

ASSISTED AND SUBSTITUTED DECISIONS:

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

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DRAFT REPORT

SUMMARY OF RECOMMENDATIONS

**Queensland Law Reform Commission
February 1995**

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Queensland Law Reform Commission publications on this Reference:

Steering Your Own Ship? An Issues Paper, August 1991.

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

Draft Report on Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability, Working Paper No 43, January 1995.

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INTRODUCTION

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

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

Impaired decision-making capacity can arise from a number of causes. It is estimated that, in any one year, 58,000 Queenslanders are affected by severe mental illness.¹ Over 15,000 people in Queensland are presently affected by dementia and it is projected that that number will rise to over 32,000 by the year 2011.² There are also approximately 5,000 people who have a severe or profound disability related to head injury. More than 100 new cases present to the Specialist Head Injury Rehabilitation Unit at the Princess Alexandra Hospital each year, and the incidence of severe head injury is approximately 5% to 10% of that hospital's caseload.³ Of course, the mere existence of a particular condition does not mean that a person is incapable of making his or her own decisions, so not all of these people would have impaired decision-making capacity. However, in the financial year from 1 July 1993 to 30 June 1994, the Public Trustee assumed responsibility for the management of the financial affairs of more than 600 individuals. The Public Trustee currently handles the affairs of almost 5,000 people.⁴ The Intellectually Disabled Citizens Council presently has 3873 active files, representing a growth in real terms of 14% since the previous year. From 1 July 1993 to 30 June 1994, 1493 applications for assistance were received by the Council and during the same period the Legal Friend gave consent to medical treatment for 1,744 patients lacking the necessary capacity to consent on their own behalf. Of these consents almost 80% were emergency consents and only 20% for people already receiving the Council's assistance.⁵ These figures amply demonstrate the extent of decision-making disability in Queensland.

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

¹ Queensland Health, *Queensland Mental Health Plan* (1994) 13.

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

³ Information provided by Headway Queensland Inc.

⁴ Figures provided by the Office of the Public Trustee.

⁵ Figures provided by the Office of the Intellectually Disabled Citizens Council.

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

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

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

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

How to make comments and submissions

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

Written comments and submissions should be sent to:-

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

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

Closing date: 19 May 1995

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

Confidentiality

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

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

SUMMARY OF RECOMMENDATIONS

This Summary of Recommendations is an extract from the Queensland Law Reform Commission's *Draft Report on Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*.¹ It contains the major recommendations made in the Draft Report. The figures in square brackets indicate the number of the paragraph in the Draft Report where the recommendation is made.²

Chapter 2: Principles

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

¹ Queensland Law Reform Commission, Working Paper No 43, January 1995.

² A full copy of the Draft Report may be obtained from the Commission by telephoning 07 227 4544 or by writing to PO Box 312 Roma Street, Q 4003.

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his or her decision-making capacity were not impaired, any determination or decision made for or about the person must take the person's wishes into account. [2.2.18]

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

Chapter 3 : The Tribunal

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

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- . That positions on the tribunal should be advertised; that the President and Deputy President should be appointed by the Governor-in-Council on the recommendation of the responsible Minister; that for other appointments there should be a selection committee chaired by the President; that appointments should be for a fixed term with eligibility for re-appointment. [3.7.3]
- . That the Governor-in-Council should have power to terminate an appointment on specified grounds. [3.7.6]
- . That the *parens patriae* jurisdiction of the Supreme Court should not be abolished. [3.8.6]
- . That, upon the establishment of the tribunal, the power of the Supreme Court to make a Protection Order on the application of the Public Trustee or any other interested person should be abolished. [3.8.10]
- . That the procedure of filing a Certificate of Disability in the Supreme Court Registry be terminated. [3.8.10]
- . That existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a tribunal order appointing a decision-maker to manage the affairs of the person concerned. [3.8.10]
- . That the power of the Supreme Court under the Fifth Schedule of the *Mental Health Act* to appoint committees of the person and of the estate and of the person should also be abolished. [3.8.11]
- . That a court which awards damages for personal injury to a person with impaired decision-making capacity should no longer have power to make a Protection Order in favour of the Public Trustee for the management of the award. [3.8.16]
- . That if, in a civil claim for damages for personal injury, a court awards damages to a person who, in the opinion of the court, may be a person for whom the tribunal could make a decision-making order, the court must refer the question of management of the award to the tribunal. [3.8.16]
- . That if a civil claim for damages is settled prior to or during the court hearing, the question of the management of any amount of agreed compensation should also be referred to the tribunal. [3.8.16]
- . That existing Protection Orders should continue to have effect but should be rescinded by a subsequent order of the tribunal appointing a decision-maker to manage the person's financial affairs. [3.8.18]

