

The Law Reform Commission

Report No 52

GUARDIANSHIP AND MANAGEMENT OF PROPERTY

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Terms of reference

GUARDIANSHIP AND MANAGEMENT OF PROPERTY – AUSTRALIAN CAPITAL TERRITORY

I, LIONEL FROST BOWEN, Attorney-General of Australia, HAVING REGARD TO:

- (a) the needs of persons in the Australian Capital Territory who are incapable, wholly or in part, of managing their personal affairs or of managing their property; and
- (b) the inadequate state of the present law in the Australian Capital Territory providing for guardianship of such persons, or for management of their property,

in pursuance of section 6 of the *Law Reform Commission Act 1973* HEREBY REFER to the Law Reform Commission for inquiry and report on:

- (c) the desirability of new legislation and procedures in the Australian Capital Territory to provide for the guardianship of persons who are unable, wholly or in part to manage their personal affairs or to manage all or part of their property;
- (d) whether or not such legislation should apply only to persons whose inability arises from a particular cause or causes, such as disease, mental illness, intellectual impairment, brain damage, other physical injury or disability, senility or the effects of a drug or drugs; and
- (e) any related matter.

2. The Commission is to draft legislation and the appropriate explanatory memorandum to give effect to any proposals it makes on this matter.

3. The Commission is to report by 31 August 1989.

DATED 29 August 1988

Lionel Bowen
Attorney-General

Participants

The Commission

The Division of the Commission constituted under the Law Reform Commission Act 1973 for the purpose of this report comprised the following members of the Commission:

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Mr R West, Public Advocate for New South Wales, Sydney
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ENDNOTES

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- i. The recommendations, statements of opinion and conclusions in this report are the responsibility of the members of the Law Reform Commission. They do not necessarily represent the views of the consultants

1. Introduction

The reference and its background

1.1 The federal Attorney-General asked the Commission on the 29th August 1988 to inquire into the desirability of new law and procedures to provide for the guardianship and management of property of persons who are unable, wholly or in part, to manage their affairs or property. Much work had already been done on this topic by the Attorney-General's Department, including public consultation and the preparation of a draft Ordinance.ⁱ This draft was circulated to the Human Rights Commission and to others in the community concerned with guardianship and management of property of disabled people. With the move to self-government in the Australian Capital Territory, responsibility for this area of the law was transferred to the ACT Administration.

Publications and consultation

1.2 The Commission published a Discussion Paper in May 1989.ⁱⁱ The public response to this paper was very substantial. Public hearings were also conducted in the Australian Capital Territory. The Commission gratefully acknowledges the assistance of a number of people and organisations in giving interviews and making submissions. Those who have made formal submissions, written or oral, to the Commission are listed in Appendix B. A number of people in the Australian Capital Territory made valuable comments on the draft Bill. They include Mr Ron Cahill, Chief Stipendiary Magistrate, Mr Len Sorbello of the ACT Administration and Mr Don Dunkley, Acting Public Trustee. Finally, the Commission acknowledges with appreciation the contribution of the honorary consultants for the Reference, whose names are listed at the beginning of this report. The consultants attended several all-day meetings in order to discuss the Commission's proposals and draft documents and provided other detailed comments and assistance. Their expert insights were of great value.

Definitions

The problem of language

1.3 There is a problem of language when dealing with people with disabilities. Some expressions which used to be common are no longer used by those working in the field because they are regarded as having connotations which tend to lower the dignity of people with disabilities. The problem is complicated by the fact that the medical profession has adopted some words as having reasonably precise meanings but the same words are used differently by non-medical people or are regarded as inappropriate. The Commission has, so far as possible, adopted usages which are current among people who are disabled and those who work with them.

Incapacity, disability etc.

1.4 In this report a number of expressions — 'incapacity', 'incapable', 'disabled' — are used to describe both the notion of legal incapacity and a person's physical or mental state. Legal incapacity means that, in law, a person is not competent to enter into legal transactions, such as making a

contract, executing a will, or giving a legally-recognised consent, for example, to an operation. Legal incapacity may be an incident of a person's status (such as minority or bankruptcy) as well as lack of mental capacity. This report is concerned with the latter kind of legal incapacity: that due to disablement in one form or another.

Guardianship and management

1.5 **Management of property.** If a person is incapacitated in such a way that legally he or she cannot enter into transactions, it may be necessary to appoint someone to manage his or her property. Such a person could be called a manager or an attorney. The incapable person may then lose the legal right to make decisions about such property, though the person might still be able to express a view which could be acted upon by the manager or attorney.

1.6 **Guardianship.** If a person is incapacitated in such a way that he or she cannot make day-to-day life decisions, apart from management of property, it may be necessary to appoint a guardian. If a guardian is appointed, the incapable person's life is, to the extent of the guardianship, 'taken over' by another. A plenary guardian under existing law has the same powers as a parent over a child. It is possible to appoint a guardian with limited powers, for example, to give consent to a particular medical procedure and no more. This is called limited guardianship, to distinguish it from full or plenary guardianship.

