techniques. The Commission believes that these and other issues which may emerge could be adequately dealt with by regulation.

The Commission recommends that the legislation provide that the tribunal may consent, for a person with impaired decision-making capacity for the decision, to the person having health care prescribed under the regulations only if the tribunal is satisfied of the matters prescribed under the regulations.

The Commission's recommendation is implemented by clause 161 of the Draft Bill in Volume 2 of this Report.

CHAPTER 11

APPEALS

1. THE NEED FOR AN APPEAL MECHANISM

Orders about decision-making for a person whose capacity is impaired impact significantly on the rights of the person concerned. They may also affect the interests of other people, including the person's relatives or other members of his or her support network, carers and service providers. An appeal mechanism which allows such orders to be challenged must therefore be provided.

The appeal process serves three functions. First, it is an avenue of possible remedy for those who are not satisfied with the result of a hearing. Second, it promotes the accountability of the body which determines the application. The existence of an open, fair and independent system of review is likely to result in greater public confidence in, and acceptance of, such determinations. Third, it provides a method of establishing guidelines about the way in which determinations should be made, thereby improving the quality of the determinations.

2. WHO SHOULD HEAR THE APPEAL

In the Draft Report,¹¹²⁷ the Commission concluded that a determination made by the tribunal under the legislation proposed by the Commission should be classified as an administrative decision, even though in making the determination the tribunal would be required to act judicially.¹¹²⁸

On this basis the Commission expressed the view that, if an Administrative Appeals Tribunal is introduced in Queensland,¹¹²⁹ as a review body it would offer advantages over a court in terms of cost and accessibility.

¹¹²⁷ Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

¹¹²⁸ At 175-176.

¹¹²⁹ The Electoral and Administrative Review Commission has recommended the establishment of an independent body, to be known as the Queensland Independent Commission for Administrative Review (QICAR), to provide a review system applicable to a wide range of administrative decisions. (*Report on Review of Appeals from Administrative Decisions*, August 1993.)

However, the Commission was concerned that, given the expertise and experience of the tribunal members,¹¹³⁰ a system of review by a general body with a broad ranging jurisdiction may not be appropriate. The Electoral and Administrative Review Commission (EARC) noted:¹¹³¹

*The combination of expert decision-making with an open decision-making process may make a decision inappropriate for a merits review.*¹¹³²

Review on the merits of such a decision combining an expert body and an open decision-making process may be, it is argued, at best a poor use of resources and at worst liable to do more harm than good.

In the Draft Report, the Commission concluded that, even if the review body did have members with a degree of expertise which matched that of the tribunal members,¹¹³³ such a system would merely result in a duplication of the role of the tribunal, with the opinion of one set of experts subject to replacement by the opinion of another set of experts. It expressed the view that this outcome would be undesirable in terms of efficiency and cost-effectiveness, with no countervailing benefit of greater fairness, accountability or impartiality.

The Commission considered that these disadvantages would outweigh the advantages of review within an administrative review system, and that the availability of judicial review would be sufficient.¹¹³⁴

¹¹³⁰ See Chapter 8 of this Report.

¹¹³¹ *Report on Review of Appeals from Administrative Decisions*, August 1993, vol 1 para 6.180 at 167.

¹¹³² See p 401 of this Report for an explanation of the term 'merits review'.

¹¹³³ See Electoral and Administrative Review Commission, *Report on Review of Appeals from Administrative Decisions*, August 1993, vol 1 para 3.140 at 62.

¹¹³⁴ At 176.

The Commission then considered the choice of forum within the existing court structure. It acknowledged that the District Courts have the advantages of greater accessibility¹¹³⁵ and lower costs, but identified a number of factors in favour of the Supreme Court.¹¹³⁶

At present the Supreme Court has power to make orders under the *Mental Health Act 1974 (Qld)* and the *Public Trustee Act 1978 (Qld)*¹¹³⁷ or under its *parens patriae*¹¹³⁸ jurisdiction. The District Court does not have power to make orders under the *Mental Health Act* and has no *parens patriae* jurisdiction. Judges of the Supreme Court would therefore have more experience in determining applications concerning decision-making for people with impaired decision-making capacity. In addition, the Supreme Court previously had power to review administrative decisions by virtue of a complicated set of remedies known collectively as the prerogative writs. This power has now been replaced by a statutory power under the *Judicial Review Act 1991 (Qld)* to review decisions of an administrative character which are made in carrying out functions conferred by legislation.¹¹³⁹

The Commission recommended that appeal against a determination of the tribunal should lie to a judge of the Supreme Court of Queensland.¹¹⁴⁰ The Commission's approach was reflected in clause 221(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. However, there were four submissions which disagreed with the Commission.¹¹⁴¹

¹¹³⁵ There are District Court judges permanently located in Cairns, Ipswich, Maroochydore, Rockhampton, Southport and Townsville. Judges make circuit visits to the following centres: Bowen, Bundaberg, Charleville (includes Cunnamulla), Charters Towers (includes Hughenden), Clermont (includes Emerald), Cloncurry (includes Mt Isa), Dalby, Gladstone, Goondiwindi, Gympie, Innisfail, Kingaroy, Longreach, Mackay, Maryborough, Roma, Stanthorpe, Toowoomba and Warwick. There are judges of the Supreme Court permanently based in Townsville and Rockhampton. Supreme Court judges make circuit visits to Bundaberg, Cairns, Longreach, Mackay, Maryborough, Mt Isa, Roma and Toowoomba.

¹¹³⁶ At 177.

¹¹³⁷ See Chapter 2 of this Report.

¹¹³⁸ See pp 21-22 of this Report.

¹¹³⁹ *Judicial Review Act 1991 (Qld)* ss 3,4, 20(1).

¹¹⁴⁰ At 177. Grounds of appeal are discussed at p 401 of this Report.

¹¹⁴¹ Submissions Nos 14, 25, 30, 64.

These submissions based their arguments on the inaccessibility of the Supreme Court to many members of the community in terms of both expense and lack of familiarity with the legal process. One respondent, a service provider, claimed that the Commission's recommendation "contradicts the arguments for why the tribunal was being proposed in the first place".¹¹⁴² Another, an advocacy organisation representing people with disability, argued that an administrative appeals tribunal, despite the disadvantages identified by the Commission, would have the significant advantage that it would be far more likely to be used than a right of appeal to the Supreme Court.¹¹⁴³ The submission pointed out that, since the introduction of the *Intellectually Disabled Citizens Act* in 1985, there had been few, if any appeals to the Supreme Court against a decision of the Intellectually Disabled Citizens Council.¹¹⁴⁴ It commented that:

However well the Council may have carried out its functions, over that period there must have been a considerable number of people who, had there been an accessible, cheap form of appeal mechanism, would have taken advantage of it.

While acknowledging that the question is academic in the absence of an Administrative Appeals Tribunal, the submission proposed that one way of addressing the shortcomings of an administrative review mechanism would be to allow a review to an Administrative Appeals Tribunal, but also to allow an appeal directly to the Supreme Court, at the Court's discretion.

The Commission remains of the view that appeals from tribunal decisions should be heard by a judge of the Supreme Court. The Commission considers it undesirable that, where the appeal is on a question of fact, the findings of a specialised body should be able to be overturned by a more generalist tribunal. The Commission also considers that, where the appeal is on a question of law, it is more appropriately determined by a court.

The Commission recommends that the legislation provide that an appeal from a determination of the tribunal should lie to a judge of the Supreme Court of Queensland.

¹¹⁴² Submission No 14.

¹¹⁴³ Submission No 64.

¹¹⁴⁴ In 1994, the Intellectually Disabled Citizens Council established formal grievance procedures to encourage and support individuals to express their concerns about implementation of the Act and to focus on the resolution of any disputes which may arise. However, statutory decisions made by the Council and the Legal Friend may not be reversed through the grievance process. The purpose of the grievance process is to provide appropriate channels of formal communication for individuals to be able to discuss and resolve their grievances. The emphasis is on mediation to resolve the grievance.

The Commission's recommendation is implemented by clause 251(1) of the Draft Bill in Volume 2 of this Report.

3. GROUNDS FOR APPEAL

In the Draft Report, the Commission considered a number of alternative bases for review of a determination made by the tribunal.¹¹⁴⁵ The options included the grounds for a review under the *Judicial Review Act 1991 (Qld)*, a full merits review, and an intermediate alternative.

The grounds for review set out in the *Judicial Review Act 1991 (Qld)* do not allow the Supreme Court to decide if the challenged decision was right or wrong in the circumstances of the particular case. They are limited to an examination of the validity and legality of the decision. The Court must consider whether the body which made the decision had statutory power to do so, whether the prescribed procedures were followed, and whether the power to make the decision was exercised fairly.¹¹⁴⁶ If fair procedures were followed, and the decision was within power and not obviously unreasonable, the decision will stand.

A full merits review, on the other hand, places the body hearing the appeal in the position of the body which made the decision. It reviews the actual decision that was made, rather than the process of arriving at the decision. The right to such a review does not depend on showing unreasonableness or procedural unfairness on the part of the body which made the decision. A decision can be challenged simply on the basis that a preferable alternative was available, and the appeal body can, if it wishes, substitute its own view of the merits of the case for that of the body which made the decision. Because a full merits review is wider in scope than a review under the *Judicial Review Act* it is usually a lengthier and more expensive procedure.

The Commission expressed the view that, particularly in the light of the expertise which specialist tribunal members would bring to the determinations of the tribunal and of the additional expense involved, a full merits review may not be warranted in every case. However, it acknowledged that the grounds for review under the *Judicial Review Act* may be too narrow.

¹¹⁴⁵ At 177-178.

¹¹⁴⁶ *Judicial Review Act 1991 (Qld)* s 20(2).

The Commission proposed that an intermediate alternative would be for the legislation which establishes the tribunal to set out the grounds on which its determinations could be challenged. This right of appeal would be additional to any available under the *Judicial Review Act*.¹¹⁴⁷

The Commission recommended that there should be an appeal as of right on a question of law and that there should also be provision for an appeal on other grounds which the Court considers sufficient to justify a review of the decision.¹¹⁴⁸ This would allow a decision to be reviewed on the basis that the tribunal was mistaken in the view which it took of the facts, but only if the Court considered such a review appropriate in the circumstances of the case. The Commission's recommendation was reflected in clauses 221(2) and 221(3) 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 approach. However, the Legal Aid Office (Queensland), while acknowledging that the Commission's recommendation should not prevent any legitimate grievance from going on appeal, pointed to certain advantages in allowing individuals an unrestricted right of appeal. The advantages identified were that an unrestricted right of appeal avoids technical arguments about appeal rights and, perhaps more importantly, tends to enhance in the individuals concerned a feeling that justice is being done. The respondent claimed that the full right of appeal provided under the *Mental Health Act 1974 (Qld)* against decisions of the Mental Health Tribunal and the Patient Review Tribunal, although not widely used, was valuable in safeguarding patients' rights.¹¹⁴⁹

However, the Commission remains of the view that its original proposal provides adequate protection for the rights of the individuals concerned. It considers that, given the wider scope of the jurisdiction of the tribunal, an unrestricted right of appeal could impose an unjustifiable burden on the court.

¹¹⁴⁷ *Judicial Review Act 1991 (Qld)* s 10.

¹¹⁴⁸ See for example *Guardianship Act 1987 (NSW)* s 67; *Guardianship and Administration Act 1990 (WA)* s 21; *Guardianship and Management of Property Act 1991 (ACT)* s 56; *Guardianship and Administration Act 1995 (Tas)* s 76.

¹¹⁴⁹ Submission No 59.

The Commission recommends that the legislation provide that:

- . appeal be as of right on a question of law;**
- . the leave of a judge of the Supreme Court be required for an appeal on any other question.**

The Commission's recommendation is implemented by clauses 251(2) and 251(3) of the Draft Bill in Volume 2 of this Report.

4. THE APPEAL PROCESS

In the Draft Report, the Commission considered whether the powers of the body which hears the appeal should be limited to a review of the material before the tribunal, or whether it should have power to allow the parties to present new evidence and to inform itself of relevant issues.¹¹⁵⁰ The Commission noted that restricting the appeal body to a consideration of the evidence before the tribunal would require evidence given at the tribunal hearing to be recorded, which would increase the costs of the proceedings and which may also require a more formal approach to the hearing. On the other hand, allowing the parties to an appeal to duplicate evidence which has already been presented to the tribunal or to introduce new evidence at the appeal stage would add considerably to the expense of the appeal process and may also delay the hearing of the appeal.

The Commission expressed the view that, although the additional complexity and cost of presenting evidence would not be warranted in all cases, it would not wish to prevent evidence being given in appropriate circumstances.

The Commission recommended that the appeal body should be given a discretionary power to decide whether, in the circumstances of a particular case, the presentation of evidence is justified. The Commission's recommendation was reflected in clause 222 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 approach although one submission, made jointly by a community legal centre and a community organisation committed to

¹¹⁵⁰
At 179-180.

improving the comfort of people living with mental illness, noted that it would be necessary for evidence to be heard in many cases and that there should not be any disincentive to the presentation of evidence where such evidence is relevant.

The Commission recommends that the legislation provide that the appeal body may decide an appeal on -

- . the material before the tribunal; and**
- . further evidence (if any) the body considers appropriate to receive.**

The Commission's recommendation is implemented by clause 255 of the Draft Bill in Volume 2 of this Report.

5. WHO SHOULD HAVE THE RIGHT TO APPEAL

In the Draft Report, the Commission considered the question of who should have a right to appeal against a decision of the tribunal.¹¹⁵¹

The Commission expressed the view that the interests of certainty would be better served by specifying the people entitled to appeal, rather than by relying on a more general formula based on the adverse effect of a decision on an individual's interests.

The Commission recommended that the person who is the subject of an application and any other party to the application should be entitled to appeal against an order of the tribunal, and that the appeal body should have a discretionary power to allow any other person to appeal if, in its opinion, that person should be entitled to do so. The Commission's recommendation was reflected in clause 221(5) 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 is now of the view that the right of appeal in the Draft Bill in Chapter 13 of the Draft Report was too widely expressed.

¹¹⁵¹ At 180-181.

Clause 221(5) of the Draft Bill defined "an eligible person" in relation to an appeal against a tribunal decision as:

- (a) the person concerned in the tribunal's proceedings; or
- (b) a participant in the tribunal's proceedings; or
- (c) a person given leave to appeal by the Supreme Court.

In the interests of fairness, the list of people entitled to take part in a tribunal hearing was intentionally broad. However, the Commission is now of the view that it is neither necessary nor desirable for the legislation to include such extensive automatic rights of appeal.

One submission, from a community legal centre, commented that "there may also be some matters where a party not necessarily subject to the original application may wish to be joined on appeal as *amicus curiae* or other types of friend of the court applications" and that such a provision should be considered for the legislation.¹¹⁵² In the view of the Commission, this situation can be provided for by specifying that the Attorney-General, who is the first law officer of the Crown and the embodiment of the notion of *parens patriae*¹¹⁵³ in the State,¹¹⁵⁴ has a right of appeal.

¹¹⁵² Submission No 73.

¹¹⁵³ See p 21 of this Report.

¹¹⁵⁴ J.L.J. Edwards, *The Law Officers of the Crown* (1964), 7.

The Commission recommends that the legislation provide that, in relation to an appeal against a tribunal decision, "an eligible person" is:

- (a) the person whose decision-making needs are under consideration;**
- (b) the person who made the application;**
- (c) a proposed appointee;**
- (d) a decision-maker removed by the tribunal;**
- (e) the Adult Guardian;**
- (f) the Public Trustee;**
- (g) the Attorney-General;**
- (h) a person given leave to appeal by the Supreme Court.**

The Commission's recommendation is implemented by clause 251(4) of the Draft Bill in Volume 2 of this Report.

6. POWERS OF THE APPEAL BODY

In the Draft Report, the Commission considered the powers which could be given to the appeal body to resolve an appeal.¹¹⁵⁵

The Commission recommended that the appeal body have power to:

- . affirm the decision of the tribunal;
- . vary the decision of the tribunal;
- . set aside the decision of the tribunal and either
 - make any other decision which the tribunal could have made; or

¹¹⁵⁵
At 181.

- remit the matter to the tribunal for reconsideration in accordance with any directions or recommendations of the appeal body.

The Commission's recommendation was reflected in clause 223 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 approach.

The Commission recommends that the legislation provide that in deciding an appeal against a tribunal order, direction or decision, a judge of the Supreme Court may:

- **confirm or change the order, direction or decision;**
- **set aside the order, direction or decision and, if the Court considers it appropriate:**
 - **substitute its own order, direction or decision (being one the tribunal could have made); or**
 - **remit the subject matter of the appeal to the tribunal for further consideration or for reconsideration in accordance with directions or recommendations of the Court.**

The Commission's recommendation is implemented by clause 256 of the Draft Bill in Volume 2 of this Report.

7. COSTS OF AN APPEAL

The general rule is that, on an appeal, the costs of the appeal will follow the event. In other words, the successful party will, in the absence of special circumstances, be awarded costs against the unsuccessful party.

Because of the potentially far-reaching effects of a tribunal decision, the Commission believes that the appeal system should be as accessible as possible. In the Draft Report, the Commission expressed the concern that application of the general rule could deter people from appealing against a decision of the tribunal or from defending an appeal.

The Commission recommended that the parties to an appeal against a decision of the tribunal should bear their own costs, and should not have to run the risk of having costs awarded against them if their appeal is unsuccessful. The Commission also recommended that the Court should have a discretion to award costs if it considers that the appeal was frivolous or vexatious, that a party has not been given reasonable prior notice of another party's intention to apply for an adjournment of an appeal or that a party has incurred costs because another party has defaulted in procedural requirements.¹¹⁵⁶ The Commission's recommendation was reflected in clause 224 of the Draft Bill in Chapter 13 of the Draft Report.

The Commission also recommended that adequate provision should be made for appeals in appropriate cases to be funded through the Legal Aid Office. The Commission was particularly concerned that if legal aid were not available, there may be no one to defend the tribunal's decision on appeal.

The Commission considered whether the proposed tribunal should be given power to defend its own decisions where necessary. It is generally not regarded as proper for a tribunal to take an active part in subsequent proceedings about its own decisions, because to do so would endanger its appearance of impartiality if a matter were remitted to it for further consideration.¹¹⁵⁷ The Commission concluded that it would not be appropriate to authorise the tribunal to advocate in favour of the exercise of its own jurisdiction, but that the better approach would be provision of legal aid to ensure that the public interest is not disadvantaged by the judge who hears the appeal being presented with an unbalanced perspective of the situation.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendations. However, two submissions disagreed with the Commission's recommendation that the parties to an appeal should each bear their own costs. One respondent, an association of trustee companies, argued that it is difficult to distinguish appeals of this kind from other judicial appeals from administrative decisions and that the ordinary principle of costs following the outcome of the appeal should apply. The respondent did not accept that an eligible person may be deterred from lodging an appeal by the risk of an award of costs award him or her if the appeal is unsuccessful.¹¹⁵⁸ Another respondent insisted that the successful party to an appeal should be entitled to recover the costs of the appeal. This respondent did not appear to consider the possibility that an appeal may not succeed and that an unsuccessful appellant may

¹¹⁵⁶ See for example *Local Government (Planning and Environment) Act 1990 (Qld)* s 7.6.

¹¹⁵⁷ *The Queen v The Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 35-36; *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 3)* (1987) 77 ALR 609.

¹¹⁵⁸ Submission No 48.

have to carry not only his or her own costs but also the costs of the other side.¹¹⁵⁹

On the other hand, a number of submissions referred to the need for a fair and equitable appeal system without the risk of financial penalty.

The Commission is not persuaded to change its recommendation.

