ASSISTED AND SUBSTITUTED DECISIONS

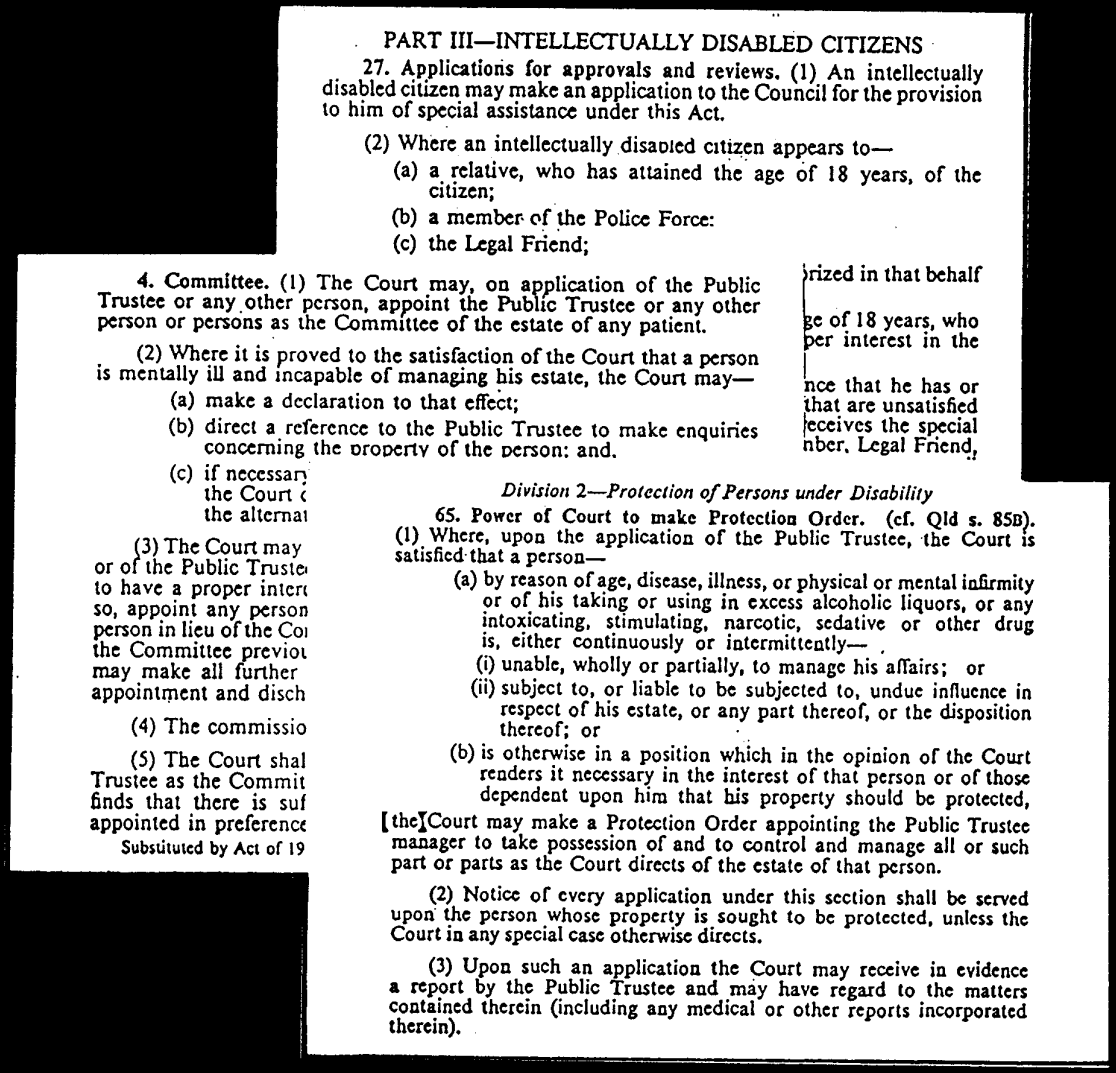
Working Paper 38

Queensland Law Reform Commission
July 1992

ASSISTED AND SUBSTITUTED DECISIONS

Decision-making for people who need assistance because of mental or intellectual disability:

A New Approach



PART III—INTELLECTUALLY DISABLED CITIZENS

27. Applications for approvals and reviews. (1) An intellectually disabled citizen may make an application to the Council for the provision to him of special assistance under this Act.

(2) Where an intellectually disabled citizen appears to—

(a) a relative, who has attained the age of 18 years, of the citizen;

(b) a member of the Police Force:

(c) the Legal Friend;

4. Committee. (1) The Court may, on application of the Public Trustee or any other person, appoint the Public Trustee or any other person or persons as the Committee of the estate of any patient.

(2) Where it is proved to the satisfaction of the Court that a person is mentally ill and incapable of managing his estate, the Court may—

(a) make a declaration to that effect;

(b) direct a reference to the Public Trustee to make enquiries concerning the property of the person; and.

(c) if necessary the Court the alternat

(3) The Court may or of the Public Truste to have a proper inter so, appoint any person person in lieu of the Co the Committee previo may make all further appointment and disch

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Substituted by Act of 19

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Division 2—Protection of Persons under Disability

65. Power of Court to make Protection Order. (cf. Qld s. 85B). (1) Where, upon the application of the Public Trustee, the Court is satisfied that a person—

(a) by reason of age, disease, illness, or physical or mental infirmity or of his taking or using in excess alcoholic liquors, or any intoxicating, stimulating, narcotic, sedative or other drug is, either continuously or intermittently—

(i) unable, wholly or partially, to manage his affairs; or

(ii) subject to, or liable to be subjected to, undue influence in respect of his estate, or any part thereof, or the disposition thereof; or

(b) is otherwise in a position which in the opinion of the Court renders it necessary in the interest of that person or of those dependent upon him that his property should be protected,

[the]Court may make a Protection Order appointing the Public Trustee manager to take possession of and to control and manage all or such part or parts as the Court directs of the estate of that person.

(2) Notice of every application under this section shall be served upon the person whose property is sought to be protected, unless the Court in any special case otherwise directs.

(3) Upon such an application the Court may receive in evidence a report by the Public Trustee and may have regard to the matters contained therein (including any medical or other reports incorporated therein).

Queensland
Law Reform Commission
Discussion Paper No 38

July 1992

ASSISTED AND SUBSTITUTED DECISIONS

DECISION-MAKING FOR PEOPLE WHO NEED ASSISTANCE BECAUSE OF MENTAL OR INTELLECTUAL DISABILITY

Queensland Law Reform Commission

How to make comments and submissions

The Commission welcomes comments and submissions on the options for reform which are discussed in this paper. Written comments and submissions should be sent to

The Secretary
Queensland Law Reform Commission
PO Box 312
North Quay Q 4002

The closing date for submissions is 31 October 1992

If you would like your submission to be treated as confidential, please indicate this clearly. However, submissions may be subject to release when the Freedom of Information Bill comes into effect.

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INTRODUCTION

Certain decisions require the person making them to have legal capacity to do so. Lack of the necessary legal capacity may mean that a decision has no legal validity.

This Discussion Paper is concerned with the lack of capacity of certain adults to make some of the decisions that affect their lives. In the context of the paper, legal incapacity of an adult to make a decision may arise in either of the following ways.

First, the person may have an intellectual or mental disability which impairs the capacity to decide. The intellectual or mental disability may be of congenital origin, or it may result from other causes such as brain damage, psychiatric illness, dementia or other kinds of organic deterioration.

Second, the nature of the disability may be such that the person is unable to communicate what he or she has decided.

Where, for one of these reasons, a person is unable to make a decision which is legally valid, there must be someone who has legal authority to decide on his or her behalf.

In Queensland the rules about substituted decision-making for adults with a mental or intellectual disability are presently contained in a number of separate pieces of legislation. The main provisions are to be found in three Acts - the Mental Health Act, the Public Trustee Act and the Intellectually Disabled Citizens Act. Some sections of the Criminal Code and the Medical Act are also relevant.

The result of this piece-meal approach is a situation in which there are gaps, overlaps and inconsistencies.

Different legislative provisions may apply to people whose incapacity arises from different causes, so that outcomes may vary even though the same problem exists - namely, the lack of legal capacity to make a particular decision. Sometimes more than one law may apply to the same person, so that the outcome will depend on which law is used. Other people may have difficulty in obtaining the assistance they require.

In 1991 the Queensland Law Reform Commission conducted a public forum to highlight matters of concern arising out of the present system. As a result of this forum the Commission published a paper entitled 'Steering Your Own Ship?'.

This Discussion Paper examines the issues raised at the forum and in 'Steering Your Own Ship?' for the purposes of identifying areas which need reform and of suggesting possible alternatives to the present system. However, the views expressed in this paper are not necessarily the final view of the Commission.

The Commission is aware of a high level of public interest in this topic. The

Commission hopes that by obtaining public comment, it will be able to make recommendations for reform which meet the needs of the people they are designed to assist.

The Honourable Mr Justice R E Cooper
Chairman

Members of the Commission

Her Honour Judge H O'Sullivan **(Deputy Chair)**

Ms R G Atkinson

Mr W A Lee

Mr R S O'Regan QC

Ms L Willmott

Principal Legal Officer

Ms P Cooper

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1. PRINCIPLES

1. INTRODUCTION

People with a mental or intellectual disability are entitled to respect for their human dignity and to assistance to become as self-reliant as possible. At the same time they are entitled to be shielded from neglect, abuse and exploitation. The issue of whether and to what extent such people require assistance to make decisions involves a balance between their right to the greatest possible degree of autonomy and their need to be protected to the extent that their disability prevents them from adequately looking after themselves and their own interests.

2. EXISTING LEGISLATION

In Queensland, the *Mental Health Act* and the *Public Trustee Act* followed the pattern set out by earlier legislation and adopted a protective approach towards people who needed assistance to make decisions.[1] Little, if any, attention was paid to the need of these people for respect and for the opportunity to live as normally as possible.

The more recent *Intellectually Disabled Citizens Act* acknowledges the rights, needs and abilities of people with an intellectual disability and offers support and assistance for them to participate in society in a positive way.[2] It provides that the need to maintain a person's dignity and self-respect must be taken into account before a decision can be made to grant or continue assistance.[3] It also recognises that, when assistance is provided, the wishes of intellectually disabled people should be taken into consideration and, where possible, carried out.[4]

3. A NEW APPROACH

The United Nations Organisation has recognised the need to protect the rights of people with a disability and declared a common basis for international action in this area.

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1 See Chapters 4 and 6.

2 Intellectually Disabled Citizens Act 1985 (Qld) Section 5.

3 Intellectually Disabled Citizens Act 1985 (Qld) Section 31A(3)(d).

4 Intellectually Disabled Citizens Act 1985 (Qld) Sections 26(2), 26(5)(d).

It has stated that a person with a mental or intellectual disability has, to the maximum degree of feasibility, the same rights as other human beings;[5] that he or she has the right to such education, training, and guidance as will enable development of maximum potential;[6] that he or she should live in circumstances as close as possible to normal and participate in different forms of community life;[7] 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.[8]

It has also stated that all disabled persons have an inherent right to respect for their human dignity and to enjoy a decent life, as normal and full as possible[9] and that they are entitled to measures designed to enable them to become as self-reliant as possible.[10]

Legislation should, therefore, embody principles which give statutory recognition to the rights of people with a mental or intellectual disability. These principles should bind the body which determines whether a person needs assistance to make decisions and, if so, the extent of the assistance required. They should also bind a person who is appointed to assist a person with a mental or intellectual disability make decisions or, if necessary, to make decisions for that person.

4. LEGISLATIVE PRINCIPLES

Possible legislative principles include:

. presumption of competence;

. encouragement of self-reliance;

. least restrictive alternative;

. substituted judgment;

. recognition of ethnic or cultural background;

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5 Declaration on the Rights of Mentally Retarded Persons, Article 1.

6 Declaration on the Rights of Mentally Retarded Persons, Article 2.

7 Declaration on the Rights of Mentally Retarded Persons, Article 4.

8 Declaration on the Rights of Mentally Retarded Persons, Article 5.

9 Declaration on the Rights of Disabled Persons, Article 3.

10 Declaration on the Rights of Disabled Persons, Article 5.

. recognition of existing supporting relationships;

. non-discrimination on basis of age or gender;

. the responsibility of the community towards people with a disability.

4.1 *Presumption of competence*

Different decisions require different degrees of understanding and competence. Because a person is unable to make decisions in one area, it does not automatically follow that he or she cannot exercise the right of choice in other areas. The questions of whether, and to what extent, intervention is necessary in the decision-making process of a person with a mental or intellectual disability should be approached on the basis that the person is capable of making his or her own decisions unless the contrary is shown.

In New Zealand, for example, the *Protection of Personal and Property Rights Act* creates a presumption that every person is able to:

- understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare;
- communicate decisions in respect of those matters; and
- manage his or her own financial affairs and property.[11]

4.2 *Encouragement of self-reliance*

Consistently with the presumption of competence and with the philosophy set out in the United Nations Declarations, legislation should provide that the person concerned should be allowed to develop and achieve his or her potential, and encouraged to make his or her own decisions. People who have a severe mental or intellectual disability may still have ways of communicating their preferences on matters within their competence.

For example, the New South Wales *Disability Services and Guardianship Act* states that people should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs.[12]

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[11] Protection of Personal and Property Rights 1988 (NZ) Sections 5, 24.

[12] Disability Services and Guardianship Act 1987 (NSW) Section 4(f). See also Protection of Personal and Property Rights Act 1988 (NZ) Section 8(b).

4.3 *Least restrictive alternative*

Where a person with a mental or intellectual disability requires assistance to make decisions this should be done in such a way as to cause minimum restriction of the rights of that person.[13]

Assistance should be provided on an 'as needs' basis only. In appropriate situations, assistance should take the form of support rather than intervention. Wherever possible the views of the person should be sought and taken into account in determining whether intervention is necessary.[14]

Where informal support is insufficient and intervention is required, the nature and extent of the intervention should be tailored to meet the needs of the person. The authority of a substitute decision-maker should be limited to specific areas where the person requires assistance. Decisions made by another person on behalf of a person with a mental or intellectual disability should, if possible, be founded on the concept of substituted judgment.

4.4 *Substituted judgment*

Essentially, the 'substituted judgment' test involves attempting to make decisions in the way that the person for whom they are being made would have done if he or she had been able to do so.[15]

Guidance as to what the person is likely to have decided in a particular situation can be provided by consultations with the person and with family and friends.

The principal advantage of this approach is its implicit respect for the autonomy of the individual. It can also be justified on the basis that the person would be likely to ratify the choices made on his or her behalf if this were ever to become possible.

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13 See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 5; Guardianship and Administration Board Act 1986 (Vic) Section 4(2)(a); Disability Services and Guardianship Act 1987 (NSW) Section 4(b); Protection of Personal and Property Rights Act 1988 (NZ) Section 8(a); Guardianship and Administration Act 1990 (WA) Section 4(2)(c); Guardianship and Management of Property Act 1991 (ACT) Section 11; Mental Health Act 1977-1986 (SA) Section 25c(b).

14 See for example Intellectually Disabled Citizens Act 1985 (Qld) Sections 5, 26(2), 26(5)(d), 31A; Guardianship and Administration Board Act 1986 (Vic) Section 4(2)(c); Disability Services and Guardianship Act 1987 (NSW) Section 4(d); Guardianship and Management of Property Act 1991 (ACT) Section 3(2)(a); Mental Health Act 1977-1986 (SA) Section 25c(a).

15 See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 26(2); Guardianship and Management of Property Act 1991 (ACT) Section 3(2)(b).

On the other hand, the 'substituted judgment' test is not appropriate in every situation. It depends on the application of the subjective values of the individual and therefore requires knowledge of the preferences of the person. This in turn depends on the person with a mental or intellectual disability being, or having been, able to communicate choices. The 'substituted judgment' approach would be appropriate in situations such as Alzheimer's Disease, for example, where the person had previously been able to exercise personal choice. However, it would be of little assistance if the extent of the disability meant that the communicated choices had been drawn from a narrow range of experiences which gave no indication how the person would have decided a particular issue if he or she had been able to do so. There are still other situations in which the 'substituted judgment' approach would involve a process of pure speculation.[16]

Where the nature of the disability means that substituted judgment is impossible, then interference in a person's right to make decisions should take the form of the least intrusive option. Substituted decisions should be made in the person's best interests[17] and in such a way as to allow the development of a valued social role for the person concerned.

4.5 *Recognition of existing relationships*

Where a decision is made on behalf of a person with a mental or intellectual disability, that decision can impact significantly on the lives of people who are in an existing supportive relationship with that person. Recognition should therefore be given to the importance of preserving such relationships by allowing people affected by the decision to put a point of view[18] or, where appropriate, to act as the assistant or substitute decision-maker.

4.6 *Recognition of cultural background*

Queensland, like the rest of Australia, is an increasingly multi-cultural society. People from different ethnic and cultural backgrounds employ different value bases in making decisions. For members of Aboriginal and migrant communities, it is particularly important that consideration be given to their cultural heritage. In New South Wales people who give assistance to or make decisions for a person with a mental or intellectual disability must observe the importance of preserving the

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16 Re Eve [1986] 2 S.C.R 388, 435 per La Forest J.

17 See for example Intellectually Disabled Citizens Act 1985 (Qld) Sections 26(3), 26(5)(d).

18 See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 26(5).

cultural and linguistic environments of that person.[19]

4.7 *Non-discrimination*

It is also important for legislation in this area to recognise that assistance given to or decisions made for a person who is unable to do so personally should be appropriate to the age of that person.[20] Legislation should also provide that assistance or substitute decision-making should be non-discriminatory on the basis of age or gender.

4.8 *Community responsibility*

The rights and welfare of people with a disability are the responsibility of every member of the community. Legislation can provide a starting point for recognising the dignity and autonomy of people with a mental or intellectual disability but a significant shift in community attitude is also needed. It has been observed that

> Unless justice is written into the very hearts of people, the ink with which the law is printed will not and cannot procure justice.[21]

All members of society have a moral duty to respect the need of people with a mental or intellectual disability to be valued as individuals and to be effectively included in the community. Although legislation cannot of itself ensure that people with a mental or intellectual disability are accorded the respect that they deserve, it can provide for the community to be encouraged to apply and promote the principles described in this chapter.[22]

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19 Disability Services and Guardianship Act 1987 (NSW) Section 4(e); Intellectually Disabled Citizens Act 1985 (Qld) Section 31A(3)(g).

20 United Nations Declaration on the Rights of Disabled Persons, Article 9.

21 Wolfensberger, The Limitations of the Law in Human Services, 9.

22 See for example Disability Services and Guardianship Act 1987 (NSW) Section 4(h).

2. DECISIONS PEOPLE NEED ASSISTANCE WITH

1. INTRODUCTION

People with a mental or intellectual disability may need assistance to make decisions in a variety of situations. The level of assistance needed will vary according to the degree of understanding required to make the decision and the extent to which the disability affects the capacity to understand or to communicate the decision. Whether a person is legally able to make a decision will depend on the complexity of the issues involved in making it. If the person lacks the legal capacity to make a decision, it may be necessary for someone else to be authorised to make the decision for him or her.

Areas where assisted or substituted decision-making may be necessary include:

. financial transactions

. lifestyle matters

. legal issues.

2. FINANCIAL TRANSACTIONS

2.1 *Capacity*

For a transaction to be valid, the parties must understand the general nature of what they are doing by their participation in the transaction.[23] Because financial transactions vary greatly in complexity, the required level of understanding is not static, but is relative to the particular transaction concerned.

The transactions in which a person with a mental or intellectual disability may become involved range from routine purchases of everyday items, to agreements for hire-purchase or a mortgage, to the management of property owned by that person. The person may be able to carry out some of these transactions unaided, and may need assistance with others. There may be some transactions which he or she lacks sufficient understanding to undertake, even with assistance. Existing mechanisms for carrying out financial transactions on behalf of a person who lacks the required level of understanding to do so personally are discussed in Chapter 6.

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[23] Gibbons v Wright (1953) 91 CLR 423, 437-439; In Re Beaney [1978] 1 WLR 770.

2.2 *Grounds for setting aside a contract*

Where a person with a mental or intellectual disability enters into a financial transaction but can show that he or she did not understand the nature of the transaction, then the transaction can be put aside by a court. However, the person must also show that the other party to the transaction was aware of his or her inability to understand what the transaction involved.[24] Despite the need to protect those who are unable to protect themselves, it is also necessary to ensure that the other party is not disadvantaged by entering into an agreement with a person whose disability that party had no reason to suspect.

A transaction may also be put aside by a court if one party has taken unfair advantage of another who is under a special disability because of illness or infirmity of body or mind. A person with a mental or intellectual disability may be able to show that, as a result of the disability, there was a lack of equality between him or her and the other party to the contract and that the disability was sufficiently evident to the stronger party to make it unfair for the stronger party to proceed with the contract in the circumstances. In such a situation, the stronger party must show that the transaction was fair, just and reasonable.[25] Alternatively, the contract may be set aside if the stronger party has unduly influenced the weaker party to make a contract which the weaker party would not otherwise have made.[26] Where the other party to the transaction is a corporation, a contract for the supply of personal or household goods and services may be put aside if the corporation has acted unconscionably by, for example, abusing a position of bargaining strength or exerting undue influence or if the other party was unable to understand the documents.[27]

2.3 *Contracts for necessaries*

Some transactions are binding on a person with a mental or intellectual disability, even though the person may not have understood them. If 'necessaries'[28] are sold and delivered to a person who, because of mental incapacity, is incompetent to contract, that person must pay a reasonable price for them.[29] A reasonable price may not be the agreed price, so that there is some degree of protection against unscrupulous exploitation. Necessaries are not confined to items of basic

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24 Imperial Loan Company Ltd v Stone [1892] 1 QB 599; Hart v O'Connor [1985] AC 1000.

25 Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, 474.

26 Blomley v Ryan (1956) 99 CLR 362, 405; Baburin v Baburin [1990] 2 QdR 101.

27 Trade Practices Act 1974 (Cwth) Section 52A; Fair Trading Act 1989 (Qld) Section 39.

28 Sale of Goods Act 1896 (Qld) Section 5. Necessaries are goods suitable to the condition in life of the person concerned and to his or her actual requirements at the time of delivery.

29 Sale of Goods Act 1896 (Qld) Section 5.

sustenance but, on the other hand, do not extend to luxuries.[30] Food, drink, clothing and accommodation are clearly capable of being 'necessaries', but what is in fact a necessary for a particular person will depend to a large extent on the circumstances of the individual. Factors such as the person's age, occupation, means and social position are taken into account. The goods must be of a kind which someone in that person's situation might reasonably have been expected to possess.[31] For example, a person might be expected to own a car, but a small second-hand sedan rather than a new limousine or luxury sports car. In that case, only the sedan would be a necessary. The goods must also be of a kind with which the person was not already adequately supplied. The onus of proving that the person was not adequately supplied with the goods in question lies with a trader who seeks to enforce the contract.[32] Provision of services such as certain types of medical treatment and legal advice can also come within the term 'necessaries'.

3. LIFESTYLE MATTERS

Lifestyle decisions also involve questions of varying complexity. They encompass routine everyday matters such as what to wear, what to eat or what time to go to bed. They also include aspects such as grooming and personal hygiene, hobbies and social activities. More complex decisions involve where and with whom the person should live, whether and where the person should work, and whether or not consent should be given to medical treatment.

A person with a mental or intellectual disability may be able to make some of these decisions unaided or may be able to make some or all of them with assistance. In most instances assistance can be given on an informal basis by family and friends.

However, where the person is unable to make the decision, even with assistance, there is no automatic right for another person to make major lifestyle decisions on his or her behalf.

For example, a carer has no legal authority to decide that a person with a mental or intellectual disability should be admitted to a hospital or nursing home, or be restrained in his or her own home. Actual or threatened application of physical force could constitute a criminal assault.[33] It could also give rise to an action for damages if the person concerned does not consent.[34] Even without the use of

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30 Peters v Fleming (1840) 6 M&W 42, 151 ER 314; Nash v Inman [1908] 2 KB 1.

31 Wharton v McKenzie (1844) 5 QB 606, 114 ER 1378.

32 Nash v Inman, supra note 30.

33 Criminal Code Section 245.

34 Collins v Willcock [1984] 1 WLR 1172; [1984] 3 All ER 374.

force, detaining a person against his or her will could still be an offence.[35] Constraint or confinement could also give rise to an action for damages for wrongful imprisonment, even if the person was unaware of the restriction.[36]

Provisions which confer legal authority to make some of these decisions about the life of a person with a mental or intellectual disability are considered in Chapter 6. Decisions about medical treatment are discussed in Chapters 10 and 11.

4. LEGAL ISSUES

Many decisions also have legal implications. The performance of some acts with a legal character may be affected by the nature and extent of a mental or intellectual disability. These acts include:

. making a will

. marrying

. voting

. consenting to adoption.

4.1 *Making a will*

The level of understanding required to make a valid will is higher than that for an ordinary financial transaction. The person making the will must, at the time the will is made, be of sound mind, memory and understanding.[37] He or she must be able to remember the property which is to be disposed of by the will, the moral claims of the people to whom the property is to be left, and the way it is to be distributed amongst those people.[38]

When a person dies without having made a valid will, the property is distributed among his or her living relatives according to a set formula known as the intestacy rules.[39]

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35 Criminal Code Section 355.

36 Meering v Graham-White Aviation Co. (1919) 122 LT 44, 53; Murray v Ministry of Defence [1988] 1 WLR 692.

37 Smith v Tebbitt [1867] LR 1 P&D 354.

38 Banks v Goodfellow [1870] LR 5 QB 549; Bailey v Bailey (1934) CLR 558; Re Shorter v Hodges (1988) 14 NSWLR 698.

39 Succession Act 1981 (Qld) Sections 34-39.

4.1.1 *A statutory will*

A possible alternative for a person who lacks the capacity to make a will because of a mental or intellectual disability is a statutory will.

In some jurisdictions legislation provides that a substitute decision-maker may make a will on behalf of a person who lacks sufficient understanding to make his or her own will.

A statutory will takes effect on the death of the person on whose behalf it was made as though it had been made by that person while he or she was legally able to do so. This may be preferable to a distribution of the person's assets according to the intestacy rules.[40]

4.2 *Marrying*

Marriage is a form of contract, and the general rule of contractual capacity applies. In order for a marriage to be valid both parties must understand the nature and effect of the marriage ceremony.[41]

Marriage is the voluntary undertaking between a man and a woman of a lifelong commitment to love and be faithful to each other.[42] This is a relatively simple concept the understanding of which does not require a high degree of intelligence.[43] Hence, the level of understanding necessary to make a valid marriage is lower than it is for decisions of a more complex nature.

However, if a person cannot understand the nature and effect of marriage, consent to marry cannot be given on his or her behalf by any other person. This is because the decision to marry is such a personal one that it cannot be delegated. In some jurisdictions there is an express prohibition against consent to marriage being given by another person on behalf of a person with a mental or intellectual disability.[44]

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40 Statutory wills are discussed on pages 181-183.

41 Marriage Act 1961 (Cwth) Sections 23(1)(d)(iii), 23B(1)(d)(iii); In the Marriage of Brown; Re Dunne (1982) 60 FLR 212.

42 Marriage Act 1961 (Cwth) Section 46(1).

43 Durham v Durham (1885) 10 PD 80; Re Park [1953] 2 All ER 1411.

44 See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 18(1)(a); Guardianship and Management of Property Act 1991 (ACT) Section 7(3)(d).

4.3 *Voting*

At common law, a person who has a severe mental illness is disqualified from voting at an election.[45] However, such a person may vote in a lucid interval.[46]

In Queensland a person is disqualified from voting if he or she is mentally ill and incapable of managing his or her affairs.[47] Mental illness is not defined.

A presiding electoral officer may ask a person claiming to be a voter if he or she is disqualified from voting. The person is then not allowed to vote until he or she has provided a signed written answer.[48] The question would not be asked if the person was entitled to a postal vote, but an application for a postal vote must be also signed by the applicant in the presence of an authorised witness.[49]

Eligibility to vote in Queensland elections therefore seems to depend on the ability to complete financial transactions and, except for visually impaired or physically incapacitated people,[50] on the ability to provide a written answer or a signature.

In Commonwealth elections, a person who, because of unsoundness of mind is incapable of understanding the nature and significance of enrolment and voting, is not entitled to vote.[51]

If a person lacks the capacity to vote, another person cannot vote on his or her behalf. This is because voting is another decision which is so personal that the power to make it cannot be delegated.[52]

The Commission seeks views as to whether this position should be maintained in Queensland.

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45 Bedford County Case, Burgess' Case (1785) 2 Lud E C 381.

46 Oakhampton Case, Robin's Case (1791) 1 Fras 69; Bridgewater Case, Tucker's Case (1803) 1 Peck 101.

47 Elections Act 1983 (Qld) Section 23(a).

48 Elections Act 1983 (Qld) Sections 73, 85.

49 Elections Act 1983 (Qld) Section 87.

50 See Elections Act 1983 (Qld) Section 86.

51 Commonwealth Electoral Legislation Amendment Act 1983 Section 23(e).

52 See Guardianship and Management of Property Act 1991 (ACT) Section 7(3)(a).

a. *Arguments against*

. The loss of the right to vote substantially diminishes political influence. Politicians may give higher priority to meeting the needs of people who can vote, as it is these people whose loyalty must be attracted or maintained at future elections. If substitute decision-makers were able to vote on behalf of people who lacked the capacity to vote personally, it would give the mentally and intellectually disabled a much needed voice in promoting rights and claims for resources.

b. *Arguments for*

. The exercise of substituted judgment is not appropriate in this context. The person may have always lacked the capacity to vote. In such a situation, to allow a substitute decision-maker to vote would have the effect of doubling the voting power of the substitute decision-maker. If the person has previously had the capacity to vote, he or she may not have voted in a consistent manner. Even if a previous consistent voting pattern is known, the possibility remains that the person might have changed his or her mind in a particular election. Alternatively, past voting patterns may not be known.

4.4 *Consenting to Adoption*

People with a mental or intellectual disability have, as part of their 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 might result in pregnancy and childbirth.[53]

The birth of a child to a person with an intellectual or mental disability sometimes gives rise to the question of adoption.

In Queensland, the situation is governed by the *Adoption of Children Act*. 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.[54]

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 is not to be made if it appears that the person lacked the necessary degree of

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[53] The issues of contraception and abortion will be discussed in Chapter 10.

[54] Adoption of Children Act 1964 (Qld) Section 19.

understanding.[55] 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.[56] There is no provision for the decision to be delegated to anyone other than the Court.[57]

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55 Adoption of Children Act 1964 (Qld) Section 24(1)(e).

56 Adoption of Children Act 1964 (Qld) Section 25(1).

57 See also Protection of Personal and Property Rights Act 1988 (NZ) Section 18(1)(b); Guardianship and Management of Property Act 1991 (ACT) Section 7(3)(c).

3. WHEN ASSISTANCE IS PROVIDED

1. EXISTING LEGISLATION

In Queensland, assisted or substituted decision-making is presently available under the *Public Trustee Act* 1978, the *Mental Health Act* 1974 and the *Intellectually Disabled Citizens Act* 1985. These Acts apply in the following situations:

1.1 *The Public Trustee Act*

This Act provides for a Protection Order[58] to be made for the property of a person who needs assistance with financial management.

A Protection Order is granted by the Supreme Court on the application of the Public Trustee[59] or of any other person, such as a relative or other carer, who has a proper interest in the affairs of the person on whose behalf the Order is sought.[60]

The range of situations covered by the Act is extremely wide.

1.1.1 *Incapacity to manage affairs*

A Protection Order may be made if the person is:

- totally or partly unable to manage his or her affairs;

  or

- susceptible or likely to be susceptible to undue influence in managing or disposing of the property concerned.

The need for assistance may result from age, disease, illness, physical or mental infirmity, or alcohol or drug abuse. This would include psychiatric illness, intellectual impairment of congenital or other origin, and dementia.

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58 The effect of a Protection Order is discussed on pages 58-59.

59 Public Trustee Act Section 65(1).

60 Public Trustee Act Section 66(1).

It is irrelevant whether the need for assistance is continuous or intermittent.[61]

1.1.2 *Test of incapacity*

It is not clear whether the test to be used by the Court to determine incapacity for financial management should be based on objective grounds, or whether the individual circumstances of the person concerned should be considered.

a. *Objective approach.* On one view, an objective approach should be adopted. A person would not be shown to be incapable of managing his or her affairs unless he or she appeared incapable of dealing in a reasonably competent fashion with routine affairs, and that lack of competence caused a risk that he or she may be disadvantaged in the conduct of such affairs or that his or her money or property may be dissipated or lost.[62]

This involves a two-step process. The first step is to ask whether the person concerned is capable of dealing with routine financial matters of everyday life. If he or she is capable of doing so, that would be the end of the matter. It would only be if the person concerned could not handle the ordinary affairs of life that consideration would be given to the second question and the person's own financial situation would become relevant.

This test would be inadequate to protect the interests of a person who, while able to handle routine matters, owns property involving questions which require a higher level of understanding of financial transactions and who is therefore vulnerable to exploitation.

b. *Subjective approach.* The alternative approach is to use a subjective test, taking into account the complexity and importance of the property involved and the person's ability to manage that property.[63]

The issue has not specifically arisen for decision in Queensland.

1.1.3 *The need to protect the property*

A Protection Order may also be made if, for some other reason, it is necessary to protect the person's property in his or her own interests or those of his or her dependants.[64] The need for assistance is not restricted to situations arising from age, disease, physical or mental infirmity or alcohol or drug abuse and involves a

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61 Public Trustee Act Section 65(1)(a).

62 PY v RJS [1982] 2 NSWLR 701.

63 See for example Re an Alleged Incapable Person (1959) 76 WN(NSW) 477.

64 Public Trustee Act Section 65(1)(b).

broad consideration of all the circumstances affecting the person.[65]

1.1.4 *Damages for personal injury*

The Supreme Court may also make a Protection Order in an action for damages for personal injury by a person who appears to the Court to be a person for whom a Protection Order might be made.[66]

A person who has suffered brain damage as a result of, for example, a car accident may be entitled to a substantial award of damages. If it appears that:

- the nature of the injury makes the person incapable of managing his or her affairs or susceptible to undue influence in the management of his or her affairs; or
- it is in the best interests of the person or his or her dependants

an application for a Protection Order may be made by the person, his or her spouse or the Public Trustee. The Court may also make the Order on its own initiative, even though an application has not been made.[67]

1.2 *The Mental Health Act*

The substituted decision-making provisions of the *Mental Health Act* are set out in the Fifth Schedule to the Act. These provisions apply to a 'patient'.

A person, other than someone for whom a Protection Order has been made under the *Public Trustee Act*, becomes a 'patient' if:

- a medical practitioner (usually a psychiatrist) notifies the Public Trustee; or
- the Supreme Court declares

that he or she is both mentally ill and incapable of managing his or her affairs.[68] The application for a Supreme Court declaration may be made by the Public Trustee or by another person such as a relative or carer.[69]

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65 Flood v Williscroft [1987] 2 QdR 358.

66 Public Trustee Act Section 67(1).

67 Public Trustee Act Section 67(2).

68 Clause 1. See pages 18-20 for further discussion.

69 See for example Re Warby SC Pet No 4 of 1991, delivered 9 May 1991 [91/123] McPherson J.

The provisions of the Act also apply to drug dependence and intellectual handicap as if each of those conditions were a mental illness.[70] Expressing or refusing to express particular views is not, by itself, to be considered mental illness. Nor is engaging in or refusing to engage in certain kinds of behaviour.[71]

Beyond this, the words 'mentally ill' are not defined in the Act. The two procedures - declaration by the Supreme Court and notification by a medical practitioner - are likely to result in the application of different tests.

1.2.1 *Supreme Court declaration*

When an application for a declaration that a person is 'mentally ill' is made to the Supreme Court, the Court has to consider the legal meaning of the term. Decided cases differ on the test which should be used. There are two alternative approaches.

The tests

a. *The traditional approach.* The traditional approach distinguishes between, on the one hand, psychiatric disorders such as schizophrenia, mania and depression and, on the other, disorders stemming from physical abnormality of the brain as a result of factors such as age or disease.[72] On this view, this second kind of disorder is not a 'mental illness'.

The history of the distinction has been traced in a series of decisions in the Protective Division of the Supreme Court of New South Wales.[73]

The problem with this approach is that it is based on outmoded, discredited medical criteria and fails to recognise that so-called 'functional' psychiatric disorders frequently have an underlying physical cause.

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70 Mental Health Act Section 5(2).

71 Mental Health Act Section 6.

72 This would include, for example, conditions such as Alzheimer's Disease or Down's Syndrome.

73 PY v RJS [1982] 2 NSWLR 700; RAP v AEP [1982] 2 NSWLR 508; CF v TCML [1983] 1 NSWLR 138; GNM v ER [1983] 1 NSWLR 144; McD v McD [1983] 3 NSWLR 81; RH v CAH [1984] 1 NSWLR 694; CCR v PS [1986] 6 NSWLR 622.

b. *The 'ordinary meaning' test.* The alternative approach has been to treat the term 'mental illness' as ordinary words of the English language, without any particular medical or legal significance. The test adopted on this approach is what an ordinary sensible person would say about the behaviour of the patient. If the answer would be 'Well the fellow is obviously mentally ill' then the case would fall within the classification of 'mental illness'.[74]

This test is open to objection on two grounds.

First, it ignores the advances made in the diagnosis and treatment of psychiatric illness and, in so doing, creates the risk of people being labelled as 'mentally ill' merely because of behaviour which is inconvenient or eccentric. Unusual or anti-social behaviour is not, of itself, a sign of mental illness.[75] This fact is recognised by the *Mental Health Act* to the extent that political, religious and moral or immoral values or activities are not, by themselves, a sufficient indication of mental illness.[76] However, forms of eccentric or anti-social behaviour which fall outside these areas would not be protected.

Second, it fails to recognise the extent of public misunderstanding about mental illness and the difficulty in arriving at an 'ordinary meaning' which would be capable of consistent application.

c. *The Queensland position.* It is not clear which interpretation is preferred by Queensland courts.

The 'ordinary meaning' test was adopted by the Court of Criminal Appeal in *R v Enright*.[77] This was a case involving fitness to plead to a criminal charge. The decision could be explained by the wording of the relevant section of the Act, which requires only that it 'appears' that the person is mentally ill.[78]

In *Re Stone* reliance on the 'ordinary meaning' test resulted in a finding that a ninety-three year old with Alzheimer's Disease was 'mentally ill'.[79]

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74 W v L [1974] 1 QB 711, 719.

75 See for example Mental Health Act 1986 (Vic) Section 8(2); Guardianship and Management of Property Act 1991 (ACT) Section 5.

76 See above note 71.

77 [1990] 1 QdR 563

78 Mental Health Act Section 29.

79 Re Stone SC Pet No 148 of 1981, delivered 24 December 1981, Master Lee.

However, more recently, the Court has refused to accept the finding in *Re Stone* as authority for the proposition that senile dementia in any form or degree will always constitute 'mental illness'. The decision in *Re Warby* recognised that such an approach would be inconsistent with the New South Wales decisions which are based on similar legislation.