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

Chapter 4 : Criteria for making an order

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

Chapter 5 : Who should be a decision-maker

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

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- . That, where the need exists to grant formal authority to someone to make decisions for a person whose decision-making capacity is impaired, consideration should be given to the importance of preserving existing support networks. [5.3.5]
- . That, in relation to financial decisions, trustee companies should be eligible for appointment. [5.3.5]
- . That the existing statutory preference given to the Public Trustee be terminated. [5.3.5]
- . That the Public Trustee be decision-maker of last resort for financial decisions. [5.3.8]
- . That a statutory office be established to act in the role of decision-maker of last resort for personal and lifestyle decisions. [5.3.8]
- . That the legislation include the following criteria for the tribunal to take into account in determining the eligibility of a proposed decision-maker:
 - . whether the proposed decision-maker will observe the principles set out in the legislation;
 - . the views and wishes of the person whose decision-making capacity is impaired;
 - . the desirability of preserving existing family or other close personal relationships;
 - . the compatibility of the person whose decision-making capacity is impaired and the proposed decision-maker;
 - . where it is proposed to appoint different people to make different decisions, the compatibility of those people with each other;
 - . the availability and accessibility of the proposed decision-maker to the person;
 - . the competence of the proposed decision-maker to carry out the duties and functions and exercise the powers under the order; and
 - . whether the interests of the proposed decision-maker are likely to conflict with those of the person whose decision-making capacity is impaired. [5.4.2]
- . That the existence of close personal ties should not be assumed to create a position of conflict. [5.4.6]

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

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

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

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

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

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

Chapter 6 : The role of the tribunal

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

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

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

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

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

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

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

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- . That the tribunal have power to require witnesses to attend and give evidence. [6.3.54]
- . That the tribunal have power to require the production of documents, to obtain information from government departments or service organisations, and to order a medical or other examination of the person who is the subject of an application. [6.3.54]
- . That the tribunal have power to require a witness to answer a question or produce a document, but that information so obtained be inadmissible against the person, save for certain limited exceptions, in subsequent court proceedings. [6.3.61]
- . That where, in the opinion of the tribunal, there is cogent evidence that a person's decision-making capacity is impaired and that there is an immediate danger to the person's welfare, the tribunal should have power to order entry to the premises and, if necessary, removal of the person to a place of safety. [6.3.64]
- . That, after a person has been removed to a place of safety, the tribunal should hold an inquiry as soon as possible to determine whether a decision-maker should be appointed or, if a decision-maker has already been appointed, whether that appointment should continue. [6.3.68]
- . That the tribunal have power to revoke the appointment of a decision-maker or to vary the terms of a decision-maker's appointment. [6.3.71]
- . That the tribunal have power to remove a decision-maker who is no longer suitable or competent to act, or who has neglected his or her duties, abused his or her authority, or otherwise contravened the proposed legislation. [6.3.71]
- . That the tribunal have power to advise or direct a decision-maker about the exercise of the authority conferred on the decision-maker or the performance of the decision-maker's duties or functions. [6.3.72]
- . That the tribunal have power to ratify the acts of an informal decision-maker who has acted in good faith. [6.3.74]
- . That an informal decision-maker whose acts have been ratified by the tribunal should be protected from personal liability. [6.3.74]
- . That the tribunal have power to appoint staff. [6.3.76]
- . That tribunal staff be responsible to and subject to the direction of the head of the tribunal. [6.3.76]

