

# **ASSISTED AND SUBSTITUTED DECISIONS**

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

**Report No 49  
Volume 1**

**Queensland Law Reform Commission  
June 1996**

The short citation for this Report is Q.L.R.C. R.49  
Published by the Queensland Law Reform Commission, June 1996  
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ISBN: 0 7242 7172 4

Printed by: The Print People

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Previous Queensland Law Reform Publications on this Reference:

*Steering Your Own Ship?*, Queensland Law Reform Commission Issues Paper MP1, August 1991.

*Assisted and Substituted Decisions: Decision-making for People Who Need Assistance Because of Mental or Intellectual Disability*, Queensland Law Reform Commission Discussion Paper WP38, July 1992.

*Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Queensland Law Reform Commission Draft Report WP43, February 1995.





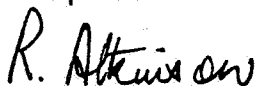
To: The Hon Denver Bearland MLA  
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its report on Assisted and Substituted Decisions.

The Report is accompanied by preliminary draft legislation prepared by the Office of Parliamentary Counsel. The Commission hopes to be involved in any further development of the Draft Bill before it is introduced into Parliament.



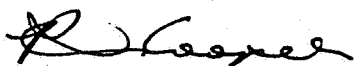
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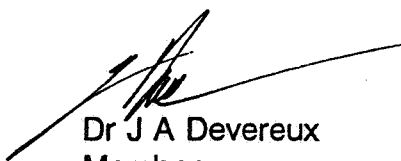
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## PREFACE

There are well over 100,000 adult members of the Queensland community who have a condition which may affect their decision-making capacity.

As at 1993, there were, at a conservative estimate, over 16,600 Queenslanders aged twenty and upwards with an intellectual disability of congenital or early childhood origin.<sup>1</sup>

There are also, at a conservative estimate, approximately 5,000 people who have a profound or severe disability related to head injury. Traumatic brain injuries are the cause of 200-300 hospital admissions in a population of 100,000 every year in Western countries. The incidence of severe head injury is approximately 5% to 10% of this case load. More than 100 new cases present to the Specialist Head Injury Rehabilitation Unit at Princess Alexandra Hospital each year.<sup>2</sup>

Between 5 and 10 per cent of the aged population are affected by moderate to severe dementia. There are now over 15,000 people with dementia in Queensland. The risk of dementia increases with age. Because our overall population is ageing, those who are most likely to develop dementia will become proportionately an even larger segment of the community. It is projected that, by the end of the next fifteen years, 32,000 people in Queensland will have dementia.<sup>3</sup>

In addition, it is estimated that, in any one year, 2.9% of the adult population will have a severe mental illness. Based on population projections for 1996, this means that about 68,300 Queenslanders will be affected.<sup>4</sup>

Although the existence of a particular condition does not necessarily mean that a person is incapable of making his or her own decisions, a significant proportion of people with a decision-making disability may need assistance to make decisions or need a substitute decision-maker to act on their behalf. In the year from 1 July 1994 to 30 June 1995, the Intellectually Disabled Citizens Council received 1,734 applications for assistance or review. The Legal Friend issued 2,195 consents for medical or allied health care - an increase of 26% on the previous year. Of these consents 80% were issued in emergency circumstances.<sup>5</sup> During the same period, the Public Trustee opened 578 new files for clients requiring protective management

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<sup>1</sup> Information provided by the Australian Institute of Health & Welfare. It is based on unpublished 1993 data belonging to the Australian Bureau of Statistics. The accuracy of the information has been verified for the Commission by the Australian Bureau of Statistics. The figure refers only to those people in households who reported needing assistance in one of nine categories including, for example, self care, health care and personal affairs.

<sup>2</sup> Information provided by Headway Queensland Inc.

<sup>3</sup> Alzheimer's Disease and Related Disorders Society (Australia), *A Fair Go for Dementia* (1990).

<sup>4</sup> Information supplied by Queensland Mental Health, based on the Queensland Mental Health Plan 1994.

<sup>5</sup> Intellectually Disabled Citizens Council, *Annual Report 1994-1995*.

of their financial affairs, bringing the total number of management clients to almost 5,000.<sup>6</sup>

Queensland is the only State or Territory in Australia which does not have a comprehensive legislative scheme providing for these issues. The present law in Queensland is outdated, inflexible and inadequate to meet the needs of people with a decision-making disability, their families and their carers. Its effect is often intrusive, resulting in the appointment of the Public Trustee and the Legal Friend as decision-makers in situations where it is unnecessary. In other situations, family members risk incurring legal liability for making decisions on behalf of a person with a decision-making disability when they have no authority to do so.

In this Report, the Queensland Law Reform Commission puts forward its recommendations for a new system, based on several years of research into models in other jurisdictions and, most importantly, extensive consultation with individuals, groups and organisations affected by the existing scheme.

The interests of people with a decision-making disability must always be the first priority of such legislation, but recognition must also be given to the valuable role performed by many families and carers.

The main thrust of the Commission's recommendations is that outside intervention should be used only when it is necessary to promote and protect the rights and welfare of a person who lacks the capacity to make his or her own decisions. The Commission has recommended the establishment of a specialist tribunal to determine assisted and substituted decision-making issues which cannot be resolved by less formal means or which arise because there is a risk to the personal well being or financial security of someone with a decision-making disability.

The Commission has also recommended the creation of two independent statutory offices - one to act as a systemic advocate on behalf of people with a decision-making disability and one to act as decision-maker of last resort in relation to personal welfare, lifestyle and health care matters. The Public Trustee would continue as decision-maker of last resort for financial decisions.

The Commission recognises that its recommendations will have some resource implications for government. The Commission has not undertaken a full costing analysis of its proposals but offers the following comments:

- . Greater recognition of family or other private decision-makers will mean fewer applications for appointment of a decision-maker and reduced demand for decision-making services provided by the government.
- . The establishment of a tribunal to deal only with those cases where there is a need for outside intervention will result in far more effective use of resources than the existing mechanisms.

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<sup>6</sup> The Public Trustee of Queensland, 1995 Annual Report.

- . An accessible tribunal will protect disadvantaged and vulnerable members of our community.
- . A comprehensive legislative scheme will ensure that the decision-making needs of all people with a decision-making disability are met, regardless of the cause of their disability.

Decision-making disability is not just something that happens to other people. It has the potential to seriously disrupt the lives of members of all Queensland families. Anyone's partner can be involved in an accident; anyone's parent can develop dementia or have a stroke; anyone's young adult son or daughter can be injured.

The law must provide a simple and inexpensive way of protecting the rights of people with a decision-making disability and of meeting their decision-making needs. It will undoubtedly be necessary to monitor in an ongoing way the operation of any legislation implementing the Commission's recommendations and the Commission hopes to be asked to perform a role in that process.



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# CHAPTER 1

## INTRODUCTION

### 1. TERMS OF REFERENCE

In September 1990 the Attorney-General requested the Commission to review various aspects of existing Queensland laws concerning people with disabilities. Since the terms of the reference were very broad, the Commission focussed its attention on the laws relating to decision-making by and for adults whose capacity to make their own decisions has been impaired. As part of this review, the Commission examined relevant provisions of the *Mental Health Act 1974 (Qld)*, the *Public Trustee Act 1978 (Qld)*, and the *Intellectually Disabled Citizens Act 1985 (Qld)*. It also considered the provisions of the *Property Law Act 1974 (Qld)* relating to enduring powers of attorney.

### 2. TERMINOLOGY

Impaired decision-making capacity may arise from a number of causes. It may result from a congenital intellectual disability, or be the consequence of brain damage brought about by injury or illness. It may be the effect of dementia, of a psychiatric condition, or of substance abuse.

Because of the variety of factors which may lead to impaired decision-making capacity, in this Report the Commission has used the term "decision-making disability" as a general description.

### 3. BACKGROUND

Making decisions is an important part of life. It empowers people by allowing them to express their individuality. It enables people to control their lives and gives them a sense of self-respect and dignity. However, for some decisions to be legally effective, it is necessary that the person making the decision has a certain level of understanding. The reason for this requirement is very simple: it is to protect against abuse or exploitation of a person who may be made vulnerable by impaired decision-making capacity.

It also helps other people who may be affected by a decision to know where they stand.

Everyday living involves a wide range of decisions which vary enormously in scope and complexity. Different decisions require different levels of understanding. As a result, a person's decision-making capacity may vary according to the difficulty of a

particular decision. A person's capacity to make the same decision may also vary over time if there is a change in the person's level of understanding.

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

However, some people have a decision-making disability which impairs their decision-making capacity to such a degree that they lack legal capacity to make some or all of their own decisions, either alone or with assistance.

If a person's decision-making capacity is impaired to this extent, there can be a significant impact on the lives of the person concerned and his or her family and carers. It may mean that the person is unable to make legally effective decisions about matters such as personal welfare and health care, and financial and property management. Yet certain decisions may have to be made: the person concerned may need medical treatment, for example, or it may be necessary to sell the person's home to arrange alternative accommodation.

The problem that arises is that no-one has an automatic right to make decisions on behalf of another adult, no matter how closely the two are related. The situation is different in relation to children who do not have a sufficient degree of understanding to make their own decisions. Parents have a responsibility to make those decisions in the best interests of their children. Usually, as children become older and more mature, they are able gradually to assume more responsibility for their own decision-making until, by the time they turn eighteen and are legally adults, it is no longer necessary for their parents to make decisions for them.<sup>1</sup>

However, a decision-maker for an adult with impaired decision-making capacity must be legally authorised to act on behalf of the other person before the decision-maker's decisions have any legal force. This is because appointment of a decision-maker is a serious restriction on a person's right of self-determination and should only occur within a system which includes proper legal safeguards for the rights of the individual concerned.

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<sup>1</sup> See, in relation to decisions about the health care of children, the Queensland Law Reform Commission's forthcoming Report: *Consent to Medical Treatment of Young People*.

#### **4. CONSULTATION**

The issues involved in this reference are sensitive and sometimes emotive. They often involve personal and intimate details about a person whose decision-making capacity is impaired. They also affect family members, carers and service providers in many different ways.

It is therefore necessary that laws about decision-making by and for a person whose decision-making capacity is impaired not only protect the person's right to be free from abuse and exploitation, but also enable practical assistance to be given so that the person's right to have his or her decision-making needs met in the least intrusive way possible is upheld. This requires sometimes differing interests and factors to be recognised and taken into account.

To this end the Commission has, since commencing work on the reference, endeavoured to consult as widely as possible with individuals and organisations with particular experience or expertise in the area. The consultation process has involved, in addition to an on-going program of discussions with interested parties, the following stages:

##### **(a) Public Forum**

The Commission held a public forum in Brisbane on 27 May 1991. Called "Looking after the affairs of people with a disability", the forum was attended by over two hundred people. Speakers involved in the administration of, or affected by, the existing laws outlined the present legal system and highlighted problems they had experienced. The forum program included two workshop sessions. There were fourteen workshop groups - ten small groups consisting of people who had a disability and their carers, and four larger groups of professionals and policy makers. The comments of the main speakers and the workshop participants were taped and later transcribed.

##### **(b) Issues Paper**

In August 1991, the Commission published an Issues Paper entitled *Steering Your Own Ship?*. The purpose of the Issues Paper was to promote awareness of the existing laws and to identify what features, if any, of the existing law were a cause of concern for the people affected by them. The contents of the Paper were based on the views expressed by the people who had attended the public forum.

### **(c) Discussion Paper**

A Discussion Paper entitled *Assisted and Substituted Decisions: A New Approach* was published by the Commission in July 1992 and widely distributed throughout Queensland. The Discussion Paper analysed the existing laws and put forward, for public comment, a range of options for reform.

Following the release of the Discussion Paper, public meetings were held in Brisbane and in a number of Queensland regional centres to inform members of the community about the contents of the Paper and to encourage feedback to the ideas it contained. Regional centres visited included Cairns, Townsville, Rockhampton, the Gold Coast, Roma and Longreach.

Over fifty written submissions were received in response to the Discussion Paper.

### **(d) Draft Report**

In February 1995 the Commission published a Draft Report containing its preliminary recommendations. These recommendations were formulated in the light of public comment on the Discussion Paper. Most of the submissions received by the Commission in response to the Discussion Paper were supportive of the Commission's approach. Where differing views were advanced, the Commission gave careful consideration to the arguments expressed.

The Draft Report also included draft legislation, prepared by the Office of Parliamentary Counsel, for implementing the Commission's proposals.

An extensive program of consultation followed the release of the Draft Report. Public seminars were held in Cairns, Townsville, Mackay, Rockhampton, Gladstone, Bundaberg, Maryborough, Maroochydore, Caboolture, Cleveland, Southport, Toowoomba and Ipswich, as well as in the Brisbane metropolitan area. Meetings were also held with relevant individuals and organisations to discuss their views of the changes proposed by the Commission.

More than 110 submissions were received in response to the Draft Report. A list of the organisations and individuals who responded to the Draft Report is set out in Appendix C to this Report. As some respondents did not wish to be identified, their names have not been included in the list. The Commission has been greatly assisted in the formulation of its final recommendations by the comments made in the submissions.

## **5. FORMAT OF THE REPORT**

This Report is divided into 3 volumes.

Volume 1 contains the main text of the Report. This text includes a discussion of the existing law, a summary of the issues canvassed in the Draft Report, an analysis of submissions made in response to the Draft Report and the final recommendations of the Commission. Volume 1 also includes the appendices to the text.

Volume 2 contains preliminary draft legislation, prepared by the Office of Parliamentary Counsel, for implementing the Commission's recommendations. The Commission gratefully acknowledges the contribution made to the formulation of its recommendations by the drafting process and in particular wishes to thank Mr John Leahy, Parliamentary Counsel, and Ms Theresa Johnson, First Assistant Parliamentary Counsel, for their assistance. It will be necessary for further work to be done on the draft legislation before it is ready for introduction to Parliament. The Commission hopes to be involved in any future work on the draft and looks forward to continuing a close liaison with the Office of Parliamentary Counsel in relation to its development.

Volume 3 contains a summary of the Commission's recommendations.

## CHAPTER 2

### THE EXISTING LAW IN QUEENSLAND

Existing Queensland laws providing for decision-making for a person with a decision-making disability derive from a variety of sources. Some are found in legislation, while others are based on court decisions. The principal mechanisms for appointing a decision-maker for a person who does not have decision-making capacity are set out below.<sup>2</sup>

#### 1. **MENTAL HEALTH ACT 1974 (Qld)**

The Fifth Schedule to the *Mental Health Act* provides for decisions to be made on behalf of a "patient". A "patient" is a person for whom a Protection Order under the *Public Trustee Act 1978 (Qld)*<sup>3</sup> has not been made and who is "mentally ill" and incapable of managing his or her property and affairs.

The *Mental Health Act* does not define "mental illness".<sup>4</sup> It does, however, state that its provisions apply to "drug dependence and intellectual handicap" as if each of those conditions were a mental illness.<sup>5</sup> It also provides that a person is not to be considered as suffering from a mental illness merely because the person expresses or refuses to express certain views, or engages or refuses to engage in certain kinds of behaviour.<sup>6</sup>

There are two ways for a person to become a "patient".

##### (a) **Notification to the Public Trustee**

The first is by notification to the Public Trustee that a person is mentally ill and incapable of managing his or her property and affairs. Notification may be given

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<sup>2</sup> Another mechanism, the enduring power of attorney, allows a person with decision-making capacity to nominate whom the person would want to act on his or her behalf if, at any time in the future, the person should lose decision-making capacity. Enduring powers of attorney are discussed in Chapter 6 of this Report.

<sup>3</sup> See pp 9-11 of this Report.

<sup>4</sup> The Act is currently the subject of a major review by Queensland Health. The questions of whether the Act should include a definition of "mental illness" and, if so, what form the definition should take, are being considered as part of that review.

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

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

by certain medical practitioners.<sup>7</sup> For example, if a person is admitted to a psychiatric hospital or a training centre established under the Act, notification may be given to the Public Trustee by a psychiatrist or psychiatric registrar who assesses the person. Notification, based on the opinion of a psychiatrist, may also be given by the superintendent of a prison or, in some circumstances, by the administrator of a hospital where the person is receiving treatment for mental illness.<sup>8</sup>

The effect of notification to the Public Trustee by a medical practitioner, prison superintendent or hospital administrator is that the person concerned is designated as a "patient" for the purposes of the Fifth Schedule and that the Public Trustee is given immediate authority to manage the person's property and affairs.<sup>9</sup>

#### **(b) Supreme Court declaration**

Alternatively, a person may become a "patient" by order of the Supreme Court.<sup>10</sup> The Public Trustee or any other person - for example, a relative or carer - may apply to the Court for the appointment of a committee of the person's estate.<sup>11</sup> If the Court is satisfied that the person concerned is mentally ill and incapable of managing his or her property and affairs, it may make a declaration to that effect and, if necessary, appoint a committee of the estate.<sup>12</sup> A person who is declared by the Supreme Court to be mentally ill and incapable of managing his or her property and affairs or of whose estate the Supreme Court has appointed a committee is a "patient" for the purposes of the Fifth Schedule.

#### **(i) Committees**

Usually, if the Court appoints a committee of the estate, it will appoint the Public Trustee. It may not appoint a person other than the Public Trustee unless it finds that there is sufficient reason why such other person should be appointed in preference to the Public Trustee.<sup>13</sup> In practice, although

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<sup>7</sup> *Mental Health Act 1974 (Qld)* s 55, Fifth Schedule cl 1.

<sup>8</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 1.

<sup>9</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 2(1).

<sup>10</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 1.

<sup>11</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 4(1). A committee of the estate has full power to manage the person's property and financial affairs.

<sup>12</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 4(2).

<sup>13</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 4(5).

this provision amounts to no more than a statutory preference in favour of the Public Trustee, it may be difficult to persuade the Court that "sufficient reason" exists to appoint someone else.<sup>14</sup> Information provided by the Office of the Public Trustee indicates that only a very few private committees have in fact been appointed.

If the Court declares that a person is mentally ill and incapable of managing his or her own property and affairs, it may, if it considers it desirable, appoint a committee of the person<sup>15</sup> as well as, or instead of, a committee of the estate.<sup>16</sup>

The Court may, on proof that there is good cause for doing so, replace a previously appointed committee.<sup>17</sup>

### **(c) Termination of decision-making authority**

The Fifth Schedule also provides a number of ways to end the authority which it allows to be given to a substitute decision-maker.

#### **(i) Public Trustee**

Where the Public Trustee is managing a patient's affairs, the Public Trustee may decide that the patient has regained capacity to manage his or her own property and affairs and may hand control of their management back to the patient.<sup>18</sup> If the patient was referred to the Public Trustee by a medical practitioner while the patient was in a psychiatric hospital or training centre established under the Act,<sup>19</sup> the notifying practitioner may subsequently inform the Public Trustee that the person is able to manage his or her own property and affairs and, in such a case, the Public Trustee's authority will terminate no later than fourteen days after the Public Trustee is notified of the person's capacity.<sup>20</sup>

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<sup>14</sup> See for example *In the matter of L.E.M.* (1929) QWN 3; *O'Dell v Barwick* [1983] 1 QdR 114.

<sup>15</sup> A committee of the person has the same powers as a guardian and may make all necessary decisions about the patient's personal well-being.

<sup>16</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 4(2)(c).

<sup>17</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 4(3).

<sup>18</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 6(1)(e).

<sup>19</sup> See pp 6-7 of this Report.

<sup>20</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 6(1)(d).



A patient or any other person with a proper interest may apply to the Supreme Court or, in some circumstances,<sup>21</sup> to a Patient Review Tribunal<sup>22</sup> for an order to terminate the authority of the Public Trustee. Before granting the application, the Court or Tribunal must be satisfied that the patient is capable of managing his or her own property and affairs.<sup>23</sup>

## (ii) Committees

If the Supreme Court has appointed a committee,<sup>24</sup> the Court may declare, on the application of the patient, the committee, or any other person appearing to the Court to have a proper interest, that the patient is capable of managing his or her own property and affairs, and may discharge the committee.<sup>25</sup> Unless the Court discharges a committee, the committee's appointment continues for the patient's lifetime.<sup>26</sup>

## 2. PUBLIC TRUSTEE ACT 1978 (Qld)

Under this Act, the Public Trustee,<sup>27</sup> or any other person who appears to the Court to have a proper interest,<sup>28</sup> may apply to the Supreme Court for a protection order appointing the Public Trustee to manage all or such part as the Court directs of the money and property of the person to whom the application relates.

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<sup>21</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 6(1B).

<sup>22</sup> The Act provides for the establishment of Patient Review Tribunals to deal with certain applications made under the Act by or on behalf of a person suffering or appearing to suffer from mental illness. See *Mental Health Act 1974 (Qld)* ss 14, 15.

<sup>23</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 6(1A).

<sup>24</sup> See pp 7-8 of this Report.

<sup>25</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 6(2).

<sup>26</sup> *Mental Health Act 1974 (Qld)* Fifth Schedule cl 6(2A).

<sup>27</sup> *Public Trustee Act 1978 (Qld)* s 65(1).

<sup>28</sup> *Public Trustee Act 1978 (Qld)* s 66(1).

### (a) Protection orders

The Court may make an order if it is satisfied that, as a result of age, disease illness, physical or mental infirmity or substance abuse, the person concerned is continuously or intermittently:

- . partly or totally unable to manage his or her own affairs;<sup>29</sup> or
- . subject to, or liable to be subjected to, undue influence in relation to the person's money and property, or to the disposition of the person's money or property;<sup>30</sup>

or if the person is otherwise in a position which in the opinion of the Court renders it necessary in the interest of that person or of the person's dependants that the person's property should be protected.<sup>31</sup>

In coming to its decision the Court may, on an application by the Public Trustee, have regard to matters (including medical and other reports) contained in a report by the Public Trustee.<sup>32</sup> On an application by the Public Trustee or any other person, the Court has power to order medical or psychological tests for the person concerned,<sup>33</sup> or to obtain information about the person's financial affairs.<sup>34</sup> However, the Court is not obliged to accept medical evidence unless it is satisfied of the facts on which the opinion is based.<sup>35</sup>

Where the Court makes a protection order on the application of a person other than the Public Trustee, the person must give written notice of the order to the Public Trustee within twenty-four hours of the making of the order.<sup>36</sup>

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<sup>29</sup> *Public Trustee Act 1978 (Qld)* s 65(1)(a)(i).

<sup>30</sup> *Public Trustee Act 1978 (Qld)* s 65(1)(a)(ii).

<sup>31</sup> *Public Trustee Act 1978 (Qld)* s 65(1)(b).

<sup>32</sup> *Public Trustee Act 1978 (Qld)* s 65(3).

<sup>33</sup> *Public Trustee Act 1978 (Qld)* s 66(1)(a).

<sup>34</sup> *Public Trustee Act 1978 (Qld)* s 66(1)(c).

<sup>35</sup> *Re Cochran* (1964) 46 DLR (2d) 587; *Re Ross* [1988] 2 QdR 61.

<sup>36</sup> *Public Trustee Act 1978 (Qld)* s 66(5).

### **(b) Action for damages**

A protection order may also be made in an action for damages for personal injuries.<sup>37</sup> Where during the course of the action it appears that:

- . the injured person is unable to manage his or her affairs or is likely to be subject to undue influence in the management or disposition of his or her money and property; or
- . it is otherwise necessary in the interest of the person or the person's dependants that the person's property be protected

an application may be made by the person, the person's spouse, the person's next friend,<sup>38</sup> the Public Trustee or any other person who appears to the Court to have a proper interest. If no application is made the Court may make a protection order on its own initiative.<sup>39</sup>

### **(c) Termination of a protection order**

A protection order continues in effect until it is rescinded. The Public Trustee or the protected person may apply to the Court at any time after an order has been made for the order to be varied or rescinded, either wholly or in part.<sup>40</sup> To be successful the application must be supported by strong evidence that the person's decision-making capacity has improved to such an extent that he or she is now able to manage his or her own affairs, and that it is in his or her best interests to have the right of management restored.<sup>41</sup>

If the protected person dies, the powers conferred on the Public Trustee by the order remain in force until a grant of administration of the person's estate is made or until the Public Trustee files a notice of cessation of management in the Court.<sup>42</sup>

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<sup>37</sup> *Public Trustee Act 1978 (Qld)* s 67(1).

<sup>38</sup> If the injured person lacks sufficient capacity to instruct legal representatives, another person must give instructions on his or her behalf. The Supreme Court Rules provide for a person with a decision-making disability to sue by his or her "next friend", usually a close relative such as a spouse or a parent. Similar provisions exist in the District Courts Rules and in the Magistrates Courts Rules. See Rules of the Supreme Court O 3 rr 16, 17; District Courts Rules rr 28, 29; Magistrates Courts Rules rr 29(5), 30.

<sup>39</sup> *Public Trustee Act 1978 (Qld)* s 67(2).

<sup>40</sup> *Public Trustee Act 1978 (Qld)* s 69(1).

<sup>41</sup> *Re Ross* [1988] 2 QdR 61.

<sup>42</sup> *Public Trustee Act 1978 (Qld)* s 69(2), 69(3).

**(d) Certificate of disability**

If the value of a person's property does not exceed \$25,000, the Public Trustee may file a certificate of disability in the Supreme Court provided that the Public Trustee is satisfied that the person is a person for whom a protection order<sup>43</sup> could be made,<sup>44</sup> and that reports from two medical practitioners are produced to the Public Trustee.<sup>45</sup> The medical reports are not necessary if the person concerned requests the Public Trustee to undertake management of his or her affairs.<sup>46</sup> However, the Public Trustee may not file a certificate of disability if the person or the person's spouse objects in writing within fourteen days of notification of the Public Trustee's intention to file the certificate.<sup>47</sup>

The effect of signing a certificate of disability is that the person concerned becomes a protected person, as though a protection order had been made by the Court, and the Public Trustee automatically assumes management of the person's affairs.<sup>48</sup>

**(e) Termination of a certificate of disability**

The Public Trustee's authority will continue in force until it is revoked by the Public Trustee or terminated by the Court.

If at any time after the filing of a certificate of disability, the value of the person's property is found to exceed \$30,000 the Public Trustee must file a revocation of the certificate in the Court.<sup>49</sup> The Public Trustee must also file a revocation of a certificate of disability if the Public Trustee is satisfied that it is no longer necessary to manage the person's affairs.<sup>50</sup>

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<sup>43</sup> See p 10 of this Report.

<sup>44</sup> *Public Trustee Act 1978 (Qld)* s 70(1).

<sup>45</sup> *Public Trustee Act 1978 (Qld)* s 70(2).

<sup>46</sup> *Public Trustee Act 1978 (Qld)* s 71.

<sup>47</sup> *Public Trustee Act 1978 (Qld)* s 70(3), 70(4).

<sup>48</sup> *Public Trustee Act 1978 (Qld)* s 72.

<sup>49</sup> *Public Trustee Act 1978 (Qld)* s 73(1)(a).

<sup>50</sup> *Public Trustee Act 1978 (Qld)* s 73(1)(b).

The Court may, on the application of the Public Trustee or a protected person, vary or terminate, either wholly or in part, the Public Trustee's authority to manage the person's affairs under the certificate of disability.<sup>51</sup>

If the person dies, the Public Trustee's authority will continue until a grant of administration is made.<sup>52</sup>

### **3. INTELLECTUALLY DISABLED CITIZENS ACT 1985 (Qld)**

The *Intellectually Disabled Citizens Act* provides for intellectually disabled citizens to receive special assistance under the Act.

#### **(a) Intellectually disabled citizen**

For the purposes of the Act, an "intellectually disabled citizen" is a Queensland resident, aged eighteen years or over, who is limited in his or her functional competence because of an intellectual impairment of congenital or early childhood origin or resulting from illness, injury or organic deterioration. "Functional competence" relates to the person's competence to carry out the usual functions of daily living, including the person's ability to take care of himself or herself and to look after his or her home, to perform civic duties, to enter into contracts and to make informed personal decisions.<sup>53</sup>

#### **(b) Assisted citizen**

An intellectually disabled citizen becomes an "assisted citizen" if the Intellectually Disabled Citizens Council approves an application for the provision of special assistance to the citizen under the Act. An application for assistance may be made by the intellectually disabled citizen,<sup>54</sup> or by:

- . an adult relative of the citizen;
- . a police officer;

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<sup>51</sup> *Public Trustee Act 1978 (Qld)* s 73(3).

<sup>52</sup> *Public Trustee Act 1978 (Qld)* s 73(4).

<sup>53</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 4.

<sup>54</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 27(1).

the Legal Friend;<sup>55</sup>

an officer of the Department of Families, Youth and Community Care<sup>56</sup> who is authorised to do so by the chief executive of the department; or

any other adult who satisfies the Council that he or she has a proper interest in the well-being of the citizen

to whom it appears that the intellectually disabled citizen is so severely limited in functional competence that the citizen has or is likely to have functional, personal or social needs that are unsatisfied and that are likely to remain unsatisfied unless the citizen receives the special assistance provided for by the Act.<sup>57</sup>

### (c) The Intellectually Disabled Citizens Council

The Intellectually Disabled Citizens Council consists of at least seven members. Members are appointed by the Governor on the advice of the State Government.<sup>58</sup> To be eligible for appointment, members must, in the opinion of the Government, have appropriate knowledge about intellectual disability because of their qualifications or personal or professional experience.<sup>59</sup> A person who is an officer or an employee of the Department of Families, Youth and Community Care<sup>60</sup> or who is a paid employee of an entity whose principal function is the delivery of services related to intellectual disability is not eligible for appointment.<sup>61</sup> Panel members who have, by reason of their qualifications or personal or professional experience, appropriate knowledge relating to intellectual disability, may be appointed throughout Queensland by the Minister to assist the Council in considering applications for assistance.<sup>62</sup>

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<sup>55</sup> See p 19 of this Report.

<sup>56</sup> Previously the Department of Family Services and Aboriginal and Islander Affairs (until July 1995) and the Department of Family and Community Services (until February 1996).

<sup>57</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 27(2).

<sup>58</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 8(1).

<sup>59</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 8(2).

<sup>60</sup> See note 56 above.

<sup>61</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 8(3).

<sup>62</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 13(1), 13(2).

The Chairperson of the Council may constitute panels of three persons, who may be Council members or panel members or a combination of both,<sup>63</sup> to consider information in support of applications to the Council and to furnish to the Chairperson a report and recommendations for consideration by the Council.<sup>64</sup>

**(d) Factors to be considered in granting assistance**

In deciding whether or not assistance should be granted, the Council considers whether or not the citizen is already being adequately assisted and supported by his or her family or whether, for some other reason, the assistance of the Council is not necessary.<sup>65</sup> Factors to be taken into account by the Council in approving the provision of special assistance include:<sup>66</sup>

- . the individual circumstances of the citizen;
- . the citizen's need for friendly support of the kind usually provided by family and friends;
- . the need to maintain the dignity and self-respect of the citizen by imposing the least restrictions possible;
- . the need to consider the citizen's own wishes so the citizen can exercise as much control as possible over his or her own life;
- . the possibility that the citizen's needs, capabilities and wishes may change over time;
- . the indigenous or ethnic background and cultural background of the citizen;
- . whether the citizen has legal capacity to make informed decisions about his or her health care either unaided or with assistance.

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<sup>63</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 13A(2).

<sup>64</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 13A(3).

<sup>65</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(2).

<sup>66</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(3).

### **(e) Forms of assistance**

If the Council grants an application for assistance, it may approve of assistance and support in relation to health care decisions being given by a relative or by the Legal Friend<sup>67</sup> to a citizen who has legal capacity to make his or her own decisions with such support and assistance.<sup>68</sup> If the citizen does not have legal capacity to make his or her own health care decisions, either alone or with assistance, the Council may authorise the Legal Friend or a legal practitioner to act on the citizen's behalf.<sup>69</sup>

If the Council considers that the citizen is in need of friendly personal support, it may determine that a volunteer friend<sup>70</sup> be appointed to furnish that support to the citizen.<sup>71</sup>

### **(f) Notification to the Public Trustee**

The Council may also, if it is of the opinion that an assisted citizen:

- . is subject or liable to be subjected to undue influence in relation to the management or disposition of any part of the citizen's money or property; or
- . is otherwise in a position that makes it desirable in the interest of the citizen or the citizen's dependants that the citizen's property should be protected

notify the Public Trustee who,<sup>72</sup> unless a committee of the estate has been appointed for the person,<sup>73</sup> then has immediate authority to manage the person's money and property.<sup>74</sup>

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<sup>67</sup> See p 19 of this Report.

<sup>68</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(4)(a).

<sup>69</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(4)b).

<sup>70</sup> See p 20 of this Report.

<sup>71</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(4)(c).

<sup>72</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 32(1).

<sup>73</sup> See p 7 of this Report.

<sup>74</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 32(2).



If obtaining the Council's approval would cause an unreasonable delay the Legal Friend,<sup>75</sup> with the prior approval of the Chairperson of the Council, may confer authority on the Public Trustee to manage the affairs of an intellectually disabled citizen.<sup>76</sup> The Legal Friend must then bring an application to the Council for the granting of special assistance to the citizen.<sup>77</sup>

**(g) Termination of management by the Public Trustee**

The Public Trustee may notify the Chairperson of the Council that adequate arrangements already exist for the management of the affairs of an assisted citizen and that it is unnecessary for the Public Trustee to be given authority to manage the citizen's affairs. The Public Trustee then ceases to manage the affairs of the assisted citizen.<sup>78</sup>

The Public Trustee's authority to manage the affairs of an assisted citizen is also terminated if:<sup>79</sup>

- . the Council notifies the Public Trustee that an assisted citizen is capable of managing his or her own affairs or that adequate alternative arrangements exist;
- . a protection order is made or a certificate of disability filed under the *Public Trustee Act 1978 (Qld)*;<sup>80</sup>
- . a committee of the estate is appointed by the Supreme Court under the *Mental Health Act 1974 (Qld)*;<sup>81</sup>
- . the Supreme Court makes an order to that effect; or
- . the Public Trustee receives notice in writing that the citizen has died.

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<sup>75</sup> See p 19 of this Report.

<sup>76</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 32(1A).

<sup>77</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 32(1B).

<sup>78</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 32(3).

<sup>79</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 34.

<sup>80</sup> See pp 9-12 of this Report.

<sup>81</sup> See p 7 of this Report.

### (h) Review

An assisted citizen, an adult relative of an assisted citizen or any other adult with a proper interest in the well-being of an assisted citizen may apply to the Council for a review of the kind and extent of the special assistance being provided to the citizen under this Act.<sup>82</sup> An application for review may also be made by a police officer, the Legal Friend<sup>83</sup> or any other officer of the Department of Families, Youth and Community Care<sup>84</sup> who considers that it would be in the interests of the well-being of the citizen for the kind and extent of assistance being provided to the citizen to be reviewed.<sup>85</sup>

The Council must review the kind and extent of assistance provided to every assisted citizen at least once in the first five years after the person becomes an assisted citizen, and then at least once every five years after the date of the last review.<sup>86</sup>

In reviewing the kind and extent of assistance provided to an assisted citizen, the Council takes into consideration the factors relevant to the determination of an original application.<sup>87</sup> If the Council is satisfied that sufficient support and assistance is being provided to the citizen by relatives of the citizen or that the assistance provided for by the Act is not necessary, the Council must terminate the assistance being provided.<sup>88</sup> If the Council approves the continuation of the provision of special assistance, it may continue or vary the kind and extent of assistance provided to an assisted citizen as the circumstances require.<sup>89</sup>

### (i) Appeal

The Act also provides for an appeal to the Supreme Court by an intellectually disabled citizen, an assisted citizen or other person who is aggrieved by a decision

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<sup>82</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 27(3).