People who are a danger to the community

1.7 The terms of reference cover the situation where a person is a danger to himself or herself but do not cover the situation where a person is a danger to the community. Those who work with people with disabilities sometimes find that there is a need to do something to protect the public from a particular individual. A common example is an old person whose ability to drive is questionable. Public consultation confirmed the Commission's view set out in the Discussion Paper that guardianship and management of property law should not have protection of the public as one of its objects.

Enduring powers of attorney

Earlier report

1.8 In 1988 the Commission published a report *Community Law Reform for the Australian Capital Territory: Third Report: Enduring Powers of Attorney* (ALRC 47). It recommended that a person who feared impending incapacity, or who wished to provide for possible future incapacity, should be able to execute a power of attorney appointing another person to act on his or her behalf during the period of incapacity. The recommendations of this report were implemented in the Powers of Attorney (Amendment) Act 1989 (ACT). Such a power of attorney – an enduring power of attorney – operates, contrary to the pre-existing law, after the donor of the power becomes incapacitated. Under the Act a power of attorney can be used to appoint a person with either management of property powers, guardianship powers or both. In some cases, where a person who has appointed an attorney becomes incapacitated, there may still be a need for a guardian or manager to be appointed because the attorney has not been given sufficient guardianship or management powers. The report on

enduring powers of attorney foreshadowed this reference and drew attention to the close relationship between enduring powers of attorney on the one hand and guardianship and management of property on the other. An enduring power of attorney allows a person, while still capable, to choose whom to appoint to manage his or her future needs in the event of incapacity and also allows the donor of the power to decide how extensive or limited the attorney's powers are to be. The appointment of a guardian or property manager by a court or Tribunal achieves the same purpose, namely, the appointment of a substitute decision-maker but with the important difference that the choice of person and the limits of that person's powers are determined by the court or Tribunal and not by the person in respect of whom an order is made.

Making the law consistent

1.9 So far as possible, the law relating to enduring powers of attorney and to guardianship and management of property should be complementary. In areas where they overlap, for example, the duty to act honestly and in the interests of the person subject to the order,ⁱⁱⁱ the law should be the same. On the other hand, it is useful to retain the distinction in language referring to the two types of substitute decision maker, the attorney and the guardian or manager. The term 'attorney' is widely understood as implying appointment, not by a court, but by the person on whose behalf the attorney acts. In contrast, 'guardian' and 'manager' are well understood as covering the cases where a court or Tribunal makes an appointment over the person. This report uses 'guardian' or 'manager' in these cases. It has, so far as possible, sought to assimilate the law governing guardians and managers of property to the law governing attorneys under an enduring power of attorney.

Other matters

The Victorian model

1.10 In making its final recommendation, the Commission has been greatly assisted by referring to the law and practice^{iv} in Victoria, though the Commission has by no means restricted itself to an examination of that jurisdiction. The Victorian model is widely regarded, both nationally and internationally as one which works very well and which gives due weight to the basic principles discussed below.^v

Plain English

1.11 The aim in preparing the Draft Act in Appendix A is to make the relevant principles of law clear and comprehensible to as wide an audience as possible. Accordingly, the Commission has drafted the Act in plain English.

ENDNOTES

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- i. Draft Guardianship and Management of Property Ordinance 1985 (ACT).
 - ii. ALRC DP 39.
 - iii. ALRC 47 para 33-6.
 - iv. Guardianship and Administration Board Act 1986 (Vic); *Annual Report 1987-8*.

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- v. The Northern Territory has substantially adopted the Victorian model with the important exception that the scheme is administered by a court: Adult Guardianship Act 1988 (NT). The New South Wales scheme, which is also based on a Tribunal model, has been operating only since August 1989. It is too early to assess its effectiveness at this stage

2. Basic principles

The two themes of guardianship and management of property

2.1 There are two broad themes in guardianship and management of property laws. The first is providing appropriate protection for those unable to look after themselves. This may entail either the care and protection of the person from neglect or abuse, or protection of the individual's property from dissipation or exploitation. The other theme is preserving and, where possible, enhancing the personal autonomy of such persons. Since these themes will conflict at times, a balance must be struck between them. Ensuring protection, on the one hand, will generally involve the appointment of a guardian or manager to make day to day decisions on behalf of the person. This will inevitably involve some loss of autonomy on the part of the person subject to the order. Enhancing personal autonomy, on the other hand, requires that the Tribunal or court, and the guardian and manager are guided in their decision-making by certain principles which ensure that the person subject to the order retains as much freedom of choice and action as his or her condition allows. These principles should operate at three distinct stages of decision-making:

deciding whether to intervene and make a guardianship or management order
determining the type of guardianship or management order to be made
the guardian or manager administering the order.

The principles

Individual autonomy versus paternalism

2.2 Article 1 of the United Nations Declaration on the Rights of Mentally Retarded Persons provides that

the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

Article 5 provides that

the mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.