In *Re Warby* a person with Alzheimer's Disease was found not to be mentally ill because, although her intellectual capacity was impaired, her mental functioning did not show symptoms commonly identified with any mental illness.[80] It was held that the finding of 'mental illness' in *Re Stone* may have depended on the particular evidence involved in the case.

1.2.2 *Notification by a medical practitioner*

A notifying medical practitioner is unlikely to be aware of these legal arguments. The notification form requires reasons to be given for the practitioner's assessment that the person is mentally ill.[81] The practitioner's opinion could be based on the existence of a particular condition, or on the person's symptoms or behaviour. People whose intellectual capacity has been impaired by dementia have been notified to the Public Trustee as being 'mentally ill'.

1.3 ***The Intellectually Disabled Citizens Act***

This Act provides assistance for a person with an intellectual impairment which:

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

and which limits the person's functional competence.

'Functional competence' concerns the ability to carry out routine functions of daily living. It includes the ability of the person to take care of himself or herself and his or her home, and to make informed personal decisions.[82]

The definitions of an 'intellectually disabled citizen' and of 'functional competence' mean that assistance can be given to a wide range of people.

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[80] Re Warby SC Pet No 4 of 1991, 9 May 1991 [91/123], McPherson J.

[81] Mental Health Regulations Forms 67-69.

[82] Intellectually Disabled Citizens Act Section 4.

However, people with mental or psychiatric illness are not included.

Further, it is not clear whether the assistance offered by the Act is available to a person who has been rendered unconscious by injury and is temporarily unable to make decisions on his or her own behalf. This question is important when consent is needed for medical treatment.[83] The directions for interpreting the Act suggest that the Act is intended to provide assistance for people with an on-going disability.[84]

The question of whether or not assistance should be given is decided by the Intellectually Disabled Citizens Council. An application for assistance may be made to the Council:

- by the person concerned; or
- on behalf of a person whose functional competence is so severely limited that he or she has or is likely to have functional, personal or social needs that will remain unsatisfied without such assistance.

People who may make an application on behalf of the person include the Legal Friend, and a relative or any other person who has a proper interest in the person's well-being - for example a carer, a close friend or a doctor.[85]

In deciding whether or not assistance should be granted, the Council considers whether or not the person 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.[86] Factors which the Council takes into account include the need to maintain the person's dignity and self-respect by imposing the least restrictions possible and the need to consider the person's own wishes so he or she can exercise as much control as possible over his or her own life.[87]

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83 See Chapter 10.

84 Intellectually Disabled Citizens Act Section 5: This Act shall be construed and applied so as to support and assist intellectually disabled citizens in participating in society in a positive way by providing a level of assistance which, in the least restrictive way, supports the individual and recognizes his rights, needs and abilities as well as the limitations that may place him at a disadvantage.

85 Intellectually Disabled Citizens Act Section 27.

86 Intellectually Disabled Citizens Act Section 31A(2).

87 Intellectually Disabled Citizens Act Section 31A(3).

2. THE *PARENS PATRIAE* JURISDICTION OF THE SUPREME COURT

People who need assistance because they have a mental or intellectual disability which makes them vulnerable to neglect, abuse or exploitation may be protected by the Supreme Court in the exercise of its *parens patriae* jurisdiction.[88]

In its original form this jurisdiction was confined to people who had a congenital intellectual disability or whose condition, including psychiatric disorders, developed after their birth. It did not include loss of competence as a result of old age. Gradually, however, it was expanded to include other forms of disability. Because of its protective nature, the emphasis is now on the person's need for assistance, rather than on the cause of the need.

3. PROBLEMS WITH THE PRESENT LAW

3.1 *Lack of principle*

The provision of assisted or substituted decision-making should be in accordance with the principles set out in Chapter 1. Intervention in a person's right to make decisions should occur only if his or her needs cannot be met in a less restrictive way.

Both the *Public Trustee Act* and the *Mental Health Act* involve a change of status for the person concerned and cause serious interference with his or her rights. However, neither requires that the criteria for intervention observe the fundamental principles of the presumption of competence and the encouragement of self-reliance. Neither Act provides guidelines, like those set out in the *Intellectually Disabled Citizens Act*, for determining whether assistance is needed. The wishes of the person concerned do not have to be sought or taken into account. The language used is patronising and demeaning, involving the stigma of a person being labelled as a 'Protected Person' or being declared to be 'mentally ill'.

The provisions of the *Public Trustee Act* may result in a Protection Order being made for a person whose need for assistance is partial and temporary.[89] This suggests a presumption of incapacity to manage finances and of susceptibility to undue influence in making decisions about financial resources. It is contrary to the principle of basing intervention in a person's decision-making process on the least restrictive alternative.

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[88] See pages 34-35 for an explanation of the *parens patriae* jurisdiction.

[89] Public Trustee Act Section 65(1)(a).

3.2 *Practical problems*

In addition to philosophically based objections, there are practical problems with the existing law.

3.2.1 *Uncertainty*

At present, some areas of the law are uncertain. It is not clear whether the legislation applies to certain categories of people. For example, inconsistencies arise because 'mental illness' is not defined in the *Mental Health Act*. It is possible that a medical practitioner making a notification to the Public Trustee will not use the same test as the Supreme Court would use in deciding whether to appoint a committee. It is also uncertain whether assistance under the *Intellectually Disabled Citizens Act* is available to a person who is unable to make a decision because he or she is temporarily unconscious.

3.2.2 *Inconsistency*

Further, under the existing law, inconsistent results are produced because different Acts and criteria apply to different people. The *Intellectually Disabled Citizens Act*, for example, does not apply to people with a psychiatric or mental illness unless intellectual impairment is also involved. The *Mental Health Act* may not apply to people with conditions like Alzheimer's Disease unless there are also symptoms of mental illness. As different forms of assistance are available under each of the Acts, for some people the assistance provided may depend on the particular mechanism used. Other people may not be able to obtain the kind of assistance they need.[90]

3.2.3 *Confusion*

Fragmentation also causes confusion about the appropriate way of obtaining assistance. This can result in unnecessary delay, expense and anxiety if the wrong kind of application is made. It can also result in inefficiency and waste of resources, since each of the Acts is administered by a different government department.

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[90] For a discussion of the kind of assistance provided by each of the Acts, see pages 58-63.

4. POSSIBLE ALTERNATIVE CRITERIA FOR INTERVENTION

Legislation should set out the criteria on which a finding can be made that a person should have assistance to make decisions or that decisions should be made on his or her behalf by someone else.

4.1 *A needs basis*

One way in which this can be done is to base the decision simply on the person's need for assistance. In New Zealand, for example, the grounds for intervention are lack of capacity to understand the nature of or to foresee the consequences of personal decisions and lack of competence to manage financial affairs.[91]

4.2 *An additional requirement of disability*

Alternatively, the legislation can require, in addition to need for assistance, that the inability to manage daily living arises from particular kinds of disability. This approach has been adopted in the United Kingdom,[92] Victoria,[93] New South Wales,[94] South Australia,[95] Northern Territory[96] and the Australian Capital Territory.[97] It has also been used in Queensland in the *Intellectually Disabled Citizens Act.*[98]

In Western Australia, the appointment of a guardian is needs based, but the existence of a specific condition as well as need must be shown for the appointment of an administrator of the person's property.[99]

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91 Protection of Personal and Property Rights Act 1988 (NZ) Section 6, Section 25.

92 Mental Health Act 1983 (UK) Sections 1, 7(2), and 94(2).

93 Guardianship and Administration Board Act 1986 (Vic) Sections 3, 22 and 46.

94 Disability Services and Guardianship Act 1987 (NSW) Sections 3(2), 7, 14.

95 Mental Health Act 1977-1986 (SA) Section 26(1).

96 Adult Guardianship Act 1988 (NT) Sections 3, 8.

97 Guardianship and Management of Property Act 1991 (ACT) Sections 7,8.

98 Intellectually Disabled Citizens Act Sections 4, 27.

99 Guardianship and Administration Act 1990 (WA) Sections 43, 64.

If the requirement that a particular kind of disability be shown is adopted in Queensland, it will be necessary to establish a set of criteria from which the need for assistance must arise. The specified causes on which need could be based include:

- intellectual disability since birth
- brain damage subsequent to birth
- psychiatric illness
- dementia
- physical degeneration of the brain resulting from other causes
- temporary loss of consciousness resulting from, for example, injuries received in a car accident.

4.3 *The arguments*

Arguments exist both in favour of and against the additional requirement of proof of a particular kind of disability.

4.3.1 *Arguments in favour*

- *Different needs.* Different conditions create different needs. Obviously, a nineteen year old who has suffered brain damage in a car accident has very different needs from an elderly dementia patient. A young adult may still have many years of life ahead of him or her, and needs opportunities to develop and to express his or her individuality. A dementia patient, however, at this time has little chance of improvement and will ultimately require total care. The needs of people with a psychiatric disorder are different yet again. There may be times when they are able to make most, if not all, of the decisions affecting their lives, while at other times they may need considerable support. One set of uniform rules might not adequately cater for the needs of people with different disabilities.

- *Expertise.* The people who decide that intervention is necessary in the decision-making process of a person with a mental or intellectual disability should have some experience or expertise in the area of the disability concerned. The requirement of proof of a specified condition would allow the appointment of people with suitable qualifications in that area of disability to determine whether intervention was necessary in an individual case, and what kind of intervention would be most appropriate.

- *Protection.* Human behaviour is endlessly variable. Yet there is a common tendency to label as 'mad' a person whose behaviour varies from the 'norm'. The requirement of a specific condition for intervening in a person's right to choose would protect people whose behaviour is merely unusual or eccentric, but who are quite capable of exercising choice and making their own decisions.

4.3.2 *Arguments against*

- *Consistency.* The fragmented nature of the existing law causes confusion and disappointment to the people affected. Much of this could be overcome by having one set of consistent rules which applied to all people with a mental or intellectual disability.

  Although different groups have different needs, the fundamental principles remain the same. The nineteen year old accident victim, the elderly dementia patient and the person with a psychiatric illness are all entitled to be treated with respect and dignity and to the greatest possible degree of autonomy.

  The need for different kinds of assistance can be met by tailoring orders according to the individual requirements of the person concerned.

- *Diagnostic difficulties.* The distinctions between conditions can easily become blurred, with the result that some conditions do not fall neatly into defined categories. Assistance may not be available if the need arises from a cause which has not been specified. There can also be a problem with dual diagnosis, where a person suffers from more than one condition.

- *Presumption of incompetence?* The existence of a mental or intellectual disability does not necessarily involve a need for assistance. There is a risk that once the existence of a specific mental or intellectual disability has been proved to the person or body deciding whether assistance is needed, then the finding of incapacity may be almost automatic. This would effectively result, contrary to the principles espoused in Chapter 1, in a presumption of incompetence.

- *Community attitude.* The widespread community misunderstanding which exists about terms such as 'mental illness' and 'intellectual disability' may mean that there is a risk of stigma attaching to people who become 'labelled' as suffering from a particular disability.

- the adjudicating body considers that a person lacks the legal capacity to make a decision about financial, health care or lifestyle matters;

- a person is unable to communicate decisions about financial, health care or lifestyle matters; or

- a person is acting in a manner injurious to his or her health or welfare and is considered by the adjudicating body to partly or wholly lack the capacity to understand the nature or to foresee the consequences of decisions about his or her personal care, welfare or health.

However, intervention should not be based solely on the grounds of a person's political, religious or moral beliefs or values, or on the fact that a person engages in immoral, illegal or antisocial behaviour.

There is also the question of whether, and to what extent, behaviour which is deliberate but irrational and which impacts adversely on family members or dependants should be a ground for intervention. For example, a person with a severe personality disorder may, although he or she has the capacity to understand his or her actions, behave in a way which causes hardship to his or dependants. In such a situation, should the spouse or other dependants of the person be able to obtain a substituted decision-making order for that person? The difficulty of such an approach would be to frame the ground for intervention in such a way that there was no risk that it would intrude in essentially private matters. For example, should a grandchild be able to obtain an order to control the finances of a mentally competent grandparent whom the grandchild believed was irrationally dissipating assets which might otherwise be expected to pass to the grandchild?

4. WHO DECIDES THAT PEOPLE NEED ASSISTANCE

1. EXISTING LEGISLATION

The conclusion that a person with a mental or intellectual disability needs assistance to make decisions may presently be made under the *Public Trustee Act* 1978, the *Mental Health Act* 1974 and the *Intellectually Disabled Citizens Act* 1985. The appropriate mechanism is determined by the nature of the disability and by the kind of assistance needed.

1.1 *The Public Trustee Act*

The *Public Trustee Act* applies to a wide range of people.[100] It makes assistance available for the management of property and other financial matters.[101]

The decision whether assistance is needed is usually made by the Supreme Court.

However, the Public Trustee also has limited power to decide that a person needs assistance with his or her financial affairs.

Assistance can be provided in the following ways:

1.1.1 *The Supreme Court*

The Public Trustee[102] or any other person with a proper interest[103] may apply to the Court for a Protection Order[104] for a person to whom the Act applies. In coming to a decision, the Court may obtain assistance from the Public Trustee's report.[105] The Court also has power to order medical or psychological tests for the person concerned[106] or to obtain information about the person's financial

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[100] See pages 15-17.

[101] The role of the Public Trustee is discussed on pages 58-59.

[102] Public Trustee Act Section 65(1).

[103] Public Trustee Act Section 66.

[104] The effect of a Protection Order is discussed on pages 58-59.

[105] Public Trustee Act Section 66(3).

[106] Public Trustee Act Section 66(1)(a).

affairs.[107] If the Court is satisfied, as a result of these reports or of any other evidence, that the person comes within the specified criteria, it may make a Protection Order.[108] In granting a Protection Order the Court is not obliged to accept the medical evidence unless it is satisfied of the facts on which the opinion is based.[109]

A Judge of the Supreme Court may also make a Protection Order in any action for damages for personal injury by a person who appears to the Court to be a person for whom a Protection Order could be made.[110] This situation can arise when a person has suffered brain damage as the result of an injury received, for example, in a car accident. The person may bring court proceedings for compensation for the injury. Where, during the course of the action, it appears that:

- the nature of the injury makes the person incapable of managing his or her affairs or susceptible to undue influence; or

- it is in the best interests of the person or his or her dependants

an application for a Protection Order may be made by the person, his or her spouse or the Public Trustee. If necessary, the Court may make the Order on its own initiative, even though an application has not been made.[111]

Either the Public Trustee or the Protected Person may apply to the Court to have the Order varied or rescinded.[112] The application must be supported by strong evidence that, as a result of the Protected Person's improved mental or intellectual condition, he or she is now able to manage his or her affairs, and it is in his or her best interests to have the right of management restored.[113]

1.1.2 *The Public Trustee*

The Public Trustee may decide that a person with a mental or intellectual disability needs assistance with the management of his or her financial affairs in cases where the extent of the property involved does not warrant a Supreme Court application.

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[107] Public Trustee Act Section 66(1)(c).

[108] Public Trustee Act Section 66(4).

[109] Re Cochran (1964) 46 DLR (2d) 587; Re Ross [1988] 2 QdR 61.

[110] Public Trustee Act Section 67.

[111] Public Trustee Act Section 67(2).

[112] Public Trustee Act Section 69.

[113] Re Ross [1988] 2 QdR 61.

If the value of the person's property does not exceed $10,000 and if reports from two medical practitioners are produced, the Public Trustee may file a Certificate of Disability in the Court.[114] The medical reports are not necessary if the person requests the Public Trustee to undertake management of his or her finances.[115] However, a Certificate of Disability may not be filed if the person objects in writing within fourteen days of receiving notification of the Public Trustee's intention.[116]

The effect of filing a Certificate of Disability is that the person becomes a Protected Person and the Public Trustee automatically assumes management of his or her property.[117]

1.2 *The Mental Health Act*

The Fifth Schedule to the Act provides for decisions to be made on behalf of a 'patient'. A person with a mental or intellectual disability can become a 'patient' in one of two ways.

1.2.1 *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 finances. Once notification is given, the Public Trustee automatically assumes control of the person's finances.[118]

When a person is admitted to a psychiatric hospital or a training centre, he or she should undergo a process of assessment. As a result of the assessment, a medical practitioner on the staff of that hospital or centre may notify the Public Trustee that the person is mentally ill and incapable of managing his or her affairs. In practice, this practitioner will usually be a psychiatrist or psychiatric registrar. There is a prescribed notification form which requires reasons to be given for the practitioner's opinion.[119]

If the person is in any other hospital or institution and is receiving treatment for mental illness, notification may be given by or on behalf of the administrator, based on the opinion of a psychiatrist. If the person is in prison, the superintendent may

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[114] Public Trustee Act Section 70.

[115] Public Trustee Act Section 71.

[116] Public Trustee Act Section 70(3).

[117] Public Trustee Act Section 72.

[118] Mental Health Act Fifth Schedule Clause 2.

[119] Mental Health Regulations Form 67.

give notification based on the opinion of a psychiatrist.[120] In each of these situations, grounds must be given for the psychiatrist's opinion.[121]

The notification procedure means that the decision that a person needs assistance is made by the psychiatrist or psychiatric registrar.

Where a person becomes a 'patient' by notification to the Public Trustee, the authority of the Public Trustee can be ended in a number of ways.

First, if the person is in a psychiatric hospital or training centre, the notifying practitioner may subsequently inform the Public Trustee that the person is capable of managing his or her affairs.[122]

Second, the patient or any other person with a proper interest may apply to the Supreme Court or to the Patient Review Tribunal for an order to terminate the Public Trustee's authority. The *Mental Health Act* provides for the Patient Review Tribunal to deal with certain applications made under the Act by or on behalf of a patient. The Tribunal consists of at least three people, of whom one is a retired judge or a person qualified to be a judge of the District Court, one a medical practitioner and one a person qualified to practise a profession that requires a special knowledge of mental illness.[123] The Court or Patient Review Tribunal must be satisfied, before granting the application to terminate the authority of the Public Trustee, that the patient is capable of managing his or her affairs.[124]

Alternatively, if no application is made, the Public Trustee may determine that the patient is capable and may hand back control of financial management.[125]

1.2.2 *Declaration of the Supreme Court*

The second way for a person to become a 'patient' is by declaration of the Supreme Court that the person is mentally ill and incapable of managing his or her affairs.

The Public Trustee or any other person, such as a relative or carer, may apply for such a declaration and for the appointment of a committee of the estate to manage the person's finances and/or a committee of the person to make decisions about

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[120] Mental Health Act Fifth Schedule Clause 1.

[121] Mental Health Regulations Forms 68, 69.

[122] Mental Health Act Fifth Schedule Clause 6(1)(a)(iv).

[123] Mental Health Act Section 14.

[124] Mental Health Act Fifth Schedule Clause 6(1)(b).

[125] Mental Health Act Fifth Schedule Clause 6(1)(a)(v).

his or her personal welfare.[126]

A committee has full power to make decisions about the person's finances and property and/or about his or her personal welfare, including the power to consent to medical treatment.

The Court may discharge a committee of the estate or of the person if, on an application by the committee, the patient or any other person with a proper interest, it is proved that the person is capable of managing his or her affairs. Unless the Court discharges a committee, the appointment continues for the lifetime of the patient.[127]

1.3 *The Intellectually Disabled Citizens Act*

An application for assistance under this Act is made to the Intellectually Disabled Citizens Council.[128] Members of the Council are appointed by the Governor on the advice of the State Government.[129] To be eligible for appointment members must have, as a result of their qualifications or professional or personal experience, appropriate knowledge about intellectual disability.[130] The Act provides that, in addition to members of the Council itself, panel members may be appointed to assist the Council to consider applications for assistance.[131] Panel members must also have qualifications or professional or personal experience which gives them appropriate knowledge of intellectual disability.[132]

If the Council decides to grant assistance to a person, it may authorise the Legal Friend, who is a barrister or solicitor appointed to provide specialised assistance under the Act,[133] to make decisions for that person about medical treatment.[134] The Legal Friend may delegate to another barrister or solicitor the authority to give

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[126] Mental Health Act Fifth Schedule Clauses 1, 4.

[127] Mental Health Act Fifth Schedule Clause 6(2).

[128] Intellectually Disabled Citizens Act Section 27.

[129] Intellectually Disabled Citizens Act Section 8(1).

[130] Intellectually Disabled Citizens Act Section 8(3).

[131] Intellectually Disabled Citizens Act Section 13(1).

[132] Intellectually Disabled Citizens Act Section 13(2).

[133] Intellectually Disabled Citizens Act Section 4.

[134] Intellectually Disabled Citizens Act Section 26. See pages 106-108.

consent for medical treatment.[135]

The Council may also notify the Public Trustee if it thinks that an assisted citizen is likely to be subject to undue influence in the management of his or her finances or that, for some other reason, it is in the best interests of the person concerned or his or her dependants that the person's property should be protected.[136]

An application to review the kind and extent of assistance provided may be brought by the person concerned or by a number of other people, including a relative, a carer and the Legal Friend.[137] Even where no application is made, there is provision for a review to take place automatically at least once every five years.[138] There is a right of appeal to the Supreme Court against the decision of the Council on an application for assistance.[139]

2. THE *PARENS PATRIAE* JURISDICTION OF THE SUPREME COURT

The Supreme Court may, in the exercise of its *parens patriae* jurisdiction, determine whether a person with a mental or intellectual disability needs assistance to make decisions.

This is a power which developed in early English law from the responsibility of the monarch to protect the welfare and property of people whose mental illness or intellectual disability made it impossible for them to look after themselves.[140] By the mid-seventeenth century this role had passed to the Court of Chancery and was extended to include people who, as a result of illness, accident or old age, had lost the capacity to manage their own affairs.[141] When the Supreme Court of Queensland was established it was given the powers of the Court of Chancery, including the power to appoint someone to look after a person who was unable to adequately safeguard his or her own interests.[142] The power is wide enough to allow the Court to approve medical procedures such as blood tests[143] and

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[135] Intellectually Disabled Citizens Act Section 23(7).

[136] Intellectually Disabled Citizens Act Section 32.

[137] Intellectually Disabled Citizens Act Section 27.

[138] Intellectually Disabled Citizens Act Section 28.

[139] Intellectually Disabled Citizens Act Section 43.

[140] Statute *de Praerogativa Regis*, 17 Edward II.

[141] Ridgway v Darwin (1802) 8 Ves Jun 65; Ex parte Cranmer (1806) 12 Ves Jun 445.

[142] Supreme Court Act 1867 Section 22.

[143] Re S v McC; W v W [1972] AC 24.

sterilisation procedures.[144]

However, the *parens patriae* jurisdiction is based on the need to protect those who cannot protect themselves. It must be exercised in accordance with this underlying principle and not for the benefit or convenience of those who have the responsibility of caring for a person with a mental or intellectual disability. At times this will mean that it should be exercised with great caution.[145]

3. PROBLEMS WITH THE EXISTING LAW

3.1 *Lack of principle*

The provisions of both the *Public Trustee Act* and the *Mental Health Act* fall well short of the principles set out in Chapter 1.

Neither Act requires that, when a decision is made that a person with a mental or intellectual disability needs assistance, consideration is given to the presumption of competence, the encouragement of self-reliance and the least restrictive alternative. There are no specified guidelines as to how a decision is to be made or what factors are to be taken into account. The notification procedures of the *Mental Health Act*, whereby control of a person's finances can be removed on unchallenged medical opinion, are particularly intrusive.

Nor does either of these Acts provide for an inexpensive, regular, automatic process to review the determination that a person needs assistance and to ensure that the needs of the person are being met without unnecessarily impinging on his or her fundamental rights.

3.2 *Lack of cohesion*

At present, each of the relevant Acts is administered by a different government department. This creates the risk of lack of cohesion, as a result of different policy decisions. It is also inefficient and wasteful of resources.

3.3 *Suitability of existing procedures*

Where the decision is made by the Supreme Court, there is greater protection against arbitrary restriction of the person's rights, since the Court will not intervene

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[144] Re Jane (1988-89) 85 ALR 409.

[145] See Re Eve [1986] 2 SCR 388, 427.

without a thorough examination of the facts and issues involved in any particular case.

There are, however, factors which militate against the suitability of the Supreme Court as a forum for determining whether a person with a mental or intellectual disability requires assistance to make the decisions that affect his or her life.

First, there is the cost of bringing the application. Second, the formal atmosphere of courtroom tradition and the adversarial nature of the proceedings may be intimidating to the person and his or her family or friends. Third, a judge may have little experience or expertise in problems involving the need for assisted or substituted decision-making of the mentally or intellectually disabled.

When an application is made under the *Intellectually Disabled Citizens Act*, the proceedings are less formal and there is no fee for bringing the application.

However, although theoretically the Intellectually Disabled Citizens Council is more accessible, its effectiveness is hampered by lack of resources. Information provided by the Council shows that applications for assistance are concentrated in the south east corner of Queensland and, to a lesser extent, along the coastal strip. Few applications are received from areas west of the Great Dividing Range.

4. POSSIBLE ALTERNATIVES

4.1 *Another court*

An advantage of using an existing court would be the saving in costs which would result because the necessary support structure would already be in place. However, substantially increased resources would be needed to meet the demands of the added workload.

Jurisdiction could be conferred on:

a. *The Family Court*

In New Zealand, determinations about decision-making for a person who needs assistance are dealt with by the Family Court. Although judges of the Family Court may have no greater expertise in mental and intellectual disability than judges of the Supreme Court, they have considerable experience in handling sensitive and emotional disputes. Family Court proceedings are usually conducted with less formality than those in the Supreme Court.

In Australia, constitutional issues which do not arise in New Zealand may mean that the Family Court would not be appropriate. Although State and Commonwealth cross-vesting legislation[146] allows the Family Court to deal with 'State matters',[147] a recent Family Court practice direction indicates that the Court will not hear a matter which would not be within its jurisdiction apart from the cross-vesting legislation, unless there is a related proceeding before the Family Court.[148]

b. *The Magistrates Court*

A second alternative to the Supreme Court would be the Magistrates Court.[149] Hearings in the Magistrates Court are considerably less expensive than those in the Supreme Court, and provision could be made for relaxing the rules of evidence and procedure.[150] However, the question of expertise and experience with mental and intellectual disability remains. In the Northern Territory, panels have been set up to advise the Court on relevant matters. Each panel has one member who has expertise in the assessment of people who have a mental or intellectual disability.[151]

4.2 *An independent tribunal*

In Victoria, South Australia, New South Wales, Western Australia and the Australian Capital Territory independent tribunals have been established to deal with applications for assisted and substituted decision-making.

In Queensland, the Intellectually Disabled Citizens Council already operates as an independent tribunal and authorises the Public Trustee and the Legal Friend to make decisions on behalf of an assisted person. However, it is not able to provide assistance in every situation.

The establishment of an independent tribunal would allow a mechanism that would be fair, economical, informal and quick. The membership of the tribunal could include people with legal qualifications and people with qualifications or experience in matters involving mental or intellectual disability.

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[146] Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld); Jurisdiction of Courts (Cross-vesting) Act 1987 (Cwth).

[147] Section 4(2).

[148] Practice Direction No 3 of 1990.

[149] See Adult Guardianship Act 1988 (NT) Section 2 and Section 11.

[150] See for example Adult Guardianship Act 1988 (NT) Section 11(2).

[151] Adult Guardianship Act 1988 (NT) Section 9.

The tribunal could operate as a series of panels. In simple cases a panel might consist of one person only; but in difficult cases a panel could consist of at least three persons. There could be a small number of full-time panel members and a large pool of part-time members.

Administrative convenience might result in the development of specialist panels to deal with particular kinds of cases - for example, congenital intellectual disability, brain damage, mental or psychiatric illness, dementia or organic deterioration arising from any other cause. Panellists could be persons suitably qualified for the work of a particular panel. In some cases it might be necessary to constitute a panel with expertise in more than one area of disability. Flexibility in the composition of the panel would mean that the needs of the person concerned could be assessed by people with an understanding of that disability and the appropriate level of assistance or support determined accordingly.

One member of a panel should be a person with legal qualifications. This would protect the rights of the person by or for whom the application is made, and would ensure that all relevant matters were considered and that the powers conferred on the panel were not exceeded.

4.2.1 *A gateway mechanism*

It is likely that a significant proportion of applications for the appointment of an assistant or substitute decision-maker would not be opposed. The operation of a tribunal could be made more streamlined and cost-effective by the appointment of a statutory officer to review applications before they are heard by the tribunal. The function of the officer, who would be part of the tribunal, would be to identify routine uncontested matters. There could also be an advisory role attached to the office, in the form of making a preliminary report to the tribunal.

5. CONCLUSION

The view of the Commission is in favour of the creation of an independent tribunal.

Members of the tribunal would have either legal qualifications or qualifications or experience in one or more types of mental or intellectual disability. The tribunal would operate on a panel system as outlined in the previous section, with panels consisting of one or up to three members of the tribunal.

The Commission is aware that establishment of a tribunal would involve commitment of resources to provide the necessary administrative framework.

Resources would also be required to ensure that assistance was available throughout Queensland, not merely in Brisbane and the south-east corner of the State.

However, the welfare of the mentally and intellectually disabled is an area which has been underfunded in the past. The fragmented nature of the existing legislation results in inefficient use of available resources.

The creation of a tribunal with comprehensive powers in the area of assisted and substituted decision-making would allow systematic, rational and much needed reform.

It would provide a simple, accessible means of ensuring that people with a mental or intellectual disability receive the assistance that they need to make decisions which affect their lives. It would remove much of the confusion caused by the present legislative patchwork. The nature of the disability would not determine the mechanism for deciding whether assistance is necessary and what kind of assistance is available. One body would be able to hear all applications for assistance and to order the form of assistance appropriate to the circumstances of the individual case.

6. CONSEQUENTIAL CHANGES TO EXISTING LAW

If this proposal is adopted, the role of the bodies which presently determine the need for assisted and substitute decision-making would have to be reassessed.

6.1 *The Supreme Court*

The Supreme Court may at present make a Protection Order or appoint a committee of the person and/or of the estate. These procedures are expensive and, in the case of a committee of the estate and the making of a Protection Order, the options are limited. Supreme Court jurisdiction could be retained but, in view of the fact that it is not widely used at present, it is likely to be used even less frequently if a cheaper, less formal alternative with relevant expertise is available. The Commission therefore recommends that the making of Protection Orders and the appointment of committees be abolished.

The Supreme Court also exercises a *parens patriae* jurisdiction. This jurisdiction is independent of any legislation. It exists for the protection of the weak and the vulnerable and for the preservation of the rights of the individual. It can be excluded only by a very clear expression of intention to do so.

The *parens patriae* jurisdiction over adults with a mental or intellectual disability has been abolished in the United Kingdom.[152] It has been retained in New South Wales[153] and in the Australian Capital Territory.[154]

6.2 *Medical practitioners*

The Commission considers that the power of medical staff of a psychiatric hospital or training centre to automatically hand control of a patient's financial affairs to the Public Trustee should be terminated.

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[152] In Re F [1990] 2 AC 1.

[153] Disability Services and Guardianship Act 1987 (NSW) Section 8(1), Section 31.

[154] Guardianship and Management of Property Act 1991 (ACT) Section 6.

5. DUTIES AND POWERS OF THE ADJUDICATING BODY

1. INTRODUCTION

The establishment of a comprehensive, integrated system of assisted and substituted decision-making would require formulation of the duties to be imposed, and the powers conferred, on the body which determines whether assistance is needed. The duties and powers should be clearly defined in the legislation setting up the scheme.

2. DUTIES

2.1 *Primary duty*

The primary duty of the adjudicating body should be, in carrying out any of its functions, to observe the principles identified in Chapter 1.

For example, in concluding whether, or to what extent, a person with a mental or intellectual disability needs assistance to make decisions, the court or tribunal should be bound by the presumption of competence. It should also be obliged to make orders which give the person concerned the greatest possible opportunity to become self-reliant in making decisions and which intrude as little as possible into the individual right of choice.

This will mean, in some cases, that the court or tribunal will decide that intervention is not necessary.

2.2 *Other duties*

Further duties could include:

2.2.1 *Notification*

An outcome which is both fair to the person with a mental or intellectual disability and acceptable to the people closest to him or her is more likely to be achieved if everyone with a significant point of view to contribute is notified of the application for an order for assisted or substituted decision-making and given the opportunity to attend and to be heard.

The adjudicating body should therefore have a responsibility to inform people with a genuine interest in the result of the proceedings that an application has been made.[155] In some jurisdictions, the duty to notify of an application for an order is placed on the person who makes the application.[156]

The legislation could require notice to be given to any person who has a proper interest in the welfare of the person for whom the application is brought. However, a general provision of this kind could cause uncertainty and confusion.

An alternative approach would be to specify the people to whom notice must be given. These could include:

- the person for whom the application is brought;
- the person's close relatives (for example his or her spouse, parents, brothers and sisters and children);
- a previously appointed substitute decision-maker;
- a primary carer;
- a proposed substitute decision-maker; and
- any relevant statutory officer such as the Public Trustee.[157]

The adjudicating body could also be given power to order that, where it considers it appropriate, notification be given to any other person in addition to those specified.[158]

If the adjudicating body has a duty to notify people that an application has been made, it would also need an accompanying power to dispense with notification in certain circumstances. This would provide for the situation where, for example, a person to whom notice must be given cannot be located.

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[155] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 29(1); Guardianship and Administration Board Act 1986 (Vic) Sections 20(1), 44(1); Guardianship and Administration Act 1990 (WA) Section 41; Guardianship and Management of Property Act 1991 (ACT) Section 35(1).

[156] See for example Disability Services and Guardianship Act 1987 (NSW) Section 10(1).

[157] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 29(2); Guardianship and Administration Board Act 1986 (Vic) Section 20(1), Section 44(1); Guardianship and Administration Act 1990 (WA) Section 41(1); Guardianship and Management of Property Act 1991 (ACT) Section 35(1).

[158] Intellectually Disabled Citizens Act 1985 (Qld) Section 29(2); Guardianship and Administration Board Act 1986 (Vic) Sections 20(1), 44(1); Guardianship and Administration Act 1990 (WA) Section 41(1); Guardianship and Administration of Property Act 1991 (ACT) Section 35(2).

A person for whom an application is made may not be able to understand the effect of the notification, or may be distressed by it. If there is a duty to notify that person, the adjudicating body may be given power to dispense with notification.[159] On the other hand, it could be argued that because the adjudicating body has an overriding responsibility to protect a person who may be vulnerable to exploitation, notification to the person for whom the application is made should not be dispensed with.[160] If the adjudicating body is given power to dispense with notification to the person for whom the application is made, the power should be exercised only in unusual circumstances, such as where the person is comatose.

Where notification is given to a person for whom an application is made it should, at the time it is given, be explained in the way that the person concerned is most likely to understand.[161]

2.2.2 *Conduct of hearings*

Hearings of court proceedings are usually open to the public. However, the proceedings of a number of tribunals are conducted in private.[162] There are arguments both for and against public hearings of applications for assisted or substituted decision-making for people with mental and intellectual disabilities.

a. *Arguments for*

- The power of a court or tribunal to determine whether a person needs assistance to make decisions involves the possibility of substantial intrusion into individual rights. It is essential to ensure that the authority of the adjudicating body is not abused. Fairness and accountability demand that the adjudicating body be under a duty to conduct its hearings in public.[163]

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159 See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 63(2).

160 See Guardianship and Administration Board Act 1986 (Vic) Sections 20(3), 44(3) and Guardianship and Administration Act 1990 (WA) Section 41(3)(b).

161 See for example Guardianship and Administration Board Act 1986 (Vic) Section 71; Disability Services and Guardianship Act 1987 (NSW) Section 99; Adult Guardianship Act 1988 (NT) Section 27; Guardianship and Administration Act 1991 (WA) Section 115.

162 See for example Social Security Act 1947 (Cwth) Section 194; Veterans' Entitlements Act 1986 (Cwth) Section 150.

163 See for example Guardianship and Administration Board Act 1986 (Vic) Section 7(1); Disability Services and Guardianship Act 1987 (NSW) Section 56; Adult Guardianship Act 1988 (NT) Section 25(1); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 11(1); Guardianship and Management of Property Act 1991 (ACT) Section 37(1).

- The body deciding the application could have power to order that, if it considered it in the best interests of the person for whom the application was made, the hearing be closed and only specified people with a genuine interest in the proceedings be allowed to be present. This would help to protect the privacy and the dignity of the person for whom the application was made.[164]

b. *Arguments against*

- Proceedings of this kind often deal with sensitive issues. The privacy of the person for whom the application is made should be respected and protected.

- Closed hearings may encourage frankness; people may feel able to say things that they would not say in an open hearing. The more informal the proceedings, the better the needs of the person for whom the application was made would be able to be met.

- Sometimes applications are made because a dispute has arisen about who should have the right to make decisions on behalf of a person with a mental or intellectual disability. If the people affected by the outcome of the application are willing to talk frankly it would be easier for the adjudicating body to adopt a mediating or facilitative role.

- There could be difficulties associated with the conduct of open hearings. It would be necessary, for example, to ensure that public access to hearings was readily available. There would also have to be specific provisions allowing for the prevention of the publication of sensitive material and for the exclusion of people from a hearing if the adjudicating body considered it necessary in the interest of the person for whom the application was brought.

- Accountability of the adjudicating body could be achieved by providing an appropriate appeal mechanism.[165]

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[164] See for example Guardianship and Administration Board Act 1986 (Vic) Section 7(3); Disability Services and Guardianship Act 1987 (NSW) Section 56; Adult Guardianship Act 1988 (NT) Section 25(3); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 11(2); Guardianship and Management of Property Act 1991 (ACT) Section 37(1).

[165] Appeals from a decision of a tribunal will be discussed in Chapter 12.

2.2.3 *Procedure*

The adjudicating body should be under a duty to conduct the hearing fairly[166] and with as little formality as possible.[167]

For all parties involved in the application, a certain degree of stress associated with the hearing is probably inevitable. The procedures of the adjudicating body should therefore be as relaxed and informal as is consistent with protecting the rights of the person for whom the application is made, and with meeting the statutory obligations of the adjudicating body.

2.2.4 *Representation at the hearing*

Emphasis on informality of proceedings raises the question of whether legal representation should be permitted at the hearing of an application for assisted or substituted decision-making.

Because of the potential erosion of the rights of a person for whom the application is brought, in some jurisdictions the court or tribunal is under a duty to ensure that the person concerned is protected by independent legal representation.[168]

The role of legal counsel could be important in challenging evidence put before the adjudicating body, thus providing a safeguard against the routine approval of applications. In cases of family dispute, the presence of an independent representative could protect the person in respect of whom the application is made from being used as a pawn in the argument. It could also help to diffuse emotional tension by avoiding direct conflict between family members at the hearing.

On the other hand, insistence on legal representation may be seen as an unwarranted and expensive formality.[169] It could be seen to pre-suppose the existence of conflict where none actually exists. It could also cause unnecessary delays in the hearing of clearcut cases and this, in turn, would increase the operating costs of the adjudicating body.

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[166] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 10(1)(a), 10(1)(b); Guardianship and Administration Act 1990 (WA) Section 15; Guardianship and Management of Property Act 1991 (ACT) Section 37(3).

[167] See for example Disability Services and Guardianship Act 1987 (NSW) Section 55(2); Guardianship and Administration Act 1990 (WA) Section 15; Guardianship and Management of Property Act 1991 (ACT) Section 37(2).

[168] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 65(1); Adult Guardianship Act 1988 (NT) Section 13(2).