The Commission recommends that the legislation provide that:

- . each party to an appeal is to bear the party's own costs of the appeal;**
- . a judge of the Supreme Court may order a party to an appeal to pay costs to another party if the court considers:**
 - (a) the appeal was frivolous or vexatious;**
 - (b) the party has not been given reasonable prior notice of intention to apply for an adjournment;**
 - (c) the party has incurred costs because the appellant defaulted in the procedural requirements.**

The Commission recommends that adequate provision should be made for appeals to be funded in appropriate cases through the Legal Aid Office.

The Commission's recommendation is implemented by clause 257 of the Draft Bill in Volume 2 of this Report.

¹¹⁵⁹Submission No 113.

CHAPTER 12

THE ADULT GUARDIAN AND THE PUBLIC ADVOCATE

1. INTRODUCTION

In all Australian States and Territories except Queensland, a comprehensive legislative scheme concerning decision-making by and for people with a decision-making disability creates a statutory office which fulfils a number of functions under the legislation. In Victoria and South Australia the statutory officer is called the Public Advocate. In New South Wales, the Northern Territory, Western Australia and Tasmania the officer is called the Public Guardian. In the Australian Capital Territory the officer is called the Community Advocate.

2. PROPOSED FUNCTIONS

In the Draft Report,¹¹⁶⁰ the Commission considered the functions undertaken by the offices in the other jurisdictions.¹¹⁶¹ The Commission recommended that certain functions be included in its proposed legislative scheme. In the submissions received by the Commission in response to the Draft Report, there was widespread support for the inclusion of these functions. An organisation representing people with acquired brain damage stated:¹¹⁶²

... these schemes are an integral element of the proposed legislation and should attract an immediate appropriate funding commitment.

A number of other submissions also commented on the need for adequate funding to ensure that the proposed functions can be effectively carried out.¹¹⁶³

In the Draft Report, the Commission recommended that the following functions be included:

¹¹⁶⁰ Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

¹¹⁶¹ At Chapter 11.

¹¹⁶² Submission No 72.

¹¹⁶³ Submissions Nos 14, 56, 64.

(a) Decision-maker of last resort

The Commission noted that there is sometimes a need for a decision-maker of last resort.¹¹⁶⁴ This need may arise, for example, because a person with a decision-making disability does not have a relative or close friend who is willing and able to act as the person's decision-maker. It may also arise because there is a dispute among the person's family members which cannot be resolved without outside intervention, or because inappropriate decisions have been made for the person.

The Commission recognised the availability of the Public Trustee to act as decision-maker of last resort for questions of financial management, and the absence of an equivalent to the Public Trustee in relation to personal decisions for a person with impaired decision-making capacity.¹¹⁶⁵

The Commission recommended that the legislation should provide for a statutory decision-maker of last resort to act where necessary in relation to decisions about personal welfare.¹¹⁶⁶

The Commission's recommendation was strongly endorsed by the majority of the submissions which commented on this issue.¹¹⁶⁷ One submission commented that it would "fill an important gap in current provisions particularly in those cases of exploitation and abuse".¹¹⁶⁸ Another noted that it recognised that "not all citizens have access to helpful and trusting support systems".¹¹⁶⁹

(b) Community decision-makers

In the Draft Report, the Commission recognised that, particularly in rural and regional areas of Queensland, there may be people with a decision-making disability who need a decision-maker but who have difficulty in accessing the services of a statutory decision-maker. To help overcome this problem, the

¹¹⁶⁴ At 42-43, 184.

¹¹⁶⁵ However, the Legal Friend can make some decisions for some people with impaired decision-making capacity. See p 19 of this Report.

¹¹⁶⁶ At 185.

¹¹⁶⁷ Submissions Nos 11, 13, 14, 23, 28, 33, 52, 53, 62, 64, 69, 71, 72, 73, 74, 76.

¹¹⁶⁸ Submission No 23.

¹¹⁶⁹ Submission No 14.

Commission recommended that the statutory decision-maker should have responsibility for a scheme of community decision-makers.¹¹⁷⁰

The advantages of such a scheme were identified as including the encouragement of community responsibility for helping meet the needs of people with impaired decision-making capacity, the development of one to one personal relationships between a decision-maker and the person for whom he or she is acting, the contribution of varying experiences by community decision-makers, and the highlighting of problems encountered by people with impaired decision-making capacity within their own community. On the other hand, disadvantages such as difficulty in recruiting suitable candidates to act as decision-makers were foreshadowed. However, it was argued that such difficulties could be overcome by an effective program of community education, training of decision-makers and monitoring of their performance.

The Commission's recommendation was strongly endorsed by the submissions received in response to the Draft Report. In particular, there was support for the personalised nature of the service which could be provided and the associated benefit for people with decision-making disabilities through more time intensive and personal involvement.¹¹⁷¹ One submission commented that most communities have people who would be capable of acting as community decision-makers.¹¹⁷²

Two submissions were opposed to the concept of community decision-makers.

One of these submissions argued that decision-makers must be able to demonstrate knowledge of and involvement with the person being assisted, preferably over a long period.¹¹⁷³ The Commission agrees that, where possible, it is important for a decision-maker to have personal knowledge of and involvement with the person. However, the Commission recognises the reality that, for a variety of reasons, it is not always possible or even desirable for someone close to the person to act as the person's decision-maker. It is to cater for such situations that the Commission recommends a scheme of community decision-makers.

¹¹⁷⁰ At 185-186.

¹¹⁷¹ Submissions Nos 14, 74.

¹¹⁷² Submission No 13.

¹¹⁷³ Submission No 54.

The other submission expressed the view that, in small towns, a community decision-makers scheme would be subject to abuse.¹¹⁷⁴ The Commission acknowledges that, particularly in close-knit communities, there could be concern over issues such as privacy and confidentiality. However, it believes that careful screening of volunteers and an effective training and monitoring program would largely overcome such difficulties. It does not agree with the submission that it would be "much more acceptable for a person to be situated anywhere and contactable by phone at any time for an emergency decision".

(c) Community awareness

During its review of the laws concerning decision-making for people with a decision-making disability, the Commission has been concerned at the lack of public understanding of and available information about the existing legislation and how it works. In the Draft Report, the Commission recognised the importance of promoting awareness and understanding of matters such as the rights of people with a decision-making disability, the need to protect people whose decision-making capacity is impaired from abuse and exploitation, when and how a decision-maker may be appointed, and the powers and duties of decision-makers. The Commission proposed an educative and advisory service to provide information on these matters, as well as general information about the tribunal.¹¹⁷⁵

Several of the submissions received by the Commission in response to the Draft Report raised the issue of the importance of educating the community about the operation of the legislation. One submission commented that the scheme proposed by the Commission would function much more effectively if members of the community understand the system before they need to use it.¹¹⁷⁶ Another noted that medical, allied health, rehabilitation, legal and welfare professionals involved with people with a decision-making disability should also have sufficient knowledge to advise individuals and families of their rights and obligations under the legislation as early as possible.¹¹⁷⁷

¹¹⁷⁴ Submission No 10.

¹¹⁷⁵ At 186.

¹¹⁷⁶ Submission No 16.

¹¹⁷⁷ Submission No 72.

(d) Complaints

(i) Investigation of complaints

The protection of the rights of people with a decision-making disability often depends on the existence of an independent complaint mechanism. Allegations or complaints by the person or by his or her family or close friends may place the person in a vulnerable situation. For example, the person may face eviction from where he or she is living if a complaint is made about his or her living conditions. Complaints about service delivery may also involve the fear of repercussions. There is therefore a need for an independent body to investigate allegations that a person is being exploited or abused or is in need of assistance, or that a carer or decision-maker is acting inappropriately, and to take any necessary action on behalf of the person. Investigative mechanisms of this kind exist in other Australian jurisdictions.¹¹⁷⁸

In the Draft Report, the Commission recommended that its proposed legislation include a mechanism for investigating complaints and allegations and for taking appropriate action - for example, initiating an application to the tribunal for appointment of a decision-maker or for the review of a previous appointment, or referring a matter to another agency such as the Health Rights Commission or the Human Rights Commission - in response to its investigations.¹¹⁷⁹

In the submissions received by the Commission in response to the Draft Report there was considerable support for the Commission's recommendation for an independent investigative mechanism.

(ii) Disclosure of results of investigation

In the Draft Report, the Commission noted that although in some situations it may be in the public interest for information about investigations to be disclosed, the information may be highly sensitive and disclosure may have serious consequences.¹¹⁸⁰ The Commission therefore proposed safeguards to ensure fairness to both those who make complaints and those against whom complaints are made.¹¹⁸¹

¹¹⁷⁸ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 16 (1)(h); *Guardianship and Administration Act 1990 (WA)* s 97(1)(c); *Community Advocate Act 1991 (ACT)* s 14(1).

¹¹⁷⁹ At 188.

¹¹⁸⁰ At 188.

¹¹⁸¹ See for example *Community Advocate Act 1991 (ACT)* s 20.

The submissions which considered this issue were generally supportive of the Commission's proposals. One submission commented that "the inclusion of a provision covering disclosure of information about any investigations ... is most welcome".¹¹⁸²

(e) Community visitors for residential facilities

(i) The role of community visitors

In the Draft Report, the Commission proposed the establishment of a scheme of community visitors.¹¹⁸³

The Commission proposed that the role of the community visitors would be to protect the rights of people with a decision-making disability who are living in residential care and who may have no-one to safeguard their individual interests. The community visitors would be able to inquire into issues such as the adequacy and standard of services provided and the care and treatment received by residents.¹¹⁸⁴

The Commission proposed that the community visitors should have certain statutory duties and powers. The suggested powers included gaining access to the facility, conferring alone with the resident,¹¹⁸⁵ obtaining information from staff of the facility and examining documents. The suggested duties included an obligation to visit the facility on a regular basis, to investigate complaints about care and treatment and to report on the results of any investigation. The Commission also proposed that community visitors be required to act in a manner which preserves, as far as possible, the privacy of a resident¹¹⁸⁶ and that, before questioning staff of a care facility or inspecting any document relating to a resident, a community visitor be required to take all reasonable steps to ascertain the wishes of the resident concerned. The community visitor should, as far as possible, take the wishes of the resident into account but would not be

¹¹⁸² Submission No 25.

¹¹⁸³ At 189-191.

¹¹⁸⁴ Office of the Public Advocate, *Annual Report 1990*, 75. See also *Guardianship and Administration Board Act 1986 (Vic)* s 15(b); *Community Advocate Act 1991 (ACT)* s 13(1).

¹¹⁸⁵ See for example *Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* s 8(1)(b).

¹¹⁸⁶ See for example *Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* s 8(3).

bound by them.¹¹⁸⁷

The Commission foreshadowed problems which may affect the overall effectiveness of such a scheme which relied on a pool of volunteers. These included difficulties in recruiting suitable volunteers; public resistance to the idea of unpaid workers entering residential care facilities; and the perception held by some members of the public that community visitors lack any official status and so their views should not be taken into account. The Commission recommended that community visitors should be paid for their services.

There was strong support in the submissions received by the Commission in response to the Draft Report for the establishment of a community visitors scheme with the functions proposed by the Commission.

(ii) Scope of the community visitors scheme

In the Draft Report, the Commission noted the existence, under the *Mental Health Act*, of an Official Visitor Scheme to provide an overview of the care provided within designated psychiatric inpatient facilities and within private hospitals providing inpatient psychiatric care.¹¹⁸⁸

The Commission also noted that the current role of the Official Visitors is under consideration as part of the review of the *Mental Health Act*. The Green Paper on the review of the *Mental Health Act* recommended that "a system of independent Community Visitors to all mental health services be established with an appropriate range of functions and powers". It referred to the preliminary proposals of this Commission in relation to the need for a similar role in other areas of care for people with disabilities.¹¹⁸⁹ The Green Paper recognised the desirability of establishing a single mainstream mechanism, with community visitors within the mental health system as one aspect of such a system. It acknowledged that such a scheme would, by requiring community visitors to report to an independent position, ensure independence of the community visitors from the mental health system.¹¹⁹⁰

The Commission made no recommendation in the Draft Report in relation to the existing role of the Official Visitors, but commented that the quality of

¹¹⁸⁷ See for example *Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW) s 8(2)*.

¹¹⁸⁸ At 191.

¹¹⁸⁹ Queensland Law Reform Commission, Discussion Paper No 38, *Assisted and Substituted Decisions: A New Approach* (1992), 166-167.

¹¹⁹⁰ Queensland Health, *Review of the Mental Health Act 1974, Green Paper* (1994), 107.

protection afforded to a resident in any care facility should not depend on the nature of the facility.

One of the submissions received by the Commission in response to the Draft Report endorsed the proposals about community visitors in the Green Paper.¹¹⁹¹ Another commented that community visitors would be well placed to fulfil the role now carried out under the *Mental Health Act*.¹¹⁹² A third specifically recommended that the scheme proposed by the Commission should replace and include the existing Official Visitors Scheme. This submission argued that:¹¹⁹³

*to include institutions and care facilities within the mental health system within the ... Community Visitors Scheme would provide additional safeguards to persons within the mental health system.*¹¹⁹⁴

(iii) Who should be a community visitor

Only two of the submissions received by the Commission in response to the Draft Report commented on who should be a community visitor.¹¹⁹⁵ These submissions commented on the need for community visitors to have an understanding of relevant legislation and issues. One of the submissions noted that past mental health consumers and consumers who are well for long periods of time between episodes would be ideally suited to act as community visitors in mental health facilities, because they understand the culture of psychiatric institutions and may recognise cause for complaint where others without the same knowledge may see nothing amiss. The same submission called for ethnic and gender needs to be taken into account when recruiting community visitors.¹¹⁹⁶

(f) Power of entry and removal

¹¹⁹¹ Submission No 53.

¹¹⁹² Submission No 52.

¹¹⁹³ Submission No 64.

¹¹⁹⁴ Another submission, Submission No 32, while not commenting specifically on the role of community visitors, referred to the added protection which would be given to patients within the mental health system by inclusion in the legislation proposed by the Commission.

¹¹⁹⁵ Submissions Nos 53, 64.

¹¹⁹⁶ Submission No 53.

Situations may arise where, if there is reason to believe that the welfare of a person with a decision-making disability is at risk, it may be necessary to gain entry to premises to investigate and, if appropriate, remove the person to safety. In Chapter 8 of this Report, the Commission has recommended that the tribunal have power to make orders concerning entry to premises and removal of a person to safety.¹¹⁹⁷

Family members, friends or service providers may be aware that a person needs assistance, but may be reluctant to become personally involved.

In the Draft Report, the Commission referred to emergency provisions in other jurisdictions.¹¹⁹⁸ The Commission recommended that the legislation provide for a statutory officer to have, with the authorisation of the tribunal, a power of entry and removal.

The submissions received by the Commission in response to the Draft Report strongly supported a power of entry and removal. One submission, however, was opposed to its inclusion in the Commission's proposed legislative scheme. The respondent argued:¹¹⁹⁹

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 Commission's response to this submission is set out on page 272 of this Report.

(g) Advocacy

(i) The nature of advocacy

Advocacy has been defined as speaking out on behalf of another person - for example, a person who is at risk of being socially devalued - in such a way as to vigorously promote that person's interests or cause, to involve an element of personal cost to the advocate and to be as free as possible from conflict of interest, owing total allegiance to the person represented.¹²⁰⁰ The aim of advocacy for people with a decision-making disability is to enable

¹¹⁹⁷ See pp 270-274.

¹¹⁹⁸ At 192. See for example *Guardianship and Administration Board Act 1986 (Vic)* s 27; *Guardianship and Administration Act 1990 (WA)* s 49; *Guardianship and Management of Property Act 1991 (ACT)* s 68.

¹¹⁹⁹ Submission No 58.

¹²⁰⁰ W Wolfensberger, *A Balanced Multi-Component Advocacy/Protection Schema* (1977) 18-21.

them to strive for justice and to achieve their potential.¹²⁰¹

(ii) **Individual advocacy**

People with a decision-making disability are often at a disadvantage in our society. First, it may be difficult for them to access, in an appropriate form, the information they need about decisions which affect their lives. Second, they may form part of what has been described as "an underclass" composed of groups of people "who remain helpless because they cannot organise adequately, cannot influence people with power sufficiently to ensure a better deal for themselves, and who have become so used to being underclass citizens that they accept their misery, misfortune and impotence as normal for themselves".¹²⁰²

Individual advocacy can help to inform people with a decision-making disability about the choices available to them and can assist them to exercise their rights.

In Queensland there is a small number of groups whose major focus is on the individual advocacy function.¹²⁰³ Members of a community volunteer to represent and advance the interests of a person with a disability as if those interests were their own. The advocates are backed up by an independent organisation which co-ordinates their activities and offers support. The advocates give friendship and emotional support, assist in overcoming day-to-day problems and act as "watchdogs" of service provision agencies.

However, there is no existing legislation in Queensland which expressly confers an individual advocacy role of this kind.¹²⁰⁴ In some Australian States and Territories, there is legislation giving an independent statutory

¹²⁰¹ Office of the Public Advocate (Victoria), *Annual Report 1990, 92.*

¹²⁰² Office of the Public Advocate (Victoria), *Silent Victims*, May 1988.

¹²⁰³ These groups include, for example, Independent Advocacy in the Tropics, Speak Up for Yourself and Outright Independence.

¹²⁰⁴ S 26(1) of the *Intellectually Disabled Citizens Act 1985 (Qld)* provides that the functions of the Legal Friend include to "obtain for or provide ... information" about "legal rights and legal procedures and specialised services ... available" for a person who has been granted assistance under the Act, "to instruct a solicitor to act for or on behalf of" the person and to "liaise with Government departments and other organisations or bodies" on behalf of the person. (See p 19 of this Report.) The Commission has been advised that these functions represent a significant proportion of the work presently carried out by the Office of the Legal Friend. (Submission No 74.) It could be argued that these functions constitute a limited form of advocacy. On the other hand, it could be argued that they are a form of service provision, rather than "true" advocacy. The Public Trustee, although having no official statutory authority to do so, in practice often provides "forceful representation of the interests of clients in negotiations/conflict with third parties." (Submissions Nos 71, 72.)

officer responsibility for undertaking advocacy on behalf of an individual or for supporting a person's right to self-advocacy as part of the broader role of protecting the rights of all people with a decision-making disability.¹²⁰⁵

(iii) Systemic advocacy

Some of the problems faced by a person with a decision-making disability may be symptomatic of a much wider problem or issue. While individual advocacy can address the concerns of a particular person, there is a need for a mechanism to address the issue on a broader scale.

Systemic advocacy targets the system which affects the people concerned. It is not concerned with individual grievances, but with patterns of problems, difficulties, shortcomings and class needs.¹²⁰⁶ It focuses on deficiencies in policies and programs, and on the need for changes in both public and private organisations.¹²⁰⁷ This may involve activities such as reporting on and making recommendations about inadequacies in procedure, government policies and legislation affecting people whose decision-making capacity is impaired.

(iv) The role of advocacy in the proposed scheme

In the Draft Report, the Commission proposed that there should be a statutory office with an advocacy role to conduct systemic advocacy to promote and protect the interests of people with a decision-making disability.¹²⁰⁸

The submissions received by the Commission in response to the Draft Report strongly supported this systemic advocacy role as pivotal to the scheme proposed by the Commission.

¹²⁰⁵ See for example *Guardianship and Administration Board Act 1986 (Vic)* ss 15(a), 16 (1)(e) and 16(1)(f); *Guardianship and Administration Act 1990 (WA)* ss 97(1)(b), 97 (1)(d); *Community Advocate Act 1991 (ACT)* ss 13 (1)(f),(g),(m); *Guardianship and Administration Act 1993 (SA)* s 21 (1)(d); *Guardianship and Administration Act 1995 (Tas)* s 15(1)(c),(d).

¹²⁰⁶ W Wolfensberger, note 1200 above, 59.

¹²⁰⁷ Office of the Public Advocate, note 1184 above, 25.