The United Nations Declaration on the Rights of Disabled Persons provides for disabled persons to have the inherent right to respect for their human dignity (article 3), to have the same civil and political rights as other human beings (article 4) and to be entitled to the measures designed to enable them to become as self-reliant as possible (article 5). A guardianship or management of property regime takes away a person's rights to manage his or her affairs and life generally. This erosion of rights should be minimised as much as possible. Individual autonomy should be maximised as much as possible by the following approaches to guardianship and management of property:

presumption of competence

least restrictive intervention
encouragement of self-management
community integration
substituted judgment.

The principles discussed

2.3 ***Presumption of competence.*** A person should be presumed to be legally competent unless shown to be otherwise.ⁱ It should not be assumed that incompetence in one area of activity necessarily means incompetence in other areas. This principle applies only in relation to the first two stages outlined above: the Tribunal's decisions of whether to grant an order and determining the scope of the order. It is not relevant to the third stage, that is, the administration of the order by the guardian or manager. The fact that a person is subject to an order indicates that the Tribunal has already found that he or she is not competent in certain respects. The guardian or manager can act on the basis of that decision when administering the order.

2.4 ***Least restrictive intervention.*** If a decision is made to appoint a guardian or a manager, the powers of the appointed person should be limited to performing the function or functions which the person with a disability is incapable of performing. If there is a choice between more and less intrusive solutions, the less intrusive should be adopted.ⁱⁱ In some cases, the least restrictive alternative may be not to appoint a guardian or manager where informal arrangements are quite sufficient to deal with any problems or decisions which have to be made. The least restrictive approach also requires that a guardianship or management of property order should be reviewed at reasonably frequent intervals.ⁱⁱⁱ

2.5 ***Encouragement of self-management.*** Individual autonomy is enhanced if the disabled person is allowed and encouraged to look after himself or herself.

2.6 ***Community integration.*** The disabled person should be encouraged to live in the general community and to participate in activities enjoyed by the community at large.

2.7 ***Substituted judgment.*** A person appointed as a manager or guardian should make decisions on behalf of the disabled person on the basis of 'substituted judgment'. That is, he or she should make the decision which the disabled person would have made if not affected by the condition which gives rise to the need for a guardianship or management order. This principle allows for individual preferences, even to the extent that what may be regarded by some people as idiosyncratic or eccentric points of view are respected. Substituted judgment is closely linked to the least restrictive intervention approach in that the substitute decision maker does not impose his or her ideas on the disabled person.

Support for, and implementation of, the principles – proposed s 2

2.8 The Discussion Paper called for comment on these principles. There was widespread support for the principles themselves and for their inclusion in the legislation. They are the principles which substantially guide the Victorian, South Australian and New South Wales Guardianship Boards, the Northern Territory Local Court and the Family Court (NZ). The Commission recommends that the principles should be stated in the legislation.

ENDNOTES

- i. See eg Protection of Personal and Property Rights Act 1988 (NZ) s 55.
- ii. See eg Protection of Personal and Property Rights Act 1988 (NZ) s 8(a); Guardianship and Administration Board Act 1986 (Vic) s 22(2), 46(2). The same approach has been adopted in New South Wales, Queensland, Northern Territory and South Australia.
- iii. See below para 4.66

3. The present position

A growing need

The need

3.1 Approximately 80 people a year in the Australian Capital Territory need management or guardianship orders or both. This estimate is made by Ms Robin Creyke, a consultant to the Commission, and is an extrapolation based on the number of applications made to the South Australian Guardianship Board in 1986-7. If the number of applications made to the Victorian Guardianship and Administration Board in 1987-8 were used as a basis of calculation, the estimate would be higher. Furthermore, the estimate of 80 is based on static figures. Net migration into the Australian Capital Territory has not been taken into account. Finally, the current estimated figure will undoubtedly rise because a large proportion of people in need of such orders are those who suffer from the effects of ageing. Although the Australian Capital Territory does not at present conform to the national average in the number of its citizens over 65,ⁱ by the year 2011 it will have caught up. The Territory has the fastest growing proportion of old people. A further substantial factor, which is not included in these estimates based on initial applications, is the burden of reviewing the orders,ⁱⁱ which must be carried out regularly by the proposed Tribunal. It is difficult enough to estimate what the demand will be on an annual basis. It is more difficult to estimate what the 'backlog' of cases is. There is, up to now, a large number, possibly 1500, of people in respect of whom an order would be sought if an accessible Tribunal administering new laws were available.

The need not met

3.2 Although there are no procedural or substantive bars to such people obtaining an order from the Supreme Court under the present lawⁱⁱⁱ in practice there are serious problems of accessibility, not the least of which is expense. It costs between \$2000 and \$4000 to obtain an uncontested order from the Supreme Court. For a contested case the figure would be higher. The filing fee alone is \$300, although this can be waived. Accordingly, there have been very few applications made^{iv} and it is possible that many people have been deterred from making applications by the cost involved. Another practical bar is that many people are concerned that proceedings will be formal and intimidating in the Supreme Court.^v The stigma of a formal finding of incapacity by a Court which is required before a guardian or manager is appointed inhibits people from using the present law. Further reluctance to use the procedure is generated by the very name of the relevant legislation – the Lunacy Act. The Public Trustee has found that many people, when told that their problem requires an application under the Lunacy Act, immediately decide to take no further action.