<sup>83</sup> See p 19 of this Report.

<sup>84</sup> See note 56 above.

<sup>85</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 27(4).

<sup>86</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 28.

<sup>87</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(1). See p 15 of this Report.

<sup>88</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 31A(2)(a).

<sup>89</sup> *Intellectually Disabled Citizens Council 1985 (Qld)* s 31A(4)(d).

of the Council to provide, terminate, vary or refuse assistance under the Act.<sup>90</sup> An appeal by an intellectually disabled citizen or by an assisted citizen may be brought on the citizen's behalf by the Legal Friend.<sup>91</sup>

### (j) The Legal Friend

The Legal Friend is a barrister or solicitor appointed to perform certain functions under the Act.<sup>92</sup>

The functions of the Legal Friend include:<sup>93</sup>

- . to obtain or provide for an assisted citizen information with respect to the citizen's legal rights and legal procedures and specialised services that are available to give the citizen assistance;
- . where the Legal Friend is satisfied that an assisted citizen cannot instruct a solicitor, to instruct a solicitor to act for or on behalf of the citizen;
- . to liaise with Government departments and other organisations or bodies on behalf of an assisted citizen.

In performing any of these functions the Legal Friend must try to carry out the wishes of the assisted citizen as expressed to the Legal Friend. Where the citizen is unable to express his or her wishes, the Legal Friend must act as the Legal Friend considers the citizen would wish to act if the citizen were able to express his or her wishes.<sup>94</sup>

The Legal Friend may also be authorised by the Council to consent, on behalf of an assisted citizen, to any medical, dental, surgical or other professional treatment or care being carried out on or provided to the citizen for the citizen's benefit.<sup>95</sup> However, if a committee of the person of an assisted citizen has been appointed under the *Mental Health Act*,<sup>96</sup> the Legal Friend may not consent to treatment for

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<sup>90</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 43(1).

<sup>91</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 43(2).

<sup>92</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 4.

<sup>93</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(1).

<sup>94</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(2).

<sup>95</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(3).

<sup>96</sup> See p 8 of this Report.

the assisted citizen without the prior approval of the committee.<sup>97</sup> Before deciding whether or not to consent to treatment for an assisted citizen, the Legal Friend must take reasonable steps to:<sup>98</sup>

- . consult with relatives of the assisted citizen who are providing ongoing care for the citizen and give due consideration to any views expressed by the relatives; and
- . be as fully informed as possible on matters requiring consent and on available options by consulting with appropriate professional persons, with persons providing ongoing care to the assisted person and with relatives of the assisted citizen or other persons who appear to the Legal Friend to have a proper interest in the well-being of the assisted citizen.

The Legal Friend must also ensure that the assisted citizen is informed as fully as possible, consistently with the citizen's ability to understand the information, on matters requiring consent and on available options.<sup>99</sup> In giving consent, the Legal Friend must ensure that, as far as possible, the consent is for the least restrictive option available, after taking into account the health, well-being and expressed wishes of the assisted citizen.<sup>100</sup>

If obtaining the Council's approval would cause unreasonable delay, the Legal Friend may, without obtaining such approval but with the prior approval of the Chairperson of the Council, consent on behalf of an intellectually disabled citizen to such essential treatment as is necessary to alleviate or prevent significant illness or suffering or to preserve the citizen's life. The Legal Friend must then bring an application to the Council as soon as possible for the provision of special assistance to the citizen.<sup>101</sup>

### **(k) Volunteer Friends Program**

The Act provides for the establishment of a Volunteer Friends Program to provide to assisted citizens friendly personal support<sup>102</sup> in the citizens' activities.<sup>103</sup>

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<sup>97</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(4).

<sup>98</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(5).

<sup>99</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(5)(c).

<sup>100</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(5A).

<sup>101</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(9), 26(9A).

<sup>102</sup> The support may take various forms, depending on the needs of the citizen. For example, a volunteer friend may provide companionship, take an assisted citizen on outings or give assistance with shopping or correspondence.

Where the Council, after hearing an application for assistance under the Act, determines that the person concerned would benefit from such support the chief executive of the Department of Families, Youth and Community Care<sup>104</sup> must endeavour to appoint a volunteer friend for the person.<sup>105</sup>

As the name implies, volunteer friends are not entitled to be paid for the support they give to assisted citizens.<sup>106</sup>

A volunteer friend does not provide counselling or professional advice to an assisted citizen, or have legal authority to make any decisions for the citizen.<sup>107</sup> The role of a volunteer friend is to try to carry out the assisted citizen's wishes as the citizen has expressed them to the volunteer friend or, where the assisted citizen is unable to express his or her wishes, to act with regard to the social and personal interests of the citizen in such a manner as the volunteer friend considers the citizen would wish to act if the citizen were able to express his or her wishes.<sup>108</sup>

#### 4. PARENS PATRIAE JURISDICTION OF THE SUPREME COURT

In addition to the statutory mechanisms for determining whether a substitute decision-maker should be appointed for a person with a decision-making disability, the Supreme Court has a power, known as the *parens patriae* jurisdiction, to appoint decision-makers for people made vulnerable by decision-making disability. This jurisdiction has been described as part of the Court's wider inherent jurisdiction.<sup>109</sup>

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<sup>103</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 35.

<sup>104</sup> See note 56 above.

<sup>105</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 37(1).

<sup>106</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 37(3).

<sup>107</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 37(5).

<sup>108</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 37(4).

<sup>109</sup> See, for example, *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 at 325 and *Carseldine v The Director of the Department of Children's Services* (1974) 133 CLR 345 per Barwick CJ at 348 and per Mason J at 363. The inherent jurisdiction of a court is the power which a court has simply because it is a court of a particular description: *The Queen v Forbes; Ex parte Bevan* (1972) 127 CLR 1 per Menzies J at 7. For a general discussion of the concept of a court's inherent jurisdiction see K Mason QC, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449.

The *parens patriae* jurisdiction is based on the need to protect those who lack the capacity to protect themselves. It is derived from the responsibility of the monarch, under early English law, to protect the welfare and property of people whose mental illness or intellectual disability made it impossible for them to look after themselves.<sup>110</sup> By the middle of the seventeenth century, this protective role had passed to the Court of Chancery. It was later extended to include people who, as a result of illness, accident or old age, were unable to make decisions about their property and personal welfare.<sup>111</sup>

When the Supreme Court of Queensland was established it was given the powers held by the Court of Chancery at that time.<sup>112</sup> These powers included the protective power to appoint a decision-maker for a person who was unable to adequately safeguard his or her own interests.

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<sup>110</sup> *Statute de Praerogativa Regis*, 17 Edward II.

<sup>111</sup> *Ridgeway v Darwin* (1802) 8 Ves Jun 65, 32 ER 275; *Ex parte Cranmer* (1806) 12 Ves Jun 445, 33 ER 168.

<sup>112</sup> *Supreme Court Act 1867 (Qld)* s 22.

# CHAPTER 3

## THE NEED FOR REFORM

### 1. INTRODUCTION

The Commission believes that the law must provide a simple and inexpensive way of meeting the decision-making needs of all people with a decision-making disability. It is also convinced, after detailed and lengthy research and consultation, that the legislation outlined in the previous chapter fails to achieve this purpose.

The *Mental Health Act* and the *Public Trustee Act* reflect an outdated, paternalistic approach to people with a decision-making disability and give little recognition to their right to participate to the greatest possible extent in the decisions which affect their lives. Even the *Intellectually Disabled Citizens Act*, which at the time of its enactment in 1985 contained a number of innovative features, has been overtaken by legislative developments in other Australian jurisdictions and overseas. In saying this, the Commission wishes to emphasise that its concern is with the state of the law and not with the way in which the law is administered or the people who administer it.

The Commission's consultations have also shown that, amongst people affected by the current law, there is widespread dissatisfaction with the situation. Many people feel that, rather than helping them overcome the legal difficulties which decision-making disability can create, the system serves only to place unnecessary obstacles in their way.

In the view of the Commission, the existing legislative framework is gravely inadequate, and cannot be satisfactorily remedied by piece-meal amendments to the present laws. An entirely new approach is required.

The overwhelming majority of the submissions received by the Commission in response to the Commission's Draft Report supported the Commission's call for the mechanisms set up under the *Mental Health Act*, the *Public Trustee Act* and the *Intellectually Disabled Citizens Act* to be replaced by a comprehensive model.

### 2. PROBLEMS WITH THE EXISTING LAW

The major problems which the Commission has identified with the existing law are described below.

**(a) Lack of principle**

It is important for legislation to recognise that people with a decision-making disability, like other members of the community, have certain fundamental human rights. For people with a decision-making disability those rights include the right to the greatest possible degree of autonomy and, equally importantly, the right to adequate and appropriate decision-making assistance when it is required.

The United Nations General Assembly has formulated a number of statements on the rights of people with disabilities. It has declared that all disabled persons have an inherent right to respect for their human dignity<sup>113</sup> and are entitled to measures to become as self-reliant as possible.<sup>114</sup>

The General Assembly has also stated that a person with an intellectual disability has, to the maximum degree of feasibility, the same rights as other human beings;<sup>115</sup> that where, because of the extent of a disability, a person is unable to exercise all of those rights in a meaningful way or it becomes necessary to restrict or deny all or some of those rights, the procedure used for that restriction or denial should contain proper legal safeguards against abuse and be subject to review and to the right of appeal to higher legal authority;<sup>116</sup> that a person with an intellectual disability should live in circumstances as close as possible to normal and participate in different forms of community life;<sup>117</sup> and that he or she has a right to a qualified guardian when this is required to protect his or her well-being and interests.<sup>118</sup>

In its statement of principles concerning the rights of persons with mental illness, the General Assembly declared that all persons with a mental illness have the right to be treated with humanity and respect for the inherent dignity of the human person, and to exercise all civil, political, economic, social and cultural rights recognised by the United Nations; that any decision that, because of mental illness, a person lacks legal capacity and needs another person appointed to act on his or her behalf, should be made only after a fair hearing by an independent and impartial tribunal; that such decisions should be reviewed at reasonable intervals and be subject to the right of appeal to a higher legal authority; and that where a

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<sup>113</sup> *Declaration on the Rights of Disabled Persons*, Article 3.

<sup>114</sup> *Declaration on the Rights of Disabled Persons*, Article 5.

<sup>115</sup> *Declaration on the Rights of Mentally Retarded Persons*, Article 1.

<sup>116</sup> *Declaration on the Rights of Disabled Persons*, Article 4; *Declaration on the Rights of Mentally Retarded Persons*, Article 7.

<sup>117</sup> *Declaration on the Rights of Mentally Retarded Persons*, Article 4.

<sup>118</sup> *Declaration on the Rights of Mentally Retarded Persons*, Article 5.



person with a mental illness is unable to manage his or her affairs, his or her interests should be protected by such measures as are necessary and appropriate.<sup>119</sup>

Many of the existing provisions do not meet these internationally recognised standards. For example, in some situations a decision-maker may be appointed without the safeguard of an impartial hearing by an independent body. Review mechanisms are either non-existent or inadequate. There is insufficient provision for substitute decision-makers to be required to respect the rights of people with a decision-making disability.

### **(b) Complexity**

Each of the three Acts explained in Chapter 2 of this Report specifies different criteria and procedures for the appointment of a substitute decision-maker.

This fragmented approach means that people are treated differently depending on the reason for their decision-making disability, even though the same problem exists - that is, lack of capacity to make decisions. It also means, because there are some overlaps between the Acts, that people with the same kind of decision-making disability may be treated differently according to which law is used. Uncertainty, inconsistency and injustice may result and may cause unnecessary delay, expense and anxiety.

The categorisation in the existing legislation causes problems for people who have dual or multiple disabilities. There are also some people with a decision-making disability who have difficulty in obtaining the assistance that they require.

Queensland is the only State or Territory in Australia which does not have a comprehensive legislative scheme to provide decision-making assistance for all people with a decision-making disability, regardless of the cause of the disability.

### **(c) Limited choice of decision-maker**

Most of the present rules concentrate power to make decisions for a person with a decision-making disability who lacks the capacity to make those decisions on his or her own behalf in the hands of a public officer.<sup>120</sup>

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<sup>119</sup> *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, Principle 1.

<sup>120</sup> For example the Public Trustee and the Legal Friend. See Chapter 2 of this Report.

The Commission acknowledges that there are situations in which it may be more appropriate for a decision to be made by an independent third party. However, there are also many situations where such outside intervention is unnecessary.

The inflexibility of the present system causes considerable resentment and, in some cases, hardship, amongst families and support networks of people with a decision-making disability. In addition, it diverts scarce resources from areas of greater need.

#### **(d) Decision-making powers**

The existing legislation not only provides little flexibility in the choice of decision-maker, but also offers little scope as to the extent of the powers which may be given to a decision-maker.

Because the range of decisions involved in everyday living varies so greatly in scope and complexity, and because different decisions require different levels of understanding, a person's decision-making capacity - and consequent need for assistance - may vary according to the difficulty of the particular decision. A person's capacity to make the same decision may also vary over time if there is a change in the person's level of understanding.

As a result of the existing lack of flexibility in the powers which can be given to a decision-maker, the authority which is conferred is often far wider than is needed to meet the needs of the actual situation.

In addition, the emphasis in the existing legislation is largely on protecting the property of a person with a decision-making disability. Insufficient attention has been paid to the need to facilitate the making of legally effective decisions about the person's well-being.

#### **(e) Unsuitability of existing procedures**

Many of the existing procedures require an application to be made to the Supreme Court. This is intended to ensure that the rights of the person who is the subject of the application are protected against arbitrary restriction. However, to a large degree, the potential advantage is negated by other factors.

The expense of making a Supreme Court application is often financially beyond the means of a person with a decision-making disability and his or her family or close friends. In addition, people may feel alienated and intimidated by the traditional courtroom atmosphere and the legal culture of adversarial proceedings, and the judge may have little expertise, experience or understanding of the needs of a person with a decision-making disability.

**(f) Administrative inefficiency**

The *Mental Health Act*, the *Public Trustee Act* and the *Intellectually Disabled Citizens Act* are all administered by different government departments.<sup>121</sup> This is inefficient and wasteful of resources and can result in the implementation of differing policy considerations.

### **3. THE COMMISSION'S RECOMMENDATIONS**

In this Report the Commission puts forward its recommendations for reform.

It advocates the adoption of a comprehensive legislative scheme to apply to all people who, because of a decision-making disability, need assistance to make their own decisions or a substitute decision-maker to make decisions on their behalf.

Central to the Commission's recommendations is the establishment of an independent tribunal to provide an accessible, affordable and simple, but sufficiently flexible, way of establishing whether a person has decision-making capacity and of determining issues surrounding the appointment and powers of decision-makers where it is necessary for another person to have legal authority to make decisions for a person whose decision-making capacity is impaired.

The Commission recognises the need to create a system which, while protecting the interests of people with a decision-making disability, allows for greater involvement in the decision-making process by the individuals concerned, where possible, and by members of their support networks.

The Commission recommends that the scheme be underpinned by a set of legislative principles binding on every person who exercises a power or performs a duty or function under the legislation.<sup>122</sup> The principles give statutory acknowledgment to the right of people with a decision-making disability to respect for their human dignity. They attempt to strike a balance between, on the one hand, the right of people with a decision-making disability to adequate and appropriate support in their decision-making and to protection from neglect, abuse and exploitation when their disability prevents them from looking after their own interests and, on the other, their right to the greatest possible degree of autonomy.

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<sup>121</sup> Queensland Health, the Department of Justice, and the Department of Families, Youth and Community Care.

<sup>122</sup> These principles are consistent with those contained in the *Disability Services Act 1992 (Qld)*.

## CHAPTER 4

### PRINCIPLES

#### 1. INTRODUCTION

In the previous chapter, reference was made to the view of the Commission that a comprehensive scheme providing for decision-making by and for people with a decision-making disability should embody a set of principles governing the operation of the legislation.

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

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

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

#### 2. THE LEGISLATIVE PRINCIPLES

In the Draft Report,<sup>123</sup> the Commission outlined a set of possible legislative principles. These principles were generally consistent with the provisions of the *Disability Services Act 1992 (Qld)*.

Of the submissions received by the Commission in response to the Draft Report, there was strong support for the development of a set of legislative principles to bind all persons who have powers, duties or functions under the provisions of the legislation. One submission, from the Public Guardian in Western Australia, commented:<sup>124</sup>

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<sup>123</sup> Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

<sup>124</sup> Submission No 25.

*The principles of guardianship legislation set the tone and direction for implementation. The QLRC recommended principles are a significant advance on those existing in other pieces of legislation ...*

An advocacy organisation for people with disability in Queensland, while welcoming the Commission's approach, recommended that the principles included in the legislation proposed by the Commission should import the principles embodied in the *Disability Services Act*.<sup>125</sup>

This submission pointed out that, while there is some overlap, there are some principles in the *Disability Services Act* which were not included in the Draft Bill in Chapter 13 of the Draft Report, particularly statements which affirm basic human rights.

The respondent's recommendation was prompted by the decision of the Court of Appeal in *CJC and Public Trustee of Queensland v Queensland Advocacy Incorporated*<sup>126</sup> to the effect that section 9(2) of the *Disability Services Act* does not create private rights that can be enforced by court action. The respondent expressed the view that it is essential for the legislation proposed by the Commission to import those principles so that there is no doubt that they too must be taken into account by anyone exercising authority under it.

The Commission has accepted the respondent's proposal, and has incorporated a number of the principles from the *Disability Services Act* in its final recommendations.<sup>127</sup>

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

#### **(a) Presumption of competence**

Intervention in the decision-making process of a person with a decision-making disability may seriously restrict that person's rights. It may also adversely affect the person's status as a member of his or her community and may, as a result, have a significant impact on the person's dignity and sense of self-esteem.

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<sup>125</sup> Submission No 64.

<sup>126</sup> Unreported (94/0090) CA 8 March 1995.

<sup>127</sup> However, to the extent that some of the principles in the *Disability Services Act* concern a right to the provision of services, they have not been included. In the view of the Commission, the legislative scheme put forward in this Report is not an appropriate vehicle for enshrining a right to access to services.

In the Draft Report, the Commission expressed the view that the existence of a decision-making disability should never be assumed to cause impairment to the person's decision-making capacity. It recommended that its proposed legislation 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.<sup>128</sup> The Commission's recommendation was reflected in clause 32 of the Draft Bill in Chapter 13 of the Draft Report.

The purpose of the Commission's recommendation was to ensure that a person alleging that the decision-making capacity of a person with a decision-making disability is impaired would have to substantiate the claim. The Commission recognises that the presumption of competence must necessarily be a rebuttable one. The question of the standard of proof required to rebut the presumption of competence is addressed in Chapter 7 of this Report.

The submissions which commented on this aspect of the Draft Report endorsed inclusion in the legislation of the principle of presumption of competence. The presumption of competence was seen, in the words of one submission, as "essential to support as much as possible the right of a person with a mental or intellectual disability to live an enjoyable and participatory life in the community they belong to".<sup>129</sup>

**The Commission recommends that the legislation be based on the principle that a person is presumed to have capacity to make his or her own decisions.**

The Commission's recommendation is implemented by clause 23 of the Draft Bill in Volume 2 of this Report.

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<sup>128</sup> At 6.

<sup>129</sup> Submission No 37.

**(b) People with disabilities have the same human rights as others**

The *Disability Services Act* provides that people with disabilities have the same basic human rights as other members of society and should be empowered to exercise those rights.<sup>130</sup> It also provides that people with disabilities have the right to respect for their human worth and dignity as individuals.<sup>131</sup>

In the view of the Commission, these principles were implicit in its recommendations in the Draft Report, although they were not expressly stated. However, the Commission agrees that they should be included to emphasise the fact that all the functions and powers in the proposed legislation must be exercised in accordance with them.

**The Commission recommends that the legislation provide that:**

- . the right to the same basic human rights regardless of a particular person's decision-making capacity must be recognised and taken into account; and**
- . the importance of empowering a person to exercise the person's basic human rights must also be recognised and taken into account; and**
- . a person's right to respect for the person's human worth and dignity as an individual must be recognised and taken into account.**

The Commission's recommendations are implemented by clauses 24 and 25 of the Draft Bill in Volume 2 of this Report.

**(c) Valued social role**

People with a decision-making disability enrich our society by adding to its diversity. They are entitled to be recognised as valued members of society.

<sup>130</sup> *Disability Services Act 1992 (Qld)* s 9(1).

<sup>131</sup> *Disability Services Act 1992 (Qld)* s 9(2)(a).

In the Draft Report, the Commission recommended that legislation should expressly recognise the valued social role of people with a decision-making disability.<sup>132</sup> The Commission's recommendation was reflected in clause 33 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions which commented on the proposed legislative principles welcomed the inclusion of a principle which emphasised valued social roles.

However, one submission, from an advocacy organisation representing people with disability in Queensland, suggested that the wording of the Draft Bill could be improved to better reflect what the respondents believed the principle should be attempting to achieve.<sup>133</sup> According to this submission, the theory of social role valorisation argues that people who are disadvantaged in our society can be accorded a greater value through performing roles that are valued by the rest of society. The submission pointed out that, in fact, many people with a decision-making disability do not perform roles which are generally perceived as valuable. The submission suggested that the legislative expression of the principle should state that people with a decision-making disability should be supported and encouraged to perform roles which are valued in society, as a strategy towards their being accorded greater value within our community.

The Commission has adopted the amendment suggested by the submission.

**The Commission recommends that the legislation provide that:**

- . a person's right to be a valued member of society must be recognised and taken into account; and**
- . the importance of encouraging and supporting a person to perform social roles valued in society must be taken into account.**

The Commission's recommendation is implemented by clause 26 of the Draft Bill in Volume 2 of this Report.

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<sup>132</sup> At 6-7.

<sup>133</sup> Submission No 64.



**(d) Participation in community life**

In the Draft Report, the Commission included in its recommendation about the valued social role of people with a decision-making disability a recommendation that all powers and duties under the proposed legislation should be exercised in such a way as to support to the greatest extent practicable a person with a decision-making disability to live a life in the general community and to participate in activities enjoyed by the general community.<sup>134</sup> This recommendation was reflected in clause 34 of the Draft Bill in Chapter 13 of the Draft Report.

The recommendation was generally endorsed by the submissions received in response to the Draft Report, although some modification was suggested.

One submission commented that, although the rider of practicability is appropriate in some contexts because individual degrees of capacity vary greatly, it should not be used in relation to encouragement and support to participate in community life and activities.<sup>135</sup> This submission argued that participation in community life and activities is of equal importance to all adults, regardless of their degree of decision-making capacity. It recommended that the words "as fully as practicable" should be deleted from clause 34.<sup>136</sup> The Commission accepts this recommendation.

**The Commission recommends that the legislation provide that the importance of encouraging and supporting a person to live a life in the general community and to take part in activities enjoyed by the general community must be taken into account.**

The Commission's recommendation is implemented by clause 27 of the Draft Bill in Volume 2 of this Report.

**(e) Encouragement of self-reliance**

People with a decision-making disability should be encouraged to develop and achieve their maximum potential and to become as self-reliant as it is reasonably possible for them to be in the circumstances of each particular case. However, the

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<sup>134</sup> At 7.

<sup>135</sup> Submission No 64.

<sup>136</sup> The *Disability Services Act 1992 (Qld)* provides, in s 11, that "Programs and services should be designed and implemented so that their focus is on developing the individual and on enhancing the individual's opportunity to establish a quality life".

goal should not be to achieve maximum self-reliance at all costs. The emotional well-being, physical safety or financial security of a person with a decision-making disability should not be put at risk by emphasis on self-reliance without adequate support.

In the Draft Report, the Commission recommended that the legislative principles should recognise the importance of encouraging a person with a decision-making disability to become as capable as is reasonably possible, in the circumstances of the particular case, of making his or her own decisions.<sup>137</sup> This recommendation was reflected in clause 35 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions which commented on this aspect of the Draft Report supported the Commission's recommendation. In the Commission's final recommendation, consistently with the principles set out in the *Disability Services Act*,<sup>138</sup> the words "physical, social, emotional and intellectual" have been used to describe a person's potential.

**The Commission recommends that the legislation provide that the importance of encouraging and supporting a person to achieve the person's maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable must be taken into account.**

The Commission's recommendation is implemented by clause 28 of the Draft Bill in Volume 2 of this Report.

**(f) Maximum participation and minimal limitations**

All adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection provided that they do not harm others and that they are capable of making decisions about such matters.

If a person has a decision-making disability which affects the person's capacity to make legally effective decisions about his or her personal welfare and financial management, intervention should take the form of the least intrusive of the available alternatives, consistent with the person's care and protection.

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<sup>137</sup> At 8.

<sup>138</sup> *Disability Services Act 1992 (Qld)* s 9(2)(b).

In the Draft Report, the Commission expressed the view that intervention should be on an "as needs" basis only; that formal intervention should occur only when informal support is insufficient; and that the views of a person with a decision-making disability should, wherever possible, be sought and taken into account in determining the need for formal intervention and in making decisions on behalf of the person.<sup>139</sup>

These views were reflected in clause 36 of the Draft Bill in Chapter 13 of the Draft Report which provided in part:

*36.(1) The importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.*

*(2) This means, for example, that, to the greatest extent practicable -*

*(a) the adult's views and wishes are to be sought and taken into account;*

The Commission recognised that in situations where there is a life history of personal choice on which to draw, the least restrictive method of making decisions for a person with a decision-making disability would be to make them in the way that the person would have done if he or she had been able to do so. Accordingly, the Commission recommended 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 the person's decision-making capacity were not impaired, any determination or decision made for or about the person must take the person's wishes into account.<sup>140</sup>

This recommendation was reflected in clause 36(2)(b) of the Draft Bill in Chapter 13 of the Draft Report which provided:

*if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be - a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes;*

However, the Commission acknowledged that, because of its reliance on a known set of individual values, the so-called "substituted judgment" approach would not be appropriate in all situations. It would be of little benefit where the nature or extent of a person's decision-making disability prevents formulation of preferences

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<sup>139</sup> At 8.

<sup>140</sup> At 9.

on which decisions can be based - for example, in the case of a person with a severe intellectual disability which the person has had since birth or early childhood, or of a person who suffers traumatic brain damage before his or her value system has been sufficiently established to provide a decision-making basis for the rest of the person's life.

The Commission also implicitly recognised that, as one submission pointed out, the "least restrictive alternative" does not always equate to the best and most appropriate way, and should not be interpreted as "the cheapest (most cost-effective) alternative" which may fall short of dealing with the person's needs.<sup>141</sup>

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

This recommendation was reflected in clause 36(2)(c) of the Draft Bill in Chapter 13 of the Draft Report which provided:

*a person or other entity in performing a function or exercising a power under this Act must do so in the way that is least restrictive of the adult's rights but consistent with the adult's proper care and protection.*

While the submissions which addressed this issue were generally very supportive of the Commission's recommendations, one submission queried whether it was the intention of the Commission that the overriding safeguard that decisions should be made in a way consistent with the person's proper care and protection applied in all cases or only in situations where it is not possible to ascertain the likely wishes of the person with impaired decision-making capacity.<sup>142</sup> This submission expressed the view that, wherever possible, a person's views and wishes should be taken into account but that, in all cases, the principle of least restrictive alternative should be followed provided that it is consistent with the person's proper care and protection. It proposed that the wording of clause 36 of the Draft Bill should be changed to express that position more clearly. The Commission has adopted this proposal.

The Commission has also included, consistently with the *Disability Services Act*, express recognition of a person's right to participate, to the greatest extent practicable, in decisions affecting the person's life,<sup>143</sup> and of a person's right to

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<sup>141</sup> Submission No 76.

<sup>142</sup> Submission No 64. This submission noted the slight variation in wording between the recommendation in paragraph 2.2.21 of the Draft Report and the corresponding paragraph on page ii of the summary of recommendations.

<sup>143</sup> *Disability Services Act 1992 (Qld)* s 9(2)(d).

necessary support and access to information to enable the person to participate in those decisions.<sup>144</sup>

**The Commission recommends that the legislation provide that:**

- . a person's right to participate, to the greatest extent practicable, in decisions affecting the person's life must be recognised and taken into account;
- . the importance of preserving, to the greatest extent practicable, a person's right to make his or her own decisions must be taken into account;
- . a person must be given support and access to information to enable the person to participate in decisions that affect the person's life;
- . to the greatest extent practicable, the views and wishes of a person for whom a decision is being made must be sought and taken into account;
- . if, from a person's previous actions, it is reasonably practicable to work out what a person's views and wishes would be, a person or other entity performing a function or exercising a power under the legislation must take into account what the person or other entity considers would be the person's views and wishes;
- . a person or other entity in performing a function or exercising a power under the legislation must:
  - . act in the way that is least restrictive of the person's rights; and
  - . act in a way that is consistent with the person's proper care and protection.

The Commission's recommendation is implemented by clause 29 of the Draft Bill in Volume 2 of this Report.

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<sup>144</sup> *Disability Services Act 1992 (Qld)* s 9(2)(e).

### **(g) Recognition of existing relationships**

Decisions made about or on behalf of a person with a decision-making disability may impact significantly on the lives of people who are in an existing supportive relationship with that person.

In the Draft Report, the Commission recommended that the legislative principles should require that the importance of maintaining a person's existing supportive relationships<sup>145</sup> be taken into account.<sup>146</sup> This recommendation was reflected in clause 37 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report endorsed the inclusion of this principle.

**The Commission recommends that the legislation provide that the importance of maintaining a person's existing supportive relationships be taken into account.**

This recommendation is implemented by clause 30 of the Draft Bill in Volume 2 of this Report.

### **(h) Recognition of background and beliefs**

Contemporary Australia is a multi-cultural society. As well as the indigenous Aboriginal and Islander communities, there are many different ethnic groups which have been formed as a result of immigration from other countries.

In the Draft Report, the Commission recognised that people from different ethnic, cultural and religious backgrounds may employ different value bases in making decisions and may have, within their own traditions, ways of overcoming problems caused by the impaired decision-making capacity of one of their members. It acknowledged that recognition should be given to systems of support which

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<sup>145</sup> S 4(e) of the *Guardianship Act 1987 (NSW)* imposes a duty to recognise the importance of preserving family relationships. The Commission used the term "existing supportive relationship" in preference to "family relationship" in view of the variety of extended family relationships and de facto partnerships which exist in contemporary society.

<sup>146</sup> At 10. This recommendation is consistent with ss 9(2)(c) 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 the demands on the families of people with disabilities.

operate in ethnic or cultural communities and recommended that, if formal intervention became necessary, decisions made about or for a person with a decision-making disability should take into account the importance of maintaining the cultural and linguistic environments of that person, and the importance of maintaining the religious beliefs, if any, held by the person.<sup>147</sup> This recommendation was reflected in clause 38 of the Draft Bill in Chapter 13 of the Draft Report.<sup>148</sup>

Among the submissions which addressed this issue there was strong support for the Commission's recommendation. One submission commented that it was "a positive step to respect, understand and support the person's cultural and linguistic environment, values and beliefs".<sup>149</sup>

However, there were two submissions which qualified their support for the Commission's recommendation.

An Aboriginal Land Council commented that the Commission's recommendation did not specifically refer to Aboriginal people. The Commission's intention, correctly identified in the submission, was that Aboriginal people would be included in the general recommendation and considered in the same way as other ethnic minorities in Australia. However, the submission argued that:<sup>150</sup>

*Aboriginal people in Australia are a special case and warrant some special attention as the original indigenous population of the country, and should be treated differently from other minority groups.*

The Commission acknowledges the force of the Aboriginal community's claim for recognition as the original inhabitants of the country. Because of this claim, and because of the requirement that Queensland legislation have "sufficient regard to Aboriginal tradition and Island custom",<sup>151</sup> it is the view of the Commission that the proposed legislative principles should refer specifically to the culture and beliefs of the Aboriginal and Islander peoples.

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<sup>147</sup> At 10-11.

<sup>148</sup> The recommendation is consistent with s 9(4) of the *Disability Services Act 1992 (Qld)* which states that services should be provided in a way "that is appropriate taking into account the disability and the person's cultural background".

<sup>149</sup> Submission No 37.

<sup>150</sup> Submission No 60.

<sup>151</sup> *Legislative Standards Act 1992 (Qld)* s 4(3) (j).

Another submission, from the Legal Friend, commented on the difficulties in ascertaining, through third party evidence, what a person's religious beliefs may be. It stated that it is virtually impossible to establish the person's depth of conviction, whether a person has embraced the entirety of a faith or only parts, and whether the person, in a moment of crisis, may have changed his or her mind. The respondent expressed concern that attempts to implement a person's wishes based on the perceptions of others may in fact result in the reverse occurring.<sup>152</sup>

The Commission is mindful that religious beliefs are essentially subjective in nature and may not, in some situations, be easy to establish with any degree of certainty. On the other hand, there are people with long and deeply held convictions who are entitled to have their beliefs respected. The Commission's recommendation that a person's religious beliefs be taken into account is intended to ensure that a person's values and beliefs can be recognised, but balanced against other relevant factors.

**The Commission recommends that the legislation provide that:**

- . the importance of maintaining a person's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account; and**
- . in particular, the importance of maintaining the cultural and linguistic environment and values of a person who is a member of an Aboriginal or Islander community should be taken into account.**

The Commission's recommendation is implemented by clause 31 of the Draft Bill in Volume 2 of this Report.

**(i) Recognition of characteristics and needs**

People with a decision-making disability are entitled to be recognised as individuals with particular characteristics and needs. Decisions made about or for a person with a decision-making disability should take account of the personal circumstances of that person.

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<sup>152</sup> Submission No 76.



In the Draft Report, the Commission recommended that the legislative principles should require that decisions made for or about a person with a decision-making disability should be appropriate to the person's characteristics and needs.<sup>153</sup> This recommendation was reflected in clause 39 of the Draft Bill in Chapter 13 of the Draft Report.

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

**The Commission recommends that the legislation provide that assistance given to a person to make a decision and a decision made for or about a person should be appropriate to the person's characteristics and needs.**

This recommendation is implemented by clause 32 of the Draft Bill in Volume 2 of this Report.

**(j) Community responsibility**

The Commission believes that the rights and welfare of people with a decision-making disability are the responsibility of every member of the community, and that all members of society have a moral duty to respect the need of people with a decision-making disability to be valued as individuals and to be effectively included in the community.

In the Draft Report, the Commission recommended that, although legislation could not of itself ensure that people with a decision-making disability are accorded the respect that they deserve, the legislation should nevertheless include a statement encouraging community application and promotion of the principles.<sup>154</sup> This recommendation was reflected in clause 31 of the Draft Bill in Chapter 13 of the Draft Report.

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

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<sup>153</sup> At 11.

<sup>154</sup> At 12.

**The Commission recommends that the legislation provide that the community is encouraged to apply and promote the legislative principles.**

This recommendation is implemented by clause 22 of the Draft Bill in Volume 2 of this Report.

### **(k) Confidentiality**

Decision-making about and for a person whose decision-making capacity is impaired often involves discussion of sensitive and intimate details about the person concerned.