[169] In Victoria, legal representation for the applicant and the person for whom the order is sought is used in less than 20% of all hearings: Guardianship and Administration Board, 1989-1990 Annual Report, 37.

The interests of the person for whom the application has been made may be adequately protected if a non-legal representative were allowed to speak on his or her behalf. The person concerned should have an automatic right to be heard, and should be encouraged to put his or her own views.

The right to legal or other representation may be automatic,[170] or may require the leave of the court or tribunal.[171] In some jurisdictions, where a person for whom an application has been made is not represented before the adjudicating body, the adjudicating body has power to appoint someone to represent that person.[172]

The person bringing the application may also wish to be represented before the adjudicating body, by either a lawyer or a non-legal representative, so that the perceived need for assistance may be explained to the adjudicating body as convincingly as possible.

Other relatives and close friends whose interests may be affected by the decision of the court or tribunal may also have a legitimate claim to representation.

The following principles could apply to entitlement to representation before the adjudicating body:

- procedures of the adjudicating body should be designed to assist the parties to a hearing to appear for themselves without the need for professional representation;
- people who are entitled to attend the hearing should be entitled and encouraged to speak for themselves;
- the adjudicating body could have power to exclude everyone else from the hearing while the person for whom the application was made speaks;
- everyone who is entitled to attend the hearing should have an automatic right to legal representation;[173]

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[170] Guardianship and Administration Board Act 1986 (Vic) Section 12(1); Adult Guardianship Act 1988 (NT) Section 13(1); Guardianship and Management of Property Act 1991 (ACT) Section 36(3).

[171] See for example Intellectually Disabled Citizens Act 1985 (Qld) Sections 29(3), 29(4); Disability Services and Guardianship Act 1987 (NSW) Section 58(1); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 13(3).

[172] See for example Guardianship and Administration Board Act 1986 (Vic) Section 12(3); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 13(4); Guardianship and Management of Property Act 1991 (ACT) Section 36(4).

[173] Experience in other jurisdictions has shown that even where legal representation is available it is, in fact, used in only a minority of cases. See for example Guardianship and Administration Board of Victoria Annual Report 1989-1990, 37.

- everyone who is entitled to attend the hearing should be able to obtain assistance from family, friends or other non-legal people in communicating with the adjudicating body; and

- the adjudicating body should have power to arrange independent legal representation for the person for whom the application is made if it appears that his or her interests are not otherwise being adequately met.

2.2.5 *Notification of decision*

The adjudicating body should be under a duty to notify the person for whom the application was made and other people with a genuine interest in the proceedings of the result of the hearing.[174]

The decisions of the adjudicating body should be recorded in writing[175] and a statement of the reasons for the decision should be available on request to any person whose interest in the matter entitled him or her to be heard or represented at the hearing.[176]

The provision of written reasons helps to ensure the accountability of the court or tribunal, and facilitates the administration of review and appeal provisions.

2.2.6 *Review*

The application of the principles of the presumption of competence and the least restrictive alternative means that an order for assistance should be made only when there is a need for it. The terms of an order should also be tailored according to the requirements of the individual situation.

For many people with a mental or intellectual disability, the effects of their condition are not static. Their need for assistance may be less or greater over a period of time. There should therefore be a mechanism which allows the terms of an order to be altered to meet the needs of changing circumstances.

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[174] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 31A(6); Mental Health Act 1977-1986 (SA) Section 25b(3); Adult Guardianship Act 1988 (NT) Section 15(3).

[175] See for example Disability Services and Guardianship Act 1987 (NSW) Section 68(1); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 4(2).

[176] See for example Guardianship and Administration Board Act 1986 (Vic) Section 13; Disability Services and Guardianship Act 1987 (NSW) Section 67(2); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 5; Guardianship and Management of Property Act 1991 (ACT) Section 45.

This mechanism could be provided by imposing on the adjudicating body a duty to automatically review orders which have been made for assisted or substituted decision-making.

Legislation could specify a period of time within which the order must be reviewed. This could be a period of two or three years.[177] Some legislation provides for a review period of five years.[178] In one Australian State, when an order has been made concerning the personal welfare of a person with a mental or intellectual disability, the circumstances of that person must be reviewed at 'reasonable intervals'.[179]

Requiring the adjudicating body to review orders automatically after a set time would have significant implications for the workload of the adjudicating body. For example, with a compulsory three year review period, all orders made in 1992 would have to be reviewed in 1995. The review process would be in addition to the hearing of applications made for the first time in 1995. Then, in 1998, as well as hearing new applications, the adjudicating body would have to review orders made in 1992 and 1995.

Alternatively, the adjudicating body could be given power to determine when each order should be reviewed.[180] This would have the advantages of providing flexibility to meet the needs of individual cases, and also of easing the administrative burden by allowing the workload to be staggered. Protection for the person subject to the order could be provided by specifying that the period for review should not exceed a certain time limit, for example five years.

The adjudicating body could also have power to review before the time specified in either the legislation or the terms of the order itself if it appears necessary to do so.[181] There could also be a right for the person concerned or any other person with a genuine interest to apply to have the order reviewed.[182] The right to apply

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[177] See for example Guardianship and Administration Board Act 1986 (Vic) Section 61(2); Adult Guardianship Act 1988 (NT) Section 23(1); Guardianship and Management of Property Act 1991 (ACT) Section 19(2).

[178] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 28; Guardianship and Administration Act 1990 (WA) Section 84.

[179] Mental Health Act 1977-1986 (SA) Section 27(3).

[180] See for example Adult Guardianship Act 1988 (NT) Section 23(1); Guardianship and Administration Act 1990 (WA) Section 84.

[181] See for example Guardianship and Administration Board Act 1986 (Vic) Section 61(3); Disability Services and Guardianship Act 1987 (NSW) Section 25; Adult Guardianship Act 1988 (NT) Section 23(2); Guardianship and Administration Act 1990 (WA) Section 86; Guardianship and Administration of Property Act 1991 (ACT) Section 19(1).

[182] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 27(3), 27(4); Guardianship and Administration Board Act 1986 (Vic) Section 61(3); Disability Services and Guardianship Act 1987 (NSW) Section 25(3); Adult Guardianship Act 1988 (NT) Section 23(2); Guardianship and Administration Act 1990 (WA) Section 86.

for a review could be automatic, or could require the leave of the court or tribunal.[183]

2.2.7 *Confidentiality*

Members of the adjudicating body and other people acting in the administration of the legislation should be under a duty not to disclose personal information about a person for whom an application is brought. This secrecy requirement could extend to past as well as current members of the body.[184]

The duty of non-disclosure could be subject to a number of exceptions. These could include:

- where the consent of the person concerned has been obtained;[185]
- where disclosure is required in carrying out functions or powers in relation to the duties of the adjudicating body;[186]
- where disclosure is required by any other law or is otherwise excused by law;[187]
- where the disclosure involves statistical or other information that could not reasonably be expected to lead to the identification of the person to whom it relates;[188] and
- where, in the opinion of the adjudicating body, the duty of non-disclosure is overridden by a public interest factor involving the personal safety of a member of the public.

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[183] See for example Protection of Personal and Property Rights Act 1988 (NZ) Sections 86, 87; Guardianship and Administration Act 1990 (WA) Sections 86, 87.

[184] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 42; Guardianship and Administration Board Act 1986 (Vic) Section 9(1); Guardianship and Management of Property Act 1991 (ACT) Section 66(1).

[185] See for example Disability Services and Guardianship Act 1987 (NSW) Section 101(a); Guardianship and Administration Act 1990 (WA) Section 113(1)(c); Guardianship and Management of Property Act 1991 (ACT) Section 66(3).

[186] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 42; Guardianship and Administration Board Act 1986 (Vic) Section 9(1); Disability Services and Guardianship Act 1987 (NSW) Section 101(b); Guardianship and Administration Act 1990 (WA) Section 113(1)(b); Guardianship and Administration of Property Act 1991 (ACT) Section 66(2).

[187] See for example Mental Health Act 1977-1986 (SA) Section 48(1); Disability Services and Guardianship Act 1987 (NSW) Section 101(d), 101(e); Guardianship and Administration Act 1990 (WA) Section 113(1)(b).

[188] See for example Mental Health Act 1977-86 (SA) Section 48(2).

2.2.8 *Duty to report*

It is essential that the adjudicating body be independent. However, there would still be a need to ensure that it is accountable for public funding and operating within its legislative framework.

The adjudicating body should therefore be under a duty to provide an annual report to the minister responsible for the department charged with the administration of the adjudicating body.

3. POWERS

In addition to the duties imposed upon it, a body which determines whether a person with a mental or intellectual disability needs assisted or substituted decision-making must have power to make the necessary orders and to enable those orders to be carried out.

3.1 *Power to make orders*

If the adjudicating body is satisfied that an order for assisted or substituted decision-making should be made, it should make the order in a form which, in conformity with the principles outlined in Chapter 1, meets the needs of the person concerned in a way which restricts his or her autonomy to the least extent possible.[189]

3.1.1 *Plenary orders*

The extent of a person's mental or intellectual disability may mean that, even applying the principle of the least restrictive alternative, he or she needs assistance with all decisions for which legal capacity is required.

The court or tribunal should therefore have power to make, where necessary, an order which confers full substituted decision-making power.

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[189] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 22(2), 22(4), 22(5) and 46(2), 46(4).

3.1.2 *Limited orders*

Legislation should confer on the adjudicating body the power to make orders which can be tailored to meet the needs of individual circumstances.

Where the person concerned has the legal capacity to make some, but not all, decisions on his or her own behalf, the court or tribunal should be able to specify the decision-making powers which are being given to the person acting as an assistant or substitute decision-maker.

For example, an order might authorise someone to give consent, on behalf of a dementia patient, to the patient's being admitted to a nursing home. An order for property management might authorise someone to perform specific acts, such as the sale of a house, on behalf of a person with a mental or intellectual disability.

3.1.3 *Temporary orders*

In granting an order, the adjudicating body should also be able to set terms which limit the duration of the order. A temporary order could be made for a length of time necessary to carry out the purpose of the order, such as admission to a nursing home or sale of a house.

3.1.4 *Conditional orders*

There may be some people who, while able at times to make their own decisions, have a recurring need for assistance with some decisions. An example would be a person who has a cyclic psychiatric illness. To meet this need, the adjudicating body could have power to make a conditional order - that is, an order which comes into effect on the occurrence of a condition, such as admission to a psychiatric hospital, which is specified in the order. This would enable the person concerned to act autonomously when he or she had the capacity to do so, yet would enable assistance to be provided whenever it was required, without the need for an application to be repeated on each occasion.

3.2 ***Power to direct substitute decision-makers***

If a person has been granted limited, temporary or conditional authority to make decisions on behalf of a person with a mental or intellectual disability, there may be doubt as to whether a particular act or decision falls within the scope of the authority.

The adjudicating body should have power to advise or direct the substitute decision-maker about the exercise of the authority and the performance of his or her duties and functions.[190]

3.3 *Powers not to be conferred*

The power of the adjudicating body to confer decision-making authority may need to be limited according to the nature of the decision involved.[191]

Some decisions may be considered so personal or may affect the rights, status or liability of other people in such a way that the right to make them should not be able to be given to another person or that their delegation should be subject to particular requirements. These decisions include:

- voting;
- consenting to marriage;
- making a will;
- consenting to adoption of a child of a person with a mental or intellectual disability; and
- consenting to or withholding consent for certain forms of medical treatment.[192]

3.4 *Power to make deferred orders*

In most jurisdictions orders for assisted and substituted decision-making do not take effect until the person for whom they are made has turned eighteen.[193]

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[190] See for example Guardianship and Administration Board Act 1986 (Vic) Section 30(3); Disability Services and Guardianship Act 1987 (NSW) Section 28; Guardianship and Administration Act 1990 (WA) Sections 47(1), 74(1); Guardianship and Management of Property Act 1991 (ACT) Sections 16(1), 18(1).

[191] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 18; Guardianship and Management of Property Act 1991 (ACT) Section 7.

[192] See pages 7-14 for a discussion of the kinds of decision for which assisted or substituted decision-making may be required. Decisions about medical treatment will be discussed in Chapters 10 and 11.

[193] But see Disability Services and Guardianship Act 1987 (NSW) Sections 15(1), 34(1) which allow an order to be made for a person who is of or above the age of sixteen years.

However, if an application for an order is not made until that time, there may be a period when, because the parents of the person no longer have an automatic decision-making power, there is no-one who has the legal authority to make necessary decisions. A possible solution to this problem is to provide that the court or tribunal may make an order for someone under the age of majority, which does not come into operation until the person concerned turns eighteen.[194]

3.5 *Power to appoint alternative decision-makers*

An assistant or substitute decision-maker may, because of absence, illness, loss of capacity or death, be unable to carry out the duties and functions specified in the order. This may mean that there is no one with legal authority to make certain decisions on behalf of a person with a mental or intellectual disability.

For example, young adults with a mental or intellectual disability may outlive their parents. A major concern for these parents is who will look after their children when they are no longer able to do so. A similar situation may also arise for the spouse of a dementia patient.

This potential problem can be avoided by giving the court or tribunal power to appoint, at the time the order for assisted or substituted decision-making is granted, an alternative decision-maker who automatically takes over the responsibility when the original decision-maker is unable to act.[195] Because circumstances may have changed considerably in the interval between the time when the order is made and the time when the need for the alternative decision-maker arises, the authority of the alternative decision-maker should be of a temporary nature and subject to ratification by the adjudicating body.

3.6 *Power to revoke or vary order*

Corresponding to the duty to review an order appointing an assistant or substitute decision-maker, the adjudicating body should have power to revoke or vary the terms of the appointment.[196]

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[194] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 19(1), 43(1); Guardianship and Management of Property Act 1991 (ACT) Section 7(4).

[195] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 34, 35; Disability Services and Guardianship Act 1987 (NSW) Section 20; Guardianship and Administration Act 1990 (WA) Section 43(1)(d).

[196] See for example Guardianship and Administration Board Act 1986 (Vic) Section 63(1); Disability Services and Guardianship Act 1987 (NSW) Section 25(5); Adult Guardianship Act 1988 (NT) Section 23(5); Guardianship and Administration Act 1990 (WA) Section 90; Guardianship and Management of Property Act 1991 (ACT) Section 19.

This power would enable the authority of an assistant or substitute decision-maker to be adjusted according to the needs of the person for whom the order was made.

3.7 *Power to remove decision-maker*

If an assistant or substitute decision-maker is no longer able or willing to continue in the role, or if there is evidence of incompetence, neglect or abuse in the exercise of decision-making authority, the adjudicating body should have power to remove the decision-maker and, if necessary, to appoint a replacement.

This power may be included in a general power of amendment of a decision-making order,[197] or there may be a specific power of removal, setting out the grounds on which an assistant or substitute decision-maker should be removed.[198]

3.8 *Power to obtain information*

To be able to make an informed judgment as to whether a person with a mental or intellectual disability needs assistance to make decisions, the adjudicating body must have access to all relevant facts and material.

Sometimes, particularly if there is a family dispute involved, people are unwilling to give evidence at the hearing of an application for an assisted or substituted decision-making order.

The court or tribunal may therefore need power to require witnesses to attend and give evidence. This power could also extend to the production of relevant documents.[199] These could include notes of medical examinations, records of financial transactions and any written evidence of the wishes of the person for whom the order is being sought.

There may also be a need for the court or tribunal to have power to require the person making the application to bring the person for whom the order is sought to the hearing. If the person for whom the order is sought is unable to attend the hearing the court or tribunal could have power to visit him or her in familiar surroundings.

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[197] See para 3.6 above.

[198] See for example Guardianship and Management of Property Act 1991 (ACT) Section 31.

[199] See for example Mental Health Act 1977-1986 (SA) Section 25(a)(1); Guardianship and Administration Board Act 1986 (Vic) Section 10(7); Disability Services and Guardianship Act 1987 (NSW) Section 60(1); Adult Guardianship Act 1988 (NT) Section 12(4); Guardianship and Administration Act 1990 (WA) Schedule 1 Part B Clause 7(1); Guardianship and Management of Property Act 1991 (ACT) Section 41.

The adjudicating body may also need power to obtain information from relevant government departments or service organisations[200] and to order a medical or other examination of a person on whose behalf an application has been made.[201]

The court or tribunal could also have power to appoint people such as lawyers, doctors and others with appropriate expertise to assist it in making its decision.[202]

3.9 *Power to make interim orders*

Situations may arise where, because of neglect or abuse, there is an immediate risk to the welfare of a person with a mental or intellectual disability. There may also be situations where the person's financial security is endangered.

In such circumstances there is a need for the court or tribunal to have power to make short term emergency orders which allow measures required to protect the interests of the person concerned to be taken.[203]

3.10 *Power to order entry and removal*

Where there is reason to believe that the welfare of a person with a mental or intellectual disability is at risk through neglect, exploitation or abuse the court or tribunal may need power to order entry to premises to investigate the situation and, if necessary, to remove the person concerned to a place of safety.[204]

At present in Queensland the *Intellectually Disabled Citizens Act* enables the Legal Friend to obtain entry to premises if there is a reasonable belief that a person to whom the Act applies[205] is in the premises and is at immediate risk. If the owner

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200 See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 31; Guardianship and Administration Board Act 1986 (Vic) Section 11(2); Adult Guardianship Act 1988 (NT) Section 12(3).

201 See for example Guardianship and Management of Property Act 1991 (ACT) Section 39(1).

202 Guardianship and Administration Board Act 1986 (Vic) Section 11(1); Guardianship and Management of Property Act 1991 (ACT) Section 40.

203 See for example Intellectually Disabled Citizens Act 1985 (Qld) Sections 26(9), 32(1)(A); Guardianship and Administration Board Act 1986 (Vic) Sections 33, 60; Disability Services and Guardianship Act 1987 (NSW) Section 18(2); Adult Guardianship Act 1988 (NT) Section 19; Guardianship and Administration Act 1990 (WA) Section 65; Guardianship and Management of Property Act 1991 (ACT) Section 67.

204 See for example Guardianship and Administration Board Act 1986 (Vic) Section 27; Disability Services and Guardianship Act 1987 (NSW) Sections 11, 12; Guardianship and Administration Act 1990 (WA) Section 49; Guardianship and Management of Property Act 1991 (ACT) Section 68.

205 See pages 20-21.

of the premises refuses to allow entry a warrant must be obtained. The Legal Friend's right to enter may only be exercised for the purpose of carrying out the duties and functions given to the Legal Friend by the Act.[206]

The *Intellectually Disabled Citizens Act* does not expressly authorise investigation[207] or removal to safety.[208] If there is to be such a power, it should be clearly expressed in the legislation and the conditions of its exercise specified.[209]

There is no equivalent legislative provision for people who do not come within the terms of the *Intellectually Disabled Citizens Act.*

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[206] Intellectually Disabled Citizens Act 1985 Section 44.

[207] Cf Guardianship and Administration Board Act 1986 (Vic) Section 27(1).

[208] It could perhaps be argued that removal to, for example, a nursing home may be justified by Section 26(3) which gives the Legal Friend power to consent to 'medical, dental, surgical or other professional treatment or care'.

[209] See for example Guardianship and Management of Property Act 1991 (ACT) Section 66(2).

6. WHO GIVES ASSISTANCE

1. ASSISTED DECISION-MAKING

In many cases, the level of a person's mental or intellectual disability means that he or she is able to make his or her own decisions, provided that sufficient support is available. Forms of support may include:

- encouragement to maximise the person's abilities and to develop his or her confidence;
- the provision of information and advice in a form which the person is able to understand; and
- the realisation that a person with a mental or intellectual disability may take a little longer to reach a decision.

Support of this nature may be provided on a purely informal basis. The family, friends and carers of a person with a mental or intellectual disability are frequently involved in assisting him or her in everyday personal and financial matters.

A more structured kind of assistance may be available through self-help or community based advocacy organisations which are committed to protecting the rights of people with disabilities by encouraging them to make their own decisions and to take control of their lives.

A formal basis for assisted decision-making may be provided by legislation.

The *Intellectually Disabled Citizens Act*, for example, enables the Legal Friend to assist by obtaining and giving information about a person's legal rights and specialised services available to the person.[210]

The Act also allows the creation of a Volunteer Friends Programme.[211] A volunteer friend may be appointed to provide friendly personal support in a person's activities. The volunteer friend is obliged to try to carry out the person's expressed wishes or, where the person is unable to express those wishes, to act in the way the volunteer friend thinks the person would wish to act if able to express his or her wishes.[212]

No other Queensland legislation presently allows for assisted decision-making.

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[210] Intellectually Disabled Citizens Act 1985 Section 26(1)(a).

[211] Intellectually Disabled Citizens Act 1985 Section 35.

[212] Intellectually Disabled Citizens Act 1985 Section 37.

Orders granted under the *Public Trustee Act* and the *Mental Health Act* involve total control and management of the decision-making process for the person with a mental or intellectual disability.

2. SUBSTITUTED DECISION-MAKING

Sometimes the extent of a person's mental or intellectual disability means that he or she is unable to make decisions even with assistance from one of the sources mentioned in the previous section. In this situation it will be necessary for someone to be appointed to make decisions on his or her behalf.

Statutory provisions about who can act and what decisions can be made for a person with a mental or intellectual disability are contained in the *Public Trustee Act* 1978, the *Mental Health Act* 1984 and the *Intellectually Disabled Citizens Act* 1985.

Other mechanisms which can be used to provide substituted decision-making are an enduring power of attorney and the *parens patriae* jurisdiction of the Supreme Court.

2.1 *The Public Trustee Act*

If a Protection Order is made or a Certificate of Disability is filed, the Public Trustee is appointed to manage the financial affairs and property of the person concerned.[213]

The order may be made for all or part of the person's property.[214] For the property which is included in the Protection Order, there is no discretion for anyone other than the Public Trustee to be appointed as manager. In other words, the Public Trustee is granted a statutory monopoly over the management of protected property. In any event, it may be difficult to persuade a court to appoint a family member, a friend, or a solicitor or accountant as a private trustee even if the legislation allowed for this.[215]

The Public Trustee's powers of management of protected property are very wide. The Public Trustee has authority, subject to certain exceptions, to do anything with the person's money, property or financial interests that the person could have done if he or she had the legal capacity to do so.[216]

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[213] Public Trustee Act Sections 65, 67 and 72. See pages 29-31.

[214] Public Trustee Act Section 68.

[215] See for example Flood v Williscroft [1987] 2 QdR 358.

[216] Public Trustee Act Sections 80(1)(d), 80(3).

The Public Trustee may use the protected property or money to provide for the person and his or her dependants.[217]

In exercising the power of management the Public Trustee must fulfil the obligations ordinarily imposed on a trustee.[218]

This means that the Public Trustee must:

- preserve the protected property by careful management and investment;
- act at all times for the benefit of the Protected Person; and
- account fully for the protected property.[219]

However, unlike other trustees, the Public Trustee does not have the option of refusing to act or of retiring as trustee.

Once a person becomes a Protected Person, either by the making of a Protection Order or by the filing of a Certificate of Disability, his or her rights to deal with the money or property in question are substantially restricted.

He or she may not, without first obtaining the approval of the Supreme Court, enter into any contract, other than a contract for necessaries,[220] involving that money or property. If he or she does enter into such a contract, the Public Trustee may bring a court application to have the contract set aside. However, the contract will not be set aside if the other party to the contract acted in good faith and did not know that the person was a Protected Person, and if the contract was for fair value.[221]

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[217] Public Trustee Act Section 80(1)(e).

[218] Public Trustee Act Section 80(1)(c).

[219] Ford and Lee, Principles of the Law of Trusts (1983), 383.

[220] For an explanation of what are 'necessaries', see page 8-9.

[221] Public Trustee Act Section 83. If the amount of money or the value of the property involved does not exceed $200,000 the matter will be heard in the District Court. Otherwise the application should be made to the Supreme Court.

2.2 *The Mental Health Act*

This Act provides for substitute decision-making in personal matters by the appointment of a committee of the person and in financial matters by the appointment of a committee of the estate.[222]

2.2.1 *Committee of the estate*

A committee of the estate may be appointed in one of two ways.

If a person has been admitted to a psychiatric hospital or training centre, and a medical practitioner - usually a psychiatrist - notifies the Public Trustee that the person is mentally ill and incapable of managing his or her financial affairs, the Public Trustee automatically assumes control of that person's finances and property.[223] All the person's money and assets are handed over to the Public Trustee for management.

Alternatively, a committee of the estate may be appointed by the Supreme Court if the Court finds that the person concerned is mentally ill[224] and incapable of managing his or her financial affairs. The application may be brought by the Public Trustee or by any other person such as a relative or close friend.

The Court may appoint the Public Trustee or any other person as committee of the estate. However, a private committee (that is, someone other than the Public Trustee) is not to be appointed unless the Court finds that there is 'sufficient reason' why that person should be appointed in preference to the Public Trustee.[225]

There is no provision as to what constitutes 'sufficient reason'. It would seem that neither an intimate knowledge of the affairs of the person concerned[226] nor a desire to avoid the costs of administration by the Public Trustee[227] would displace the statutory presumption in favour of the Public Trustee. Information provided by the Public Trustee's Office indicates that between 1973 and 1989 only a handful of private committees were in fact appointed.

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[222] See pages 32-33.

[223] Mental Health Act Section 55 and Fifth Schedule.

[224] See pages 18-20.

[225] Mental Health Act Fifth Schedule Clause 4.

[226] In the matter of L.E.M. 1929 QWN 3.

[227] O'Dell v Barwick [1983] 1 QdR 114.

If someone other than the Public Trustee is appointed, the Public Trustee has a supervisory role to ensure that the committee carries out his or her obligations.[228] A private committee must:

- provide security for the management of the estate;[229] and
- account to the Public Trustee as required.[230]

There is a limit on the amount of the estate which can be disposed of (other than by way of authorised trustee investments) without Court approval.[231]

If a committee of the estate is appointed for a person with a mental or intellectual disability, the effect on the person's right to enter into contracts is the same as if a Protection Order had been made under the *Public Trustee Act*.[232]

2.2.2 *Committee of the person*

The Supreme Court may appoint a committee of the person for someone who is found by the Court to be mentally ill[233] and incapable of managing his or her estate.

The Act does not specify who may act as a committee. Usually the application for appointment is brought by a relative such as the son or daughter of an elderly person with Alzheimer's Disease or a parent of a younger person with a severe intellectual disability.

A committee has full guardianship powers and may make decisions about every aspect of the personal care and welfare of the person concerned. This includes:

- where the person should live - in his or her own home, with the committee or some other person, or in a nursing home or other institution;
- if and where the person should work;

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[228] Mental Health Act Fifth Schedule Clause 2(2).

[229] Mental Health Act Fifth Schedule Clause 9.

[230] Mental Health Act Fifth Schedule Clause 10.

[231] Mental Health Act Fifth Schedule Clause 13.

[232] Mental Health Act Fifth Schedule Clause 13; See page 59.

[233] See pages 18-20.

- what social or other activities the person should participate in; and
- whether consent should be given to medical treatment.

2.3 *The Intellectually Disabled Citizens Act*

Substituted decision-making on behalf of an assisted person[234] is available for consent to medical, dental, surgical or other professional treatment or care[235] and for financial management.[236]

2.3.1 *Medical consent*

If an assisted person lacks the capacity to consent to medical, dental, surgical or other treatment, a substituted consent may be provided by the Legal Friend. The consent of the Legal Friend has the same legal effect as if the assisted person had the legal capacity to consent and did in fact consent.[237] In an emergency the Legal Friend may give consent for treatment to a person with an intellectual disability for whom an application for assistance has not been made or approved.[238]

The position of Legal Friend is a statutory office to which a person, who must be a barrister or a solicitor, is appointed to provide special assistance under the Act.[239] The Legal Friend may delegate the authority to consent to treatment to another barrister or solicitor.[240] The power to delegate may make it easier for the Legal Friend's functions to be performed in areas where accessibility to the Legal Friend may be a problem.

The role of the Legal Friend in deciding whether to consent to the proposed treatment will be discussed in Chapter 10.

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234 See pages 20-21.

235 Intellectually Disabled Citizens Act Section 26(3).

236 Intellectually Disabled Citizens Act Section 32.

237 Intellectually Disabled Citizens Act Section 26(3).

238 Intellectually Disabled Citizens Act Section 26(9).

239 Intellectually Disabled Citizens Act Section 6.

240 Intellectually Disabled Citizens Act Section 26(7).

The Legal Friend may not consent to treatment for a person for whom a committee of the person has been appointed under the Fifth Schedule of the *Mental Health Act* unless the committee has agreed.[241]

2.3.2 *Financial management*

If the Intellectually Disabled Citizens Council considers that an assisted person is:

- subject to, or likely to be subject to, undue influence in the management and disposition of money and assets; or
- in a position that makes it desirable in his or her interests, or the interests of his or her dependants, that his or her property should be protected

the Council notifies the Public Trustee. The effect of notification is that, unless a committee of the estate has already been appointed, the Public Trustee automatically takes over management of the person's property and finances.[242]

The Legal Friend has an emergency notification power, provided that the prior approval of the Chairman is obtained and that an application to the Council is made as soon as possible.[243]

2.3.3 *Other decisions*

The Legal Friend may obtain and provide to an assisted citizen information and advice about the citizen's legal rights and about legal procedures. The Legal Friend may also instruct a solicitor to act on behalf of an assisted citizen.[244]

It could be argued that these powers effectively enable the Legal Friend to make substituted decisions about legal matters.

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[241] Intellectually Disabled Citizens Act Section 26(4).

[242] Intellectually Disabled Citizens Act Section 32.

[243] Intellectually Disabled Citizens Act Section 32(1A).

[244] Intellectually Disabled Citizens Act Section 26(1).

2.4 *Enduring Powers of Attorney*

An alternative method of allowing substituted decisions to be made is by means of an enduring power of attorney.

Enduring powers of attorney are explained in Chapter 9.

2.5 *The Parens Patriae Jurisdiction of the Supreme Court*

The Court may use its power under the *parens patriae* jurisdiction[245] to make a decision on behalf of a person with a mental or intellectual disability. This is sometimes done to authorise medical treatment for someone who is unable to consent personally.

However, because this can involve a substantial intrusion into the rights of the person concerned, the Court will give careful consideration to whether what is being proposed is in the best interests of the person's welfare and will exercise the jurisdiction sparingly.[246]

3. PROBLEMS WITH THE EXISTING LAW

3.1 *Public Trustee Act and Mental Health Act*

There are several problems associated with these Acts.

3.1.1 *Lack of principle*

In both Acts, the emphasis is on total management and control, rather than on assisting a person with a mental or intellectual disability to make his or her own decision.

Under the *Public Trustee Act*, for example, the court may except part of a person's property from a Protection Order, but otherwise the Public Trustee has complete authority to make decisions about the financial affairs of the person for whom an order is made. Similarly, the *Mental Health Act* gives a committee of the person or of the estate full decision-making power over the personal welfare or finances of

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[245] See pages 34-35.

[246] Re Eve [1986] 2 SCR 388; Re Warby SC Pet No 4 of 1991, delivered 9 May 1991 [91/123] McPherson J.

the person for whom the committee was appointed. There is no provision for the power of the Public Trustee or a committee to be limited to particular decisions which need to be made according to individual circumstances.

Neither Act requires that, where possible, the views of a person with a mental or intellectual disability be sought and taken into account. There is no statutory obligation on the Public Trustee or on a committee to exercise their decision-making authority in a way which is least restrictive of the rights of the person for whom they are making the decision and which encourages the person concerned to be as self-reliant as possible.

3.1.2 *Failure to recognise existing support networks*

One of the major criticisms of existing methods of providing substituted decision-making for a person with a mental or intellectual disability is the lack of recognition given to the role played in the life of that person by family members and close friends.

First, there is, at present, limited scope for family members or friends to act in a formal capacity as substitute decision-makers. This may be a source of resentment and frustration. For example, parents of an intellectually disabled child have, in most cases, legal authority to make decisions on behalf of their child. However, after their child's eighteenth birthday, they lose this authority, even though they are usually the primary care-givers. They may see the loss of authority as an implication that they are no longer worthy of being entrusted with the responsibility of making decisions that they have been making all their child's life. The spouse or partner of a person who, after many years of shared commitment, loses legal decision-making capacity as a result of brain damage or dementia, may also feel excluded from the decision-making process.

Second, people close to a person with a mental or intellectual disability are often in the best position to understand and interpret the wishes of the person concerned, yet present legislation contains few requirements that these people be consulted in the decision-making process.

Third, existing legislation gives little acknowledgment to the effect of substituted decision-making on other family relationships and circumstances. The needs of a person with a mental or intellectual disability may impact significantly on the lives of other family members, but the interests of families as a whole may not be adequately taken into account.

3.1.3 *The role of the Public Trustee*

For financial decisions, the monopoly in the *Public Trustee Act* and the presumption in the *Mental Health Act* in favour of the Public Trustee may be unnecessarily limiting. The people closest to the person who needs assistance feel as though they are excluded from any role in the decision-making process.

Family members may disagree with the Public Trustee's approach to management. Where there has been an award of damages as compensation for personal injury, members of the family may regard the damages as family money and may wish the Public Trustee to invest the amount in a way which is incompatible with the Public Trustee's statutory duty. The purchase of a speculative investment such as, for example, a family business would be a breach of the Public Trustee's duty of trust.

It is, of course, essential that a person with a mental or intellectual disability be protected from exploitation. However, appointing the Public Trustee to manage his or her financial affairs is not the only way this can be done. Where there has been a history of shared assets and responsibilities, or of careful and honest management on behalf of another person, and there is little risk of exploitation, or of dissipation of assets, the role imposed on the Public Trustee by the legislation may be an unnecessary intrusion on private arrangements.

3.1.4 *Protection Orders in damages actions*

The appointment of the Public Trustee to manage damages awarded to a person as compensation for personal injuries may financially disadvantage the person's spouse and also produce results which are anomalous in the light of other legislative provisions contained in the *Family Law Act* and the *Succession Act.*

The injured person may seek to be compensated for the expense of housekeeping and nursing services. The right to be compensated arises from the need for the services created by the injured person's loss of capacity and it exists even if the services are provided free of charge. Sometimes the spouse of the injured person may give up work to provide these services. However, the care component of a damages award is not held in trust for the person who provides the services, and a spouse has no legal claim to it.[247] Nor is the Public Trustee obliged to give the spouse an allowance or lump sum adequate to meet his or her own financial needs free from the scrutiny of the Public Trustee. The spouse may therefore be deprived of his or her financial independence.

The injured person may also seek compensation for loss of earning capacity. In some cases, this amounts to a very substantial claim. The injured person and his or her spouse may have treated income received prior to the accident as joint

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[247] Griffiths v Kirkemeyer (1979) 139 CLR 161.

property, but the income component of a damages award will be regarded by the Public Trustee solely as the property of the injured person. The spouse will have no legal entitlement to it, although the Public Trustee may apply some of it towards the maintenance of the spouse.[248]

However, if the marriage comes to an end after a damages award has been made, the amount of the award will be taken into account, along with factors such as the state of health of each of the parties and the capacity of each for employment, in adjusting the property rights of the injured person and the spouse.[249]

Alternatively, if the accident results in the death of the injured person, the surviving spouse will be assured of an independent income.

If an award of damages has been made before the death of the injured person, then the amount of the award remaining at the time of death forms part of the person's estate. If the person dies without making a valid will, the spouse will benefit from the estate under the intestacy rules.[250] If the person leaves a will which does not include the surviving spouse, the surviving spouse may apply to the Supreme Court for adequate provision out of the estate.[251]

If no action for damages has been brought before the death of the injured person, his or her dependants may bring an action for compensation for the loss caused to them by the death.[252]

3.1.5 *The private committee of the estate*

Although the *Mental Health Act* contains provisions designed to ensure protection against financial exploitation the attempt could prove ineffective.

The committee is not placed in the position of a trustee. There is no statutory obligation to provide compensation for improper management or to avoid a conflict between the committee's own interests and those of the person for whom the decisions are being made. Nor is there any limitation on a committee's power of management. If a committee invested in a risky business venture which subsequently failed, the powers of the Public Trustee would be of little practical use after the event.

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[248] Public Trustee Act Section 80(1)(e)(ii).

[249] Family Law Act Sections 79(4), 75(2).

[250] Succession Act 1981 Qld Sections 34-39.

[251] Succession Act 1981 Section 41.

[252] Common Law Practice Act Sections 12-15C.

Loss incurred by a committee may be offset to some extent by the requirement of security. However, in some circumstances, the imposition of a substantial security may deter a relative or friend from making an application in a situation where it is the most appropriate way to assist a person to make financial decisions or to provide a substitute decision-maker.

3.1.6 *The committee of the person*

While there are provisions intended to protect the property and money of a person with a mental or intellectual disability, there are no equivalent provisions for protecting the individual concerned. Prevention of dissipation of assets seems to have been more important in the legislative priorities than prevention of abuse or neglect of a person made vulnerable by disability.

For decisions of a personal nature, there are some people who do not have anyone such as a relative or close friend to act on their behalf. This is a particular concern for the elderly and for younger people with an intellectual disability who are likely to outlive their parents. There is no mechanism in the *Mental Health Act* which would allow for the appointment of a guardian of last resort.

3.2 ***Intellectually Disabled Citizens Act***

3.2.1 *Medical consents*

Unless a committee of the person has been appointed, the Legal Friend is the only person with legal authority to consent to medical treatment for an adult with an intellectual disability which deprives him or her of the required degree of capacity to make his or her own decision.

Where there is a committee of the person, the Legal Friend is not to consent to treatment without the committee's prior approval. However, there is no mechanism for ensuring that the Legal Friend is notified that a committee has been appointed.

The statutory role of the Legal Friend is sometimes seen as an intrusion into private relationships. This is particularly the case for parents of young adults with an intellectual disability. Parents who have always made decisions about treatment for their child find it difficult to accept that their legal authority to do so comes to an end when their son or daughter turns eighteen. For them and for their child chronological age is often irrelevant.

The issue of consent to treatment will be discussed in Chapter 10.

3.2.2 *Financial management*

The powers of the Public Trustee on notification by the Council or by the Legal Friend are the same as those conferred by the *Public Trustee Act*. They are therefore very wide and potentially intrusive.

However, the Council retains the right to terminate the authority of the Public Trustee if it decides that the assisted citizen is capable of managing his or her own financial affairs or if it is satisfied that adequate alternative arrangements exist.[253]

This means that there is considerably more flexibility and that intervention by the Public Trustee is a last resort when a suitable private management scheme cannot be put into place.

4. POSSIBLE ALTERNATIVES

4.1 *Existing support networks*

An order which gives a person the right to make decisions about the lifestyle and financial position of a person with a mental or intellectual disability should be in the least intrusive form possible.

In many situations this could be done by expanding the role played by family members and close friends in the decision-making process.

Primary responsibility for assistance and support often rests with family and friends. The people closest to a person with a mental or intellectual disability are familiar with the wishes of that person. They can recognise his or her strengths and vulnerabilities and may be in the best position to identify his or her needs.

4.2 *Personal matters*

In most situations, questions relating to personal matters should be able to be resolved by a member of a person's existing support network, provided that there are safeguards against abuse and neglect.

However, it may not always be possible or appropriate for a family member or friend to make decisions affecting the life of a person with a mental or intellectual disability.

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[253] Intellectually Disabled Citizens Act Section 34(g).