The present law: Lunacy Act 1898 (NSW:ACT)

The Act

3.3 The need for guardianship orders is not being met adequately in the ACT under the present law. Apart from the barriers outlined above, this is partly due to deficiencies in the current

legislation. If a person in the Australian Capital Territory is incapable of managing his or her affairs because of, for example, advancing senility, brain damage or mental illness and it is necessary to appoint either a guardian or a person to manage his or her property, an application must be made to the Supreme Court under the Lunacy Act 1898 (NSW:ACT). The Attorney-General's Department, in its investigations, and the Commission, in its discussions with community groups, social workers, lawyers, doctors and others involved with disabled people, have found widespread dissatisfaction with the present law. It is the law of by gone age; its name alone is offensive to modern thinking and even its language is old fashioned.^{vi}

Problems with the present law

3.4 ***Basic principles not applied.*** The Lunacy Act does not require the Supreme Court, when making orders, to apply the principles recommended in chapter 2.^{vii} In particular the Court is not directed to follow the least restrictive alternative. Only plenary orders can be made, that is, the Court has no power to make a limited guardianship or management of property order. In general, the Act contains no philosophy of management or guardianship. It is purely an enabling law.

3.5 ***Limited coverage.*** Some groups of disabled people who may need guardianship or management of property orders cannot obtain them. In relation to guardianship orders, the Act does not cater for people suffering from senile dementia or drug or alcohol related diseases.^{viii}

3.6 ***Focus on property.*** A further defect is that the Act's principal focus is on the protection of property. Very few provisions deal with personal matters.

3.7 ***No periodic review of orders.*** Whilst it is possible to appeal against an order made under the Act,^{ix} there is no provision for periodic review of orders. Article 7 of the Declaration on the Rights of Mentally Retarded Persons provides that the procedure for restricting or denying rights because of the person's incapacity

must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

Periodic review is an important means of implementing the least restrictive alternative principle. An order should remain in force only so long as it is needed and should be capable of being modified as necessary. Under the Lunacy Act an order remains in force, usually for an indeterminate time, and will only cease to operate if an application is made to have the order revoked.^x

3.8 ***No guiding standards.*** Although the general law imposes standards of accountability on those appointed to manage another's property the Act imposes no standards of this sort. In relation to guardianship, both the Act and the general law are silent. In particular, there is no requirement that a guardian is bound by the substituted judgment principle described above.

ENDNOTES

i. The proportion is 5.3%, the national average 11%.

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- ii. See para 4.64–4.65.
 - iii. See below para 3.3.
 - iv. Probably no more than 20 since 1927.
 - v. eg Marr *Submission* 24 July 1989.
 - vi. eg, ‘committee’ (with the accent on the final syllable) means a person appointed by the Court to manage an insane person’s property and money.
 - vii. Para 2.8.
 - viii. In NSW decisions, the Act has been interpreted to exclude from its coverage the following types of cases: senile dementia (*RAP v AEP* [1982] 2 NSWLR 508); anorexia nervosa and substance abuse (*JAH v Medical Superintendent of Rozelle Hospital* [1986] ACLD 295); (*CN v Medical Superintendent of Rozelle Hospital* [1986] ACLD 294); mild forms of intellectual disability (*RH v CAH* [1984] 1 NSWLR 694, 696).
 - ix. Lunacy Act 1898 (NSW:ACT) s 114.
 - x. Known as a superseding order: Lunacy Act 1898 (NSW:ACT) s 104

4. A new legal order

New laws

New laws needed

4.1 It is clear that new laws and procedures are needed to provide a proper environment for making guardianship and management of property orders for the citizens of the Australian Capital Territory. New laws will not only serve this purpose but also will help to educate the public about the problems in this areas and the possible solutions. Experience in Victoria has shown that public awareness of problems arising from disablement has increased since the passing of the Guardianship and Administration Board Act 1986 (Vic). No-one has said to the Commission that the existing law and practice are satisfactory. Many have expressed dissatisfaction. What follows is a discussion of the matters to be considered in devising new laws and procedures. The proposals made apply the principles referred to in chapter 2: least restrictive intervention, encouraging self-management, community integration and substituted judgment.

Tribunal

4.2 Throughout this chapter, it will be assumed that the body which makes guardianship or management of property orders should be a Tribunal and not a court. Whether a court or Tribunal should be the appropriate body is discussed fully in paragraphs 5.1–5.10, where it is concluded that a Tribunal is the preferable body to make these orders.