¹²⁰⁸ At 194.

3. RESPONSIBILITY FOR PROPOSED FUNCTIONS

(a) Separation of functions

In the Draft Report, the Commission recommended that there should be two separate statutory offices established in Queensland and that the roles currently performed in other jurisdictions should be divided between them.¹²⁰⁹ The Commission proposed that the two offices should be called the Office of the Adult Guardian and the Office of the Public Advocate. The Commission expressed the view that the reason for combining the various functions in one office in other jurisdictions was an economic one.¹²¹⁰

The majority of the submissions received by the Commission in response to the Draft Report strongly supported the Commission's recommendation to separate the two offices. Only one submission opposed the proposal.¹²¹¹

(b) Division of responsibility

In the Draft Report, the Commission recommended that the role of the Public Advocate should be confined to carrying out systemic advocacy to promote and protect the interests of people with a decision-making disability. It noted that the need for an independent mechanism to undertake such a role had been highlighted in Queensland by events such as the Ward 10B Inquiry in Townsville and the recent investigation by the Criminal Justice Commission of the Basil Stafford Centre.¹²¹²

The Commission recommended that the Adult Guardian should have the following functions:

to act as decision-maker of last resort for decisions about personal welfare issues,¹²¹³

¹²⁰⁹ At 184.

¹²¹⁰ At 194.

¹²¹¹ Submission No 14. Two submissions (Nos 10 and 63) argued that there was no need for a Public Advocate.

¹²¹² At 194.

¹²¹³ At 185.

- to co-ordinate and supervise a scheme of community decision-makers;¹²¹⁴
- to carry out an advisory and educational service;¹²¹⁵
- to investigate complaints;¹²¹⁶
- to co-ordinate and supervise a scheme of community visitors;¹²¹⁷
- to exercise, with the authorisation of the tribunal, a power of entry into premises where it is believed that a person with a decision-making disability may be at risk, and removal of the person from the premises if necessary for the safety and well-being of the person.¹²¹⁸

The Commission's recommendations were reflected in clauses 210, 230, 235 and 236 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 recommendations that the Public Advocate should have a systemic advocacy role and that the Adult Guardian should act as decision-maker of last resort for personal welfare decisions and should be responsible for a scheme of community decision-makers. It was seen as essential that, to minimise potential conflict of interest, the decision-making role should be separated from the advocacy role. An advocacy organisation for people with disability commented.¹²¹⁹

With all advocacy or protective service endeavours the need to minimise conflict of interest is of extreme importance. Conflict of interest tends to undermine objectivity and wholehearted commitment. While individuals may be able to rise above conflict of interest, groups or organisations are most likely to be compromised. While the functions of a protective service (Adult Guardian) and advocacy are closely related, when these are carried out within one agency, ... conflict of interest will occur. For example, [a protective service provider] could not be expected to advocate on behalf of a

¹²¹⁴At 186.

¹²¹⁵At 187.

¹²¹⁶At 188.

¹²¹⁷At 189.

¹²¹⁸At 192.

¹²¹⁹Submission No 64A.

person who believes they are getting a raw deal from [the protective service provider].

Another reason identified for the separation of the two roles was the need for focus and clarity of roles:¹²²⁰

Both the Adult Guardian and Public Advocate will undertake very demanding roles. Both offices will have high expectations placed upon them by many in the community. Many of these expectations will be unrealistic, either because of limited resources or because of a misunderstanding about the strengths and limits of a protective service on the one hand, and advocacy on the other. In order to withstand those expectations and develop community acceptance, a high degree of focus and clarity will be needed by both agencies. Were they to be combined, that focus and that clarity of roles would be extremely difficult to maintain [and] a true advocacy focus could be lost within a larger agency.

Two of the submissions received by the Commission in response to the Draft Report highlighted the need for close communication between the Adult Guardian and the Public Advocate.¹²²¹ They made the point that acting as a decision-maker often leads to awareness of systemic issues. One of the submissions commented that, in practice, "the work of the Adult Guardian will inform the work of the Public Advocate". This submission noted that "the experience of day to day guardianship matters" allowed identification of "emerging trends which require systemic advocacy".¹²²²

One submission warned, however, that issues arising from the work of the tribunal or from the other functions proposed by the Commission should not be allowed to drive the work of the Public Advocate at the expense of broader systemic issues of importance to the interests of people with a decision-making disability in Queensland.¹²²³

For example, the systemic problems facing people with intellectual disability who come into contact with the criminal justice system, whether as victims or accused, may not be directly raised through the work of the Tribunal or the Adult Guardian. The Public Advocate

¹²²⁰ Submission No 64A.

¹²²¹ Submissions Nos 14, 25.

¹²²² Submission No 25.

¹²²³ Submission No 64A.

needs to be able to stand back and assess where his/her advocacy resources are most needed.

The Commission is not persuaded that the advantages of combining the two roles would outweigh the disadvantages.

Some respondents expressed widely diverging views as to the scope of some of the other functions proposed by the Commission in the Draft Report and as to which of the two offices should have responsibility for some of those functions.

(i) Class representation

One area of concern brought to the notice of the Commission is the absence of any legally recognised representative for groups of people with a decision-making disability to take part in inquiries and court actions which may affect the rights and interests of those people as a class. In order to be eligible to take part in proceedings brought for the purpose of preventing a breach of a public right or of securing the performance of a public duty, a person or body must be able to show a special interest in the matter, exceeding the interest of members of the public generally. Without such a special interest, a person or body has no standing to take part in the matter, unless there is a statutory right to do so.¹²²⁴

The problem of lack of standing was highlighted recently in Queensland by the decision of the Court of Appeal in *Criminal Justice Commission and the Public Trustee v Queensland Advocacy Incorporated*.¹²²⁵ In that case, it was held that Queensland Advocacy Incorporated, a systems advocacy organisation for people with disabilities in Queensland, did not have a sufficient interest to be able to appear before an inquiry into the operation of the Basil Stafford Centre, a government residential facility for intellectually disabled people, and to represent the rights and interests of the residents.

There is clearly a need for such a vulnerable section of our society to be afforded the right of representation in such situations. In the view of the Commission, this is a responsibility which is consistent with the systemic advocacy role of the Public Advocate.

¹²²⁴ *Australian Conservation Foundation Incorporated v The Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

¹²²⁵ Supreme Court of Queensland, Court of Appeal 8 March 1995 unreptd (App Nos 90/94, 91/94).

(ii) Individual advocacy

A number of submissions queried the proposed restriction of the role of the Public Advocate to systemic issues, in the light of a widely perceived need for individual advocacy services. The majority of the submissions which discussed the issue favoured the extension of the Public Advocate's role to include individual advocacy.

The following reasons were advanced for providing individual advocacy under the proposed legislation:¹²²⁶

- . Individual needs exist which are not being met at present as preference is being given to the area of systemic advocacy.
- . The provision of effective individual advocacy often informs about the broader nature of problems of client groups and leads to systemic outcomes.
- . Individual advocacy ensures that every opportunity is afforded to family members and service providers to reach an agreement about what is in the best interests of the person with a decision-making disability.
- . Advocacy carried out via the proposed legislation would give the advocate greater status and authority than via the informal nature of the community advocacy sector and would therefore have a greater chance of success.

The Department of Family Services and Aboriginal and Islander Affairs¹²²⁷ and the Intellectually Disabled Citizens Council pointed to a gap which would exist if the position of Legal Friend no longer existed.¹²²⁸ The Council said:¹²²⁹

... there appears to be no substitute for the advocacy role which the Legal Friend has under the current legislation.

¹²²⁶ Submissions Nos 14, 68, 74.

¹²²⁷ Now the Department of Families, Youth and Community Care.

¹²²⁸ However, see note 1204 above in relation to the advocacy role played by the Legal Friend.

¹²²⁹ Submission No 52.

In its submission, the Department noted:¹²³⁰

Advocacy and general legal advice represent a significant proportion of the work presently carried out by the ... Legal Friend.

The Council supported restriction of the Public Advocate's role to systemic issues, and proposed that an individual advocacy function be given to the Adult Guardian.

On the other hand, another submission strongly opposed the extension of the Public Advocate's role. An advocacy organisation for people with disability in Queensland, expressed the view that, while it was acutely aware of the great need for a range of individual advocacy responses for people with disability throughout Queensland, it did not believe that giving the Public Advocate an individual advocacy function could ever satisfy this need and that attempts to deliver individual advocacy through a government agency would be severely limited.

The respondent put forward the following reasons why the Public Advocate should not carry out individual advocacy.¹²³¹

Community based advocacy groups are attempting to address the need for individual advocacy. Although there is a view that the need for individual advocacy is not being taken up by community based advocacy groups, of the six advocacy groups currently funded under the Commonwealth Disability Advocacy Program in Queensland, four undertake individual advocacy. Another five groups of people are at various stages in working towards establishing individual advocacy organisations in different parts of the State.

The ability of these groups to meet the need for individual advocacy is hampered by lack of government commitment to funding independent community based advocacy. Under the Commonwealth/State Disability Agreement both the Commonwealth and State Governments have responsibility for advocacy, but that joint responsibility has produced very little in the way of joint co-operation to date. Advocacy groups have been working with the Commonwealth and State Governments to develop joint funding guidelines for advocacy. Queensland will be the first State in Australia where such co-operation between independent advocacy groups and both levels of government has resulted in such guidelines. This

¹²³⁰ Submission No 74.

¹²³¹ Submission No 64A.

process takes time, but is more likely to result in more of the individual advocacy need being met in the long-term than through a government agency response.

Any government agency has a limited ability to carry out individual advocacy. The essence of good advocacy lies in a commitment to address the fundamental needs of the individual in question, and to follow that commitment over time for as long as necessary. This means that the advocate must get to know the person, understand the person's history and current circumstances, interpret the person's wishes where possible, and form a sincerely held opinion about what is needed to bring about real change in the person's life. Community based citizen advocacy is structured in such a way as to facilitate and support such committed advocacy relationships.

In a government agency, however, staff turn-over, funding and policy changes, and the conflict which arises through paid advocacy (at some point the advocate may have to choose between the interests of the person who needs advocacy and the interests of the employer who pays the advocate) all lead to severe limitations on individual advocacy.

Many people have a limited view of individual advocacy, believing it to be confined to activities such as investigating complaints, removing people to a place of safety, negotiating with a service provider, arranging for additional supports or services to be provided, providing legal advice, intervening in or initiating court applications or assisting people before the courts to have adequate representation. As important as these functions are, they are not advocacy functions per se. They are powers that individual advocates may call on to assist in their advocacy, but they do not replace advocacy. They are better categorised as elements of a sound protective scheme.

There are many generic agencies that are well-placed to take up issues for people with a decision-making disability and which should be encouraged to do so. Rather than looking to the Public Advocate to address all issues on the basis that a person has a decision-making disability, the scheme should be encouraging, where possible and appropriate, other advocacy, complaints handling and support agencies which have expertise in the substantive issue at hand. The initial response of many people who are concerned with abuse of or discrimination against people with a disability is to focus on the disability and look for a disability agency to intervene, when the fundamental issue has other causes, such as sexual discrimination or poor housing. This scheme should not encourage an inappropriate focus on the individual's disability in providing a protective mechanism.

Much individual advocacy is carried out independently of any organisational structure, particularly by family members and friends, but within an organisational framework, a community based advocacy group has many advantages over a statutorily based government agency. Community based programs typically employ a small number of co-ordinators whose job is exclusively to find suitable people in the community to link up with a person who has a disability and who needs an advocate, and to support the advocate in developing and maintaining a relationship with the person. Because the advocate usually advocates for one person only, and is unpaid, this form of advocacy has minimal conflict of interest. The advocate's total allegiance is to the person for whom he or she advocates. Contrary to the view that such advocates have no status and authority, and therefore their advocacy is weak, citizen advocates bring with them the "power of the volunteer", and are answerable to no-one but the person for whom they are advocating.

The Commission recognises that there is significant need for individual advocacy throughout Queensland. However, it is persuaded that it would not be appropriate for the Public Advocate to undertake an individual advocacy role as well as systemic advocacy and, further, that there are more effective ways in which individual advocacy can be carried out.

(iii) Community visitors

In the Draft Report, the Commission proposed that the community visitors scheme should be under the control of the Adult Guardian.¹²³²

A number of submissions expressed the view that it would be more appropriate for the scheme to be administered by the Public Advocate.¹²³³ One of these submissions commented:¹²³⁴

It [the role of the community visitors] is conceptually a systemic function, that being, of "inquiring into issues such as adequacy and standard of services provided and the care and treatment received by residents".

¹²³²At 189.

¹²³³Submissions Nos 14, 68, 74, 76.

¹²³⁴Submission No 68.

Practically, this means that the Visitors will undertake a range of activities on behalf of people with disabilities both at an individual and an institutional/residential level. They have in a sense a roving "watch dog" brief which will, more likely than not, identify systemic issues through individual cases.

Other submissions argued that the role of community visitors in visiting residents of care facilities, investigating complaints about their treatment or care and reporting the results of investigations to enable action to be taken, could, if under the control of the Adult Guardian, lead to a conflict of interest should issues arise relating to substitute decision-making. These submissions stressed the importance of separating the advocacy role from the function of decision-maker of last resort.¹²³⁵

However, another respondent considered that the question of responsibility for the community visitors scheme would depend on the nature and purpose of the scheme itself. This submission noted:¹²³⁶

[The respondent's] support for the Adult Guardian's role in relation to community visitors is based on the assumption that the primary role of the community visitors is to investigate individual complaints and to advise the Adult Guardian accordingly. While there will be systemic issues which arise out of the work of community visitors, the scheme seems to be one aimed at dealing with individual complaints.

If the main role of a Community Visitors Scheme was, however, to provide a mechanism through which systemic problems and issues could be drawn to the attention of the relevant authorities, it could be argued that this scheme should be administered by the proposed Public Advocate. The role of community visitors would thus be seen to be agents of the Public Advocate who would use the information provided by them to carry out [their] systemic advocacy role.

The respondent expressed the view that such a role for a Community Visitors Scheme would be problematic. It stated:

¹²³⁵ Submissions Nos 14, 74, 76.

¹²³⁶ Submission No 64.

In practice, residents of facilities would bring individual complaints and would have a reasonable expectation that they be addressed in some way. It would be very difficult for community visitors to take details of individual complaints from persons who may very well leave themselves vulnerable to abuse by speaking out, and yet not to be able to offer them any resolution of that specific complaint.

In the view of the Commission, the aim of establishing a community visitors scheme is to protect the rights and interests of individual residents of residential facilities and to enable action to be taken to redress infringement of those rights and interests. To the extent that the community visitors scheme offers a protective service for individual residents, it is more appropriately located within the responsibility of the Adult Guardian. The Commission acknowledges that the work of community visitors in assisting individual residents is likely to reveal patterns which can be used to identify systemic issues for which the Public Advocate is responsible. However, the Commission is not persuaded that it is necessary for the Public Advocate to undertake responsibility for the community visitors scheme in order for the Public Advocate to address those systemic issues. It should not be difficult for administrative protocols to be developed between the Adult Guardian and the Public Advocate so that relevant information obtained from performance of the Adult Guardian's individual protective function is made available to the Public Advocate.

(iv) Investigation of complaints

In the Draft Report, the Commission recommended that the Adult Guardian be given the role of an independent complaints mechanism with power to investigate allegations that a person with a decision-making disability is being abused or exploited or is in need of assistance, or that a carer or decision-maker is acting inappropriately.¹²³⁷

In the view of the Commission, some of the arguments raised by the submissions in relation to community visitors are relevant in this context also. First, there would be an inevitable conflict of interest if the complaint involved the performance of the Adult Guardian as decision-maker. Second, performance of the investigative role by the Public Advocate would inform the Public Advocate's functions in relation to systemic issues.

However, the scheme as proposed by the Commission is able to accommodate these matters. The appointment of the Adult Guardian as decision-maker is subject to review by the tribunal if decision-making authority is exercised inappropriately. Further, it would not be necessary for

¹²³⁷At 188.

the Public Advocate to actually perform the investigative role to be made aware of any systemic issue which may emerge. The Commission envisages the role of the Adult Guardian, although separate from that of the Public Advocate, as complementary to it and as an important source of information about potential systemic issues.

Furthermore, if responsibility for investigating complaints were to be given to the Public Advocate, this could in itself involve a conflict of interest. The power to investigate complaints requires the investigator to act in an impartial objective manner, while advocacy, by definition, demands that the advocate is clearly on the side of the person for whom the advocacy is carried out. Even if the two tasks were to be carried out by different members of staff within the Office of the Public Advocate, there is the potential for damaging internal conflict of interest.

(v) Education and community awareness

In the Draft Report, the Commission recommended that the Adult Guardian have responsibility for providing information and advice about the proposed legislative scheme. However, the Commission recognises that community awareness is not just about the legislative scheme proposed by the Commission and that there is also a need for promotion and dissemination of information about broader issues relating to the rights and interests of people with a decision-making disability. This function is intimately linked to liaison with community groups and agencies in the wider community, and is part of the systems approach to disability issues for which the Public Advocate has responsibility.

The Commission recommends that the legislation provide that:

- . **two separate independent statutory offices be established to perform functions under the legislation;**
- . **the Public Advocate:**
 - . **have responsibility for systemic advocacy on behalf of people with a decision-making disability;**
 - . **may take part in proceedings about the protection of the rights and interests of people with a decision-making disability;**
 - . **have responsibility for promoting public awareness about the rights and interests of people with a decision-making disability;**
- . **the Adult Guardian have responsibility for:**
 - . **a scheme of community decision-makers;**
 - . **a scheme of community visitors;**
 - . **investigating complaints that a person with a decision-making disability is being abused or neglected or is in need of assistance;**
 - . **seeking assistance for a person with a decision-making disability from a government department, institution, welfare organisation or the provider of a service or facility;**
 - . **providing information and advice about the legislative scheme proposed by the Commission and about the role of decision-makers under that scheme.**

The Commission recommends that the demand for individual advocacy should be met by further development of government policy and funding commitment towards independent community based advocacy, rather than through the additional funding that would be required to have this role carried out through the Public Advocate.

The Commission's recommendations are implemented by clauses 281, 282, 297, 298 and 299 of the Draft Bill in Volume 2 of this Report.

4. RELATIONSHIP WITH PUBLIC TRUSTEE

In the Draft Report, the Commission recommended that the Office of the Adult Guardian and the Office of the Public Advocate should be two separate independent statutory entities. This recommendation was underlined by clauses 238(3) and 251(3) of the Draft Bill in Chapter 13 of the Draft Report. These provisions had the effect of making the Adult Guardian ineligible for appointment as the Public Advocate and vice versa. The Draft Report did not expressly consider the possible relationship between either of these offices and the Public Trustee. However, the Commission regarded it as implicit in its recommendations that, despite the close liaison necessary between the three statutory offices to ensure their effective operation, each office should exist as an entirely independent entity.

In its submission in response to the Draft Report, the Public Trustee proposed that the role of the Adult Guardian could be performed by the Public Trustee.¹²³⁸ The submission stated that the Office of the Public Trustee:

... has, within the limits of its powers, financial and otherwise, traditionally undertaken activities not dissimilar to a number of the functions proposed for the Adult Guardian. The broad range of professional and other skills within the Public Trust Office would continue to be able to be utilised and could be adapted to meet the requirements of the proposed role.