Chapter 7 : Duties and powers of decision-makers

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

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- . that, if required by the tribunal, the decision-maker must present to the tribunal or to a person nominated by the tribunal, a plan of management to be approved by the tribunal or its nominee;
- . that the decision-maker must not enter, without the consent of the tribunal, into a transaction in relation to the property of a person with impaired decision-making capacity if there is an actual or potential conflict between the interests of the decision-maker and the interests of the person;
- . that, except in relation to property owned jointly by the decision-maker and a person whose decision-making capacity is impaired, a decision-maker must keep his or her property separate from the property of the person. [7.2.7]
- . That a financial decision-maker, if ordered to do so by the tribunal, be required to present the tribunal with a summary of receipts and expenditure and, if requested by the tribunal, to provide more detailed accounts. [7.2.9]
- . That the tribunal should have a discretion to impose further obligations, such as the payment of a security if, in the opinion of the tribunal, the above obligations would be inadequate in the circumstances of a particular case. [7.2.10]
- . That, if ordered to do so by the tribunal, a decision-maker should be liable to compensate the person for whom he or she is appointed for any loss caused by the decision-maker's failure to comply with the statutory obligations. [7.2.11]
- . That a court which finds a decision-maker liable to the person for the loss caused by the breach should be required, in assessing damages, to take into account the amount of compensation paid by the decision-maker as a result of a tribunal order. [7.2.12]
- . That powers which may be given to a decision-maker in relation to personal decisions include:
 - . to decide where the person is going to live;
 - . to decide who is going to live with the person;
 - . to decide whether the person should work and, if so, the kind and place of work, and the employer;
 - . to decide what education or training the person will receive;

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

- . That the powers which may be conferred on a decision-maker include authority to make decisions about legal proceedings. [7.4.5]
- . That a decision-maker be liable to the other party to litigation for the costs of the litigation, but be entitled to an indemnity from the person on whose behalf the action is taken. [7.4.6]
- . That a decision-maker have power to agree to or reject the terms of a settlement of a claim, but that, as at present, settlement require sanction by the Public Trustee or, where appropriate, a judge of a District Court or of the Supreme Court. [7.4.7, 7.4.10]

Chapter 8 : Enduring Powers of Attorney

- . That legislation provide that an enduring power of attorney may authorise the holder to make decisions other than those relating to the donor's money and property. [8.6.3]
- . That the donor of an enduring power of attorney not be able to give his or her attorney authority to make a decision which the tribunal could not delegate to a substitute decision-maker. [8.6.5]
- . That a donor be able to limit the power to be given to an attorney or to instruct the attorney about the exercise of the power. [8.6.7]
- . That
 - a) an enduring power of attorney for personal decisions does not come into effect unless the donor has lost the capacity to make the decision;
 - b) in relation to decisions about the management of the donor's money or property, or about legal proceedings involving the donor, the donor be able to specify that an enduring power of attorney come into effect -
 - (i) immediately
 - (ii) on a specified date
 - (iii) when the donor loses capacity to decide;
 - c) if the donor fails to specify when the power is to commence, it should be effective immediately the document creating the power is executed.