Jurisdiction and recognition of orders – proposed s 4(1)(a), s 5(1)(a), s 5(2) and s 6

4.3 A threshold question to determine is the jurisdiction of the Tribunal. The position in relation to residents of the Australian Capital Territory presents no problems: the Tribunal should have jurisdiction to appoint a guardian or manager for any resident in need of an order. It should be able to make an order which can apply to property in any other State or Territory which will recognise the order for that purpose. However, the jurisdiction in relation to non-residents must also be clarified. This is an issue which may be of great practical importance in relation to a Tribunal situated in the ACT because of the Territory's proximity to New South Wales. In all probability, some residents of New South Wales who live near the ACT border will want guardians who happen to be resident in the ACT, or will own property in the Territory and be in need of a management order over the property. Ideally, non-residents should be subject to a guardianship or management order granted in the State or Territory of their own residence, but such orders will have to be enforced in the ACT if they are to be effective. Accordingly, a formal mechanism to allow for recognition will be required. The Commission recommends, therefore, that these orders should be able to be registered in the ACT by the Tribunal and that upon registration the appointment should be recognised as if it had been made by the Tribunal. However, in practice such recognition of a manager of property may not always be possible for a number of reasons. First, it may be impracticable for a manager to be appointed in the place where the person resides for reasons such as expense or distance. Secondly, a court or Tribunal of another State or Territory may decline to extend its order to property in the ACT on jurisdictional

grounds. Thirdly, there may be a valid management order in another jurisdiction but for some reason it may not be able to be registered in the Australian Capital Territory. In these cases, it should be possible for the ACT Tribunal itself to appoint a manager for the ACT property. Where possible, in cases like these, the Tribunal should endeavour to minimise the potential for conflict by choosing as manager the same person as appointed by the other court or Tribunal.

Guardianship – criteria for intervention

Two models

4.4 In the Discussion Paper a distinction was drawn between two types of intervention – the ‘substitute decision making’ model and the ‘care’ model.

The substitute decision making model

4.5 If the Tribunal is to make an order, it has already been seen that this constitutes an intervention in the person’s life which erodes his or her autonomy. What should be the basis for this intervention? The first model only deals with the situation where the person cannot, because of a disability, legally make important decisions. It would require the Tribunal to be satisfied that the person in question

needs to make a decision of importance to his or her welfare or health and lacks legal capacity to make that decision.

In such a case the appointed guardian would have the power to make these decisions, but would not provide care or protection. It would be left to welfare agencies, charitable organisations, citizens advocates, the police and families to provide informal assistance of this kind.

The care model

4.6 A care model for intervention would require the Tribunal to be satisfied that the person in question either

needs to make a decision of importance to his or her welfare or health other than one concerning property and lacks legal capacity to make that decision or is unable to manage his or her day to day life and his or her needs cannot be met except by the appointment of a guardian.

The types of needs of the person which are established will determine the kind and scope of the order that is made by the Tribunal.

Policy choice

4.7 The question raised in the Discussion Paper was whether the proposed legislation should adopt the narrower substitute decision making model or the wider (and potentially more intrusive) care model. If the narrower model were adopted, the Tribunal would not have the power to

appoint a guardian simply to care for a person. If the broader model were adopted, on the other hand, the Tribunal would have a discretion to appoint a guardian – a discretion guided by the least restrictive alternative principle. In short, in relation to the issue of initial intervention, should the need to intervene as little as possible be a matter for legislative prescription or Tribunal discretion? The Commission's recommendation, guided by submissions made to it which were overwhelmingly in favour of the care model, is to adopt the broader model because it provides greater flexibility in decision making for the Tribunal. The ability to appoint a carer is particularly needed in cases where the relatives of the person are in dispute about who should look after him or her. In choosing the broader model, the Commission is mindful of the fact that this is a more intrusive regime but stresses the point that a Tribunal which is properly guided by the least restrictive alternative principle will very often decide not to appoint a carer if present arrangements are working satisfactorily. This is borne out by the experience of the Victorian Guardianship and Administration Board whose cautious approach in this regard has been upheld by the Victorian Administrative Appeals Tribunal.ⁱ

Incapacity?

The issue

4.8 The terms of reference specifically raise the question: should the Tribunal have to be satisfied that the lack of capacity or inability to manage day-to-day life arises because of a specific mental or physical incapacity or condition? The 1985 draft legislation prepared by the Attorney-General's Department provided that the person must be shown to be incapable of managing his or her affairs because of

mental impairment
age or
the effect of a drug.

The Victorian legislation is similar: it requires that the person be suffering from a 'disability',ⁱⁱ which means

intellectual impairment, mental illness, brain damage, physical disability or senility.ⁱⁱⁱ

Other jurisdictions vary. In New Zealand it is not necessary to show a defined incapacity.^{iv} In New South Wales 'need' is the only criterion for intervention^v but the Northern Territory, Queensland, South Australian and Tasmanian Acts require both need and defined incapacity.^{vi}

The arguments

4.9 Apart from the obvious point that the Tribunal is only dealing with incapacity due to disability (as opposed to bankruptcy or minority), the principal argument in favour of requiring a defined incapacity is that it provides an additional safeguard, so that allegations of incompetence or eccentric or anti-social behaviour would not be sufficient justification for making an order. In cases where the Tribunal has to be satisfied that the person lacks legal capacity, a requirement of defined incapacity may make the task of proving legal incapacity clearer. However, this will not be so in every case because it is quite possible for a person to be suffering from a defined physical or mental

incapacity or condition and yet not be legally incapacitated. In relation to the care criterion for intervention, a requirement that the Tribunal be satisfied that there is a specific condition of incapacity ensures that the Tribunal focuses on this issue. It gives the Tribunal a definite 'gateway' when it is deciding whether or not a person is unable to manage his or her day to day life.