One submission, from a group of relatives and family carers of people with schizophrenia, strongly argued that the legislative principles should uphold the person's right to confidentiality and should require that functions performed or powers exercised under the legislation should be performed or exercised in such a way as to preserve that right.<sup>155</sup>

The Draft Report made certain substantive recommendations in relation to the privacy of people with a decision-making disability. It recommended that, to preserve the privacy and dignity of a person with a decision-making disability who is the subject of an application to the tribunal proposed by the Commission, the tribunal should have power to conduct closed proceedings.<sup>156</sup> It also recommended that past and present members and staff of the tribunal be required to observe a duty of confidentiality concerning information about a person involved in a tribunal hearing.<sup>157</sup> Clause 260 of the Draft Bill in Chapter 13 of the Draft Report extended this requirement of confidentiality to other people involved in the administration of the Act.<sup>158</sup> However, the Draft Report did not specifically include the right to privacy and confidentiality in the principles it recommended.

The Commission accepts the importance of legislative recognition of privacy considerations.

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<sup>155</sup> Submission No 33.

<sup>156</sup> At 70.

<sup>157</sup> At 58-60.

<sup>158</sup> See pp 247-251 and 274-277 of this Report for the Commission's final recommendations on these issues.

**The Commission recommends that the legislation provide that a person or other entity who performs a function or exercises a power under the legislation must respect the right of a person with a decision-making disability to confidentiality of information about the person.<sup>159</sup>**

The Commission's recommendation is implemented by clause 33 of the Draft Bill in Volume 2 of this Report.

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<sup>159</sup> See United Nations Organisation, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, Principle 6.

# CHAPTER 5

## TYPES OF DECISION

### 1. INTRODUCTION

The types of decisions that a person needs assistance with will vary, depending on the nature and extent of the person's decision-making disability and on the person's individual circumstances.

In the Draft Report,<sup>160</sup> the Commission identified certain categories of decisions for which assistance may be necessary. The Commission's final recommendations concerning the types of decision which should be included in the legislative scheme proposed by the Commission, in the light of the submissions received in response to the Draft Report, are set out below.

### 2. PERSONAL DECISIONS

In the Draft Report, the Commission considered the types of decisions which may need to be made with respect to the personal welfare of a person with a decision-making disability.<sup>161</sup>

The types of decisions identified by the Commission were:

- . where the person is going to live;<sup>162</sup>
- . who is going to live with the person;<sup>163</sup>
- . whether the person should work and, if so, the kind and place of work, and the employer;<sup>164</sup>

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<sup>160</sup> Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

<sup>161</sup> At 85-86.

<sup>162</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* s 24(2)(a); *Adult Guardianship Act 1988 (NT)* s 17(2)(a); *Guardianship and Administration Act 1990 (WA)* s 45(2)(a); *Guardianship and Management of Property Act 1991 (ACT)* s 7(2)(a); *Guardianship and Administration Act 1995 (Tas)* s 25(2)(a).

<sup>163</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* s 24(2)(b); *Adult Guardianship Act 1988 (NT)* s 17(2)(b); *Guardianship and Administration Act 1990 (WA)* s 45(2)(b); *Guardianship and Management of Property Act 1991 (ACT)* s 7(2)(a); *Guardianship and Administration Act 1995 (Tas)* s 25(2)(b).

<sup>164</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* s 24(2)(c); *Adult Guardianship Act 1988 (NT)* s 17(2)(c); *Guardianship and Administration Act 1990 (WA)* s 45(2)(c); *Guardianship and Management of Property Act 1991 (ACT)* s 7(2)(c) and (d); *Guardianship and Administration Act 1995 (Tas)* s 25(2)(c).

what education or training the person will receive.<sup>165</sup>

The Commission noted that legislation in some Canadian provinces<sup>166</sup> includes in personal and lifestyle decisions the authority:

to decide whether the person should apply for any licence or permit; and

to make normal day-to-day decisions on behalf of the person including decisions about diet and dress.

The Commission recommended that these decisions should be included in the legislative scheme proposed by the Commission.<sup>167</sup> The Commission's recommendations were reflected in the definition of "personal decision" in clause 14 of the Draft Bill in Chapter 13 of the Draft Report.

The submissions received by the Commission in response to the Draft Report were generally supportive of the Commission's recommendations. However, a number of submissions commented on the scope of the definition.<sup>168</sup> One submission expressed concern that "provisions such as these could be used to take charge and change the life circumstances of a person during an episode of mental illness".<sup>169</sup> Another warned of the need for caution in relation to the relationship between the power to make certain "personal decisions" as defined by the draft legislation and what is considered to be a decision-making disability.<sup>170</sup>

In the Draft Report, the Commission emphasised that power to make such decisions must be exercised in accordance with the principles of the legislation, and not used as a means of controlling behaviour which is merely unusual or eccentric. The Commission also acknowledged that, in many instances, such matters would be able to be dealt with informally, and there would be no need for a decision-maker to be granted formal authority to make decisions about them. However, the Commission envisaged that situations could arise - for example, in

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<sup>165</sup> See for example *Guardianship and Management of Property Act 1991 (ACT)* s 7(2)(b).

<sup>166</sup> See for example Alberta (*Dependent Adults Act*, R.S.A. 1980, c. D-32), Saskatchewan (*The Dependent Adults Act*, S.S. 1989, c. D-25.1) and British Columbia (*Adult Guardianship Act 1993* s 19).

<sup>167</sup> At 86.

<sup>168</sup> Submissions Nos 25, 52, 53, 63.

<sup>169</sup> Submission No 53.

<sup>170</sup> Submission No 25.

the case of a family dispute - where it would be desirable for one person to have legal authority to have the final say.<sup>171</sup>

On balance, the Commission remains of the view that "personal decisions" should remain broadly defined in the legislative scheme so as to provide for situations where it is necessary for a decision-maker to have authority which includes the matters set out above.

**The Commission recommends that the legislation provide that the "personal decisions" which a decision-maker may be authorised to make include:**

- . where the person is going to live;**
- . who is going to live with the person;**
- . whether the person should work and, if so, the kind and place of work, and the employer;**
- . what education or training the person will receive;**
- . whether the person should apply for any licence or permit; and**
- . normal day-to-day decisions on behalf of the person including, for example, decisions about diet and dress.**

The Commission's recommendation is implemented by Schedule 1, clause 6 of the Draft Bill in Volume 2 of this Report.

### **3. EXCLUDED PERSONAL DECISIONS**

Some decisions are of such a personal nature that, if a person lacks the capacity to make the decision on his or her own behalf, it should not be possible for someone else to make a substituted decision for the person.<sup>172</sup>

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<sup>171</sup> At 86.

<sup>172</sup> Some other decisions - for example, decisions about some medical treatments - may involve such serious issues that their delegation should be subject to particular requirements. See pp 58-69 of this Report. Decisions about medical treatment are discussed in Chapter 10 of this Report.

In the Draft Report, the Commission identified a number of decisions which may be considered too personal to be made by a substitute decision-maker.<sup>173</sup> In the Draft Bill in Chapter 13 of the Draft Report, these decisions were referred to as "excluded personal decisions".<sup>174</sup>

#### (a) Consent to marriage

In order for a marriage to be valid, both parties to the marriage must be capable of understanding the nature and effect of the marriage ceremony.<sup>175</sup> Marriage is the voluntary undertaking between a man and a woman of a lifelong commitment to love and be faithful to each other.<sup>176</sup> In the eyes of the law, this is a relatively simple concept, the understanding of which does not require a high degree of intelligence.<sup>177</sup> Hence, the level of understanding necessary to make a valid marriage is lower than it is for decisions of a more complex nature.

In the Draft Report, the Commission recommended that substituted consent should not be able to be given for the marriage of a person who lacks the capacity to consent on his or her own behalf.<sup>178</sup> The Commission's recommendation was reflected in clause 15(e) 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.

#### (b) Consent to adoption

People with a decision-making disability have, as part of the right to live as normal a life as possible, the right to enjoy sexual relations if they choose to do so. For a woman, sexual activity may result in pregnancy and childbirth.

Unfortunately, a person with a decision-making disability may be vulnerable to sexual exploitation. For a woman, such abuse may also result in pregnancy and childbirth.

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<sup>173</sup> At 64.

<sup>174</sup> Cl 15.

<sup>175</sup> *Marriage Act 1961 (Cth)* ss 23(1)(d)(iii), 23B(1)(d)(iii); *Dunne v Brown* (1982) 60 FLR 212.

<sup>176</sup> *Marriage Act 1961 (Cth)* s 46(1).

<sup>177</sup> *Durham v Durham* (1885) 10 PD 80; *In the Estate of Park* [1953] 2 All ER 1411.

<sup>178</sup> At 64.

The birth of a child to a person with a decision-making disability sometimes gives rise to the question of adoption.

In Queensland, the situation is governed by the *Adoption of Children Act 1964 (Qld)*. An adoption order is not to be made unless consent to the adoption has been given by both the parents of a child if they are married or by the mother if the parents of the child are not married.<sup>179</sup>

For a consent to be valid, the person giving it must have the capacity to understand the nature and effect of the consent. An adoption order ought not to be made if it appears that a person lacks the necessary degree of understanding to give an effective consent.<sup>180</sup> The Children's Court or the Supreme Court may grant an order to dispense with consent if the Court is satisfied that the person is in such a physical or mental condition as not to be capable of properly considering the question of whether consent should be given and that the welfare of the child will be promoted if the order is made. The Court may also take into account any special circumstances that make it desirable that the order be made.<sup>181</sup> There is no provision for the decision to be delegated to any one other than the Court.

In the Draft Report, the Commission recommended that substituted consent should not be able to be given to the adoption of a child of a person who lacks the necessary capacity to consent personally.<sup>182</sup> The Commission's recommendation was reflected in clause 15(d) 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 remains of the view that provisions concerning substituted consent to the adoption of a child of a person who lacks capacity to make the decision should be dealt with in the context of the law relating to adoption.

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<sup>179</sup> *Adoption of Children Act 1964 (Qld)* s 19.

<sup>180</sup> *Adoption of Children Act 1964 (Qld)* s 24(1)(e).

<sup>181</sup> *Adoption of Children Act 1964 (Qld)* s 25(1).

<sup>182</sup> At 64. See also *Protection of Personal and Property Rights Act 1988 (NZ)* s 18(1)(b); *Guardianship and Management of Property Act 1991 (ACT)* s 7(3)(c).



### (c) Voting

In the Draft Report, the Commission recommended that if a person lacks decision-making capacity to vote on his or her own behalf, there should be no authority for another person to cast a substituted vote.<sup>183</sup>

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

The Commission also noted the inadequacy of the existing legislative provisions concerning eligibility to vote.<sup>184</sup> The present test of eligibility is whether, because of unsoundness of mind, a person is incapable of understanding the nature and significance of voting.<sup>185</sup> The Commission expressed the view that the test is inappropriate for two reasons.

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

Second, it is not clear what degree of understanding is required or what issues are involved in the term "nature and significance of voting". It could mean that it is sufficient for the person to understand how to complete a ballot paper. Alternatively, it may be necessary for the person to be able to identify candidates and parties and to understand issues of policy. In the view of the Commission, the second test would place an unfair burden on people with a decision-making disability. Because they may not fully understand the complexities of the electoral system, it may be assumed that they do not have sufficient understanding to exercise their right to vote. However, other members of the community are not placed under such scrutiny and their right to vote is not questioned.

Further, the legislation does not prescribe how decisions about "unsoundness of mind" are to be made or challenged.

The Commission believes that changes to the electoral laws are beyond the scope of the present reference and therefore makes no recommendation in relation to them.

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<sup>183</sup> At 66.

<sup>184</sup> At 65-66.

<sup>185</sup> *Electoral Act 1992 (Qld)* s 64(1)(a)(i); *Referendums Act 1989 (Qld)* s 4.34(1); *Commonwealth Electoral Act 1918 (Cth)* s 93(8)(a).

However, the Commission is of the view that the government should give further consideration to the legislative criteria for eligibility to vote to ensure that they:

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

#### (d) Making a will

In the Draft Report, the Commission raised the question of whether legislation should authorise another person to make a will for a person with impaired decision-making capacity.<sup>186</sup> This question raises wide issues. It presupposes that neither an existing will, if any, nor intestacy rules, nor family provision legislation, can do justice in certain circumstances. An example may be where a person who lacks testamentary capacity has been abandoned by his or her family and it is right that a will should be made in favour of a person who has no rights upon intestacy or under family provision legislation, most probably a person who has cared gratuitously or beyond the call of duty for the person, whether a member of the family or not.

In the United Kingdom and New Zealand, a substitute decision-maker may make a will on behalf of a person who lacks sufficient understanding to make his or her own will.<sup>187</sup> Legislation providing for making a will for a person who lacks testamentary capacity was recently passed in South Australia, but has not yet come into operation.<sup>188</sup> Recommendations for legislation providing a statutory will-making power have been made in Victoria<sup>189</sup> and New South Wales.<sup>190</sup>

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<sup>186</sup> At 200-201.

<sup>187</sup> See for example *Mental Health Act 1983 (UK)* ss 96, 97; *Protection of Personal and Property Rights Act 1988 (NZ)* s 55.

<sup>188</sup> *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996 (SA)*.

<sup>189</sup> Chief Justice's Law Reform Committee, *Wills for Mentally Disordered Persons* (1985); Law Reform Committee, *Reforming the Law of Wills* (1994).

<sup>190</sup> New South Wales Law Reform Commission, Report No 68, *Wills for Persons Lacking Will-Making Capacity* (1992).

However, to allow a substitute will to be made for a person who lacks testamentary capacity may be seen as inconsistent with the policy underlying family provision legislation, which is concerned not with the will which a competent testator might make, but with making adequate provision for the proper maintenance and support of the persons entitled to make application under the legislation. It may be justifiable to do this in the case where the person concerned cannot make a will at all because of incapacity. Nevertheless this question does about upon the possibility of reconsidering the underlying policy of family provision legislation.

The Draft Report did not make any specific recommendation in relation to this issue. Clause 15(a) of the Draft Bill in Chapter 13 of the Draft Report provided that making or revoking the will of a person with impaired decision-making capacity is an "excluded personal decision".

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

The Commission is presently taking a leading role in a comprehensive review of succession law throughout Australia, with a view to achieving uniform legislation. The Commission believes that the question of a statutory power to make a will for a person who lacks testamentary capacity is better dealt with in the wider context of that review.

**(e) Making or revoking an enduring power of attorney or advance health care directive**

An enduring power of attorney is a document which enables an individual to choose the person the individual would want to make decisions on his or her behalf if he or she became unable to decide personally. For a person who has sufficient capacity to make an enduring power of attorney, it is an extremely useful planning tool for the future.<sup>191</sup> An advance health care directive under the legislation proposed by the Commission would allow a person to give instructions about future health care and to nominate a person to make health care decisions if the instructions in the directive are inadequate.<sup>192</sup>

In the Draft Report, the Commission expressed the view that revocation of an enduring power of attorney is an extremely personal decision, and that a substitute decision-maker should not be able to revoke a power made by a person who no longer has the capacity to revoke it personally.<sup>193</sup> The Commission's

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<sup>191</sup> Enduring powers of attorney are discussed in Chapter 6 of this Report.

<sup>192</sup> Advance directives for health care are discussed in Chapter 10 of this Report.

<sup>193</sup> At 112.

recommendation was reflected in clause 15(b) of the Draft Bill in Chapter 13 of the Draft Report.

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

The Commission is of the view that the same argument against enabling a decision-maker to revoke an enduring power of attorney applies also to making an enduring power of attorney and making or revoking an advance directive for health care.

**The Commission recommends that the legislation provide that:**

- . a decision-maker should not be authorised to make an "excluded personal decision";**
- . an "excluded personal decision" for a person whose decision-making capacity is impaired is a decision about one or more of the following -**
  - . making or revoking the person's will;**
  - . making or revoking the person's enduring power of attorney or advance directive;**
  - . exercising the person's right to vote in a local government, State or Commonwealth election or referendum;**
  - . consenting to adoption of a child of the person;**
  - . consenting to the person's marriage.**

The Commission's recommendation is implemented by clauses 34(3), 120(3) and Schedule 1 clause 7 of the Draft Bill in Volume 2 of this Report.

#### 4. HEALTH CARE DECISION

In the Draft Bill in Chapter 13 of the Draft Report, a "health care decision" was generally defined, in clause 16(1), as a decision about a person's health care. "Health care" was defined as:<sup>194</sup>

*any care, treatment, service or procedure -*

- (a) to maintain, diagnose or treat [a person's] physical or mental condition; and*
- (b) carried out by, or under the supervision of, a health care provider.*

"Health care provider" was defined as a person who provides health care in the ordinary course of business or the practice of a profession.<sup>195</sup>

"Health care" did not include:<sup>196</sup>

- the administration of a pharmaceutical drug for the purpose and in accordance with the dosage level recommended in the manufacturer's instructions, being a drug for which a prescription is not required and which is normally self-administered; or
- first aid treatment of the person; or
- a non-intrusive examination made for diagnostic purposes.

In the submissions received by the Commission in response to the Draft Report, there was general acceptance of these definitions.

The definition of "health care decision" did not include a decision about a special consent health care procedure.<sup>197</sup>

The definition of "health care decision" also excluded a decision "to withhold or withdraw health care intended to sustain or prolong" the life of a person with

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<sup>194</sup> Cl 17(1).

<sup>195</sup> S 9, Schedule.

<sup>196</sup> Cl 17(2). See for example *Guardianship Act 1987 (NSW)* s 33(1); *Guardianship and Administration Act 1995 (Tas)* s 3.

<sup>197</sup> Cl 16(1). "Special consent health care decisions" are discussed on pp 58-68 of this Report and in Chapter 10 of this Report.

impaired decision-making capacity who is "terminally ill or in a persistent vegetative state".<sup>198</sup> The reason for this exclusion was the Commission's recognition, in the Draft Report, that the question of withholding or withdrawing such treatment from 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 ethical and moral dilemmas and requires extensive public consultation and debate. It was the view of the Commission that, while issues relating to the right to refuse or terminate life-sustaining treatment need to be addressed, such matters were outside the scope of this reference and that decisions relating to them should remain outside the legislative scheme proposed by the Commission.<sup>199</sup> The result of such an exclusion would be that the legal implications of such treatment would be determined, as they are now, according to the existing civil and criminal law.<sup>200</sup>

The submissions which commented on this issue supported the Commission's approach.

However, there were some questions raised about the definition of a "health care decision".

One respondent commented on the uncertainty attaching to the kind of decision which would constitute withholding health care intended to sustain or prolong life.<sup>201</sup> The respondent noted that, for example, for a patient with a decision-making disability who has advanced cancer, treatment may involve a choice between radical surgery which may extend the person's life but which has a high chance of being unsuccessful, and conservative therapy and palliative care. The respondent suggested that a decision to favour conservative therapy and palliative care rather than painful, invasive surgery which may ultimately prove unsuccessful, could, under the proposed definition, be "withholding treatment intended to prolong life". Such a decision would therefore be beyond the authority of a substitute decision-maker.

This was not the result the Commission intended to achieve. The exclusion was directed to decisions about withholding or withdrawing artificial means of life support for patients for whom there is no real prospect of recovery - decisions about forms of intervention which are sometimes referred to as "prolonging the process of dying".

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<sup>198</sup> Cl 16(2).

<sup>199</sup> At 170. See also Chapter 10 of this Report.

<sup>200</sup> The existing law is discussed on pp 317-321 of this Report.

<sup>201</sup> Submission No 68.

An advocacy organisation for people with disability queried the use of the term "persistent vegetative state". The respondents argued that:<sup>202</sup>

*... 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". Such demeaning and stigmatising language has no place in legislation such as proposed.*

*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 Commission used the term as an accepted medical expression, but acknowledges that it is inappropriate and could cause offence.

The respondents also questioned why the exclusion of decisions about withholding life-sustaining measures was restricted to patients who are terminally ill or in a state of permanent or persistent unconsciousness. They stated:

*We assume that the intention is to exclude all decisions to withdraw or withhold health care treatment intended to sustain or prolong the [person's] life, irrespective of whether a patient is categorised as terminally ill or unconscious on a permanent or persistent basis. If that is so, and in any event in our submission, the definition of "health care decision" should not include this qualification.*

The respondents' concern that treatment aimed at sustaining or prolonging life should not be withheld and that patients should not be allowed to die simply because they have a decision-making disability is a very real one. The Legal Friend also cited requests by "many" parents of profoundly intellectually disabled adults to withhold consent to anti-biotics which may be necessary, for example, to treat chest infections in situations where the question of refusing treatment would not arise if the patient did not have a decision-making disability.<sup>203</sup>

The Commission acknowledges that, if it is only decisions about withholding or withdrawing artificial life-sustaining measures which are excluded from the scheme, there will remain within the scheme considerable scope for substitute decision-makers to refuse treatment on behalf of a person who is unable to make his or her own decision about the matter, including treatment which may be intended to sustain or prolong the person's life.

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<sup>202</sup> Submission No 64.

<sup>203</sup> Submission No 76A.

However, the Commission stresses that its proposed scheme would not authorise refusal of treatment only on the basis that the patient had a decision-making disability. The legislative principles, which form the framework for the scheme, provide that a decision-maker must act in a way which is consistent with the proper care and protection of the person with impaired decision-making capacity.<sup>204</sup> A substitute decision-maker, in making a decision about health care treatment for a person with impaired decision-making capacity, must also comply with the health care principle, which provides that a decision may only be made if it is appropriate to promote and maintain the person's health and well-being".<sup>205</sup>

There are additional safeguards provided in the Commission's scheme by the power of the tribunal proposed by the Commission to remove the authority of a decision-maker who is acting inappropriately, and by the roles of the Adult Guardian and the Public Advocate.<sup>206</sup>

The Legal Friend suggested that the legislation should include a procedure for compulsory notification of a proposal to withhold or withdraw treatment which may sustain or prolong life. The respondent argued that a requirement of notification to the proposed tribunal would allow an independent decision to be made about the issue.<sup>207</sup> However, it is unlikely that a treatment provider who would accede to a request to withhold treatment in a situation where treatment would be given to a competent patient, would comply with such a requirement. Moreover, a compulsory notification requirement may impede effective decision-making in many cases where refusal of treatment is contemplated for entirely legitimate reasons, and may alienate decision-makers and health care providers alike. In that event, the net result of the notification requirement would be counterproductive.

In the view of the Commission, the problem raised is not one that readily lends itself to legislative remedy. For example, even though at present the *Intellectually Disabled Citizens Act* requires that decisions about medical treatment for a person to whom the Act applies be made by the Legal Friend, there is no way of knowing the extent to which family members and health care providers agree to withhold treatment without reference to the Legal Friend.

If, as the Legal Friend contends, there is a practice of denying treatment to a patient with a decision-making disability in circumstances in which the same treatment would be given to a patient who does not have such a disability, enactment of regulatory legislation is unlikely to affect the practice to any significant

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<sup>204</sup> CI 36(2)(c) of the Draft Bill in Chapter 13 of the Draft Report.

<sup>205</sup> See pp 358-359 of this Report.

<sup>206</sup> See Chapter 12 of this Report for an explanation of the roles of the Adult Guardian and the Public Advocate.

<sup>207</sup> Submission No 76A.



degree. The answer is more likely to lie in vigorous advocacy directed towards attitudinal change.

**The Commission recommends that the legislation provide that:**

- . **"health care" is any care, treatment, service or procedure -**
  - (a) **to maintain, diagnose or treat a person's physical or mental condition; and**
  - (b) **carried out by, or under the supervision of, a health care provider;**
- . **"health care" does not include -**
  - (a) **the administration of a pharmaceutical drug if -**
    - (i) **a prescription is not needed to obtain the drug; and**
    - (ii) **the drug is normally self-administered; and**
    - (iii) **the administration is for a recommended purpose and at a recommended dosage level; or**
  - (b) **first aid treatment; or**
  - (c) **a non-intrusive examination made for diagnostic purposes;**
- . **a "health care decision" of or for a person is a decision about health care (other than special consent health care) of the person;**
- . **if a person is terminally ill or in a state of permanent or persistent unconsciousness, a health care decision of or for the person does not include a decision to withhold or withdraw life-sustaining measures;**
- . **"life sustaining measure" means medical treatment that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, and includes assisted ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation;**
- . **the proposed scheme does not affect the common law relating to the withholding or withdrawal of life-sustaining measures.**

The Commission's recommendation is implemented by Schedule 1 clauses 8 and 9 of the Draft Bill in Volume 2 of this Report.

## 5. SPECIAL CONSENT HEALTH CARE DECISIONS

In the Draft Report, the Commission noted that there are some forms of treatment which may require special consent procedures.<sup>208</sup> The reason for special consent requirements is that some forms of treatment are particularly invasive or have particularly serious consequences, so that the result of making a wrong decision may be particularly grave. There are also situations where the decision may involve a conflict of interest or where the emotional involvement of a family member may make it difficult for them to decide objectively.

In the Draft Bill in Chapter 13 of the Draft Report, a decision about certain forms of treatment was referred to as a "special consent health care decision".<sup>209</sup> "Special consent health care" for a person who lacked capacity to make a decision about the health care on his or her own behalf included:<sup>210</sup>

### (a) Removal of tissue for donation

In Queensland, the *Transplantation and Anatomy Act 1979 (Qld)* provides criteria for the removal of tissue from adults who have the capacity to consent to such a procedure.<sup>211</sup> Section 10 of that Act deals with consent to the removal of regenerative tissue. "Regenerative tissue" is defined as tissue that, after injury or removal, is replaced in the body of a living person by natural processes of growth or repair.<sup>212</sup> Section 11 deals with consent to removal of non-regenerative tissue. There are no equivalent provisions in the existing legislation concerning decisions about removal of tissue from adults who do not have the capacity to make their own decision about the matter.<sup>213</sup>

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<sup>208</sup> At 145-146.

<sup>209</sup> Cl 18.

<sup>210</sup> Cl 19.

<sup>211</sup> See also *Transplantation and Anatomy Act 1978 (ACT)*; *Human Tissue Transplant Act 1979 (NT)*; *Human Tissue Act 1982 (Vic)*; *Human Tissue and Transplant Act 1982 (WA)*; *Human Tissue Act 1983 (NSW)*; *Transplantation and Anatomy Act 1983 (SA)*; *Human Tissue Act 1985 (Tas)*.

<sup>212</sup> *Transplantation and Anatomy Act 1979 (Qld)* s 4(1).

<sup>213</sup> See for example *Guardianship and Management of Property Act 1991 (ACT)* ss 4, 70; *Guardianship and Administration Act 1995 (Tas)* ss 3, 39.

In the Draft Report, the Commission expressed the view that similar consent requirements should apply to the removal of both regenerative and non-regenerative tissue for the purpose of donation to another person. It acknowledged that the consequences of the removal of regenerative tissue may be less severe for the donor, since the tissue removed would be capable of regrowth or of repairing itself. However, the Commission argued that, since there would inevitably be some degree of risk for the donor and since the performance of the procedure would be primarily intended to benefit a person other than the donor, removal of regenerative tissue for donation to another person should be subject to the same consent requirements as the removal of non-regenerative tissue.

The Commission recommended that consent to the donation of tissue from a donor who lacks the capacity to give his or her own consent should be a special consent health care decision.<sup>214</sup> The Commission's recommendation was reflected in clause 19(a) 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 support for the Commission's recommendation.

However, three submissions argued that it should not ever be possible for consent to be given to the removal of tissue from a person with impaired decision-making capacity for the purpose of donation to another person.<sup>215</sup>

In the Draft Report, the Commission acknowledged the need for protection of people with impaired decision-making capacity, but considered that the importance to a person's emotional well-being of saving the life of someone who occupies a significant place in the person's relationships should be able to be taken into account. On balance, the Commission remains of the view that a decision about removal of tissue for the purpose of donation to another person should be a special consent health care decision, subject to appropriate legislative safeguards.<sup>216</sup>

## **(b) Sterilisation**

In recent years there has been increasing debate about medical or surgical intervention involving the fertility of people who, because of impaired decision-making capacity, are unable to give their own consent to such intervention. Much of the discussion has centred on decisions concerning interventions for young

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<sup>214</sup> At 149.

<sup>215</sup> Submissions Nos 21, 56, 63.

<sup>216</sup> The appropriate consent mechanism and criteria to be taken into account are discussed in Chapter 10 of this Report.

women with an intellectual disability who lack the capacity to decide for themselves about proposals concerning contraceptive or menstrual management measures. Sterilisation procedures may also be proposed for men with impaired decision-making capacity.

The sexual development of young adults with a decision-making disability may be normal for their chronological age. As a result, a young adult may experience sexual feelings but express them inappropriately or lack an understanding of the possible consequences of a sexual relationship.<sup>217</sup>

A young woman may be distressed by menstruation, and there may be associated emotional changes and management difficulties. In such a situation, parents (who are often the primary carers) and health care professionals may believe that medical or surgical intervention is appropriate and that to prevent intervention may be to deny a lifestyle choice available to other women. They may also believe that intervention will reduce vulnerability to sexual assault.<sup>218</sup>

The Commission believes that, in the overwhelming majority of cases where parents seek a sterilisation procedure, they act with integrity in what they consider to be the best interests of their child. They decide only after extensive medical consultation and give the matter a great deal of thought. They do not make the decision lightly.

There is, however, a growing community awareness about the importance of safeguards against inappropriate use of these forms of intervention, particularly sterilisation procedures, and an increasing concern about the long term health effects of procedures which result in sterilisation.

The Commission is concerned that insufficient information may be available to parents or other carers about other solutions. As a result, it may be difficult for them to make a truly informed choice.<sup>219</sup>

For example, research involving small groups of women with high support needs reports positive outcomes in teaching menstrual management skills to these women.<sup>220</sup> Medical practitioners may not encounter, and therefore may not be

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<sup>217</sup> But see G Carlson, *Sterilising people who have intellectual disabilities: The questions that are not being asked*, a Paper presented at the National Conference on Rights, Ethics and Justice for People with Disabilities, Brisbane, April 1996.

<sup>218</sup> But see G Carlson, note 217 above.

<sup>219</sup> See S Brady, *The Rights of the Child to be Heard*, a Paper presented to the Australian Legal Convention, September 1995.

<sup>220</sup> Wilson et al, *Menstrual Management and Fertility Management for Women Who Have an Intellectual Disability: An Analysis of Australian Policy* (1992).

aware of the existence of, women with high support needs and their families who are managing menstruation and fertility control through non-medical and non-surgical means. Moreover, the training of health care professionals may not reflect the contemporary change of direction in services for people with impaired decision-making capacity away from a medical model towards a more educational approach and a more normalised lifestyle. Some medical practitioners may therefore not have an accurate knowledge of current practices in services to people with an intellectual disability on which to base predictions and advice about menstrual and fertility management.<sup>221</sup>

With access to counselling, more information and practical support, it is possible that different choices may be made.<sup>222</sup> Experience indicates that, if given other options, parents are likely to choose those that are less invasive. For example, in relation to the performance of sterilisation procedures on children under the age of eighteen, a significant proportion of proposed sterilisations were diverted from the Family Court of Queensland between September 1994 and September 1995 as a result of the development of guidelines to promote opportunity for access to developmental services, information, advice, support and referral for families.<sup>223</sup>

In all Australian States and Territories where there is comprehensive legislation dealing with decision-making for people whose decision-making capacity is impaired, authority to consent to sterilisation procedures on adults is restricted.<sup>224</sup> In the view of the Commission it is desirable that its recommendations should be consistent with developments in this area of the law elsewhere in Australia.

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<sup>221</sup> Wilson et al, *Menstrual Management and Fertility Management for Women Who Have an Intellectual Disability: An Analysis of Australian Policy* (1992) 1-13.

<sup>222</sup> In Victoria, the experience of the Office of the Public Advocate has been that "applications for sterilisation usually reflect not a need for sterilisation but a lack of support services .... services such as education programs in menstrual management or human relations, therapist's advice re design of bathrooms, home help services and such like. If these matters are given attention ... then not infrequently the family's perception that their daughter needs a sterilisation is altered." Letter from the Deputy Public Advocate dated 10 September 1993.

<sup>223</sup> S Brady, *Medical Procedure Cases in the Family Court - the Role of Protocols*, a Paper presented at the Second National Conference of the Family Court of Australia, September 1995.

<sup>224</sup> See for example *Guardianship and Administration Board Act 1986 (Vic)* s 37; *Guardianship Act 1987 (NSW)* ss 33(1), 36(1); *Adult Guardianship Act 1988 (NT)* s 21; *Guardianship and Administration Act 1990 (WA)* s 57; *Guardianship and Management of Property Act 1991 (ACT)* ss 4, 70; *Guardianship and Administration Act 1993 (SA)* ss 3, 61; *Guardianship and Administration Act 1995 (Tas)* ss 3, 39. The High Court of Australia has also held, in relation to the performance of sterilisation procedures on minors, that authority to consent is restricted. See *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*). See also *P v P* (1994) 181 CLR 583.

In the Draft Report, the Commission recommended that the performance of a sterilisation procedure on an adult who lacks capacity to consent should be a special consent health care decision.<sup>225</sup> The Commission's recommendation was reflected in clause 19(b) of the Draft Bill in Chapter 13 of the Draft Report.

The majority of the submissions which commented on this issue supported the Commission's approach.<sup>226</sup> They recognised the Commission's recommendation as an important safeguard against unwarranted intervention.<sup>227</sup>

### (c) Termination of pregnancy

If a woman whose decision-making capacity is impaired becomes pregnant, the question may arise as to whether or not the pregnancy should be terminated. Her family and medical advisers may consider that continuing the pregnancy would have a seriously adverse effect on her physical or mental health, that giving birth would be a frightening experience for her, that she would be unable to care for the child or that she would be greatly distressed if the child were taken away from her to be given up for adoption.

In some Australian jurisdictions, special consent provisions apply to termination of pregnancy for a woman who lacks capacity to make her own decision about the matter.<sup>228</sup>

In the Draft Report, the Commission expressed the view that, because of the serious consequences of a termination procedure, similar provisions should be introduced in Queensland. The Commission recommended that consent to a termination of pregnancy for a woman unable to give her own consent because her decision-making capacity is impaired should be a special consent health care decision.<sup>229</sup> The Commission's recommendation was reflected in clause 19(c) of the Draft Bill in Chapter 13 of the Draft Report.

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<sup>225</sup> At 152.

<sup>226</sup> Submissions Nos 21, 22, 23, 25, 36, 53, 55, 56, 63, 64, 68, 73, 74.

<sup>227</sup> The appropriate consent mechanism and criteria to be taken into account are discussed in Chapter 10 of this Report.

<sup>228</sup> See for example *Guardianship Act 1987 - Regulation (NSW)* cl 4; *Adult Guardianship Act 1988 (NT)* s 21(4)(b)(ii); *Guardianship and Administration Board (Vic) Annual Report 1989-1990*, 38; *Guardianship and Management of Property Act 1991 (ACT)* ss 4, 70; *Guardianship and Administration Act 1993 (SA)* ss 3, 61; *Guardianship and Administration Act 1995 (Tas)* ss 3, 39, 45.

<sup>229</sup> At 154.