In some situations there may not be a relative or close friend who is willing or able to make the necessary decisions. It may not be appropriate to give decision-making power to a family member because there is evidence that a person with a mental or intellectual disability is being abused or neglected by his or her family. It may also be inappropriate because, at the other extreme, the family is likely to stifle potential for development by overprotectiveness.

A statutory office could be created to provide a substitute decision-maker where the need arises for a guardian of last resort.[254] This could consist of a single officer, or could involve a number of officers with expertise in the needs created by different mental and intellectual disabilities.

Decisions made on behalf of a person with a mental or intellectual disability may impact significantly on the lives of those who make up the support network. Where it is neither possible nor appropriate for a member of that network to act as substitute decision-maker for a person with a mental or intellectual disability, the effect of the decision in the wider context of the supportive relationships should be taken into account.

The question of who should be authorised to consent to medical treatment will be considered in Chapter 10.

4.3 *Financial management*

There are many situations in which private management arrangements could be made for the finances of a person with a mental or intellectual disability.

It may be possible to give decision-making power to a close relative or friend. In many cases this could be done with minimal risk of abuse or exploitation. Examples are parents of a young adult who have provided support throughout his or her entire life and the spouse of a person who suffers brain damage as a result of an accident or whose competence has been destroyed by dementia. In such cases private management seems the most appropriate solution.[255]

Factors which could be taken into account include:

- the length of the relationship between the person needing assistance and the person authorised to decide;
- the existence of joint assets and responsibilities such as the maintenance of children; and
- the experience and competence of the proposed manager in handling

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[254] The creation of such an office is discussed in Chapter 13.

[255] See for example Re O'Sullivan Pet No 1 of 1986, 18 July 1988 Thomas J. (unreptd).

financial matters of the kind involved in the administration of the affairs of the person needing assistance.

However, it will not always be possible or appropriate for a family member to act.

There may not be anyone with the necessary expertise to make financial decisions. This is a particular problem where there has been a substantial award of damages and neither the spouse nor any member of the family has any experience of managing a very large sum of money.

If the need for assistance has been caused by injury to a person who was previously able to make his or her own decisions, the resulting stress may lead to the breakdown of existing relationships.

A possible alternative would be to allow private trustee companies to act on behalf of the person concerned. Private trusts with appropriate legal or financial management expertise could also be set up. These arrangements would be subject to the law of trusts and the duties imposed on trustees. They would also have the effect of removing the statutory advantage given to the Public Trust Office. Criticisms of the Public Trust Office include claims of inflexibility and of a lack of approachability and sympathy. Experience in Victoria showed that the standard of service provided by the Public Trust Office improved significantly when it was placed in a competitive situation.[256]

If no other alternative is available or appropriate in the circumstances, the Public Trustee could act as a guardian of last resort for decisions of a financial nature.

Where power to make financial decisions is given to someone other than a family member, the financial management should also take into consideration the effect of intervention on the rights of the family and dependants of the person concerned.

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[256] Guardianship and Administration Board, Annual Report 1989-1990, 26.

7. ELIGIBILITY, DUTIES AND POWERS OF PEOPLE WHO GIVE ASSISTANCE

An assistant or substitute decision-maker is a person who assists a person with a mental or intellectual disability to make decisions in a variety of situations. These decisions may involve important lifestyle and financial issues. In many situations, it may be possible for assistance to be provided on an informal basis. However, sometimes it may be necessary for the adjudicating body to appoint a decision-maker with formal legal authority to make decisions on behalf of a person with a mental or intellectual disability.

The eligibility of a person to be appointed as a substitute decision-maker, and the powers and duties to be conferred on that person, should be clearly defined in legislation.

1. ELIGIBILITY

To ensure that a person appointed as an assistant or substitute decision-maker is suitable to act for the person requiring assistance, legislation should spell out the considerations which the adjudicating body should take into account in making an appointment.

1.1 *Factors in favour of appointment*

The primary consideration should be that, in performing his or her functions, an assistant or substitute decision-maker will observe the principles set out in Chapter 1.

It is also essential that the interests of a person who is appointed as an assistant or substitute decision-maker do not conflict with those of the person with a mental or intellectual disability on whose behalf the assistant or substitute decision-maker is acting. Often the most appropriate assistant or substitute decision-maker will be a relative or other member of the person's immediate support network. This may or may not involve a position of actual or potential conflict. Merely because a person has close personal ties with the person with a mental or intellectual disability, he or she should not be automatically considered to be in a position of conflict with the person who needs assistance[257].

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[257] See for example Guardianship and Administration Board Act 1986 (Vic) Section 23(3); Adult Guardianship Act 1988 (NT) Section 14(3); Guardianship and Administration Act 1990 (WA) Sections 44(3), 68(4); Guardianship and Management of Property Act 1991 (ACT) Section 10(5).

Other considerations which the adjudicating body could take into account include:

- the views and wishes of the person with a mental or intellectual disability;[258]
- the desirability of preserving existing family or other close personal relationships;[259]
- the compatibility of the person requiring assistance and the person giving the assistance;[260]
- where different persons are appointed to assist in the making of different decisions, the compatibility of those people with each other;[261]
- the availability and accessibility of the substitute decision-maker to the person requiring assistance;[262]
- the competence of the substitute decision-maker to carry out the duties and functions and exercise the powers under the order;[263] and
- whether the interests of the substitute decision-maker are likely to conflict with those of the person requiring assistance.[264]

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258 See for example Guardianship and Administration Board Act 1986 (Vic) Sections 23(2)(a) and 47(c)(i); Disability Services and Guardianship Act 1987 (NSW) Section 14(2)(a); Adult Guardianship Act 1988 (NT) Section 14(2)(a); Guardianship and Administration Act 1990 (WA) Sections 44(2)(c) and 68(3)(b); Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(a).

259 See for example Guardianship and Administration Board Act 1986 (Vic) Section 23(2)(b); Disability Services and Guardianship Act 1987 (NSW) Section 14(2)(b); Adult Guardianship Act 1988 (NT) Section 14(2)(b); Guardianship and Administration Act 1990 (WA) Section 44(2)(a); Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(b).

260 See for example Guardianship and Administration Board Act 1986 (Vic) Sections 23(2)(c) and 47(2)(b); Disability Services and Guardianship Act 1987 (NSW) Section 17(1)(a); Adult Guardianship Act 1988 (NT) Section 14(2)(c); Guardianship and Administration Act 1990 (WA) Sections 44(2)(b) and 68(3)(a); Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(c).

261 See for example Guardianship and Administration Board Act 1986 (Vic) Sections 23(2)(c) and 47(2)(b); Adult Guardianship Act 1988 (NT) Section 14(2)(c); Guardianship and Administration Act 1990 (WA) Sections 44(2)(b) and 68(3)(a).

262 See for example Guardianship and Administration Board Act 1986 (Vic) Section 23(2)(d); Disability Services and Guardianship Act 1987 (NSW) Section 17(1)(c); Adult Guardianship Act 1988 (NT) Section 14(2)(d); Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(e).

263 See for example Guardianship and Administration Board Act 1986 (Vic) Section 47(1)(c)(iv); Protection of Personal and Property Rights Act 1988 (NZ) Sections 12(5)(a) and 31(5)(a); Guardianship and Administration Act 1990 (WA) Sections 44(2)(d) and 68(3)(c); Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(f).

264 See for example Guardianship and Administration Board Act 1986 (Vic) Sections 23(1)(b) and 47(1)(c)(ii); Disability Services and Guardianship Act 1987 (NSW) Section 17(1)(b); Adult Guardianship Act 1988 (NT) Section 14(1)(b); Protection of Personal and Property Rights Act 1988 (NZ) Sections 12(5)(c) and 31(6); Guardianship and Administration Act 1990 (WA) Section 44(1)(b); Guardianship and Management of Property Act 1991 (ACT) Section 10(4)(g).

1.2 *Disqualifications*

Some people may be considered as inappropriate assistant or substitute decision-makers. It may be desirable to automatically exclude certain kinds of people from ever becoming a substitute decision-maker.[265]

For decision-making about personal matters, the people who should be disqualified may include:

- a person who has been convicted of a criminal offence involving fraud, dishonesty or violence; and
- a person who has been refused or removed from an appointment as a substitute decision-maker in Queensland or elsewhere.

These people should also be disqualified from making financial decisions. In addition, there may be other people who should be disqualified from appointment as decision-makers for financial matters. These may include:

- a person who has proved incompetent in managing the affairs of others;
- a person who is a bankrupt or has applied to become one;
- a person who is presently unable to pay his or her debts, or will be unable to pay them in the future; and
- a person who has made an agreement with creditors as to the payment of debts.

1.3 *Where there is no suitable assistant or substitute decision-maker available*

For some people with a mental or intellectual disability, there may not be a suitable person who is willing and able to provide the necessary assistance.

If this situation arises in relation to financial decisions, the decision-making role may be given to the Public Trustee or to a private trustee company.

Where there is no person who is suitable to be appointed to provide assistance with decisions about lifestyle matters, then a statutory officer may have to be appointed to fulfil this role.[266]

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[265] See for example Guardianship and Administration of Property Act 1991 (ACT) Section 10(2).

[266] The establishment of a statutory office to act as a guardian of last resort is discussed in Chapter 13.

2. DUTIES

2.1 *The primary duty*

The primary duty of an assistant or substitute decision-maker should be to observe the principles in Chapter 1. These include:

2.1.1 *Encouragement of self-reliance*

The role of an assistant or substitute decision-maker should be to:

- encourage the person who needs assistance to make his or her own decisions to the maximum extent possible;[267]
- encourage the person who needs assistance to integrate as much as possible in the life of the community;[268] and
- encourage and assist the person to become capable of caring for himself or herself and of making judgments about personal welfare and financial affairs.[269]

2.1.2 *Least restrictive alternative*

In performing his or her functions, an assistant or substitute decision-maker should be obliged to act in a way which is least restrictive of the rights of the person with a mental or intellectual disability.

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[267] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 18(4)(a).

[268] See for example Guardianship and Administration Board Act 1986 (Vic) Section 28(2)(b); Adult Guardianship Act 1988 (NT) Section 20(2)(b); Protection of Personal and Property Rights Act 1988 (NZ) Section 18(4)(b); Guardianship and Administration Act 1990 (WA) Section 51(2)(b).

[269] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 28(2)(c)and 49(2)(a); Adult Guardianship Act 1988 (NT) Section 20(2)(c); Protection of Personal and Property Rights Act 1988 (NZ) Section 36(1); Guardianship and Administration Act 1990 (WA) Sections 51(2)(c) and 70(2)(a).

2.1.3 *Substituted judgment*

Where possible, an assistant or substitute decision-maker should make decisions in the way that the person with a mental or intellectual disability would have done had he or she been able to do so.[270] This requires the assistant or substitute decision-maker to:

- consult as far as possible with the person needing assistance about his or her wishes;[271] and
- consult with family members and close friends about the known preferences of the person with a mental or intellectual disability.[272]

2.1.4 *Best interests*

Where it is not possible for an assistant or substitute decision-maker to follow the principle of substituted judgment,[273] there should be a duty to act in the best interests of the person with a mental or intellectual disability.

The duty to act in a person's best interests could include:

- protecting the person requiring assistance from neglect, abuse and exploitation;[274]
- acting as an advocate for the person;[275]
- consulting with other people and groups (other than ones whose aim is financial gain) who are interested in and competent to advise about the person's welfare or management of the person's property;[276] and

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[270] See for example Intellectually Disabled Citizens Act 1985 (Qld) Section 26(2).

[271] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 28(2)(e) and 47(2)(b); Adult Guardianship Act 1988 (NT) Section 20(2)(e); Protection of Personal and Property Rights Act 1988 (NZ) Sections 18(4)(c)(i) and 43(1)(a); Guardianship and Administration Act 1990 (WA) Sections 51(2)(e) and 70(2)(b).

[272] See for example Protection of Personal and Property Rights Act 1988 (NZ) Sections 18(4)(c)(ii) and 43(1)(b).

[273] See page 5.

[274] See for example Guardianship and Administration Board Act 1986 (Vic) Section 28(2)(d); Adult Guardianship Act 1988 (NT) Section 20(2)(d); Guardianship and Administration Act 1990 (WA) Section 51(2)(d).

[275] See for example Guardianship and Administration Board Act 1986 (Vic) Section 28(2)(a); Adult Guardianship Act 1988 (NT) Section 20(2)(a); Guardianship and Administration Act 1990 (WA) Section 51(2)(a).

[276] See for example Protection of Personal and Property Rights Act 1988 (NZ) Sections 18(4)(c)(iii) and 43(1)(c).

- where joint decision-makers have been appointed, consulting with each other regularly to ensure that the person's interests are not jeopardised in any way by a lack of communication between the decision-makers.[277]

2.2 *Additional duties for financial managers*

Where a person has been appointed to make decisions about the finances and property of a person with a mental or intellectual disability, there may be a need for additional safeguards to protect the person with the disability.

The assistant or substitute decision-maker should be under a duty to exercise his or her authority to manage the property of a person with a mental or intellectual disability for the benefit of that person. This could include a duty to balance against the desirability of maintaining the lifestyle which the person needing assistance would have had apart from the mental or intellectual disability, the need to ensure that as far as possible the person does not become destitute.[278] It may be necessary, in some situations, for this obligation to override the duty to make decisions in the way in which the person concerned would have made them.

There are several options for minimising the opportunity for fraud or the possibility of mismanagement. However, some of these could prove unduly onerous where there is a background of jointly owned and managed property or responsible management on behalf of the person who requires assistance.

It may be more appropriate for legislation to give the adjudicating body power to impose additional duties if circumstances require. Accountability of financial management could be promoted by allowing the adjudicating body to impose, where necessary, a duty on a financial manager to:

- file with the adjudicating body or with the Public Trustee a statement of the assets involved within a specified time of taking control of the property;[279]

- keep accurate records and accounts of all his or her dealings and transactions in the property as a result of the appointment;[280]

- file with the adjudicating body or with the Public Trustee at specified intervals a financial statement showing the assets and liabilities of the estate and all receipts and expenditure. The statement could be examined and items disallowed unless the decision maker had acted in good faith and with

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[277] See for example Protection of Personal and Property Rights Act 1988 (NZ) Sections 18(5) and 43(6).

[278] See for example Guardianship and Management of Property Act 1991 (ACT) Section 14(2).

[279] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 45(2).

[280] See for example Property Law Act 1974 (Qld) Section 175D.

reasonable care. The decision-maker could then be liable for any disallowed items;[281]

- keep his or her property and money separate from the property and money of the person for whom he or she has been appointed to act.[282] The assistant or substitute decision-maker could be relieved of this obligation if the money or property in question is owned jointly by the assistant or substitute decision-maker and the person for whom the decision is being made;[283]

- give a security for the due performance of his or her duties.[284] The amount of the security could be assessed by the adjudicating body. If the person breached his or her duties then the whole or part of the security could be forfeited.

3. POWERS

Some people with a mental or intellectual disability will need assistance with all decisions for which legal capacity is required. Other individuals will be able to make some decisions and not others.

A substitute decision-maker's power should restrict a person's freedom for decision-making and action only to the extent that is necessary to allow a legally valid decision to be made.[285] A substitute decision-maker should have power to make decisions only where the person concerned lacks the required degree of capacity. The extent of the power of the substitute decision-maker to assist in making decisions will therefore vary according to the needs of the individual person with a mental or intellectual disability.

Careful consideration must be given to the nature and extent of the powers which a substitute decision-maker should have. These powers may involve decisions about personal lifestyle matters or about financial management.

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[281] See for example Mental Health Act 1977 (SA) Section 28; Guardianship and Administration Board Act 1986 (Vic) Section 58; Adult Guardianship Act 1988 (NT) Section 16; Protection of Personal and Property Rights Act 1988 (NZ) Section 45; Guardianship and Administration Act 1990 (WA) Section 80; Guardianship and Management of Property Act 1991 (ACT) Section 27.

[282] See for example Property Law Act 1974 (Qld) Section 175E(1)(b); Guardianship and Management of Property Act 1991 (ACT) Section 14(4)(b).

[283] See for example Property Law Act 1974 (Qld) Section 175E(2); Guardianship and Management of Property Act 1991 (ACT) Section 14(4)(b).

[284] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 37.

[285] See for example Guardianship and Management of Property Act 1991 (ACT) Section 11.

3.1 *Personal decisions*

3.1.1 Powers conferred on the substitute decision-maker could include:

- to decide where the person requiring assistance is to live;[286]
- to decide who is going to live with the person requiring assistance;[287]
- to decide whether the person requiring assistance is to work. This may involve further decisions about the type of work, the place of work and who the employer will be;[288]
- to decide what education or training the person requiring assistance will receive;[289] and
- to consent to certain treatment relating to health care.[290]

3.1.2 There are certain powers which it may be desirable not to confer on an assistant or substitute decision-maker. These could include, for example, consenting to marriage or sexual intercourse and voting on behalf of the person with a mental or intellectual disability.[291] They may also include consent to some forms of medical treatment.[292]

3.1.3 The order making the appointment could also impose any limitations or restrictions which the adjudicating body considered necessary on the power of the substitute decision-maker.

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[286] See for example Guardianship and Administration Board Act 1986 (Vic) Section 24(2)(a); Adult Guardianship Act 1988 (NT) Section 17(2)(a); Guardianship and Administration Act 1990 (WA) Section 45(2)(a); Guardianship and Management of Property Act 1991 (ACT) Section 7(2)(a).

[287] See for example Guardianship and Administration Board Act 1986 (Vic) Section 24(2)(b); Adult Guardianship Act 1988 (NT) Section 17(2)(b); Guardianship and Administration Act 1990 (WA) Section 45(2)(b); Guardianship and Management of Property Act 1991 (ACT) Section 7(2)(a).

[288] See for example Guardianship and Administration Board Act 1986 (Vic) Section 24(2)(c); Adult Guardianship Act 1988 (NT) Section 17(2)(c); Guardianship and Administration Act 1990 (WA) Section 45(2)(c); Guardianship and Management of Property Act 1991 (ACT) Section 7(2)(d).

[289] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 27(1)(e); Guardianship and Management of Property Act 1991 (ACT) Section 7(2)(b).

[290] Decisions about medical and other treatment for people with a mental or intellectual disability will be discussed in Chapters 10 and 11.

[291] See pages 11 and 12.

[292] See pages 120-135.

3.2 *Financial decisions*

3.2.1 Decisions which a substitute decision-maker could have power to make include:

- to buy or sell property;
- to invest any moneys forming part of the estate: in order to safeguard against 'bad' investments by the substitute decision-maker, a provision could be inserted in the legislation that the person investing could only invest in securities in which trustees may by law invest; and
- to spend moneys on maintaining the person with a mental or intellectual disability and his or her dependants.

3.2.2 It may be desirable to limit the powers which are conferred on a substitute decision-maker. Limitations could include:

- making any payments which the person with a mental or intellectual disability is not legally required to pay; and
- prohibiting a substitute decision-maker from making, without the prior authority of the adjudicating body, any gifts on behalf of the person with a mental or intellectual disability;[293] or
- imposing a limit on the value of gifts which the substitute decision-maker may make on behalf of the person with a mental or intellectual disability - for example, a limit of $25 per gift, not to exceed $100 per year - without first obtaining the consent of the adjudicating body.

3.2.3 The adjudicating body, when appointing a substitute decision-maker, could make the order subject to such conditions or restrictions as it considered necessary in all the circumstances. This could involve, for example, a limitation on the amount or type of property which the substitute decision-maker could dispose of without the consent of the adjudicating body.

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[293] See for example Guardianship and Administration Act 1990 (WA) Section 72(3).

3.3 *Other decisions*

It may be necessary for a substitute decision-maker to have additional powers.

These could include:

- to commence or continue, in accordance with the Rules of the Supreme Court, any legal proceeding on behalf of a person with a mental or intellectual disability;[294] and

- to seek the advice or direction of the adjudicating body if there is a doubt about how to carry out the terms of the order or how to exercise the functions of a substitute decision-maker.[295]

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[294] See for example Guardianship and Management of Property Act 1991 (ACT) Section 7(2)(f). See also Intellectually Disabled Citizens Act 1985 (Qld) Section 26(1)(b) which provides that the Legal Friend may instruct a solicitor to act for an intellectually disabled citizen.

[295] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 30(1) and 55(1); Disability Services and Guardianship Act 1987 (NSW) Section 26; Protection of Personal and Property Rights Act 1988 (NZ) Sections 18(6) and 43(3); Guardianship and Administration Act 1990 (WA) Sections 47(1) and 74(1); Guardianship and Management of Property Act 1991 (ACT) Sections 16 and 18.

8. TERMINOLOGY

1. INTRODUCTION

Certain decisions require the person making them to have the legal capacity to do so. Lack of the necessary legal capacity may mean that a decision has no legal validity.

Where, because of a mental or intellectual disability, a person does not have the required capacity to make a decision which is legally valid, there must be someone who has legal authority to decide on his or her behalf. In such a situation there is a need for names which describe the authority and the roles of both the person for whom the decision is made and the substitute decision-maker.

Several options are available.

2. OPTIONS

2.1 *Guardianship and Management of Property*

These expressions are used in a number of other jurisdictions.[296] Arguments exist both in favour of and against their adoption in Queensland.

2.1.1 *Arguments against*

Feedback from a Public Forum held by the Commission in May 1991 suggests that the general community does not understand the word **guardianship** in its legal sense. For many people, it carries overtones of a parent-child relationship which is offensive to adults who have a mental or intellectual disability and who need assistance to make decisions. It is associated with the idea of complete control, and with the failure to recognise both the principles set out in Chapter 1 and the need for varying degrees of assistance in making decisions.

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[296] Mental Health Act 1983 (UK); Guardianship and Administration Board Act 1986 (Vic); Disability Services and Guardianship Act 1987 (NSW); Adult Guardianship Act 1988 (NT); Personal and Property Rights Act 1988 (NZ); Guardianship and Administration Act 1990 (WA); Guardianship and Management of Property Act 1991 (ACT).

Similarly, the bureaucratic connotations of the word **administration** introduce an unwelcome paternalistic element that people find difficult to relate to the sympathetic giving of assistance. Administration is not generally understood as meaning helpful assistance with financial affairs. The term **management** is also usually associated with total control.

Further, the use of separate terms, while administratively convenient, reflects an artificial distinction between decisions of a personal nature (guardianship) on the one hand and of a financial nature (administration) on the other. In practice, the two frequently overlap.

For example, a decision about where to live or where to take a holiday is a personal one about an issue of lifestyle. Yet it acquires financial implications when a person's property is under the legal control of someone who does not approve of the decision.

In Victoria, where legislation[297] uses the term **guardianship** for personal matters and **administration** for property matters, the Guardianship and Administration Board reported that, although the Board had been in operation for three years, a significant number of applicants continued to be uncertain which was the appropriate form of order. Applicants often sought orders for both guardianship and administration when they were concerned only with the financial affairs of the person.[298]

The use of one expression to describe assistance with both personal and financial matters does not necessarily mean that different people could not be appointed to assist in each area.

2.1.2 *Arguments for*

There is no virtue in change for its own sake. Use of these terms in other jurisdictions has given them an accepted legal meaning. The adoption of the terms in use in other jurisdictions is also desirable in the interests of uniformity.

Separation of financial and personal decisions would allow the appointment of a different person in each area, thus lessening the chance of total control of the legally incapacitated person's life being taken by a single person.

Separation of financial and personal decisions may also help to ensure that intervention is kept to a minimum.

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297 Guardianship and Administration Board Act 1986 (Vic).

298 Guardianship and Administration Board Annual Report 1989-1990, 19.

Provided that adequate resources were made available, public misconception about the nature of each could be countered by education and by the provision of information which would assist applicants to accurately identify the type of order required.

Any perceived element of paternalism in the use of the term **guardian** could be avoided by calling the person who gives assistance a **welfare**[299] **guardian.**

2.2 *Substituted Power of Attorney*

At present in Queensland it is possible for a person to execute a **power of attorney** and an **enduring power of attorney.** Both of these mechanisms allow, in certain circumstances, one person (the donor) to authorise another person (the attorney) to act on his or her behalf.[300] By the addition of the word **substituted** or **statutory,** the expression **power of attorney** could be modified to denote the authority to make a decision on behalf of someone who lacks the legal capacity to make the decision personally.

2.2.1 *Arguments against*

A **power of attorney** has certain legally recognised features. One of these is that the donor of the power may choose the person to act on his or her behalf. However, the reason for appointing a substitute decision-maker for a person who lacks legal capacity is that the person concerned is unable to exercise the power of choice. It could be considered inappropriate to use the expression in a context which is not legally correct.

Further, powers of attorney have traditionally been used in a commercial context to authorise the making of decisions within a fairly narrow compass, such as the signing of documents relating to bank accounts and property interests. If interpreted in this way, the expression does not reflect the wide range of decisions where assistance may be necessary.

A **substituted power of attorney** implies that a new authority to make decisions has been conferred, replacing an authority previously granted by the person concerned.

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[299] See Protection of Personal and Property Rights Act 1988 (NZ).

[300] The effect of these mechanisms is explained in Chapter 9.

The term **statutory power of attorney** could cause confusion. The **enduring power of attorney** is a statutory creation[301] and statutory recognition is given to ordinary **powers of attorney**.[302]

2.2.2 *Arguments for*

Most people understand that a power of attorney has the effect of authorising one person to act on behalf of another.

Like an ordinary power of attorney, a **substituted** or **statutory** power of attorney could confer full guardianship powers or, alternatively, it could be limited to specified purposes. This would allow it to be tailored to meet individual needs, thus providing the necessary flexibility for each individual situation.

There would be less stigma for a person lacking legal capacity to make a decision if his or her substitute decision-maker was known by the same name as someone with authority to make decisions on behalf of a person with that capacity.

3. EXISTING TERMINOLOGY IN QUEENSLAND LEGISLATION

In Queensland, provisions concerning assisted or substituted decision-making are presently contained in the *Mental Health Act,* the *Public Trustee Act* and the *Intellectually Disabled Citizens Act.*[303]

3.1 *Mental Health Act*

In the *Mental Health Act* the relevant provisions are set out in the Fifth Schedule to the Act. The Fifth Schedule describes the substitute decision-maker as a **committee** of the person or of the property of the person who is unable to make the decision. **Committee** is an archaic term which is not widely recognised or understood, even by members of the legal profession.

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[301] See for example Property Law Act 1974 (Qld) Section 175A.

[302] See for example Property Law Act 1974 (Qld) Sections 169, 170.

[303] These provisions have been discussed in Chapters 3,4 and 6.

3.2 *Public Trustee Act*

The *Public Trustee Act* uses the expression **protected person**. This terminology carries with it outmoded overtones of paternalism.

3.3 *Intellectually Disabled Citizens Act*

The *Intellectually Disabled Citizens Act* refers to a person who has an intellectual disability and who receives assistance from the Intellectually Disabled Citizens Council as an **assisted citizen**. This has the advantage of being easily understood and of preserving the dignity of the person with a disability. However, the word **citizen** could be considered unnecessarily formal and impersonal.

4. A NEW APPROACH

A further option would be to introduce an entirely new terminology in Queensland. This approach would have the advantage that the terms selected would not carry any emotional on theoretical baggage from other contexts or jurisdictions. It would also allow for the use of words that are easily understood by people affected by the law.

An order which authorises another person to make decisions on behalf of an assisted person could be called an **Assisted** or **Substituted Decision Order** or a **Statutory Power to Decide**.

Assisted or **Substituted Decision Order** indicates that the holder of the order has authority to take part in the decision-making process or to make a decision on behalf of another person. **Statutory Power to Decide** does not expressly refer to the fact that the holder of the order is authorised to make decisions on behalf of another person. It does, however, provide the information that the order has a legal basis founded on statute.

The person who needs assistance to make a decision or for whom a decision is made could be called an **assisted person**.[304] The person who helps an assisted person to make a decision could be called an **assistant decision-maker**.

The use of these terms would indicate the nature of the process - namely to assist a person in an area where he or she lacks legal capacity to make a decision, rather than taking control of every aspect of the person's life.

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[304] In some other Australian States, a person for whom a decision-making order has been made is called a represented person. See for example Guardianship and Administration Board Act 1986 (Vic); Guardianship and Administration Act 1990 (WA).

9. ENDURING POWERS OF ATTORNEY

In Chapter 4, procedures for appointing a substitute decision-maker were outlined. None of the mechanisms discussed provide for the person concerned to choose whom he or she would like to act on his or her behalf.

There is, however, one way in which a person may be able to nominate his or her own substitute decision-maker.

This process is known as an enduring power of attorney. An enduring power of attorney is a special kind of power of attorney.

1. POWER OF ATTORNEY

1.1 *The common law*

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.[305] An attorney is a kind of agent.

A donor can authorise an attorney to do anything which he or she 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.

Traditionally, powers of attorney were used to transfer the right to manage property. This is probably a reflection of the importance of property interests in the development of English law. There seems to be no reason in principle why the operation of a power of attorney should be restricted in this way and should not be used, for example, to give instructions about legal matters or to make decisions about the donor's lifestyle. However, a power of attorney could not be used to make lifestyle decisions, such as consent to marriage or to sexual intercourse, which require such a degree of personal judgment that they cannot be delegated.

The power may be conferred in general terms. Alternatively, it may specifically authorise the attorney to perform particular acts on behalf of the donor. Most powers of attorney are intended to have legal effect as soon as they are created.

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[305] The word 'attorney' is sometimes used to refer to a lawyer. The word is not used in that sense in this paper. It is not necessary for a person to be a lawyer to be appointed as an attorney under a power of attorney.

However, the grant of authority may be expressed to take effect in the future. Sometimes, even though it is not stated that the power does not come into operation immediately, it may be clear from the rest of the document that the power is intended to commence in the future. In general, the attorney's authority will continue until the donor revokes the power or dies, unless there is an express or implied limitation on the duration of the power.[306]

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.[307] The power is revoked if the donor subsequently loses the ability to understand in broad terms its nature and effect.[308]

The revocation of a power of attorney by the subsequent loss of the donor's capacity has serious implications. For example, if a person who grants a power of attorney develops Alzheimer's Disease and 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. It also destroys the potential value of a power of attorney as a tool for allowing people to continue to have some degree of control over the decisions which affect them even after they have lost the capacity to decide for themselves.

1.2 *Queensland legislation*

In Queensland the creation of powers of attorney is now partly controlled by legislation. Provisions in the *Property Law Act* 1974 apply to powers of attorney generally. Provisions in some other statutes relate to powers of attorney in specific situations.[309]

The *Property Law Act* contains standard forms for creating a general power of attorney[310] and for revoking a power of attorney.[311]

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[306] See for example Danby v Coutts & Co (1895) 29 ChD 500.

[307] Gibbons v Wright (1953) 91 CLR 423, 445.

[308] Drew v Nunn (1879) 4 QBD 661; Yonge v Toynbee [1910] 1 KB 215.

[309] See for example Real Property Act 1861 Section 104; Trusts Act 1973 Section 6; Corporations Law 1990 Section 182(8).

[310] Property Law Act Second Schedule Form 16.

[311] Property Law Act Second Schedule Form 17.

Section 170 of the *Property Law Act* states that 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. This would give the attorney very wide powers. Section 170 further provides that a general *or other* power of attorney may be revoked by using the prescribed form.

Two conclusions may be drawn from these provisions.

First, the Act allows for the donor to appoint more than one attorney.

Second, it is not mandatory to use the standard form to create a power of attorney. If the standard form is used, the effect will be to give the attorney the very wide power conferred by a general power of attorney. However, the Act clearly envisages a kind of power of attorney other than this general conferral of power. A donor who wishes to limit the authority of the attorney or to specify the period during which the authority may be exercised - for example, a donor who is going overseas and wishes to appoint someone to act on his or her behalf for certain purposes while he or she is away - would be able to do so. It would also be possible for the donor to appoint different attorneys to make different decisions.

The provisions in the *Property Law Act* do not alter the common law position with respect to the capacity required for a donor to grant a power of attorney or to the revocation of the power of attorney if the donor subsequently loses that degree of capacity. The Act provides some protection for an attorney who, not knowing that a power has been revoked, acts in reliance on that power.[312] However, the protection is limited by a further provision that knowledge of revocation includes knowledge of any event which has the effect of revoking the power.[313]

2. ENDURING POWERS OF ATTORNEY

The problems caused by the common law rule that a power of attorney is revoked by the incapacity of the donor have led to the development of a new kind of mechanism called an **enduring power of attorney**. An enduring power of attorney survives the subsequent mental incapacity of the donor. Amendments to the *Property Law Act* in 1990 allow for the creation of an enduring power of attorney in Queensland.

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[312] Property Law Act Section 174(1).

[313] Property Law Act Section 174(5).

2.1 *The legislation*

The *Property Law Act* contains a standard form for the donor of an enduring power of attorney to use. To be an enduring power, a power must be 'in or to the effect of' this form. The form gives the attorney power to do on behalf of the donor anything which the donor could lawfully authorise an attorney to do.[314]

A justice of the peace or qualified legal practitioner must certify 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.[315]

Agreeing to act as an attorney involves undertaking serious responsibilities. The form which creates the power contains a notice to the attorney of the importance of the obligations involved.[316]

The attorney must not, unless authorised by the terms of the power, 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. The attorney must keep his or her own property and money separate from the property and money of the donor, except for property and money which are owned jointly by the attorney and the donor.[317] The attorney must also keep accurate records.[318]

The attorney must exercise the power honestly and with reasonable diligence to protect the interests of the donor. Failure to do so may incur a fine of up to $12,000 and the attorney may be liable to compensate the donor for any loss caused by the failure.[319] The attorney may apply to the Supreme Court for directions on the meaning of the power and the way the power should be exercised.[320] If the attorney breaches any of the duties imposed by the Act the Court may, if it considers that the attorney acted honestly and reasonably and ought fairly to be excused, relieve the attorney of liability for the breach.[321]

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[314] Property Law Act Section 175A; Form 16A.

[315] Property Law Act Section 175A; Form 16A.

[316] Property Law Act Form 16A.

[317] Property Law Act Section 175E.

[318] Property Law Act Section 175D.

[319] Property Law Act Section 175H.

[320] Property Law Act Section 175G(2).

[321] Property Law Act Section 175I.

If there are reasonable grounds to suspect that the interests of the donor are not being protected according to the provisions of the Act, the Public Trustee may require the attorney to produce records and accounts of transactions made by the attorney on behalf of the donor.[322] 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.[323] The Court may appoint an attorney to act in place of an attorney who has been removed.[324]

3. PROBLEMS WITH THE EXISTING LAW

The concept of an enduring power of attorney represents a significant advance in the law concerning substituted decision-making. It provides, for the first time, a simple and inexpensive method of allowing people to plan for the future and to choose whom they would like to make decisions for them if they lose capacity to decide for themselves.

However, it is not a complete solution.

3.1 *Capacity*

The *Property Law Act* does not at present contain a test of capacity to execute an enduring power of attorney. The prescribed form requires the donor to declare that the power will continue in effect if he or she loses capacity. It also requires the witnesses to certify that the donor **appeared** to understand the nature and extent of the power. However, the appearance of understanding is not necessarily an indication of the reality of the situation.[325]

In other jurisdictions, seemingly different tests of capacity have been used. One possibility is to apply the common law test of capacity to the execution of an enduring power of attorney. This would require the donor to understand the nature

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[322] Property Law Act Section 175F.

[323] Property Law Act Section 175G(1).

[324] Property Law Act Section 175G(3).

[325] The distinction is particularly significant in cases of dementia. To a stranger, the donor may **appear** to understand the implications of signing the form. However, within a short space of time the donor may have completely forgotten that the power has been executed. It may be that in such a situation the person concerned does not in fact have the required capacity.

of the acts or transactions authorised by the power.[326] It has been suggested that this test involves the donor having, at the time the enduring power is executed, the capacity to undertake those acts or transactions in person.[327] This is a very high standard of capacity. In the United Kingdom, on the other hand, it has been held that it is not necessary for the donor to have the capacity to personally perform the acts in question. It is sufficient if the donor understands that:

- the attorney will have full control over the donor's affairs;
- the attorney will be able to do anything with the donor's property that the donor could have done;
- the attorney's authority will continue after the donor has lost the capacity to make his or her own decisions; and
- if he or she does lose the capacity to make his or her own decisions, the donor will not be able to revoke the attorney's power.[328]

Because of the extended nature of an enduring power, the donor's level of understanding at the time the power is granted is of vital importance. The donor may not have considered the possibility of an enduring power until his or her mental faculties begin 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 what is involved. It is therefore necessary to have a test of capacity stringent enough to protect the vulnerable. However, requiring too high a level of capacity would reduce the availability of an enduring power of attorney and thus detract from its value as a simple, efficient, inexpensive method of enabling people to provide for the time when they may be unable to make their own decisions.

3.2 *Limited availability*

There will always be some people with a mental or intellectual disability who do not have a sufficient degree of understanding to grant an enduring power of attorney and so will not be able to take advantage of the procedure. Other people who have the required capacity may fail to grant an enduring power of attorney before they lose capacity. Examples are a person who suffers brain damage in an accident or who develops Alzheimer's Disease. It will not be possible for such a person to use an enduring power of attorney to appoint a substitute decision-maker if it has not been done before he or she loses the necessary degree of understanding.

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[326] See for example Ranclaud v Cabban [1988] New South Wales Conveyancing Reports 55-385.

[327] Munday, The Capacity to Execute an Enduring Power of Attorney in New Zealand and England, [1989] New Zealand Universities Law Review, 253.

[328] Re K [1988] Ch 310.

3.3 *Inflexibility*

The Act requires an enduring power of attorney to be 'in or to the effect of' the prescribed form.[329] In such a situation it is not necessary that the exact wording of the form be used, as long as the variation does not involve any substantial change to the meaning.[330]

The prescribed form states that the donor gives to an attorney the authority 'to do on my behalf anything that I may lawfully authorize an attorney to do'.[331] This wording, together with the requirement that there be no substantial change to the meaning of the form, produces the result that a donor who wishes to restrict the power of an attorney or to specify when the power should come into operation may not be able to do so. A limited or deferred grant of authority may significantly alter the nature of the broad general scope of the power which the prescribed form gives to an attorney, and therefore may not be 'to the effect of' the prescribed form.

The prescribed form provides for more than one attorney to be appointed. Where this occurs, the attorneys may be appointed jointly, or jointly and severally.[332] If they are appointed jointly, they must act together. If they are appointed severally, they may act independently. However, in either case, the attorneys acting together or independently will have authority to do anything that the donor could lawfully authorise them to do. The form does not allow the donor to allocate a particular responsibility - for example, the sale of a house - to a particular attorney; nor does it allow the donor to appoint more than one attorney specifying an order of preference; nor to appoint an alternative attorney. To attempt to do so may substantially alter the meaning of the form.

3.4 *Scope of the power*

The Act does not specify the scope of an enduring power. As a result, it is unclear whether the authority of an enduring power is limited to financial management, or whether it includes making decisions about legal matters and questions of lifestyle. Traditionally, powers of attorney have been used in a commercial or financial context. However, there is nothing in the legislation to require that the operation of an enduring power be limited in this way. There is no legal principle which would

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[329] Property Law Act Section 175A; Form 16A.

[330] See for example Clazy v The Registrar of Titles [1902] WAR 113; Drake v Templeton (1913) 16 CLR 153; Harris v Thallon [1926] SRNSW 456; Ex parte Taylor [1980] QdR 253.

[331] Form 16A.