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

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

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

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

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

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

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

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

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

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. That if the enduring power of attorney gives the attorney power to make a health care decision for the donor, a current health care provider of the donor should not be eligible to act as a witness. [8.6.25]

. That a Commissioner for Declarations be authorised to witness an enduring power of attorney, retrospective to the date of commencement of the *Justices of the Peace and Commissioners for Declarations Act*. [8.6.28]

. That

- a) it be an offence to dishonestly induce a person to grant an enduring power of attorney;
- b) the penalty for the offence include the forfeiture of any interest which the person might otherwise have had in the estate of the person improperly induced to execute the instrument;
- c) there should be a power to grant relief from forfeiture in appropriate circumstances. [8.6.30]

. That there be provision for another person to sign an enduring power of attorney on behalf of a donor who is prevented by physical disability from doing so, but that the person who signs should not be a witness or a person named in the document as an attorney. [8.6.35]

. That

- a) there should be a legislative test of capacity to revoke an enduring power of attorney;
- b) the test should be the same as the test of capacity for executing a power. [8.6.40]

. That revocation of an enduring power should be in writing and should be signed and witnessed in the same way as the power is executed. [8.6.42]

. That the donor should be required to take reasonable steps to notify the attorney of the revocation. [8.6.42]

. That the appointment of a person's husband or wife as attorney should be automatically revoked in the event of divorce. [8.6.46]

. That an enduring power of attorney should be revoked by a subsequent marriage unless the power was granted in express contemplation of that marriage. [8.6.47]

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

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

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

Chapter 9 : Health care treatment

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

- . the nature and degree of any significant risks associated with each of those forms of treatment; and
- . the reasons why it is proposed that any particular form of treatment should be carried out. [9.7.5]
- . That, in making a decision about the proposed treatment, the decision-maker should be required to take into account the views (if any) of the patient and the factors referred to above. [9.7.7]
- . That a consent given by a person authorised to make health care decisions should be ineffective if the health care provider is aware, or ought reasonably to be aware, that the patient objects to the carrying out of the treatment. [9.7.9]
- . That if the treatment is likely to cause the patient no distress, or if it may cause the patient some degree of distress which is temporary and which is outweighed by the benefit of the treatment to the patient, the objection of a patient who has little or no understanding of the proposed treatment should be disregarded and the consent of the authorised decision-maker should be effective. [9.7.11]
- . That the legislation extend the scope of an enduring power of attorney by allowing a donor who wishes to do so to include in the decisions which an attorney is authorised to make decisions about the health care of the donor. [9.8.6]
- . That, to be able to grant a valid enduring power of attorney for health care, a donor must be able to understand that the power authorises the attorney to make health care decisions which the donor is no longer able to make and that, once the donor has lost decision-making capacity, he or she will have no control over the decisions made by the attorney and will not be able to revoke the power. [9.8.8]
- . That, if an enduring power of attorney authorises an attorney to make health care decisions, a current health care provider should not be eligible to act as a witness. [9.8.9]
- . That the donor of an enduring power of attorney for health care should be able to choose whether to authorise his or her attorney to make decisions about all aspects of his or her health care, or whether to specify certain forms of health care about which the attorney is not authorised to decide or about which the attorney must decide in accordance with the directions of the donor. [9.8.12]
- . That the tribunal have power, if circumstances (including advances in medical science) have changed to such an extent that the power is no

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

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

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

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

- . the research involves minimal risk to the person; and
 - . the research has been approved by a relevant ethics committee; and
 - . the research may result in significant benefit to the person or other people affected by the same condition as the person; and
 - . the research cannot be carried out without the participation of a person or persons affected by that condition. [9.11.49]
- . That the tribunal should refuse consent if the person objects to participating in the treatment or research, or if the person has made an advance directive or enduring power of attorney for health care in which he or she indicates an unwillingness to participate in research or receive experimental treatment. [9.11.50]
- . That the legislation include a power for additional forms of treatment to be specified by regulation made under the legislation as requiring special consent procedures. [9.11.52]
- . That where a treatment provider believes that treatment is necessary to meet imminent risk to the person's life or health, the treatment may be given even though consent has not been obtained. [9.12.3]
- . That treatment may be administered without consent if the treatment provider believes that the treatment should be given urgently to prevent significant pain or distress. [9.12.3]
- . That the treatment should not be given if the person objects or if the treatment provider is aware that the person, at a time when he or she was capable of making his or her own health care decisions, refused treatment of the kind proposed. [9.12.4]
- . That it should be an offence to administer treatment to a person who lacks capacity to consent to that treatment unless:
- . consent for the treatment has been given in accordance with the requirements of the legislation or of any other Act; or
 - . the legislation authorises performance of the treatment without consent; or
 - . the treatment is given in accordance with an order of the Supreme Court in its *parens patriae* jurisdiction. [9.12.5]
- . That the legislation enable a person with the necessary degree of decision-making capacity to make an advance directive containing information and