The submissions received by the Commission in response to the Draft Report generally supported the Commission's approach. Only two submissions disagreed with the Commission's recommendation.<sup>230</sup> Their argument was based on opposition to the actual performance of a termination procedure. However, the Commission remains of the view that since, in certain circumstances, a termination procedure may be lawfully performed in Queensland, it is necessary that an appropriate consent mechanism be provided for a person who lacks capacity to decide personally whether the procedure should be performed.<sup>231</sup>

#### (d) Participation in research or experimental health care

There is no specific legislation in Queensland regulating human participation in experimental treatment and medical research.<sup>232</sup> The National Health and Medical Research Council (NHMRC) has issued ethical guidelines for the conduct of such research.<sup>233</sup> Compliance with these guidelines is usually required for approval for research conducted within an institution<sup>234</sup> and for funding purposes.<sup>235</sup> It is also the policy of the Australian Medical Association.<sup>236</sup>

The NHMRC guidelines provide that, before research is undertaken, the free consent of the subject should be obtained.<sup>237</sup> They further provide that "[s]pecial care must be taken in relation to consent, and to safeguarding individual rights and welfare where the research involves children, the mentally ill and those in dependant relationships or comparable situations".<sup>238</sup> In the case of a subject who, as a result of "mental illness", lacks the capacity to consent "consent should

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<sup>230</sup> Submissions Nos 43, 63.

<sup>231</sup> The appropriate consent mechanism and criteria to be taken into account are discussed in Chapter 10 of this Report.

<sup>232</sup> Cf *Animals Protection Act 1925 (Qld)* and *Animals Protection (Use of Animals for Scientific Experiments) Regulation 1991 (Qld)*.

<sup>233</sup> National Health and Medical Research Council, *Statement on Human Experimentation and Supplementary Notes* (1992).

<sup>234</sup> *Statement on Human Experimentation and Supplementary Notes* (1992), Supplementary Note 1.

<sup>235</sup> See for example *National Health and Medical Research Council Act 1992 (Cth)* s 51(3).

<sup>236</sup> Australian Medical Association, *Handbook of Resolutions* (1995) Annexure E.

<sup>237</sup> *Statement on Human Experimentation and Supplementary Notes* (1992), cl 8.

<sup>238</sup> *Statement on Human Experimentation and Supplementary Notes* (1992), cl 10.

also be obtained from the person who stands legally in the position of guardian, next friend, or the like".<sup>239</sup>

The guidelines appear to assume that a legally appointed "guardian" has authority to consent to all forms of experimental treatment or research. The Commission is not persuaded that this is so.

Research and experimental treatment can be broadly categorised as being either therapeutic or non-therapeutic. Therapeutic research or experimentation is designed and conducted for the benefit of the subject, either to diagnose or treat illness. Non-therapeutic research, on the other hand, refers to an experiment designed not to benefit the research subject directly but to gain knowledge that can be used in the treatment of other persons.<sup>240</sup>

The provisions which currently exist in Queensland for giving substitute consent to treatment of a person who lacks the capacity to give his or her own consent are discussed in Chapter 10 of this Report. If an application is made to the Supreme Court in the exercise of its *parens patriae* jurisdiction, the Court will apply the test of what is in the best interests of the person with impaired decision-making capacity.<sup>241</sup> If a committee has been appointed under the *Mental Health Act 1974 (Qld)*, he or she will also be under a duty to act in the best interests of the person concerned.<sup>242</sup> If an application is made to the Legal Friend for consent to treatment of a person who is an assisted person under the *Intellectually Disabled Citizens Act 1985 (Qld)*, the Legal Friend can consent to treatment which is for the benefit of the person and which is the least restrictive option available.<sup>243</sup>

In the view of the Commission, application of these tests would preclude a substitute consent being given for a person with impaired decision-making capacity to participate in non-therapeutic research or experimentation. It may also prevent valid authorisation of participation in therapeutic research or experimental treatment.

The Commission therefore believes that the NHMRC guidelines about consent to participation in medical research and experimentation, although important, are insufficient and that legislation should be enacted to clarify the position.

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<sup>239</sup> *Statement on Human Experimentation and Supplementary Notes* (1992), Supplementary Note 2.

<sup>240</sup> A Varga, *The Main Issues in Bioethics* (1984) 155.

<sup>241</sup> See pp 21-22 of this Report.

<sup>242</sup> See pp 7-8 of this Report. See also R Gordon and S Verdun-Jones, *Adult Guardianship Law in Canada* (1992) 4-6, 4-7.

<sup>243</sup> See pp 19-20 of this Report.



In the Draft Report, the Commission recommended that 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 should be a special consent health care decision.<sup>244</sup> The Commission's recommendation was reflected in clause 19(d) 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. One submission described the Commission's recommendation as "an advance on existing legislation across Australia".<sup>245</sup> However, three submissions expressed the view that people who lack the capacity to consent on their own behalf should never be the subject of research or experimental treatment.<sup>246</sup>

The Commission shares the concerns of these respondents about the need to protect the rights, dignity and wellbeing of vulnerable members of our society. However, the Commission is also concerned that people with a decision-making disability should not, because of their disability, be deprived of an alternative form of treatment which may be available to competent patients when conventional methods of treatment have failed. The Commission also recognises, in the light of the NHMRC guidelines and of the policy of the Australian Medical Association, that medical research is being carried out at present on people with a decision-making disability. The Commission therefore remains of the view that the need for special consent procedures provides an important safeguard.<sup>247</sup>

#### **(e) Prescribed psychiatric treatment**

Recently there has been a significant review of mental health legislation in Queensland. The Minister for Health has released a number of Discussion Papers and a Green Paper dealing with issues arising as a result of the review. One of these issues is the need for special consent criteria for certain forms of psychiatric treatment.

The initial review agreed with the Commission that there are certain forms of treatment for which special criteria should apply. Treatment procedures identified by the review included electroconvulsive therapy, psychosurgery, hormone

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<sup>244</sup> At 157, 159.

<sup>245</sup> Submission No 25.

<sup>246</sup> Submissions Nos 21, 56, 63.

<sup>247</sup> The appropriate consent mechanism and criteria to be taken into account are discussed in Chapter 10 of this Report.

therapies used for behavioural modification and experimental techniques.<sup>248</sup> The review proposed that:<sup>249</sup>

*As a general principle, the authority of a legally appointed guardian or substitute decision maker to consent to the administration of mental health treatments should not extend to authorisation of non-standard treatments. These treatments are significantly restrictive or invasive of the patient, such that a third party may not be able to fully assess the impact of a proposed treatment as perceived by the individual. In addition, a guardian may be unwilling to accept responsibility for authorising the administration of such treatments to the patient. Alternative mechanisms are required to ensure that the rights of patients are maintained in the administration of these treatments.*

These proposals were open for public comment prior to release of the Green Paper. The Green Paper included the following proposals concerning special consent mechanisms for certain types of psychiatric treatment:

- electroconvulsive therapy - to be administered only with the consent of the patient. However, in emergency situations of life threatening risk to the patient, ECT may be administered to an involuntary patient without consent, if two psychiatrists provide written opinion that all other options have been considered and that ECT is the best remaining treatment alternative. Approval must be obtained from the Director of Clinical/Medical Services of the treatment facility and reasonable attempts made to consult with the patient's next of kin or nominated person;<sup>250</sup>
- psychosurgery - to be declared by the Governor in Council a proscribed treatment under the *Mental Health Act* and thereby prohibited in Queensland without the written approval of the Director of Mental Health;<sup>251</sup>

<sup>248</sup> Queensland Health, *Review of the Mental Health Act, Discussion Paper Number 3: Treatment of People with Mental Illness* (May 1993), 23.

<sup>249</sup> *Id.*, 24.

<sup>250</sup> Queensland Health, *Review of the Mental Health Act 1974, Green Paper* (1994), 71.

<sup>251</sup> *Id.*, 72.

- . hormone therapies - to be administered to an involuntary patient or a patient in custody on the recommendation of two psychiatrists that the treatment constitutes the least restrictive alternative available, consent to be obtained from the patient and the treatment to be approved by the Director of Clinical/Medical services of the treatment facility;<sup>252</sup>
- . insulin coma therapy - to be declared by the Governor in Council a proscribed treatment under the *Mental Health Act* and thereby prohibited in Queensland without the written approval of the Director of Mental Health;<sup>253</sup>
- . group therapy - to be regulated by the issuing of guidelines by the Director of Mental Health and the Mental Health Review Committee which reports to the Health Rights Commissioner;<sup>254</sup>

In the Draft Report, the Commission noted that the proposals in the Green Paper are not a statement of government policy. They were put forward to encourage public comment before the formulation of legislation. The Commission indicated that, pending the outcome of the review, it did not intend to comment further on the particular forms of treatment to which special consent procedures should apply. In the Draft Bill in Chapter 13 of the Draft Report, clause 19(e) provided that "special consent health care" includes psychiatric health care prescribed under regulations.

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

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<sup>252</sup> Id, 71.

<sup>253</sup> Id, 72.

<sup>254</sup> Id, 72.

**(f) Additional forms of treatment**

In the Draft Report, the Commission noted that, as a result of developments in technology and research, treatments once regarded as experimental may become normal procedures. They would therefore no longer require special consent. However, there may be some other reason - such as, for example, their invasive nature or possible consequences - why special consent procedures should still apply. Over time, accepted standards of practice may change, or additional forms of treatment for which special consent procedures should apply may be identified.

The Commission therefore recommended that the proposed legislation include a power for additional forms of treatment to be specified by regulation made under the legislation as requiring special consent procedures.<sup>255</sup>

The Commission's recommendation was reflected in clause 19(f) 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.<sup>256</sup>

**The Commission recommends that the legislation should provide that "special consent health care" for a person who lacks capacity to make his or her own decision is:**

- (a) removal of tissue from the person for donation to someone else;**
- (b) sterilisation of the person;**
- (c) termination of a pregnancy of the person;**
- (d) participation by the person in research or experimental health care;**
- (e) psychiatric health care prescribed under the regulations;**
- (f) other health care prescribed under the regulations.**

<sup>255</sup> At 159.

<sup>256</sup> 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 for people with an intellectual disability, 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's recommendation is implemented by Schedule 1 clauses 11-15 of the Draft Bill in Volume 2 of this Report.

## 6. FINANCIAL DECISION

In the Draft Report, the Commission expressed the view that the proposed legislation should identify powers which may be given by the tribunal to decision-makers appointed to make decisions about financial matters. The Commission recommended that the powers which may be conferred on a decision-maker should be expressed as widely as possible,<sup>257</sup> but that the legislation should specify some of the powers which may be given to a decision-maker in relation to financial matters, including:<sup>258</sup>

- . paying for maintenance and accommodation expenses for the person and his or her dependants;
- . paying the person's debts;
- . receiving money payable or belonging to the person and taking action to recover such money;
- . discharging any mortgage over the person's property;
- . paying rates, taxes, insurance premiums or other outgoings payable in respect of the person's property;
- . insuring any property of the person;
- . preserving and improving the estate of the person;
- . carrying on any trade or business of the person;
- . performing contracts entered into by the person;
- . investing, on behalf of the person, in authorised trustee investments;
- . investing, with the approval of the tribunal, in investments other than authorised trustee investments;

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<sup>257</sup> See for example s 8(2) of the *Guardianship and Management of Property Act 1991 (ACT)* which provides:

The powers that may be conferred on a manager of a person's property are those that the person would have if he or she were legally competent to exercise them.

<sup>258</sup> At 86-87.

- . purchasing or selling any real property; and
- . taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by virtue of an existing shareholding, whether or not the shares are an authorised trustee investment.

The Commission's recommendation was reflected in clause 23 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, two submissions commented that the power in clause 23(2)(k) to invest in authorised trustee investments was too restrictive.<sup>259</sup>

#### (a) Authorised trustee investments

One of these submissions, from an association of statutory trustee companies, argued that a financial decision-maker should have wide powers of investment. The respondent claimed that the Commission's recommendation, which was based on the existing provisions of the *Trusts Act 1973 (Qld)*,<sup>260</sup> did not allow for a diversified investment portfolio or investment for capital growth and therefore did not facilitate sound investment management. Nor did it incorporate the "prudent person rule" adopted in more contemporary trust legislation.<sup>261</sup> The respondent also claimed that, on a practical level, the requirement to obtain tribunal approval for non-authorised investments would be too cumbersome as, in many situations, there is a need to act quickly.

The Commission acknowledges that financial managers should be able to perform their role without undue restriction. However, it also recognises the need for the legislation to contain investment guidelines as a protection for both the person whose finances are being managed and the manager. The Commission's approach allowed for other kinds of investment, but was directed towards discouraging speculation by requiring tribunal authorisation.<sup>262</sup> This approach is consistent with restrictions on the powers of financial managers in other Australian

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<sup>259</sup> Submissions Nos 1A, 48.

<sup>260</sup> *Trusts Act 1973 (Qld)* s 21.

<sup>261</sup> *Trustee (Investment Powers) Amendment Act 1995 (SA)*; *Trustee and Trustee Companies (Amendment) Act 1995 (Vic)*.

<sup>262</sup> Cl 23(2)(l).

jurisdictions.<sup>263</sup>

On balance, the Commission is not persuaded that the proposed restriction on the investment powers of a financial manager should be removed.

**(b) Investment in existing share portfolio**

The same two submissions also criticised clause 23(2)(m),<sup>264</sup> which related to investment in shares associated with the existing portfolio of the person for whom the decision is being made.

The association of statutory trustee companies noted that this restriction would not enable expansion of share investment or establishment of new share investment.<sup>265</sup> However, this is not the case. Clause 23(2)(l) provided for investment in other than authorised investments with the approval of the tribunal.

A solicitor commented that the restriction was inappropriate because as well as limiting the decision-maker's power of investment, it would sanction the making of investment decisions which may be clearly negligent if it became apparent that shares in the existing portfolio were worthless.<sup>266</sup> In the view of the Commission, there are likely to be circumstances where it would be necessary for a financial decision-maker to have this power to enable efficient management of an existing share portfolio. However, the provision is facilitative only, and the power would have to be exercised in accordance with the decision-maker's duty of care.<sup>267</sup> The Commission's recommendation would allow a decision-maker, without having to seek the tribunal's approval, to continue and enhance an investment already made by the person whose decision-making capacity is impaired, but would not excuse a breach of duty by the decision-maker.

The Commission is not persuaded to change its recommendation.

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<sup>263</sup> See for example *Protected Estates Act 1983 (NSW)* s 28(1)(d); *Guardianship and Administration Board Act 1986 (Vic)* s 51; *Guardianship and Administration Act 1990 (WA)* s 71, Sched 2 Pt A; *Guardianship and Management of Property Act 1991 (ACT)* s 24; *Guardianship and Administration Act 1993 (SA)* s 39; *Guardianship and Administration Act 1995 (Tas)* s 56.

<sup>264</sup> Submissions Nos 1A, 48.

<sup>265</sup> Submission No 48.

<sup>266</sup> Submission No 1A.

<sup>267</sup> See pp 281-282 of this Report.

### (c) Dealing with real property

A further issue which arises in relation to financial decisions concerns the power of a financial decision-maker to invest in, or to sell, real property on behalf of the person whose affairs are being managed. Clause 23(2)(j) of the Draft Bill included in the definition of a financial decision "buying or selling real property" on behalf of a person whose decision-making capacity is impaired. The Commission believes that, because of the highly speculative nature of the real estate market, there should be limitations on a financial decision-maker's power to purchase real estate. It also believes that, because of the potential for abuse, the power of a decision-maker to sell the person's real property should also be restricted. However, the Commission recognises that it may be necessary for the decision-maker to buy property, for example, to provide a home for the person or the person's dependants or to protect the value of real property which the person already owns. It may also be necessary to sell property in order to be able to finance the provision of alternative accommodation. The Commission wishes to provide some measure of protection for a person with a decision-making disability without unreasonably fettering the ability of a financial decision-maker to engage in transactions which are for the person's benefit. A number of jurisdictions in Australia impose some restriction on the ability of a financial decision-maker to enter into real property transactions on behalf of a person whose decision-making capacity is impaired.<sup>268</sup>

### (d) Using property as security

The Commission has also considered the question of the scope of a "financial decision" in relation to the use by a decision-maker of property owned by a person with impaired decision-making capacity as security for a loan or a mortgage. The Commission is aware that it is common practice for lending institutions to require a borrower to execute a power of attorney in their favour as a form of security. In some cases, an enduring power of attorney is used. The Commission is mindful of the commercial convenience of such an arrangement. However, it is also conscious of the opportunity for abuse that would be presented to an unscrupulous decision-maker if the person who granted the power subsequently lost the capacity to oversee the use made of the power and to revoke it if necessary. The Commission considers that the preferable course in such a situation would be for a general power of attorney to be used. In the event of future loss of capacity, application could be made if necessary to the tribunal proposed by the Commission for appointment of a decision-maker with specific powers granted by the tribunal to meet the needs of particular circumstances.

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<sup>268</sup> See for example *Protected Estates Act 1983 (NSW)* ss 24(2), 28(2), 33(1); *Guardianship and Administration Act 1990 (WA)* s 71, Sched 2 Part A cl 5; *Guardianship and Administration Act 1993 (SA)* s 39(4).



In the view of the Commission, the financial decisions which a substitute decision-maker can make on behalf of a person with impaired decision-making capacity should not include an unrestricted ability to use the person's property as security. However, the Commission is also aware that a decision-maker may need to use property as security if, for example, it becomes necessary to arrange alternative accommodation for the person. The Commission would not wish to make such a situation more difficult.

**The Commission recommends that the legislation provide that:**

**a "financial decision" includes a decision (other than a decision about a legal matter) about the possession, custody, control or management of a person's property;**

**a "financial decision" includes a decision about one or more of the following:**

- (a) paying maintenance and accommodation expenses for the person and the person's dependants;**
- (b) paying the person's debts;**
- (c) to the extent that the decision is not a litigation related decision, receiving and recovering money payable to the person;**
- (d) discharging a mortgage over the person's property;**
- (e) paying rates, taxes, insurances premiums or other outgoings for the person's property;**
- (f) insuring the person or the person's property;**
- (g) otherwise preserving or improving the person's estate;**
- (h) carrying on any trade or business of the person;**
- (i) performing contracts entered into by the person;**
- (j) entering into an authorised real estate transaction for the person;**
- (k) with the tribunal's approval, entering into a real estate transaction for the person which is not an authorised real estate transaction;**
- (l) investing for the person in authorised investments;**
- (m) with the tribunal's approval, investing for the person in investments that are not authorised investments;**
- (n) entering into an authorised security transaction for the person;**

- (o) with the tribunal's approval, entering into a security transaction for the person which is not an authorised security transaction;
- (p) taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by the person's existing shareholding (whether or not the shares are an authorised investment).

**The Commission recommends that the legislation provide that:**

- . **an "authorised real estate transaction" means -**
  - . **the purchase of real estate for the purpose of:**
    - (a) providing a home for the person or the person's dependants;
    - (b) protecting the value of the person's existing real property;
  - . **the sale of any of the person's real estate for the purpose of providing a home for the person or any dependants of the person.**
- . **an "authorised security transaction" means -**
  - using the person's property as security for:**
    - (a) a loan to provide for the reasonable needs of the person or the person's dependants;
    - (b) a mortgage to purchase a home for the person or the person's dependants.

The Commission's recommendation is implemented by Schedule 1 clauses 16-21 of the Draft Bill in Volume 2 of this Report.

## 7. DECISION ABOUT A LEGAL MATTER

In order to protect the interests of a person with impaired decision-making capacity, legal proceedings may become necessary. If the person concerned lacks a sufficient degree of understanding to instruct legal representatives, another person must give instructions on his or her behalf. At present, the Supreme Court Rules provide for a person with impaired decision-making capacity to sue by his or her "next friend", usually a close relative such as a spouse or a parent, and to defend an action by a "guardian ad litem" appointed by the court. Similar provisions exist in the Rules of the District Courts and of the Magistrates Courts.<sup>269</sup> In addition, the Legal Friend<sup>270</sup> may instruct a solicitor on behalf of a person who is an assisted citizen under the *Intellectually Disabled Citizens Act 1985 (Qld)*.<sup>271</sup>

In the Draft Report, the Commission noted that recent legislation in other jurisdictions has enabled appointed decision-makers to make decisions on behalf of a person with impaired capacity in relation to legal proceedings.<sup>272</sup> The Commission recommended that the tribunal should be able to authorise an appointed decision-maker to make legal decisions on behalf of a person with impaired decision-making capacity. The Commission envisaged that the power of appointed decision-makers in relation to legal proceedings would be additional to the procedures provided by the rules of the various courts, and that the recommendation would result in costs savings where the person with impaired decision-making capacity is a defendant in an action, since it would not be necessary to make a court application for the appointment of a guardian ad litem.

The Commission also recommended that the decision-maker should be liable to the other party to the proceedings for costs of the proceedings, but should be entitled to an indemnity from the person whose decision-making capacity is impaired. This approach reflected the position which presently exists under the Supreme Court Rules.

The Commission noted that sometimes parties to a legal dispute agree to settle it themselves without going to court or, if court proceedings have commenced, before they are completed. If a person whose decision-making capacity is

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<sup>269</sup> Rules of the Supreme Court O 3 rr 16, 17. See also the District Courts Rules r 28, Magistrates Courts Rules r 29(5).

<sup>270</sup> See p 19 of this Report.

<sup>271</sup> *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(1)(b).

<sup>272</sup> At 90. See for example *Guardianship and Administration Act 1990 (WA)* s 71, Sched 2 Part A cl 15; *Guardianship and Management of Property Act 1991 (ACT)* s 7(2)(f); *Guardianship and Administration Act 1993 (SA)* s 39(2)(k); *Guardianship and Administration Act 1995 (Tas)* s 56(2)(f).

impaired does not have a sufficient degree of understanding to decide whether or not to agree to a settlement, the decision must be made by some other person.<sup>273</sup> At present, in this situation, the "next friend" or "guardian ad litem" would have to decide whether or not to agree to the terms of settlement.<sup>274</sup> In keeping with its recommendation that an appointed decision-maker be able to be given power to act in relation to legal proceedings on behalf of a person with impaired capacity, the Commission further recommended that a decision-maker also have power to agree to the terms of settlement of a claim.<sup>275</sup>

The Commission's recommendation was reflected in clause 24 of the Draft Bill in Chapter 13 of the Draft Report.

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

However, after further consideration, the Commission is concerned that the focus of clause 24 may have been too narrow. Clause 24(1) of the Draft Bill provided -

*A "litigation related decision" of, or for, an adult is a decision about a legal matter of a civil or criminal nature involving the adult or the adult's property, including, for example, a decision to agree to a settlement of a claim.*

Many decisions about legal matters do not involve litigation. To ensure that such matters are not excluded from the powers which may be given to a decision-maker, it is the view of the Commission that the definition should be extended to include obtaining legal services, including advice about legal rights, for a person whose decision-making capacity is impaired, as well as giving instructions to commence, continue, compromise, defend or settle any legal proceedings on the person's behalf.<sup>276</sup>

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<sup>273</sup> However, settlement of a claim made by or on behalf of a person who lacks capacity to make his or her own decision about the settlement is not valid unless it is sanctioned by a court or the Public Trustee. See pp 452-455 of this Report.

<sup>274</sup> As to the authority of a next friend or guardian ad litem to settle proceedings, see *Rhodes v Swithenbank* (1889) 22 QBD 577; *Katundi v Hay* [1940] St R Qd 39. Cf *Glassford v Murphy* (1878) 4 VLR 123 (L).

<sup>275</sup> At 90.

<sup>276</sup> See for example *Intellectually Disabled Citizens Act 1985 (Qld)* s 26(1); *Adult Guardianship Act 1993 (British Columbia)* s 19(e).

**The Commission recommends that the legislation provide that:**

- . a "decision about a legal matter" is a decision about a legal matter of a civil or criminal nature involving a person or the person's property, including:**
  - . a decision about obtaining legal services for the person, including information about the person's legal rights; and**
  - . a decision about using legal services to undertake a transaction;**
  - . a decision about giving instructions to commence, continue, compromise, defend or settle any legal proceedings on the person's behalf.**

The Commission's recommendation is implemented by Schedule 1 clause 22 of the Draft Bill in Volume 2 of this Report.

**The Commission recommends that a decision-maker who engages in a legal proceeding on behalf of a person with impaired decision-making capacity should incur liability for costs awarded against the person to any other party to the proceeding, but should be entitled to an indemnity from the person.**

## CHAPTER 6

### ENDURING POWERS OF ATTORNEY (CHOOSING YOUR OWN DECISION-MAKER)

#### 1. INTRODUCTION

An enduring power of attorney enables an individual to choose the person the individual would want to make decisions on his or her behalf if he or she became unable to decide personally. It is, for those who are able to take advantage of it, the least intrusive means of appointing a substitute decision-maker.

The concept of an enduring power of attorney was developed from an ordinary power of attorney.

#### 2. POWER OF ATTORNEY

A power of attorney is a formal document by which one person empowers another to act on his or her behalf for certain purposes. The person who grants the power is called a donor. The person who is authorised to act on behalf of the donor is called a donee or an attorney. An attorney is a kind of agent. A person who acts as an attorney does not have to be a lawyer.

For a power of attorney to be valid the donor must be able to understand, at the time the power is created, the general nature of the acts or transactions which the power purports to authorise.<sup>277</sup>

Most powers of attorney are intended to have legal effect as soon as they are created. However, the terms of the document may state that it is intended to take effect in the future. Sometimes, even though it is not actually stated that the power is not to come into effect immediately, it may be apparent from the rest of the document that the power is intended to commence in the future. In general, unless there is an express or implied limitation on the duration of the power, the attorney's authority will continue until the power is revoked or the donor dies.<sup>278</sup>

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<sup>277</sup> *Gibbons v Wright* (1954) 91 CLR 423 at 445.

<sup>278</sup> See for example *Darby v Coutts & Co* (1885) 29 ChD 500.

A donor with the necessary degree of capacity may revoke a power of attorney at any time.<sup>279</sup> There is little authority as to what is the requisite capacity. Revocation need not necessarily be by formal instrument. It would appear that a donor may orally revoke a power of attorney.<sup>280</sup>

The power is also revoked if the donor subsequently loses the ability to understand, in broad terms, its nature and effect.<sup>281</sup> A power of attorney may be revoked in a number of other ways. It will cease to have effect if, for example, the donor marries, becomes bankrupt or dies.<sup>282</sup>

The creation and operation of powers of attorney in Queensland are now partly controlled by legislation.<sup>283</sup> The *Property Law Act 1974 (Qld)* contains an approved form for creating a general power of attorney.<sup>284</sup>

A general power of attorney, in the form provided, confers on the attorney (or attorneys, if more than one) authority to do anything on behalf of the donor which the donor could lawfully delegate to an attorney.<sup>285</sup> A donor can authorise an attorney to do anything which the donor could lawfully have done, unless the act in question is required by statute to be performed by the donor personally, or demands the exercise of the donor's own skill or discretion.<sup>286</sup> The terms of the authority conferred by a general power of attorney are therefore very wide.

However, it is not mandatory to use the approved form to create a power of attorney. The *Property Law Act* clearly envisages a kind of power of attorney other than the wide conferral of authority effected by the general power.<sup>287</sup> It is therefore possible to limit the extent of an attorney's authority or to specify the

<sup>279</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 219. A power of attorney which has been given as a security is irrevocable.

<sup>280</sup> *Halsbury's Laws of England*, Fourth Edition (Reissue), Vol 1(2), para 191; *R v Wait* (1823) 11 Price 518, 147 ER 551; *The Margaret Mitchell* (1858) Swab 382, 166 ER 1174.

<sup>281</sup> *Drew v Nunn* (1879) 4 QBD 661; *Yonge v Toynbee* [1910] 1 KB 215.

<sup>282</sup> *Tingley v Muller* [1917] 2 Ch 144 at 183 per Bray J.

<sup>283</sup> The *Property Law Act 1974 (Qld)* contains provisions which apply to powers of attorney generally. Provisions in some other statutes relate to powers of attorney in specific situations. See for example *Land Title Act 1994 (Qld)* Part 7 Division 3; *Trusts Act 1973 (Qld)* s 56; *Corporations Law* s 182(8).

<sup>284</sup> *Property Law Act 1974 (Qld)* Form 13.

<sup>285</sup> *Property Law Act 1974 (Qld)* s 170(1).

<sup>286</sup> *Halsbury's Laws of England*, Fourth Edition (Reissue), Vol 1(2), para 45.

<sup>287</sup> S 170(2) provides for the revocation of a general or other power of attorney.



period during which the authority may be exercised. For example, a donor who is going overseas and wishes to appoint someone to act on his or her behalf for certain purposes while he or she is away is able to do so.

The *Property Law Act* also contains a form for revoking a power of attorney.<sup>288</sup> The Act does not affect revocation of a power on other grounds such as the death of the donor.

The provisions in the *Property Law Act* do not alter the position with respect to the capacity required for a donor to grant a power of attorney or to the revocation of a power of attorney if the donor subsequently loses capacity.<sup>289</sup> The revocation of a power of attorney by the subsequent loss of the donor's capacity has serious implications. For example, if, as a result of traumatic brain injury or dementia, a person who has granted a power of attorney loses the necessary degree of understanding, the attorney will no longer have any legal authority to make decisions for the donor. This means that the attorney may incur liability for acts done in reliance on the power.<sup>290</sup> It also destroys the potential value of a power of attorney as a simple and relatively inexpensive mechanism for allowing people to have some degree of control over the decisions which affect them even after they have lost the capacity to decide for themselves.

### 3. ENDURING POWER OF ATTORNEY

The concept of an enduring power of attorney was developed to overcome the problems caused by the revocation of an ordinary power of attorney by the donor's loss of capacity. It was recognised that, in many cases, the benefit of the power of attorney was taken away from people at the very time it was most needed. In many jurisdictions there is now legislation specifically enabling a power of attorney to survive or endure after the donor's loss of capacity.<sup>291</sup>

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<sup>288</sup> *Property Law Act 1974 (Qld)* s 170(2); Form 15. S 170(2) states that a power of attorney "may" be revoked by instrument in the approved form. Although use of the form would appear not to be mandatory, it would clearly facilitate proof of revocation.

<sup>289</sup> See pp 79-80 of this Report.

<sup>290</sup> The *Property Law Act 1974 (Qld)* provides some protection for an attorney who, not knowing that the power has been revoked as a result of the donor's loss of capacity, acts in reliance on that power. However, the protection is limited to the extent that knowledge of revocation includes knowledge of any event which has the effect of revoking the power. See s 174(1), 174(5).

<sup>291</sup> *Conveyancing Act 1919 (NSW)* s 163F(2); *Powers of Attorney Act 1934 (Tas)* s 11A(3); *Powers of Attorney Act 1956 (ACT)* s 12(2); *Instruments Act 1958 (Vic)* s 114; *Powers of Attorney Act 1980 (NT)* s 13; *Powers of Attorney and Agency Act 1984 (SA)* s 6(1), 6(3); *Guardianship and Administration Act 1990 (WA)* s 105(1). See also *Protection of Personal and Property Rights Act 1988 (NZ)* s 96.

In Queensland, the *Property Law Act* was amended in 1990 to allow the creation of an enduring power of attorney.<sup>292</sup> The Act contains an approved form for the donor of an enduring power to use.<sup>293</sup> The form gives the attorney power to do on behalf of the donor anything which the donor could lawfully authorise an attorney to do. To be an enduring power, the instrument which creates the power must be in the approved form. The form must be signed by a Justice of the Peace or a qualified legal practitioner who certifies that, at the time the donor signed the form, he or she appeared to understand the nature and effect of the power being given to the attorney.<sup>294</sup> The form also contains a notice to the attorney of the importance of the obligations involved in becoming an attorney.<sup>295</sup>

An attorney must not use the power to enter into any transactions where there is a possibility of conflict between his or her interests and the interests of the donor.<sup>296</sup> An attorney must keep accurate records<sup>297</sup> and, apart from money and property which are owned jointly by the donor and the attorney, must keep his or her own money and property separate from the money and property of the donor.<sup>298</sup>

The holder of an enduring power of attorney must use the power honestly and with reasonable diligence to protect the interests of the donor. Failure to do so may result in a substantial fine, and the attorney may be liable to compensate the donor for any loss caused by the failure.<sup>299</sup> The attorney may apply to the Supreme Court for directions on the meaning of the power and the way the power should be exercised.<sup>300</sup>

Where there are reasonable grounds for suspecting that the interests of the donor are not being protected according to the provisions of the Act, the Public Trustee may require the attorney to produce records and accounts of transactions made

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<sup>292</sup> *Property Law Act 1974 (Qld)* Part 9 Division 2.

<sup>293</sup> *Property Law Act 1974 (Qld)* Form 14.

<sup>294</sup> *Property Law Act 1974 (Qld)* s 175A.

<sup>295</sup> *Property Law Act 1974 (Qld)* Form 14.

<sup>296</sup> *Property Law Act 1974 (Qld)* s 175E.

<sup>297</sup> *Property Law Act 1974 (Qld)* s 175D.

<sup>298</sup> *Property Law Act 1974 (Qld)* s 175E.

<sup>299</sup> *Property Law Act 1974 (Qld)* s 175H.

<sup>300</sup> *Property Law Act 1974 (Qld)* s 175G(2).

by the attorney on behalf of the donor.<sup>301</sup> The Public Trustee or any other person with a proper interest in the affairs of the donor may apply to the Supreme Court for an order for the attorney to provide to the Court and to the applicant records of all dealings where the attorney has used the power; for the records to be audited; and for the power to be revoked or varied or for the attorney to be removed.<sup>302</sup> The Court may appoint an attorney to act in place of an attorney who has been removed.<sup>303</sup>

If the attorney breaches any of the obligations imposed by the Act the Court may, if it is satisfied that the attorney acted honestly and reasonably and ought fairly to be excused, relieve the attorney of liability for the breach.<sup>304</sup>

An enduring power of attorney may be revoked in the same way, apart from the donor's loss of capacity, as an ordinary power.<sup>305</sup> The Act also specifically provides that a power is revoked if the Court gives the attorney leave to withdraw, if either the donor or the attorney becomes bankrupt, if the attorney loses capacity or if the Court, on an application by any person who has a proper interest in the matter, revokes the power during any period of incapacity of the donor.<sup>306</sup>

#### 4. ADVANTAGES OF ENDURING POWERS OF ATTORNEY

An enduring power of attorney allows a person who has the necessary degree of capacity to plan for the future. It is a private arrangement, which can be changed or revoked at any time while the donor has the capacity to do so. It therefore enhances individual autonomy.

The advance nomination of a decision-maker of the individual's choice also removes the need which may otherwise subsequently arise for a hearing to determine whether a decision-maker should be appointed. For people with impaired decision-making capacity and for their relatives and carers, such hearings almost inevitably involve some inconvenience and anxiety and, no matter how sensitively they are handled, there may also be some degree of embarrassment or

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<sup>301</sup> *Property Law Act 1974 (Qld)* s 175F.

<sup>302</sup> *Property Law Act 1974 (Qld)* s 175G(1).

<sup>303</sup> *Property Law Act 1974 (Qld)* s 175G(3).

<sup>304</sup> *Property Law Act 1974 (Qld)* s 175I.

<sup>305</sup> *Property Law Act 1974 (Qld)* ss 175B, 175C(1).

<sup>306</sup> *Property Law Act 1974 (Qld)* ss 175C(2), 175G(1)(c).

distress. The simple expedient of granting an enduring power of attorney while it is possible avoids these difficulties.