[332] Form 16A.

prevent the power being used to make decisions about the lifestyle of the donor although it could not be used to make decisions of such a personal nature that they could not be delegated.

3.5 *Need for an independent witness*

An enduring power of attorney is an obvious target for an unscrupulous attorney. The attorney has full authority over the donor's affairs, and, if the donor loses the capacity to make his or her own decisions, he or she will be effectively unable to revoke the power. It is essential to provide safeguards against potential abuse.

The *Property Law Act* attempts to provide protection against exploitation of the donor. Exploitation could take the form of influence to grant the power to a particular person or in a particular way. Elderly people may be especially susceptible to this kind of pressure. One of the measures designed to counter exploitation of this nature is the requirement that the execution of the power be witnessed by someone other than the attorney. The witness should be truly independent. In Queensland, however, the only requirement is that the witness is a justice of the peace or a legal practitioner.[333]

3.6 *Portability*

The population of Australia is increasingly mobile. The fact that an enduring power of attorney may be granted many years before it is intended to be used may mean that if the donor does lose capacity he or she may no longer be living in the jurisdiction where the enduring power was executed. For example, a person who granted a power of attorney in one State or Territory may subsequently retire and move to live in another State or Territory. Under the present legislation it may not be possible for an enduring power executed in another State or Territory in accordance with the law of that State or Territory to be recognised in Queensland.[334]

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[333] Section 175A(a)(ii).

[334] This problem has been recognised by Law Reform Commissions in other States, but as yet no measures have been taken. See for example Law Reform Commission of Western Australia, Discussion Paper on Medical Treatment for the Dying, 1988, para 3.19(4); Law Reform Commission of Victoria, Enduring Powers of Management, Report No 35, 1990, 6. See also Creyke, Enduring Powers of Attorney: Cinderella Story of the 80s, 21 University of Western Australia Law Review 122 (1991).

3.7 *Relationship to appointment of committee or making of protection order*

The legislation does not resolve the question of the relationship between an enduring power of attorney and the appointment of a committee under the *Mental Health Act* or the making of a protection order under the *Public Trustee Act*. If a committee is appointed or a protection order made after an enduring power has been executed, should the attorney cease to act, or should the attorney be answerable to the Public Trustee or the committee? On the other hand, could an enduring power of attorney be granted after a management order has been made or a committee appointed? At common law this might not be possible since it would create a potential conflict between the committee and the attorney.[335]

4. ALTERNATIVE PROPOSALS

The Commission has identified a number of changes which could be made to the existing legislation.

4.1 *A statutory test of capacity*

The legislation could include a statutory test of capacity. The test would have to recognise the extended nature of an enduring power. However, if the required standard of capacity is too high, the potential advantage of allowing people their choice of substitute decision-maker may be lost. It should be sufficient that the donor has a general understanding of the extent of the authority which he or she is giving to the attorney and, in particular, that the attorney's authority will continue in the event of the donor losing capacity and that if the donor does in fact lose capacity the power will become effectively irrevocable.

4.2 *Scope of the power*

The legislation could also specify the limits of the authority which it is possible to grant to an attorney. At present it is unclear whether decisions about legal or personal matters can be delegated to an attorney, or whether an agent's authority extends only to financial matters. The legislation could clarify the situation by expressly providing that an attorney may make decisions other than those relating

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[335] In re Walker [1905] 1 Ch 160, 172.

to the donor's money and property.[336]

4.3 *Flexibility*

The legislation could provide a mechanism for allowing the donor to specify the limits of the power conferred on the attorney. This could be done by giving the attorney power over:

- all the donor's financial and personal decisions; or
- only those financial and personal decisions which the donor specifies.

There could also be provision for the donor to set out any powers which he or she does not want the attorney to exercise.[337]

Being able to limit the power of an attorney would enable a donor to appoint different attorneys for different purposes. For example, one attorney could be given power to sell the donor's house if the donor needs to be admitted to a hospital or nursing home. Another attorney could be given control of the rest of the donor's financial affairs.

This amendment should be retrospective to the commencement of enduring power of attorney legislation, to protect the position of an attorney who has acted in reliance on any existing power which purports to restrict the authority of the attorney and which, under the existing legislation, may not be an enduring power.

4.4 *Time of commencement*

Because of the potential of an enduring power to solve decision-making problems which may arise in the future, people may grant such a power with a view to providing for the possibility of their own incapacity as they grow older. However, even though they appoint someone they trust to be their attorney, they may wish to retain full control over their affairs while they are able to do so. They may not wish the authority of the attorney to come into effect immediately the power is executed.

There may be no difficulty with decisions about the donor's lifestyle. While a donor still has capacity to make his or her own lifestyle decisions, substituted decisions made by an attorney would be ineffective unless the donor agreed with them.

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[336] See for example Powers of Attorney Act 1956-1991 (ACT) Section 13. The use of an enduring power of attorney for consent to or refusal of medical treatment is discussed in Chapters 10 and 11.

[337] See for example Enduring Powers of Attorney Act 1985 (UK); Powers of Attorney Act 1956-1991 (ACT) Section 13, Schedule; Enduring Powers of Management Act 1991 (Vic).

In other situations, the donor should be able to choose when the power is to become operative. Legislation could allow for an enduring power of attorney to include a triggering mechanism. The donor could specify that the power is to come into effect:

- immediately the form is completed;
- on a specified date;
- when a specified condition is satisfied; or
- when the donor loses capacity.[338]

4.4.1 *Loss of capacity*

The problem with loss of capacity as a triggering mechanism is that loss of capacity is often a gradual process. In most cases, it will not be possible to pinpoint a precise moment at which a person loses the necessary degree of understanding to make his or her own decisions. This could have the unfortunate result that people with whom an attorney may wish to deal on behalf of a donor may not be satisfied that the power has come into effect and that the attorney actually has the authority which he or she claims. To avoid any uncertainty which may be caused by progressive deterioration of the donor's capacity, the legislation could provide a test for the loss of capacity which would trigger the attorney's authority. A further option would be for the power to come into effect only when the adjudicating body has declared that the donor no longer has legal capacity. The attorney would be able to apply to the adjudicating body for a declaration that the donor had lost capacity and for an order that the power of attorney was in force.[339] An order from the adjudicating body would provide proof that the attorney had power to make decisions on behalf of the donor.

4.4.2 *A specified condition*

The happening of an event on which the operation of the power depends may not be easily capable of independent and objective determination. People with whom the attorney wishes to deal on behalf of the donor of the power may be uncertain whether the specified condition has been satisfied. It may be difficult to prove that the triggering event has taken place.

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[338] See for example Enduring Power of Management Act 1991 (Vic); Powers of Attorney Act 1956-1991 (ACT) Schedule.

[339] Guardianship and Administration Act 1990 (WA) Section 104(1)(b)(ii), Section 106(2)(b).

4.5 *Independent witness*

The legislation could provide that the witness is not to be a relative of either the donor or the attorney.[340] This would promote greater independence of the witness and provide increased protection against exploitation of the donor.

4.6 *Portability*

The legislation could provide for powers of attorney executed in other States or Territories to be recognised and given effect to in Queensland. This could be done in one of three ways:

- by recognising an enduring power from another jurisdiction provided that it satisfied the requirements of that jurisdiction;

- by recognising an enduring power from another jurisdiction provided that it substantially complied with Queensland requirements; or

- by developing, in co-operation with other States and Territories, a set of minimum requirements which would allow an enduring power to be recognised and implemented in any Australian jurisdiction.[341]

4.7 *Relationship to appointment of committee or making of a Protection Order*

If the present provisions for appointment of committees and for making protection orders are to be retained, a mechanism will have to be provided for establishing priority between an attorney and a committee or the Public Trustee. Alternatively, if a new tribunal is created with power to make orders about assisted and substituted decision-making for people with a mental or intellectual disability,[342] provision will have to made to establish whether an enduring power takes precedence over an order of the tribunal or is subject to it.

In other Australian State and Territory jurisdictions and in New Zealand, varying

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[340] See for example Powers of Attorney Act 1956 (ACT) Section 13(2).

[341] See Creyke, note 334 above, at 145-147.

[342] The proposal to establish a new tribunal is discussed at pages 37-39.

approaches have been adopted.[343]

4.7.1 *If an enduring power has been exercised prior to the making of an order*

To recognise the priority of a previously executed enduring power of attorney is to give maximum effect to the expressed wishes of the person concerned. However, the role of the Supreme Court or of the proposed tribunal is also to protect a donor who no longer has power to control the acts of an attorney. The Commission is therefore of the view that, where a person has executed an enduring power of attorney, that power should continue to have effect unless it is shown that there has been abuse, incompetence or neglect on the part of the attorney or that, for any other reason, the enduring power should be terminated. The attorney would therefore become accountable to the Court or the tribunal.

There is a possibility that an order for substituted decision-making could be made without knowledge of a previously executed enduring power of attorney.

There are several ways of avoiding this problem.

First, legislation could require registration of all enduring powers of attorney. However, this option is administratively cumbersome, expensive and could involve privacy implications.

Second, legislation could impose on any person who appears at a hearing of an application for an order for substituted decision-making a duty to disclose knowledge of an existing enduring power of attorney.

Third, the application form for an order for substituted decision-making could include a question directed at knowledge of the existence of a previously executed enduring power of attorney.

To cater for the possibility of competing authority between an attorney and a substitute decision-maker appointed by a Court or tribunal in ignorance of the existence of the power, legislation could include a saving provision to validate the acts of a substitute decision-maker who did not know of the existence of the power and whose authority to act is in doubt.

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[343] See for example Instruments Act (Vic) Section 117; Powers of Attorney and Agency Act (SA) Section 10; Guardianship and Administration Act (WA) Section 108; Powers of Attorney Act (Tas) Section 11D; Powers of Attorney Act (NT) Section 18; Powers of Attorney Act (ACT) Section 18; Protection of Personal and Property Rights Act (NZ) Section 100.

4.7.2 *If a substituted decision-making order has been made*

For many people with a mental or intellectual disability, their lack of understanding will mean that the question of whether an enduring power of attorney can be executed after the making of a substituted decision-making order will never arise. However, in some instances, such as a cyclic or episodic mental illness, there will be periods when a person regains sufficient capacity to execute an enduring power of attorney.

The Commission is of the view that, in such a situation, an enduring power of attorney:

- could be granted over matters not included in the order;
- could not be granted over matters included in the order while the order is in operation. If a temporary order has been made in a case of cyclic illness, a power could be executed after the order expired. The Court or tribunal could have power to vary or revoke the terms of the order if it is satisfied that a person in respect of whom an order had been made has sufficient capacity to execute an enduring power.

4.8 *Which Act?*

At present the provisions relating to enduring powers of attorney are located in the *Property Law Act*. This is a result of the role of powers of attorney in property management. However, an enduring power of attorney has a potentially much wider scope and the provisions concerning its creation and operation properly belong with legislation about assisted or substituted decision-making.

4.9 *Supervision of attorneys*

The nature of an enduring power of attorney requires that there be a mechanism for protecting a donor who has lost capacity against exploitation by an attorney. At present, the power of scrutiny of the operation of an enduring power rests solely with the Supreme Court.[344]

If a tribunal is established with power to make orders for assisted and substituted decision-making for people with a mental or intellectual disability,[345] the tribunal

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[344] Property Law Act Section 175G.

[345] See pages 37-39.

should also have, in the first instance, power to scrutinise the operation of enduring powers of attorney to ensure that the attorney is acting in accordance with his or her statutory obligations. This would accord with the need for accessibility and with the development of a rational, integrated substituted decision-making mechanism.

If legislation transferred the statutory power of supervision of the conduct of attorneys to a tribunal, the Supreme Court could retain its scrutinising role under its *parens patriae* jurisdiction.[346]

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[346] See pages 34-35.

10. CONSENT TO TREATMENT

1. INTRODUCTION

An essential element of the concept of individual autonomy is the right of every person to decide what happens to his or her own body.

Subject to certain exceptions - for example situations of emergency or self-defence, jostling in a crowd or the normal incidents of contact sport - any intentional touching of another person is unlawful unless the other person has consented to that touching. In the absence of consent, even the slightest degree of physical contact may give rise to a civil claim for damages for trespass to the person or to a criminal assault charge.[347]

This general rule applies, unless there is a specific statutory provision to the contrary, to the performance of health care procedures on a patient who has not given his or her consent. In other words, every person has a right to decide whether to consent to or to refuse medical treatment. The requirement of consent is intended to ensure protection for the patient against unauthorised interference with his or her right to bodily integrity and for the health care provider against possible legal action.

The following questions arise:

- what constitutes sufficient consent to protect a health care professional who administers treatment from the risk of legal action?
- what degree of capacity is required to give that consent?
- what happens if a patient lacks the capacity to consent on his or her own behalf?

2. THE ISSUES

2.1 *What constitutes sufficient consent?*

Consent to interference with bodily integrity by any form of health care treatment must be 'real'.

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[347] Criminal Code Section 245; Collins v Willcock [1984] 1 WLR 1172, [1984] 3 All ER 374.

2.1.1 *Trespass and assault*

a. *The United States.* In some jurisdictions in the United States a patient's agreement to undergo treatment has been held not to be a 'real' consent unless the patient has been given sufficient information to allow an informed choice to be made. The average patient has little understanding of the complexities and consequences of treatment, and so relies on the health care provider to communicate information which enables risks and alternatives to be evaluated. The health care provider therefore has a duty of reasonable disclosure of the range of treatments available to the patient and of the dangers involved. Failure to disclose to a patient all the facts which a reasonable person in the patient's position would consider relevant may make the health care provider liable for trespass to the person.[348]

b. *Australia and the United Kingdom.* In Australia and the United Kingdom, for the purposes of an action for damages for trespass to the person or of an assault charge, a 'real' consent is one which has not been obtained by fraud or by misrepresentation of the nature of the procedure.[349] It is sufficient if the patient is informed in broad terms of the nature of the proposed treatment before giving consent. Failure on the part of a person providing treatment to supply information about possible alternative methods of treatment or to disclose the existence of side-effects or of risks associated with the treatment does not invalidate the consent.[350]

2.1.2 *Negligence*

Even though failure to disclose information about risks does not invalidate consent, if insufficient information has been given to a patient about a proposed course of treatment, he or she may be able to bring an action for damages in negligence.

The basis of an action in negligence is a breach by one person of a duty of care which he or she owes to another. Failure by a health care professional to give a patient adequate information may amount to a breach of the health care professional's duty of care to the patient.

The scope of the duty to give information to a patient involves a question of balance between two competing interests: the patient's right to self-determination and the health care provider's concern to act in what he or she believes to be in

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[348] See for example Canterbury v Spence (1972) 464F 2d 772.

[349] Chatterton v Gerson [1981] 1 QB 432, 443; Sidaway v Board of Governors of Bethlem Royal Hospital [1984] 1 QB 493, 511 (CA).

[350] Ellis v Wallsend District Hospital [1989] Aust Torts Reports 68,752; F v R (1983) 33 SASR 189.

the best interests of the patient.

In the United Kingdom it has been held that the so-called American doctrine of 'informed consent' is not part of the law.[351] Although recognition has been given to the right of a patient to be given sufficient information to make a rational and balanced judgment, the emphasis has been on what it is reasonable - from the point of view of a careful and responsible practitioner - to disclose.[352] The question of what is reasonable is determined, in the first instance, by whether it is in accord with an accepted body of medical practice (the *Bolam* test) - in other words, whether it is what some, but not necessarily all or even most, responsible practitioners would do in the circumstances.[353] The danger inherent in this test is that, in the context of the provision of information, it would allow the paternalistic attitudes of some members of health care professions to override growing demand from patients for improved communication.

The issue of reasonableness of giving information to, or withholding it from, a patient has been discussed in only a few reported cases in Australia.[354] Generally speaking, whether a practitioner has acted reasonably has been assessed in the light of all the circumstances of the case including the nature of the treatment and the seriousness and likelihood of possible risks, and the patient's mental and emotional condition and level of understanding. Evidence of accepted medical practice has been regarded as relevant but not necessarily conclusive.[355] It has been recognised that not all accepted medical practices may be desirable ones and that information may be withheld less in the interests of the patient than as a protection or convenience for the medical profession.[356]

2.2 *What degree of capacity is required to give consent?*

To give a legally valid consent a person must be able to understand in broad terms the nature of the proposed procedure and its likely consequences. This means that there is no fixed test of capacity. Whether a person has sufficient capacity to consent on his or her own behalf will depend in every situation on the complexity of

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[351] Sidaway v Board of Governors of Bethlem Royal Hospital [1984] 1 QB 493 (CA).

[352] Sidaway v Board of Governors of Bethlem Royal Hospital [1985] AC 871 (HL).

[353] Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.

[354] See for example Rogers v Whitaker (1991) 23 NSWLR 600.

[355] Albrighton v Royal Prince Alfred Hospital & Ors [1980] 2 NSWLR 542; F v R (1983) 33 SASR 189; Battersby v Tottman (1985) 37 SASR 524; Gover v South Australia (1985) 39 SASR 543; E v Australian Red Cross Society & Ors (1991) ATPR 41-085.

[356] F v R (1983) 33 SASR 189.

the treatment and the ability of the patient to understand the information provided and to make a reasoned judgment based on that information.

The fact that a person has a mental or intellectual disability does not automatically mean that he or she lacks the capacity to decide whether to consent to or refuse treatment.

2.3 *What happens when the patient lacks the capacity to consent?*

Contrary to popular belief there is no automatic right for next of kin to make a substituted decision about whether or not medical treatment should be given to an adult who lacks capacity to consent personally.

Where, because of a mental or intellectual disability, the patient does not have the necessary level of understanding, some other person must therefore be authorised to consent on the patient's behalf in order to protect the interests of both the patient and the health care provider.

The identity of that person and the method of his or her appointment will be determined by the existing law of the jurisdiction.

2.3.1 *The present situation in Queensland*

Introduction. In Queensland a substitute decision-maker may be appointed for the purpose of giving or withholding medical consent for a person with a mental or intellectual disability under the provisions of the *Intellectually Disabled Citizens Act* or the Fifth Schedule of the *Mental Health Act*.

Certain sections of the *Medical Act* and the *Mental Health Act* may authorise the administration of treatment even though no consent has been given. There are also relevant provisions in the *Criminal Code*.

In addition to these statutory provisions, the Supreme Court may exercise its powers under the *parens patriae* jurisdiction.[357]

There is also decided case law from other jurisdictions which recognises that, in certain situations, the performance of medical or surgical treatment on a person who cannot consent may not be unlawful.

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[357] See pages 34-35 for a discussion of the *parens patriae* jurisdiction.

a. *The Intellectually Disabled Citizens Act*

The *Intellectually Disabled Citizens Act* applies to a person whose ability to carry out the ordinary activities of daily living and to make informed decisions has been limited by an intellectual impairment which he or she has had from birth or which is the result of illness, injury or organic deterioration.[358]

This would include, for example, people who have Down's Syndrome or other congenital conditions, people who have suffered brain damage as a result of an accident, and people who have dementia.

However, it does not include people with mental or psychiatric illness.

It is not clear whether the provisions of the *Intellectually Disabled Citizens Act* apply to a person who does not have a permanent intellectual disability but who is unable to consent to medical treatment because he or she is unconscious.

If the treatment is necessary to save or prolong the person's life, then it will be authorised under the *Medical Act*.[359] However, if the treatment is beneficial but not life-saving or life-prolonging, this provision is of no assistance.

If a surgical operation is performed in good faith and for the benefit of the patient there is no criminal liability.[360] This provision does not cover other forms of treatment and does not give relief from liability in a civil action for treatment given without consent.

There may be situations which fall outside both of these provisions. For example, if the patient has had an accident, it may be to the patient's advantage for the health care provider to act immediately, even though there is no threat to the patient's life. Diagnostic procedures such as the insertion of a catheter or the injection of dye, which do not involve a surgical operation,[361] may be performed while the patient is still unconscious to determine the nature and extent of the injury.

It is arguable that the Legal Friend has authority to give consent in the above example. Clearly, the unconscious patient's ability to make decisions concerning his or her welfare has been limited by injury. What is not clear is whether a state of transient unconsciousness constitutes 'intellectual impairment'. The interpretation section of the Act suggests that the Act is intended to provide assistance for

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[358] Intellectually Disabled Citizens Act Section 4.

[359] See page 108.

[360] Criminal Code Section 282.

[361] For a wider interpretation of 'surgical operation', see O'Regan, Surgery and Criminal Responsibility under the Queensland Criminal Code, (1990) 14 Criminal Law Journal, 73.

people with an on-going disability rather than a temporary loss of capacity.[362] If this is so, the patient would not come within the terms of the Act and the Legal Friend would not be able to consent to the procedures.

Once a person has been granted assistance under the Act,[363] the Legal Friend may give consent to any medical, dental, surgical or other professional treatment or care.[364] The Legal Friend is a barrister or solicitor appointed under the Act to provide specialised assistance to intellectually disabled citizens.[365] The powers of the Legal Friend, including the power to consent to medical treatment, may be delegated to other barristers or solicitors.[366] The delegation may be made by the Legal Friend, or as a result of a decision of the Intellectually Disabled Citizens Council.[367]

In exercising the power to give consent the Legal Friend must:

- take all reasonable steps to consult with relatives of the patient who provide ongoing care for the patient and give due consideration to their views;
- take all reasonable steps to be as fully informed as possible on matters requiring consent;
- inform the patient, to the extent that he or she is able to understand, about matters requiring consent and the options available; and
- consent to the least restrictive option available, taking into account the health, well-being and expressed wishes, if any, of the patient.[368]

In an emergency, if the Legal Friend is of the opinion that the process of obtaining approval to grant assistance would cause unnecessary delay, the Legal Friend may consent to treatment for an intellectually disabled person who has not previously been granted assistance under the Act. If this situation arises, the Legal Friend must first obtain the approval of the Chairman of the Intellectually Disabled Citizens Council, and an application for assistance must be made to the Council as soon as

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362 Intellectually Disabled Citizens Act Section 5: This Act shall be construed and applied so as to support and assist intellectually disabled citizens in participating in society in a positive way by providing a level of assistance which, in the least restrictive way, supports the individual and recognises his rights, needs and abilities as well as the limitations which may place him at a disadvantage.

363 See Chapter 3.

364 Intellectually Disabled Citizens Act Section 26(3).

365 Intellectually Disabled Citizens Act Section 4.

366 At the time of writing, the powers of the Legal Friend had been delegated to eight barristers or solicitors.

367 Intellectually Disabled Citizens Act Section 26(7), Section 31A(4)(b)(ii).

368 Intellectually Disabled Citizens Act Section 26(5).

possible. Emergency consents may only be given for treatment which is necessary to preserve the patient's life or to prevent significant illness or suffering.[369]

b. *Mental Health Act*

Under the Fifth Schedule of the *Mental Health Act* a committee of the person may be appointed for a person who is mentally ill and unable to manage his or her affairs.[370]

The term 'mentally ill' is not defined in the Act, except that it includes 'intellectual handicap'.[371]

A committee of the person has full guardianship powers, and can therefore consent to or refuse medical treatment on behalf of the person for whom the appointment was made. There is no limitation on the nature of the procedures for which consent can be given or withheld, nor are there any guiding principles for the exercise of the power of consent.

c. *Other statutory provisions*

i. The *Medical Act* allows treatment to be given in an emergency situation where treatment is necessary to save or prolong life. If the patient is incapable of consenting, and if a relation of the patient is not available to consent to the procedure, the medical superintendent of the hospital may consent on behalf of the patient.[372] This provision applies to anyone who needs treatment of that kind, whatever the reason for his or her inability to consent.

ii. The *Mental Health Act* provides for involuntary admission to hospital of a person who is mentally ill. If the nature or severity of the illness requires the person to be hospitalised, and if hospitalisation is necessary to protect the person's own interests or to protect other people, the person concerned may be admitted to hospital for treatment of mental illness. The application for admission must be supported by a written recommendation from a medical practitioner.[373]

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[369] Intellectually Disabled Citizens Act Section 26(9).

[370] Mental Health Act Fifth Schedule Clause 4(2)(c).

[371] Mental Health Act Section 5(2); See pages 18-20.

[372] Medical Act Section 52.

[373] Mental Health Act Section 18.

This provision authorises admission. It does not expressly authorise the giving of treatment to a patient if the patient refuses to consent.[374]

iii. The *Criminal Code* may also give some protection for a health care provider who treats a person who is unable to consent because he or she has a mental or intellectual disability or because he or she is unconscious. It states that a person who, in good faith and with reasonable care and skill, carries out a surgical operation for the benefit of a patient, will not be criminally responsible for an assault if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.[375] This provision does not include forms of treatment other than surgery. Nor will it relieve a health care provider from liability in a civil action for damages for trespass to the person.

Another relevant provision of the *Code* imposes on a person who has charge of another who (because of age, sickness, unsoundness of mind, detention or any other reason) is unable to arrange the medical care which he or she requires, a duty to provide that medical care.[376] This would include the administrator of hospital where patients were involuntarily detained under the *Mental Health Act*. However, there is a difference between a duty to provide medical care and the right to give it where the patient is not capable of giving consent or refuses to consent. It is likely that the duty to provide medical care would extend no further than making the care available. It is doubtful that it would authorise the forcible administration of treatment in the absence of consent.[377]

d. *The parens patriae jurisdiction*

The Supreme Court has a protective jurisdiction to safeguard the interests of all those who cannot protect themselves. This would include people with a mental or intellectual disability.[378]

If an application is made to it, the Court may use this jurisdiction to authorise medical treatment for someone who is unable to consent personally. This is an expensive procedure.

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[374] See page 115.

[375] Criminal Code Section 282.

[376] Criminal Code Section 285; R v MacDonald and MacDonald [1904] StRQd 151.

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

[378] See pages 34-35.

The procedures for which consent may be given include blood tests[379] and sterilisation operations.[380]

It has been held that the Family Court also has a *parens patriae* jurisdiction[381] but this is probably restricted to the welfare of persons under the age of eighteen years.[382]

The proposed treatment may involve a substantial intrusion into the rights of the person concerned. Because the underlying principle of the jurisdiction is the welfare of the patient, consent will not be given unless the proposed treatment is clearly in the best interests of the patient.[383]

The 'best interests' of the patient do not include the convenience of the patient's carers.[384] Beyond this, no uniform test of what constitutes the patient's 'best interests' has been formulated.

In a Canadian case, it was held that the *parens patriae* jurisdiction involved doing what is necessary for the protection of the person for whose benefit it is exercised.[385]

The test of what is necessary to protect the patient has been criticised in Australia as too narrow. The basis of the criticism is that, although the concept of the welfare of the person concerned clearly includes the need to protect that person, it also raises much broader issues and each case should be decided on its own merits.[386]

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379 S v McC; W v W [1972] AC 24.

380 Re Jane (1988-89) 85 ALR 409.

381 Re Jane (1988-89) 85 ALR 409, 415.

382 Family Law Act 1975 as amended Section 63F(2) (Cwth); Commonwealth Powers (Family Law - Children) Act 1990 (Qld) Section 3(3)(a). See also Public Guardian v MA (1990) Family Law Reports 46.

383 Re Jane (1988-89) 85 ALR 409.

384 Re Eve [1986] 2 SCR 388.

385 Re Eve [1986] 2 SCR 388.

386 Re Jane (1988-89) 85 ALR 409. Although the case concerned the question of consent to a procedure proposed to be performed on a minor, the comments made in the Family Court about the principles governing the exercise of the *parens patriae* jurisdiction are relevant to a discussion of the jurisdiction as it might affect adults with a mental or intellectual disability.

e. *Case law*

It is generally recognised that, even where there is no statutory protection for a health care provider such as that provided by Section 52 of the *Medical Act* or Section 282 of the *Criminal Code*, there are situations in which it should not be unlawful for treatment to be given to a person who is unable to consent.

The most obvious example is, of course, a patient who requires emergency treatment but who is unable to consent because he or she is unconscious.[387]

In the United Kingdom this judge-made exception to the general rule that consent must be given for medical treatment has been extended to include people whose inability to consent is caused by a mental or intellectual disability.[388]

In a case concerning the sterilisation of a severely intellectually disabled woman, the House of Lords considered whether it was necessary to obtain court approval in order for the procedure to be lawful. The majority held that it would be lawful for treatment to be carried out on a mentally or intellectually disabled patient without consent provided that the treatment was in the best interests of the patient. However, where the proposed treatment involved a sterilisation operation, the serious nature of the procedure would make it desirable - but not essential - for a court declaration to be sought that in the circumstances of the case the sterilisation was in the patient's best interests and therefore not unlawful.

Only one member of the Court expressed reservations at leaving unscrutinised decisions about the performance of sterilisation procedures on patients who lack the capacity to consent for themselves.[389]

No clear consensus emerges from the decision about the test to be applied to determine the 'best interests' of the patient. Some of the judges favoured the view that for all forms of treatment the test of what an accepted body of medical opinion would consider in the patient's best interest - the *Bolam* test[390] - should be used. Some drew a distinction between various forms of treatment, allowing the *Bolam* test for routine procedures and curative or preventative measures, but requiring a more stringent test for a sterilisation operation. One judge considered

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[387] Wilson v Pringle [1987] 1 QB 237.

[388] In re F [1990] 2 AC 1.

[389] Lord Griffiths stated at page 70:'I cannot agree that it is satisfactory to leave this grave decision with all its social implications in the hands of those having the care of the patient with only the expectation that they will have the wisdom to obtain a declaration of lawfulness before the operation is performed'. In relation to the medical profession, see also the dissenting judgment of Lord Scarman in Sidaway v Bethlem Royal Hospital [1985] AC 871 and the dictum of Sir John Donaldson MR in the Court of Appeal decision in the same case [1984] 1 QB 493 that 'the law will not permit the medical profession to play God'.

[390] Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.

that for all forms of treatment the test to be applied should be whether the treatment is carried out to save the life of the patient or to ensure improvement or prevent deterioration in his or her physical or mental health.

One of the reasons for the conclusion that court approval was not essential was that the Court did not have power to give a substituted consent, because in the United Kingdom the *parens patriae* jurisdiction over adults with a mental or intellectual disability has been abolished. As a result, apart from any relevant statutory provisions, the courts no longer have a protective role in relation to such people.

The position in Queensland is somewhat different. Unless there is a situation of emergency, medical treatment for a person with a mental or intellectual disability is lawful only if a legally valid consent has been given or the Supreme Court exercising its *parens patriae* jurisdiction has approved. There is no decided case law to support the view that, in order for treatment of a person with a mental or intellectual disability to be lawful, it is sufficient if the treatment is in the patient's best interests and it is not necessary for consent to be obtained.

3. PROBLEMS WITH THE EXISTING LAW

3.1 *Fragmentation*

The fragmented nature of the system which presently exists in Queensland means that different mechanisms for obtaining consent apply to people whose inability to give or withhold consent on their own behalf stems from different causes. This in turn may mean that, according to the reason for the lack of capacity to consent, differing criteria are used to determine whether or not consent to treatment should be granted.

For example, under the *Intellectually Disabled Citizens Act*, treatment must be for the person's benefit[391] and must be the least restrictive option available, taking into account the health and well-being and expressed wishes of the patient.[392] In coming to a decision about whether or not to give consent the Legal Friend has an obligation to consult with relatives, carers and professional advisers.[393]

On the other hand, if a committee of the person is appointed for someone who is mentally ill, the Fifth Schedule to the *Mental Health Act* offers no guiding principle

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[391] Intellectually Disabled Citizens Act Section 26(3).

[392] Intellectually Disabled Citizens Act Section 26(5)(d).

[393] Intellectually Disabled Citizens Act Sections 26(5)(a) and 26(5)(b).

as to how the powers of the committee, which include giving or withholding consent to treatment, should be exercised.

If the Supreme Court is asked to use its *parens patriae* jurisdiction to consent to treatment for an adult with a mental or intellectual disability it will decide according to what the judge hearing the application considers to be in the best interests of the patient's welfare.

3.2 *Uncertainty*

Some areas of the present law concerning consent to treatment are unclear.

3.2.1 *Where a patient is unconscious*

It is not clear whether the definition of an 'intellectually disabled citizen', in the *Intellectually Disabled Citizens Act* includes a person who does not have a permanent intellectual disability but is unable to make decisions on his or her own behalf because he or she is unconscious. If the Act does not apply, there is no other way for consent to be given.

If treatment is necessary to save or prolong life, the *Medical Act* will protect the health care provider from liability, even though no consent has been obtained.[394] If a surgical operation is performed in good faith for the benefit of the patient, no criminal liability will be incurred by the person who performs it.[395]

Otherwise it may be necessary to wait until the patient regains consciousness and is able to consent in person.

3.2.2 *Where a patient is mentally ill*

Section 18 of the *Mental Health Act* sets out the grounds for involuntary admission to a psychiatric hospital. One of those grounds is that the patient is suffering from 'mental illness'. 'Mental illness' is not defined by the Act.

There are differing views as to whether legislation regulating the involuntary hospitalisation and treatment of the mentally ill should attempt to define mental illness.

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[394] See page 108.

[395] Criminal Code Section 282.

The main argument in favour of definition is a civil libertarian one. There is concern that, unless the conditions for compulsory detention and treatment are clearly specified, the power to admit a person to a psychiatric institution may be abused.

The arguments against definition include the following:

a. Attempts to define 'mental illness' in terms of recognised psychiatric diseases are inadequate because:

   (i) diagnosis is not always evident at the time a decision to admit the patient must be made: thorough assessment of a person's mental state may be necessary before a diagnosis can be made;

   (ii) the kinds and degrees of mental illness are complex, and the distinctions between them may be blurred;

   (iii) the pace of advances or changes in diagnostic techniques and terminology may outstrip legislative capacity to keep up to date.

b. The degree of precision required in order to avoid the 'vagueness' charges of the civil libertarian argument creates the risk that some categories of patients who require treatment will be excluded.

The approaches adopted in other Australian jurisdictions vary. In some, the concept of mental illness is dealt with only by way of exclusion - that is, by specifying what is not to be considered mental illness.[396] Where a definition has been attempted, the results range from the generality of 'any illness or disorder of the mind'[397] to a specific list of symptoms.[398]

The Commission understands that the Health Department is presently reviewing the provisions of the *Mental Health Act* concerning involuntary hospitalisation and treatment of psychiatric patients. The review will consider whether it is desirable for 'mental illness' to be defined and, if so, will attempt to construct a workable definition.

The Commission does not intend to consider the matter further pending the outcome of this review.

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[396] See for example Mental Health Act 1979 (NT) Section 4; Mental Health Act 1986 (Vic) Section 8(2). The Mental Health Act 1984 (Qld) also excludes certain criteria: see Section 6(d).

[397] Mental Health Act 1977 (SA) Section 5.

[398] Mental Health Act 1990 (NSW) Schedule 1.

3.2.3 *Where a mentally ill patient has been involuntarily admitted to hospital*

The *Mental Health Act* provides for a mentally ill person to be involuntarily admitted to hospital if the severity of the illness requires hospitalisation and if hospitalisation is necessary to protect the person's own interests or to protect other people.

However, it is not clear whether this provision would also authorise treatment to be given to a patient if the patient refused to give his or her consent.

It could be argued that, since admission is for the purpose of treating the patient's mental illness, there is an implied authorisation for treatment to be given.

On the other hand, there is a recognised presumption of statutory interpretation that legislation will not be construed as taking away existing rights unless its wording is not reasonably capable of any other meaning.[399] Although certain sections of the *Mental Health Act* authorise the use of force in particular circumstances[400] there is no specific authorisation in the Act for the forcible administration of treatment which has been refused by the patient.[401] If the intention of the Act is to take away the patient's right to refuse treatment, this should be unambiguously stated.[402]

3.3 *Inaccessibility*

A person with a psychiatric illness may refuse treatment because the nature of the illness causes a lack of insight into his or her own condition.

If the person is not an involuntary patient of a psychiatric hospital, and if the provisions of the *Mental Health Act* do not at present authorise treatment for an involuntary patient who refuses to consent, the only way in which treatment can effectively be authorised is by an application to the Supreme Court for either the appointment of a committee of the person or an order under the *parens patriae* jurisdiction.

Because of the expense involved this is usually not a viable alternative.

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399 See for example Sargood Bros v Commonwealth (1910) 11 CLR 258, 279; Reg v Hallstrom [1986] 1 QB 1090, 1104.

400 See for example Mental Health Act Sections 20(3), 25(4) and 50B.

401 Report of the Commission of Inquiry into the Care and Treatment of Patients in the Psychiatric Unit of the Townsville General Hospital (the Carter Report) Volume 1, 435.

402 See for example Mental Health Act 1983 (UK) Section 63.

3.4 *The role of the Legal Friend*

The Legal Friend's role in deciding whether to consent to treatment for a person with an intellectual disability gives rise to a number of concerns:

- there is no limit to the kinds of procedures for which the Legal Friend can give consent;

Most forms of treatment are intrusive to some extent. Some are far more intrusive than others. The performance of sterilisation procedures on intellectually disabled young women is a clear illustration of an intrusive procedure which involves a substantial interference in the rights of the individual concerned.

Even though the role of the Legal Friend is governed by the principle of the least intrusive option, it is open to question whether it is desirable that the decision in a matter of such significance should be left in the hands of one individual. It is even less desirable that the authority to consent to a procedure of this nature can be delegated to a person who has no professional training in the care and treatment of the intellectually disabled and who is unlikely to have any first hand experience in matters of this kind.[403]

- it is sometimes perceived as an intrusion into the role of primary care-givers;

The parents of an intellectually disabled child are able to make decisions about the health care of their son or daughter until he or she becomes eighteen years old.[404] Once their child has turned eighteen years of age they are no longer legally entitled to do so. Yet for them and their child nothing is changed by an eighteenth birthday. Their son or daughter has no greater capacity to consent to treatment on his or her own behalf. For many, the present system is viewed as a message to them that, while they still have the burden of the day to day care of their children, they are no longer fit to make decisions which they have been making in good faith for eighteen years. It is a source of resentment to them that part of their role is taken from them and given to a stranger.

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[403] See Intellectually Disabled Citizens Act Section 26(7).

[404] However, the extent of parental decision-making power is now limited by the decision of the High Court in Re Marion, delivered on 6 May 1992. The majority held that sterilisation of an intellectually disabled minor should not come within the ordinary scope of parental power to consent to medical treatment, and that it is essential to obtain the authorisation of the Family Court for the performance of such a procedure.

Other close family members, such as the spouse of a person who suffers brain damage in an accident or who suffers from dementia, may also feel excluded from the decision-making process.

- there may be communication difficulties;

Apart from other barristers or solicitors to whom the powers of the Legal Friend have been delegated,[405] the functions of the Legal Friend's role are carried out by one person assisted by one legal officer. Although the Legal Friend's office operates a twenty-four hour call service, the lack of resources and the problems imposed by distance may sometimes mean that the level of consultation with carers and relatives cannot be maintained at the level which all parties concerned would wish.

Unless adequate funding is provided, however, the communication problems posed by the State's geography are likely to affect the accessibility of any system of substituted decision-making.

4. POSSIBLE ALTERNATIVES

Any proposed mechanism for providing or withholding consent to treatment for a person with a mental of intellectual disability should have three main objectives:

- protection of the fundamental rights of the person with a mental or intellectual disability;
- ensuring that a person is not deprived of necessary treatment because he or she lacks the capacity to consent to that treatment; and
- creating certainty of the consent procedures to be followed so that health care providers can protect themselves against the risk of legal action.