The submission alluded to the widely held belief within the community generally that the Public Trustee is the body from which assistance can be sought and obtained in relation to estate, trust, protective management and related issues, and argued that it would make sense to formalise authority for performing many of the services presently undertaken. It noted that in New South Wales, the Public Guardian is also the Protective Commissioner. It claimed that, even though acceptance of the proposal might result in the Public Trust Office acting in different representative capacities in the same matter, conflict of interest could be avoided. It pointed to the fact that the *Public Trustee Act* expressly authorises the Public Trustee to sue himself or herself in different representative capacities. The submission concluded:

The level of accountability by the Public Trust Office for its operations, making it unique from similar service providers in the private sector, acts as an effective way of ensuring proper performance of particular roles and avoidance of conflict of interest. The proposal for a tribunal with a monitoring role and statutory specification of principles to be adopted in the performance of powers and duties under the legislation would enhance that accountability.

¹²³⁸ Submission No 71.

There are several points to be made in response to this submission.

First, the Public Trustee's submission does not specify the activities which the Public Trustee has performed which are "not dissimilar to a number of the functions proposed for the Adult Guardian". The role of the Public Trustee in relation to people with a decision-making disability is to act as decision-maker in the area of financial decisions and, more recently, to undertake legal advocacy on behalf of some clients. Although decision-making about financial matters will invariably involve some consideration of the personal circumstances of the individual for whom the decision is being made, the Public Trustee has no direct experience or expertise in acting as decision-maker in the areas of health care and personal welfare. More importantly, the Public Trustee has not to date been involved in activities such as the establishment, co-ordination and supervision of schemes such as the proposed community decision-makers program or the community visitors program. The Public Trustee has never exercised a power of entry and removal.

Second, the Public Trustee offers a range of services which have nothing to do with its role as decision-maker of last resort for people with impaired decision-making capacity. These services include preparation of wills and enduring powers of attorney, administration of estates, preparing tax returns, managing unclaimed money and, until recently, conveyancing.¹²³⁹ The interest of government in having a public agency to carry out these functions creates a conflict with the interest of Public Trustee clients with a decision-making disability in having a service focused and dedicated exclusively to their needs. This factor differentiates the role of the Public Trustee from that of the Protective Commissioner in New South Wales, which is exclusively one of financial management and, more recently, personal guardianship.

Third, the role of the Adult Guardian is an integral part of the legislative scheme proposed by the Commission. The Commission is concerned that public perception of the way in which the functions of the Office of the Public Trustee have been fulfilled may compromise community acceptance, and therefore the effectiveness, of the Office of the Adult Guardian, which is essential to the overall success of the scheme. This concern is reflected in the submission by made by an advocacy organisation for people with disability in Queensland:¹²⁴⁰

¹²³⁹ The Public Trustee has a wide range of powers and functions under the following Acts: *Trusts Act*, *Succession Act*, *Companies (Qld) Code*, *Trust Accounts Act*, *Companies (Acquisition of Shares)(Qld) Code*, *Property Law Act*, *Land Sales Act*, *Drugs Misuse Act*, *Crimes (Confiscation of Profits) Act*, *Local Government Act*, *Art Unions and Amusements Act*, *Disposal of Uncollected Goods Act*, *Warehouseman's Liens Act*, *Soccer Football Pools Act*, *Mining Act*, *Pawnbroker's Act*, *Credit Societies Act*, *Building Societies Act*, *Anzac Cottages and TB Homes Act*, *Collections Act*, *Workers Compensation Act*. (The Public Trustee of Queensland, 1995 Annual Report, 7.)

¹²⁴⁰ Submission No 64A.

In our experience, the Public Trustee has taken very seriously its duty to protect individual's financial interests. For people who have been unable to manage their own affairs, the Public Trustee has had a virtual monopoly in this role. They have not had to compete with other financial managers. We believe this has resulted in the development of a culture that holds that, so long as all legal and financial regulations are followed, and so long as tight control is maintained over individual estates, the proper role of financial manager is being carried out. In terms of protecting some people's financial interests, this may be so. But in our experience it has resulted in a number of unsatisfactory practices and an attitude of over protection.

The Commission recommends that the roles and functions of the Office of the Adult Guardian and the Office of the Public Advocate should be independent of the Office of the Public Trustee.

The Commission's recommendation is implemented by clauses 290(3) and 303(3) of the Draft Bill in Volume 2 of this Report.

5. OTHER ISSUES

(a) Delegation by the Adult Guardian

In the Draft Report, the Commission recommended that, because of the inherent conflict of interest involved, professional care providers should not be eligible for appointment as decision-makers.¹²⁴¹ However, the Commission considered that there may be situations in which the most obvious person to make such decisions is a paid carer for the person whose capacity is impaired. The Commission recommended that the Adult Guardian, if appointed as decision-maker for a person with impaired decision-making capacity, should have power to delegate authority to make day to day decisions to another person.¹²⁴² This would mean that the Adult Guardian, as appointed decision-maker, would retain ultimate responsibility for ensuring the needs and interests of the person with a decision-making disability were met, and would be able to supervise the performance of the person to whom the authority was delegated.

¹²⁴¹At 48.

¹²⁴²At 185.

The Commission's recommendation was reflected in clause 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 recommendation. One submission welcomed it as a "practical and less intrusive response to meeting the needs of people with impaired decision-making capacity."¹²⁴³ Another commented on the close relationship sometimes formed between a paid carer and a person with a decision-making disability, and the value of the carer's knowledge and understanding of the person's needs.¹²⁴⁴

One submission, however, proposed that the power of delegation should be given to the tribunal.¹²⁴⁵ The Commission does not agree with this suggestion for two reasons. First, it believes that, as a general rule, the tribunal should not become directly involved in the decision-making process. Second, it believes that the Adult Guardian will be in a better position to become familiar with the particular circumstances of individual situations and to assess whether delegation of authority is appropriate.

The Commission recommends that the legislation provide that the Adult Guardian, if appointed decision-maker for a person whose decision-making capacity is impaired, may delegate day to day decision-making authority to another person.

The Commission's recommendation is implemented by clause 286 of the Draft Bill in Volume 2 of this Report.

(b) Liaison with other decision-makers

Where the Adult Guardian is appointed as decision-maker in relation to personal welfare issues for a person with impaired decision-making capacity, it may be that a decision-maker has also been appointed to manage the person's financial affairs. The financial decision-maker may be the Public Trustee, a trustee company or a private individual.

¹²⁴³ Submission No 68.

¹²⁴⁴ Submission No 63.

¹²⁴⁵ Submission No 56.

In this Report, the Commission has recommended that where two or more decision-makers are appointed for a person whose decision-making capacity is impaired, each decision-maker should have a duty to consult with every other decision-maker for the person to ensure that the person's well-being is not prejudiced by lack of communication between decision-makers.¹²⁴⁶ This duty would, of course, apply to both the Adult Guardian and the Public Trustee.

(c) Liaison with law enforcement agencies

Two of the submissions received by the Commission in response to the Draft Report raised the issue of the need for liaison with law enforcement agencies to assist those agencies to deal with situations where a person with a decision-making disability is suspected of committing an offence.¹²⁴⁷ One of these submissions specifically pointed to the recognised need for another person to be present at police questioning of persons with a decision-making disability.¹²⁴⁸

In 1977, the Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland (the Lucas Report) acknowledged that there are "many cases of seriously disadvantaged adults where there is the need to have some outside person advised of their situation and that they are the subject of police investigation."¹²⁴⁹

The Report recommended that the Public Defender's Office be notified in such a situation; that, outside Brisbane, a private practitioner be appointed as an agent of the Public Defender for this purpose; and that, in remoter areas where no solicitor was readily available, the duty should be to notify the nearest magistrate of the situation. The purpose of notification was "to have a responsible person advised who understands the problem of a person under disability and can do what that person himself would have done if he possessed normal or mature faculties."¹²⁵⁰

Although the Commission has not, at this stage, undertaken any investigation into the extent to which the recommendations of the Lucas Report and other relevant reports have been implemented, it is mindful of the fact that people with a decision-making disability who come in contact with the criminal justice system often have many unmet needs. However, since this issue is much wider than the provision of

¹²⁴⁶ See pp 284-285 of this Report.

¹²⁴⁷ Submissions Nos 13, 52.

¹²⁴⁸ Submission No 52.

¹²⁴⁹ *Report of Committee of Inquiry into the Enforcement of the Criminal Law in Queensland* (Lucas Report) 1977, at para 130.

¹²⁵⁰ At para 131.

assisted or substituted decision-making for the person concerned, the Commission does not intend to make any recommendation at this stage.

(d) Administrative arrangements

In the Draft Report, the Commission made recommendations about administrative arrangements for the Office of the Adult Guardian and the Office of the Public Advocate.

It recommended that the positions of Adult Guardian and Public Advocate be created as independent statutory offices within the administrative responsibility of the Minister for Justice and Attorney-General, and that they should not be subject to the direction or control of a particular Minister in performing their functions, but that they should each be required to present an annual report to the Minister for tabling in Parliament. The Commission also recommended that the positions should be advertised and that appointments - which should be for a fixed term and be renewable - should be made by the Governor-in-Council.¹²⁵¹

Although in the submissions received by the Commission in response to the Draft Report there was general acceptance of the Commission's proposals, some questions were raised about reporting and staffing arrangements for the Adult Guardian and the Public Advocate.

One submission argued that the Adult Guardian and the Public Advocate should report directly to Parliament rather than to a particular Minister.¹²⁵² The basis of the argument was that, while in a majority of cases it may be an advantage to report to a Minister, problems could arise if the report were to criticise the Minister. The submission cited an incident where a Minister had allegedly refused to accept from a tribunal a report for tabling in Parliament unless criticisms of the Minister's handling of resourcing issues were changed. It expressed concern that where a Minister wished to escape Parliamentary scrutiny of criticism, Ministerial influence could jeopardise the independence of the statutory offices proposed by the Commission.

In Chapter 8 of this Report, the Commission considered a similar question in relation to the tribunal. The Commission concluded that the obligation of the Minister to table the Report, thus making it a public document, would be a sufficient safeguard for the independence of the tribunal, and that direct reporting to Parliament would also remove the advantage of the support of a sympathetic Minister.¹²⁵³

¹²⁵¹ At 195.

¹²⁵² Submission No 64.

¹²⁵³ See pp 277-278 of this Report.

The submission also raised the possibility that if, as proposed in the draft legislation, staff of the Office of the Adult Guardian and the Office of the Public Advocate were to be appointed under the *Public Service Management and Employment Act 1988 (Qld)*, there could be significant departmental influence in staff appointments.

In Chapter 8 of this Report, the Commission has recommended that the President of the tribunal should have the same powers, in relation to the appointment of staff, as the chief executive of a government department.

In the view of the Commission, reporting and staffing arrangements for the Offices of the Adult Guardian and the Public Advocate should be consistent with those which apply to the tribunal.

The Commission recommends that the legislation provide that:

- . **as soon as practicable after each financial year, the Adult Guardian and the Public Advocate must:**
 - . **prepare a report of operations during the year; and**
 - . **give a copy of the report to the Minister for Justice and the Attorney-General;**
- . **the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives the report;**
- . **the staff necessary to enable the Adult Guardian and the Public Advocate to exercise their functions are to be appointed under the *Public Service Management and Employment Act 1988*;**
- . **the Adult Guardian and the Public Advocate have all the functions and powers of the chief executive of a department, so far as the powers and functions relate to the organisation units made up of the Adult Guardian and staff and the Public Advocate and staff, as if -**
 - (a) **those units were departments within the meaning of the *Public Service Management and Employment Act 1988*; and**
 - (b) **the Adult Guardian and the Public Advocate were the chief executives of those departments.**

The Commission's recommendations are implemented by clauses 296 and 309 of the Draft Bill in Volume 2 of this Report.

CHAPTER 13

OTHER MATTERS

1. COSTS

Under existing Queensland legislation, in some circumstances it is necessary for an application to be made to the Supreme Court to enable a person to be appointed as a decision-maker for a person whose decision-making capacity is impaired.¹²⁵⁴ For many people with the responsibility of caring for a person with impaired decision-making capacity, the expense involved in such an application means that it is not a viable option.

The Commission believes that the principle of "user pays" is not appropriate in the context of determinations about assisted or substituted decision-making for people with impaired decision-making capacity, and that the cost of protecting the interests of such people is one which should be borne by the community as a whole. It also believes that the purpose of establishing a system which is financially accessible to those who need to use it would be defeated if the cost of making an application prevented people from doing so.

In the Draft Report,¹²⁵⁵ the Commission recommended that there be no fee for making an application to the tribunal and that there be no award of costs against a person for unsuccessfully making or opposing an application, unless the tribunal considers that there are circumstances which justify making an order for costs.

The Commission's recommendations were reflected in clauses 170 and 218 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 recommendations.

¹²⁵⁴ See Chapter 2 of this Report.

¹²⁵⁵ Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

The Commission recommends that the legislation provide that:

- . **no fees are payable to the tribunal for making an application under the legislation;**
- . **each participant in a proceeding is to bear the participant's own costs of the proceeding;**
- . **the tribunal may order an applicant to pay a participant's costs in exceptional circumstances, including, for example, if the tribunal considers the application is frivolous or vexatious.**

The Commission's recommendations are implemented by clauses 208 and 219 of the Draft Bill in Volume 2 of this Report.

2. INTERJURISDICTIONAL RECOGNITION OF ORDERS

In Australia, each State or Territory has its own laws about decision-making for a person with a decision-making disability. This can cause problems when people move from one State or Territory to another, or if a person who lives in one State or Territory owns property in another State or Territory.

In the Draft Report, the Commission noted that much of the uncertainty and inconvenience which presently exists could be avoided by a scheme of reciprocal recognition of orders made in other Australian jurisdictions.¹²⁵⁶ It recommended that provision be made for a decision-making order made in another State or Territory to be recognised and enforced in Queensland as though it were an order of the tribunal.¹²⁵⁷

The Commission's recommendation was reflected in clauses 225 to 228 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 recommendations.

¹²⁵⁶ See for example *Guardianship and Management of Property Act 1991 (ACT)* s 12.

¹²⁵⁷ At 203.

The Commission recommends that the legislation provide for recognition and enforcement of orders made in other Australian jurisdictions.

The Commission's recommendation is implemented by clauses 258-262 of the Draft Bill in Volume 2 of this Report.

3. CORONIAL INQUESTS

In the Draft Report, the Commission referred to existing Queensland laws providing for an independent inquiry into the death of a person with impaired decision-making capacity.¹²⁵⁸

Concerns had been expressed to the Commission that the duty of a coroner, under the *Coroners Act 1958 (Qld)*, to hold an inquiry into the death of a person who dies while detained in a prison or psychiatric hospital¹²⁵⁹ is too limited, and that an inquiry is rarely held into the death of a person in any other kind of institution such as a residential facility for people with impaired decision-making capacity. There were also concerns that the statutory list of people who may request an inquest is too limited, particularly in view of the number of people with impaired decision-making capacity who do not have relatives or close friends to advocate on their behalf.

The Commission acknowledged the importance of these issues, but expressed the view that they should be dealt with in the *Coroners Act* rather than in the Commission's proposed legislation for assisted and substituted decision-making. The Commission noted that the *Coroners Act* was under review.

It is the understanding of the Commission that the review of the *Coroners Act* is still ongoing.

¹²⁵⁸ At 203.

¹²⁵⁹ *Coroners Act 1958 (Qld)* s 7(1)(b).

The Commission reaffirms its view that the issues raised are important and should be dealt with in the context of the review of the *Coroners Act*. It does not intend to comment further on this matter pending the outcome of the review.

4. WHERE A TRUSTEE LOSES CAPACITY

A person who has been appointed as a trustee may subsequently lose capacity to make some or all of the decisions required to be made in fulfilling the role of trustee.

The *Trusts Act 1973 (Qld)* makes some provision for the appointment of a new trustee in such a situation. Where a trustee is incapable of acting, then the person nominated in the instrument creating the trust for the purpose of appointing new trustees or, in default of such a person, a surviving or continuing trustee or the personal representative of the last surviving trustee, may appoint a new trustee to replace the incapacitated trustee.¹²⁶⁰ The Supreme Court also has power to appoint a new trustee if it is expedient to do so.¹²⁶¹

The effect of these provisions is that if the incapacitated trustee is the sole trustee, and if the instrument creating the trust makes no provision for the appointment of new trustees, it is necessary to apply to the Supreme Court to have a new trustee appointed. For many small family trusts, the cost of such an application may not be warranted.

In the Draft Report, the Commission expressed the view that there may be some advantage in giving the tribunal power to appoint a new trustee in such a situation.¹²⁶² This approach would remove the need for an application to the Supreme Court. The Commission recognised, however, that there may be opposition to the appointment of a proposed new trustee and that it may not be appropriate for the tribunal to become involved in disputes of such a nature.

The Commission identified two possible ways of overcoming this problem:

¹²⁶⁰ *Trusts Act 1973 (Qld)* s 12.

¹²⁶¹ *Trusts Act 1973 (Qld)* s 80.

¹²⁶² At 202.

- by requiring all contested applications for the appointment of a new trustee to be heard by the Supreme Court; or
- by providing that a person who opposed an application to the tribunal for the appointment of a new trustee should be entitled to have the proceedings transferred to the Supreme Court.

The Commission also suggested that the tribunal itself should have power to transfer proceedings if it considers that the matter should be heard in the Supreme Court.

The Commission did not reach a concluded view on these matters, and therefore it did not make any recommendation in relation to them. However, it specifically invited submissions on the issues outlined above.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's approach. One submission noted that there is little or no point in having a system which is financially inaccessible.¹²⁶³ Another submission, from an advocacy organisation representing people with disability in Queensland, commented that power to appoint a new trustee would be consistent with the tribunal's role in considering an appointment for a financial decision-maker.¹²⁶⁴ However, there are many situations in which the beneficiaries of a trust do not themselves lack decision-making capacity. The respondent also shared the Commission's concern about contested applications:

... there will often be other interests at stake and the tribunal could well find itself embroiled in higher court challenges. It therefore seems sensible to restrict any power such as this to situations where the appointment of a new trustee was known to be uncontested by all persons who might otherwise have a right to object. Where there is any reasonable possibility of the appointment being contested, the legislation should stipulate that the matter be transferred to the Supreme Court.

After further consideration, the Commission is of the view that it would not be appropriate to remove one aspect of a very complex area of law to the jurisdiction of the tribunal. Replacement of a trustee is linked to other powers - for example, power to vary the terms of a trust - which are beyond the role envisaged for the tribunal and beyond the tribunal's expertise.

¹²⁶³ Submission No 73.

¹²⁶⁴ Submission No 64.

5. WHERE A PERSON WITH IMPAIRED DECISION-MAKING CAPACITY ENTERS A CONTRACT

For a contract to be valid, the parties to the contract must understand the general nature of what they are doing by their participation in the agreement.¹²⁶⁵ Transactions in which a person with a decision-making disability may become involved range from routine purchases of everyday items, to agreements for hire-purchase, rent or mortgage, to the management of property owned by that person.

Where a person with a decision-making disability enters into a financial transaction and it can be shown that he or she did not understand the nature of the transaction, then the transaction can be set aside by a court. However, it must also be shown that the other party to the transaction was aware of the person's inability to understand what the transaction involved.¹²⁶⁶

A transaction may also be set aside by a court if one party has taken unfair advantage of another who is under a special disability because of illness or infirmity of body or mind. It may be able to be shown that, as a result of a decision-making disability, there was a lack of equality between the person with the disability and the other party to the contract, and that the disability was sufficiently evident to the stronger party to make it unfair for the stronger party to proceed with the contract in the circumstances. In such a situation, the stronger party must show that the transaction was fair, just and reasonable.¹²⁶⁷ Alternatively, the contract may be set aside if the stronger party has unduly influenced the weaker party to make a contract which the weaker party would not otherwise have made.¹²⁶⁸

The consequence of a court decision about whether or not to set aside a contract is that one of the parties to the contract will have to bear the whole of any resulting loss. If the contract is not set aside, the person with a decision-making disability must meet the obligations imposed by the contract or risk liability for damages for breach. For example, a person with dementia or with a psychiatric illness may, as a result of impaired decision-making capacity caused by the illness, undertake to buy an expensive car. The person's illness may not be apparent to the other party to the contract, who may have no reason to suspect the person's lack of capacity.