The execution of an enduring power of attorney has the further advantage of being relatively inexpensive for the person making it. Enduring powers of attorney also reduce the demand on the system for appointing decision-makers and hence the cost to government.<sup>307</sup>

One of the submissions received by the Commission in response to the Draft Report<sup>308</sup> noted that:<sup>309</sup>

*There is no doubt that as we move to the turn of the century and beyond the potential increase in the number of people who may require a substitute decision-maker is highly significant. The provision of financial, personal and medical Enduring Powers of Attorney is one way in which we can reduce the demand on guardianship tribunals and more importantly ensure that competent Australians are able to plan for the possibility that they may one day lose capacity.*

## 5. LIMITATIONS AND DISADVANTAGES

An enduring power of attorney will not provide a solution in every situation. Because of the threshold requirement of capacity, there will be some people who will never have a sufficient level of understanding to take advantage of the procedure. Alternatively, people who initially have the required degree of capacity may fail to make an enduring power of attorney while they have the opportunity. This may be because they are unaware of its existence, or because of apathy, or it may be the result of a reluctance to confront the possibility of their own incapacity. Whatever the reason, if the document is not completed while the person has the capacity to do so, subsequent loss of capacity will mean that the exercise of personal choice in the appointment of a decision-maker will no longer be possible. In other words, an enduring power of attorney will not assist a person who loses capacity as a result of, for example, traumatic brain damage or dementia unless the person granted the power prior to the loss of capacity.

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<sup>307</sup> R Creyke, "Privatising Guardianship - the EPA Alternative" (1993) 15 *Adelaide Law Review* 79.

<sup>308</sup> Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

<sup>309</sup> Submission No 25.

Enduring powers of attorney create significant potential for abuse. First, if the donor's mental faculties have begun to deteriorate, he or she may be easily persuaded that granting a power is in his or her best interests, yet may not fully appreciate the extent of the authority conferred on the attorney. The donor may be subjected to undue pressure to grant the enduring power, or may be manipulated into granting it in favour of a particular person. Second, since an enduring power is designed to operate after the donor of the power has lost capacity, the donor will have no control over the attorney or the way the power is exercised if his or her decision-making capacity does, in fact, become impaired.

## **6. THE COMMISSION'S RECOMMENDATIONS**

The present enduring power of attorney legislation creates, for the first time, a simple and inexpensive method of enabling people to provide for any future loss of decision-making capacity by selecting in advance the person they would like to act on their behalf should the necessity arise. It is, therefore, a major development in the Queensland law concerning decision-making for people with impaired decision-making capacity.

However, it is the view of the Commission that there are still considerable improvements which could be made. The Commission's recommendations are set out below.

### **(a) 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.

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, except in reference to existing legislation which uses the traditional terms.

### **(b) Integration into scheme of decision-making legislation**

The present legislative provisions relating to enduring powers of attorney are contained in the *Property Law Act 1974 (Qld)*. This is the result of their development from an ordinary power of attorney which, traditionally, has been used as a tool for delegating authority to manage property and financial matters.

However, when used as a planning device for possible future loss of decision-making capacity, enduring powers of attorney have a potentially much wider field of operation.<sup>310</sup> In the Draft Report, the Commission suggested that the law relating to enduring powers of attorney should not remain as part of the *Property Law Act*, but should be incorporated into the comprehensive scheme of legislation proposed by the Commission for assisted and substituted decision-making by and for people with a decision-making disability.

Only two of the submissions received by the Commission were opposed to the proposal.

One submission was based on purely pragmatic considerations. It argued that it would take some time for the scheme proposed by the Commission to be put in place. It saw the need for reform of the law concerning enduring powers of attorney as a matter of urgent priority which should therefore be dealt with separately by amendment to the existing legislation.<sup>311</sup>

The Commission accepts that some of its proposed changes to the enduring power of attorney legislation could be effected by simply amending the *Property Law Act*, and that such a course of action would be of immediate benefit to many members of the community, particularly to elderly people for whom delayed reforms may be too late.

However, the Commission remains strongly of the view that, in the longer term, it is more appropriate for the amended provisions to be incorporated into its recommended legislative scheme dealing with decision-making by and for people with a decision-making disability. Such an approach would simplify the law and make it more accessible for those it is designed to assist. Indeed, the benefit of the Commission's proposals concerning the duties and obligations of a decision-maker appointed under an enduring power of attorney and improved supervision of the exercise of decision-making authority given by an enduring power of attorney would be lost if the enduring power of attorney provisions were not included in the proposed scheme.

The second submission proposed that the law applicable to both ordinary and enduring powers of attorney be consolidated into a single but separate statutory enactment.<sup>312</sup> However, the Commission remains of the view that it would be more appropriate for the enduring power of attorney legislation to be included in a comprehensive legislative scheme dealing with decision-making by and for people with a decision-making disability.

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<sup>310</sup> See pp 89-91 of this Report.

<sup>311</sup> Submission No 70.

<sup>312</sup> Submission No 58.

In the view of the Commission, its proposed legislative scheme should contain all the relevant provisions relating to the creation and operation of enduring powers of attorney.<sup>313</sup>

**The Commission recommends that legislation providing for enduring powers of attorney should be included in a legislative scheme dealing with decision-making by and for people with a decision-making disability.**

**(c) Jurisdiction over enduring powers of attorney**

At present, disputes involving enduring powers of attorney are determined by the Supreme Court. The Supreme Court derives its powers in relation to enduring powers of attorney from its inherent jurisdiction<sup>314</sup> and from the *Property Law Act 1974 (Qld)*. In the Draft Report, the Commission recommended that the powers of the Supreme Court in relation to enduring powers of attorney be transferred to the tribunal proposed by the Commission.<sup>315</sup> The Commission's recommendation was based on the greater accessibility of the tribunal.

The majority of submissions which addressed the issue supported the Commission's recommendation.

However, after further consideration, the Commission has come to the view that the Supreme Court should retain its inherent jurisdiction over enduring powers of attorney and that, under the legislation proposed by the Commission, the Supreme Court and the tribunal should be given concurrent powers. While there will be many straightforward cases which the tribunal would be able to deal with more simply and less expensively than if they were heard in the Supreme Court, some disputes about enduring powers of attorney may involve very complex issues, the resolution of which would divert the resources of the tribunal from areas of greater need. It would be more appropriate for such disputes to be dealt with in the Supreme Court. Questions about an enduring power of attorney may also be raised during the course of wider litigation in the Supreme Court and it would be

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<sup>313</sup> The relationship between the legislative scheme proposed by the Commission and the *Property Law Act 1974 (Qld)*, the *Land Act 1994 (Qld)* and the *Land Title Act 1994 (Qld)* is discussed on pp 164-172 of this Report.

<sup>314</sup> See pp 21-22 of this Report.

<sup>315</sup> See for example pp 112-113, 119, 120.

both expensive and inconvenient if the Supreme Court did not have power to deal with them.<sup>316</sup>

The Supreme Court and the tribunal should each have power to order that an application be transferred to the other, where it is considered that the other forum is more appropriate to determine the issues involved in the particular case.

The conferral of concurrent jurisdiction on the Supreme Court and the tribunal may result in proceedings being brought in relation to the same enduring power of attorney in both the Court and the tribunal at the same time. This situation would clearly be undesirable. The Supreme Court would have inherent jurisdiction to stay a matter before the Court if it considered appropriate. It would also have power under the Rules of the Supreme Court to stay a proceeding brought in the Supreme Court until after the determination of a concurrent proceeding brought in the tribunal.<sup>317</sup> In the view of the Commission, the tribunal should be given power to stay a proceeding brought in the tribunal about an enduring power of attorney until after the determination of any concurrent proceeding in the Supreme Court. A party to either proceeding should also be entitled to apply for a stay of one of the proceedings.

The tribunal should also have power to appoint a decision-maker on an interim basis, pending the resolution of litigation in the Supreme Court concerning an enduring power of attorney.

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<sup>316</sup> In this Chapter, a recommendation that a power be given to the proposed tribunal in relation to enduring powers of attorney includes giving the same power to the Supreme Court.

<sup>317</sup> Rules of the Supreme Court O 60.



**The Commission recommends that:**

- . the Supreme Court retain its inherent jurisdiction over enduring powers of attorney;
- . the proposed legislation confer jurisdiction on both the Supreme Court and the tribunal in relation to enduring powers of attorney;
- . the Supreme Court may, if it considers appropriate, transfer a proceeding about an enduring power of attorney to the tribunal;
- . the tribunal may, if it considers appropriate, transfer a proceeding about an enduring power of attorney to the Supreme Court;
- . the tribunal be given power, either on its own motion or on the application of a participant in either proceeding, to stay a hearing about an enduring power of a attorney if a concurrent proceeding has been brought in the Supreme Court;
- . the tribunal have interim power to appoint a decision-maker pending the resolution of litigation in the Supreme Court concerning an enduring power of attorney.

The Commission's recommendations are implemented by clauses 311-315 of the Draft Bill in Volume 2 of this Report.

**(d) Decisions which an enduring power of attorney can authorise**

The present legislation provides that a general power of attorney in the approved form operates to confer "authority to do on behalf of the donor anything which a donor can lawfully do by an attorney".<sup>318</sup> There is no equivalent provision in relation to an enduring power of attorney. However, the instrument which creates an enduring power of attorney must be in the approved form.<sup>319</sup> The approved form states that the donor gives the attorney authority "to do on my behalf anything that I may lawfully authorise an attorney to do".<sup>320</sup> Since the introduction of the

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<sup>318</sup> *Property Law Act 1974 (Qld)* s 170(1).

<sup>319</sup> *Property Law Act 1974 (Qld)* s 175A.

<sup>320</sup> *Property Law Act 1974 (Qld)* Form 14.

Queensland enduring power of attorney legislation there has been uncertainty about the nature of the power which could be conferred on an attorney under an enduring power.

Traditionally, powers of attorney have been used in a commercial or financial context. This is probably a reflection of the importance of property interests in the development of the law. However, there is nothing in the legislation to require that the operation of an enduring power be limited in this way.<sup>321</sup> At common law, the only restriction on an attorney's power was that it could not be used to do any thing which was required by statute to be done by the donor personally, or which demanded the exercise of the donor's own skill or discretion.<sup>322</sup> Unfortunately, there is little authority as to the extent to which an attorney can be authorised to make decisions about the personal welfare of the donor, as distinct from his or her property matters, unless authorised by statute to make such decisions.<sup>323</sup> There is no doubt that an enduring power of attorney would be a useful alternative to a decision-making order in relation to decisions about the personal welfare and lifestyle of a person whose decision-making capacity has become impaired.<sup>324</sup> This approach has already been adopted in legislation in some Australian and overseas jurisdictions.<sup>325</sup>

In the Draft Report,<sup>326</sup> the Commission recommended that the existing situation be clarified by legislation which expressly provides that the decisions which a person who makes an enduring power of attorney may appoint a chosen decision-maker to make are not confined to decisions about the person's money and property.<sup>327</sup> The Commission's recommendation was reflected in clause 40(3) of the Draft Bill in Chapter 13 of the Draft Report.

<sup>321</sup> But see the Second Reading Speech of the Hon Mr A G Eaton, Minister for Land Management, which refers to the 'management of affairs' in the event of incapacity: Hansard 20 March 1990, 477.

<sup>322</sup> *Halsbury's Laws of England*, Fourth Edition (Reissue), Vol 1(2), para 45.

<sup>323</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 154. See also M Fowler, 'Appointing an Agent to Make Medical Treatment Choices' (1984) 84 *Columbia Law Review* 985 at 1009-1012.

<sup>324</sup> The use of an enduring power of attorney in relation to medical treatment will be discussed in Chapter 10 of this Report.

<sup>325</sup> See for example *Powers of Attorney Act 1956* (ACT) s 13; *Guardianship and Administration Act 1993* (SA) s 25, *Consent to Medical Treatment and Palliative Care Act 1995* (SA) Pt 2 Div 3; *Guardianship and Administration Act 1995* (Tas) Part 5. See also for example *Protection of Personal and Property Rights Act 1988* (NZ) s 98; *Representation Agreement Act 1993* (British Columbia) ss 7, 9.

<sup>326</sup> Queensland Law Reform Commission, Working Paper No 43, *Assisted and Substituted Decisions*, February 1995.

<sup>327</sup> At 99. See also Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry Into the Human Rights of People with Mental Illness* (1993) Vol 2 p 903.

The recommendation was strongly supported in the submissions received by the Commission in response to the Draft Report. The Department of Family Services and Aboriginal and Islander Affairs<sup>328</sup> noted:<sup>329</sup>

*The ability to use an Enduring Power of Attorney for a wider range of decisions will enhance its use as a personal planning tool. This will in turn create the potential for cost economies given the likelihood of increased demand for substitute decision-making due to the ageing of the population.*

**The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may use it to authorise a chosen decision-maker to make personal decisions, health care decisions, financial decisions and decisions about legal matters.<sup>330</sup>**

The Commission's recommendation is implemented by clause 34(2) of the Draft Bill in Volume 2 of this Report.

- (e) Decisions which an enduring power of attorney cannot authorise**
- (i) Personal decisions**

In Chapter 5 of this Report the Commission recommends that there are some decisions which are of such a personal nature that, if the person concerned is not able to make them, they should not be made by another person on his or her behalf.<sup>331</sup> These decisions include voting on behalf of the person and consenting to the person's marriage. In the Draft Bill in Volume 2 of this Report decisions of this kind are referred to as "excluded personal decisions". There are also some forms of health care treatment for which the Commission recommends that special consent procedures should apply.<sup>332</sup> In the Draft Bill in Volume 2 of this Report decisions of this kind are referred to as "special consent health care decisions".

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<sup>328</sup> Now the Department of Families, Youth and Community Care.

<sup>329</sup> Submission No 74.

<sup>330</sup> The definition of each of these kinds of decision is discussed in Chapter 5 of this Report.

<sup>331</sup> At pp 46-52 of this Report.

<sup>332</sup> At pp 58-69 of this Report.

In the Draft Report, the Commission recommended that a person who makes an enduring power of attorney should not be able to give to his or her chosen decision-maker authority to make excluded personal decisions and special consent health care decisions.<sup>333</sup> This recommendation was reflected in clause 40(4) of the Draft Bill in Chapter 13 of the Draft Report.

Only two of the submissions received by the Commission directly addressed this issue.

One of these submissions, from the Public Guardian in Western Australia, supported the Commission's recommendation.<sup>334</sup>

The other, from a solicitor, stated that there should be no restriction on a person's power of delegation. The respondent argued that there are no such restrictions imposed on the testator of a will nor should there be on a person making a power of attorney.<sup>335</sup>

However, in the view of the Commission the two situations are completely different and no analogy should be drawn between them in this context. A will disposes of the property of the testator. The wishes expressed by the testator in the will do not take effect until after his or her death and are for the benefit of the beneficiaries named in the will. Moreover, the testator's freedom of disposition is not entirely unfettered but is subject to the need to make adequate provision for certain family members.<sup>336</sup>

An enduring power of attorney, on the other hand, becomes operative during the lifetime of the person who made it. It does not dispose of property after the person's death, but rather delegates authority to make decisions about the management of the person's property and financial affairs - and, under the recommendations of the Commission, other aspects of the person's life - while the person is still alive.

The Commission remains of the view that there are some kinds of personal decisions which a chosen decision-maker should not be authorised to make on behalf of a person with impaired decision-making capacity.

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<sup>333</sup> At 99.

<sup>334</sup> Submission No 25.

<sup>335</sup> Submission No 58.

<sup>336</sup> *Succession Act 1981 (Qld)* ss 40-44.

**The Commission recommends that the legislation provide that the maker of an enduring power of attorney should not be able to delegate to a chosen decision-maker power to make excluded personal decisions or special consent health care decisions.**

The Commission's recommendation is implemented by clause 34(3) of the Draft Bill in Volume 2 of this Report.

**(ii) Financial decisions**

**A. Borrowing and mortgaging**

One of the submissions received by the Commission in response to the Draft Report noted that there have been questions raised as to the validity under the current legislation of securities over land executed by an attorney appointed by an enduring power of attorney. The submission suggested that some lenders in the banking sector have declined to accept such a mortgage as security for a loan.<sup>337</sup> Subsequent enquiries by the Commission have shown this to be so.<sup>338</sup>

At common law powers of attorney were generally interpreted strictly. The authority of an attorney had to be found expressly or by necessary implication in the terms of the document creating the power.<sup>339</sup> An attorney could not use the property of the person who made the enduring power for the attorney's own benefit unless specifically authorised by the terms of the power. Hence, the common law would not allow an attorney to incur liability by borrowing unless the power were expressly granted.<sup>340</sup> Similarly, an attorney could not give a guarantee in the absence of express power to do so.<sup>341</sup>

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<sup>337</sup> Submission No 71.

<sup>338</sup> Letter to the Commission from Westpac Banking Corporation, 10 August 1995.

<sup>339</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 49.

<sup>340</sup> *Jacobs v Morris* [1902] 1 Ch 816 at 828-29.

<sup>341</sup> *Tobin v Broadbent* (1947) 75 CLR 378 at 401 per Dixon J.

However, the use of a power of attorney is a useful device for providing security in commercial transactions.<sup>342</sup>

The common law position was changed in Queensland by the power of attorney provisions in the *Property Law Act*. That Act provides that a power of attorney executed in the approved form confers authority "to do on behalf of the donor anything which the donor can lawfully do by an attorney".<sup>343</sup>

The enduring power of attorney legislation does not include an equivalent provision. The approved form for making an enduring power states that the person granting the power authorises the attorney "to do on my behalf anything that I may lawfully authorise an attorney to do".<sup>344</sup> It has been argued that, without provision in the legislation itself as to the extent of an attorney's authority, the wording of the form may be interpreted narrowly. There is some concern that the apparently wide terms of the power given by the form for creating an enduring power of attorney, without statutory guidance as to how those terms should be interpreted, may not be sufficient to displace the common law prohibitions.

There is a contrary argument that the words of the form for making an enduring power of attorney are as much a part of the legislation as the provision which describes the authority of an attorney under an ordinary power,<sup>345</sup> and that it is a matter of mere convenience that the words are set out in the form rather than in the body of the legislation.

In any event, the Commission believes that the perceived inadequacy of the existing legislation would be cured by the proposals put forward by the Commission in the Draft Report. Clause 49 of the Draft Bill in Chapter 13 of the Draft Report provided that:

*When an adult's enduring power of attorney for a decision begins, it gives the chosen decision-maker for the decision power to do, for the adult, anything the adult could lawfully authorise someone else to do in relation to the decision ...*

However, after further consideration, the Commission questions whether it is advisable for an enduring power of attorney to allow a chosen decision-maker to use the property of the person who granted the power as a

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<sup>342</sup> See B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 47-48 for a description of situations in which a power of attorney may be used in this way.

<sup>343</sup> *Property Law Act 1974 (Qld)* s 170(1).

<sup>344</sup> *Property Law Act 1974 (Qld)* Form 14.

<sup>345</sup> *IRC v Gittus* [1920] 1 KB 563 at 576.

security. For the reasons put forward in Chapter 5 of this Report, the Commission is now of the view that a decision-maker for a person with impaired decision-making capacity should not have unrestricted authority to use the person's property as security.

## **B. Real estate transactions**

Similarly, for the reasons explained in Chapter 5 of this Report, the Commission is of the view that a decision-maker for a person with impaired decision-making capacity should not have unrestricted authority to enter into real estate transactions on behalf of the person.

### **(f) Limitation of chosen decision-maker's authority**

Because the existing legislation requires an enduring power of attorney to be in the approved form,<sup>346</sup> and because the form states that the attorney has authority to do anything that the donor may lawfully authorise an attorney to do,<sup>347</sup> there has been uncertainty as to whether the existing legislation allows a donor to place a limitation on the acts which an attorney is authorised to perform. It has been suggested that, since the critical clauses in the form relate to the appointment of the attorney and the intention of the donor that the power survive any future decision-making incapacity, rather than the delegation of a general authority to the attorney, a limited delegation may still be in the approved form. On the other hand, it may be that the only permissible deviation from the form would be variations to the layout or format of the form.<sup>348</sup> It is at least arguable that a limited grant of authority may significantly alter the nature of the broad general scope of the power which is conferred by the approved form, and therefore may not comply with the requirement that the instrument creating the power be "in the approved form".

Clearly, however, situations may arise in which a person who makes an enduring power of attorney does not wish to give a chosen decision-maker unlimited power, or wishes to give particular instructions about the way in which the power is to be exercised. In the Draft Report, the Commission recognised that it would be in keeping with the principles of the proposed legislation to provide for these options. The Commission recommended that enduring power of attorney legislation allow for a person who makes an enduring power of attorney, if the person chooses to do so, to limit the power to be given to a chosen decision-maker or to instruct the

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<sup>346</sup> *Property Law Act 1974 (Qld)* s 175A.

<sup>347</sup> *Property Law Act 1974 (Qld)* Form 14.

<sup>348</sup> B Collier and S Lindsey, *Powers of Attorney in Australia and New Zealand* (1992) 137.

chosen decision-maker about the exercise of the power.<sup>349</sup> The Commission's recommendation was reflected in clause 41 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 proposal.

**The Commission recommends that the legislation provide that, in an enduring power of attorney, the person who makes the enduring power of attorney may limit the power given to a chosen decision-maker and state instructions for a chosen decision-maker to apply when making decisions.**

The Commission's recommendation is implemented by clause 34(2) of the Draft Bill in Volume 2 of this Report.

#### **(g) Capacity to make an enduring power of attorney**

The level of understanding of the person making an enduring power of attorney at the time the power is granted is vitally important. The operation of an enduring power extends beyond the person's loss of decision-making capacity and, as a result, the person's ability to monitor the conduct of the chosen decision-maker and to change or revoke the power may be lost. It is therefore necessary to have a test of capacity stringent enough to protect people who may be vulnerable to pressure or manipulation. However, if the test is too strict, enduring powers of attorney will be available to fewer people, and their value as a method of enabling people to provide for the time when they may be unable to make their own decisions significantly diminished.

The present legislation requires the witness to the enduring power of attorney to certify that, at the time the donor executed the power, he or she appeared to understand the nature and effect of the power.<sup>350</sup> The Commission is concerned that this provision may not be adequate.

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<sup>349</sup> At 100. See also *Powers of Attorney Act 1956 (ACT)* Schedule; *Guardianship and Administration Act 1993 (SA)* Schedule. See also Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) Vol 2 p 903.

<sup>350</sup> *Property Law Act 1974 (Qld)* s 175A(a)(ii), Form 14.



In the Draft Report, the Commission recommended that the legislation require the document creating the power to incorporate a series of prescribed notes explaining the matters to be understood by the person making it.<sup>351</sup> The legislative standard of capacity was set out in clause 42 of the Draft Bill in Chapter 13 of the Draft Report. The forms in Appendix A and Appendix B to the Draft Report contained a notice to the person making the enduring power of attorney providing information about the nature and effect of the power.

In the submissions received by the Commission in response to the Draft Report there was general acceptance of the test of capacity proposed by the Commission.

**The Commission recommends that the legislation provide that a person making an enduring power of attorney must understand -**

- . that in the power of attorney, the person may specify or limit the power to be given to a chosen decision-maker and instruct a chosen decision-maker about the exercise of the power;**
- . when the power will begin;**
- . that if the power for a type of decision begins, the chosen decision-maker will make, and have full control over, all the person's decisions of the type unless limitations or instructions are included in the power of attorney;**
- . that the power the person has given will continue even if the person becomes a person with impaired decision-making capacity;**
- . that the person may revoke the power of attorney at any time the person is capable of making another enduring power of attorney;**
- . that at any time the person is not capable of revoking the enduring power of attorney, the person will not be able to oversee the use of the power.**

The Commission's recommendation is implemented by clause 36 of the Draft Bill in Volume 2 of this Report.

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<sup>351</sup> At 104-105.

**The Commission further recommends that the document creating the power incorporate a series of prescribed notes explaining the matters which the person making the enduring power of attorney is required to understand in order to have capacity to grant the power.**

#### **(h) The role of the witness**

Anecdotal evidence available to the Commission indicates that some people who witness an enduring power of attorney may not be aware of the nature of their role.<sup>352</sup> It appears that some witnesses believe that all that is entailed is ensuring that the signature is genuine. However, a witness to an enduring power of attorney has a higher degree of responsibility. A person who witnesses an enduring power of attorney certifies as to the level of capacity of the person making the power.

The Draft Bill in Chapter 13 of the Draft Report provided, in clause 43, for the witness to certify that at the time the person making the enduring power of attorney signed the document,<sup>353</sup> the person making the enduring power appeared to the witness to understand certain matters. The forms proposed by the Commission also required the witness to the enduring power of attorney to certify that at the time the power was executed the person granting the power appeared to the witness to understand the matters mentioned in the notice to the person making the power of attorney.<sup>354</sup>

Some submissions received in response to the Draft Report proposed that stricter obligations should be imposed on a witness to an enduring power of attorney.

The Intellectually Disabled Citizens Council noted that, if the use of enduring powers of attorney is not to be abused, the person making an enduring power of attorney must understand to the greatest degree possible the extensive powers which he or she is conferring on a chosen decision-maker. The respondent suggested that, before an enduring power of attorney is executed, the witness should be required to read, or otherwise communicate in an appropriate way, the terms of an enduring power of attorney to the person making the power, as a further check that the person is aware of what he or she is doing. The respondent considered such a measure was necessitated by the varying degrees of literacy among the population and the possible pressures the person making the enduring

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<sup>352</sup> See pp 105-109 of this Report for a discussion of who can witness an enduring power of attorney.

<sup>353</sup> Or, if another person signed the document on the person's behalf and in the person's presence, at the time the other person signed the document.

<sup>354</sup> See Appendix A and Appendix B to the Draft Report.

power might be under at the time. The submission also argued that it would assist a witness to assess the degree of comprehension exhibited by the person making the enduring power.<sup>355</sup>

The Commission is mindful of the need for people who make enduring powers of attorney to be aware of the possible consequences of their action. It also agrees that witnesses should be encouraged to explain the effect of making an enduring power of attorney and of the terms of the power, particularly if the witness is doubtful about the capacity of the person making the power. However, it is concerned that to require the witness, in every case, to read or otherwise communicate the terms of the power to the person making it would be somewhat impractical. It would make the process of executing the power more complicated and time consuming and possibly more expensive. The proposal also raises the question of the consequences of failure to comply with the requirement and the scope for litigation which would be created. The Commission believes that the answer lies in effective community education programs about enduring powers of attorney, their advantages and the possibility that they may be misused.

A number of submissions expressed concern as to the competence of the witness to certify as to the level of capacity of the person making the enduring power. One respondent, a solicitor, commented:<sup>356</sup>

*The witness is being asked to make an assessment of a person's mental ability. The witness is not a psychologist or psychiatrist.*

One submission argued that there should be an obligation placed on a witness to make enquiries of other professionals with relevant expertise before certifying as to the capacity of the person making the power, and that failure to make such enquiries should incur a penalty. This respondent acknowledged that the proposal would complicate a little the process of making an enduring power of attorney, but emphasised the importance of protecting a person who may be vulnerable.<sup>357</sup>

The Commission agrees that it is important to protect people who make enduring powers of attorney against possible misuse of the power. However, it is concerned that requiring the witness to make enquiries in every case could have unintended consequences. Consideration would have to be given, for example, to the privacy implications of such a proposal. For people in remote areas it could also reduce the availability of an enduring power of attorney as a planning tool because of the difficulty the witness may face in obtaining relevant professional advice.

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<sup>355</sup> Submission No 52.

<sup>356</sup> Submission No 1.

<sup>357</sup> Submission No 10.

Another submission proposed that, in marginal cases, the witness should be obliged to require certification by a medical practitioner as to the capacity of the person making the enduring power.<sup>358</sup>

The Commission agrees that it would be prudent for a witness who is doubtful about the capacity of a person making an enduring power of attorney to insist on evidence as to the person's level of understanding. However, the Commission is not convinced that a statutory requirement is the most effective means of achieving this objective. A statutory requirement would also raise the question of the consequences of failure to comply.

**The Commission recommends that the form for granting an enduring power of attorney should contain a warning to the witness that it may, in the future, be necessary for the witness to provide information about the capacity of the person who is making the enduring power of attorney and that the witness should, if necessary, make appropriate enquiries.**

**The Commission recommends improved training for Justices of the Peace and Commissioners for Declarations in relation to their role in witnessing enduring powers of attorney.<sup>359</sup>**

**(i) Inducing execution of an enduring power of attorney**

In the Draft Report, the Commission considered the inclusion in the legislation of a provision making it an offence to, by dishonesty or undue influence, induce another person to execute an enduring power of attorney.<sup>360</sup> The intention of the Commission was to provide an additional safeguard for a person who may be vulnerable to pressure to grant an enduring power of attorney or to make it in a particular way.

<sup>358</sup> Submission No 71.

<sup>359</sup> The Commission is concerned that the information provided to Justices of the Peace and Commissioners for Declarations is inadequate and, in some respects, incorrect. *Manual One: Administrative Duties of Commissioners for Declarations and Justices of the Peace* (July 1993), published by the Department of Justice and Attorney-General (now the Department of Justice) instructs a witness who is doubtful about the capacity of a person making an enduring power of attorney to "insist first that a medical practitioner decide whether the donor is capable of understanding the power of attorney process." (At 73) However, the manual contains no information for the witness as to the level of capacity required to make an enduring power of attorney. Further, the manual states that "A Commissioner for Declarations, or a Justice of the Peace, or a medical practitioner, must witness the signatures of both the donor and the agent."

<sup>360</sup> At 107. See *Guardianship and Administration Act 1993 (SA)* s 79(1).

However, the Commission was concerned at the effect of including an element of undue influence in the offence. Such a provision would cover the situation of an overbearing adult child, for example, who might use undue influence to be appointed as attorney for an elderly parent. But the Commission expressed the view that it would have the potential for a much wider operation. An elderly spouse, for example, anxious for arrangements to be settled, might cajole an ailing partner into granting an enduring power while he or she still has capacity to do so. The Commission did not wish to subject such a person to allegations of undue influence.<sup>361</sup>

The Commission therefore recommended that the scope of the offence should be limited to dishonest inducement and that the penalty for the offence should include the forfeiture of any interest which the person might otherwise have had in the estate of the person induced to execute the instrument.<sup>362</sup> The severity of the penalty was intended as a deterrent and the Commission further recommended that the court which heard the charge should have power to grant relief from forfeiture in an appropriate case. The Commission's recommendations were reflected in clause 57 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 inclusion of additional safeguards for people who make enduring powers of attorney.

However, after further consideration, the Commission has reservations about the penalty proposed in the Draft Report. The Commission is concerned that the proposed provision would have no deterrent effect if, for example, the person who induces the making of an enduring power of attorney has no interest or potential interest in the estate of the person who makes the power.

The Commission is still of the view that the offence should carry a severe penalty. However, rather than forfeiture of an interest in the estate of the person induced to make the power, the Commission now believes the imposition of a heavy fine or a term of imprisonment would be a preferable alternative.

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<sup>361</sup> Although there is authority that an interspousal relationship does not give rise to a presumption of undue influence, this is not to say that on the facts of particular cases there cannot be either actual undue influence or even a presumption of undue influence between the parties to such a relationship. See J Carter and D Harland, *Contract Law in Australia* (3rd ed, 1996) 483-484.

<sup>362</sup> See for example *Medical Treatment Act 1988* (Vic) s 5F; *Guardianship and Administration Act 1993* (SA) s 79(2).

**The Commission recommends that the legislation provide that:**

- . it is an offence to dishonestly induce a person to make an enduring power of attorney;**
- . a person found guilty of the offence may be ordered to pay a substantial fine and/or sentenced to a term of imprisonment.**

The Commission's recommendation is implemented by clause 73 of the Draft Bill in Volume 2 of this Report.

**(j) How to make an enduring power of attorney**

**(i) Forms**

The Draft Report contained two alternative options for a form for executing an enduring power of attorney in accordance with the legislation proposed by the Commission.

The shorter version of the form, in Appendix A to the Draft Report, grouped together the kinds of decisions which a chosen decision-maker may be authorised to make. This form would be appropriate for a person who wished to give all the authority granted by the power to one chosen decision-maker or to give equal powers to more than one decision-maker. It would allow the person making the power to impose limitations on or give instructions about the exercise of the authority granted by the power.

The second version of the form, in Appendix B to the Draft Report, was longer and appeared, at first glance, more complicated to complete. It consisted of different sections for different kinds of decisions. The person making the enduring power of attorney would not have to complete all the sections of the form, but only those sections dealing with the kinds of decisions which the person making the power wished to give a chosen decision-maker authority to make. Each section of the form would have to be separately signed and witnessed. This version of the form would be more appropriate for a person who wished to appoint different chosen decision-makers for different kinds of decisions.

Both forms contained notes to the person making the enduring power of attorney and to the chosen decision-maker, and a certificate to be completed by the witness.

The submissions which specifically considered the proposed forms varied in their approach. One submission, from an organisation representing older members of the community, felt that "the second form is too confusing for people who do not deal with these sort of papers every day".<sup>363</sup> Three submissions expressed the view that both forms were appropriate.<sup>364</sup> Three submissions strongly favoured the second form. An advocacy organisation representing people with disabilities noted:<sup>365</sup>

*While it (the longer version) will take longer to fill out and will require more signatures in many cases, we believe it offers additional safeguards to donors by requiring that their specific intentions be sought on specific decisions.*<sup>366</sup>

The Department of Family Services and Aboriginal and Islander Affairs<sup>367</sup> commented:<sup>368</sup>

*Although the version in Appendix B is longer and more complex than the version in Appendix A its individual format for each type of decision better conveys the seriousness and separation of each type of decision-making appointment by compelling the signatory to consider each power separately. Its requirement for the donor and witness to sign at the end of each part add to this ... impression.*

In the view of the Commission, the second version would not be more difficult to complete although, because of its length, it may be more time-consuming. However, the Commission recognises that some people will not wish to appoint different chosen decision-makers or to give instructions about the exercise of the power and that, for such people, the first form would be adequate.

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<sup>363</sup> Submission No 27.

<sup>364</sup> Submissions Nos 18, 54 and 73.

<sup>365</sup> Submission No 64.

<sup>366</sup> The respondent proposed that the full text of the legislation's principles be included under the section "Important Notice to Chosen Decision-makers", since it is unlikely that decision-makers will refer to the legislation or keep a copy of the principles for future reference. The respondent also proposed that the power of the tribunal proposed by the Commission to give chosen decision-makers advice and assistance should be included on the forms. The forms in the Draft Report referred to the obligation of a chosen decision-maker to comply with the legislative principles. The Commission is concerned that to include the principles in their entirety would add considerably to the length and complexity of the forms. However, the Commission accepts that it would be desirable for chosen decision-makers to be informed that advice and assistance is available from the tribunal.

<sup>367</sup> Now the Department of Families, Youth and Community Care.

<sup>368</sup> Submission No 74.

**The Commission recommends that the legislation contain alternative short form and long form versions of the form for making an enduring power of attorney.**

The forms recommended by the Commission are set out in Appendix A and Appendix B to this Report.