Recommendation – proposed s 4(1)(a), s 5(1)(a), s 7

4.10 The Commission's view is that the legislation should require the Tribunal to be satisfied that a particular condition is the reason for this incapacity or inability to manage. This needs to be framed sufficiently widely to include both those suffering from well established mental or psychological conditions, such as manic depression or schizophrenia, and those suffering from conditions which do not appear to fall neatly within accepted diagnostic definitions. At the same time, it is essential to ensure that people who are merely eccentric, or in some way different from the norm, should not be regarded as suffering from an incapacity that gives rise to the need for a guardianship order. The Commission recommends that the defined incapacity should refer to a physical, mental, psychological or intellectual condition, but a person should not be considered to have such a condition merely because he or she:

- is eccentric
- does or does not express a particular political or religious opinion
- is of a particular sexual orientation or expresses a particular sexual preference
- engages or has engaged in illegal or immoral conduct; or
- takes or has taken drugs, including alcohol (but the effects of a drug may be taken into account).

Need for care – a subjective or objective judgment?

4.11 ***The issue.*** The criterion of need for care contains a strong element of subjective judgment. For example, how is it possible to determine whether or not someone should be labelled 'unable' to manage his or her day-to-day life? Without some objective criteria, Tribunal members would have to decide for themselves, albeit guided by the basic principles set out in the legislation. Is it possible to inject some objective criteria, apart from those basic principles, for the guidance of Tribunal members? If it were possible, not only would the members be better guided by the legislation but also an appeal court would be able to determine more easily whether the Tribunal had made a 'correct' decision. The law's traditional response to this kind of problem has been to apply a criterion of reasonableness. The Tribunal would have to decide whether a particular person was reasonably capable of managing his or her day-to-day life. Inherent in such a question is a judgment about whether the person is making reasonable decisions. But this does not eliminate the subjective judgment of the Tribunal members. The next step, in attempting to inject objective criteria, is to spell out more specifically what should guide the Tribunal. For example, the legislation could state that a person should be deemed to be unable to manage his or her day to day life if his or her health or welfare are likely to be at risk if the person is left unaided.

4.12 ***Recommendation – proposed s 4(1).*** The Commission's view is that objective criteria should be provided for the guidance of Tribunal members so far as possible. The requirement of defined incapacity, discussed above, provides one objective criterion. So too does a requirement that the person's health or welfare will be substantially at risk. If this risk arises because the person is

unable to make reasonable judgements relating to health or welfare, or do any thing necessary for his or her health or welfare then the Tribunal should be able to make an order.

Medical and other examinations – proposed s 40

4.13 The 1985 draft Ordinance provided for medical examinations for the purpose of assisting the Court to decide whether an order should be made.^{vii} Such medical examinations were not to be mandatory. Whether a person needs a guardianship or management order is something which the proposed Tribunal should decide aided by the best evidence available. The Commission endorses the approach taken in the 1985 draft Ordinance which allows, but does not compel, the determining body to make use of medical examinations. However, the wording of the proposed legislation should make it clear that evidence from health professionals, other than medical practitioners, is also acceptable. An authority to carry out a medical examination will have the same effect as a valid consent for anything done in the course of the examination.

Management of property

Criteria for intervention

4.15 A somewhat similar dilemma arises in relation to the criteria for intervention to make management orders: should intervention be based on lack of legal capacity or on the broader need for a competent manager? In making comparisons between the criteria for intervention in relation to guardianship, on the one hand, and management, on the other hand, it is instructive to compare the cases. Assume that a person is not legally incapacitated, yet is unable to maintain reasonable standards of day-to-day self care such that his or her health or welfare are substantially in danger. It has been recommended that intervention is justified. By comparison, if a legally competent person is managing his or her property or money very badly so that it is being dissipated, is intervention justified? It could be said that it is in order to preserve assets both for the person's benefit and for his or her dependents. Yet, if the only evidence of the need for intervention is the dissipation of property, how can the Tribunal distinguish between a case where intervention is justified and where it is not, given that many people in the community waste their assets?

Appointment of managers – proposed s 5

4.16 A narrower test is recommended in relation to managers because it is desirable that where people have legal capacity they should be entitled to manage and control their own money or property. To place legally competent people under management orders would contradict the principle of encouraging personal autonomy. Specifically, it would be in opposition to the view that the lives of disabled people should be interfered with to the least extent possible and that they should be encouraged to look after themselves where practicable. For these reasons, the Commission recommends that management orders be made only when a person is, because of some physical, mental, psychological or intellectual condition, legally incompetent to enter into transactions and

it is likely that such transactions may need to be entered into, or
it is necessary or desirable to preserve the person's property by preventing attempted
dispositions of the property.