¹²⁶⁵ *Gibbons v Wright* (1953) 91 CLR 423, 437-439.

¹²⁶⁶ *Imperial Loan Company Ltd v Stone* [1892] 1 QB 599.

¹²⁶⁷ *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474.

¹²⁶⁸ *Blomley v Ryan* (1956) 99 CLR 362, 405; *Baburin v Baburin* [1990] 2 QdR 101. Where the other party to the transaction is a corporation, a contract for the supply of personal or household goods and services may be set aside if the corporation has acted unconscionably by, for example, abusing a position of bargaining strength or exerting undue influence or if the other party was unable to understand the documents: *Trade Practices Act 1974 (Cth)* s 51AB, *Fair Trading Act 1989 (Qld)* s 39.

To enforce the contract may cause considerable financial hardship to the person and the person's family. On the other hand, if the contract is set aside, the whole of any resulting loss will be borne by the other contracting party.

Some transactions are binding on a person with a decision-making disability, even though the person may not have understood them. If "necessaries" are sold and delivered to a person who lacks contractual capacity, that person must pay a reasonable price for them.¹²⁶⁹ Necessaries are not confined to items of basic sustenance but, on the other hand, do not extend to luxuries.¹²⁷⁰ Food, drink, clothing and accommodation are clearly capable of being necessaries, but what is in fact a necessary for a particular person will depend to a large extent on the circumstances of the individual. Factors such as the person's age, occupation, means and social position are taken into account. The goods must be of a kind which someone in that person's situation might reasonably be expected to own.¹²⁷¹ For example, a person might be expected to own a car, but a small second-hand sedan rather than a new limousine or expensive sports car. In that case, only the sedan would be a necessary. The goods must also be of a kind with which the person was not adequately supplied. The onus of proving that the person was not adequately supplied with the goods in question lies with a trader who seeks to enforce the contract.¹²⁷² Provision of services such as certain types of medical treatment and legal advice can also be a necessary.

In the Draft Report, the Commission considered the extent to which a person with a decision-making disability should be liable for a contract which he or she does not understand.¹²⁷³ The Commission was unable to come to a unanimous conclusion on the issues involved.

The majority view was that, if a financial decision-maker is appointed for a person, the person should be deemed incapable of exercising any of the powers given to the decision-maker in relation to any property to which the decision-maker's powers extend,¹²⁷⁴ or of becoming liable under any contract without an order of the tribunal or the written consent of the decision-maker. However, a transaction made by the person for adequate consideration or, if the person gives the consideration, for consideration which is not excessive, with or to or in favour of any other person who proves that he or she acted in good faith and did not know

¹²⁶⁹ *Sale of Goods Act 1896 (Qld)* s 5.

¹²⁷⁰ *Peters v Fleming* (1840) 6 M&W 42, 151 ER 314; *Nash v Inman* [1908] 2 KB 1.

¹²⁷¹ *Wharton v McKenzie* (1844) 5 QB 606, 114 ER 1378.

¹²⁷² *Nash v Inman*, note 1270 above.

¹²⁷³ At 198-200.

¹²⁷⁴ See for example *Protection of Personal and Property Rights Act 1988 (NZ)* s 53(1).

or could not reasonably have known that the property was subject to a decision-making order, should not be invalidated.¹²⁷⁵

The majority considered that a non-judicial tribunal is an inappropriate forum for resolving contractual disputes, that existing remedies are adequate and that, even if they are not, there should not be special rules for particular groups of people.

The minority considered statutory removal of contractual capacity to be inconsistent with the principle of the presumption of competence. It also recognised that, from a practical point of view, statutory removal of capacity would not necessarily prevent a person from entering into a contractual arrangement.

The minority argued that, in view of the expertise and experience of tribunal members, the tribunal would be ideally suited to determining whether a person with a decision-making disability had sufficient capacity to understand a transaction; that the tribunal should have power to declare a contract invalid on the basis that one of the parties to the contract lacked contractual capacity; and that the tribunal should be able to make an order which is as fair as possible to both parties to the dispute and should be able, in an appropriate case, to adjust the rights of the parties to the contract so that the loss is able to be distributed between them.

The minority envisaged that the tribunal's power in relation to contractual capacity and the power to adjust transactions would be additional to the powers and remedies already available within the existing court structure and that it would be possible to transfer matters from a court to the tribunal and vice versa. However, members of the minority considered that the tribunal would provide a far more accessible forum for people who are unlikely to be able to afford the expense of court litigation. The minority noted the existence of similar provisions in the Australian Capital Territory.¹²⁷⁶

Because of these differing views, the Commission did not put forward any recommendations on the issues outlined above. However, it invited submissions on those issues.

Six submissions commented specifically on the matters raised by the Commission. Four submissions supported the minority view.¹²⁷⁷ Only one submission endorsed the majority view.¹²⁷⁸

¹²⁷⁵ See for example *Guardianship and Administration Board Act 1986 (Vic)* s 52.

¹²⁷⁶ *Guardianship and Management of Property Act 1991 (ACT)* s 71.

¹²⁷⁷ Submissions Nos 10, 18, 54, 56.

¹²⁷⁸ Submission No 73.

One submission put forward a compromise proposal. The respondent, an advocacy organisation representing people with disability in Queensland, agreed with the minority that there is a need for reform to ensure that contractual matters involving people with impaired decision-making capacity can be fairly resolved. The submission also agreed that it would be appropriate and within the tribunal's expertise for the tribunal to make determinations about a person's contractual capacity. The submission proposed that the tribunal could be given power to declare whether, in a particular case, a person with a decision-making disability did or did not understand the nature of a contract and the consequences of signing it.

However, the respondent did not agree that the role proposed by the minority for the tribunal to have power to declare contracts invalid and to adjust the rights of parties was appropriate. The submission's objection to the extension of the role of the tribunal was based on a view that it would take the tribunal beyond its primary focus and purpose - to determine individual capacity and to make or monitor appointment of substitute decision-makers - which are centred on the interests of a person with impaired decision-making capacity.¹²⁷⁹

The proposed role of determining contractual validity, and particularly the role of readjusting contractual liability, introduces the interests of other parties to the contract. It would extend the role of the tribunal beyond the focus on the individual who has impaired decision-making ability to one of attempting to readjust contractual relationships between different parties, only one of whom is the person with the impaired ability. It is a role, we believe, that this proposed tribunal would be singularly unsuited to, and which could therefore cause some unfair results. This in turn could weaken the credibility of the tribunal in the wider community.

The submission proposed, instead, an extension of power to existing generic bodies, for example the Small Claims Tribunal, which can offer a similar degree of access as would the proposed tribunal. The body called upon to determine questions of contractual liability could then have reference to the tribunal's findings as to the capacity of a party to the contract.

The Commission agrees with the tenor of the respondent's proposal and is now of the view that any Queensland judicial or quasi judicial body should be bound by the tribunal's determination of a person's decision-making capacity to enter into a contract.

¹²⁷⁹ Submission No 64.

The Commission recommends that the legislation provide that:

- . the tribunal have power to declare whether a person with a decision-making disability had capacity to enter a particular contract;**
- . a declaration by the tribunal that a person lacked capacity is binding in any subsequent proceedings about the contract.**

The Commission's recommendation is implemented by clauses 240 and 242 of the Draft Bill in Volume 2 of this Report.

The Commission recommends a review of the law relating to the contractual liability of people with a decision-making disability with a view to identifying an appropriate forum for adjudicating disputes and providing more flexible remedies to enable fairness of outcome.

6. ADMINISTRATIVE RESPONSIBILITY

In the Draft Report, the Commission considered the question of administrative responsibility for the proposed legislation.¹²⁸⁰ The Commission recommended that administrative responsibility should be given to the Department of Justice and Attorney-General,¹²⁸¹ rather than to the Department of Family Services and Aboriginal and Islander Affairs.¹²⁸²

The Commission's recommendation was based on two factors. First, it recognised the provision of decision-making assistance to people with a decision-making disability as a rights issue rather than as a welfare issue. The Department of Justice and Attorney-General has administrative responsibility for the court system and for other legislation with a rights perspective - for example the *Dispute Resolution Centres Act 1990 (Qld)* and the *Anti-Discrimination Act 1991 (Qld)*.

¹²⁸⁰ At 204-205.

¹²⁸¹ Now the Department of Justice.

¹²⁸² Now the Department of Families, Youth and Community Care.

Second, since the Department of Family Services is a major service provider for people with decision-making disability, administration of the proposed legislation could involve significant conflict of interest.

The submissions which considered this issue generally supported the Commission's recommendation. However, the Intellectually Disabled Citizens Council commented:¹²⁸³

... that the current legislation has been well administered to date by the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA). The Council is concerned to ensure that the welfare aspect of issues surrounding these rights is not lost.

... the Council believes that little potential for conflict of interest would exist should the legislation be administered by the DFSAIA.

The Commission noted in the Draft Report that the purpose of departmental administrative responsibility would be merely to facilitate the provision of administrative and resource needs, and to ensure public accountability. The Commission emphasised, however, the need for the tribunal to be allowed to function as an entirely independent body. The Commission recommended that the tribunal be given financial autonomy with a complete budget covering all its needs.

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

In the view of the Commission similar considerations apply in relation to the independence of the Adult Guardian and the Public Advocate.

The Commission recommends that administrative responsibility for the scheme of legislation proposed by the Commission should be given to the Attorney-General and Minister for Justice.

7. EFFECT OF COMMISSION PROPOSALS ON EXISTING LAW

In the Draft Report, the Commission considered some of the effects which its proposals would have on the existing Queensland laws relating to decision-making for people with impaired decision-making capacity.

¹²⁸³Submission No 52.

(a) Jurisdiction of the Supreme Court

The *parens patriae* jurisdiction of the Supreme Court is described in Chapter 2 of this Report.

In the Draft Report, the Commission noted that it is possible for the *parens patriae* jurisdiction of the Supreme Court to be abolished but that, since it is part of the prerogative jurisdiction formerly exercised by the Court of Chancery on behalf of the Crown, it will be removed only by legislation which expressly or by necessary or inescapable implication removes it.¹²⁸⁴ The *parens patriae* jurisdiction over adults with a mental or intellectual disability has been displaced in the United Kingdom.¹²⁸⁵ It has been retained by legislation in other Australian jurisdictions.¹²⁸⁶

The Commission recognised the benefit of the *parens patriae* jurisdiction as a formal accountability mechanism which would provide a safeguard additional to an automatic review process for tribunal decisions and to the proposed appeal procedure.¹²⁸⁷ It was also seen as providing a safety-net for situations or issues not covered or foreseen by the proposed legislation.

The Commission recommended that the *parens patriae* jurisdiction of the Supreme Court should not be abolished.

The Commission's recommendation was reflected in clause 6 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.

After further consideration, the Commission is of the view that, for the reasons expressed above for not abolishing the Supreme Court's *parens patriae* jurisdiction, the Supreme Court's general jurisdiction should also be expressly retained. Although the Commission has recommended that the Supreme Court should exercise, concurrently with the proposed tribunal, the powers to be given to

¹²⁸⁴ At 23. See *The Minister of State for the Interior v Neyens* (1964) 113 CLR 411; *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345; *Johnson v The Director-General of Social Welfare (Victoria)* (1976) 135 CLR 92.

¹²⁸⁵ *In re F* [1990] 2 AC 1.

¹²⁸⁶ See for example *Guardianship Act 1987 (NSW)* ss 8(1), 31; *Guardianship and Management of Property Act 1991 (ACT)* s 6.

¹²⁸⁷ The review process and appeal procedure proposed by the Commission are discussed in Chapters 7 and 11 of this Report respectively.

the proposed tribunal in relation to enduring powers of attorney,¹²⁸⁸ the Commission regards the retention of the Supreme Court's general jurisdiction as providing an additional safety-net for situations or issues not covered or foreseen by the proposed legislation. The Commission envisages, however, that where the legislation proposed by the Commission provides for the particular matter before the Supreme Court, the Court will apply that law before resorting to its general powers.

The Commission recommends that the legislation provide that the inherent jurisdiction of the Supreme Court and, in particular, its *parens patriae* jurisdiction are not affected by the legislation.

The Commission's recommendation is implemented by clauses 311 and 312 of the Draft Bill in Volume 2 of this Report.

(b) Sanction of settlements

In Chapter 5 of this Report, the Commission has recommended that a decision-maker who is appointed with authority to make decisions about legal matters should be able to be given power to agree to the settlement of a claim on behalf of a person with impaired decision-making capacity for the decision.

However, in Queensland, settlement of a claim made by or on behalf of a person who lacks the necessary capacity to agree to the settlement on his or her own behalf is not valid at present unless it has been sanctioned by the Public Trustee or by a judge or magistrate of the court having jurisdiction to hear the claim.¹²⁸⁹ In the Draft Report, the Commission recognised the importance of this provision, and did not propose to alter it, since the purpose of the requirement is to ensure that the interests of the person with impaired decision-making capacity are protected. The Commission acknowledged that, if the person has been injured, for example, his or her family may be anxious for legal proceedings to be finalised and may be susceptible to pressure from an insurer to accept a settlement offer which is not in the person's best interests. The Commission expressed the view that independent scrutiny of a settlement offer prevents potential conflict of interest problems.

¹²⁸⁸ See pp 87-89 of this Report.

¹²⁸⁹ *Public Trustee Act 1978 (Qld)* s 59(1).

The Commission recommended that settlement of a claim by an appointed decision-maker should require sanction by the Public Trustee or, where appropriate, by the relevant court.¹²⁹⁰

Although the submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation, two submissions raised further issues in relation to the sanction of the settlement of claims.

One submission, from an association of statutory trustee companies, proposed that, where a statutory trustee company is appointed to make legal decisions on behalf of a person whose decision-making capacity is impaired, the company should be exempt from the requirement to obtain sanction of a settlement.¹²⁹¹ The respondent argued that the reasons set out above for requiring sanction of settlements, in particular the problem of potential conflict of interest, do not apply to statutory trustee companies.

The other submission, from an advocacy organisation representing people with disability in Queensland, while agreeing that the sanction requirement is an important safeguard against claims being settled against the best interests of the claimant, questioned whether the Public Trustee, or even the courts, should retain their power of sanction.¹²⁹² The respondent proposed that the power should be transferred to the tribunal. The submission identified four major benefits of this proposal:

- The principles in the legislation proposed by the Commission¹²⁹³ would apply to the tribunal's decision regarding a sanction. Unless other legislation was amended, the courts and the Public Trustee would not be required to follow these principles, even though a properly authorised decision-maker who had agreed to the settlement would have had to do so.

- The proposed tribunal has an overall monitoring role over decision-makers. The monitoring role embodied in the power of sanction should also go to the tribunal.

¹²⁹⁰ At 91.

¹²⁹¹ Submission No 48.

¹²⁹² Submission No 64.

¹²⁹³ See Chapter 4 of this Report.

The Public Trustee may be the appointed decision-maker. There is little safeguard in the same body sanctioning a settlement to which it is a party, particularly when, in performing its sanction role, the Public Trustee would not be required to follow the legislative principles to which it would be subject as decision-maker.

The use of the tribunal to perform the sanction role would have the additional benefit of bringing those legal practitioners who practise in the field of personal injuries into contact with the principles which would underpin the new legislation. The present focus on the quantity of a damages award would be challenged by other quality considerations which an application of the principles would produce. For example, the application of the principle which emphasises the importance of participation in community life would help to ensure that settlements based on institutional care were questioned. While damages claims which proceeded to court and were not settled would not automatically face such scrutiny, over a period of time an increasing appreciation of the principles amongst practitioners may impact on those claims as well.

After careful consideration of all the issues involved, the Commission has concluded that court sanction of a settlement should still be required. The reason for this is that the assessment of damages is a specific legal issue to be resolved according to the application of established criteria with which the courts are well familiar.

The Commission also agrees that the safeguard provided by the sanction requirement may be weakened by the possibility of a dual role being performed by the Public Trustee. Even if, within the Public Trust Office, the sanction process is administratively separated from the role as decision-maker, there is room for at least a perception of conflict of interest. Accordingly, the Commission is persuaded that it would not be appropriate for the sanctioning role of the Public Trustee to continue.

The Commission is not persuaded that statutory trustee companies should be exempted from the sanction requirement. The Commission accepts that a statutory trustee company would not be faced with a personal conflict of interest in the same way that a family member might be. However, this does not mean that the potential for conflict of interest does not exist. The attitude of the statutory trustee company towards a settlement may be influenced by factors outside the welfare of the person whose decision-making capacity is impaired - for example, the amount which may be available for investment in the funds of the company.

The Commission recommends that the legislation provide that a decision to settle a claim on behalf of a person whose decision-making capacity is impaired must be sanctioned by a court.

The Commission's recommendation is implemented by clause 316 of the Draft Bill in Volume 2 of this Report.

(c) Protection orders

Protection orders appointing the Public Trustee to manage the affairs of a person with a decision-making disability are discussed in Chapter 2 of this Report.

(i) On the application of the Public Trustee or another interested person

In the Draft Report, the Commission recommended that, upon the establishment of the tribunal proposed by the Commission.¹²⁹⁴

- the power of the Supreme Court to make a Protection Order on the application of the Public Trustee or any other interested person should be abolished;¹²⁹⁵
- the procedure of filing a Certificate of Disability in the Supreme Court Registry should also be terminated;¹²⁹⁶
- existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a tribunal order appointing a decision-maker to manage the affairs of the person concerned.¹²⁹⁷

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

¹²⁹⁴At 24.

¹²⁹⁵Protection orders are discussed on pp 10-11 of this Report.

¹²⁹⁶Certificates of Disability are discussed on p 12 of this Report.

¹²⁹⁷*Cf Aged and Infirm Persons' Property Act 1940 (SA) s 30.*

The Commission recommends that:

- . **the power of the Supreme Court to make a Protection Order on the application of the Public Trustee or any other interested person should be abolished;**
- . **the procedure of filing a Certificate of Disability in the Supreme Court Registry should also be abolished;**
- . **existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a tribunal order appointing a decision-maker to manage the financial affairs of the person concerned.**

(ii) In damages awards

In the Draft Report, the Commission drew attention to the position of the spouse of an injured person who receives an award of damages as compensation for the injury if a Protection Order is made in respect of the damages.¹²⁹⁸

The Commission noted that a person who gives up work to care for his or her injured spouse and thereby loses financial independence¹²⁹⁹ may be worse off than a person whose marriage comes to an end after his or her spouse has received a damages award or a person whose spouse dies as a result of injuries for which compensation has been awarded. If the marriage breaks down after a damages award has been made, the amount of the award will be taken into account, along with factors such as the state of health of the parties and the capacity of each for employment, in adjusting the property rights of the injured person and the spouse.¹³⁰⁰ If the

¹²⁹⁸ At 25.

¹²⁹⁹ The spouse of an injured person has no legal entitlement to any part of the damages awarded, even though he or she may have given up work to provide, free of charge, nursing and housekeeping services for which the injured person receives financial compensation: *Griffiths v Kerkemeyer* (1979) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327. See also Queensland Law Reform Commission, Report No 45, *The Assessment of Damages in Personal Injury and Wrongful Death Litigation*, October 1993.

¹³⁰⁰ *Family Law Act 1975 (Cth)* ss 79(4), 75(2).

injured person dies, the surviving spouse will be entitled to at least a share of the estate and possibly to compensation for loss arising as a result of the injured person's death.¹³⁰¹

The Commission acknowledged the need to protect against mismanagement or exploitation, particularly where large sums of money are involved, but expressed the view that the interests of the person who has been awarded damages may be adequately safeguarded by means other than a Protection Order.