Consideration of alternative measures to those presently available involves two central issues:

- who should be able to give consent; and
- whether there should be separate categories of treatment which require a special procedure for obtaining consent.

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[405] See page 107.

4.1 *Who should be able to consent?*

People who could be authorised to consent to the administration of treatment to a person who lacks the capacity to consent on his or her own behalf include substitute decision-makers who have been appointed to represent the person concerned and family members or other primary carers who have no formal decision-making authority. In certain circumstances, members of the relevant health care profession might be authorised to give treatment without the consent of the person concerned or someone else on his or her behalf.

4.1.1 *The role of primary carers*

Reference has already been made to the scope for involvement of people such as family members and close friends, who are often the main support network for a person with an intellectual or mental disability, in the decision-making process for that person.[406]

Many forms of treatment which are necessary to promote or maintain the health or well-being of a person with a mental or intellectual disability are purely routine. They do not involve a major intrusion into bodily integrity or a potential denial of human rights.

Frequently, the primary carers of people with a mental or intellectual disability are in the best position to act as substitute decision-makers and to provide consent for such procedures.

They have the responsibility for the day to day care of the person concerned. They understand the person they care for and devote a considerable amount of their time to meeting his or her needs. It may be necessary for them to act as interpreters between health care providers and the patient with a mental or intellectual disability. They usually have the trust and the confidence of the person concerned and it may be necessary for them to be present at or participate in some forms of treatment.

In many instances, health care providers will have to rely on primary carers for details of medical history of allergies, medication, sicknesses and any other relevant background information. It seems somewhat illogical that the health care provider, who relies on that information, should then have to turn to someone who has no knowledge of the person concerned, in order to obtain a valid consent.

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[406] See page 65.

4.1.2 *Should primary carers have an automatic right to consent?*

Some primary carers, particularly parents of intellectually disabled children who turn eighteen, feel that they should automatically by virtue of the fact that they are primary carers have the right to decide about the health care of the person they care for. To them, a requirement that they should have to seek approval of a court or a tribunal before they can legally authorise treatment is an unjust reflection on their integrity.

Their attitude is understandable. Other primary carers, however, recognise that an automatic right to decide about treatment should not be attached to the caring role.

The overriding concern is not the rights of the carers, but rather the welfare of the person with a mental or intellectual disability. Whilst the overwhelming majority of carers are responsible people acting genuinely in the best interests of the person concerned, it is necessary to provide protection against those who are not.

The Commission is therefore of the view that primary carers should not automatically be able to decide about consent to treatment. They should, however, be able to approach the court or tribunal for approval to act as substitute decision-makers for the purpose of consenting to routine treatment which is necessary to promote or maintain the health or well-being of the person concerned. Approval, if granted, would cover all forms of treatment other than those for which special consent procedures may be required. It would not be necessary for approval to be sought each time consent is needed.

The court or tribunal should have power to make reasonable enquiries about the history of the relationship between a person with a mental or intellectual disability and a carer who seeks approval to make health care decisions on his or her behalf. An application by a primary carer should be granted unless there is convincing evidence that the carer is not likely to uphold the principles set out in Chapter 1 or to observe the duties outlined in Chapter 7, or is otherwise not an appropriate person to exercise that authority.

This approach would meet the three objectives outlined above and, at the same time, would not unduly disadvantage the majority of care-givers.

4.1.3 *Other jurisdictions*

Other Australian jurisdictions have recognised that primary care-givers have a role in giving consent to medical treatment.[407]

Only one State, New South Wales, has conferred an automatic power to give consent to minor medical procedures on primary care-givers.[408] In South Australia, a recommendation has been made that certain family members should have an automatic power of consent to routine procedures.[409] In the other States or Territories, consent to treatment is an aspect of substituted decision-making power for which approval must be sought from the relevant court or tribunal.

4.2 ***Should there be special consent procedures for certain forms of treatment?***

Some forms of treatment constitute a significant interference with what are generally regarded as basic human rights.

Examples of treatment of this kind include contraceptive and sterilisation procedures, abortion, transplantation of non-regenerative tissue, and some forms of psychiatric treatment, such as electro-convulsive therapy.

Controversial forms of treatment like these raise the issue of who should be able to give consent to their performance, when the person on whom it is proposed to perform them lacks the capacity to make his or her own decision about the procedure in question.

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[407] Guardianship and Administration Board Act 1986 (Vic) Section 24(2)(d); Disability Services and Guardianship Act 1987 (NSW) Section 38(b); Adult Guardianship Act 1989 (NT) Section 17(2)(d); Guardianship and Administration Act 1990 (WA) Section 45(2)(d); Guardianship and Management of Property Act 1991 (ACT) Section 7(2)(e).

[408] Disability Services and Guardianship Act 1987 Section 38(b), Section 39(b).

[409] South Australian Health Commission, Report of the Committee Established to Review Part IVA of the Mental Health Act 1977, March 1991.

4.2.1 *Contraception, sterilisation and abortion*

a. *The arguments*

In the last few years there has been considerable debate about legal questions arising from the sexuality and fertility of the intellectually and mentally disabled. Much of the discussion has centred on decisions concerning medical interventions for young women who lack the capacity to decide for themselves whether or not to consent to the measures proposed by their parents or by medical advisers. Forms of intervention which have come under scrutiny include contraceptive, menstrual management and sterilisation procedures.

Issues such as authority to consent to such procedures, and the criteria by which a decision should be made, may involve consideration of competing interests which are difficult to reconcile.

The principles set out in Chapter 1 recognise that all people with a mental or intellectual disability are entitled to a way of life that is as normal as possible.

For an ordinary woman, menstruation, sexual activity and conception are all normal incidents of life. For an intellectually disabled woman, however, her sexual development and her awareness of that development may be normal for her chronological age, but her mental age may be that of a small child. This may mean that although she experiences sexual feelings, she lacks the capacity to understand the possible consequences of a sexual relationship.

In such a situation parents (who are usually the primary carers) and health care professionals may believe that medical intervention is appropriate.

Reasons for this belief include the following:

- menstruation may cause behavioural problems as a result of distress at the sight of blood;
- menstruation may cause problems of hygiene and there may be an increased risk of urinary tract infections;
- menstruation and its associated hygiene problems may cause restrictions on the woman's way of life;
- menstrual pain may cause distress;
- the lack of understanding of the consequences of sexual intercourse may create a risk of unwanted pregnancy;
- there may be a risk of sexual exploitation;

- sterilisation may lessen the need for intrusive supervision;
- there is a right to choose among procreation, sterilisation and other methods of menstrual management and contraception: women who lack the legal capacity to make the decision for themselves should not be deprived of the opportunity to have a richer and more active life as a result of the elimination of the risk of pregnancy;
- there may be other conditions such as epilepsy which would be exacerbated by pregnancy;
- there may be a lack of understanding of pregnancy and the process of childbirth and an inability to cope with a normal labour;
- caesarean delivery is a major surgical procedure and there may be problems, such as picking at the wound, associated with recovery;
- there may be an inability to assume the responsibilities of parenthood;
- there may be an adverse psychological reaction if the baby is given up for adoption;
- there may be an inability to manage less intrusive forms of contraception such as the use of condoms;
- in addition to management problems, there may be medical contra-indications to the use of oral contraceptives;
- the long term effects of some forms of contraception, such as Depo Provera, are unknown; and
- the loss of reproductive capacity would hold no significance for a woman who was unable to appreciate its implications.

On the other hand, there is a growing community awareness about the need for safeguards against abuse of these forms of intervention, particularly sterilisation procedures.

Reasons for this concern include the following:

- most sterilisation procedures are permanent and irreversible;
- the right to reproduce is seen as a basic human right, which does not cease to exist because the person concerned lacks the capacity to understand it;
- in the past, sterilisations have been performed for eugenic reasons;

- sterilisation may be proposed for the convenience of other people rather than in the interests of the people concerned;
- in some cases sterilisations have been sought or performed in the absence of conclusive evidence of either fertility or sexual activity;[410]
- sterilisation by hysterectomy involves a major surgical procedure;
- improved training methods may increase the chance of other methods of menstrual management and contraception being successful;
- even if other menstrual management techniques are not successful, it is no less dignified for a young woman to receive assistance with menstrual hygiene than it is for her to be dependent on others for bathing and toileting;
- removing the risk of pregnancy does not reduce the risk of sexual exploitation and might, in fact, increase it;
- removing the risk of pregnancy does not eliminate the risk of AIDS or other sexually transmitted diseases; and
- future scientific advances may result in an improvement in the capacity of the person concerned, or in the availability of less intrusive procedures.

b. *Other jurisdictions*

In other Australian jurisdictions, legislation has resulted in limitations being imposed on the power to consent to such procedures.

In all Australian States and Territories where comprehensive guardianship schemes have been introduced, the power to consent to sterilisation procedures is restricted. In some States special provisions also apply to other contraceptive procedures and to termination of pregnancy.

However, the legislation is not uniform. Because there are significant variations between jurisdictions, a summary of the provisions in each of the other States or Territories is set out below.

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[410] See for example Re D [1976] 1 All ER 326; Re B [1987] 2 All ER 211. Both of these cases involved proposed sterilisation procedures for minors.

South Australia

The relevant provisions of the *Mental Health Act* 1977 (as amended) apply to any person who, because of a mental or intellectual disability, lacks the capacity to consent to the proposed treatment.[411]

Where the person concerned is of or above the age of sixteen years, a sterilisation procedure or termination of pregnancy is not to be carried out without the consent of the Guardianship Board unless the medical practitioner carrying out the procedure is of the opinion that the procedure is necessary to meet imminent risk to the person's life or health and that opinion is supported by the written opinion of one other medical practitioner.[412]

Sterilisation is defined as any procedure that results or is likely to result in the person being infertile.[413]

The Board has unrestricted power to consent to a sterilisation which is therapeutically necessary.[414] Otherwise, however, the Board may consent to a sterilisation procedure only if the following conditions are satisfied:

- there is no likelihood of the person ever acquiring the capacity to consent;
- the person is physically capable of procreating; and
- either -

  the person is, or is likely to be, sexually active, and no method of contraception could reasonably be expected to be successful;

  or -

  where the patient is a woman, cessation of the menstrual cycle would be in her best interests and would be the only practicable way of dealing with menstrual problems.[415]

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411 Mental Health Act 1977 (SA) Section 28a.

412 Mental Health Act 1977 (SA) Sections 28c, 28g.

413 Mental Health Act 1977 (SA) Section 5.

414 Mental Health Act 1977 (SA) Section 28e(1).

415 Mental Health Act 1977 (SA) Section 28e(2).

The Act also imposes restrictions on the power of the Board to authorise a termination of pregnancy.[416]

When the Board gives its consent to a proposed treatment, the procedure is not to be performed until avenues of appeal have been exhausted.[417]

Victoria

The *Guardianship and Administration Board Act* 1986 provides that the consent of both the Guardianship Board and the person's guardian must be obtained before a major medical procedure can be performed on a person who lacks the capacity to consent.[418]

The Act does not define the term 'major medical procedure', but gives the Guardianship Board power to issue guidelines.[419] The Board has, in accord with this provision, specified sterilisation and termination of pregnancy as major medical procedures.[420]

The Board may consent to a major medical procedure if it is satisfied that it is in the 'best interests' of the person concerned.[421] There are no criteria specified for the Board to take into account in determining the person's 'best interests'.[422]

New South Wales

The medical consent provisions of the *Disability Services and Guardianship Act* 1987 apply to any person who is of or above the age of sixteen years and is incapable of giving consent because he or she lacks the necessary degree of understanding or because he or she is unable to communicate a decision.[423]

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[416] Mental Health Act 1977 (SA) Section 28f.

[417] Mental Health Act 1977 (SA) Sections 28e(3), 28f(2).

[418] Guardianship and Administration Board Act 1986 (Vic) Section 37(1).

[419] Guardianship and Administration Board Act 1986 (Vic) Section 37(3).

[420] Guardianship and Administration Board Annual Report 1989-1990, 38.

[421] Guardianship and Administration Board Act 1986 (Vic) Section 42.

[422] But see Section 28(2) for 'best interest' criteria in relation to the functions of a guardian.

[423] Disability Services and Guardianship Act 1987 (NSW) Sections 33, 34(1).

Under the Act, unless a medical practitioner considers it necessary as a matter of urgency to save the patient's life or to prevent damage to the patient's health, 'special medical treatment' can only be performed with the consent of the Guardianship Board.[424]

'Special medical treatment' is defined as:

- any medical treatment that is intended, or is reasonably likely to have the effect of rendering permanently infertile the person on whom it is carried out; or
- any treatment declared by regulation made under the Act to be special treatment.[425]

By regulation, the following treatments have been declared 'special medical procedures':

- any medical treatment in the nature of a vasectomy or tubal occlusion; and
- any medical treatment that is carried out for the purpose of terminating pregnancy.[426]

In coming to a decision the Board must consider the views of the person concerned, if any, and of the person proposing the treatment, the person responsible for the patient and of the Public Guardian. It must also consider the condition of the patient for which treatment is proposed, alternative available courses of treatment for that condition, the general nature and effect of each of those courses of treatment, the nature and degree of any significant risks associated with each of the courses of treatment and the reasons for which a particular method of treatment is proposed. Further, the Board must take into account the need to ensure that lack of capacity does not deprive a person of necessary treatment and to ensure that the only purpose of the treatment is promoting and maintaining the health and well being of the patient.[427]

The Board may not consent to any form of treatment unless it considers that, in all the circumstances, it is the most appropriate treatment available. In the case of 'special medical treatment', the Board may not consent unless it is satisfied that the proposed treatment is necessary to save the patient's life or prevent serious damage to the patient's health.[428]

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[424] Disability Services and Guardianship Act 1987 (NSW) Section 36.

[425] Disability Services and Guardianship Act 1987 (NSW) Section 33.

[426] Disability Services and Guardianship (General) Regulation Clause 5.

[427] Disability Services and Guardianship Act 1987 (NSW) Sections 32, 42 and 44.

[428] Disability Services and Guardianship Act 1987 (NSW) Section 45.

Northern Territory

The *Adult Guardianship Act* 1988 provides that, where a guardian has been appointed, a major medical procedure is not to be performed without the permission of the Court, unless in an emergency the procedure appears necessary to save the life of the person concerned.[429]

'Major medical procedures' include medical procedures relating to contraception or to the termination of pregnancy.[430]

If the Court is satisfied that the person concerned is capable of understanding the nature of the proposed treatment and is capable of giving or refusing consent, the Court is to give effect to the person's wishes.[431]

However, the Court has an overriding power to consent to treatment if it is satisfied that it would be in the person's best interests.[432] There are no specified criteria for determining the best interests of the person concerned.

Western Australia

The *Guardianship and Administration Act* 1990 requires that both the Guardianship Board and the person's guardian consent to any procedure for the sterilisation of a person for whom a guardianship order has been made.[433]

The Board may consent if it is satisfied that sterilisation is in the best interests of the person concerned.[434]

There are no specified criteria for determining the best interests of the person concerned.

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[429] Adult Guardianship Act 1988 (NT) Section 21(1), 21(2).

[430] Adult Guardianship Act 1988 (NT) Section 21(4).

[431] Adult Guardianship Act 1988 (NT) Section 21(7).

[432] Adult Guardianship Act 1988 (NT) Section 21(8).

[433] Guardianship and Administration Act 1990 (WA) Section 57(1).

[434] Guardianship and Administration Act 1990 (WA) Section 63(2).

Sterilisation is not defined apart from a provision that it does not include a lawful therapeutic procedure.[435]

Where consent is granted, a sterilisation procedure is not to be carried out until all rights of appeal have lapsed or been exhausted.[436]

Australian Capital Territory

When a guardian is appointed under the *Guardianship and Management of Property Act* 1991 the Guardianship and Management of Property Tribunal may declare that the person concerned is not competent to consent to prescribed medical procedures.[437]

A 'prescribed medical procedure' includes an abortion, a reproductive sterilisation, a hysterectomy and any medical procedure concerned with contraception.[438]

The Tribunal may consent to such procedures if it is satisfied that:

- the procedure is otherwise lawful;
- the person concerned is not likely, in the foreseeable future, to become competent to consent; and
- the procedure would be in the person's best interests.[439]

The Act specifies a number of factors which the Tribunal must take into account in determining whether a particular prescribed procedure would be in a person's best interests. They include:

- the wishes of the person, as far as they can be ascertained;
- what would happen if the procedure was not carried out;
- what alternative treatments are presently available; and

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[435] Guardianship and Administration Act 1990 (WA) Section 56.

[436] Guardianship and Administration Act 1990 (WA) Section 57(1)(b).

[437] Guardianship and Management of Property Act 1991 (ACT) Section 69(2).

[438] Guardianship and Management of Property Act 1991 (ACT) Section 4.

[439] Guardianship and Management of Property Act 1991 (ACT) Section 70(1).

- whether the procedure can be postponed because better treatments may become available.[440]

c. *Conclusion*

Legislative developments in other Australian jurisdictions clearly recognise the need for safeguards to ensure that irreversible fertility control procedures are not carried out unnecessarily or for the convenience of carers rather than the welfare of the person concerned.

The Commission is of the view that safeguards should also be implemented in Queensland.

Provisions which could be adopted include:

- that the adjudicating body have the sole authority to consent to lawful medical procedures concerning contraception, sterilisation and abortion;

- that the adjudicating body have power of consent to such procedures whether or not an order for assisted or substituted decision-making has been made;

- that, notwithstanding that the power of the adjudicating body is otherwise confined to people aged eighteen years or over, the power of consent to procedures concerning contraception, sterilisation and abortion be granted where the person for whom the treatment is proposed is aged sixteen years or over;[441]

- that where consent to a sterilisation procedure is granted, the procedure not be carried out until all rights of appeal have lapsed or been exhausted;

- that, before consenting to a contraceptive or sterilisation procedure, the adjudicating body be satisfied that:

  - either -

    the person concerned is, or is likely to be, fertile and sexually active;

    or -

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[440] Guardianship and Management of Property Act 1991 (ACT) Section 70(3).

[441] The effect of specifying the age of sixteen years would be to prevent parents from consenting to procedures of this kind without any impartial scrutiny of their decision. This has already been done in South Australia and New South Wales: see pages 124, 125. Such a provision would be consistent with the High Court decision in Re Marion (6 May 1992) that the scope of parental authority does not extend to giving consent to sterilisation procedures for intellectually disabled minors. See note 404 above.

cessation of menstruation is the only practicable way of overcoming problems associated with menstruation; and

- there is no other less intrusive form of treatment which is reasonably likely to be successful; and
- the treatment cannot reasonably be postponed; and
- the person concerned is not likely, in the foreseeable future, to be competent to make his or her own decision;

- that the adjudicating body, in coming to its decision, take into account:
  - the expressed wishes, if any, of the person concerned;
  - alternative forms of treatment which are presently available, or likely to be available in the foreseeable future;
  - the nature and extent of any significant risks associated with the proposed treatment and with any available alternative forms of treatment; and
  - that the purpose of the treatment is promoting and maintaining the health and well being of the person concerned.

d. *Legality of sterilisation and abortion procedures in Queensland*

There is some doubt as to the legality of sterilisation and abortion procedures carried out in Queensland.

i. *Sterilisation*. Although there would not be an assault if a legally valid consent had been obtained,[442] the nature of the procedure may mean that the person who performs it commits the offence of grievous bodily harm. It would be irrelevant that the patient, or some other person on his or her behalf, had consented to the procedure, because consent is not an element of this offence. In other words, if the effect of the procedure satisfies the definition of grievous bodily harm, then an offence would be committed.[443]

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[442] Criminal Code Section 245.

[443] Criminal Code Section 320.

'Grievous bodily harm' includes an injury which would 'cause or be likely to cause permanent injury to health'.[444] By derivation, the word 'health' refers to a state of being whole. It has been defined as 'Soundness of body; that condition in which its functions are duly discharged'.[445] It could be argued that a sterilisation procedure causes permanent injury to health in the sense that it permanently prevents the normal bodily function of reproduction and thus the 'wholeness' or completeness of the body.

A person who performs a sterilisation operation which constitutes grievous bodily harm may be protected from criminal liability if the operation is performed in good faith and for the benefit of the patient.[446] 'Benefit' is not defined. There are judicial decisions which suggest that sterilisation carried out for contraceptive or other non-therapeutic purposes may not be for the patient's benefit.[447]

The Criminal Code Review Committee has recommended that the *Code* be amended to extend the meaning of 'benefit' to make it clear that sterilisation procedures performed with a legally valid consent are not unlawful.[448] The Queensland Law Reform Commission considers that if this recommendation is not implemented it would be necessary for legislation which set out procedures to be followed in obtaining consent for sterilisation of a person with a mental or intellectual disability to further provide that a sterilisation performed in accordance with those procedures is not unlawful.

The Commission recognises that such a provision would apply only to the sterilisation of a person with a mental or intellectual disability. However, reform of the law with respect to sterilisation procedures in a wider context is outside the scope of the matters referred to the Commission by the Attorney-General.

ii. *Abortion.* In Queensland, the legality of an abortion procedure depends upon Section 282 of the *Criminal Code* which provides:

> **Surgical operations.** A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the

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[444] Criminal Code Section 1.

[445] The Shorter Oxford English Dictionary, Volume 1, 938.

[446] Criminal Code Section 282.

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

[448] First Interim Report of the Criminal Code Review Committee, 98. A similar recommendation was made in the Report and Recommendations of the Commission of Inquiry into the Status of Women in Queensland 1973 at pages 10-11. See also Crimes Act 1961 (NZ) Section 61A(2).

> preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

It is not clear from the words of the section whether, to be lawful, the procedure must be for the preservation of the mother's life, or whether it is sufficient that the procedure is for the benefit of the mother and its performance is reasonable. In *R v Ross and McCarthy*, Mansfield SPJ seemed to assume the former.[449] Mack J agreed with his reasons.[450] The decision is supported by views expressed in later cases.[451] It has been suggested, however, that the reference to an operation on an unborn child for the preservation of the mother's life was intended to provide a defence to a charge of child destruction under Section 313 of the *Code*, and does not relate to abortion procedures. On this approach an abortion would be lawful if it was performed for therapeutic purposes with reasonable care and skill and was reasonable, having regard to all the circumstances.[452]

4.2.2 *Transplantation of non-regenerative tissue*

The transplantation of non-regenerative tissue involves the removal of tissue or of an organ such as a kidney, for which the body cannot manufacture a replacement, for the purpose of donating it to another person.

Because of the serious nature and consequences of the procedure, there is a need for strict controls on the performance of such an operation on a person who lacks the mental capacity to consent on his or her own behalf.

One option is to prohibit the giving of consent to the donation of non-regenerative tissue by a person with a mental or intellectual disability. However, this may prevent the life of a family member being saved if the person with a mental or intellectual disability is the only compatible donor available. It may be more appropriate to allow consent to be given, subject to stringent legislative safeguards.

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[449] [1955] StRQd 48, 81.

[450] [1955] StRQd 48, 115.

[451] See for example K v T [1983] 1 QdR 396, 398; R v Bayliss and Cullen (1986) 9 Qld Lawyer Reps 8, 45.

[452] O'Regan, Surgery and Criminal Responsibility under the Code, (1990) 14 Criminal Law Journal, 73 at 77-82.

a. *Existing legislation*

Legislation in some Australian jurisdictions provides special procedures for consent to tissue donations by a person with a mental or intellectual disability.

In Victoria, the Guardianship and Administration Board has specified the donation of non-regenerative tissue as a major medical procedure for which the consent of the Board must be obtained.[453]

In the Northern Territory, the definition of a major medical procedure, for which the consent of the Court must be obtained, includes a 'procedure that does not remove an immediate threat to a person's health and which is generally accepted by the medical profession as being of a major nature'.[454] It would therefore appear that a procedure which does remove an immediate threat to a person's health is not a major procedure. However, it is not clear whether, in order for the procedure not to be major, the threat to be removed must relate to the health of the person who lacks capacity to consent to the procedure or, in the case of tissue donation, of the person receiving the tissue. In any event, transplantation of non-regenerative tissue is likely to be generally accepted by the medical profession as being of a major nature.

In the Australian Capital Territory, removal of non-regenerative tissue is a prescribed procedure[455] for which only the Tribunal has authority to consent.[456] In addition to the factors which the Tribunal must take into account on an application for contraceptive or sterilisation procedures,[457] the Tribunal must consider the relationship between the donor and the recipient of the tissue.[458] It must also be satisfied that:

- the risk to the person from whom the tissue is to be taken is small;
- the risk of failure of the transplant is low;
- the life of the person to whose body the tissue is to be transplanted would be in danger if the transplant were not made; and

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[453] Guardianship and Administration Board Annual Report 1989-1990, 38.

[454] Adult Guardianship Act 1988 (NT) Section 21(4).

[455] Guardianship and Management of Property Act 1991 (ACT) Section 4.

[456] Guardianship and Management of Property Act 1991 (ACT) Section 70.

[457] See pages 128-129.

[458] Guardianship and Management of Property Act 1991 (ACT) Section 70(3)(e).

it is highly likely that transplanting tissue from another donor would be unsuccessful.[459]

In Queensland, the *Transplantation and Anatomy Act* 1979 provides criteria for the removal of non-regenerative tissue from adults who have the capacity to consent to such a procedure.[460] There is, however, no specific provision for consent for transplantation of non-regenerative tissue when the proposed donor lacks the capacity to give his or her own consent.

b. *Conclusion*

Although the need for consent to be given to such a procedure may rarely arise,[461] the removal of non-regenerative tissue is a significant invasion of bodily integrity and should be carried out only after the most careful consideration of the issues involved.

The Commission is therefore of the view that special consent procedures should apply to the removal of non-regenerative tissue from persons who lack the capacity to give their own consent.

4.2.3 *Involuntary psychiatric treatment*

Where a substitute decision-maker is appointed for a person who is suffering from mental illness, the substitute decision-maker may be given authority to consent to psychiatric treatment for that person.

However, some forms of psychiatric treatment, such as electro-convulsive therapy, are invasive. Other forms of treatment, such as the administration of medication as a chemical restraint, may be used inappropriately.[462]

There is, on the one hand, a need to protect the interests of mentally ill patients by the provision of procedures to regulate the use of such forms of treatment where the patient does not consent to them.

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[459] Guardianship and Management of Property Act 1991 (ACT) Section 70(4).

[460] Transplantation and Anatomy Act 1979 (Qld) Section 11.

[461] In Victoria, no applications were received by the Guardianship and Administration Board during 1989-1990. See Guardianship and Administration Board Annual Report 1989-1990, 39. In Queensland, no applications for consent to tissue transplantation have been made to the Legal Friend.

[462] Report of the Commission of Inquiry into the Care and Treatment of Patients in the Psychiatric Unit of the Townsville General Hospital (the Carter Report), Volume 1, 228-240.

But equally, on the other, there is a need to ensure a balance so that well-intentioned protective measures do not obstruct the alleviation of the suffering of the mentally ill.[463] There are situations where it is essential for treatment to be given as a matter of urgency to prevent the risk of serious harm to the patient or to members of the community.

Achieving this balance is a difficult task. It may be open to question whether a comprehensive scheme of guardianship legislation is the appropriate place to attempt it. There are arguments in favour of maintaining specific mental health legislation to deal with the issue of involuntary treatment. These arguments include:

- Adequate protection of mentally ill patients requires detailed safeguards for admission and treatment procedures. To include, with respect to only one aspect of substituted decision-making, the amount of detail which would be necessary to achieve the purpose could distort the focus of a comprehensive scheme of legislation.

- Decisions about treatment for mental illness differ from other substituted decisions, because it is the illness itself which causes the incapacity to decide.

- Situations involving involuntary treatment of mental illness are often acute and life-threatening. It is essential that treatment be available without delay. The sheer volume of the number of consents required for the treatment of involuntary psychiatric patients would place an intolerable burden on the administration of a comprehensive scheme.[464]

- Other Australian States which have introduced comprehensive guardianship schemes have retained separate mental health legislation to deal with the question of involuntary hospitalisation and treatment for mental illness.[465]

The Commission is of the view that specific, detailed procedures should be provided for the involuntary treatment of mental illness, except in emergency situations. The Commission understands that the Health Department is currently

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[463] There is evidence to suggest that many patients, when recovered, recognise the need for involuntary treatment to be given during, for example, a psychotic episode. See for example Snowdon, Alternative proposals for reform of mental health legislation in Australia, Medical Journal of Australia, May 14 1983, 471; James and Whiteford, Mental health legislation, Medical Journal of Australia, June 23 1984, 799; Schwartz et al, Autonomy and the Right to Refuse Treatment: Patients' Attitudes after Involuntary Medication, 39 Hospital and Community Psychiatry, October 1988, 1049; Adams and Hafner, Attitudes of Psychiatric Patients and their Relatives to Involuntary Treatment, 25 Australian and New Zealand Journal of Psychiatry 1991, 231.

[464] Information provided by the Division of Psychiatric Services indicates that, at any one time, there are approximately 1,400 psychiatric patients in Queensland hospitals, one-third of whom have been detained involuntarily.

[465] For example Mental Health Act 1979 (NT); Mental Health Act 1983 (ACT); Mental Health Act 1986 (Vic); Mental Health Act 1990 (NSW).

reviewing the relevant provisions of the *Mental Health Act*. The Commission does not intend to consider the matter further pending the outcome of this review.

5. ENDURING POWERS OF ATTORNEY FOR MEDICAL TREATMENT.

5.1 *The concept*

The concept of an enduring power of attorney was explained in Chapter 9.

A power of attorney is a formal document in which one person (the donor of the power) authorises another (the donee or the attorney) to act on his or her behalf for certain purposes. In order to grant a power of attorney, the donor must have the necessary legal capacity. If, at any time after having granted the power of attorney, the donor loses the degree of understanding required, the power of attorney becomes invalid.[466]

An enduring power of attorney is a special kind of power which survives the subsequent incapacity of the donor. In other words, it is a mechanism which allows a donor to choose a person to make decisions for him or her when he or she no longer has the capacity to make them personally.[467]

5.2 *The present legislation*

At present, provisions for granting an enduring power of attorney in Queensland are contained in the *Property Law Act*.

The extent of the authority conferred on an attorney by these provisions is not entirely clear. In particular, it is not clear whether they allow an attorney to decide about health care on behalf of a donor who has lost the capacity to make his or her own decisions. It is possible that, in the absence of specific legislation, a decision about health care would be considered too personal to be able to be delegated to an attorney.

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[466] See pages 87-89.

[467] See pages 89-91.

5.3 *A possible solution*

5.3.1 *The need for legislation.* The question could be put beyond doubt by the introduction of specific legislation to allow the authority to make decisions about medical treatment to be given to an attorney.[468] This would allow people, while they have legal capacity, to choose the person they would like to make decisions about their health care if they should ever lose the capacity to make their own decisions.

5.3.2 *Who should be an attorney?* An attorney may have to make serious decisions about the health care of the donor. The donor should therefore appoint as attorney someone he or she knows well and trusts completely. A person who is close to the donor - for example a spouse or other close relative or friend - is also likely to be familiar with the donor's wishes concerning health care.

5.3.3 *Capacity to grant the power.* For a power to be valid it would be necessary for the donor to have the required degree of capacity when the power of attorney is granted. The test of capacity should be whether, at the time he or she gives the power, the donor understands that it will authorise the attorney to make health care decisions on his or her behalf if he or she loses the capacity to make them personally.

5.3.4 *Revocation of a power.* It should also be possible for the donor to change his or her mind and to revoke the power of attorney. This raises the question of the degree of capacity necessary for revocation of the power.

Should the test be whether the donor has sufficient capacity to grant a new power? Should the donor be able to revoke the power after he or she has lost the capacity to make his or her own health care decisions? One problem that this could cause is that it might disrupt a course of treatment which the attorney had authorised. On the other hand, health care providers are unlikely to refuse life-sustaining treatment to a person who indicates a desire to be given such treatment, even if that person lacks the legal capacity to make the decision.

It has been suggested that a solution might be to provide that the donor may revoke the power at any time prior to losing the capacity to make his or her own health care decisions, but should be able to revoke the power at any time, even after he or she has lost capacity, if life-sustaining treatment is involved.[469] Alternatively, the power to revoke the attorney's authority after the donor has lost capacity may be given to the court or tribunal[470] which has jurisdiction to decide

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[468] See for example Medical Treatment Act 1988-1990 (Vic); Power of Attorney Act 1956-1991 (ACT) Section 13(1)(b).

[469] President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioural Research Deciding to Forego Life-sustaining Treatment (1983), 152.

[470] See pages 37-39.

issues concerning assisted or substituted decision-making for a person with a mental or intellectual disability.[471]

5.3.5 *The triggering mechanism.* The power of attorney could come into effect if the donor of the power became incompetent to make decisions about his or her own health care. This would be consistent with the purpose of an enduring power of attorney - that is, to allow the donor to provide a substitute decision-making mechanism in the event that he or she loses the ability to make his or her own decisions.

However, it has been argued that incapacity of the donor may not be an appropriate trigger. For example, if a patient is in extreme pain, or is drifting in and out of consciousness, it may be difficult to determine if he or she is able to make a rational decision about treatment and whether the power of attorney can come into operation.[472]

5.3.6 *The duration of a power.* The authority of the attorney could continue to be effective for the duration of the donor's incapacity.[473] In some situations, such as where a donor develops dementia, the nature of the donor's incapacity will mean that once the authority of the attorney has come into operation it will have a continuous effect. However, there may be other situations, such as an episodic mental illness, where the donor's incapacity may be only temporary. In such a case, the authority of the donor would lapse when the donor regained sufficient capacity. It would be re-activated by a recurrence of the illness which caused a further loss of decision-making capacity.

5.3.7 *The scope of a power.* Some people may wish their attorney to have an unlimited authority to make decisions about their health care. Other people may wish to specify the forms of treatment for which the attorney is authorised to give consent, or to nominate forms of treatment to which the attorney may not consent. There should be sufficient flexibility to allow people to make such choices.[474]

5.3.8 *Periodic expiration of a power.* Because of its nature and purpose, an enduring medical power of attorney may be granted many years before the donor loses the capacity to make his or her own decisions. In such a situation, the donor may change his or her mind about who should act as attorney, or what forms of treatment the attorney should or should not be able to authorise. To ensure that the power of attorney continues to reflect the donor's wishes, the power of attorney

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[471] See for example Medical Treatment Act 1988 (Vic) Section 5C.

[472] Law Reform Commission of Saskatchewan, Proposals for an Advance Health Care Directives Act, 29 (December 1991).

[473] See for example Medical Treatment Act 1988-1990 (Vic) Section 5A(2)(b); Powers of Attorney Act 1956-1991 (ACT) Section 13(2)(a).

[474] See for example Powers of Attorney Act 1956-1991 (ACT) Schedule Part C.

could expire a certain number of years after it is made, unless at the end of the specified time the donor has lost the capacity to make health care decisions himself or herself.[475] The problem with an automatic expiry provision is, however, that there may be a danger that people will forget to renew an earlier power. If that happened, people who thought that they had provided for the event of their own loss of decision-making capacity, would not in fact have done so.

5.3.9 *Obligations imposed on the attorney.* Legislation could impose on the attorney, in acting as a substitute health care decision-maker for the donor, an obligation to give effect to the known wishes of the donor. If the wishes of the donor are unknown the attorney should act in the best interests of the donor.[476]

5.3.10 *Safeguards.* There would need to be safeguards to protect the donor from abuse by the attorney. These could include provisions for having the document independently witnessed. They could also include a power for the adjudicating body to revoke the attorney's authority if it is not being used in the best interests of the donor.[477]

5.3.11 *Relationship between power and decision-making order.* There would also need to be provision for the situation where a substitute decision-maker is appointed by a court or tribunal after a medical enduring power of attorney has been granted. To preserve the autonomy of the patient to the greatest possible extent, the decisions of the attorney appointed by the patient should be effective unless it is shown that the attorney is not acting in the best interests of the patient.

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[475] See for example Californian Durable Power of Attorney Health Care Act 1983 Section 2436.5.

[476] See for example Powers of Attorney Act 1956-1991 (ACT) Section 13(1)(b).

[477] See for example Medical Treatment Act 1988-1990 (Vic) Section 5C.

11. REFUSAL OF TREATMENT

1. THE RIGHT TO REFUSE TREATMENT

1.1 *The competent patient*

The corollary of the requirement of consent is the right of a patient who has the necessary degree of understanding to refuse to undergo treatment.

Courts have accepted that a legally competent adult is entitled to reject intervention.[478] The principle of self-determination means that a patient has the decisive role in the health care decision-making process, even if the decision may involve risks and is against the weight of professional opinion.[479]

In some jurisdictions, the common law freedom to refuse treatment has been given statutory recognition. In Victoria, for example, a patient may sign a 'Refusal of Treatment' form in which he or she refuses treatment in general or of a particular kind. To be effective, the refusal must relate to a condition which is in existence at the time when the form is signed. The patient must have been given and have understood sufficient information about his or her condition and alternative forms of treatment to allow him or her to decide whether to refuse treatment in general or of a particular kind.[480]

Statutory recognition of the right of a patient to refuse to undergo treatment may help to overcome a number of problems.

Legislation may be necessary to ensure that the patient's expressed wishes are legally binding.[481] The traditional role of health care providers has been the preservation of life. Consequently, there may be some reluctance amongst members of health care professions to withhold treatment which they consider beneficial, even though the patient has expressed a wish not to be given that treatment.

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[478] See for example R v Blaue [1976] 3 All ER 446 (UK).

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

[480] Medical Treatment Act 1988 (Vic) Section 5.

[481] See for example Medical Treatment Act 1988 (Vic) Section 6.

Legislation may also be necessary to establish conclusively that, if a patient dies after having refused treatment, the cause of death is the underlying condition and not the withholding or withdrawal of treatment. Such a provision would protect health care providers from criminal prosecution and from civil action for damages as compensation as a result of the patient's death.[482] It would also establish, for life insurance purposes, that the patient did not cause his or her own death.

The patient's right to choose assumes a particular significance in the context of modern medical technology and the development of sophisticated life-sustaining devices. A patient may not wish to suffer prolonged pain or to endure the indignity of being kept alive by artificial means. The Law Reform Commission of Saskatchewan noted that for most terminally ill patients anger and depression ultimately give way to acceptance. It commented:[483]

> Once death's inevitability has been accepted, the problem facing the patient may be to persuade those about him or her to permit the death to occur with dignity, without prolonged suffering, and without heroic attempts to preserve a mere biological existence.

1.2 *The incompetent patient*

The right to human dignity should not depend on capacity to make personal decisions about health care treatment. An incompetent patient should not be treated as being of lower status or worth and should therefore have access to the same right of choice which is recognised for a competent patient. To insist that an incompetent patient be subjected to treatment which a competent patient may decline is to place a lesser value on his or her dignity and hence to downgrade the status of the incompetent patient.

If a competent patient has a right to reject measures which may save or prolong life, there may be circumstances in which it is appropriate for a person who has been appointed as a substitute decision-maker to reject treatment on behalf of a patient who lacks the necessary capacity to make his or her own decision. The issue could arise where, for example, an elderly patient with advanced dementia developed an unrelated condition which required artificial means of life support. It could also arise in the context of a decision about painful and invasive measures such as chemotherapy for a terminally ill patient whose chances of recovery, even with treatment, were limited. A third situation in which it could arise is where brain damage leaves the patient in an irreversible and persistent vegetative state but where, with nasogastric feeding and other care, the patient may survive for an extended period of time.