Who may apply? – proposed s 10

4.17 The 1985 draft legislation listed the following people who could initiate guardianship proceedings:

- the spouse of the person
- a child, parent, brother or sister of the person
- the Public Trustee
- the Director of Mental Health
- any other person whom the Court considers, in the circumstances, should be permitted to apply.

A slightly different list for management of property in the 1985 draft legislation added the person in respect of whom the order was sought and excluded the Director of Mental Health. The list should be the same for both guardianship and management of property proceedings. It is important that the person in respect of whom an order is sought should be able to initiate either type of proceeding and that anyone who has an interest in the welfare of the person should also have the right to apply. Accordingly there should be no restriction on the persons who can initiate an application for the appointment of a guardian or manager. Ultimately, a list of the type set out above allows any person to initiate proceedings, provided the Tribunal agrees. The Victorian Act has the virtue of simplicity: 'Any person may apply to the Board. . .'.^{viii} No problems appear to have been encountered in Victoria as a consequence of this wide test. The Commission regards it as preferable to a long list which includes 'any other person the Tribunal permits' and proposes that any person including the Public Advocate, the Director of Mental Health and the Public Trustee should be entitled to make an application.

Who should be given notice? – proposed s 35

4.18 In the Discussion Paper, the Commission suggested that notice of pending guardianship or management proceedings should be given to as wide a group as possible of relatives and friends of the incapacitated person. Notice provides an additional safeguard against unscrupulous or dishonest persons who may try to obtain an order. As this view appears to have won widespread acceptance, the Commission endorses the list proposed in the Discussion Paper:

- the person who is to be the subject of an order
- the person's spouse
- the person's parents
- the person's brothers and sisters
- each child of the person who is of or over the age of 18 years
- if a guardian has been appointed for a person – the guardian
- if a manager has been appointed for a person – the manager
- the Public Advocate
- if the matter relates to property – the Public Trustee
- any other person the Tribunal directs.

Who is entitled to appear at the inquiry? – proposed s 37

4.19 Those who have the right to notice should also have a right to participate in the inquiry. Thus all except the last category of person in the list above should have a right to appear at the inquiry. On the other hand, where a person receives notice solely because the Tribunal has so directed, there should be no automatic right of appearance. The Tribunal must have the flexibility to give notice to a person who may have a worthwhile contribution to make, but whose value to the proceedings is unknown until the Tribunal has an opportunity to question him or her at the hearing. It may be that some who receive notice are unable to assist the inquiry in any way, but the Tribunal is not in a position to know this in advance. Accordingly, it is preferable that such persons may be given notice, but should appear or adduce evidence only by leave of the Tribunal, rather than as of right. Other persons should be able to appear by leave of the Tribunal.

Choice of guardian or manager

Person affected should be consulted – proposed s 12(4)(a)

4.20 The basic principles outlined in chapter 2 make it clear that, in determining who should be appointed as guardian or manager, the person most affected by the choice should, so far as possible, have a say. Thus the Tribunal should consult the incapacitated person.^{ix} This approach was not followed in the 1985 draft legislation. The Commission's recommendation is that the incapacitated person should be so consulted to the extent that his or her capacities permit.

Persons eligible

4.21 *List of persons.* The 1985 draft legislation lists the following as eligible to be appointed as a manager or a guardian:^x

- the person's spouse
- the person's child, parent, brother or sister
- the Public Trustee
- any other person whom the Court considers, in the circumstances, should be so appointed.

4.22 *The Public Advocate.* In jurisdictions where there is a Public Advocate, he or she is eligible to be appointed and, in practice, is very frequently appointed, particularly as an interim guardian. The question whether there should be a Public Advocate in the Australian Capital Territory is discussed in Chapter 6 where the appointment of a Public Advocate is recommended. If there is to be such an office, it is essential that the Public Advocate be included in the list.

4.23 *Eligibility – proposed s 11.* Since such a wide group of people is to be eligible, it is simpler if the legislation states only that the Public Advocate or a natural person, may be appointed as a guardian and that the Public Advocate, the Public Trustee, a trustee company or a natural person may be appointed as a manager. The 1985 draft Ordinance went on to provide that two or more persons can be appointed as joint managers or guardians. The Commission endorses this approach.

4.24 *Trustee companies as managers.* No specific mention is made in the 1985 draft Ordinance of trustee companies which commonly act as managers of property. The list of eligible

managers includes 'any other person' which would cover the appointment of a body corporate. It would be preferable to spell out more specifically that a trustee company may be appointed as a manager because of the well-established role of trustee companies in management of property.