The Commission recommended that the power of a court to make a Protection Order appointing the Public Trustee in an action for damages for personal injury should be replaced.¹³⁰²

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

Only one respondent disagreed with the Commission's proposal. The Public Trustee argued:¹³⁰³

The fact that the Family Law Act and the Succession Act give certain rights to a spouse would seem to be one good reason why having an independent manager of the funds awarded would be a desirable situation.

If, as is unfortunately the case so often, the marriage comes to an end, the rights of the spouse should properly be determined according to law with the person with a disability being independently represented and his or her funds being safeguarded. Finding an independent person as financial manager will be a difficult matter since the family/carers of the person with a disability are so often biased against the spouse for what they see as a failure to live up to matrimonial obligations.

The Commission recognises that there will be situations where it is preferable for an independent manager to be appointed. However, the Commission does not accept that in all such cases it will be necessary for the Public Trustee to be appointed under a Protection Order.

¹³⁰¹ *Succession Act 1981 (Qld) ss 34-39, 41; Common Law Practice Act 1867 (Qld) ss 12-15C. See also Queensland Law Reform Commission, Report No 48, De Facto Relationships: Claims by Surviving De Facto Partners under the Common Law Practice Act 1867 for Damages for Wrongful Death, November 1994.*

¹³⁰² At 26.

¹³⁰³ Submission No 71.

The Commission is not persuaded to change its recommendation.

The Commission also recommended that there should be a requirement that if, in a civil claim for damages for personal injury, a court awards damages to a person who, in the opinion of the court, may be a person for whom the tribunal could make a decision-making order, the court must refer the question of management of the award to the tribunal. Similarly, the Commission recommended that if the claim is settled prior to or during the court hearing,¹³⁰⁴ the question of the management of any amount of agreed compensation should also be referred to the tribunal to allow a decision-making order to be made if one does not already exist and if the tribunal is satisfied that an order should be made in the circumstances of the case or, where there is an existing order, a review of its appropriateness in the light of the amount of the award or settlement.

The Commission recommended that, pending a determination by the tribunal, the amount awarded as damages should be paid into court to be paid out according to the directions of the tribunal,¹³⁰⁵ and that the same procedure should be adopted if a claim made by or on behalf of a person whose decision-making capacity is impaired is settled¹³⁰⁶ either prior to the commencement of court proceedings or while they are in progress.¹³⁰⁷ The Commission further recommended that existing Protection Orders should continue to have effect, but should be rescinded by a subsequent order of the tribunal appointing a decision-maker to manage the person's financial affairs.¹³⁰⁸

The submissions received by the Commission in response to the Draft Report supported the Commission's recommendations. The Public Guardian in Western Australia commented:¹³⁰⁹

¹³⁰⁴ See pp 76-78 of this Report for a discussion of settlement of legal disputes involving a person whose impaired decision-making capacity means that the person cannot make his or her own decision about whether or not to agree to the terms of the settlement.

¹³⁰⁵ Cf *Guardianship and Administration Board Act 1986 (Vic)* s 66.

¹³⁰⁶ See note 1304 above.

¹³⁰⁷ Payment of damages recovered when a claim is settled is presently governed by s 59 of the *Public Trustee Act 1978 (Qld)*.

¹³⁰⁸ Cf *Aged and Infirm Persons' Property Act 1940 (SA)* s 30.

¹³⁰⁹ Submission No 25.

At the present stage in Western Australia, damages claims for personal injury and subsequent Court awards are under the jurisdiction of the District Court of Western Australia and there is no compulsion for the Court to refer the question of management to the Guardianship and Administration Board. The QLRC recommendations to separate out the function of awarding damages and administration of the sum is a significant advance on existing arrangements in this jurisdiction. It is not appropriate for the Guardianship Board or Tribunal to be involved in the determination of damages. However, the knowledge and expertise in continuing governance of the administration of such damages is most appropriately dealt with by the Tribunal.

However, the Public Trustee opposed the Commission's recommendation:¹³¹⁰

Prior to the enactment of s 67 of the Public Trustee Act 1978, costs were needlessly incurred in the separate consideration at a later hearing of a Protection Order for financial management. The new provision was seen as a considerable advance resulting in a time saving for all concerned and a reduction in costs.

The proposed procedure will involve a return to the pre-1978 situation. Delays will be inevitable in the ultimate finalisation of the case from the viewpoint of family/carers ... who after many years of waiting for the outcome of the damages claim are seeking to 'get things established' and alleviate the financial stress built up over the years. Knowing that damages (often substantial) have been awarded and that the funds cannot be utilised until a further application is adjudicated upon by the Tribunal will exacerbate the situation. An additional costs issue will also arise since a prospective substitute decision-maker in these types of case will invariably seek advice from solicitors and others involved.

The Commission does not accept that its recommendation will result in additional costs. The Commission has recommended that there should be no fee payable for making an application to the tribunal and that legal representation before the tribunal should not be necessary. The cost of legal advice in respect of a tribunal application should be no greater than in respect of a Protection Order.

¹³¹⁰ Submission No 71.

In the Draft Report, the Commission acknowledged that its recommendation would inevitably result in some degree of delay and inconvenience because of the need for a tribunal hearing after the court gives its decision. However, it was the view of the Commission that the advantages of its recommendation - the availability of the experience and expertise of the tribunal members in assessing the needs of the injured person, avoiding inconsistencies which could arise if both the court and the tribunal had power to make an order about the management of the award, and the choice of decision-maker rather than automatic appointment of the Public Trustee - outweighed the disadvantages.

The Commission is not persuaded to change its recommendation. However, after further consideration, the Commission is now of the view that some refinement of its original recommendation may be appropriate.

The Commission recommends that the legislation provide that:

- . **the power of a court in an action for damages for personal injury to make a Protection Order appointing the Public Trustee to manage the damages awarded to an injured adult plaintiff should be discontinued;**
- . **a court which awards damages or sanctions the settlement of a claim for damages to an injured adult who, in the opinion of the court, may be a person for whom the tribunal could make a decision-making order, may make an order which:**
 - . **includes an order as to costs;¹³¹¹**
 - . **refers the question of management of the damages award to the tribunal;**
 - . **directs that -**
 - . **if the tribunal, within twenty-one days¹³¹² of the court order, appoints a decision-maker to manage the amount of damages, the defendant must pay the amount, less any statutory refunds, to the appointed decision-maker, whose receipt shall be sufficient to discharge the defendant;**
 - . **if the tribunal does not make an appointment within twenty-one days of the court order, the defendant may pay the amount, less any statutory refunds, into court and the receipt of the Registrar of the court shall be sufficient receipt to the defendant;**
 - . **upon lodgement with the Registrar of a copy of the tribunal order, the money paid into court be paid out, with such accretions or deductions as may be incurred, in accordance with the order of the tribunal;**

¹³¹¹ Where appropriate directing taxation of costs on both a party and party and solicitor and client basis.

¹³¹² The period of twenty-one days accords with the time limit in s 48 of the *Supreme Court Act 1995 (Qld)* - previously s 73 of the *Common Law Practice Act 1867 (Qld)* - where judgment is given or an order is made by a court of record for the payment of money. Unless otherwise ordered, interest is payable after twenty-one days on so much of the money as is unpaid.

existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a subsequent order of the tribunal appointing a decision-maker to manage the person's affairs.

The Commission's recommendations are implemented by clause 317 of the Draft Bill in Volume 2 of this Report.

(d) The Intellectually Disabled Citizens Council

(i) The Council and the Legal Friend

One of the major functions of the Intellectually Disabled Citizens Council is to make determinations about the need of certain people for a decision-maker to make financial and health care decisions. The Legal Friend may give additional assistance by obtaining and giving information about a person's legal rights and specialised services available to the person, by instructing a solicitor to act for the person and by liaising with government departments and other organisations or bodies on behalf of a person.¹³¹³

To the extent that the Council makes determinations about the need for a decision-maker, its role overlaps with that of the proposed tribunal. The Commission considers that the remaining aspects of the Council's role could be carried out in other ways.¹³¹⁴ The functions of the Legal Friend are replaced in the Commission's scheme by private decision-makers or by the Adult Guardian.

In the Draft Report, the Commission recommended that the Council and the position of the Legal Friend should be discontinued.¹³¹⁵

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

¹³¹³ *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(1).

¹³¹⁴ See p 464 of this Report for the Commission's recommendation about the Volunteer Friends Program.

¹³¹⁵ At 27.

The Commission recommends that the Intellectually Disabled Citizens Council and the position of the Legal Friend be discontinued.

(ii) The Volunteer Friends Program

The Council also provides friendly personal support through the Volunteer Friends Program.¹³¹⁶

Under the Act the Council may appoint a "volunteer friend" to provide friendly personal support to a person who is an assisted citizen under the Act.¹³¹⁷ This support may take on various forms - for example, providing companionship, going on outings, assistance with personal shopping and letter-writing. The volunteer friend is matched with the person granted assistance. The Volunteer Friends program is limited to people who the Council has determined are in need of assistance. Other people with impaired decision-making capacity who are not assisted citizens cannot access the program.

In the Draft Report, the Commission recognised the value of the service provided by the program, and expressed the view that the service should be extended.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's recommendation. One submission, from two community organisations dedicated to serving the needs of people in North Queensland, commented:¹³¹⁸

... the benefits of the Volunteer Friends Programme to [other people with a decision-making disability] would be enormous. People with an intellectual disability are not the only people who would really appreciate the personal support that a volunteer friend could give them. The sense of value and respect that such a programme confers on a person cannot be overestimated.

¹³¹⁶ *Intellectually Disabled Citizens Act 1985 (Qld)* ss 35, 37.

¹³¹⁷ *Intellectually Disabled Citizens Act 1985 (Qld)* s 37. A similar scheme has been set up to serve federally funded nursing homes.

¹³¹⁸ Submission No 73.

The Commission recommends that the Volunteer Friends Program be retained as a program within the Department of Families, Youth and Community Care and be expanded to include any person with a decision-making disability, who needs personal support and friendship, whatever the cause of the decision-making disability and whether or not the person is subject to a decision-making order.

(e) Notification under the *Mental Health Act 1974 (Qld)*

In the Draft Report, the Commission expressed the view that the notification procedures in the *Mental Health Act* constituted a violation of basic human rights requirements.¹³¹⁹ The Commission based its view on the following factors:

- . the provisions lack respect for the individual autonomy and the dignity of the person concerned;
- . the wishes of the person do not have to be sought or taken into account;
- . there is no opportunity for the person, or for someone acting on the person's behalf, to challenge a proposed notification before it is made;
- . there is no automatic review procedure.¹³²⁰

The Commission recommended that the powers of notification in the *Mental Health Act* should be abolished.

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

The Commission recommends that the powers of notification in the Fifth Schedule of the *Mental Health Act* should be abolished.

¹³¹⁹ At 27. See also Human Rights and Equal Opportunity Commission, *Mental Health Legislation and Human Rights*, (1992) 74.

¹³²⁰ The notification procedures under the *Mental Health Act 1974 (Qld)* are discussed in Chapter 2 of this Report.

APPENDIX A

ENDURING POWER OF ATTORNEY

(SHORT FORM)

ENDURING POWER OF ATTORNEY

short form

IMPORTANT NOTICE TO ADULT MAKING THIS DOCUMENT

This document will allow your chosen decision maker or chosen decision makers to make decisions and do things for you.

Type of decision, limits and instructions

You may give a chosen decision maker power to make a personal decision, health care decision, financial decision or decision about a legal matter. You may limit the power given to a chosen decision maker and state instructions for a chosen decision maker to apply when making a decision.

When power begins—personal or health care decision

Power to make a personal decision or health care decision only begins when (if ever) even with assistance, you are not capable of understanding the nature, and foreseeing the effects, of the decision and communicating the decision.

When power begins—financial or legal decision

You may nominate when power to make a financial decision or decision about a legal matter begins. If you do not nominate when power to make a financial decision or decision about a legal matter begins, it begins immediately.

Effect of power

Once the power of a chosen decision maker to make a decision begins, your chosen decision maker will make, and have full control over, that decision unless limitations or instructions are included in this document.

Continuation of power

A chosen decision maker's power to make a decision continues if you become incapable, even with assistance, of understanding the nature and foreseeing the effects of the decision and communicating the decision.

Formal revocation and overseeing power

You may revoke this document at any time you have capacity to make an enduring power of attorney giving the same power. If this document gives power to make a health care decision, you may revoke the health care power at any time you have capacity to make an enduring power of attorney giving the same health care power. However, at any time you do not have this capacity, you will not be able to oversee the use of the power or to revoke it.

**ADDITIONAL NOTICE TO ADULT
MAKING THIS DOCUMENT**

Advice of formal revocation

If you revoke this document, you must advise your chosen decision maker(s) of this. If this document has been registered for land dealings, you must also deregister the registered power of attorney.

Assistance from Tribunal

While (if ever) you lack capacity to oversee the use of your enduring power of attorney, the Assisted and Substituted Decisions Tribunal has power to protect your interests. It may order a chosen decision maker to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove a chosen decision maker or change or revoke your power of attorney if your interests are not adequately protected.

Other actions by you that revoke this document

Apart from formal revocation of your enduring power of attorney, certain things you may do after signing this document also revoke it.

Marriage or divorce

If you marry, your power of attorney is revoked. However, if your future spouse is a chosen decision maker, your power of attorney is only revoked where it gives power to a different chosen decision maker. You can change this by a contrary statement in this document. If you divorce, your enduring power of attorney is revoked to the extent it gives power to your former spouse.

Death

If you die, your enduring power of attorney is revoked in its entirety.

Making an inconsistent decision document

If you make an advance health care directive or another enduring power of attorney inconsistent with this document, this enduring power of attorney is revoked to the extent of the inconsistency. You must then advise your chosen decision maker(s) of this and, if this document has been registered for land dealings, you must also register the revocation.

Chosen decision maker's actions that revoke your enduring power of attorney

Certain things a chosen decision maker may do after you sign this document also revoke your enduring power of attorney.

Withdrawal

While you are capable of using the power you have given to a chosen decision maker, the chosen decision maker may withdraw by giving you a signed notice. Alternatively, a chosen decision maker may get the Tribunal's leave to withdraw.

Paid carer or health care provider

If a chosen decision maker is your paid carer or health care provider, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Impaired decision-making capacity

Also, if a chosen decision maker becomes incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision and communicating the decision, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Death

Also, if a chosen decision maker dies, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Bankruptcy or insolvency

Finally, if a chosen decision maker becomes bankrupt or insolvent, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Draft

**IMPORTANT NOTICE TO PEOPLE
EXECUTING THIS DOCUMENT**

Advice

The Adult Guardian or a solicitor can advise about this enduring power of attorney, including its contents, a chosen decision maker's responsibilities under it and how to execute it.

Adult

The adult making this enduring power of attorney must sign this document after clause 7 or instruct another person to sign for the adult and in the adult's presence.

Person signing for adult

The adult may instruct another person to sign for the adult and in the adult's presence. If another person signs for the adult, the person must be 18 or more and must not also be the witness or a chosen decision maker for the adult. The person must complete the statement beside the space for the person's signature.

Witness

The witness must be a justice, commissioner for declarations or lawyer. The witness must not also sign for the adult or be a chosen decision maker for the adult, a relation of the adult or a relation of a chosen decision maker. If this document gives power to make a health care decision, the witness must not be a current health care provider of the adult.

The witness must sign and date this document after clause 7.

The witness must also sign the certificate in clause 8.

Chosen decision maker

A person who is at least 18 and not a paid carer or current health care provider for the adult may be made a chosen decision maker. Also, for a personal or health care decision, the Adult Guardian may be made chosen decision maker or, for a financial decision or decision about a legal matter, the Public Trustee or a trustee company may be made the chosen decision maker.

The chosen decision maker, or each chosen decision maker if more than 1 is given power, must sign the acceptance in clause 9.

ENDURING POWER OF ATTORNEY

PART 1—POWER TO CHOSEN DECISION MAKER

Nature of power of attorney

1. This is an enduring power of attorney.

Chosen decision maker and decision

2. I, <print your full name here> (the “adult”)
 of <print your address here>
 choose <print your chosen decision maker’s full name here>
 of <print your chosen decision maker’s address here>
 as my chosen decision maker for—

- <print description of decision>
- <print description of type of decision>
- personal decisions
- health care decisions
- financial decisions
- decisions about legal matters
- all decisions

[Notes—

1. • *Cross out what does not apply.*

2. *You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision Making Act 1996, section 39. This clause may be modified or repeated as appropriate. Choosing 2 or more chosen decision makers jointly gives extra protection because the chosen decision makers then have equal authority and can act only with the agreement of all of them. However, if a joint chosen decision maker is unable to exercise the power (for example, he or she dies), the remaining chosen decision makers exercise the power.*

3. *You cannot give power to make—*

- *excluded personal decisions—a decision about your will, enduring power of attorney or advance health care directive; voting at elections; or consenting to adoption or marriage*
- *special consent health care decisions—tissue donation; sterilisation; pregnancy termination; research or experimental health care or certain psychiatric or other health care prescribed by the regulations. However, even if you give power to make all health care decisions (other than special consent health care decisions), if you are, or become, terminally ill or go into a state of permanent or persistent unconsciousness, this enduring power of attorney does not authorise your chosen decision maker to withhold or withdraw life-sustaining health care.]*

Limits

3. The power given to the chosen decision maker in clause 2 is subject to the following limits—

<print any limits>

[Notes—

1. For example “The chosen decision maker must not sell my shares in ABC Pty Ltd” or “The chosen decision maker must not consent to a blood transfusion”.

2. If you do not wish to specify any limits, cross out clause 3.]

Instructions

4. The power given to the chosen decision maker in clause 2 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example “The chosen decision maker may use the following assets of mine for his/her own personal use—<list the assets>.”

2. If you do not wish to specify any instructions, cross out clause 4.]

When power begins

5. The power given to the chosen decision maker in clause 2 begins—

- immediately
- from <print date>
- if <print occasion>
- when (if ever) I become an adult with impaired decision-making capacity for the decision

[Notes—

1. • Cross out what does not apply.

2. Completion of this clause is unnecessary for a power to make a personal or health care decision. Such a power begins when (if ever) you become an adult with impaired decision-making capacity for the decision. It cannot begin before that time regardless of what clause 5 says.

3. If you do not complete clause 5, power to make a financial decision or decision about a legal matter begins immediately. If you complete clause 5 by inserting a date or occasion, but you become an adult with impaired decision-making capacity for the decision before that date or occasion happens, the power begins when you become an adult with impaired decision-making capacity.]

Payment

6. The chosen decision maker in clause 2 may draw from my money or income, payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 6.

2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

Statement of understanding

7.(1) I fully understand that by signing this document, I give power to make the decision mentioned in clause 2 to the chosen decision maker mentioned in clause 2.

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision subject to the limitations mentioned in clause 3 and instructions mentioned in clause 4.

or

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision and that, if I wanted, I could have limited the power or given instructions about its use.

(3) I understand that if the power to make a decision begins, the chosen decision maker will make, and have full control over, the decision subject to any limitations or instructions in this document.

(4) I understand the chosen decision maker's power continues even if I have impaired decision-making capacity.

(5) I understand I may revoke this enduring power of attorney at any time I am capable of making another enduring power of attorney giving the same power and while I am not capable of doing so, I am unable to effectively oversee the use of this enduring power of attorney.

[Note—

1. •Cross out the subclause (2) that does not apply.]

.....

• Signature of adult giving the power

or

• Signature of person directed by adult –
to sign for adult

.....

[I, <print your full name here> *state—

(a) I am at least 18 years

(b) I am not

- a witness for this power of attorney
- a chosen decision maker of the adult.

.....

Signature of person directed by adult to
sign for adult]

.....
Signature of witness

.....
Date**

[Notes—

1. • Cross out what does not apply.
2. * To be completed by person directed by adult to sign for adult.
3. ** To be completed by witness.]