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[482] See for example Medical Treatment Act 1988 (Vic) Section 9.

[483] Proposals for an Advance Health Care Directives Act, December, 1991, 3.

2. GROUNDS FOR REFUSING TREATMENT OF AN INCOMPETENT PATIENT

2.1 *The 'best interests' test*

In the three examples above, a substituted decision about whether to consent to or refuse treatment for the patient could be based on the 'best interests' test.

The patient's best interests could be determined by a process of balancing the benefits to the patient of saving or prolonging his or her life against the burdens imposed on him or her by the proposed treatment.

The preservation of the patient's life may, for example, be at the price of prolonged pain. The proposed treatment may itself involve a degree of suffering which outweighs the possible increase in life expectancy. Other relevant factors to consider would include the extent to which the patient's general physical condition had deteriorated and the loss of dignity which would be caused by the level of bodily intrusion involved in the continued care of the patient.

2.2 *The substituted judgment test*

An alternative approach involves making the decision of whether or not to administer or to continue life sustaining treatment on the basis of what the patient would have decided if he or she had been able to do so - the 'substituted judgment' test.

If the patient, if he or she had had the capacity to do so, would have been likely to reject the treatment, the balancing process between the benefits and burdens involved would be overridden by the patient's expressed wishes and would become irrelevant.

Evidence of what the patient would be likely to have decided may be provided in a number of ways. He or she may, prior to losing the capacity to make his or her own decisions, have expressed a view about treatment given to other people in similar situations and may have indicated a desire not to be kept alive by artificial means. Other factors such as the patient's religious beliefs and previous history of treatment may also be relevant.

The advantage of the 'substituted judgment' test is its respect for the principle of maximising the patient's opportunity to control his or her life. However, the test may not be suitable in all situations where a patient lacks the capacity to make his or her own decisions about life-prolonging treatment.

First, it would not be an appropriate method of substitute decision-making where, as in a case of severe intellectual disability, the patient had never had the capacity to formulate or express views or preferences about forms of health care treatment.

Second, there may be no one sufficiently close to the patient to know what he or she is likely to have decided or to be an appropriate source of a decision about whether or not to continue treatment.

Third, the patient may never have seriously considered the possibility of his or her own future loss of decision-making capacity. He or she may never have given sufficient indication of what he or she would have wanted to allow a decision to be made on the basis of the patient's right to self-determination.

Fourth, the evidentiary value of any expression of the patient's wishes may be eroded by factors such as the length of the period between when the wishes were expressed and when capacity was lost, or the generality of the terms in which the wishes were expressed.

Fifth, there is the possibility of apparent, if not actual, conflict of interest, particularly where the person purporting to exercise the substituted judgment stands to gain financially from the death of the patient.

3. ADVANCE DIRECTIVES

Acting as a substitute decision-maker for a patient who lacks the capacity to decide about his or her own health care may involve difficult and sometimes painful decisions, particularly if the patient is terminally ill or is in an irreversible state of coma which may last for an indefinite period of time.

If a legally recognised mechanism existed which would enable a person, while he or she had the necessary decision-making capacity, to give directions which would be binding on health care providers in the event of the subsequent loss of that capacity, then the decision-making process could be made considerably less onerous.

This approach would allow the person concerned a greater degree of self-determination and may assist health care providers in coming to terms with some of the ethical problems which may result from advances in medical technology. It would also create the potential for improved doctor/patient communication by promoting the opportunity for discussion about possible alternatives for future health care.

3.1 *Living wills*

One possible mechanism for giving directions about future health care has been called a 'living will'.

The name is somewhat misleading. It does not refer to a will in the commonly understood sense - that is, a document in which a person declares how his or her property is to be disposed of after he or she has died. In the present context, the accepted meaning of the term 'living will' is a formal written statement in which a person expresses the wish that if he or she should, in the future, lose the capacity to make decisions about his or her own health care, and if he or she should become terminally ill, any measures intended to sustain or prolong life should be withheld.

The concept of the living will was developed in the United States. Over forty individual States have now enacted legislation giving it effect. However, it has not yet received statutory recognition in the United Kingdom and, in Australia, only South Australia and the Northern Territory have adopted it.[484]

In some jurisdictions where living will legislation has been enacted, a living will is not binding unless the patient was terminally ill when it was signed.[485] In other jurisdictions a living will may be executed at any time while the person concerned has the necessary degree of understanding to do so, but it will not come into operation until the person becomes terminally ill.

In South Australia and the Northern Territory, a patient is 'terminally ill' if

- death would be imminent unless life prolonging measures were undertaken; and
- there is no reasonable prospect of recovery even if such measures were undertaken.[486]

3.1.1 *Problems associated with living wills*

While the concept of a living will may have the advantage of relieving a substitute decision-maker from an unenviable responsibility, it may also involve a number of

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[484] Natural Death Act 1983 (SA); Natural Death Act 1988 (NT).

[485] See for example California Natural Death Act 1976 Section 7191 (West Supp. 1976).

[486] Natural Death Act 1983 (SA) Section 3; Natural Death Act 1988 (NT) Section 3.

problems.[487] These problems stem from the fact that at the time when a living will is made, the person making it may not be in a position to know what is likely to happen in the future. Potential problems include:

Time lapse. The nature of an advance directive means that it may be made a considerable time before the person concerned loses the necessary capacity to make his or her own health care decisions.

A living will may be made when a person is young and healthy. However, many people as they grow older become more accepting of the inevitable decline in their health and faculties. As a result, there may be a possibility that a person who had previously expressed a desire to have life-sustaining treatment withheld would, if he or she had the capacity to do so, change his or her mind if the need for such treatment eventuated.

A living will which is made a considerable time before it is needed is also likely to be made in ignorance of future medical developments and of improved techniques and treatments which may become available. There could therefore be a danger that by the time it comes into operation, a living will may not accurately reflect the wishes of the person concerned.

There are two ways of overcoming these problems.

The first is for legislation to provide that a living will is not binding unless the patient has been diagnosed as being terminally ill when it is signed. This procedure has been adopted in some jurisdictions in the United States.[488] It means that the patient has knowledge of his or her condition, and of probable treatments, when the living will is made.

The second is to provide that a living will automatically lapses after a certain period of time - for example, five years - unless the person making it has lost the capacity to make his or her own health care decisions within that period. For a living will to remain effective, it would have to be renewed every five years. This would help to ensure that the wishes expressed in the living will were reasonably current.

Each of these solutions creates further difficulties.

The requirement that a person must be terminally ill to make a binding living will creates definitional problems. The concept of what constitutes terminal illness is difficult and, to a large extent, subjective. In many jurisdictions there is a provision

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[487] In South Australia, evidence to the Select Committee of the House of Assembly on the Law and Practice Relating to Death and Dying identified a need to repeal the Natural Death Act and replace it with 'more appropriate and more relevant legislation'. See the Interim Report of the Select Committee (October 1991), Appendix E, page 3.

[488] See for example California Natural Death Act 1976, note 485 above.

that the death of the patient must be imminent.[489] This requirement would exclude a living will as an effective substitute decision-making mechanism for people whose loss of capacity to make their own health care decisions arises from a sudden unexpected trauma such as a car accident.[490]

The requirement that a living will automatically lapse if not renewed after a specified interval of time may mean that a person is deprived of an effective method of giving directions about his or her health care at a time when it is most needed. The person concerned may forget to renew the will, particularly as his or her physical or mental faculties begin to decline with age.

Triggering mechanism. The requirement that a patient be terminally ill before a living will comes into operation means that the range of people whose wishes will be implemented under a living will is very narrow. The legislation would not apply to many people who have lost the capacity to make their own decisions and for whom decisions about life-sustaining and other treatment must be made. It would not cover, for example, decisions about treatment which would sustain the life of a patient who might survive for a considerable period of time, although in a coma resulting from irreversible brain damage.[491]

The alternative would be to allow people to stipulate the circumstances in which they want their living will to come into effect. However, this approach could lead to difficulties of interpretation. If the patient has attempted to provide for all eventualities by making a living will in which the triggering event is broadly described, it may be given a narrow interpretation by health care providers. This may frustrate the patient's intention and thus detract from his or her right of self-determination. Conversely, if the patient attempts to avoid this problem by giving a direction which is expressed to take effect in specific circumstances, he or she may fail to allow for a particular situation, and his or her wishes may again be frustrated because the direction does not provide for the condition for which treatment is proposed.

Inflexibility. Most living will legislation requires that, to be effective, a living will must be created in accordance with a form set out in the legislation.[492] An advance directive which does not comply with the prescribed form may not be binding on health care providers. The purpose of requiring certain formalities -

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[489] See for example Natural Death Act 1983 (SA) Section 3; Natural Death Act 1988 (NT) Section 3.

[490] The introduction of natural death legislation in the United States was inspired in part by the case of Karen Quinlan, a young woman who was left in a persistent vegetative state as a result of unexplained prolonged oxygen deprivation. It is ironic that her situation would have been outside the legislation.

[491] See note 490 above.

[492] See for example Natural Death Act 1983 (SA) Section 4(1).

such as, for example, the need to have the patient's signature independently witnessed - is to safeguard the interests of the patient. However, if the formalities designed to protect the patient are too stringent, they may in fact defeat the patient's wishes: the patient may not have the physical capacity to sign the document; a terminally ill patient, whose death is imminent, may not give any consideration to legal niceties. Should the clearly expressed wishes of such a patient be ignored because they do not meet with formal requirements imposed by legislation?

Scope of treatment. Some presently existing legislation operates only to enable a patient to refuse that treatment which is identified in the prescribed form. Although the wording varies, this is usually a general description, such as to treatment which is intended to sustain or prolong life.[493] This means that a patient is unable to specify which forms of treatment are acceptable or unacceptable or to nominate a preferred form of treatment.

However, if a person who makes a living will specifies particular forms of treatment which he or she does not want to receive, there may be a risk that the treatment actually proposed was not anticipated at the time the document was drawn up. There may also be a risk that the patient's wishes have been so narrowly expressed that a particular situation is not provided for.

The solution may be to allow a person who makes a living will a choice of refusing life-prolonging treatment in general, or of specifying which treatments he or she wishes to be withheld.[494]

Effect of failure to make a living will. There may be a risk that failure to make a living will could be interpreted as a desire to have life-sustaining or life-prolonging treatment administered under any circumstances, resulting in treatment being given when it cannot be beneficial and is unlikely to have been wanted by the patient. There may be many reasons for not making a living will, among them ignorance, apathy or the failure to foresee the kind of situation which in fact develops. However, this problem could be overcome by providing that no inference about the patient's wishes is to be drawn from a failure to make a living will.

3.2 *Enduring power of attorney*

The concept of an enduring power of attorney for health care was discussed in

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[493] Certain forms of life-sustaining treatment, such as the administration of pain relief and the provision of food and water, may be excluded from the treatments which the legislation allows the patient to refuse.

[494] See for example Natural Death Regulations 1984 (SA) Regulation 2; Natural Death Regulations 1989 (NT) Regulation 2.

Chapter 10.

An enduring power of attorney is, in effect, another form of advance directive. Whereas a living will directs health care providers about the treatment a person wishes to receive after he or she has lost the capacity to make his or her own decisions, an enduring power of attorney appoints another person to give directions on behalf the donor who has lost the capacity to decide.

3.2.1 *Refusal of treatment by attorney*

Legislation which allows a donor to appoint an attorney to make health care decisions on the donor's behalf could also confer on the attorney specific authority to refuse treatment for the donor in certain circumstances.

In addition to the general safeguards provided for the protection of the donor,[495] this power would need to be subject to special safeguards to ensure that it was properly exercised. The safeguards could include a requirement that the attorney has been given sufficient information to make the decision and limitations on the kinds of treatment that could be refused. The limitations could be that:

- the attorney may not refuse the reasonable provision of food and water, or the provision of reasonable medical procedures for the relief of pain or discomfort;
- the proposed treatment would cause the donor unreasonable distress; and
- there are reasonable grounds for believing that the donor, if competent, would refuse the treatment.[496]

4. CONCLUSION

The Commission supports the view that the principle of self-determination should be promoted by enabling a person who has the necessary legal capacity to make arrangements to allow for decisions about his or her health care to be made if he or she should lose that capacity in the future.

The options include:

a. a living will which comes into effect when the patient is terminally ill and

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[495] See page 139.

[496] See for example Medical Treatment Act 1988 (Vic) Section 5B.

which allows the patient to refuse treatment which sustains or prolongs life;

b. a directive which is binding on health care providers even though the patient is not terminally ill and which is not limited to the rejection of treatment which sustains or prolongs life;

c. a directive of the kind in either (a) or (b) above which automatically lapses and has to be renewed after a specified period of time unless the patient has lost the capacity to make his or her own decisions within that time;

d. a medical enduring power of attorney, which allows the attorney to make health care decisions on behalf of the donor, including a decision about withdrawing or withholding treatment; or

e. a combination of (a) or (b) and (d) above, which would allow a person to give instructions about future health care in the event of incapacity, and also to appoint a substitute decision-maker to make health care decisions on his or her behalf if the directions given lack sufficient clarity or fail to anticipate the circumstances which actually arise.

12. APPEALS

1. THE NEED FOR AN APPEAL MECHANISM

A determination about assisted or substituted decision-making for a person with a mental or intellectual disability involves sensitive issues. It may impact significantly on the rights and welfare of the person for whom the order is sought. It may also have a substantial effect on the interests of that person's relatives and other members of his or her support network.

It is, therefore, essential to provide an appropriate appeal mechanism by which the adjudicating body's determination about the provision of assisted or substituted decision-making may be challenged. The appeal process serves two principal functions.

First, for the people concerned, it is an avenue of possible remedy for those who are not satisfied with the outcome of a hearing. For example, if an order has been made there may be a dispute about the terms of the order, or even about the need for an order to be made. Alternatively, if an order has been refused, relatives or carers of the person for whom the application was made may be concerned that the refusal will leave a vulnerable person without adequate means of protection.

Second, from a public perspective, it helps to ensure the accountability of the adjudicating body. In general, as a check that an adjudicating body is acting properly and within the limits of its powers, proceedings which may affect individual rights and interests should be open to the public. However, the nature of the issues involved in the determination of an application for assisted or substituted decision-making for a person with a mental or intellectual disability may mean that the matter is better dealt with in a closed, private hearing.[497] If this is the case, the appeal procedure assumes an additional importance. Members of the community are entitled to expect that decisions affecting individual rights and interests will be subject to public scrutiny and that such decisions may be challenged to seek the correction of any perceived errors. The existence of an open, fair and independent system of review is likely to promote confidence in, and acceptance of, the decisions of the adjudicating body.

There is a third way in which the review system may be important. The effect of an appeal may reach further than the parties concerned. While each application should be treated according to its merits, the appeal procedure provides a method of establishing guidelines about the legislation and about the way in which the adjudicating body should come to its decision. An appeal may not only correct an error which has been made in a particular case, but may also provide valuable

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[497] See pages 43-44.

feedback to assist in preventing future errors. Thus the appeal system has a role to play in improving the quality of the determinations made by the adjudicating body.

2. THE ISSUES

The establishment of an independent tribunal[498] to hear applications for assisted or substituted decision-making for a person with a mental or intellectual disability would raise the following questions about an appeal system:

- who should hear the appeal?
- what should be the grounds of appeal?
- what powers should be given to the appeal body?
- who should have a right to appeal?

3. WHO SHOULD HEAR THE APPEAL?

3.1 *Other jurisdictions*

Approaches to this question in other Australian jurisdictions have varied. In Victoria, decisions of the Guardianship and Administration Board are reviewed by the Administrative Appeals Tribunal.[499] However, in the Australian Capital Territory, the only other jurisdiction which presently has an Administrative Appeals Tribunal, an appeal from a decision of the Guardianship Tribunal lies to the Supreme Court of the Australian Capital Territory.[500] One possible reason for the distinction is that in Victoria, the nature of a determination about assisted or substituted decision-making was considered to be mainly administrative, while in the Australian Capital Territory it was characterised as being principally judicial.[501]

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[498] See pages 37-39.

[499] Guardianship and Administration Board Act 1986 (Vic) Section 67.

[500] Guardianship and Management of Property Act 1991 (ACT) Section 56.

[501] Australian Law Reform Commission Report No 52, Guardianship and Management of Property, 44 (1989).

3.2 *The Queensland position*

In Queensland, there is no state Administrative Appeals Tribunal. A review of an order granting or refusing assisted or substituted decision-making for a person with a mental or intellectual disability would have to be heard within the existing court structure - that is, by either the District Court or the Supreme Court.

The District Court has the advantages of greater accessibility[502] and lower costs. However, only the Supreme Court has at present jurisdiction to make orders under the *Mental Health Act* and the *Public Trustee Act*[503] and it would therefore have a greater degree of experience in this area. Judges of the Supreme Court may also exercise the *parens patriae* jurisdiction.[504] There is no *parens patriae* jurisdiction in the District Court. Further, if the orders of an independent tribunal hearing applications about assisted and substituted decision-making are correctly classified as administrative rather than judicial, the Supreme Court, not the District Court, will have a statutory authority to review them.

The common law basis for obtaining a review of an administrative decision was, until recently, found in a complicated set of remedies known collectively as the prerogative writs. Only the Supreme Court, as part of its inherent jurisdiction to review the decisions of inferior courts and tribunals, had power to issue these writs. The enactment of the *Judicial Review Act* 1991 will end the power of the Supreme Court to issue the prerogative writs. However, the Court will still be able to make an order which grants similar relief to that which could have been obtained by a prerogative writ.[505]

In addition, the *Judicial Review Act* 1991 will give the Supreme Court a statutory power to review decisions of an administrative character which are made in carrying out functions conferred by legislation.[506]

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

[503] See pages 29-30, 32-33.

[504] See pages 34-35.

[505] Judicial Review Act 1991 Section 41.

[506] Judicial Review Act 1991 Sections 3, 4 and 20(1).

3.3 *The nature of the determination*

The way a determination about assisted or substituted decision-making is classified is central to resolving the question of who should review such a determination.

The distinction between an administrative decision and a judicial one is often difficult to draw. Because of the complexity of the law a decision which is regarded as administrative for one purpose may be regarded as judicial for another.[507] There may also be an overlap between the two kinds of decisions. The exercise of judicial power may involve incidental decisions which are essentially of an administrative nature. On the other hand, a body which has to make an administrative decision may be required to act in a judicial manner - that is, justly and fairly and in accordance with the rules of natural justice - in coming to that decision.[508]

Certain features may help to identify a decision as being either judicial or administrative.[509] In general, a judicial decision involves a determination, by application of the law to the facts as found by the adjudicating body, about the existing rights or liabilities of parties to a dispute.[510] An administrative decision is one made in reliance on a statutory power, in the course of implementing or carrying into effect the provisions of that statute. It applies criteria which are specified in the relevant legislation to the circumstances of an individual case. It does not merely determine existing rights or liabilities, but may create or modify them.[511]

3.4 *Conclusion*

The role of the adjudicating body, in deciding whether or not to grant an application, would be to consider whether the extent of a person's mental or

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[507] See for example de Smith's Judicial Review of Administrative Action, 4th ed (1980), 78.

[508] See for example R v Davison (1954) 90 CLR 353; R v Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361; Hamblin v Duffy (1981) 34 ALR 333; Legal Aid Commission (WA) v Edwards (1982) 42 ALR 154; Evans v Friemann (1981) 35 ALR 428; Lamb v Moss (1983) 49 ALR 533.

[509] However, while certain features may be essential to the exercise of an administrative or judicial function, they may not necessarily be conclusive as to the classification of the power. See for example Precision Data Holdings Ltd v Wills (1991) 66 ALJR 171 at 176-177.

[510] See for example R v Davison (1954) 90 CLR 353; R v Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361.

[511] See for example Hamblin v Duffy (1981) 34 ALR 333; Burns v ANU (1982) 40 ALR 707.

intellectual disability would bring him or her within the specified criteria[512] and to make an appropriate order. In so doing, the adjudicating body would act in reliance on the authority conferred on it by legislation; it would implement the legislation by applying the general provisions of the legislation to the circumstances of a particular individual.

The Commission is therefore of the view that, although the adjudicating body would be required to act judicially, its determination of an application for assisted or substituted decision-making for a person with a mental or intellectual disability should be classified as an administrative decision.

This view is reinforced by the increasing recognition which courts have given in recent years to the right of members of the community to challenge decisions made by public officials in their exercise of statutory functions. This recognition has resulted in a wide interpretation being given to the phrase 'decision of an administrative character' in existing legislation in other jurisdictions.[513] It is likely that a similar approach would be taken to the use of the same words in the Queensland *Judicial Review Act* and that a determination about assisted or substituted decision-making would be within the scope of the Act.

3.5 *Possible alternatives*

3.5.1 *Specific provision*

The legislation conferring power on the adjudicating body could include a specific appeal procedure. This right of appeal would be additional to any available under the *Judicial Review Act*.[514]

The Supreme Court would be able to dismiss an application for review under the *Judicial Review Act* if any other adequate means of review existed. If the procedure specified review by a body other than the Supreme Court, the Court would be bound to dismiss an application under the *Judicial Review Act* if it was satisfied that it was in the interests of justice to do so. Similarly, an application for review brought under the specific provisions could be dismissed if an application had been made under the *Judicial Review Act*.[515]

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[512] See Chapter 3.

[513] See for example Hamblin v Duffy (1981) 34 ALR 333; Tooheys Ltd v Minister for Business and Consumer Affairs (1981) 36 ALR 64, 73.

[514] Judicial Review Act 1991 Section 10.

[515] Judicial Review Act 1991 Sections 11, 12.

3.5.2 *An Administrative Appeals Tribunal?*

The Electoral and Administrative Review Commission (EARC) is at present considering the introduction of an Administrative Appeals Tribunal in Queensland.[516] If this course is adopted, it would provide a cheaper, less formal and more flexible forum than the Supreme Court for reviewing a determination about assisted or substituted decision-making for a person with a mental or intellectual disability.

3.6 *Recommendation*

The Commission considers that an Administrative Appeals Tribunal, if introduced, should be given power to review decisions of the adjudicating body. However, in the absence of an Administrative Appeals Tribunal in Queensland, the Commission is of the tentative view that appeals from a determination of the adjudicating body about assisted or substituted decision-making for a person with a mental or intellectual disability should be heard in the Supreme Court.

4. GROUNDS

4.1 *The Judicial Review Act*

Neither the statutory right of review created by the Act nor the common law as modified by the Act allows the Supreme Court to review a decision on its merits - that is, to determine whether the decision was right or wrong in the circumstances of the particular case.

The grounds for review are set out in the Act.[517] They are limited to the validity and the legality of the decision. The role of the Court is to determine whether the decision was within the statutory power of the decision-maker, whether the prescribed procedures were followed, and whether the power to make the decision was exercised fairly.

It follows from this that if a decision was within the legal power of the person or body making it, if fair procedures were followed and if the decision was not obviously unreasonable, a person dissatisfied with the decision would have no right of appeal under the Act.

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[516] Electoral and Administrative Review Commission, Issues Papers Nos 14 and 18.

[517] Judicial Review Act 1991 Section 20(2).

4.2 *Possible alternatives*

The potentially intrusive nature of an order for assisted or substituted decision-making gives rise to an argument that a system of review based solely on the legality of the original determination is insufficient.

An alternative approach would be for legislation to set out wider grounds for challenging such a determination.[518] These grounds could include, for example, that the adjudicating body was mistaken in the view which it took of the facts or that, in the opinion of the appeal body, there is some other reason sufficient to justify a review.[519]

A further alternative would be not to require any error by the adjudicating body. This could be done by placing the body which hears the appeal in the position of the adjudicating body, and requiring it to review the actual decision of the adjudicating body rather than the way the adjudicating body arrived at the decision or the reasons for the decision. This is called a full merits review. The right to such a review would not depend on showing procedural unfairness or unreasonableness on the part of the adjudicating body. A determination could be challenged simply on the basis that a preferable alternative was available and the appeal body would be able to substitute its own view of the merits of the case for that of the adjudicating body.[520]

4.3 *Conclusion*

The Commission is of the tentative view that if a tribunal is established to determine applications for assisted or substituted decision-making for a person with a mental or intellectual disability, and if an Administrative Appeals Tribunal is not introduced, appeals from a decision of the tribunal should be heard by the Supreme Court on the grounds set out in the *Judicial Review Act*.

In the light of the expertise brought by specialist members of the tribunal to their determination, and because of the additional expense involved in a complete rehearing, the Commission considers that to give the Supreme Court power to conduct a full merits review would be unwarranted.

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[518] See for example Disability Services and Guardianship Act 1987 (NSW) Section 67(1) and Guardianship and Management of Property Act 1991 (ACT) Section 56(1), which allow an appeal to the Supreme Court as of right on a question of law and on 'any other question' with the leave of the Court.

[519] See for example Guardianship and Administration Act 1990 (WA) Section 21(b).

[520] Administrative Appeals Tribunal Act 1976 (Cwth) Section 43; Administrative Appeals Tribunal Act 1984 (Vic) Section 25.

5. POWERS OF THE APPEAL BODY

There is a range of powers which legislation could give to the body which reviews a decision about assisted or substituted decision-making for a person with a mental or intellectual disability.

5.1 *To review material before the adjudicating body*

The appeal body could be given power to review determinations of the adjudicating body on a basis which is restricted to a consideration of the record of the material which was presented to the adjudicating body. Limiting the scope of the material available to the appeal body in this way may have two consequences. First, it may affect the way hearings are conducted by the adjudicating body. Second, because the appeal body does not hear the evidence for itself, it may affect the attitude of the appeal body to decisions made by the adjudicating body.

5.1.1 *Effect on conduct*

A review procedure which is based on the material available to the adjudicating body would, for example, require a transcript to be taken of the evidence given at the hearing. This would increase the cost of the proceedings.

The hearing might also have to be conducted in a more court-like manner to allow the evidence to be accurately recorded. It might be argued that proceedings could become less accessible because increased formality and more complex procedures would foster an adversarial atmosphere and intimidate members of the public who are unfamiliar with the legal system. On the other hand, however, certain minimum standards of formality are probably required to safeguard the interests of those affected by the outcome of the hearing. A structured and orderly format would contribute to the fairness of the proceedings, but still allow the hearing to be conducted with less formality than in a courtroom.

5.1.2 *Effect on attitude*

If the material available to the appeal body is limited to a written record of the evidence given at the original hearing, the appeal body will not have an opportunity to assess the characters of the people who take part in the hearing and to form an opinion of the reliability of their evidence. The adjudicating body, on the other hand, would have had this opportunity. As a result, the appeal body might be reluctant to depart from the adjudicating body's findings of fact or to set aside an exercise of discretionary powers which is based on an assessment of the evidence

presented to the adjudicating body.

5.2 *To hear evidence*

Alternatively, the appeal body could be given power to receive evidence. This would enable the parties to the appeal to re-present their cases to the appeal body. The appeal body could have power to allow the parties to present new evidence[521] and also to inform itself of relevant issues.[522] It would then come to its own conclusion based on the totality of the evidence before it.

This approach would be more conducive to a full merits review of a determination by the adjudicating body. Enabling the appeal body to form its own view of the circumstances of a case would create a greater latitude for the appeal body to differ from the findings of the adjudicating body. This factor could enhance the accountability of and promote public confidence in the adjudicating body, particularly if the determination in question is the result of a closed hearing.

However, allowing the parties to an appeal to duplicate evidence which has already been presented to the adjudicating body or to introduce new evidence at the appeal stage could add considerably to the cost of the appeal process. As stated at page 156, the Commission is of the tentative view that the additional expense and complexity of a full merits review would be unwarranted.

5.3 *To make orders*

The appeal body could be given power to resolve the matter in a number of ways. These could include:[523]

- affirming the decision of the adjudicating body;
- varying the decision of the adjudicating body; and
- setting aside the decision of the adjudicating body and either
  - making, in substitution for the decision of the adjudicating body, any

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[521] See for example Guardianship and Administration Act 1990 (WA) Section 29(1)(b).

[522] See for example Administrative Appeals Tribunal Act 1976 (Cwth) Section 33(1); Administrative Appeals Tribunal Act 1984 (Vic) Section 35(1).

[523] See for example Administrative Appeals Tribunal Act 1976 (Cwth) Section 43; Administrative Appeals Tribunal Act 1984 (Vic) Section 25; Disability Services and Guardianship Act 1987 (NSW) Section 67; Guardianship and Administration Act 1990 (WA) Section 30; Guardianship and Management of Property Act 1991 (ACT) Section 56.

other decision which the adjudicating body could have made; or

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

6. WHO SHOULD HAVE THE RIGHT TO APPEAL?

The right to appeal could be given to any person whose interests would be affected by the decision of the adjudicating body.[524] However, defining the ambit of such a vague provision could be difficult. The grant or refusal of an order for assisted or substituted decision-making has the potential to impinge on the interests of a wide range of people, both directly and indirectly.[525] The interests concerned are also uncertain. They would not necessarily be confined to a financial or legal interest[526] but the extent of the other interests which might be included is not clear.

A possible solution would be to confine the right of appeal to those people entitled to be notified of and take part in the original hearing.[527] In Chapter 5 it was suggested that, in order to avoid confusion and uncertainty, legislation could specify categories of people to be notified of the hearing of an application for an order for assisted or substituted decision-making for a person with a mental or intellectual disability.[528] A similar approach could therefore be adopted in relation to the people who may appeal against the outcome of such a hearing.

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[524] See for example Administrative Appeals Tribunal Act 1976 (Cwth) Section 27(1); Administrative Appeals Tribunal Act 1984 (Vic) Section 27 (1).

[525] See Administrative Appeals Tribunal Act 1984 (Vic) Section 27(2)(c).

[526] See Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 1) (1980) 3 ALD 74.

[527] See for example Disability Services and Guardianship Act 1987 (NSW) Section 67; Guardianship and Management of Property Act 1991 (ACT) Section 56.

[528] See page 42.

13. THE ROLE OF THE ADULT GUARDIAN

In Chapter 6 reference was made to the need for a statutory office which would provide a guardian of last resort where an assistant or substitute decision-maker is required by a person with a mental or intellectual disability.[529] In relation to financial matters, this role can be performed by the Public Trustee.

A new statutory office could be created to provide for a guardian of last resort for making decisions of a personal nature. The statutory officer could be called the Adult Guardian.

Victoria was the first State in Australia to introduce this type of statutory office. The statutory officer is known as the Public Advocate. The Victorian model has been used as a basis for legislation in New South Wales, Northern Territory, Western Australia and the Australian Capital Territory. In the Northern Territory, Western Australia, and New South Wales the officer is known as the Public Guardian, and in the Australian Capital Territory as the Community Advocate. In each of these jurisdictions the statutory office has been given a number of additional roles besides that of guardian of last resort.

This Chapter will explore the functions that a statutory office of this kind could perform in Queensland.

1. ASSISTANT OR SUBSTITUTE DECISION-MAKER

1.1 *The need for a guardian of last resort*

Situations may arise where there is no suitable assistant or substitute decision-maker available within the social network of a person with a mental or intellectual disability to make decisions about his or her lifestyle. The need for a guardian of last resort may arise from a number of causes.

The person concerned may not have any relatives or close friends who are able or willing to act as an assistant or substitute decision-maker. If someone is available, it may not be appropriate for that person to act: there may be a family dispute about who should take on the role, or the person available to act may be too emotionally involved with the person who needs assistance to be able to make objective decisions. If the person available is in a close relationship with the person who needs assistance, he or she may not be able to separate his or her own interests from those of the other person or to put the interests of the other

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[529] See pages 70-71.

person first.

Alternatively, an assistant or substitute decision-maker may become sick or incapacitated. There may be a personal or business reason which prevents an assistant or substitute decision-maker from carrying out his or her duty to the person concerned for a limited time. If an assistant or substitute decision-maker dies, there may be a need for someone to step into the shoes of the deceased decision-maker until a replacement can be appointed.

In each of these situations the gap could be filled by the creation of a statutory office.[530] This would ensure that personal matters of the mentally or intellectually disabled person could be attended to in an appropriate manner. The statutory officer could be appointed as a permanent assistant or substitute decision-maker, or on a temporary basis while someone else is unable to act[531] or while a suitable replacement is found.[532]

Some guidance as to the extent of the need for a guardian of last resort can be found in the use of this statutory officer in other States. For example, in Victoria 64.29% of all substitute decision-making orders for the 1989-90 year were in favour of the Public Advocate.[533]

1.2 *Additional decision-making roles*

The statutory officer could also be appointed as an alternative decision-maker,[534] and could have power to make applications to the adjudicating body for the appointment of a substitute decision-maker or for the review of an existing order for

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[530] See for example Guardianship and Administration Board Act 1986 (Vic) Section 16(1)(a); Disability Services and Guardianship Act 1987 (NSW) Section 17; Adult Guardianship Act 1988 (NT) Section 5(1)(d); Guardianship and Administration Act 1988 (WA) Section 97(1)(a); Community Advocate Act 1991 (ACT) Section 13(1)(j).

[531] See for example Adult Guardianship Act 1988 (NT) Section 5(3).

[532] See for example Adult Guardianship Act 1988 (NT) Section 5(4) and Guardianship and Administration Act 1990 (WA) Section 99.

[533] The Guardianship and Administration Board which appoints the assistant or substitute decision-maker (including the Public Advocate) has suggested a partial explanation for the high figure - guardianship applications often arise because of a dispute between family members or between family members and a professional care-giver about the care given to the person with a mental or intellectual disability or as a result of allegations of abuse, neglect or exploitation. In these situations, therefore, the rate of appointment of the Public Advocate rather than relatives as a substitute or assistant decision-maker is generally likely to be higher than occurs in the general community. Guardianship and Administration Board Annual Report 1989-1990, 23.

[534] See discussion on the appointment of alternative decision-maker on page 53.

assisted or substituted decision-making.[535]

1.3 *Support for community decision-makers*

The statutory office could be responsible for promoting community responsibility for guardianship by recruiting, advising and supporting volunteer community decision-makers.[536]

People with a disability and those supporting them may encounter difficulties in tapping into the appropriate services. This is exacerbated in Queensland by the regional nature of the State. More isolated communities simply do not have the same resources available to them as their city counterparts.

This same type of regional difficulty may be encountered when the services of a person like the Adult Guardian are required.

A possible solution is the appointment of voluntary members from the community where the mentally or intellectually disabled person is living to fulfil the role of the assistant or substitute decision-maker.[537] This scheme encourages the community to accept some responsibility for guardianship.

Some of the advantages of appointing community decision-makers include:

- the ability of a community decision-maker to become acquainted with the disabled person and his or her needs;
- the ability of a community decision-maker to concentrate his or her energies on one individual;
- the varying experiences different community decision-makers would bring to the position;
- the problems encountered by mentally or intellectually disabled persons within their own community could be highlighted and effective strategies put in place; and

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[535] See for example Guardianship and Administration Board Act 1986 (Vic) Section 16(1)(a) and (b); Disability Services and Guardianship Act 1987 (NSW) Sections 9(1)(c) and 25(3)(c); Adult Guardianship Act 1988 (NT) Section 5(a) and (e); Guardianship and Administration Act 1990 (WA) Section 97(1)(a); Community Advocate Act 1991 (ACT) Sections 13 and 15.

[536] This is one of the key objectives of the Office of the Public Advocate in Victoria: Office of the Public Advocate Annual Report 1990, 60. See Guardianship and Administration Board Act 1986 (Vic) Section 15(a) and (b).

[537] Victoria has a Community Decision-maker Program. In the ACT, the Community Advocate will be taking steps to set up such a program. The Northern Territory is considering establishing such a program.

. the strain on the Adult Guardian's resources would be lessened.

Disadvantages may include:

. the difficulty of appointing suitable persons as community decision-makers. This could be overcome by effective and continual training being received by the participants in the scheme. Monitoring of the community decision-makers' performance would also have to be effective.

2. ADVOCACY

Advocacy is usually understood to mean speaking on behalf of another person rather than one's self. However, in the context of advocacy for a disadvantaged group, it has been said to involve much more than just speaking. The 'much more' has been described as consisting of three elements:[538]

. vigour and gusto in advancing the interest or cause of another person;

. a cost to the advocate, which may include the wear and tear on the advocate's emotion, time which the advocate may have wished to spend doing something else, or the risk of being ostracised by others; and

. the absence, to the maximum extent possible, of conflict of interest in the performance of the advocacy role. A person performing an advocacy role owes total allegiance to the person he or she represents.

The aim of advocacy for an intellectually or mentally disabled person is to enable him or her to strive for justice and achieve his or her potential.[539]

There are various forms of advocacy.

2.1 *Self advocacy*

People with a mental or intellectual disability should be encouraged and supported to speak up for themselves wherever possible.

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[538] Wolf Wolfensberger: A Balanced Multi-Component Advocacy/Protection Schema. 1977 Canada. See pages 18-21.

[539] Office of the Public Advocate Annual Report 1990, 92.

2.2 *Individual advocacy*

Persons with a mental or intellectual disability are at a disadvantage in our society. The Public Advocate, in Victoria, has described people with such a disability as forming part of 'an underclass' composed of groups of people 'who remain helpless because they cannot organise adequately, cannot influence people with power sufficiently to ensure a better deal for themselves, and who have become so used to being underclass citizens that they accept their misery, misfortune and impotence as normal for themselves'.[540]

Individual advocacy assists persons with a mental or intellectual disability to have a say in the choices available to them and to exercise their rights. A statutory officer like an Adult Guardian could be responsible for undertaking advocacy on behalf of the individual or supporting a disabled person's right to self advocacy in order to protect the rights of all people with a mental or intellectual disability.[541]

There is no existing legislation in Queensland which expressly confers an advocacy role of this kind. However, the functions of the Legal Friend include to 'obtain for or provide information' about 'legal rights and legal procedures and specialised services available' for a person who has been granted assistance under the *Intellectually Disabled Citizens Act* and to 'liaise with Government Departments and other organisations or bodies' on behalf of such a person.[542] It could be argued that these functions in relation to people who qualify for assistance under the Act[543] constitute a limited form of advocacy.

2.3 *Community advocacy*

In general, community advocacy involves volunteer members from the community acting as an advocate for a disabled person.

Community advocacy may assist a mentally or intellectually person in many ways including:

. overcoming day to day problems including finding accommodation,

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[540] Office of the Public Advocate, Silent Victims, (Victoria) May 1988.

[541] See for example Guardianship and Administration Board Act 1986 (Vic) Sections 15(a) and 16(1)(e) and (f); Adult Guardianship Act 1988 (NT) Section 5(2)(c); Guardianship and Administration Act 1990 (WA) Section 97(1)(b) and (d); Community Advocate Act 1991 (ACT) Sections 13(1)(f),(g), (m) and 16.

[542] Intellectually Disabled Citizens Act 1985 Section 26(1)(a), 26(1)(c).

[543] See pages 20-21.

obtaining training, learning how to use transport;

- acting as a 'watchdog' to organisations which affect the lives of the mentally or intellectually disabled person; and

- leading to a bonding between the two people where emotional support and friendship are exchanged.

A possible role for the Adult Guardian is to encourage, promote and support these services.[544]

2.4 *Systemic advocacy*

Some problems which are faced by a mentally or intellectually disabled person may be symptomatic of a much wider problem or issue. Such problems may stem from a defect in a policy or practice by an organisation which is affecting a whole range of people with a mental or intellectual disability.