**(ii) Signature**

At present, the form creating an enduring power of attorney has provision for signature by the donor.<sup>369</sup> A person who wishes to grant an enduring power and who has the necessary capacity may be prevented by physical disability from doing so. This situation is catered for by a provision allowing a power of attorney to be "signed and sealed by, or by direction and in the presence of, the donor of the power".<sup>370</sup>

In the Draft Report, the Commission acknowledged that such a provision does much to increase the accessibility of the enduring power of attorney mechanism. However, it expressed concern that, given the potential for abuse of an enduring power, some restrictions should be placed on who can sign the power on behalf of the person making it and that additional witnessing requirements should apply when the person making the power is unable to sign it personally.<sup>371</sup>

The Commission recommended that the proposed legislation should include provision for another person to sign the document on behalf of the person making the enduring power of attorney. The person who signs on behalf of the donor should not be a witness or a person who is named in the document as a chosen decision-maker. The witness should be required to certify that, in the witness' presence, the person making the power instructed the person to sign the document on his or her behalf, that the person signed the document in the presence of both the person making the power and the witness, and that the person making the power appeared to the witness to understand the matters necessary to make an enduring

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<sup>369</sup> See *Property Law Act 1974 (Qld)* Form 14.

<sup>370</sup> *Property Law Act 1974 (Qld)* s 169(1). Note, however, that it is unclear whether the provisions of Part 9 Division 1 apply to enduring powers of attorney.

<sup>371</sup> At 109.



power of attorney.<sup>372</sup> The Commission's recommendations were reflected in clause 43 of the Draft Bill in Chapter 13 of the Draft Report.

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

**The Commission recommends that the legislation provide that:**

- **another person may sign an enduring power of attorney on behalf of the person making the power;**
- **the person who signs should not be a witness to the enduring power of attorney or a person who is named in the enduring power of attorney as a chosen decision-maker;**
- **the witness be required to certify that, in the presence of the witness, the person making the enduring power of attorney instructed the other person to sign the document on his or her behalf;**
- **the other person signed the document in the presence of both the witness and the person making the enduring power of attorney; and**
- **the person making the enduring power of attorney appeared to the witness to understand the matters necessary to make an enduring power of attorney.**

The Commission's recommendations are implemented by clauses 40 and 41 of the Draft Bill in Volume 2 of this Report.

**(iii) Who may witness an enduring power of attorney**

The requirement of an independent witness is an essential safeguard for a person who makes an enduring power of attorney. Elderly people, for example, may be susceptible to pressure to grant an enduring power to a particular person or in a particular way. The presence of an independent witness who must certify to the capacity of the person making the power serves to lessen the risk of exploitation of this kind. The existing legislation in Queensland requires that the execution of the document be witnessed by

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<sup>372</sup> At 109.

a Justice of the Peace<sup>373</sup> or a legal practitioner, who certifies that the donor appeared to have the necessary capacity.<sup>374</sup>

In some jurisdictions, the legislation requires that a document creating an enduring power of attorney be signed by two witnesses.<sup>375</sup> In Western Australia, both witnesses must be persons authorised by law to take declarations.<sup>376</sup> In Victoria, Tasmania and the Australian Capital Territory, the witnesses do not require any particular qualifications.<sup>377</sup>

In the Draft Report, the Commission expressed the view that, although the requirement of a second witness may provide some additional protection against exploitation or manipulation of the person making the enduring power of attorney, for some people it would also significantly increase the difficulty in executing the document, and, in many cases, create an unnecessary barrier. The Commission concluded that the requirement of an additional witness was not warranted.<sup>378</sup>

The Commission recommended that the existing requirement that an enduring power of attorney be witnessed by a legal practitioner or a Justice of the Peace be retained, as it emphasises the fact that the execution of an enduring power, although a relatively simple procedure, is a serious step with important legal consequences.<sup>379</sup> In order to re-inforce the need for the witness to be truly independent, the Commission further recommended that legislation should provide that the witness not be related to either the person making the power or the chosen decision-maker,<sup>380</sup> and that, if the

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<sup>373</sup> See p 107 of this Report.

<sup>374</sup> *Property Law Act 1974 (Qld)* s 175A(a)(ii).

<sup>375</sup> See for example *Powers of Attorney Act 1934 (Tas)* s 11A(2)(a); *Powers of Attorney Act 1956 (ACT)* s 12(1)(b); *Instruments Act 1958 (Vic)* s 115; *Guardianship and Administration Act 1990 (WA)* s 104(2)(a).

<sup>376</sup> *Guardianship and Administration Act 1990 (WA)* s 104(2)(a).

<sup>377</sup> However, in the Australian Capital Territory there is a restriction that neither witness may be the donee of the power or a relative of the donee or donor. See *Powers of Attorney Act 1956 (ACT)* s 12(1)(b).

<sup>378</sup> At 106.

<sup>379</sup> At 105.

<sup>380</sup> See for example *Powers of Attorney Act 1956 (ACT)* s 12(1)(b); *Guardianship and Administration Act 1995 (Tas)* s 32(2)(c).

enduring power included authority to make a health care decision,<sup>381</sup> a current health care provider should not be eligible to act as witness.<sup>382</sup>

Since enduring power of attorney legislation was enacted in Queensland in 1990, there have been changes to Queensland legislation concerning Justices of the Peace. The *Justices of the Peace and Commissioners for Declarations Act 1991* created different levels of persons who are now authorised to exercise the powers previously conferred on a Justice of the Peace. The relevant categories of persons are now a Justice of the Peace and a Commissioner for Declarations. In the Draft Report the Commission recommended that, because of some uncertainty about the powers of a Commissioner for Declarations, the enduring power of attorney legislation be amended to make it clear that a Commissioner for Declarations is authorised to witness an enduring power of attorney and to certify as to the capacity of the donor, and that the amendment should be retrospective to the date on which the *Justices of the Peace and Commissioners for Declarations Act 1991* came into operation.<sup>383</sup>

The Commission's recommendations were reflected in clause 43 of the Draft Bill in Chapter 13 of the Draft Report.

The majority of the submissions received by the Commission in response to the Draft Report accepted the Commission's proposals. However, a number of submissions argued that the witnessing requirements should be even tighter than those proposed by the Commission.

Two submissions suggested that execution of an enduring power of attorney should require two witnesses. The Legal Friend proposed that neither witness should be related to the person making the power nor to the chosen decision-maker, and one should be a lawyer, a Justice of the Peace or a Commissioner for Declarations.<sup>384</sup> The other respondent proposed that one of the witnesses should be a solicitor and the other a medical practitioner.<sup>385</sup>

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<sup>381</sup> Enduring powers of attorney for health care decisions are discussed in Chapter 10 of this Report.

<sup>382</sup> At 106.

<sup>383</sup> At 107.

<sup>384</sup> Submission No 76.

<sup>385</sup> Submission No 79.

Two submissions expressed the view that only lawyers should be able to witness an enduring power of attorney. One respondent's view was based on the belief that lawyers would be better able to understand the forms for executing an enduring power of attorney and to instruct the person making the enduring power on its possible use and consequences.<sup>386</sup> The other respondent, a solicitor, argued that unlike lawyers Justices of the Peace are not exposed to ascertaining whether clients have testamentary capacity or to other areas of the law where some "street wisdom and technique" are acquired by a legal practitioner to determine such matters.<sup>387</sup>

The Commission remains of the view that any additional protection provided by such measures would be outweighed by the practical barriers which they would present to many people who wish to make an enduring power of attorney. The Commission believes that the better approach is for Justices of the Peace and Commissioners for Declarations to be more informed about the responsibility that they undertake in witnessing an enduring power. The Commission has recommended, on page 100 of this Report, that better training programs should be available for Justices of the Peace and for Commissioners for Declarations. The Commission's recommendations concerning the information which should be included in the form for making an enduring power of attorney would also assist people who witness such documents.

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<sup>386</sup> Submission No 10.

<sup>387</sup> Submission No 1.

**The Commission recommends that the legislation provide that an enduring power of attorney must be signed by a witness who is:**

- . a Justice of the Peace, a Commissioner for Declarations or a lawyer; and**
- . not the person signing the enduring power of attorney on behalf of the person making it; and**
- . not a chosen decision-maker of the person making the enduring power of attorney; and**
- . not a relation of the person making the enduring power of attorney or the chosen decision-maker; and**
- . if the enduring power of attorney gives power to make a health care decision, not a current health care provider for the person making the enduring power of attorney.**

The Commission's recommendation is implemented by clause 42 of the Draft Bill in Volume 2 of this Report.

**(k) Who may be a chosen decision-maker**

**(i) Appointment of more than one chosen decision-maker**

The approved form in the existing legislation provides for more than one attorney to be appointed. Attorneys may be appointed jointly, or jointly and severally.<sup>388</sup> If they are appointed jointly, they must act together. If they are appointed severally, they may act independently of each other. In either case, because of the requirement that an enduring power be in the approved form,<sup>389</sup> and because the form gives an attorney power to do anything the donor may lawfully authorise an attorney to do, the attorneys acting together or independently will have all the powers the donor could lawfully grant.

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<sup>388</sup> *Property Law Act 1974 (Qld)* Form 14.

<sup>389</sup> *Property Law Act 1974 (Qld)* s 175A.

In the Draft Report, the Commission noted that there may be situations where a person who makes an enduring power of attorney wishes to nominate different decision-makers for different purposes - for example, one to make decisions about personal welfare and another to make decisions about business or property matters. Alternatively, the person may wish to nominate a decision-maker to act on a temporary basis if the chosen decision-maker is unavailable. The person may also wish to nominate successive decision-makers to provide for the eventuality that the person's first choice may not be able to act when the power comes into operation, or that, at some time in the future, the original chosen decision-maker may be removed or cease to act.<sup>390</sup>

The Commission recommended that the proposed legislation should enable a person who makes an enduring power of attorney, at the time the power is granted,<sup>391</sup> to nominate different decision-makers for specific purposes<sup>392</sup> and to nominate acting or successive decision-makers.<sup>393</sup> The Commission's recommendations were reflected in clause 46 of the Draft Bill in Chapter 13 of the Draft Report.

The majority of the submissions received by the Commission were in favour of the Commission's recommendations. One respondent suggested that the nomination of different chosen decision-makers for particular purposes would be a safeguard which increased protection for the person making the enduring power of attorney.<sup>394</sup>

However, one submission commented that having different decision-makers for different purposes could be too unwieldy.<sup>395</sup>

The Commission acknowledges that the line of demarcation between different kinds of decisions may not be absolutely clear. To overcome some of the difficulties that this might cause, the Commission proposed in the Draft Report that a decision-maker authorised under an enduring power of attorney to make a decision for a person with impaired decision-making

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<sup>390</sup> At 102.

<sup>391</sup> If the Commission's recommendations are implemented, the subsequent appointment of a chosen decision-maker would revoke an earlier power conferring the same decision-making authority on a different chosen decision-maker. See pp 136-138 of the Report.

<sup>392</sup> See for example *Protection of Personal and Property Rights Act 1988 (NZ)* s 99(1)(b).

<sup>393</sup> At 102-103. See for example *Protection of Personal and Property Rights Act 1988 (NZ)* s 95(5).

<sup>394</sup> Submission No 28.

<sup>395</sup> Submission No 63.

capacity should be under an obligation to consult with any other decision-maker for the person and that, where chosen decision-makers have been nominated to make decisions jointly and it becomes impossible for the decision-makers to agree, any of the decision-makers should be able to apply to the proposed tribunal for directions.<sup>396</sup> The Commission's recommendations were reflected in clauses 128 and 129 of the Draft Bill in Chapter 13 of the Draft Report.

On balance, the Commission remains of the view that the advantages of allowing a person who makes an enduring power of attorney to choose the most appropriate decision-maker for a particular kind of decision outweigh the possible disadvantages.

**The Commission recommends that the legislation provide that a person who makes an enduring power of attorney be able to nominate:**

- . different chosen decision-makers for different purposes;**
- . alternative chosen decision-makers so that power is given to a particular chosen decision-maker only in a stated circumstance;**
- . successive chosen decision-makers so that power is given to a particular chosen decision-maker only when power given to another chosen decision-maker ends.**

The Commission's recommendation is implemented by clause 39 of the Draft Bill in Volume 2 of this Report.

Another submission drew attention to a potential problem which could arise as a result of the wording of clause 46(b) of the Draft Bill in Chapter 13 of the Draft Report.<sup>397</sup> This clause, which adopted the wording of the existing legislation, provided for a person making an enduring power of attorney to choose "joint or joint and several" decision-makers. The submission commented that it is quite common for people who make an enduring power of attorney to require a kind of composite appointment which provides that, for example, any two of a greater number of decision-

<sup>396</sup> At 117-118. The powers and duties of decision-makers are discussed in Chapter 9 of this Report.

<sup>397</sup> Submission No 31.

makers can act. However, the submission noted that some authors<sup>398</sup> have commented that a power granted in these terms would not comply with a statutory requirement that the appointment be specified to be either joint or joint and several.

The submission suggested that provision should be made for such a "composite" nomination.<sup>399</sup>

**The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may nominate:**

- . joint or joint and several chosen decision-makers; or**
- . two or more joint chosen decision-makers, being a number less than the total number of nominated decision-makers.**

The Commission's recommendation is implemented by clause 39 of the Draft Bill in Volume 2 of this Report.

Another problem considered by the Commission is the possibility that a person making an enduring power of attorney may nominate more than one chosen decision-maker for a decision or kind of decision, but may fail to specify how their authority is to operate.

**The Commission recommends that the legislation provide that, if a person who nominates more than one chosen decision-maker for a decision or kind of decision fails to specify how the authority is to be exercised, then the chosen decision-makers should be taken to have been appointed jointly.**

The Commission's recommendation is implemented by clause 173 of the Draft Bill in Volume 2 of this Report.

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<sup>398</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 213 citing Aldridge, *Powers of Attorney* (7th edition 1988) 37.

<sup>399</sup> See for example *Powers of Attorney Act 1956 (ACT)* s 3AB.



A further issue brought to the Commission's attention concerns the position where one of a number of decision-makers appointed jointly under an enduring power of attorney is unable to continue to act.

The current law is that, if an authority which has been given jointly to more than one person under an enduring power of attorney cannot be exercised jointly by all the people to whom it was given, the grant of authority becomes invalid.<sup>400</sup> The Commission believes that, in many cases, this would be contrary to the wishes of the person who made the enduring power, who may not have been aware of what would happen if all the decision-makers were not able to continue to act jointly and may not have sufficient capacity to make a new enduring power.

For example, one respondent told the Commission that his mother had made an enduring power of attorney appointing the respondent and his two brothers jointly, because she wanted them all to have an equal say in managing her affairs. Unfortunately, however, one brother predeceased the mother, so that the power was no longer valid. The respondent believed that his mother who, by that time, would not have been able to execute a new power, would have wanted the two remaining brothers to continue to act on her behalf. He submitted that the law should be changed to allow the power to continue to be exercised jointly by the remaining appointees.<sup>401</sup>

The Commission accepts the respondent's submission.

**The Commission recommends that the legislation provide that, where a person who makes an enduring power of attorney appoints more than one chosen decision-maker to act jointly, the power should not be invalidated by the inability of any of the chosen decision-makers to continue to act, but should continue to confer authority on the remaining chosen decision-makers, if more than one, to act jointly, until the last of the chosen decision-makers is unable to act.**

The Commission's recommendation is implemented by clause 176 of the Draft Bill in Volume 2 of this Report.

<sup>400</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 214; *Adams v Buckland* (1705) 2 Vern 514, 23 ER 929; *Friend v Young* [1897] 2 Ch 421 at 429; *Hudson v Hudson* [1948] P 292.

<sup>401</sup> Submission No 114.

## (ii) Corporate chosen decision-makers

The present enduring power of attorney legislation does not specifically provide for the eligibility for appointment of a corporate chosen decision-maker. However, there may be some people who wish to make their own arrangements for the eventuality of future loss of capacity to make their own decisions but who do not wish or are not able to nominate a relative or friend to act on their behalf. If these people are not able to nominate a corporate decision-maker, they may be denied the advantages of the legislation. Eligibility of corporate decision-makers would increase the accessibility of enduring power of attorney legislation.

In the Draft Report, the Commission expressed the view that, although in some situations, it should be possible for a person who makes an enduring power of attorney to nominate a corporate decision-maker to act on his or her behalf under an enduring power of attorney, it would not be appropriate for all corporations to be eligible for appointment.<sup>402</sup> Corporate service providers such as nursing home operators, for example, would inevitably be faced with a conflict of interest if they were appointed. There could also be problems with the standard of accountability for corporations.

The Commission recommended that eligibility for corporate chosen decision-makers should be restricted to the Public Trustee and to statutory trustee companies. Factors influencing the Commission were that either the Public Trustee or a statutory trustee company may be appointed to act under an ordinary power of attorney;<sup>403</sup> both are subject to strict standards of accountability as trustees and both are subject to further regulation by statute;<sup>404</sup> and neither the Public Trustee nor a statutory trustee company is likely to be affected by any conflict of interest.<sup>405</sup>

However, the Commission also recommended that the authority of the Public Trustee or a trustee company under an enduring power of attorney should not extend to making decisions about the personal care and welfare of the person who made the enduring power. In recommending that the existing

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<sup>402</sup> At 103.

<sup>403</sup> *Trustee Companies Act 1968 (Qld)* s 22(1); *Public Trustee Act 1978 (Qld)* s 27(1).

<sup>404</sup> *Trustee Companies Act 1968 (Qld)*; *Public Trustee Act 1978 (Qld)*.

<sup>405</sup> A person who intends to appoint the Public Trustee or a statutory trustee company as his or her chosen decision-maker should make enquiries about the fees and charges payable in relation to the management of the property concerned. A statutory trustee company may charge a commission representing a percentage of both the capital value of the estate and of the income received by the company on account of the estate and, in addition, a fee calculated at a rate not exceeding 1% of the capital sum invested in the common fund of the company on account of the estate. (*Trustee Companies Act 1968 (Qld)* ss 41, 45(1)(b).) The Public Trustee's charges are set out in the *Public Trustee Regulation 1989*.

legislation be amended to allow a person who makes an enduring power of attorney to confer on a chosen decision-maker authority to make decisions about personal matters,<sup>406</sup> the Commission envisaged that the person entrusted with making those decisions would be someone close to the person, who was familiar with the person's lifestyle and values. The Commission believed that it would be inappropriate for authority to make decisions requiring sympathetic knowledge of personal preferences to be conferred on a corporate decision-maker.<sup>407</sup>

The Commission's recommendations were reflected in clauses 44 and 45 of the Draft Bill in Chapter 13 of the Draft Report.

The few submissions which specifically considered this issue supported the Commission's recommendations.

**The Commission recommends that the legislation provide that:**

- . eligibility for corporate attorneys should be restricted to the Public Trustee and to statutory trustee companies; and**
- . 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 personal care and welfare of the person who made the enduring power of attorney.**

The Commission's recommendation is implemented by clauses 37 and 38 of the Draft Bill in Volume 2 of this Report.

The Commission recognises that there will be some people who do not have close friends or relatives whom they wish to appoint as chosen decision-makers for personal matters. The effect of the recommendations put forward by the Commission in the Draft Report would be that, if a person needed a substitute decision-maker for such matters, an application would have to be made to the tribunal proposed by the Commission. In the absence of an appropriate member of the person's family or support network, it is likely that the Adult Guardian<sup>408</sup> would be appointed.

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<sup>406</sup> See pp 89-91 of this Report.

<sup>407</sup> At 103-104.

<sup>408</sup> See Chapter 12 of this Report.

However, if the person were able to make an enduring power of attorney, he or she would be able to give instructions about the way in which matters of a personal nature should be decided. The Commission would not wish to deprive a person of the opportunity to plan for future care if the person became unable to make his or her own decisions.

**The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may nominate the Adult Guardian as chosen decision-maker for personal and health care decisions.**

The Commission's recommendation is implemented by clause 37 of the Draft Bill in Volume 2 of this Report.

**(iii) Professional care givers**

In the Draft Report, the Commission recommended that, because of the inherent conflict of interest involved, a person who provides on a professional basis services for the care of a person with impaired decision-making capacity should not be eligible to be appointed as a decision-maker for that person.<sup>409</sup> It considered that a similar conflict of interest would arise if a person who provided care on a professional basis were to act as decision-maker under an enduring power of attorney, and recommended that such a person should not be eligible for appointment under an enduring power of attorney.<sup>410</sup> In the Draft Bill in Chapter 13 of the Draft Report, such a person was described as a "paid carer". The term "paid carer" was defined in the Dictionary in the Schedule to the Draft Bill as:

*someone who -*

- (a) performs services for the (person's) care; and*
- (b) receives remuneration from any source for the services, other than ...*

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<sup>409</sup> At 48.

<sup>410</sup> At 118.

The Commission also recommended that the fact that a person receives a carer's pension should not make the person ineligible for appointment.<sup>411</sup> The Commission further recommended that a current health care provider for the person should not be eligible.<sup>412</sup>

These recommendations were reflected in clauses 44(b) and 45(b) of the Draft Bill in Chapter 13 of the Draft Report.<sup>413</sup>

**The Commission recommends that a paid carer or a current health care provider for a person should not be eligible for appointment as a chosen decision-maker for that person.**

The Commission's recommendation is implemented by clauses 37 and 38 of the Draft Bill in Volume 2 of this Report.

**(iv) Other criteria for disqualification**

One of the submissions received by the Commission in response to the Draft Report proposed that persons with a history of criminal offences or bankruptcy should be excluded from being appointed as chosen decision-makers.<sup>414</sup>

In the Draft Report, the Commission recommended that, for a substitute decision-maker appointed by the proposed tribunal, the existence of a previous criminal conviction or the fact that a person had been made bankrupt should not be automatic grounds of disqualification, but should be factors to be taken into account in assessing the person's suitability for appointment.<sup>415</sup>

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<sup>411</sup> The Dictionary in the Schedule to the Draft Bill defined the term "paid carer" to exclude a person who is paid a carer's pension or who has received payment for services originally provided on a voluntary basis to a person who has been awarded damages as compensation for the need for those services under the principle established in *Griffith v Kerkemeyer* (1977) 139 CLR 161. See Queensland Law Reform Commission, Report No 45, *The assessment of damages in personal injury and wrongful death litigation*, October 1993.

<sup>412</sup> At 118.

<sup>413</sup> Cl 56(1) of the Draft Bill also provided that an enduring power of attorney is revoked to the extent that it gives decision-making power to a chosen decision-maker who subsequently becomes a paid carer or a health care provider.

<sup>414</sup> Submission No 52.

<sup>415</sup> At 46.

This recommendation was reflected in clause 88 of the Draft Bill in Chapter 13 of the Draft Report.

The Commission also adopted the approach in the Draft Report that the duties and obligations of a decision-maker chosen by an enduring power of attorney should parallel as closely as possible the duties and obligations of an appointed decision-maker.

The proposal made in the submission raises the question of whether the same approach should be adopted in relation to eligibility to act as a decision-maker. On the one hand, it might be argued that a person making an enduring power of attorney should have freedom of choice of decision-maker. On the other, the vulnerability of a person making an enduring power of attorney may be even greater if he or she chooses a decision-maker in ignorance of the decision-maker's true background.

While the Commission is concerned to ensure that people who make an enduring power of attorney are given adequate protection, it believes that, from a practical point of view, the proposal would be almost impossible to enforce.

#### **(l) Invalidity of an enduring power of attorney**

The situation may arise where the validity of an enduring power of attorney is challenged. The challenge may be made on the basis that, for example, the person who granted the power lacked the necessary degree of capacity at the time the power was made, that the formal requirements for execution of an enduring power of attorney were not complied with, or that the person who made the enduring power of attorney was subjected to duress or undue influence.

#### **(i) Power to decide validity**

At present, it is necessary to make an application to the Supreme Court to determine the validity of a disputed power.

One of the submissions received by the Commission in response to the Draft Report recommended that the tribunal proposed by the Commission should be given power to deal with the situation where a person's capacity at the time of making an enduring power of attorney is in question.<sup>416</sup> This proposal is consistent with the Commission's recommendation that the

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<sup>416</sup> Submission No 74.

proposed legislation should confer concurrent powers on the Supreme Court and the tribunal with respect to enduring powers of attorney.<sup>417</sup>

In the view of the Commission, the power should not be restricted to determining the validity of an enduring power of attorney on the basis of the capacity of the person who made it, but should include adjudication of challenges on other grounds of alleged invalidity.<sup>418</sup>

**The Commission recommends that the legislation provide that the Supreme Court and the tribunal each have power to:**

- . **determine whether a person who has granted an enduring power of attorney had the necessary degree of capacity at the time the power was made; and**
- . **if it is satisfied that the person did not have the necessary degree of capacity at the time the power was made, declare the enduring power of attorney invalid; and**
- . **declare an enduring power of attorney invalid on other grounds; and**
- . **If it is satisfied that an enduring power of attorney is not valid, appoint, in the same proceeding, a decision-maker for the person who made the enduring power of attorney, if it considers it appropriate to do so.**

The Commission's recommendation is implemented by clauses 63 and 312 of the Draft Bill in Volume 2 of this Report.

**(ii) Effect of invalidity**

An invalid enduring power of attorney cannot effectively confer decision-making authority on the chosen decision-maker named in the document creating the power. The lack of authority which results from the invalidity of an enduring power of attorney can have serious consequences for both the chosen decision-maker and third parties who deal with the chosen decision-

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<sup>417</sup> See pp 87-89 of this Report.

<sup>418</sup> A challenge to an enduring power of attorney on grounds such as duress or undue influence may involve complex issues of law or fact which, because of the demand on the resources of the tribunal, would be more appropriately dealt with in the Supreme Court. The Commission has recommended, at p 89 of this Report, that the Supreme Court and the tribunal should each have power to transfer a matter to the other if it considers appropriate.

maker in reliance on the power.

**A. Position of the chosen decision-maker**

A chosen decision-maker named in the document creating an enduring power of attorney will have no formal authority if, for any reason, the enduring power of attorney is invalid. A chosen decision-maker who acts under an invalid enduring power of attorney will therefore be acting informally. The Commission makes certain recommendations in this Report about protection from personal liability for informal decision-makers.<sup>419</sup>

In the view of the Commission the proposed legislation should also provide specific protection for a chosen decision-maker who acts in reliance on an invalid power, provided that the decision-maker did not know or have reason to believe that the power was invalid.

**B. Position of third party**

A third party who deals with a chosen decision-maker in reliance on an invalid enduring power of attorney may also be put at risk of personal liability by the chosen decision-maker's lack of authority.

In the view of the Commission, it is undesirable that an innocent third party should be exposed to risk of liability in this situation.

**The Commission recommends that the legislation provide that:**

- . a chosen decision-maker who acts in reliance on an invalid enduring power of attorney is protected from personal liability, provided that the chosen decision-maker did not know or have reason to believe that the power was invalid;**
- . a third party who deals with a chosen decision-maker in reliance on an enduring power which is invalid is protected, provided that the third party did not know or have reason to believe that the enduring power of attorney was invalid.**

The Commission's recommendation is implemented by clause 43 of the Draft Bill in Volume 2 of this Report.

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<sup>419</sup> See pp 209-211.



**(m) When an enduring power of attorney comes into effect**

As previously explained,<sup>420</sup> an ordinary power of attorney generally takes effect as soon as it is executed, unless it is apparent from the document that it is intended to take effect in the future. The terms of the approved form in the existing legislation for the execution of an enduring power of attorney give no indication of an intention to defer the operation of the power.<sup>421</sup> Because the power must be in the approved form,<sup>422</sup> it is doubtful whether the person making an enduring power of attorney is presently able to specify that the power is to come into operation at some time in the future.

However, the purpose of an enduring power of attorney is to allow people to plan for the possibility of future incapacity. The execution of a power does not necessarily mean that the person making it is ready to hand authority to the chosen decision-maker immediately. He or she may wish to retain full control over his or her own affairs for as long as possible.

In the Draft Report, the Commission recommended that enduring power of attorney legislation expressly provide that an enduring power of attorney for decisions about personal welfare is not to have effect unless the person who made the power has lost capacity to make the decision.<sup>423</sup> The Commission further recommended that in relation to decisions about the management of the money or property of the person who made the power, or about a legal matter involving the person or the person's property, the person be able to specify that the power is to come into effect immediately the power is made, or on a specified date, or when the person loses capacity to decide.<sup>424</sup>

However, the Commission recognised that allowing a person making an enduring power of attorney to choose when the power comes into operation would create the risk of invalidating the power if the person failed to exercise that choice. The Commission recommended that, if the person making the enduring power of attorney fails to specify when it is to commence, it should come into effect immediately the document creating the power is executed.<sup>425</sup>

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<sup>420</sup> See p 79 of this Report.

<sup>421</sup> *Property Law Act 1974 (Qld)* Form 14.

<sup>422</sup> *Property Law Act 1974 (Qld)* s 175A.

<sup>423</sup> At 101. See for example *Powers of Attorney Act 1956 (ACT)* s 13(2), Schedule; *Protection of Personal and Property Rights Act 1988 (NZ)* s 98.

<sup>424</sup> At 101. See for example *Powers of Attorney Act 1956 (ACT)* Schedule.

<sup>425</sup> At 101.

The Commission also recognised that the onset of incapacity may be gradual and that, in some cases, there may be a period of uncertainty as to whether or not the power has become operative. The Commission expressed the view that these problems could be overcome by providing that the chosen decision-maker or any other person with a proper interest may apply for a declaration that the donor has lost capacity and that the power is in force.<sup>426</sup> The test of capacity used would be the same as that used in the determination of an application for the appointment of a decision-maker.

The Commission's recommendations were reflected in clauses 41(d), 47 and 48 of the Draft Bill in Chapter 13 of the Draft Report.

Although the majority of submissions which commented on the issue were in favour of the Commission's proposals, one respondent argued that they would be unworkable in practice.<sup>427</sup>

This submission pointed out that, if the commencement of the power were deferred until the happening of a specified event, such as the onset of incapacity, the chosen decision-maker would not be able to use the enduring power of attorney as a normal power of attorney if the person who made the power went overseas on holiday. The Commission is aware that some people who make an enduring power of attorney wish to use it in this way. Under the Commission's proposals they would not be prevented from doing so. They would be able to specify that the enduring power of attorney is to come into effect immediately it is executed, or during periods when they are away. Alternatively, if they failed to specify when the power is to commence it would, by default, become effective upon its execution.

However, the Commission's proposals would mean that people who do not want to use their enduring power of attorney in this way are able to choose to retain full control over their own affairs for as long as they wish to do so. The Commission's proposals merely increase the options available to people who make an enduring power of attorney. One submission, from the Public Guardian in Western Australia, commented that a similar provision in the Western Australian legislation provides enormous flexibility.<sup>428</sup>

The submission which expressed concern at the Commission's recommendations also questioned the practicality of the Commission's proposal to allow a person who makes an enduring power of attorney to specify that it is not to come into effect until the person has lost capacity to make the relevant decision or kind of

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<sup>426</sup> See for example *Guardianship and Administration Act 1990 (WA)* ss 104(1)(b)(ii), 106(2)(b).

<sup>427</sup> Submission No 1.

<sup>428</sup> Submission No 25. See *Guardianship and Administration Act 1990 (WA)* s 104(1)(b).

decision.<sup>429</sup> It argued that if, for example, the chosen decision-maker attempted to use such a conditional power to withdraw money from the account of the person who made the enduring power, a prudent bank manager would insist on proof that the condition had been satisfied. This would involve the inconvenience, expense and delay of obtaining a medical certificate to the effect that the person who made the power had lost decision-making capacity.

In the view of the Commission, this would be a small price to pay for the measure of protection it would give the person who made the enduring power of attorney.

The submission argued further that, if the chosen decision-maker wished to conduct a transaction the following month, the bank manager may require a second medical certificate, even though the original stated that the person who made the enduring power of attorney would be unlikely to ever regain capacity. Under the Commission's proposals, however, the chosen decision-maker would be able, if he or she did not wish to obtain a new medical certificate, to apply for a declaration that the power had come into effect.<sup>430</sup>

**The Commission recommends that the legislation provide that:**

- . an enduring power of attorney for personal or health care decisions is not to begin unless the person who made the power has lost capacity to make the decision;**
- . in relation to decisions about the management of money or property of the person who made the enduring power of attorney, or about legal matters involving the person or the person's money and property, the person be able to specify whether the power is to begin immediately, or on a specified date or occasion such as, for example, while the person is overseas or when the person has lost decision-making capacity;**
- . if the person who made an enduring power of attorney giving power to make financial decisions or decisions about legal matters failed to specify when the power is to begin, it should begin immediately the document creating the power is executed.**

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<sup>429</sup> Submission No 1.

<sup>430</sup> See p 124 of this Report.

The Commission's recommendations are implemented by clauses 45 and 46 of the Draft Bill in Volume 2 of this Report.

**(n) Using an enduring power of attorney**

**(i) Impaired capacity declaration**

If a person who makes an enduring power of attorney specifies that the power is not to become effective until the person has lost decision-making capacity, there may be, if the onset of incapacity is gradual, a period of uncertainty as to whether or not the power has become operative.

In the Draft Report, the Commission expressed the view that the tribunal recommended by the Commission in Chapter 8 of this Report should have power, on application by a chosen decision-maker or any other person with a proper interest in the matter, to make a declaration that the person who made the enduring power of attorney has lost decision-making capacity and that the power has come into operation.<sup>431</sup> The Commission's recommendation was reflected in clause 50 of the Draft Bill in Chapter 13 of the Draft Report.

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

**The Commission recommends that the legislation provide that a chosen decision-maker or any other interested person may apply for a declaration that the person who made the enduring power of attorney has impaired decision-making capacity for a decision or kind of decision.**

The Commission's recommendation is implemented by clauses 64 and 70 of the Draft Bill in Volume 2 of this Report.

**(ii) Duties of chosen decision-makers**

The existing legislation imposes certain duties on attorneys who exercise decision-making power conferred on them by an enduring power of attorney. These duties were discussed on pages 82-83 of this Report.

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<sup>431</sup> At 102. See for example *Guardianship and Administration Act 1990 (WA)* ss 104(1)(b)(ii), 106(2)(b).

In the Draft Report, the Commission expressed the view that the existing statutory duties required modification and that some additional duties should be imposed, particularly in the light of the expanded scope which the Commission has recommended for enduring powers of attorney.<sup>432</sup>

The Commission also expressed the view that the duties imposed on a chosen decision-maker should be consistent with those imposed on an appointed decision-maker.<sup>433</sup>

The duties of decision-makers are discussed in Chapter 9 of this Report.

**(iii) Advice and directions about exercise of power**

When an enduring power of attorney has come into operation, a chosen decision-maker or another person affected by the operation of the power may be uncertain as to the scope of the power or as to how the power should be exercised.

This issue is discussed on pages 283 and 284 of this Report.

**(iv) Supervision of chosen decision-makers**

If a person who has made an enduring power of attorney loses decision-making capacity, he or she may no longer be able to oversee the conduct of the chosen decision-maker or to revoke the power. There is a need for a mechanism which protects a person who has made an enduring power of attorney against incompetence or neglect on the part of the chosen decision-maker, or against exploitation by the chosen decision-maker.

**A. Who should supervise**

Under the existing legislation, the Public Trustee or any other person with a proper interest may apply to the Supreme Court for an order that the attorney provide records and accounts of all dealings and transactions involving the donor's property; that the records and accounts be audited; that the power be varied or revoked; or that the attorney be removed. The Court may appoint an attorney to replace an attorney who has been removed.<sup>434</sup>

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<sup>432</sup> At 113.

<sup>433</sup> At 113.

<sup>434</sup> *Property Law Act 1974 (Qld)* s 175G.