PART 2—WITNESS' CERTIFICATE

IMPORTANT NOTICE TO WITNESS

Your role goes beyond ensuring that the signature of the adult giving the power is genuine. You certify that the adult appeared to understand the matters stated in clause 7 (Statement of understanding). In the future, you may have to provide information about the adult's capacity to understand these matters when giving the power. If you are doubtful about the adult's capacity, you should make appropriate inquiries.

Witness' certificate

8. I, <print your full name here>

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker of the adult
- a relation of the adult or a relation of a chosen decision maker of the adult
- a current health care provider of the adult

(c)* the adult signed this enduring power of attorney in my presence

(e)* in my presence, the adult instructed a person to sign this enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this enduring power of attorney, the adult appeared to me to understand the matters stated in clause 7.

.....

Signature of witness

.....

Date**

[Notes—

1. • Cross out what does not apply.
2. Being a current health care provider of the adult only disqualifies a witness if the power of attorney gives power to make a health care decision.
3. * Cross out the paragraph (c) that does not apply.
4. ** To be completed by witness.]

<p style="text-align: center;">IMPORTANT NOTICE TO CHOSEN DECISION MAKER(S)</p>
--

Responsibilities

If you accept this power of attorney, you will be taking on serious responsibilities. Failure to observe these responsibilities could result in you being convicted of an offence, required to pay compensation or removed as chosen decision maker.

You should take particular note of the responsibilities imposed by the *Assisted and Substituted Decision Making Act 1996*, chapter 8. Here is a summary of some of the chapter—

General duty

You must exercise the given power honestly and with reasonable care. It is an offence not to do so and you may also be required to compensate the adult.

You must comply with the terms of the enduring power of attorney, any other tribunal requirement and the Act's general principles, including—

- presuming the adult has capacity to make a decision and recognising the adult's right to maximum participation and minimal limitations in decision-making
- respecting the adult's human worth and dignity and equal basic human rights
- recognising the adult's role as a valued member of society and encouraging the adult's participation in community life and self-reliance
- taking into account the importance of maintenance of the adult's existing supportive relationships and the adult's cultural and linguistic environment and values
- ensuring decisions are appropriate to the adult's characteristics and needs
- recognising the adult's right to confidentiality of information.

You must also make a health care decision only if it is appropriate to promote and maintain the adult's health and well-being.

If the adult has other substitute decision makers, you must consult with them on a regular basis. If you are a joint decision maker, you may only exercise your power unanimously, unless 1 of you is unable to exercise the power.

Duty to keep records

You must keep reasonable records of dealings and transactions made under the power. It is an offence not to do so and the Tribunal may require you to produce them.

Duty to keep property separate

You must keep your property separate from the adult's property unless you and the adult jointly own the property.

Duty to present management plan and get approval for unauthorised transactions

If you may make a financial decision or decision about a legal matter, you must present a plan of management to the tribunal if required by the tribunal. You must also get approval for unauthorised investments, unauthorised real estate transactions and unauthorised security transactions.

Duty to avoid conflict transaction

You must not enter into transactions in which the adult's interests and your interests (or those of your relation, business associate or close friend) could or do conflict. For example, you must not buy the adult's car even if you pay its market value.

However, you may enter into a conflict transaction authorised by this power of attorney or by the Tribunal or a conflict transaction that provides for the needs of a person the adult might reasonably be expected to provide for.

Duty about gifts

You must not give away the adult's property except where the adult would have been likely to do so, for example, giving a marriage gift to a relation of the adult or a donation to the adult's favourite charity.

Power to maintain adult's dependants

You may give reasonable maintenance to the adult's dependants.

How to execute document as chosen decision maker

If you have power to execute a document for the adult, you may execute it in the ordinary way, but you must note on the document that you execute as chosen decision maker for the adult under an enduring power of attorney.

When power begins

Power to make a personal or health care decision only begins when (if ever) the adult is not capable, even with assistance, of understanding the nature and foreseeing the effects of the decision and communicating the decision. The adult may nominate when power to make a financial decision or decision about a legal matter begins (see clause 5). If the adult does not nominate when power to make a financial decision or decision about a legal matter begins, it begins immediately.

When power ends*Your actions*

Certain things you may do after the adult signs this document may also revoke the enduring power of attorney. While the adult is capable of using the power given to you, you may withdraw by giving the adult a signed notice. Alternatively, you may get the Tribunal's leave to withdraw. If you are the adult's paid carer or health care provider, the adult's enduring power of attorney is revoked to the extent it gives you power. Also, if you become

incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision or of communicating the decision, the enduring power of attorney is revoked to the extent it gives you power. Finally, if you die, the adult's enduring power of attorney is also revoked to the extent it gives you power.

Adult's actions

The adult may revoke the enduring power of attorney and is required to advise you of formal revocation.

Apart from formal revocation of the enduring power of attorney, certain other things the adult may do after signing this document may also revoke it. If the adult makes another enduring power of attorney giving your power to another chosen decision maker, this enduring power of attorney is revoked to that extent. If the adult marries, the enduring power of attorney is revoked. However, if the adult marries a chosen decision maker, the enduring power of attorney is only revoked where it gives power to a different chosen decision maker. In this document, the adult can change the effect of marriage on the enduring power of attorney. If the adult divorces, the enduring power of attorney is revoked to the extent it gives power to the adult's former spouse. If the adult dies, the enduring power of attorney is revoked in its entirety.

Tribunal's actions

Your power may also be changed or revoked by the Assisted and Substituted Decisions Tribunal.

Your liability

You may become personally liable if you use the enduring power of attorney knowing it has been changed or revoked or knowing of an event that effectively revokes it. Personal liability may also happen if you use the enduring power of attorney when you have reason to believe revocation has happened.

Assisted and Substituted Decisions Tribunal

The Assisted and Substituted Decisions Tribunal has power to protect the adult's interests. It may order you to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove you or change or revoke the enduring power of attorney if the adult's interests are not adequately protected.

Help with matters about this document

The Assisted and Substituted Decisions Tribunal located at <address and phone> is able to make a declaration about this document's validity or whether your power to make a decision for the adult has begun. It is also able to give advice about your power and other help.

The Adult Guardian or a solicitor can also advise you about this document and your power and responsibilities under it.

**PART 3—CHOSEN DECISION MAKER'S
ACCEPTANCE**

Chosen decision maker's acceptance

9. I, <print your full name here> _____

state that—

- (a) I am at least 18
- (b) I am not—
 - a paid carer of the adult
 - a current health care provider of the adult
- (c) I have read this enduring power of attorney
- (d) I understand that by signing this document, I take on the responsibility of exercising the power that I have been given by the document
- (e) I also understand that I must exercise the power in accordance with the *Assisted and Substituted Decision Making Act 1996*.

.....
Signature of chosen decision maker

[Note—

1. Clause 9 must be repeated for each chosen decision maker.]

APPENDIX B

ENDURING POWER OF ATTORNEY

(LONG FORM)

ENDURING POWER OF ATTORNEY

long form

IMPORTANT NOTICE TO ADULT MAKING THIS DOCUMENT

This document will allow your chosen decision maker or chosen decision makers to make decisions and do things for you.

Type of decision, limits and instructions

You may give a chosen decision maker power to make a personal decision, health care decision, financial decision or decision about a legal matter. You may limit the power given to a chosen decision maker and state instructions for a chosen decision maker to apply when making a decision.

When power begins—personal or health care decision

Power to make a personal decision or health care decision only begins when (if ever) even with assistance, you are not capable of understanding the nature, and foreseeing the effects, of the decision or of communicating the decision.

When power begins—financial or legal decision

You may nominate when power to make a financial decision or decision about a legal matter begins. If you do not nominate when power to make a financial decision or decision about a legal matter begins, it begins immediately.

Effect of power

Once the power of a chosen decision maker to make a decision begins, your chosen decision maker will make, and have full control over, that decision unless limitations or instructions are included in this document.

Continuation of power

A chosen decision maker's power to make a decision continues if you become incapable, even with assistance, of understanding the nature, and foreseeing the effects, of the decision or of communicating the decision.

Formal revocation and overseeing power

You may revoke this document at any time you have capacity to make an enduring power of attorney giving the same power. If this document gives power to make a health care decision, you may revoke the health care power at any time you have capacity to make an enduring power of attorney giving the same health care power. However, at any time you do not have this capacity, you will not be able to oversee the use of the power or to revoke it.

ADDITIONAL NOTICE TO ADULT
MAKING THIS DOCUMENT

Advice of formal revocation

If you change or revoke your enduring power of attorney, you must advise your chosen decision maker(s) of this. If this document has been registered for land dealings, you must also deregister the registered power of attorney.

Assistance from Tribunal

While (if ever) you lack capacity to oversee the use of your enduring power of attorney, the Assisted and Substituted Decisions Tribunal has power to protect your interests. It may order a chosen decision maker to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove a chosen decision maker or change or revoke your enduring power of attorney if your interests are not adequately protected.

Other actions by you that revoke this document

Apart from formal revocation of your enduring power of attorney, certain things you may do after signing this document also revoke it.

Marriage or divorce

If you marry, your power of attorney is revoked. However, if your future spouse is a chosen decision maker, your power of attorney is only revoked where it gives power to a different chosen decision maker. You can change this by a contrary statement in this document. If you divorce, your enduring power of attorney is revoked to the extent it gives power to your former spouse.

Death

If you die, your enduring power of attorney is revoked in its entirety.

Making an inconsistent decision document

If you make an advance health care directive or another enduring power of attorney inconsistent with this document, this enduring power of attorney is revoked to the extent of the inconsistency. You must then advise your chosen decision maker(s) of this and, if this document has been registered for land dealings, you must also register the revocation.

Chosen decision maker's actions that revoke your enduring power of attorney

Certain things a chosen decision maker may do after you sign this document also revoke your enduring power of attorney.

Withdrawal

While you are capable of using the power you have given to a chosen decision maker, the chosen decision maker may withdraw by giving you a signed notice. Alternatively, a chosen decision maker may get the Tribunal's leave to withdraw.

Paid carer or health care provider

If a chosen decision maker is your paid carer or health care provider, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Impaired decision-making capacity

Also, if a chosen decision maker becomes incapable, even with assistance, of understanding the nature, and foreseeing the effects, of a decision and communicating the decision, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Death

Also, if a chosen decision maker dies, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Bankruptcy or insolvency

Finally, if a chosen decision maker becomes bankrupt or insolvent, your enduring power of attorney is revoked to the extent it gives the chosen decision maker power.

Draft

**IMPORTANT NOTICE TO PEOPLE
EXECUTING THIS DOCUMENT**

Advice

The Adult Guardian or a solicitor can advise about this enduring power of attorney, including its contents, a chosen decision maker's responsibilities under it and how to execute it.

Adult

If you wish to give power to make a *personal decision*, part 2 must be completed and you must sign after clause 7.

If you wish to give power to make a *health care decision*, part 3 must be completed and you must sign after clause 14.

If you wish to give power to make a *financial decision*, part 4 must be completed and you must sign after clause 21.

If you wish to give power to make a *decision about a legal matter*, part 5 must be completed and you must sign after clause 28.

Person signing for adult

The adult may instruct another person to sign for the adult and in the adult's presence. If another person signs for the adult, the person must be 18 or more and may not also be the witness or a chosen decision maker for the adult. The person must complete the statement beside the space for the person's signature.

Witness

The witness must be a justice, commissioner for declarations or lawyer. The witness must not also be a chosen decision maker for the adult; a relation of the adult or a relation of a chosen decision maker. If witnessing the adult's signature in part 3 dealing with health care decisions, the witness must not be a current health care provider of the adult.

The person witnessing the adult's signature in a part must sign and date this document where indicated after the adult's signature. The witness must also sign the certificate at the end of the part.

Chosen decision maker

A person who is at least 18 and not a paid carer or current health care provider for the adult may be made a chosen decision maker. Also, for a personal or health care decision, the Adult Guardian may be made chosen decision maker, or, for a financial decision or decision about a legal matter, the Public Trustee or a trustee company may be made the chosen decision maker.

The chosen decision maker, or each chosen decision maker if more than 1 is given power, must sign the acceptance in clause 30.

ENDURING POWER OF ATTORNEY

PART 1—PRELIMINARY

Adult making enduring power of attorney

1. I, <print your full name here> (the “adult”)
of <print your address here>
make this enduring power of attorney.

PART 2—CHOSEN DECISION MAKER FOR PERSONAL DECISIONS

Chosen decision maker for personal decisions

2. I choose <print full name of your chosen decision maker for personal decisions here>
of <print the chosen decision maker’s address here>
as my chosen decision maker for—
- personal decisions
 - <print description of personal decision>
 - <print description of type of personal decision>

[Notes—

1. *This part will allow your chosen decision maker to make a personal decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a personal decision for you, cross out part 2 entirely.*

2. *A personal decision could be a decision about where and with whom you live, whether you work or undertake education or training, whether you apply for a licence or permit, and day-to-day issues like diet and dress. You cannot give power to make excluded personal decisions—a decision about your will or enduring power of attorney, voting at elections, or consenting to adoption or marriage.*

3. • *Cross out what does not apply.*

4. *You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision Making Act 1996, section 39. This clause may be modified or repeated as appropriate. Choosing 2 or more chosen decision makers jointly gives extra protection because the chosen decision makers then have equal authority and can act only with the agreement of all of them. However, if a joint chosen decision maker is unable to exercise the power (for example, he or she dies) the remaining chosen decision makers exercise the power.]*

Limits

3. The power given to the chosen decision maker in clause 2 is subject to the following limits—

<print any limits>

[Notes—

1. For example "The chosen decision maker must not require me to move away from my home."
2. If you do not wish to specify any limits, cross out clause 3.]

Instructions

4. The power given to the chosen decision maker in clause 2 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "If I need frail aged care, I want you to try the XYZ Nursing Home first."
2. If you do not wish to specify any instructions, cross out clause 4.]

When power begins

5. I understand that because of the Act the power given to the chosen decision maker in clause 2 begins when (if ever) I become an adult with impaired decision-making capacity for the decision.

[Note—

1. Power to make personal decisions cannot begin before you become an adult with impaired decision-making capacity for the decision regardless of what you say in this document.]

Payment

6. The chosen decision maker in clause 2 may draw from my money or income, payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 6.
2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

Statement of understanding

7.(1) I fully understand that by signing this part, I give power to make the decision mentioned in clause 2 to the chosen decision maker mentioned in clause 2.

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision subject to the limitations mentioned in clause 3 and instructions mentioned in clause 4.

or

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision and that, if I wanted, I could have limited the power or given instructions about its use.

(3) I understand that if the power to make a decision begins, the chosen decision maker will make, and have full control over, the decision subject to any limitations of instructions in this part.

(4) I understand the chosen decision maker's power continues even if I have impaired decision-making capacity.

(5) I understand I may revoke the powers given by this document at any time I am capable of making an enduring power of attorney giving the same power and while I am not capable of doing so, I am unable to effectively oversee the use of this document.

.....
• Signature of adult giving the power

or

• Signature of person directed by adult to sign for adult

[I, <print your full name here>* state—

(a) I am at least 18 years

(b) I am not

• a witness for this power of attorney

• a chosen decision maker of the adult.

.....

Signature of person directed by adult to sign for adult]

.....
Signature of witness

.....
Date**

[Notes—

- 1. • Cross out what does not apply.*
- 2. *To be completed by person directed by adult to sign for adult.*
- 3. ** To be completed by witness.]*

Draft

IMPORTANT NOTICE TO WITNESS

Your role goes beyond ensuring that the signature of the adult giving the power is genuine. You certify that the adult appeared to understand the matters stated in clause 7 (Statement of understanding). In the future, you may have to provide information about the adult's capacity to understand these matters when giving the power. If you are doubtful about the adult's capacity, you should make appropriate inquiries.

Witness' certificate

8. I, <print your full name here>

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a relation of a chosen decision maker

(c)* the adult signed this part of the enduring power of attorney in my presence

or

(c)* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters stated in clause 7.

.....
Signature of witness

.....
Date**

[Notes—

1. • Cross out what does not apply.
2. * Cross out the paragraph (c) that does not apply.
3. ** To be completed by witness.]

PART 3—CHOSEN DECISION MAKER FOR HEALTH CARE DECISIONS

Chosen decision maker for health care decisions

9. I choose <print full name of your chosen decision maker for health care decisions here>

of <print the chosen decision maker's address here>

as my chosen decision maker for—

- health care decisions
- <print description of health care decision>
- <print description of type of health care decision>

[Notes—

1. This part will allow your chosen decision maker to make a health care decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a health care decision for you, cross out part 3 entirely.

2. A health care decision could be a decision consenting, refusing to consent, or withdrawing consent, to health care for you. You cannot give power to make a special consent health care decision—donation of tissue; sterilisation; pregnancy termination; research or experimental health care; or certain psychiatric or other health care prescribed by the regulations. However, even if you give power to make all health care decisions (other than special consent health care decisions), if you are, or become, terminally ill or go into a state of permanent or persistent unconsciousness, this enduring power of attorney does not authorise your chosen decision maker to withhold or withdraw life-sustaining health care.

3. • Cross out what does not apply.

4. You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision Making Act 1996, section 39. This clause may be modified or repeated as appropriate. Choosing 2 or more chosen decision makers jointly gives extra protection because the chosen decision makers then have equal authority and can act only with the agreement of all of them. However, if a joint chosen decision maker is unable to exercise the power (for example, he or she dies), the remaining chosen decision makers exercise the power.]

Limits

10. The power given to the chosen decision maker in clause 9 is subject to the following limits—

<print any limits>

[Notes—

1. For example "The chosen decision maker must not consent to a blood transfusion."

2. If you do not wish to specify any limits, cross out clause 10.]

Instructions

11. The power given to the chosen decision maker in clause 9 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "If I need hospitalisation, I wish to be admitted to the XYZ Hospital."
2. If you do not wish to specify any instructions, cross out clause 11.]

When power begins

12. I understand that because of the Act the power given to the chosen decision maker in clause 9 begins when (if ever) I become an adult with impaired decision-making capacity for the decision.

[Note—

1. Power to make health care decisions cannot begin before you become an adult with impaired decision-making capacity for the decision regardless of what you say in this document.]

Payment

13. The chosen decision maker in clause 9 may draw from my money or income, payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 13.
2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

Statement of understanding

14.(1) I fully understand that by signing this part, I give power to make the decision mentioned in clause 9 to the chosen decision maker mentioned in clause 9.

- (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision subject to the limitations mentioned in clause 10 and instructions mentioned in clause 11.

• (2) I understand this gives the chosen decision maker power to do, for me anything I could lawfully do myself in relation to the decision and that, if I wanted, I could have limited the power or given instructions about its use.

(3) I understand that if the power to make a decision begins, the chosen decision maker will make, and have full control over, the decision subject to any limitations of instructions in this part.

(4) I understand the chosen decision maker's power continues even if I have impaired decision-making capacity.

(5) I understand I may revoke the power given by clause 9 at any time I am capable of making an enduring power of attorney giving the same power and while I am not capable of doing so, I am unable to effectively oversee the use of this part.

[Note—

1. • Cross out the subclause (2) that does not apply.]

.....

• Signature of adult giving the power

or

• Signature of person directed by adult to sign for adult

[I, <print your full name here>* state—

(a) I am at least 18 years

(b) I am not

• a witness for this power of attorney

• a chosen decision maker of the adult.

.....

Signature of person directed by adult to sign for adult]

.....
Signature of witness

.....
Date**

[Notes—

1. • *Cross out what does not apply.*
2. * *To be completed by person directed by adult to sign for adult.*
3. ** *To be completed by witness.]*

Draft

IMPORTANT NOTICE TO WITNESS

Your role goes beyond ensuring that the signature of the adult giving the power is genuine. You certify that the adult appeared to understand the matters stated in clause 14 (Statement of understanding). In the future, you may have to provide information about the adult's capacity to understand these matters when giving the power. If you are doubtful about the adult's capacity, you should make appropriate inquiries.