While an individual advocate can address a particular person's concerns, there needs to be in operation a mechanism which addresses the wider problem or issue.

Systemic advocacy can assist. As the name suggests, it advocates for positive change to the system which affects the people concerned. This form of advocacy focuses on 'policy, program or organisational deficiencies or alternatively the need for a change in the style or manner of a public or private organisation'.[545]

This may involve investigating and reporting on and making recommendations about inadequacies in procedure, government policies and legislation affecting people with a disability.[546]

This is a role which could be performed by an Adult Guardian.

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[544] See for example Guardianship and Administration Board Act 1986 (Vic) Section 15(b) and Community Advocate Act 1991 (ACT) Section 13(1)(c).

[545] Office of the Public Advocate Annual Report 1990, 25.

[546] See for example Guardianship and Administration Board Act 1986 (Vic) Section 15(d) and Community Advocate Act 1991 (ACT) Section 13(1)(h).

2.5 *Community Visitors Scheme*

People with a mental or intellectual disability may be living in residential care - for example, a nursing home - and have no-one to protect their individual rights.

A possible solution is the introduction of a Community Visitors Scheme such as that co-ordinated by the Office of the Public Advocate in Victoria. Community visitors are volunteers appointed on a regional basis to make regular visits to mentally or intellectually disabled residents in various facilities and services like hospitals and nursing homes. Ideally, the people appointed should be members of the community interested in the well-being of the mentally or intellectually disabled and with some legal or social welfare background. The role of the community visitors is to inquire into issues such as the adequacy and standard of services provided and the care and treatment residents receive.[547]

Problems which may face a Community Visitor Scheme which relies on a pool of volunteers include:

- difficulty, particularly in regional areas, in recruiting suitable volunteers and the amount of time that, once recruited, they can devote to this project;
- public resistance to the idea of unpaid amateurs entering residential care facilities; and
- the perception held by some members of the general public that though volunteers do valuable work, they lack any official status and so their views should not be taken into account. This perception may jeopardise in some instances the effectiveness of a volunteer community visitor.

A possible solution to the problems outlined above would be to pay community visitors for the work undertaken by them. In addition the Adult Guardian could be required to provide training for people who wish to be appointed.

To assist in providing an effective Community Visitors Scheme the community visitor could have the following statutory duties and powers:

Duties

- to visit the particular facility or service on a regular basis - at least twice a month;

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[547] Office of the Public Advocate Annual Report 1990, 75; Guardianship and Administration Board Act 1986 (Vic) Section 15(b). The Office of the Community Advocate in the ACT is also looking at the establishment of a similar scheme; see Community Advocate Act 1991 (ACT) Section 13(1)(a) and (c).

- to investigate any complaint about the adequacy and standard of services provided and the care and treatment the residents receive;[548] and

- to provide to the Adult Guardian the results of any investigation carried out by the visitor.

Powers

- to obtain access at any time to the particular facility or service to which he or she is appointed;

- to require an employee of the facility or service to provide information and/or answer questions relevant to the investigation; and

- to obtain access to and to examine documents which are kept by the facility or service and be provided with a photocopy of any document upon request.

2.6 *Potential conflict between advocacy and decision-making roles*

There is an argument that an 'advocacy' role by its very nature excludes the possibility of other functions such as a decision-making function being performed by the same person or organisation. The basis of the argument is the potential conflict which could arise between the two roles.

In the present context, the object of advocacy could be said to be to present the wishes of the person being advocated for, irrespective of the opinion of the advocate about the merit of those wishes. However, this kind of advocacy may be incompatible with a substitute decision-making role where a 'best interests' approach is appropriate.

While acknowledging that there is merit in this argument, the Commission is of the tentative view that an Adult Guardian office could incorporate a number of roles including advocacy and assistant or substitute decision-maker.

No State or Territory which has introduced guardianship legislation has split the role of advocate and decision-maker into two separate statutory offices. The practice of having one officer performing both roles appears to be working satisfactorily in these jurisdictions.

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[548] The community visitor could be excused from investigating the complaint if he or she believed it to be frivolous or vexatious or could be more conveniently carried out by another community visitor.

A safeguard which may be introduced is to permit any person concerned about conflict between the roles to apply to have the order appointing the Adult Guardian as an assistant or substitute decision-maker reviewed.[549]

3. EDUCATION AND RESEARCH

At a public forum[550] called 'Looking after the Affairs of People with a Disability' held by the Queensland Law Reform Commission on 27 May 1991, concern was expressed at the lack of understanding and information about existing legislation for mentally and intellectually disabled people and how the legislation works.[551]

In Victoria, New South Wales, Australian Capital Territory and Western Australia, the Adult Guardian or the equivalent statutory officer has a special statutory function to ensure that the general public has either an awareness and understanding of or information concerning some or all of the following:[552]

- all legislation relating to persons with a mental or intellectual disability;
- the role of a court or tribunal which makes orders about assisted or substituted decision-making;
- the role of the Public Advocate or equivalent office;
- the appointment, functions, powers and duties of an assistant or substitute decision-maker;
- the rights of a mentally or intellectually disabled person under the legislation; and
- the need to protect people with a disability from abuse and exploitation and to protect their rights.

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549 Possible review procedures are discussed in Chapter 12.

550 In advertising the forum, the Commission targeted the people affected by the present legislation about intellectual and mental disability.

551 Queensland Law Reform Commission 'Steering Your Own Ship' August 1991, pages 56-58.

552 See for example Guardianship and Administration Board Act 1986 (Vic) Section 15(c); Disability Services and Guardianship Act 1987 (NSW) Section 79; Guardianship and Administration Act 1990 (WA) Section 97(1)(e) and (f); Community Advocate Act 1991 (ACT) Section 13(1)(d), (e) and (k).

The fulfilment of this function should lead to increased understanding in the community, particularly within the disabled community of:[553]

- the rights, needs and vulnerabilities of the disabled; and
- the existence of and means of access to services which protect the rights of the disabled.

The Adult Guardian could also initiate and conduct investigative research projects which would promote the rights and dignity of people with a mental or intellectual disability.[554]

The educational and research role may be implemented in a variety of ways including publicly speaking about disability; liaising with and responding to the media; organising and participating in seminars and public meetings; and preparing and distributing videos and written material on seminar and meeting topics.

In addition, a service could be offered to handle inquiries from the public relating to the decision-making matters.[555]

The service could operate on many levels including:

- promptly advising and/or assisting the person making an inquiry;
- providing general information about the tribunal and associated support services;
- operating as a type of filtering service - determining whether an application for appointment of an assistant or substituted decision-maker is appropriate; and
- referring people to relevant organisations.

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[553] These are objectives of the Office of the Public Advocate. See Office of Public Advocate Annual Report 1990, 97.

[554] For example, the Office of the Public Advocate in Victoria has undertaken research projects into people with intellectual disabilities as victims of crime (Silent Victims, 1988) and into effective advocacy for people with disabilities (A Stands for Advocacy, 1990).

[555] Victoria, Australian Capital Territory, New South Wales, Northern Territory and Western Australia operate this type of service.

4. INVESTIGATIONS

4.1 Reports

Before a tribunal or court is in a position to hear an application for the appointment of an assistant or substitute decision-maker, that tribunal or court may need additional information to enable it to make the most appropriate decision. In order to provide this information to the tribunal or court there may be a need for pre-hearing investigations.

In Victoria, Northern Territory, Western Australia and the Australian Capital Territory, this type of investigation is undertaken by the statutory equivalent of the Adult Guardian.[556] The Public Advocate in Victoria considers the benefits of pre-hearing reports to include:

- the court or tribunal having comprehensive and appropriate information available to it;
- investigators being able to explain to the person on behalf of whom the application is made, the applicant, family and friends, the hearing process and the roles of the Guardianship and Administration Board and the Public Advocate;
- investigators being able to play an advocacy role, resulting in the early resolution of applications; and
- investigators being able to identify issues of a systematic nature and alert the Office of the Public Advocate.[557]

4.2 Complaints and allegations

An allegation or complaint made by or on behalf of an intellectually or mentally disabled person may place him or her in a vulnerable position with the individual or organisation who is the subject of the complaint.

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[556] See for example Guardianship and Administration Board Act 1986 (Vic) Section 16(1)(d); Adult Guardianship Act 1988 (NT) Section 5(2)(b); Guardianship and Administration Act 1990 (WA) Section 97(1)(b); Community Advocate Act 1991 (ACT) Section 14(2). In New South Wales, investigations are carried out by staff of the Guardianship Board.

[557] The Office of the Public Advocate Annual Report 1990, 53.

For example, a mentally or intellectually disabled person may face eviction from where he or she is living because a complaint is made about his or her living conditions.

The rights of a person with a mental or intellectual disability must be protected.

Any allegations or complaints that a person with a mental or intellectual disability is being exploited or abused or is in need of assistance, or that a carer or assistant or substitute decision-maker is acting inappropriately should be thoroughly investigated. The investigative role may be performed by the Adult Guardian.[558]

During the course of an investigation, the Adult Guardian may wish to disclose information to the public about the investigation. For example, if an investigation into a residential care facility reveals conditions of neglect or abuse, the Adult Guardian may wish to issue a warning about the facility. However, information of this type may be highly sensitive and disclosure may have serious consequences. Safeguards would have to be in place to be fair to all persons concerned. They could include that:[559]

- the disclosure is necessary and reasonable for the public interest;
- the disclosure would not be likely to prejudice investigations;
- if the opinion contained in the disclosure is critical of a person or body then the person or body should be given an opportunity to answer the criticism before the opinion is expressed; and
- the identity of the complainant is not revealed (either directly or indirectly) unless it is necessary and reasonable to do so.

Where necessary, action should be taken on behalf of the disabled person. The matter may be referred to an agency such as the Health Department or Human Rights Commission.

An organisation or individual with responsibilities towards a person with a mental or intellectual disability should be held accountable for conduct which is of an exploitative or abusive nature. A possible solution is to impose some form of penalty on the offending individual or organisation.

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[558] See for example Guardianship and Administration Board Act 1986 (Vic) Section 16(1)(h); Guardianship and Administration 1990 (WA) Section 97(1)(c) and Community Advocate Act 1991 (ACT) Section 14(1).

[559] See for example Community Advocate Act 1991(ACT) Section 20.

4.3 Power of entry and removal

Chapter 5 discussed the need for an adjudicating body to have power, if there is a reason to believe that the welfare of a person with a mental or intellectual disability is at risk, to make orders to enter premises to investigate and, if necessary, to order the removal of a person to safety.

In the Australian Capital Territory and Western Australia, the statutory equivalent of the Adult Guardian may apply to the Board or Tribunal in emergency situations for a warrant to enter premises. The Adult Guardian could also be given a power of removal.[560]

In Queensland, the only legislation which confers a power of entry of this kind is found in the *Intellectually Disabled Citizens Act*. The Legal Friend may apply for a warrant to enter premises in which the Legal Friend believes the well-being of a person with an intellectual disability is at risk. The purpose of the warrant is to allow the Legal Friend to exercise his powers and authorities and to perform all his functions and duties under the Act.[561] This could include instructing a solicitor to take legal action on behalf of an intellectually disabled person whose well-being is threatened.[562] However, the Legal Friend has no express power to remove a person to safety.

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[560] In Western Australia, any guardian can apply for the warrant (Guardianship and Administration Act 1988 (WA) Section 49). In the Australian Capital Territory, the Community Advocate can remove the person with a disability (Community Advocate Act 1991 (ACT) Section 68). In Victoria, the Board can empower the Public Advocate or specify some other person to enter the premises to visit the person with a disability for the purpose of preparing a report. After receiving the report, the Board may make an order enabling the person with a disability to be removed to another place (Guardianship and Administration Board Act 1986 (Vic) Section 27).

[561] Intellectually Disabled Citizens Act Sections 44(5) and (6).

[562] Intellectually Disabled Citizens Act Section 26(1)(b).

14. OTHER MATTERS

The introduction of a comprehensive scheme of legislation dealing with assisted or substituted decision-making for people with a mental or intellectual disability would raise a number of other issues. These issues include:

- costs of an application for assisted or substituted decision-making;
- the effect of a decision-making order on other areas of law;
- immunity of the adjudicating body;
- interstate implications of assisted or substituted decision-making; and
- administrative responsibility for the proposed legislation.

1. COSTS

1.1 *The present situation*

Under existing Queensland legislation, in some circumstances it is necessary for an application to be made to the Supreme Court to enable another person to be authorised to make decisions on behalf of a person with a mental or intellectual disability.[563] For many people involved in the care of a person with a mental or intellectual disability this is not a viable option because of the legal costs involved.

1.2 *The aim of reform*

One of the aims of setting up an independent tribunal to deal with the provision of assisted or substituted decision-making for people with a mental or intellectual disability would be to provide a system which is financially accessible to those who need to use it. This aim would be defeated if the cost involved prevented people from making an application.

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[563] See Chapter 4.

1.3 *User pays?*

There is a current trend towards the principle of 'user-pays' for the provision of services by the government. It is, however, open to question whether the application of this principle is appropriate to the operation of a body which determines issues about assisted or substituted decision-making for a person with a mental or intellectual disability. The needs of the mentally and intellectually disabled and their carers have been neglected for too long. Protecting the interests of people with a mental or intellectual disability is a community responsibility and the cost of providing this protection should be borne by the community as a whole.

1.4 *Recommendation*

1.4.1 *Cost of application*

The Commission is of the view that no fee should be imposed for making an application for an order for assisted or substituted decision-making.

1.4.2 *Cost of legal representation*

If a party involved in the hearing of an application chooses to have legal representation, the cost of representation should be borne by that party. There should be no award of costs made against a person who makes an application or opposes the making of an order, unless the adjudicating body considers that the person concerned has acted from some improper motive and has attempted to abuse the system. In such a situation it may be appropriate for that person to pay legal costs incurred by other parties to the hearing.[564]

2. THE EFFECT OF A DECISION-MAKING ORDER

The making of an order for assisted or substituted decision-making may have consequential effects in other areas of the law. These areas include contractual liability and will-making.

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[564] See for example Guardianship and Administration Act 1990 (WA) Section 16(3); Guardianship and Management of Property Act 1991 (ACT) Section 47.

2.1 *Contractual liability*

2.1.1 *The present position*

The present legal position of a person with a mental or intellectual disability who enters into a contract has already been discussed.[565]

The existing rules represent an attempt to resolve a conflict between two competing interests. On the one hand, there is a need to prevent exploitation of a person who may be placed at a disadvantage because of his or her disability. But on the other hand, it is also necessary to protect a person who deals fairly and in good faith with a person who has a mental or intellectual disability.

However, the present law may not adequately achieve the desired balance.

2.1.2 *Possible problems*

One way in which a contract made by a person with a mental or intellectual disability may be set aside is to show that the disability placed the person concerned in a weaker position than the other party to the contract and that the disability was sufficiently obvious to the stronger party to make it unfair, in the circumstances, for the stronger party to proceed with the contract. Once this has been done, the stronger party must show that the transaction was in fact fair, just and reasonable.[566]

However, it may be difficult to prove that the person's disability was so evident to a total stranger as to give rise to an inference that the stranger acted in an unconscionable manner. Further, the person with a mental or intellectual disability may also be at a financial disadvantage in relation to the other party. The possibility of incurring substantial legal costs against a party - such as a bank, a finance company or an insurance company, for example - which has significantly greater resources may act as a powerful deterrent to an assertion of the rights of the person with a mental or intellectual disability.

The Australian Law Reform Commission has suggested further inadequacies in the existing rules.[567] Problems which it identified in relation to the making of an order for assisted or substituted decision-making for a person with a mental or

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[565] See pages 7-9.

[566] Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, 474.

[567] Australian Law Reform Commission Report No 52, Guardianship and Management of Property, 34-36 (1989).

intellectual disability include uncertainty about the validity of a contract entered into by that person and the unfairness of one party having to bear the entirety of any loss resulting from such a contract.

Uncertainty. Some legislation[568] provides that if the property of a person with a mental or intellectual disability is subject to a management order, that person loses the capacity to enter into a binding contract, other than a contract for 'necessaries',[569] involving property which is subject to the order.

From a practical point of view, even though the person concerned may lack contractual capacity, it may not be possible to prevent him or her from entering into contractual arrangements. Another person dealing with the person with a mental or intellectual disability would have no means of knowing if what has been contracted for is a 'necessary', since whether or not something is a 'necessary' will depend on the individual circumstances of the person concerned.

According to the Australian Law Reform Commission, this kind of situation is unsatisfactory because some transactions made by a person whose property is subject to an order will be valid, but others will not; and there will be no easy way to determine which are valid and which are not.

Unfairness. The Australian Law Reform Commission considered existing rules about the contractual liability of a person with a mental or intellectual disability to be unsatisfactory because they are inflexible: the solutions provided - whether under legislation or at common law or equity - are on an all or nothing basis. One party must bear the whole of any loss which may arise from a contract made by a person with a mental or intellectual disability.

2.1.3 *A possible solution.*

The Australian Law Reform Commission recommended that a contract entered into by a person whose property is subject to a decision-making order should not be automatically invalid, but should be able to be set aside within a certain time limit. It also recommended a power to adjust transactions so as to achieve a just result between the parties to such a contract. For example, if a contract is set aside because one of the parties has a mental or intellectual disability, compensation might be awarded to the other party to the contract. This recommendation has been carried into effect in the Australian Capital Territory. The *Guardianship and*

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[568] See for example Mental Health Act 1974 (Qld) Fifth Schedule Clause 13(4); Public Trustee Act 1978 (Qld) Section 83.

[569] 'Necessaries' are explained on pages 8-9.

Management of Property Act 1991 provides that the Guardianship Tribunal, the Supreme Court and the Magistrates Court may adjust the rights of the parties to a transaction.[570]

2.1.4 *An alternative approach*

The Victorian legislation adopts a different approach to the resolution of the conflict of interests between a person with a mental or intellectual disability and someone who, in good faith, makes a contract with that person.

The *Guardianship and Administration Board Act* 1986 deems a person whose property is subject to a management order to lack capacity to make a contract involving property subject to the order without the approval of the Board or the written consent of the administrator appointed under the management order. If the person concerned does enter a contract, the contract is void and the administrator may bring an action in any court which has jurisdiction to hear the matter to recover the property. However, the contract is not invalid if the transaction was for adequate consideration and the other person proves that he or she acted in good faith and had no knowledge or could not reasonably have known of the management order.[571]

2.1.5 *Conclusion*

Statutory removal of capacity. The Commission is of the view that a comprehensive scheme of legislation about assisted and substituted decision-making for a person with a mental or intellectual disability should not automatically remove the contractual capacity of a person for whom a financial decision-making order is made.

First, automatic removal of capacity would be inconsistent with the principle of presumption of competence.

Second, statutory removal of capacity does not necessarily prevent a person from entering into a contractual arrangement. The other party to the contract may have no means of knowing that the person concerned lacks capacity because an order has been made. In some situations, enforcement of the contract may cause hardship, even though the other party acted in good faith. Conversely, setting aside the contract may also be unfair.

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[570] Guardianship and Management of Property Act 1991 (ACT) Section 73(2)(c). In Western Australia, the Guardianship and Administration Act 1990 confers a power of adjustment on the Supreme Court of Western Australia. See Section 82.

[571] Guardianship and Administration Board Act 1986 (Vic) Section 52.

Power to determine validity of a contract. In Queensland the validity of a contract must at present be determined within the existing court structure, according to the jurisdiction of each of the courts.

The creation of a new tribunal to decide matters concerning assisted or substituted decision-making for a person with a mental or intellectual disability would raise the question of whether the tribunal should also have power to determine the capacity of a person whose property is subject to an order of the tribunal to make contracts involving that property.

There are two factors in favour of such a proposition. First, the composition of the tribunal would provide the expertise required to make an accurate assessment of the nature and extent of the disability of the person concerned and whether, in the light of the disability, he or she had sufficient understanding of what the agreement involved to constitute legal capacity to make the contract in question. Second, in terms of cost and informality of atmosphere, a tribunal would be more accessible to most people who try to set aside a contract made by a person who needs an assisted or substituted decision-making order for the management of his or her financial affairs.

The Commission is therefore of the tentative view that a tribunal which makes orders about assisted and substituted decision-making for a person with a mental or intellectual disability should also be able to determine, on the grounds of capacity, the validity of a contract made by a person whose property is subject to an order of the tribunal. This is the course which has been adopted in the Australian Capital Territory.[572]

Power to adjust transactions. Under existing law if a contract is enforced or set aside, one party must bear the whole of any loss which results. The Commission considers that, in some circumstances, it may not be fair to require one party to carry the whole of any loss resulting from a transaction entered into by a person for whom an order for assisted or substituted decision-making about financial matters has been made.

For example, the person concerned simply may not have the resources to meet the obligations imposed by a contract which he or she has made. A person with a psychiatric illness may, during a certain phase of the illness, arrange to purchase an expensive item such as a car. The other party to the contract may have no reason to suspect the person's illness. To enforce the contract may cause considerable financial hardship to the person and the person's dependants. To set aside the contract would mean the seller had to bear any resulting losses - for example, the cost of depreciation.

The Commission is of the tentative view that, when such a person makes a

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[572] Guardianship and Management of Property Act 1991 (ACT) Section 71.

contract, there should be a power to adjust the rights of the parties to the transaction so that the loss can be distributed in a manner which is fair in the circumstances of the case. In the above example, an order could be made for the car to be returned to the seller together with a payment to compensate for its depreciated value. If the car had been damaged, there could be an additional payment to cover the cost of repairs. The disabled buyer would then be relieved of any further obligation under the contract.

Powers additional to those of courts. The powers to be given to the tribunal in relation to contractual capacity and adjustment of transactions would be additional to the powers and remedies already available within the existing court structure. There could also be a power for a matter to be transferred from a court to the tribunal and vice versa.[573] This would mean that if a person with a mental or intellectual disability was financially disadvantaged by a court action over a contract which he or she had made, an application could be brought to transfer the hearing to the tribunal.

Time limit. If a person with a mental or intellectual disability or someone acting on his or her behalf wishes to set aside a contract made by the person on the grounds that the person did not sufficiently understand the nature of the transaction, fairness to the other party requires that action be taken within a reasonable time.

In Western Australia, the time allowed is two years.[574] In the Australian Capital Territory an application must be made within ninety days of completion of the transaction.[575]

Neither of these alternatives is entirely satisfactory. Allowing a contract to be set aside two years after it was made would seem unfair to the other party. On the other hand, three months from the completion of the transaction may not be sufficient. In some cases, it may be some time before an assistant or substitute decision-maker becomes aware that the contract has been made.

The Commission is therefore of the view that the time limit in which an application may be brought to set aside a contract on the grounds that a person whose property is subject to a decision-making order lacked the capacity to make the contract should be ninety days from the time when the assistant or substitute decision-maker became aware of the existence of the contract, but in any event no more than two years from the date the contract was made.

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[573] See for example Guardianship and Management of Property Act 1991 (ACT) Section 71(3).

[574] Guardianship and Administration Act 1990 (WA) Section 82(2).

[575] Guardianship and Management of Property Act (ACT) 1991 Section 71.

2.2 *Making a will*

For a person with a mental or intellectual disability there are two important issues involved in relation to making a will. These issues are:

- testamentary capacity; and
- the adequacy of existing provisions for a person who lacks testamentary capacity.

2.2.1 *Testamentary capacity*

Testamentary capacity was discussed at page 10. Existing Queensland legislation providing for assisted or substituted decision-making does not change the present law.[576]

However, in some jurisdictions capacity to make a will is affected by an order for assisted or substituted decision-making. A person for whom an order has been made may be able to make a will only with the approval of the adjudicating body[577] or subject to such conditions as may be imposed by the adjudicating body.[578]

The introduction of a comprehensive scheme of legislation for assisted and substituted decision-making would raise the question of the relationship between an order made under that legislation and the testamentary capacity of the person for whom it was made.

There seems no reason why the making of an order should automatically displace testamentary capacity. The fact that a person with a mental or intellectual disability needs assistance to make decisions about personal care or some decisions about financial management does not necessarily mean that he or she lacks the degree of understanding required to effectively dispose of property by will. Whether or not a person with a mental or intellectual disability has a sufficient degree of understanding to make a valid will should be determined on the facts and circumstances of each individual case. Automatic displacement of testamentary capacity would, in effect, displace the principle of the presumption of competence.

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[576] See for example Public Trustee Act 1978 (Qld) Section 83(3); Mental Health Act (Qld) 1974 Fifth Schedule Clause 13(6).

[577] See for example Protection of Personal and Property Rights Act 1988 (NZ) Section 55.

[578] Mental Health Act 1977 (SA) Section 28aab.

The Commission is therefore of the tentative view that the existing rules about testamentary capacity should not be affected by legislation providing for assisted or substituted decision-making.

2.2.2 *What happens when a person lacks testamentary capacity?*

a. *The existing law.* Under the present law, if a person dies without having made a valid will his or her property is distributed according to a formula known as the intestacy rules.[579] Some family members who feel that they are not fairly treated by the intestacy rules may make an application for an increased share. This mechanism is called family provision.[580]

b. *A possible alternative.* A possible alternative approach for a person who lacks the capacity to make a will because of a mental or intellectual disability is a statutory will.

In some jurisdictions legislation provides that a substitute decision-maker may make a will on behalf of a person who lacks sufficient understanding to make his or her own will. These jurisdictions include the United Kingdom and New Zealand. Introduction of a statutory will-making scheme has also been recommended by the Law Reform Commission of New South Wales.[581]

In the United Kingdom, a judge may direct the receiver (manager) of a person's affairs to make a will which makes any provision which could have been made by the person concerned if he or she had had the necessary capacity.[582] This gives the receiver the same freedom to decide how to dispose of the person's property as the person would have had. In New Zealand also the Court may authorise the manager of the affairs of a person who is unable to make a valid will to execute a will on behalf of that person. However, before issuing the order, the Court consults with people who may be affected by the will and directs the manager as to the terms of the will.[583] An further option would be for the body which appoints the manager of a person's affairs to make the will itself rather than delegating the authority to the manager of the person's affairs.

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[579] Succession Act 1981 (Qld) Sections 34-39.

[580] Succession Act 1981 (Qld) Sections 40-44.

[581] New South Wales Law Reform Commission Report No 68, Wills for Persons Lacking Testamentary Capacity, February 1992.

[582] Mental Health Act 1983 (UK) Sections 96, 97.

[583] Protection of Personal and Property Rights Act 1988 (N.Z.) Section 55. See also Mental Health Act 1977-1986 (SA) Section 28aab

A statutory will takes effect on the death of the person on whose behalf it was made as though it had been made by that person while he or she was legally able to do so.

This may be preferable to a distribution of the person's assets according to the intestacy rules.

Arguments against

- A statutory will is inconsistent with the concept of a will, which is a reflection of the mind of the person who makes it. This is an area where the application of the principle of substituted judgment is inappropriate.

- It creates the potential for a person with a disability to be exploited if rivalries develop among family members or friends seeking to gain control over the disposal of the person's assets. The need for safeguards against exploitation could make the procedure more expensive.

- In some situations the person who is appointed to look after the affairs of a person with a mental or intellectual disability would be the person most likely to benefit if the person with the disability had been able to make his or her own will. For the same person to make the will and benefit under it could be seen to involve a conflict of interest.

- A statutory will may be made many years before the death of the person for whom it is made. If circumstances prevailing at the time of death are different from those prevailing when the will is made the will may have to be altered to reflect the change in circumstances.

- There is no need for the introduction of a statutory will. In Queensland there is at present a system of family provision.[584] This allows the spouse, children and other dependants (including a de facto spouse)[585] of a person who has died to apply to the Supreme Court[586] or to the District Court[587] for maintenance and support. The Court has power to determine what benefits the applicants should take, despite the intestacy rules or the provisions of any existing will. The Court takes into consideration the circumstances existing at the death and at the date of the hearing. A

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[584] Succession Act 1981 (Qld) Sections 40-44.

[585] Succession Act 1981 (Qld) Section 41.

[586] If the value of the estate exceeds $200,000.

[587] If the value of the estate does not exceed $200,000.

statutory will is therefore appropriate only in a jurisdiction where family provision law is not so well developed.

Arguments for

- The person may have previously had the necessary degree of understanding and may have made a valid will. However, if his or her circumstances change after the capacity to make a will has been lost, there is no mechanism for altering the will accordingly. Alternatively, a previous will may have been revoked by a subsequent marriage.[588] Frail elderly people, for example, may be particularly susceptible to fortune-hunters.

- The intestacy and family provision rules may not adequately reflect existing supportive relationships. They do not allow for anyone other than specified family members or a de facto spouse to share the estate of the deceased.

- At present a de facto spouse is entitled only to so much of the estate as would provide 'proper maintenance and support'. This may not recognise the extent of the de facto spouse's moral claim to the estate. Further, the need for a court application which may be defended by other family members could be a drain on the value of the estate.

- The body which appoints a person to make a will on behalf of a person with a mental or intellectual disability could give directions as to how the will should be made. This would avoid the potential conflict of interest which could arise if the substitute will-maker is someone who would be likely to benefit from the will if the person with a mental or intellectual disability had the capacity to make it.

3. IMMUNITY FROM BEING SUED

3.1 *The need for immunity*

The issues involved in any consideration of the need for assisted or substituted decision-making for a person with a mental or intellectual disability are sensitive and often emotive. It is essential that people who take part in the hearing of an application feel able to speak freely and without fear of retribution.

Because of the nature of the issues involved it is likely that not everyone will be happy with the outcome of the hearing of an application. This is particularly so

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[588] Succession Act 1981 (Qld) Section 17.

where there is a dispute about what is in the best interests of the person concerned. As a consequence, the body which determines whether or not an order should be granted should also be protected from liability for its decisions. A person who acts in accordance with an order of the adjudicating body should also be protected.

3.2 *Immunity of a court*

If the matter is dealt with by a court, the members of the court will be immune from being sued. The common law has long recognised the need for such a measure to protect the independence of the judiciary.[589] Protection for things said during the course of the hearing is also given by statute. This protection extends to people appearing before the court.[590]

3.3 *The position of a tribunal*

Similar principles should apply when the matter is dealt with by a tribunal. The common law has extended immunity to tribunals which have similar attributes to courts and to those who give evidence before such tribunals.[591] Factors which have been held to be relevant include that the tribunal is recognised by law, that people appearing before the tribunal have a right to legal representation, that there is provision for compelling witnesses to appear and that the tribunal's proceedings are held in public.[592]

In other Australian jurisdictions, statutory protection has been given to tribunals hearing applications for assisted or substituted decision-making for a person with a mental or intellectual disability,[593] to people taking part in such hearings[594] and

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589 See for example Anderson v Gorrie [1895] 1 QB 668.

590 Criminal Code Section 372.

591 See for example Trapp v Mackie [1979] 1 WLR 377.

592 But note that under the Social Security Act 1947 (Cwth) for example, the Social Security Appeals Tribunal is immune from suit (Section 232) although hearings are closed to the public (Section 194).

593 Mental Health Act 1977 (SA) Section 50; Guardianship and Administration Board Act 1986 (Vic) Section 70(1); Disability Services and Guardianship Act 1987 (NSW) Section 100; Guardianship and Administration Act 1990 (WA) Section 114; Guardianship and Management of Property Act 1991 (ACT) Section 65.

594 See note 593 above.

people acting in accordance with orders of the tribunals.[595]

Protection from legal action usually depends on the tribunal or the person in question having acted in good faith.

3.4 *Excess of jurisdiction*

Provided that a tribunal acts in good faith it should not be liable for an act which is outside the scope of its jurisdiction. In such a situation a sufficient remedy is provided by the existence of an appropriate review mechanism.[596]

3.5 *Conclusion*

The Commission considers it essential that, if a tribunal is established to deal with questions concerning assisted or substituted decision-making for people with a mental or intellectual disability, legislation should confer protection from personal liability on members of the tribunal, provided that they act in good faith. This immunity should also be extended to people giving evidence to the tribunal and people acting in accordance with orders of the tribunal.

4. INTERSTATE IMPLICATIONS

4.1 *The problem*

The population of Australia is becoming increasingly mobile. People move from State to State because of work or family commitments, or because they wish to relocate in their retirement. It is not unusual for a person who lives in one State to own property in another State.

Situations may occur where an assistant or substitute decision-maker is needed to act in one State or Territory on behalf of a person with a mental or intellectual disability who lives or owns property in another State or Territory. However, laws about assisted or substituted decision-making for a person with a mental or

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[595] See for example Mental Health Act 1977 (SA) Section 50; Guardianship and Administration Board Act 1986 (Vic) Sections 26(2), 55(5) and 70; Medical Treatment Act 1988 (Vic) Section 9; Disability Services and Guardianship Act 1987 (NSW) Sections 30, 35(3) and 100; Guardianship and Administration Act 1990 (WA) Section 114; Guardianship and Management of Property Act 1991 (ACT) Sections 65 and 69.

[596] But see Mental Health Act 1977 (SA) Section 50(1) which limits protection to an act or omission in good faith, without negligence and in the exercise of powers or functions or in the discharge of duties under the Act.

intellectual disability are not uniform throughout Australia. As a result, there may be difficulties involving the authority of an adjudicating body to make an order affecting a person or property in another State or Territory and the recognition of such an order in that State or Territory.

4.2 *Power to make an order*

4.2.1 *Personal orders*

At common law the power to make orders about assisted or substituted decision-making for the personal care of a person with a mental or intellectual disability was originally very wide. It extended to all British subjects, wherever they happened to live.[597] The concept of jurisdiction based on nationality has since been disputed and is unlikely to be applied in modern times.[598] Later, it was accepted that British courts had power to make orders for any person physically present within the jurisdiction.[599]

In Australia, some legislation conferring power to make such orders includes a jurisdictional limitation.[600] Other legislation[601] does not define the jurisdictional limitations of the power. It has been suggested that legislation concerning assisted or substituted decision-making about the personal welfare of a person with a mental or intellectual disability should be interpreted as applying only to a person who is physically within the jurisdiction.[602] However, the legislation may be interpreted to allow the adjudicating body to order a medical examination of a person living outside the jurisdiction for the purposes of determining whether it is necessary to make an order for the protection of property within the jurisdiction.[603]

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[597] See ex parte Southcote (1751) Amb 109, 112.

[598] E. Sykes and M. Pryles, Australian Private International Law, 3rd ed, 1991, 378.

[599] See for example In re Sottomaior (1874) Law Rep 9 Ch App 677, where the Court of Appeal ordered that a Portuguese citizen, who had been living in London for some years, could be returned to the custody and care of his wife in Portugal.

[600] But see Intellectually Disabled Citizens Act 1985 Section 4, which defines an assisted citizen as, inter alia, a person who is resident in Queensland, and Guardianship and Management of Property Act 1991 (ACT) Section 7.

[601] For example, the Fifth Schedule of the Mental Health Act.

[602] P. Nygh, Conflict of Laws in Australia, 5th ed, 1991, 429.

[603] See for example Re Magavalis [1983] 1 QdR 59.

4.2.2 *Property orders*

At common law, even though a person with a mental or intellectual disability was not physically within the jurisdiction, there was power to make an order for the management of property owned by that person within the jurisdiction.[604] Legislation conferring power to make orders about property management is generally interpreted in line with this common law principle.[605]

4.3 *Enforceability of orders*

Even where an adjudicating body in one State or Territory has power to make an order about assisted or substituted decision-making for a person with a mental or intellectual disability, there may be a problem having that order recognised or enforced in another State or Territory.

At common law, a decision about a person's mental competence would not be binding in another jurisdiction.[606] A person appointed in one State or Territory to manage the property of a person living in that State or Territory may be entitled to take control of movable property in another State or Territory if an order concerning the property had not already been made in that State or Territory.[607] However, a person appointed in one State or Territory would not be able to exercise control over immovable property in another State or Territory.[608]

There are some legislative provisions designed to overcome these difficulties. For example, under the *Mental Health Act* 1974 (Qld) an order made by a court of competent jurisdiction in another State may be registered in the Supreme Court of Queensland and recognised and enforced as though it had been made by the Supreme Court of Queensland.[609] Enforcement of an order made by a court

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[604] Re Scott (1874) 22 W.R. 748.

[605] See for example Re Magavalis [1983] 1 QdR 59, where an order was made in the Supreme Court of Queensland appointing a committee of the estate under the Mental Health Act 1974 (Qld) for property in Queensland of a person living in South Australia. But see also Re G [1966] NZLR 1028, where it was held that the Supreme Court of New Zealand could make an order for the management of New Zealand property to which a person living in the United Kingdom was entitled only if that person was subject to the jurisdiction of the Court by reason of domicile or residence.

[606] Ex parte Otto Lewis (1749) Ves Sen 299.

[607] Didisheim v London and Westminster Bank [1900] 2 Ch 15.

[608] Grimwood v Bartels (1877) 46 LJ Ch 788.

[609] Fifth Schedule Clause 8(3).

may be possible under the *Service and Execution of Process Act* 1901 (Cwth).[610] Section 118 of the Commonwealth Constitution also provides that 'full faith and credit' should be given throughout Australia to 'judicial proceedings in every State'. These provisions do not apply to orders of a tribunal.[611] However, proposed new legislation to replace the *Service and Execution of Process Act* includes orders of tribunals which exercise adjudicative functions.[612]

4.4 *Conclusion*

Much of the uncertainty and inconvenience caused by interstate implications of orders for assisted or substituted decision-making could be avoided by a scheme of reciprocal recognition of orders made in other Australian jurisdictions. The Commission therefore recommends that the introduction of comprehensive legislation in this area should include provision for a simple method of registering the appointment under similar legislation, of an assistant or substitute decision-maker in another State or Territory.[613]

5. ADMINISTRATIVE RESPONSIBILITY

In Queensland there are at present three Acts - the *Mental Health Act*, the *Public Trustee Act* and the *Intellectually Disabled Citizens Act* - which contain provisions about assisted and substituted decision-making for a person with a mental or intellectual disability. Each of these three Acts is administered by a different government department.[614]

This fragmentation results in inconsistency, lack of co-ordination and unnecessary duplication of resources.

If comprehensive legislation for assisted or substituted decision-making is introduced and an independent tribunal established to determine whether and what

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610 See for example Re Magavalis [1983] 1 QdR 59, where McPherson J considered that an order of the Supreme Court of Queensland for a medical examination of a person living in South Australia could be enforced under the Service and Execution of Process Act.

611 Nygh (supra note 602) suggests at page 148 that, on the basis of the interpretation given to identical words in Magnolia Petroleum Co v Hunt (1943) 320(US) 430, the 'full faith and credit' provisions of Section 118 could apply to proceedings of all bodies which have a duty to act judicially, including those of an administrative character.

612 Service and Execution of Process Bill 1992 (Cwth) Section 3.

613 See for example Guardianship and Management of Property Act 1991 (ACT) Section 12.

614 The departments are respectively the Department of Health, the Department of Justice and the Department of Family Services.

kind of assistance is needed by a person with a mental or intellectual disability, administrative responsibility for the management of such a tribunal should be in the hands of a single department. The responsibility of the department should be confined strictly to matters concerned with running the tribunal. In all other respects the tribunal must be completely independent.

The Commission is of the tentative view that, in the light of the welfare nature of the function of the tribunal, administrative responsibility for the conduct of the tribunal should be given to the Department of Family Services.