In the Draft Report, the Commission recommended that power to revoke or vary the terms of an enduring power of attorney, or to appoint another chosen decision-maker, be transferred from the Supreme Court to the tribunal proposed by the Commission. The Commission believed that the greater accessibility of the tribunal would prove to be stronger protection for a person who has made an enduring power of attorney who may be vulnerable to abuse by a chosen decision-maker than measures such as requiring a higher degree of capacity or more stringent witnessing procedures which would reduce the availability of an enduring power to a significant number of people.<sup>435</sup> The Commission's recommendation was reflected in clauses 52 and 53 of the Draft Bill in Chapter 13 of the Draft Report.

Only two of the submissions received by the Commission in response to the Draft Report favoured retaining the jurisdiction of the Supreme Court to supervise the performance of a chosen decision-maker under an enduring power of attorney.<sup>436</sup>

In view of the cost of an application to the Supreme Court, the Commission is concerned that, in many cases, the protection offered by the Court to a person who has made an enduring power of attorney would be more illusory than real. However, after further consideration, the Commission has come to the view that the proposed legislation should confer concurrent power on the Supreme Court and the tribunal.<sup>437</sup>

**The Commission recommends that the legislation provide that both the Supreme Court and the tribunal have supervisory jurisdiction over chosen decision-makers appointed by enduring powers of attorney.**

The Commission's recommendation is implemented by clauses 63-67 and 312 of the Draft Bill in Volume 2 of this Report.

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<sup>435</sup> At 113.

<sup>436</sup> Submissions Nos 58, 71. However, submission No 71 commented in another context that "[t]he proposal for a tribunal with a monitoring role and a statutory specification of principles to be adopted in the performance of powers and duties under the legislation would enhance ... accountability".

<sup>437</sup> See pp 87-89 of this Report.

## **B. Grounds for removal**

In the Draft Report, the Commission adopted the approach that the duties and obligations of a decision-maker chosen under an enduring power of attorney should be the same as those of a decision-maker appointed by the tribunal proposed by the Commission. In the view of the Commission, the same approach should be adopted in relation to the grounds for removing a decision-maker. The grounds for removal of both chosen and appointed decision-makers are discussed in Chapter 9 of this Report.

### **(v) Appointment of a monitor**

A recent development in enduring power of attorney legislation in some Canadian jurisdictions is intended to provide additional protection for a person who makes an enduring power of attorney. In British Columbia, for example, the appointment of an attorney may be accompanied by the appointment of a monitor. If the person who makes the enduring power does not nominate someone to act as monitor or state in the document that a monitor is not required, the Public Trustee may appoint a monitor. The monitor's duty is to try to ensure that the attorney fulfils his or her statutory obligations. The monitor has power to visit and consult with the donor, and to require the attorney to produce accounting records or otherwise report to the monitor. The monitor may direct the attorney to comply with the statutory obligations and, if the attorney does not do so, the monitor must notify the Public Trustee.<sup>438</sup>

In the Draft Report, the Commission acknowledged that, in some circumstances, it may be useful for a donor to appoint a monitor. However, the Commission expressed a number of reservations about such a system.<sup>439</sup>

If, for example, there is tension over the donor's choice of a particular family member as an attorney, the situation may be exacerbated by the appointment of another family member as monitor. Potential attorneys may be deterred from accepting appointment by the prospect of having someone constantly looking over their shoulder. Provision for appointment of a monitor would also add to the complexity of the legislation and to the execution process.

Further, it might be argued that since in British Columbia a court application, brought by or on the recommendation of the Public Trustee, must be made for the removal of an attorney who is suspected of acting improperly, there

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<sup>438</sup> *Representation Agreement Act 1993 (British Columbia)* ss 12, 20.

<sup>439</sup> At 108.

is greater need for supervision of attorneys in order to protect a donor who has lost capacity. Under the Commission's proposals, any person with a genuine interest in the welfare of the donor will be able to apply to the tribunal to have the attorney removed.<sup>440</sup>

The Commission made no recommendation about the appointment of monitors, but specifically invited comment on the issue.

The submissions which considered the question of the appointment of monitors were evenly divided. Those which favoured the requirement to appoint a monitor focussed on the need for greater accountability of chosen decision-makers.<sup>441</sup>

In the submissions which disagreed that there should be a requirement to appoint a monitor, it was argued that a properly resourced, accessible and flexible tribunal should be able to perform the monitoring role adequately.<sup>442</sup> It was also argued that, in any event, given the private nature of the execution and use of enduring powers of attorney, the supervisory role of the tribunal would be needed even if the role of a privately appointed monitor were included in the legislation.<sup>443</sup> Reference was also made to the conflict which could arise between a chosen decision-maker and a monitor, and the effect which this could have on the ability of a chosen decision-maker to carry out his or her duties efficiently.<sup>444</sup> One respondent commented that "[a] monitor would have authority without any responsibility, and the attorney would have all the responsibility without the final authority".<sup>445</sup>

The Commission is not convinced that the potential benefit of the appointment of a monitor, if any, would not be outweighed by the disadvantages which it could create. The Commission believes that the better approach for a person who wishes to impose some measure of control over the way an enduring power of attorney is exercised would be to appoint two or more chosen decision-makers jointly, so that they had equal

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<sup>440</sup> The Commission has recommended in Chapter 13 of this Report that there should be no application fee for bringing an application to the tribunal and that there should be no award of costs against a person for unsuccessfully making an application.

<sup>441</sup> Submissions Nos 25, 52, 71, 73, 79.

<sup>442</sup> Submissions Nos 10, 64, 74.

<sup>443</sup> Submissions Nos 64, 74.

<sup>444</sup> Submissions Nos 18, 74.

<sup>445</sup> Submission No 54.



authority and could act only with the agreement of all of them. One of the submissions proposed that the form to be used for creating an enduring power of attorney include a note to the person making the power about the extra protection that may be offered by a joint appointment.<sup>446</sup> This suggestion is consistent with the view taken by the Commission.

**The Commission recommends that the legislation should not provide for the appointment of a monitor to supervise the exercise of an enduring power of attorney by a chosen decision-maker.**

**The Commission recommends that the form for creating an enduring power of attorney include a note to the person making the enduring power about the extra protection offered by a joint appointment.**

**(o) Revocation**

**(i) Capacity to revoke**

The existing legislation provides that, during a period of legal incapacity of the donor of an enduring power of attorney, the Supreme Court may, on the application of any person who in the opinion of the Court has a proper interest in the matter, revoke the power.<sup>447</sup> However, as the degree of understanding needed to make a particular decision varies according to the nature and complexity of the decision, there is no fixed standard of "legal incapacity" for all purposes. The legislation does not address the question of the extent to which a donor's decision-making capacity must be impaired before the donor is no longer able to revoke the power effectively.

If, as the Commission has recommended, a statutory test of capacity to execute an enduring power of attorney is introduced,<sup>448</sup> it would be consistent with this approach to consider the inclusion of a statutory test of capacity to revoke.

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<sup>446</sup> Submission No 64.

<sup>447</sup> *Property Law Act 1974 (Qld)* s 175(G)(1)(c).

<sup>448</sup> See pp 96-97 of this Report.

Accordingly, in the Draft Report, the Commission gave serious consideration to the degree of capacity necessary for effective revocation of an enduring power of attorney.<sup>449</sup>

The Commission acknowledged that, on one view, a person who has granted an enduring power of attorney should always be able to revoke it, whatever his or her level of capacity at the time of revocation. A person whose decision-making capacity is impaired may, for example, no longer wish the nominated chosen decision-maker to act on his or her behalf or may object to decisions made by the chosen decision-maker. However, the Commission recognised certain difficulties in allowing a person who has made an enduring power of attorney to revoke the power regardless of his or her level of capacity. First, as a consequence of his or her impaired decision-making capacity, the person may be confused. The wish to revoke may be prompted by the person's distorted perceptions of his or her relationships with the people around him or her. Secondly, the person who made the enduring power of attorney may not have sufficient capacity to execute a new power. Consequently, the person may dismiss a chosen decision-maker who is acting in the person's best interests, and not be able to appoint a replacement. This result would entirely defeat the purpose of the enduring power of attorney mechanism.

The Commission considered that an alternative would be to allow a person who has made an enduring power of attorney to revoke the power if he or she is capable of understanding the nature and effect of the revocation. However, the Commission was concerned that the difficulties outlined above would also apply to this option.<sup>450</sup>

The Commission recommended that the legislative test of capacity to revoke an enduring power of attorney should be the same as that for executing an enduring power,<sup>451</sup> thus ensuring that a person who revokes an enduring power of attorney would be able to grant a new power if he or she chose to do so. The Commission's recommendation was reflected in clause 54(3)(b) of the Draft Bill in Chapter 13 of the Draft Report.

There was general acceptance of this recommendation in the submissions received by the Commission.

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<sup>449</sup> At 109-110.

<sup>450</sup> See also *Smith v Public Trustee of Queensland*, Writ No 42 of 1994 (Supreme Court unreptd), where Cullinane J rejected a submission that a "minimal" understanding of the nature and effect of a power of attorney and the fact that it was being revoked was a sufficient test of capacity to revoke an enduring power of attorney.

<sup>451</sup> At p 110.

**The Commission recommends that the legislation provide that, in order to revoke an enduring power of attorney, the person who made the power must understand the matters necessary to make the same power.**

The Commission's recommendation is implemented by clause 48(2) of the Draft Bill in Volume 2 of this Report.

**(ii) Method of revocation**

At common law, a power of attorney could be revoked informally.<sup>452</sup>

In the Draft Report, the Commission acknowledged that revocation of an enduring power of attorney should not be a complex procedure. However, it expressed concern that to allow oral revocation could lead to problems of proof and to consequent uncertainty. Moreover, the Commission recognised that revocation of an enduring power of attorney has important legal consequences since, if the person who made the power loses capacity to make a decision included in the power, there will be no-one with legal authority to make that decision on the person's behalf.<sup>453</sup>

The Commission recommended that revocation of an enduring power of attorney should be in writing and should be signed and witnessed in the same way as the power is executed. The Commission further recommended that the person who made the power should be obliged to take reasonable steps to notify the chosen decision-maker of the revocation.<sup>454</sup> These recommendations were implemented by clause 54 of the Draft Bill in Chapter 13 of the Draft Report.

In the submissions received by the Commission there was general acceptance of the Commission's recommendation. However, one respondent expressed the view that the procedural requirements proposed by the Commission were too onerous in relation to an enduring power of attorney for health care. This submission is discussed in Chapter 10 of this Report.

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<sup>452</sup> See p 80 of this Report.

<sup>453</sup> At 110.

<sup>454</sup> At 110-111.

**The Commission recommends that the legislation provide that:**

- . revocation of an enduring power of attorney should be:**
  - . in writing; and**
  - . signed and witnessed in the same way as the power is executed;**

**and that if a person revokes an enduring power of attorney, the person must take reasonable steps to advise all chosen decision-makers under the power of the revocation.**

The Commission's recommendations are implemented by clause 48 of the Draft Bill in Volume 2 of this Report.

**(iii) Grounds for revocation**

At present, the circumstances in which an enduring power of attorney will automatically be revoked are set out in the existing legislation.<sup>455</sup>

In the Draft Report, the Commission recommended that some additional grounds, which revoke a power of attorney at common law, should also be included.<sup>456</sup>

**A. Divorce**

People who make enduring powers of attorney often appoint their husband or wife as their decision-maker under the power. However, if a couple later divorces, it is likely that the relationship has deteriorated to such an extent that it is no longer appropriate for either partner to continue to be nominated to act on the other's behalf.

In the Draft Report, the Commission noted that if a person makes a will leaving property to his wife or her husband, or appointing the person's husband or wife as executor of the will, a subsequent divorce will invalidate the gift of property to the former spouse and revoke the appointment of the

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<sup>455</sup> See p 83 of this Report.

<sup>456</sup> At 111-112.

former spouse as executor.<sup>457</sup> The Commission recommended that a similar provision should be enacted in relation to enduring powers of attorney, and that the legislation should state that the appointment of a person's husband or wife to act under an enduring power should be automatically revoked in the event of divorce. The Commission's recommendation was reflected in clause 55 of the Draft Bill in Chapter 13 of the Draft Report.

Only four of the submissions received by the Commission in response to the Draft Report specifically commented on this issue. Of those four submissions, three supported the Commission's recommendation.<sup>458</sup> The fourth, however, argued that divorce should not automatically revoke an enduring power of attorney to the extent that it gives decision-making authority to a former spouse.<sup>459</sup> The respondent commented that people who divorce may nevertheless have continuing common business interests where continuity of mutual powers of attorney is essential. The respondent proposed that the effect of divorce on an enduring power of attorney to the extent that it confers power on a former spouse should be a rebuttable presumption, and that a person who makes an enduring power of attorney should be able to express a contrary intention in the document.

However, the Commission believes that greater certainty is achieved by an unqualified provision. It is of the view that, in a situation where it is necessary for mutuality of interests to continue, the parties should make new enduring powers of attorney in the light of the changed circumstances.<sup>460</sup>

**The Commission recommends that the legislation provide that, to the extent that an enduring power of attorney gives decision-making power to a spouse, the enduring power of attorney should be revoked by subsequent divorce.**

The Commission's recommendation is implemented by clause 53 of the Draft Bill in Volume 2 of this Report.

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<sup>457</sup> At 111. See *Succession Act 1981 (Qld)* s 18.

<sup>458</sup> Submissions Nos 25, 73, 76.

<sup>459</sup> Submission No 58.

<sup>460</sup> If one of the ex-spouses has lost capacity and is unable to execute a new power, the other would be able to apply to the tribunal proposed by the Commission to be appointed as decision-maker in relation to those matters of ongoing mutual interest.

## B. Marriage

A will is revoked by a subsequent marriage unless it was expressly made in contemplation of that marriage.<sup>461</sup> In the Draft Report, the Commission recommended that a similar provision should be enacted in relation to enduring powers of attorney.<sup>462</sup> The Commission's recommendation was reflected in clause 55 of the Draft Bill in Chapter 13 of the Draft Report.

Only four of the submissions received by the Commission in response to the Draft Report specifically commented on this issue. Of those four submissions, two were in favour of the Commission's recommendation.<sup>463</sup>

However, two submissions strongly disagreed with the recommendation. One of these submissions based its opposition on the argument that succession law, which deals with inheritance, should be distinguished from enduring powers of attorney, which deal with matters of financial and investment management.<sup>464</sup> The Commission acknowledges the distinction. However, there are two further points which need to be taken into consideration. The first is that, under the Commission's proposals, an enduring power of attorney will be able to deal with a much wider range of decisions, including decisions about the personal welfare and health care of the person who made the power. The second is that marriage often involves significant rearrangement of a person's financial affairs.

The other submission which disagreed that marriage should automatically revoke an enduring power of attorney relied on a different argument. The respondent noted that the capacity required to enter a valid marriage<sup>465</sup> is fairly low, and that automatic revocation may well terminate valid and appropriate arrangements put in place previously which reflected the wishes of the person at the time he or she made the power.<sup>466</sup>

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<sup>461</sup> *Succession Act 1981 (Qld)* s 17.

<sup>462</sup> At 111.

<sup>463</sup> Submissions Nos 25, 73.

<sup>464</sup> Submission No 48.

<sup>465</sup> A marriage will be void if the consent of either party is not a real consent because that person is mentally incapable of understanding the nature and effect of the marriage ceremony: *Marriage Act 1961 (Cth)* ss 23(1)(d)(iii), 23B(1)(d)(iii).

<sup>466</sup> Submission No 76.

The Commission remains of the view that an enduring power of attorney should generally be revoked by marriage. It believes that, in the majority of cases, a person who made an enduring power of attorney would wish the changed circumstances brought about by marriage to prevail. If a chosen decision-maker under an enduring power of attorney which is revoked by a subsequent marriage is concerned that revocation of the enduring power of attorney might adversely affect the interests of the person who made the power, the chosen decision-maker would be able to apply to the tribunal proposed by the Commission for appointment as decision-maker for the person.

However, upon further consideration, the Commission is of the view that the exceptions to this general principle should be slightly broader than the one exception recommended in the Draft Report.

The recommendation in the Draft Report would operate to revoke an enduring power of attorney unless it were expressly made in contemplation of a *particular* marriage. The Commission is now of the view that it would give maximum effect to the wishes of a person making an enduring power of attorney if the person could include a general expression that the enduring power of attorney is not to be revoked by marriage. This would, to some extent, meet the concern expressed in the second of the two submissions which disagreed with the recommendation in the Draft Report,<sup>467</sup> as it would permit a person who did not want his or her enduring power of attorney to be revoked by a subsequent marriage to provide to that effect, even if no marriage was then contemplated by the person.

In addition, the Commission considers that an enduring power of attorney should not be revoked, even though it is silent as to the effect of marriage, where the marriage is to the person appointed as the chosen decision-maker under the enduring power of attorney. For example, a couple living in a *de facto* relationship might make enduring powers of attorney appointing each other as the other's chosen decision-maker. At that stage, they might not contemplate marriage, or might simply overlook expressing their intention that the enduring powers of attorney are not to be revoked by their subsequent marriage.

The Commission is of the view that to the extent to which an enduring power of attorney appoints as chosen decision-maker a person who subsequently marries the person who made the enduring power of attorney, the enduring power of attorney should not be revoked. In those circumstances, there is no reason to suppose that the person who made the enduring power of attorney and then married his or her chosen decision-maker would wish to have a different arrangement prevail after the marriage.

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<sup>467</sup> Submission No 76.

**The Commission recommends that the legislation provide that:**

- . if a person marries after making an enduring power of attorney, the enduring power of attorney is revoked unless**
  - . a contrary intention is expressed in the enduring power of attorney; or**
  - . the marriage is to the person appointed as the person's decision-maker under the enduring power of attorney, in which case the enduring power of attorney is revoked to the extent it gives power to a person other than the person who becomes the person's spouse.**

The Commission's recommendation is implemented by clause 52 of the Draft Bill in Volume 2 of this Report.

### **C. Execution of subsequent document**

Confusion may arise if a person who has appointed a chosen decision-maker under an enduring power of attorney at a later time executes another enduring power conferring the authority to make the same decision or kind of decision on a different chosen decision-maker. There may be a dispute as to which of the chosen decision-makers is entitled to act on behalf of the person who granted the power. Similarly, if a person who has appointed a chosen decision-maker to make health care decisions under an enduring power of attorney subsequently executes an advance directive for health care<sup>468</sup> which includes the same decisions, there may be confusion about the chosen decision-maker's authority.

In the Draft Report, the Commission recommended that an enduring power of attorney should be revoked to the extent that a person who has the necessary capacity to do so subsequently executes an enduring power which confers the same decision-making authority on a different chosen decision-maker, or makes an advance directive which includes the same decisions.<sup>469</sup> The Commission's recommendation was reflected in clause 55 of the Draft Bill in Chapter 13 of the Draft Report.

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<sup>468</sup> See pp 346-358 of this Report.

<sup>469</sup> At 112.



Three of the submissions received by the Commission in response to the Draft Report addressed this issue. Two of these submissions were in favour of the Commission's recommendation.<sup>470</sup> One submission commented that it "resolves the confusion which currently prevails where several EPAs can be in existence at the same time".<sup>471</sup> The third submission argued that a revocation clause in all enduring powers of attorney would cover the situation.<sup>472</sup> However, in the view of the Commission, this approach could have unintended consequences if a later power conferred different powers from those conferred by the earlier. Although this is unlikely to happen under the existing legislation, the expanded nature of enduring powers of attorney proposed by the Commission may mean that a person makes enduring powers of attorney for different purposes at different times. A person who does so would probably not want the later power to revoke the earlier. The Commission acknowledges that the presence of a revocation clause may alert the person making the enduring power of attorney to the possible effect of making a new power. However, the Commission has included in the form for granting an enduring power a warning as to the acts of the person making the power which would revoke the power.<sup>473</sup>

**The Commission recommends that the legislation provide that an enduring power of attorney should be revoked to the extent that the person who granted the power, having the necessary capacity to do so, subsequently makes another enduring power which gives power to make the same decisions to a different chosen decision-maker, or makes an advance directive for health care which covers the same subject matter.**

The Commission's recommendation is implemented by clause 55 of the Draft Bill in Volume 2 of this Report.

One of the submissions received by the Commission proposed that provision should be made for the revival of an enduring power of attorney revoked in this way if the later power is intentionally revoked without granting a further power.<sup>474</sup>

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<sup>470</sup> Submissions Nos 48, 73.

<sup>471</sup> Submission No 48.

<sup>472</sup> Submission No 58.

<sup>473</sup> See Appendix A and Appendix B to this Report.

<sup>474</sup> Submission No 48.

The Commission acknowledges that this proposal would ensure that there was a legally authorised decision-maker for the person. However, it is not persuaded that it is an appropriate solution. The fact that a document which revoked powers previously granted by an enduring power of attorney is itself subsequently revoked does not necessarily mean that the person who made the original enduring power of attorney would want the earlier powers revived. The Commission believes that in the situation posed by the submission, the preferable approach would be for an application to be made to the tribunal proposed by the Commission, if necessary, for the appointment of a decision-maker.

**(iv) Warning about revocation**

**The Commission recommends that the form for executing an enduring power of attorney should include a warning to both the person making the power and the person's chosen decision-makers about the events which operate to revoke the authority given by the power.**

**(v) Substituted revocation**

The decision to intentionally revoke an enduring power of attorney is an extremely personal one. In the Draft Report, the Commission expressed the view that, if a person who has made an enduring power of attorney loses the capacity necessary to revoke the power, only the tribunal proposed by the Commission should be able to revoke the power. The Commission recommended that revocation of an enduring power of attorney should be included in the decisions which a substitute decision-maker could not be authorised to make on behalf of a person with impaired decision-making capacity.<sup>475</sup> The Commission's recommendation was reflected in clauses 15(b), 40(4) and 53(4) of the Draft Bill in Chapter 13 of the Draft Report.

There was general support for the Commission's recommendation in the submissions received in response to the Draft Report. One submission, from the Public Guardian in Western Australia, described the recommendation as "an important initiative".<sup>476</sup>

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<sup>475</sup> At 112.

<sup>476</sup> Submission No 25.

In this Report, the Commission has recommended that its proposed legislation should confer concurrent jurisdiction on the Supreme Court and the tribunal.<sup>477</sup>

**The Commission recommends that the legislation provide that a substitute decision-maker cannot be authorised to revoke an enduring power of attorney on behalf of a person who has lost capacity to revoke the power personally and that, once a person who has made an enduring power of attorney has lost capacity to revoke it, the power can be revoked only by the tribunal or by the Supreme Court.**

The Commission's recommendation is implemented by clauses 34(3), 66, 120(3), 312 and Schedule 1 clause 7 of the Draft Bill in Volume 2 of this Report.

**(vi) Inducing revocation**

Although in the Draft Report the Commission considered the inclusion in the legislation of a provision making it an offence to, by dishonesty or undue influence, induce another person to execute an enduring power of attorney<sup>478</sup> the Commission did not consider the inclusion of a corresponding provision in relation to inducing the revocation of an enduring power of attorney.

In this Report the Commission has recommended that it should be an offence to dishonestly induce a person to make an enduring power of attorney.<sup>479</sup>

It is foreseeable that a dishonestly induced revocation of an enduring power of attorney could have detrimental consequences to the person who made the power. The person may not have, and may never again have, the capacity to make a new power of attorney and will thereby have no control over those matters which were the subject of the revoked power. Although the tribunal would have power to appoint a substitute decision-maker for the person, the decision-maker thus appointed may not necessarily have been the choice of the person.

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<sup>477</sup> See pp 87-89 of this Report.

<sup>478</sup> At 107.

<sup>479</sup> At pp 100-102 of this Report.

The Commission is of the view that it should be an offence to dishonestly induce the revocation of an enduring power of attorney. As with the proposed offence of dishonestly inducing the making of an enduring power of attorney, the Commission is of the view that it would be inappropriate to extend the scope of the offence to include inducing the revocation of an enduring power of attorney by anything other than dishonesty. If, for example, the offence were to include inducement by way of undue influence it would cover the situation of an elderly spouse cajoling his or her partner into revoking a power of attorney given to a child with whom the spouse has had a falling out. It would be inappropriate for the spouse in such circumstances to be the subject of allegations of undue influence.

The penalty for dishonestly inducing the revocation of an enduring power of attorney should be the same as the penalty proposed for the offence of dishonestly inducing the making of an enduring power of attorney, that is, a substantial fine or a term of imprisonment.

**The Commission recommends that the legislation provide that:**

- **it is an offence to dishonestly induce a person to revoke an enduring power of attorney;**
- **a person found guilty of the offence may be ordered to pay a substantial fine and/or sentenced to a term of imprisonment.**

The Commission's recommendation is implemented by clause 73 of the Draft Bill in Volume 2 of this Report.

**(vii) Protection from effect of revocation**

**A. Chosen decision-maker**

A chosen decision-maker may incur personal liability for acts done in reliance on an enduring power of attorney if the power was not in operation at the time. The existing legislation is unclear about the circumstances in which liability will arise.

The *Property Law Act* confers limited protection on an attorney who acts on an ordinary power of attorney which has been revoked if, at the time, the attorney did not know the power had been revoked.<sup>480</sup> However, there is at present no equivalent protection specifically conferred in relation to revocation of enduring powers of attorney. There is some doubt as to whether the protection given to an attorney under an ordinary power would also apply to an attorney under an enduring power, because there is no direct link between the part of the Act which deals with ordinary powers of attorney and the part which deals with enduring powers.

In the Draft Report, the Commission adopted the approach that the proposed scheme of legislation should specifically confer protection on a decision-maker who acts under an enduring power of attorney.<sup>481</sup>

The existing legislation is also unclear as to the extent of the knowledge which the attorney must possess to be deprived of protection. It has been suggested that the attorney must have actual knowledge of the revocation or of the occurrence of an event which has the effect of revoking the power before the protection is lost.<sup>482</sup>

The Commission's recommendations that a person who revokes an enduring power of attorney must take reasonable steps to notify a chosen decision-maker of the revocation<sup>483</sup> and that the form for making an enduring power of attorney must contain warnings about the events which will revoke the power<sup>484</sup> will assist in establishing the extent of a chosen decision-maker's knowledge.

In the Draft Report, the Commission expressed concern that an unscrupulous decision-maker may seek to avoid notification of revocation and may continue to use an enduring power of attorney even though he or she is aware that the person who made the power intends to revoke it. The Commission considered that a chosen decision-maker should not be protected from personal liability in such a situation. The Commission recommended that the statutory protection given to a chosen decision-maker who acts on an enduring power which has been revoked should be restricted to a chosen decision-maker who does not know or does not have

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<sup>480</sup> *Property Law Act 1974 (Qld)* s 174. Knowledge of revocation includes knowledge of any event which has the effect of revoking the power.

<sup>481</sup> At 120.

<sup>482</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 179-180.

<sup>483</sup> See pp 131-132 of this Report.

<sup>484</sup> See p 138 of this Report.

reason to believe that the power has been revoked.<sup>485</sup> The Commission's recommendation was reflected in clause 60 of the Draft Bill in Chapter 13 of the Draft Report.

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

**The Commission recommends that the legislation provide that if a person revokes an enduring power of attorney, a chosen decision-maker who purports to exercise the power and who does not know the power has been revoked does not incur any liability to the person or to anyone else because of the revocation.**

**The Commission further recommends that the legislation provide that knowledge of revocation includes knowledge of the happening of an event having the effect of revoking the power, and having reason to believe that the power has been revoked.**

The Commission's recommendations are implemented by clause 62 of the Draft Bill in Volume 2 of this Report.

#### **B. Person who deals with a chosen decision-maker**

At present, the interests of a third party who deals with an attorney whose authority under an ordinary power of attorney has been revoked are protected if the third party has acted without knowledge of the revocation.<sup>486</sup> However, it is not clear whether this protection would extend to a transaction under an enduring power of attorney which has been revoked. The extent of the knowledge required to deprive a third party of the statutory protection is also unclear.

In the Draft Report, the Commission noted that it has been suggested that a third party may lose protection even if he or she does not have actual knowledge of the revocation.<sup>487</sup> This view is based on the fact that, since a third party is largely dependent on the bona fides of the attorney, a third

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<sup>485</sup> At 121.

<sup>486</sup> *Property Law Act 1974 (Qld)* s 174. Knowledge of revocation includes knowledge of any event which has the effect of revoking the power.

<sup>487</sup> At 122.

party who has reason to doubt the authority of an attorney should safeguard his or her own position by making such enquiries as are reasonable in the circumstances. A third party who fails to take reasonable steps to protect his or her own interests should not be protected by the legislation.<sup>488</sup>

The Commission recommended 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.<sup>489</sup> The Commission's recommendation was reflected in clause 60 of the Draft Bill in Chapter 13 of the Draft Report.

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

**The Commission recommends that the legislation provide that, if an enduring power of attorney has been revoked, a third party who deals with a chosen decision-maker and who does not know or have reason to believe that the power has been revoked should be protected.**

The Commission's recommendation is implemented by clause 62 of the Draft Bill in Volume 2 of this Report.

**(p) Enduring power of attorney made in another jurisdiction**

**(i) Recognition**

Under the existing legislation, it may not be possible for an enduring power of attorney granted in another State or Territory of Australia in accordance with the law of that State or Territory to be recognised in Queensland.

However, a person who lives in another State or Territory may own property in Queensland or, given the increasingly mobile nature of the Australian population, may move to Queensland after having made an enduring power of attorney in that other State or Territory.

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<sup>488</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 180, 195.

<sup>489</sup> At 122.

In the Draft Report, the Commission recommended that, in order to avoid the problems which could arise in such a situation if the person who made the enduring power of attorney did in fact lose decision-making capacity, 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.<sup>490</sup> The Commission's recommendation was reflected in clause 59 of the Draft Bill in Chapter 13 of the Draft Report.

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

However, after further consideration, the Commission has come to the view that its original recommendation may not have been sufficiently clear. The Commission did not intend that, in order to be recognised in Queensland, an enduring power of attorney made in another jurisdiction should have to comply with the procedural requirements in Queensland as well as in the jurisdiction of origin. The Commission's concern was to ensure that an enduring power of attorney made in another jurisdiction could not be used in Queensland to give authority to make decisions which could not be delegated to a chosen decision-maker under an enduring power of attorney made in Queensland. Accordingly, the Commission has altered its original recommendation to clarify its intention.

**The Commission recommends that the legislation provide that, if an enduring power of attorney is made in another State or Territory and the enduring power of attorney complies with the requirements in that State or Territory in relation to an enduring power of attorney, then, to the extent that the powers given by the enduring power of attorney could validly have been given in Queensland, it should be treated as if it had been made in Queensland and complied with the requirements of the Queensland legislation.**

The Commission's recommendation is implemented by clause 74 of the Draft Bill in Volume 2 of this Report.

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<sup>490</sup> At 124.



**(ii) Protection for chosen decision-makers and third parties**

The Commission has recommended that an enduring power of attorney executed in another jurisdiction in Australia should be recognised in Queensland, to the extent that the authority conferred by the power could have been validly given in Queensland, if it complies with the legislation in the jurisdiction where it was executed.

However, the legislative requirements with respect to formalities of execution and the provisions relating to the extent of the authority which can lawfully be conferred on a chosen decision-maker vary between jurisdictions. The Commission is concerned that it may impose an unduly onerous burden on a chosen decision-maker to require the chosen decision-maker to determine whether an enduring power of attorney executed in another jurisdiction complies with the legislation in that jurisdiction. It is similarly concerned about the position of a third party who deals with a chosen decision-maker acting under an enduring power of attorney made in another jurisdiction, purportedly in compliance with the requirements of that jurisdiction.

In the Draft Report, the Commission recommended that the protection given to a chosen decision-maker should be extended to include the situation of a chosen decision-maker who acts in reliance on an enduring power of attorney executed in another jurisdiction, provided that the chosen decision-maker did not know or have reason to believe that the power did not comply with the legislation in the jurisdiction where it was executed.<sup>491</sup> It also recommended that a third party who acts in reliance on an enduring power of attorney should have similar protection.<sup>492</sup> The Commission's recommendations were reflected in clause 61 of the Draft Bill in Chapter 13 of the Draft Report.

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

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<sup>491</sup> At 121.

<sup>492</sup> At 122.

**The Commission recommends that the legislation provide that, if a person's enduring power of attorney has been made in another State or Territory and does not comply with the requirements in that State or Territory in relation to enduring powers of attorney:**

- . a chosen decision-maker who purports to act under the enduring power and who does not know or have reason to believe that there has been non-compliance should not incur any liability because of the non-compliance; and**
- . a person who deals with a chosen decision-maker who purports to exercise power under the enduring power should also be protected if the person did not know or have reason to believe there had been non-compliance.**

The Commission's recommendations are implemented by clause 75 of the Draft Bill in Volume 2 of this Report.

**(q) Relationship between enduring power of attorney and decision-making order**

Circumstances may arise in which it is necessary to determine the relationship between an enduring power of attorney and a decision-making order. This may happen if, for example, an application for a decision-making order is made while there is an enduring power of attorney in existence. The present law in Queensland provides no way of establishing priority between an enduring power of attorney and an order made under the provisions of the *Mental Health Act*, the *Public Trustee Act* or the *Intellectually Disabled Citizens Act*.<sup>493</sup>

In the Draft Report, the Commission considered the relationship between an enduring power of attorney and an order made by the proposed tribunal. The Commission noted that one possible approach would be to provide that an enduring power of attorney is revoked by or becomes subject to a subsequent tribunal order. However, in the view of the Commission, this would give insufficient weight to the wishes expressed by the person who made the enduring power of attorney at a time when he or she had the capacity to do so.<sup>494</sup> The Commission recommended that the tribunal should not make an order concerning

<sup>493</sup> See Chapter 2 of this Report.

<sup>494</sup> At 124.

decisions which are included in the authority granted to a chosen decision-maker under an enduring power of attorney, unless it is shown that there has been abuse, incompetence or neglect on the part of the chosen decision-maker or that, for any other reason, the enduring power should be terminated.<sup>495</sup> The Commission's recommendation was reflected in clause 52 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 that the tribunal should not make an order unless the interests of the person who made the enduring power of attorney were not being adequately protected by the chosen decision-maker.<sup>496</sup>

**The Commission recommends that the legislation provide that, if a person has made an enduring power of attorney, the tribunal should not make an order appointing a decision-maker for the person unless there are grounds for removing a chosen decision-maker or revoking the enduring power of attorney.**

The Commission's recommendation is implemented by clause 66 of the Draft Bill in Volume 2 of this Report.

In the Draft Report, the Commission acknowledged the possibility that a tribunal order may be made in ignorance of the existence of an enduring power of attorney. It recommended that the legislation should include a saving provision to validate the acts of a decision-maker appointed in such a situation.<sup>497</sup> The Commission's recommendation was reflected in clause 101 of the Draft Bill in Chapter 13 of the Draft Report, which also conferred a similar protection on a person who, without knowledge of the enduring power of attorney, deals with a decision-maker appointed by the tribunal.

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

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<sup>495</sup> At 125.

<sup>496</sup> One submission, however, commented on the circumstances in which the tribunal should be able to override an enduring power of attorney.

<sup>497</sup> At 125.