Witness' certificate

15. I, <print your full name here>

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a relation of a chosen decision maker
- a current health care provider of the adult

(c)* the adult signed this part of the enduring power of attorney in my presence

(c)* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult

and

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters stated in clause 14.

.....
Signature of witness

.....
Date**

[Notes—

1. • *Cross out what does not apply.*
2. * *Cross out the paragraph (c) that does not apply.*
3. ** *To be completed by witness.]*

PART 4—CHOSEN DECISION MAKER FOR FINANCIAL DECISIONS

Chosen decision maker for financial decisions

16. I choose <print full name of your chosen decision maker for financial decisions here>

of <print the chosen decision maker's address here>

as my chosen decision maker for—

- financial decisions
- <print description of financial decision>
- <print description of type of financial decision>

[Notes—

1. This part will allow your chosen decision maker to make a financial decision for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a financial decision for you, cross out part 4 entirely.

2. A financial decision could be a decision about the possession, custody, control or management of your property, for example, a decision to sell your existing home to fund a home for you in a retirement village. For your further protection, even if you give power to make all financial decisions, certain types of real estate transactions, security transactions and investments need the prior approval of the Assisted and Substituted Decisions Tribunal.

3. • Cross out what does not apply.

4. You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision Making Act 1996, section 39. This clause may be modified or repeated as appropriate. Choosing 2 or more chosen decision makers jointly gives extra protection because the chosen decision makers then have equal authority and can act only with the agreement of all of them. However, if a joint chosen decision maker is unable to exercise the power (for example, he or she dies), the remaining chosen decision makers exercise the power.]

Limits

17. The power given to the chosen decision maker in clause 16 is subject to the following limits—

<print any limits>

[Notes—

1. For example "The chosen decision maker must not sell my shares in ABC Pty Ltd."

2. If you do not wish to specify any limits, cross out clause 17.]

Instructions

18. The power given to the chosen decision maker in clause 16 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "The chosen decision maker may buy my house at a fair market valuation."

2. If you do not wish to specify any instructions, cross out clause 18.]

When power begins

19. The power given to the chosen decision maker in clause 16 begins—

- immediately
- from <print date>
- if <print occasion>
- when (if ever) I become an adult with impaired decision-making capacity for the decision

[Notes—

1. Cross out what does not apply.

2. If you do not complete clause 19, power to make a financial decision begins immediately. If you complete clause 19 by inserting a date or occasion, but you become an adult with impaired decision-making capacity for the decision before that date or occasion happens, the power begins when you become an adult with impaired decision-making capacity.]

Payment

20. The chosen decision maker in clause 16 may draw from my money or income, payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 20.

2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

Statement of understanding

21.(1) I fully understand that by signing this part, I give power to make the decision mentioned in clause 16 to the chosen decision maker mentioned in clause 16.

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision subject to the limitations mentioned in clause 17 and instructions mentioned in clause 18.

or

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision and that, if I wanted, I could have limited the power or given instructions about its use.

(3) I understand that if the power to make a decision begins, the chosen decision maker will make, and have full control over, the decision subject to any limitations of instructions in this part.

(4) I understand the chosen decision maker's power continues even if I have impaired decision-making capacity.

(5) I understand I may revoke the powers given by this document at any time I am capable of making an enduring power of attorney giving the same power and while I am not capable of doing so, I am unable to effectively oversee the use of this document.

.....
• Signature of adult giving the power

or

• Signature of person directed by adult to sign for adult

[I, <print your full name here>* state—

(a) I am at least 18 years

(b) I am not

- a witness for this power of attorney
- a chosen decision maker of the adult.

.....
Signature of person directed by adult to sign for adult]

.....
Signature of witness

.....
Date**

[Notes—

1. • Cross out what does not apply.
2. * To be completed by person directed by adult to sign for adult.
3. ** To be completed by witness.]

Draft

IMPORTANT NOTICE TO WITNESS

Your role goes beyond ensuring that the signature of the adult giving the power is genuine. You certify that the adult appeared to understand the matters stated in clause 21 (Statement of understanding). In the future, you may have to provide information about the adult's capacity to understand these matters when giving the power. If you are doubtful about the adult's capacity, you should make appropriate inquiries.

Witness' certificate

22. I, <print your full name here>

state that—

(a) I am a—

- justice of the peace
- commissioner for declarations
- lawyer

(b) I am not—

- a chosen decision maker for the adult
- a relation of the adult or a relation of a chosen decision maker

~~(c)* the adult signed this part of the enduring power of attorney in my presence~~

~~(c)* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult~~

~~and~~

(d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters stated in clause 21.

.....
Signature of witness

.....
Date**

[Notes—

1. • *Cross out what does not apply.*
2. * *Cross out the paragraph (c) that does not apply.*
3. ** *To be completed by witness.]*

PART 5—CHOSEN DECISION MAKER FOR DECISIONS ABOUT LEGAL MATTERS

Chosen decision maker for decisions about legal matters

23. I choose <print full name of your chosen decision maker for decisions about legal matters here>

of <print the chosen decision maker's address here>

as my chosen decision maker for—

- decisions about legal matters
- <print description of decision about a legal matter>
- <print description of type of decision about a legal matter>

[Notes—

1. *This part will allow your chosen decision maker to make a decision about a legal matter for you. You need not sign this if you do not want to. If you do not want a chosen decision maker to make a decision about a legal matter for you, cross out part 5 entirely.*

2. *A decision about a legal matter is a decision about a legal matter involving you or your property, including, for example—*

- *a decision to use legal services to obtain information about your legal rights*
- *a decision to use legal services to bring or defend proceedings*
- *a decision involved in bringing or defending proceedings (including a decision to settle whether before or after the start of proceedings). Note that if you have impaired decision-making capacity at the time of settlement, the settlement must be sanctioned by a court. It does not matter whether proceedings have been started.*

3. *Cross out what does not apply.*

4. *You may choose 1 or more chosen decision makers—see Assisted and Substituted Decision Making Act 1996, section 39. This clause may be modified or repeated as appropriate. Choosing 2 or more chosen decision makers jointly gives extra protection because the chosen decision makers then have equal authority and can act only with the agreement of all of them. However, if a joint decision maker is unable to exercise the power (for example, he or she dies), the remaining chosen decision makers exercise the power.]*

Limits

24. The power given to the chosen decision maker in clause 23 is subject to the following limits—

<print any limits>

[Note—

1. *If you do not wish to specify any limits, cross out clause 24.]*

Instructions

25. The power given to the chosen decision maker in clause 23 is subject to the following instructions—

<print any instructions>

[Notes—

1. For example "I want Ms ABC to act as my solicitor."
2. If you do not wish to specify any instructions, cross out clause 25.]

When power begins

26. The power given to the chosen decision maker in clause 23 begins—

- immediately
- from <print date>
- if <print occasion>
- when (if ever) I become an adult with impaired decision-making capacity for the decision

[Notes—

1. Cross out what does not apply.
2. If you do not complete clause 26, power to make a decision about a legal matter begins immediately. If you complete clause 26 by inserting a date or occasion, but you become an adult with impaired decision-making capacity for the decision before that date or occasion happens, the power begins when you become an adult with impaired decision-making capacity.]

Payment

27. The chosen decision maker in clause 23 may draw from my money or income, payment for services as chosen decision maker on the following terms—

<print terms>

[Notes—

1. You do not need to pay a chosen decision maker for the power to be effective. If you do not wish to pay a chosen decision maker, cross out clause 27.
2. If you wish to pay a chosen decision maker, set out the exact terms of payment including the method of payment, for example, a particular amount from a particular bank account.]

Statement of understanding

28.(1) I fully understand that by signing this part, I give power to make the decision mentioned in clause 23 to the chosen decision maker mentioned in clause 23.

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision subject to the limitations mentioned in clause 24 and instructions mentioned in clause 25.

or

• (2) I understand this gives the chosen decision maker power to do, for me, anything I could lawfully do myself in relation to the decision and that, if I wanted, I could have limited the power or given instructions about its use.

(3) I understand that if the power to make a decision begins, the chosen decision maker will make, and have full control over, the decision subject to any limitations of instructions in this part.

(4) I understand the chosen decision maker's power continues even if I have impaired decision-making capacity.

(5) I understand I may revoke the powers given by this document at any time I am capable of making an enduring power of attorney giving the same power and while I am not capable of doing so, I am unable to effectively oversee the use of this document.

.....
• Signature of adult giving the power

or

• Signature of person directed by adult to sign for adult

[I, <print your full name here>* state—

(a) I am at least 18 years

(b) I am not

• a witness for this power of attorney

• a chosen decision maker of the adult.

.....
Signature of person directed by adult to sign for adult]

.....
Signature of witness

.....
Date**

[Notes—

1. • *Cross out what does not apply.*
2. * *To be completed by person directed by adult to sign for adult.*
3. ** *To be completed by witness.]*

Draft

IMPORTANT NOTICE TO WITNESS

Your role goes beyond ensuring that the signature of the adult giving the power is genuine. You certify that the adult appeared to understand the matters mentioned in clause 28 (Statement of understanding). In the future, you may have to provide information about the adult's capacity to understand these matters when giving the power. If you are doubtful about the adult's capacity, you should make appropriate inquiries.

Witness' certificate

29. I, <print your full name here>

state that—

- (a) I am a—
- justice of the peace
 - commissioner for declarations
 - lawyer
- (b) I am not—
- a chosen decision maker for the adult
 - a relation of the adult or a relation of a chosen decision maker
- (c)* the adult signed this part of the enduring power of attorney in my presence
- (c)* in my presence, the adult instructed a person to sign this part of the enduring power of attorney for the adult and the person signed it in my presence and the presence of the adult
- and
- (d) at the time the adult, or person for the adult, signed this part of the enduring power of attorney, the adult appeared to me to understand the matters stated in clause 28.

.....
Signature of witness

.....
Date**

[Notes—

1. • Cross out what does not apply.
2. * Cross out the paragraph (c) that does not apply.
3. ** To be completed by witness.]

IMPORTANT NOTICE TO CHOSEN DECISION MAKER(S)

Responsibilities

If you accept this power of attorney, you will be taking on serious responsibilities. Failure to observe these responsibilities could result in you being convicted of an offence, required to pay compensation or removed as chosen decision maker.

You should take particular note of the responsibilities imposed by the *Assisted and Substituted Decision Making Act 1996*, chapter 8. Here is a summary of some of the chapter—

General duty

You must exercise the given power honestly and with reasonable care. It is an offence not to do so and you may also be required to compensate the adult.

You must comply with the terms of the enduring power of attorney, any other tribunal requirement and the Act's general principles, including—

- presuming the adult has capacity to make a decision and recognising the adult's right to maximum participation and minimal limitations in decision-making
- respecting the adult's human worth and dignity and equal basic human rights
- recognising the adult's role as a valued member of society and encouraging the adult's participation in community life and self-reliance
- taking into account the importance of maintenance of the adult's existing supportive relationships and the adult's cultural and linguistic environment and values
- ensuring decisions are appropriate to the adult's characteristics and needs
- recognising the adult's right to confidentiality of information.

You must also make a health care decision only if it is appropriate to promote and maintain the adult's health and well-being.

If the adult has other substitute decision makers, you must consult with them on a regular basis. If you are a joint decision maker, you may only exercise your power unanimously, unless 1 of you is unable to exercise the power.

Duty to keep records

If you have power to make a financial decision or a decision about a legal matter, you must keep reasonable records of dealings and transactions made under the power. It is an offence not to do so and the Tribunal may require you to produce them.

Duty to keep property separate

You must keep your property separate from the adult's property unless you and the adult jointly own the property.

Duty to present management plan and get approval for certain unauthorised transactions

If you may make a financial decision or decision about a legal matter, you must present a plan of management to the tribunal if required by the tribunal. You must also get approval for unauthorised investments, unauthorised real estate transactions and unauthorised security transactions.

Duty to avoid conflict transaction

You must not enter into transactions in which the adult's interests and your interests (or those of your relation, business associate or close friend) could or do conflict. For example, you must not buy the adult's car even if you pay its market value.

However, you may enter into a conflict transaction authorised by this power of attorney or by the Tribunal or a conflict transaction that provides for the needs of a person the adult might reasonably be expected to provide for.

Duty about gifts

You must not give away the adult's property except where the adult would have been likely to do so, for example, giving a marriage gift to a relation of the adult or a donation to the adult's favourite charity.

Power to maintain adult's dependants

You may give reasonable maintenance to the adult's dependants.

How to execute document as chosen decision maker

If you have power to execute a document for the adult, you may execute it in the ordinary way, but you must note on the document that you execute as chosen decision maker for the adult under an enduring power of attorney.

When power begins

Power to make a personal or health care decision only begins when (if ever) the adult is not capable, even with assistance, of understanding the nature and foreseeing the effects of the decision and communicating the decision. The adult may nominate when power to make a financial decision or decision about a legal matter begins (see clause 5). If the adult does not nominate when power to make a financial decision or decision about a legal matter begins, it begins immediately.

When power ends*Your actions*

Certain things you may do after the adult signs this document may also revoke the enduring power of attorney. While the adult is capable of using the power given to you, you may withdraw by giving the adult a signed notice. Alternatively, you may get the Tribunal's leave to withdraw. If you are the adult's paid carer or health care provider, the adult's enduring power of attorney is revoked to the extent it gives you power. Also, if you become

incapable, even with assistance, of understanding the nature and foreseeing the effects of a decision or of communicating the decision, the enduring power of attorney is revoked to the extent it gives you power. Finally, if you die, the adult's enduring power of attorney is also revoked to the extent it gives you power.

Adult's actions

The adult may revoke the enduring power of attorney and is required to advise you of formal revocation.

Apart from formal revocation of the enduring power of attorney, certain other things the adult may do after signing this document may also revoke it. If the adult makes another enduring power of attorney giving your power to another chosen decision maker, this enduring power of attorney is revoked to that extent. If the adult marries, the enduring power of attorney is revoked. However, if the adult marries a chosen decision maker, the enduring power of attorney is only revoked where it gives power to a different chosen decision maker. In this document, the adult can change the effect of marriage on the enduring power of attorney. If the adult divorces, the enduring power of attorney is revoked to the extent it gives power to the adult's former spouse. If the adult dies, the enduring power of attorney is revoked in its entirety.

Tribunal's actions

Your power may also be changed or revoked by the Assisted and Substituted Decisions Tribunal.

Your liability

You may become personally liable if you use the enduring power of attorney knowing it has been changed or revoked or knowing of an event that effectively revokes it. Personal liability may also happen if you use the enduring power of attorney when you have reason to believe revocation has happened.

Assisted and Substituted Decisions Tribunal

The Assisted and Substituted Decisions Tribunal has power to protect the adult's interests. It may order you to produce a summary of receipts and expenditure or more detailed accounts. These may be audited. It may also remove you or change or revoke the enduring power of attorney if the adult's interests are not adequately protected.

Help with matters about this document

The Assisted and Substituted Decisions Tribunal located at <address and phone> is able to make a declaration about this document's validity or whether your power to make a decision for the adult has begun. It is also able to give advice about your power and other help.

The Adult Guardian or a solicitor can also advise you about this document and your power and responsibilities under it.

PART 6—CHOSEN DECISION MAKER'S ACCEPTANCE

Chosen decision maker's acceptance

30. I, <print your full name here>

state that—

- (a) I am 18 or more
- (b) I am not—
 - a paid carer for the adult
 - a current health care provider of the adult
- (c) I have read this enduring power of attorney
- (d) I understand that by signing this document, I take on the responsibility of exercising the power that I have been given by the document
- (e) I also understand that I must exercise the power in accordance with the *Assisted and Substituted Decision Making Act 1996*.

.....
Signature of chosen decision maker

[Note—

Clause 30 must be repeated for each chosen decision maker.]

APPENDIX C

LIST OF RESPONDENTS TO WP No. 43

RESPONDENTS TO WP No.43

The Commission thanks the many individuals and organisations who made submissions in response to the Draft Report.

The names of a number of respondents who wished to remain anonymous have not been included in the list below.

Alzheimers' Association of Queensland Incorporated
Anson, C C & L M
APSI Bundaberg Branch
Apunipima Cape York Health Council
Archdiocesan Aged Care Office
Association of Independent Retirees
Australian Manufacturing Workers' Union
Australian Medical Association of Queensland
Australian Parent Advocacy Incorporated
Australian Pensioner's & Superannuants League
Better Hearing Australia
Bell, Mr Peter
Brady, Sue
Brasher, M A
Brown, A
Bundaberg Access & Recreation
Bundaberg Community Council
Bundaberg Toy Library
Burdekin Parent Support Group
Canet, Mrs Bev
Cape York Land Council
Carlson, Glenys
Catholic Women's League Australia
Coman, Clare
Coman, Maurice
Community Access & Transition
Cooper, Mr John
Cooper, Mrs L E
Crane, Mr Roger
Crawford, Heather Joan
Crawford, S W
Cunningham, Mr & Mrs M
Dansby, Mr Cliff
Department of Education
Department of Families, Youth and Community Care (previously Department of
Family Services and Aboriginal and Islander Affairs)
Department of Lands
Elder, R J

Endeavour Foundation
Ethnic Liaison Project (HACC)
Feez Ruthning Solicitors
Frank, David (Commonwealth Bank of Australia)
Gold Coast Family Support Group
Gooley, Mr J
Guise, D B
Hamwood, Dr John A
Hankey, Mr & Mrs
Harrison, Eunice
Headway Queensland Incorporated
Health Rights Commission
Henderson, Mr Paul D
Intellectually Disabled Citizens Council of Queensland
Ipswich Regions Accommodation Service
Kenalwyn - Bundaberg & District Neighbourhood
Kramer, K A
Lambourne, Mrs J
Lambourne, J C
Lang, Judith
Legal Aid Office (Queensland)
Legal Friend (Hugh Carter)
Legg, H C
Lion of the Temple of Judah, The
Logan Hospital (Dr Lewis Driver)
Lynch, Kevin
Lynch, R
Malcolm, J
Malcolm, N
McMahon, Mr G J (Bayside Bi-Polar Affective Self-help Group)
North Queensland Autistic Support Group Branch
Over 50 Friendship Club
Peiffer, Vera Ellen
Peiffer, Ronald
Petford Training Farm
President - New South Wales Guardianship Board
Probus Club of Redlands-Bayside Incorporated, The
Public Guardian's Office, Western Australia
Public Trustee of Queensland, The
Queensland Mental Health Consumer Advisory Group
Queensland Advocacy Incorporated
Queensland Council of Carers
Queensland Health
Queensland Health - Darling Downs Region
Queensland Health - Wide Bay Region
Queensland Law Society Incorporated
Queensland Parents of People with a Disability Incorporated
Queensland Retired Teachers' Association, The
Rayem, H S M

Rea, Mr John L
Redland Shire Council
Renwick, I & J
Robertson, G
Robertson, N G
Schizophrenia Fellowship South Queensland
Schizophrenia Fellowship of North Queensland Incorporated
Smallbone, Grahame (Westpac)
Smith, Mrs Olive
Society of St Vincent de Paul
Stuart, Reg
Summerville, M A
Thompson, Mr Ric
Trustee Corporations Association of Australia
Turner, G
Turner, J W
University of Queensland - Department of Social Work
University of Queensland - School of Medicine, Department of Social and
Preventive Medicine
Victims of Child Abuse Laws (V.O.C.A.L.)
Welsh, Edward
Whitney, T
Wilson, Mr L
Wray, Charles W
Wray, Joanne
Wood, Mr R