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

- . That an advance directive should be in writing and should be witnessed by a Justice of the Peace, a Commissioner for Declarations or a legal practitioner who is not related to or a current health care provider for the maker of the advance directive. [9.13.10]
- . That if the directive is signed by another person on behalf of the maker of the directive, the person who signs the directive should not be a witness or a person whom the maker of the directive has appointed as a decision-maker. [9.13.10]
- . That the maker of an advance directive be able to appoint another person to make decisions on his or her behalf if the instructions in the directive are inadequate or unclear. [9.13.16]
- . That the test of capacity to revoke an advance directive for health care should be whether the person has sufficient capacity to make a new directive. [9.13.18]
- . That revocation of an advance directive for health care should be in writing and signed and witnessed in the same way as the execution of the directive. [9.13.20]
- . That an advance directive should also be revoked by the execution of a subsequent directive to the extent that the subsequent directive relates to the same health care decisions or appoints a different decision-maker, provided that at the time the later directive was executed, the maker had sufficient capacity. [9.13.21]
- . That legislative provisions about advance directives should not detract from any existing common law rights. [9.13.24]
- . That procedures relating to involuntary treatment for mental illness be contained in the *Mental Health Act* and that there be no provision for substituted consent for involuntary psychiatric care. [9.15.5]
- . That a person authorised to consent to health care treatment for a mentally ill person whose decision-making capacity is impaired, should be able to consent to standard psychiatric treatment for that person, unless the person's condition is such that he or she meets the criteria for treatment as an involuntary patient. [9.15.9]

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

Chapter 10 : Appeals

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

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

Chapter 11 : The Adult Guardian and the Public Advocate

. That an office of the Adult Guardian be created. [11.2.4]

. That the Adult Guardian be available for appointment, where the tribunal considers it appropriate, as decision-maker for decisions about personal welfare issues. [11.2.4]

. That the Adult Guardian be able to delegate decision-making authority to another person. [11.2.4]

. That the Adult Guardian have responsibility for a scheme of community decision-makers and for recruiting, training and supporting volunteers and monitoring their performance. [11.2.8]

. That the role of the Adult Guardian include an advisory service and an educational and research function. [11.2.12]

. That the Adult Guardian be given power to investigate allegations that a person with impaired decision-making capacity is being exploited or abused or is in need of assistance or that a carer or decision-maker is acting inappropriately. [11.2.21]

. That the Adult Guardian be given power to take appropriate action in response to its investigations. [11.2.21]

. That the legislation include guidelines for the disclosure of information about any investigations conducted by the Adult Guardian. [11.2.21]

. That the Adult Guardian have responsibility for a scheme of community visitors to protect the rights of people with impaired decision-making capacity living in residential care facilities. [11.2.27]

. That the Volunteer Friends programme currently existing under the *Intellectually Disabled Citizens Act* continue within the Department of Family Services and Aboriginal and Islander Affairs and be expanded to include any person with impaired decision-making capacity who needs personal support and friendship, whether or not the person is subject to a decision-making order. [11.2.36]

. That the Adult Guardian be given power to apply to the tribunal for an order authorising entry into premises where it is believed that a person with

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

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

Chapter 12 : Other matters

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

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

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

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