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

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

**The Commission further recommends that the legislation provide that:**

- . if the tribunal has made a decision-making order for a person, the person should not be able to appoint a chosen decision-maker to make decisions which have been included in that order while the order is in operation;**
- . if the person has the necessary capacity, the person should be able to make an enduring power of attorney appointing a chosen decision-maker to make decisions about matters not included in the tribunal order.**

## **7. REGISTRATION**

A further issue concerning enduring powers of attorney involves the question of registration.

At present it is not necessary to register an enduring power of attorney unless it is to be used to deal with real property.<sup>498</sup> The need to register an enduring power of attorney in that situation arises from the philosophy underlying the Torrens

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<sup>498</sup> *Property Law Act 1974 (Qld)* s 171(2). Although this provision applies to powers of attorney, it has generally been assumed to apply also to enduring powers. There is no specific provision about registration of enduring powers of attorney.

system of title by registration that a person entering into a transaction involving a registered interest in land should be able to rely on the register.<sup>499</sup>

Some respondents expressed the view that all enduring powers of attorney, including those appointing a chosen decision-maker for personal decisions about matters such as the health care of the person who made the enduring power of attorney, should be registrable and that registration should be compulsory.<sup>500</sup>

The Commission accepts that it is necessary for enduring powers of attorney to be registered with the Registrar of Titles for the purpose of dealing with real property. However, it does not believe that all enduring powers of attorney should be registrable. Nor is the Commission persuaded that a system of compulsory registration would result in the advantages put forward by these respondents. In any event, the Commission considers that any potential benefits of compulsory registration would be outweighed by the disadvantages that would also be involved.

The Commission's approach is consistent with legislation in the majority of other Australian jurisdictions.<sup>501</sup>

**(a) Registrability**

**(i) Financial decisions**

Some people who make an enduring power of attorney may specifically authorise a chosen decision-maker under the power to enter into certain transactions involving real property.<sup>502</sup> However, others may confer a much broader authority to make financial decisions. The definition of "financial decision" proposed by the Commission includes certain real property transactions.<sup>503</sup>

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<sup>499</sup> *Gibbs v Messer* [1891] AC 248.

<sup>500</sup> Submissions Nos 1, 116, 117, 119.

<sup>501</sup> Only the Northern Territory and Tasmania require the registration of all enduring powers of attorney: *Powers of Attorney Act 1934 (Tas)* ss 6, 11E(3); *Powers of Attorney Act 1980 (NT)* s 13(c). See also R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 101.

<sup>502</sup> However, the Commission has recommended that there should be restrictions on the kind of decisions involving real property that a person who makes an enduring power of attorney can authorise a chosen decision-maker to make. See pp 72-75 of this Report.

<sup>503</sup> See Chapter 5 of this Report.

Because it is necessary for an enduring power of attorney to be registered in order for it to be used to deal with real property, enduring powers of attorney which authorise real property transactions or which confer a general authority to make financial decisions should be registrable.

**(ii) Other decisions**

While the Commission acknowledges that other kinds of decision, for example personal and health care decisions, are just as important as financial ones, it is concerned that making all enduring powers of attorney registrable may have unintended consequences.

The Queensland Law Society Inc commented that:<sup>504</sup>

*Often the practical effect of making something registrable is that all recipients require a registered document because of the perceived advantages of the registration process.*

Registrability may, for example, impede access to needed health care, if health care providers refused to accept the consent of a chosen decision-maker unless the enduring power of attorney were registered. Such a result would be contrary to one of the major aims of the legislative scheme proposed by the Commission - namely, 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 a valid consent.<sup>505</sup>

Insistence by third parties that an enduring power of attorney be registered before the authority of the chosen decision-maker is accepted would add to the expense of the procedure for the individuals concerned. It would also significantly increase the number of applications for registration, thus adding to the cost of administering the system of registration and causing delays and uncertainty.

**(b) Compulsory registration**

**(i) Perceived advantages**

The submissions identified a number of potential benefits of a system of compulsory registration. Those advantages are set out below, followed by the Commission's response to the main arguments put forward in the submissions:

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<sup>504</sup> Submission No 118.

<sup>505</sup> See p 359 of this Report.

- . preventing fraud;
- . allowing members of the public to search the register;
- . creating certainty for third parties who are asked to deal with the chosen decision-maker - for, example, doctors or banks - that the enduring power of attorney has not been revoked;
- . reminding the person who made the enduring power of attorney - for example, an elderly person who has forgotten what arrangements he or she has made - who is the chosen decision-maker; and
- . emphasising the serious nature of an enduring power of attorney.

The Public Trustee advocated that registration should also serve as a check on the validity of the enduring power of attorney and that, once the enduring power of attorney was registered, the validity granted by registration should give protection to third parties dealing with an alleged chosen decision-maker provided the former acted in good faith. Failure to register an enduring power of attorney would not make it invalid, but the "deemed" validity conferred by registration would not be available to unregistered enduring powers of attorney.

The Public Trustee also proposed that the last registered enduring power of attorney should cancel all previously registered documents, subject to it being the last granted in time.<sup>506</sup>

#### **A. Prevention of fraud**

The Commission does not accept that a system of compulsory registration would prevent fraud or abuse. The registering authority would not be able to distinguish, on the face of the document, between a genuine enduring power of attorney, a forged enduring power of attorney or an enduring power of attorney obtained by duress or undue influence.

Abuse would not be detected without a detailed and comprehensive verification process, which would be expensive and time-consuming. Even worse, registration might give the appearance of authenticity to a fraudulent document.

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<sup>506</sup> Submission No 117.

**B. Making the enduring power of attorney a public document that can be searched**

An important element of the concept of an enduring power of attorney, apart from providing for future decision-making needs that a person might have, is to permit the person who makes the enduring power of attorney to make his or her own arrangements in a private way.

An enduring power of attorney may contain sensitive, confidential information about the financial position, personal life and health of the person who made it.

It may be necessary for a chosen decision-maker to produce the enduring power of attorney to a third party, such as a bank or a doctor, to establish that the chosen decision-maker has the relevant powers. However, the production of an enduring power of attorney to those persons who have a legitimate interest in knowing its contents is quite a different matter from its being capable of being searched by persons without any legitimate interest in it, which would be the inevitable result of compulsory registration.

In the Commission's view, the privacy of a person who makes an enduring power of attorney far outweighs any supposed public interest in being able to search a register. A public register would result in a significant invasion of that privacy.

**C. Creating certainty for third parties who are asked to deal with the chosen decision-maker**

The Commission recognises that it is important, if enduring powers of attorney are to be an effective means of substitute decision-making, for there to be certainty for third parties who are asked to deal with a chosen decision-maker. The Commission is not persuaded, however, that compulsory registration is necessary to achieve that certainty.

The submissions suggested that a system of compulsory registration would provide greater certainty for third parties in the following situations:

***Where the enduring power of attorney lacks formal validity***

A third party may be concerned about his or her position if it transpires that an enduring power of attorney is invalid because it has been incorrectly executed - for example, it has been witnessed by a person who is ineligible to act as a witness. It is presumably in this type of situation that the Public Trustee sees an advantage in the "deemed validity" of a registered enduring power of attorney whereby, upon registration of the enduring power of attorney, any defects in the execution of the document creating the power



would be cured and the enduring power of attorney would be deemed to be valid.

In the view of the Commission, it is possible to adequately protect the interests of third parties without a system of deemed validity. Moreover, the Commission is concerned that deemed validity might protect a third party at the expense of the person who made an enduring power of attorney. If a registered enduring power of attorney were deemed to be valid despite, for example, having been witnessed by the chosen decision-maker appointed under it, it could increase the possibility of a fraud being perpetrated on the person who made it.

Under the Commission's proposals, where the question of validity arises prior to the exercise of the authority conferred by an enduring power of attorney, either the chosen decision-maker or the third party would be able to apply to the tribunal proposed by the Commission for an order about the validity of the power. The tribunal would be able to make a declaration about the validity of an enduring power of attorney and, if necessary, to appoint a decision-maker for the person who made the enduring power of attorney.<sup>507</sup>

In this Report, the Commission also provides protection for a third party who has acted in reliance on an invalid enduring power of attorney, if the third party did not know or have reason to believe that the power was invalid.<sup>508</sup>

The Commission acknowledges that the protection which its scheme confers is not the automatic blanket protection provided by a system of deemed validity. However, it is ultimately a question of balancing the protection of the person who has made the enduring power of attorney against the certainty sought by the third party who has relied on it.

Because of the vulnerability of people with a decision-making disability, the Commission would prefer to see any risk, albeit small, associated with conducting transactions on the basis of an enduring power of attorney fall on the third party, who may have suspicions about the validity of the enduring power of attorney and be able to make his or her own enquiries, than on the person who made it, who may no longer be in a position to revoke it or otherwise able to protect himself or herself.

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<sup>507</sup> See pp 118-119 of this Report.

<sup>508</sup> At p 120.

The Commission also acknowledges that if an enduring power of attorney is not valid, by reason of a defect in its execution, it will not be capable of use to meet the future decision-making needs of the person who made it. However, it is always open to the person intended to be appointed as a chosen decision-maker under it to apply to the tribunal to be appointed as a substitute decision-maker.

That course would seem to the Commission to be the appropriate one. To suggest that an invalid enduring power of attorney should, by the act of registration, become a valid one, could seriously erode the protections, such as the witnessing requirements, that the Commission has consciously recommended with a view to reducing the possibility that enduring powers of attorney will be misused.

***Where the enduring power of attorney has been revoked***

The rights and interests of a third party who acts in reliance on an enduring power of attorney may be put at risk if the third party is unaware that the enduring power of attorney has been revoked. For example, a health care provider who acts upon the consent of a chosen decision-maker appointed by an enduring power of attorney which has been revoked may be exposed to both civil and criminal liability for treating a person without a valid consent.<sup>509</sup>

One of the submissions proposed that a compulsory system of registration of enduring powers of attorney and of revocations of enduring powers could give:<sup>510</sup>

*an immunity to a person acting on reliance of a registered enduring power of attorney unless there has been the registration of a revocation of the enduring power of attorney.*

However, the protection conferred would be dependent on whether or not the third party had searched the register to determine whether or not the enduring power of attorney had been revoked. This would very often be impractical.

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<sup>509</sup> See p 311 of this Report.

<sup>510</sup> Submission No 116.

In this Report, the Commission has recommended that if an enduring power of attorney has been revoked, a third party who deals with a chosen decision-maker and who does not know or have reason to believe that the power has been revoked should be protected.<sup>511</sup>

In the Commission's view, this recommendation provides sufficient protection for third parties, without the need for registration.

***Where there is a subsequent enduring power of attorney***

A third party may also be put at risk if a person confers the same decision-making authority on different chosen decision-makers in enduring powers of attorney executed at different times.

However, the Commission does not believe that a system of compulsory registration is necessary to establish priority among enduring powers of attorney in such a situation. Under the Commission's proposals, an earlier enduring power of attorney will automatically be revoked by a subsequent one which confers the same decision-making authority.<sup>512</sup> A third party who does not know or have reason to believe that an enduring power of attorney has been revoked will be protected.<sup>513</sup>

In the view of the Commission, these proposals provide adequate protection and create greater certainty than the proposal made by the Public Trustee, which would apply only if the last registered enduring power of attorney was the last granted in time.

**D.     Emphasising the serious nature of a power of attorney**

An enduring power of attorney is a very powerful document. The Commission recognises that it is important that a person who makes an enduring power of attorney understands the significance of what he or she is doing.

However, the Commission is doubtful of the extent to which a requirement of registration would add to a person's appreciation of the significance of making an enduring power of attorney at the time the power is made. The question of registration would arise only *after* the enduring power of attorney has been made, and it is possible that the person who made the power may

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<sup>511</sup> At p 143.

<sup>512</sup> See pp 136-137 of this Report.

<sup>513</sup> See pp 142-143 of this Report.

never be involved in the act of registration, which may well be carried out by the person's solicitor or by the chosen decision-maker.

The Commission in its recommendations has sought to impress upon a person making an enduring power of attorney the significance of doing so in two important ways, which are both contemporaneous with the making of the enduring power of attorney: the Commission has imposed quite strict witnessing requirements<sup>514</sup> and the Commission has included in the recommended forms for an enduring power of attorney<sup>515</sup> a number of important warnings to a person making an enduring power of attorney.

The Commission is of the view that these measures are more likely to emphasise the importance of making an enduring power of attorney than requiring it to be registered.

**E. That registration would permit the last enduring power of attorney to cancel all previously registered documents**

The Commission is not convinced that this would be a desirable result.

One of the most significant changes proposed to the legislation governing enduring powers of attorney is that they should be able to be used to appoint decision-makers for a number of different decisions - including health care, financial, lifestyle and legal-related decisions - rather than being confined simply to financial decision-making, as has traditionally been the case. Under the Commission's proposals, it is quite possible that a person could make a number of enduring powers of attorney over a period of time, each conferring power to make a different type of decision.

If the registration of an enduring power of attorney were automatically to cancel or revoke all previously registered enduring powers of attorney, the result could be that an enduring power of attorney appointing a decision-maker for one type of decision would revoke an earlier enduring power of attorney under which a decision-maker had been appointed for a different type of decision. For example, a previous enduring power of attorney that was still appropriate in relation to a person's health care decisions would be revoked simply as a result of the subsequent registration of an enduring power of attorney which appointed a chosen decision-maker for financial decisions.

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<sup>514</sup> See pp 105-109 of this Report.

<sup>515</sup> See Appendix A and Appendix B to this Report.

If that result were to be avoided, it would be necessary each time an enduring power of attorney was executed to repeat in it all the appointments and directions included in previously executed enduring powers of attorney in relation to decisions other than the one for which a decision-maker was now to be appointed.

The Commission recognises the need to provide for the situation where a person confers the same decision-making authority on different chosen decision-makers under enduring powers of attorney executed at different times. Accordingly, the Commission has recommended that an earlier enduring power of attorney is revoked to the extent that the same decision-making authority is included in a later one. A third party who acts in reliance of an enduring power of attorney which has been revoked will be protected if he or she did not know or had no reason to believe that the power had been revoked.<sup>516</sup>

In the view of the Commission, this is a simpler and more effective way of dealing with the situation than a system of compulsory registration.

**(ii) Possible disadvantages**

The Commission is of the view that compulsory registration would have a number of potential disadvantages:

**A. Lack of flexibility with respect to revocation**

The Commission is particularly concerned in relation to enduring powers of attorney for health care decisions that an appropriate balance be struck between on the one hand, the need for certainty of revocation, and on the other, the desire not to impede unduly a person's ability to revoke an enduring power of attorney. It was for this reason that the Commission has recommended relaxation of the witnessing requirements of a revocation of an enduring power of attorney for health care.<sup>517</sup>

For registration to produce the certainty that the proponents of compulsory registration seek, it would be necessary for an enduring power of attorney to be operative until the registration of a revocation of the power. For many people it may be difficult to arrange registration of their revocation, so that their ability to change their previous arrangements would be seriously hindered. In any event, the need for registration could significantly delay the effectiveness of such a revocation.

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<sup>516</sup> See pp 142-143 of this Report.

<sup>517</sup> See pp 327-331 of this Report.

**B. Costs**

A system of compulsory registration of enduring powers of attorney would be resource intensive. The Commission is not persuaded that the cost of establishing and maintaining a register of all enduring powers of attorney and of revocations of enduring powers of attorney can be justified in terms of the benefits that such a system would confer. In addition to the cost to government, there is also the possibility of the cost of charges to be borne by individual members of the community who register an enduring power of attorney or who wish to search the register.

**C. Delay and consequential uncertainty**

In addition to the costs that would be involved, there would inevitably be delays in the registration procedure for both enduring powers of attorney and revocation of a registered power. This would create grey areas in terms of liability and may, in some situations, prevent timely use of an enduring power of attorney while, in others, extending the effectiveness of an enduring power of attorney which the person who made it wishes to cancel.

**D. Additional bureaucracy**

A further disadvantage of a system of compulsory registration of enduring powers of attorney is that it would introduce a layer of bureaucracy into what is intended to be an essentially private arrangement, without any real corresponding benefit.

**(c) Effect of registration**

The purpose of registering an enduring power of attorney which is to be used to deal with real property is to extend to a transaction carried out under the power the certainty and protection provided by the Torrens system of title by registration.

It is not the intention of the Commission to further extend the protection given by registration to financial dealings of any other kind transacted under the power.

**The Commission recommends that the legislation provide that:**

- **enduring powers of attorney which confer authority to deal with real property or to make financial decisions be registrable;**
- **the Registrar of Titles have power to register a certified extract from an enduring power of attorney which includes power to make other decisions;**
- **registration of an enduring power of attorney for financial decisions has effect only in relation to dealings in real property.**

The Commission's recommendations are implemented by clauses 72 and 330 of the Draft Bill in Volume 2 of this Report.

**The Commission recommends that:**

- **enduring powers of attorney for decisions other than financial decisions should not be registrable;**
- **there should not be a compulsory system of registration for all enduring powers of attorney.**

#### **(d) Termination of registration**

Under the existing legislation, once an enduring power of attorney has been registered, the authority of a chosen decision-maker under the power to deal with real property on behalf of the person who made the power will continue unless an instrument revoking the power is registered.<sup>518</sup>

The Commission has recommended that a person who makes an enduring power of attorney may, while he or she has sufficient capacity, formally revoke the power by complying with the requirements set out at pages 131-132 of this Report. The Commission is of the view that, in such a situation, if the power has been registered, the person should be responsible for registering the revocation.

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<sup>518</sup> *Property Law Act 1974 (Qld) s171(4).*

The Commission has also recommended that the proposed legislation provide that, in some circumstances, an enduring power of attorney may be revoked by the Supreme Court or the tribunal, or that power may be removed from a decision-maker chosen under the enduring power of attorney and a new decision-maker appointed.<sup>519</sup> The Commission considers that if such an order is made in relation to a registered enduring power of attorney, it would be undesirable for the registration to continue and that it would be appropriate for the registrar of the tribunal, or a person directed to do so by the Supreme Court, to register the affecting order.

The Commission has further recommended that an enduring power of attorney be revoked in whole or in part in a number of other ways - for example, by the marriage<sup>520</sup> or divorce of the person who made the enduring power of attorney;<sup>521</sup> or by a later enduring power of attorney of the person covering the same subject matter.<sup>522</sup> The enduring power of attorney will also be revoked by the death of the person who made it, or by the death, loss of decision-making capacity or withdrawal of the chosen decision-maker.

In the view of the Commission, where revocation of a registered enduring power of attorney occurs by reason of a later enduring power of attorney made by the person, it would be reasonable to impose a positive obligation on the person to register the revocation. In those circumstances the person would have the capacity necessary to make an enduring power of attorney and would presumably be capable of understanding the effect of creating the later enduring power of attorney.

Also, where revocation of a registered enduring power of attorney occurs by the death of the person who made the power, it would be reasonable to require the personal representatives of the person to register the revocation.<sup>523</sup> The enduring power of attorney or a copy of it is likely to be among the person's personal effects, and the chosen decision-maker under the enduring power of attorney may also be a personal representative.

However, it is difficult to formulate a standard procedure for registering revocation of an enduring power of attorney which has been revoked in the other circumstances outlined above. The Commission considers that, in such cases, the

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<sup>519</sup> See pp 125-126 of this Report.

<sup>520</sup> See pp 134-136 of this Report.

<sup>521</sup> See pp 132-133 of this Report.

<sup>522</sup> See pp 136-137 of this Report.

<sup>523</sup> It may be advisable to make reference to this provision in the *Succession Act 1981* (Qld) to put personal representatives on notice of their obligations under the provision.



most satisfactory approach is for the legislation to provide that certain people are entitled to register a revocation of an enduring power of attorney upon presentation of evidence that the enduring power of attorney has been revoked. Such evidence might include, for example, the death certificate of the chosen decision-maker, the marriage certificate of the person who made the enduring power of attorney or bankruptcy papers relating to the chosen decision-maker.

The Commission has also recommended that both the Supreme Court and the tribunal should have power, under the legislation proposed by the Commission, to make a declaration about the validity of an enduring power of attorney.<sup>524</sup> In the view of the Commission, it would be undesirable for the authority of a chosen decision-maker to deal with real property under an enduring power of attorney which has been registered to continue after the power had been declared invalid. The Commission considers that, in this situation also, it would be appropriate for the registrar of the tribunal or a person directed to do so by the Supreme Court to register the declaration of invalidity so as to bring the chosen decision-maker's authority to an end.

It should also be possible to terminate the effect of registration of an enduring power of attorney without actually revoking the enduring power of attorney. For example, a person with an episodic psychiatric illness may make an enduring power of attorney which is expressed to take effect when the person's decision-making capacity is impaired. If the enduring power of attorney is registered while it is in operation, thus enabling the chosen decision-maker to take any necessary steps in relation to the person's real property, the person may wish, on regaining capacity, to terminate the chosen decision-maker's ability to deal without property, while still leaving the enduring power of attorney in place, to be used if the person loses capacity again in the future.

**The Commission recommends that the legislation provide that if an instrument creating an enduring power of attorney has been registered it shall not, unless a different intention appears from the instrument, cease to confer on a decision-maker any authority to deal with land on behalf of the person who made the power until the enduring power of attorney is deregistered.**

<sup>524</sup> See pp 118-119 of this Report.

**The Commission recommends that the legislation provide that if a request to register an enduring power of attorney has been lodged under the *Land Title Act 1994 (Qld)* and:**

- . the enduring power of attorney is revoked -**
  - . by formal revocation by the person who made it, the person must take reasonable steps to register the revocation;**
  - . by a later enduring power of attorney of the person covering the same subject matter, the person who made the enduring power of attorney must take reasonable steps to register the revocation;**
  - . by the death of the person who made the enduring power of attorney, the person's personal representatives must take reasonable steps to register the revocation;**
  - . by any other means, the following people may register the revocation upon presentation of sufficient evidence that the revocation has occurred:**
    - . the person who made the power;**
    - . a chosen decision-maker under the power;**
    - . a decision-maker appointed by the tribunal;**
    - . after the death of the chosen decision-maker, the chosen decision-maker's personal representative;**
    - . the registrar of the tribunal;**
    - . a person directed by the Supreme Court to register the revocation;**
- . the enduring power of attorney is declared invalid by the tribunal or the Supreme Court, or the Court or tribunal makes another order affecting the enduring power of attorney:**
  - . the registrar of the tribunal or a person directed by the Supreme Court, must take reasonable steps to register the declaration or the order; and**

the Court or the tribunal may make an order about the costs of registering the declaration or order;

the power given by the enduring power of attorney is no longer exercisable, the person who made the enduring power of attorney must take reasonable steps to deregister the enduring power of attorney.

The Commission's recommendations are implemented by clauses 48(6)(b), 54(2), 55(2), 59(2), 68(b) and 333 of the Draft Bill in Volume 2 of this Report.

**(e) Registering authority**

Despite its view that there should not be compulsory registration of all enduring powers of attorney, the Commission has given consideration to the question of where such a register should be located if it were established. Some of the submissions to the Commission proposed that the register should be kept by the Registrar of Titles, who presently maintains a register of enduring powers of attorney for the purposes of dealings with real property.<sup>525</sup> However, the Registrar of Titles, while expressing the view that the present register for dealings with land should continue, does not wish to become involved in a registry for all enduring powers of attorney.<sup>526</sup>

The Public Trustee submitted.<sup>527</sup>

*Because it is considered that the system of registration should do more than record the lodgement of documents which follow a certain form, the registering authority should have some expertise or experience in this area of the law. For that reason the Public Trustee believes that his Office would be an appropriate option as a registering authority.*

While the Commission does not accept that the system proposed by the Public Trustee would have the advantages contended for, it is strongly of the view that, if such a system is established, the registering authority should be independent of the Office of the Public Trustee because of the conflict of interest that the Public

<sup>525</sup> Submissions Nos 116, 119.

<sup>526</sup> Submission No 115.

<sup>527</sup> Submission No 117.

Trustee's involvement would create. As the Public Trustee would be eligible to be appointed as a chosen decision-maker for financial decisions, it would be inappropriate to place it in a position where it would be required to scrutinise enduring powers of attorney by which it was appointed as a financial decision-maker.

Further, as the proposed tribunal will maintain a record of all decision-makers appointed by it, it would seem consistent, if all enduring powers are to be required to be registered, for such registration to occur within the tribunal.<sup>528</sup> In that way, the tribunal will have a record of all substitute decision-makers, whether they be appointed by the tribunal or chosen under an enduring power of attorney.

**The Commission recommends that, if a system of compulsory registration is established, the registering authority should be the tribunal recommended by the Commission in Chapter 8 of this Report.**

## **8. OTHER LEGISLATION**

The scheme proposed by the Commission in relation to enduring powers of attorney necessitates consideration of the impact of the scheme on certain existing Queensland legislative provisions.

### **(a) The *Property Law Act 1974 (Qld)***

Division 1 of Part 9 of the *Property Law Act* deals with powers of attorney. Division 2 of Part 9 of the *Property Law Act* deals with enduring powers of attorney.

The scheme proposed by the Commission is intended to replace the provisions in the *Property Law Act* which deal with enduring powers of attorney. The Commission envisages that, upon implementation of its scheme, the provisions in the *Property Law Act* dealing with enduring powers of attorney would be repealed.

The question then arises as to the extent to which the *Property Law Act* provisions concerning powers of attorney are relevant to the new scheme proposed by the Commission. Some of those provisions were incorporated directly into the Draft

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<sup>528</sup> See for example *Guardianship and Administration Act 1995 (Tas)* s 32(2)(d).

Bill in Chapter 13 of the Draft Report.<sup>529</sup> Others were incorporated into the scheme proposed by the Commission by reference to the *Property Law Act*.<sup>530</sup>

In the process of formulating its final recommendations, the Commission has given further consideration to the application of some sections of the *Property Law Act*.

(i) **Section 169**

There is some difference of opinion as to the method of execution of a power of attorney required at common law.<sup>531</sup> However, if the power of attorney gives authority to execute a deed,<sup>532</sup> the power of attorney must itself be in the form of a deed.<sup>533</sup> A deed must be executed under seal.

Section 169(1) provides for the method of execution of a power of attorney. It requires the document which creates a power of attorney to be signed and sealed.

Section 169(2) deems a document creating a power of attorney to be signed and sealed if it is executed in accordance with section 45 of the *Property Law Act*. Section 45 modifies the common law in relation to the execution of deeds. A power of attorney which complies with section 45 will take effect as a deed.

The Draft Bill in Chapter 13 of the Draft Report provided for the method of execution of an enduring power of attorney under the scheme proposed by the Commission.<sup>534</sup> The Draft Bill did not require an enduring power of attorney to be executed under seal, but provided that section 169(2) of the *Property Law Act* would apply to an enduring power of attorney.<sup>535</sup> The effect of these provisions would be that an enduring power of attorney

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<sup>529</sup> For example, s 169(1) of the *Property Law Act 1974 (Qld)* was covered by clause 43(1)(b) of the Draft Bill.

<sup>530</sup> For example cl 58 of the Draft Bill applied a number of sections of the *Property Law Act 1974 (Qld)* to an enduring power of attorney made under the Commission's scheme.

<sup>531</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 1-2.

<sup>532</sup> A deed is an instrument which either of itself passes an interest, right or property, creates an obligation binding on some person, or amounts to an affirmation or confirmation of something which passes an interest, right or property. It is the most solemn act that a person can perform with respect to a particular property. In order to be a deed at common law an instrument must comply with certain formalities. See *Halsbury's Laws of Australia* [140-1].

<sup>533</sup> *Steiglitz v Egginton* (1815) Holt 141, 171 ER 193. See *Halsbury's Laws of Australia* [15-40], [140-1].

<sup>534</sup> Cl 43.

<sup>535</sup> Cl 58.

executed in accordance with section 45 of the *Property Law Act* would take effect as a deed.

The Commission remains of the view that it is desirable for its proposed scheme to include a provision which ensures that an enduring power of attorney made under the scheme will take effect as a deed. However, after further consideration, the Commission now believes that the preferable approach would be to insert a facilitative provision directly into its proposed legislation rather than to refer to the provisions of the *Property Law Act*.<sup>536</sup>

**The Commission recommends that the legislation provide that an enduring power of attorney which is made in accordance with the prescribed form, notwithstanding that it is not expressed to be executed under seal, is for all purposes to be taken to be, and to have effect as, a deed.**

The Commission's recommendation is implemented by clause 40(5) of the Draft Bill in Volume 2 of this Report.

**(ii) Section 171**

Section 171 provides for the registration of powers of attorney and of instruments revoking powers. It is not necessary to register a power of attorney unless the power is to be used to deal with interests in real property. The need to register a power of attorney in that situation arises from the philosophy underlying the Torrens system of title by registration that a person entering into a transaction involving a registered interest should be able to rely on the register.<sup>537</sup>

The Draft Bill in Chapter 13 of the Draft Report provided that section 171 would apply to an enduring power of attorney made under the scheme proposed by the Commission.<sup>538</sup>

After further consideration, the Commission has come to the view that any recommendations concerning Torrens system registration should apply not only to decision-makers chosen by enduring power of attorney, but also to

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<sup>536</sup> See for example *Powers of Attorney Act 1956 (ACT)* s 3AD.

<sup>537</sup> *Gibbs v Messer* [1891] AC 248.

<sup>538</sup> Cl 58.

decision-makers appointed by the tribunal proposed by the Commission.<sup>539</sup> This issue is discussed in Chapter 9 of this Report.<sup>540</sup>

The Commission also believes that its original recommendation requires refinement to ensure consistency with some of its other recommendations concerning enduring powers of attorney.

At present, enduring powers of attorney made under the provisions of the *Property Law Act* take effect immediately upon their execution.<sup>541</sup> An enduring power of attorney may be registered and used to deal with land at any time after the power has been executed.

However, the Commission has recommended that a person who makes an enduring power of attorney should be able to specify when the power is to come into effect - for example, when the person who made the power loses capacity to make the decisions included in the power or on the happening of a nominated event. In the view of the Commission, it should not be possible for an enduring power of attorney to be registered - and the decision-maker chosen by the power armed with the ability to deal with land under the power - before the power has come into effect. Registration should take effect only on proof of the happening of the event or of the incapacity of the person who made the power.

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<sup>539</sup> See Chapter 8 of this Report.

<sup>540</sup> See pp 304-305 of this Report.

<sup>541</sup> See p 121 of this Report.

**The Commission recommends that the legislation provide that:**

- . an enduring power of attorney may be registered for the purpose of dealing with real property;**
- . an enduring power of attorney expressed to take effect on the happening of a stated occasion is not registrable without proof that the occasion has occurred;**
- . if the stated occasion is the incapacity of the person who made the power, the power is not registrable unless the tribunal has declared that the person does not have decision-making capacity for the decisions included in the power<sup>542</sup> or there is a certificate from two medical practitioners that the person does not have decision-making capacity for the decisions included in the power.**

The Commission's recommendation is implemented by clauses 72 and 330 of the Draft Bill in Volume 2 of this Report.

**(iii) Section 172**

Section 172 is a facilitative provision which enables an attorney acting under a power of attorney to execute deeds in his or her own name, provided that the instrument is executed in such a way as to show that the attorney is acting on behalf of the person who made the power. Without such a provision:<sup>543</sup>

*an attorney must sign the principal's name to, and affix the principal's seal to, any deed executed by him or her on behalf of the principal if the principal is to have the right to sue on the deed and the attorney is to escape personal liability.*

In the view of the Commission, an equivalent provision should be incorporated into the Draft Bill in relation to enduring powers of attorney.

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<sup>542</sup> See p 124 of this Report.

<sup>543</sup> B Collier and S Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) 65.



**The Commission recommends that the legislation include a provision equivalent to section 172 of the *Property Law Act 1974 (Qld)***

The Commission's recommendation is implemented by clause 180 of the Draft Bill in Volume 2 of this Report.

**(iv) Section 175**

Section 175 of the *Property Law Act* is a facilitative provision which allows the contents of a power of attorney to be proved by a copy certified in accordance with the requirements of the section. Without such a provision it may be necessary for an attorney to produce the original power of attorney each time he or she acts under its authority. In the view of the Commission an equivalent provision should be incorporated in the Draft Bill in relation to enduring powers of attorney.

**The Commission recommends that the legislation include a provision equivalent to section 175 of the *Property Law Act 1974 (Qld)*.**

The Commission's recommendation is implemented by clause 181 of the Draft Bill in Volume 2 of this Report.

**(b) The Land Title Act 1994 (Qld)**

The *Land Title Act 1994 (Qld)* is an Act to "consolidate and reform the law about registration of freehold land and interests in freehold land."<sup>544</sup> It contains procedural provisions concerning registration.

The Act provides that, subject to the terms of the power, registration of a power of attorney in accordance with the Act gives the decision-maker appointed by the power authority to deal with any interest in land that may be dealt with under the Act by the person who made the power.<sup>545</sup> It also provides that an act done by the decision-maker in accordance with the terms of a registered power of attorney

<sup>544</sup> *Land Title Act 1994 (Qld)* Preamble.

<sup>545</sup> *Land Title Act 1994 (Qld)* s 132.

has the same effect as if the act were done by the person who made the power.<sup>546</sup>

In the view of the Commission, the provisions of the *Land Title Act* relating to powers of attorney should be expressed to apply to enduring powers of attorney which are executed and registered in accordance with the requirements of the legislation proposed by the Commission, and to orders of the tribunal which appoint a decision-maker with authority to deal in real estate. They should also apply to enduring powers of attorney executed prior to the commencement of that legislation.

Section 137(1) of the *Land Title Act* provides that, if an act is required or permitted to be done by or in relation to a person under the Act, and the person is mentally or intellectually impaired or incapable of managing the person's own affairs, the act may be done by or in relation to a person who is responsible by law for the management and care of the first person's interests. In the view of the Commission, this section should be amended to refer to a decision-maker chosen or appointed under the proposed legislation or to an attorney appointed under an enduring power of attorney made before the proposed legislation comes into effect.

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<sup>546</sup> *Land Title Act 1994 (Qld)* s 134.

The Commission recommends that the *Land Title Act 1994 (Qld)* be amended as follows:

- . In section 4, the following definitions be inserted:
  - "power of attorney"** includes an enduring power of attorney;
  - "enduring power of attorney"** means an enduring power of attorney executed in accordance with the provisions of the legislation proposed by the Commission or, for an enduring power of attorney executed prior to the commencement of that legislation, an enduring power of attorney executed in accordance with the provisions of the *Property Law Act*.
- . Section 132A be amended to include reference to a decision-maker appointed by the tribunal;
- . Section 133(1) be amended to require the Registrar to also keep a register of decision-makers appointed by the tribunal;
- . Section 137 be amended to refer to an appointed or chosen decision-maker under the proposed legislation, or to an attorney under an enduring power of attorney made before the proposed legislation comes into effect.

The Commission's recommendation is implemented by clauses 327-336 of the Draft Bill in Volume 2 of this Report.

**(c) *The Land Act 1994 (Qld)***

Section 385 of the *Land Act 1994 (Qld)* mirrors section 137 of the *Land Title Act 1994 (Qld)*. In the view of the Commission it should be similarly amended.

**The Commission recommends that the *Land Act 1994 (Qld)* be amended as follows:**

- . Section 385 be amended to refer to a decision-maker chosen or appointed under the proposed legislation or to an attorney under an enduring power of attorney made before the proposed legislation comes into effect.**

The Commission's recommendation is implemented by clauses 323-326 of the Draft Bill in Volume 2 of this Report.