Suitability

4.25 *Suitability requirements – proposed s 12(4)*. The 1985 draft Ordinance did not deal specifically with the question of suitability in choosing a guardian or manager. The Tribunal should be satisfied, for example, that the guardian or manager will observe the principle that the person's autonomy is to be preserved as much as possible. In determining whether it is satisfied, the Tribunal should take into account, in addition to the basic principles outlined in chapter 2, at least those factors outlined in the Discussion Paper.

- the represented person's views and wishes
- the desirability of preserving existing family relationships
- whether the two persons are compatible
- whether the proposed guardian or manager resides in the Territory
- whether the proposed guardian or manager will be available and accessible to the other person
- the nature of the duties and functions to be performed and the powers to be exercised under the order and whether the proposed guardian or manager is competent to perform and exercise them.

4.26 *Consent – proposed s 12(1)*. A person should not be appointed as guardian or manager, unless he or she has consented to the appointment in writing.

4.27 *Criminal convictions and bankruptcy – proposed s 12(2)*. The 1985 draft Ordinance provides that the person to be appointed (apart from the Public Trustee) must lodge a document declaring that he or she is not a bankrupt and has not been convicted of an offence involving fraud or dishonesty or an offence punishable by 12 months or more imprisonment. Such an approach is too absolute. Conviction and bankruptcy do not necessarily mean that a person is unsuitable; the court or Tribunal must assess, in the light of the information, whether or not the person is suitable. Furthermore, classifying by reference to 12 months or more imprisonment is arbitrary. Rather, any inquiry should focus on offences involving violence, fraud or dishonesty, since these crimes, of their nature, are likely to be relevant in assessing a potential guardian or manager's suitability. There should also be a requirement that the person state under oath or affirmation, in relevant cases, whether or not he or she has been refused appointment as a guardian or manager or removed from office in either capacity.

4.28 *Institutional supervisors*. There is a case for specifically excluding from acting as a guardian or manager a person who acts in a supervisory role in an institution in which the person in respect of whom an order is sought resides.^{xi} However scrupulous or honest the manager or supervisor may be, such persons may be tainted with the appearance of a continuing conflict of interests in managing the person's property. Furthermore, if the person should be in dispute with the supervisor, an independent guardian may be needed to act as advocate in the dispute. On the other hand, in relation to management of small amounts of property or money, it is frequently the case that an institutional supervisor acts as manager. This happens, for example, with pension payments. Such

arrangements are obviously convenient and should not be ruled out by legislation. Institutional supervisors should not be automatically excluded as unsuitable, but their role as such should be carefully considered by the Tribunal.

4.29 *Conflict of interests – proposed s 12(4)(g) and s 12(5).* An alternative approach to this kind of problem, to be found in the Victorian and Northern Territory legislation, is to provide that a person who has or may have a conflict of interests cannot be appointed.^{xii} The Victorian legislation also provides that a parent or nearest relative of the person must not necessarily be regarded as being in a conflict of interests.^{xiii} This should be compared with the New South Wales legislation which directs that a conflict of interests or potential conflict is a factor which must be taken into account in deciding who should be appointed, but it is not conclusive.^{xiv} This more general approach is preferable and allows more flexibility to the Tribunal appointing the guardian or manager. A potential conflict of interest must very often be present between the person and any person who is suitable to be appointed as a guardian or manager because the latter is necessarily someone who is close to the person in respect of whom an order is sought. An example is provided by a son who is looking after his ageing mother's affairs when that son will benefit under her will when she dies. Again, a hard and fast exclusion seems undesirable. In order to exclude a potential guardian or manager, the Tribunal would need to be satisfied that the proposed guardian's or manager's interests and duties are likely to conflict with the other person's interests to the detriment of those interests.

Alternative and replacement guardians and managers – proposed s 8(1) and 17(3)

4.30 One problem that arises, when a parent is made guardian or manager of an adult incapacitated son or daughter is the parent's concern over making arrangements for the taking over of guardianship or management when the parent either dies or becomes incapacitated. One solution is for the parent to nominate a new guardian or manager. Alternatively, the Tribunal could have the power to appoint an alternative or replacement while the parent is still acting as guardian or manager. The replacement person would then take over upon the parent's death or incapacity. Appointing a replacement ahead of time relieves the existing guardian or manager of worry about what will happen when he or she dies or becomes incapacitated. The latter course of action, whereby the Tribunal rather than the parent appoints a replacement guardian or manager, is preferable because the Tribunal made the original appointment and should make any other appointments. The Tribunal, with its experience, expertise and detachment, will be able to appoint a suitable alternative guardian or manager in consultation with both the incapacitated person and the existing guardian or manager.^{xv} The simplest way to achieve this objective is for the Tribunal to make an appointment conditional on the death or incapacity of the existing guardian or guardians. Once the condition has been fulfilled and the new guardianship is operating, the Commission recommends that a review should be held to confirm or vary the appointment or, in appropriate cases, to replace the guardian where he or she has ceased to be suitable.

Form of guardianship and management of property orders

Requirements for orders – proposed s 8, s 9

4.31 *Form of order.* The Tribunal, having established that the criteria for intervention are satisfied, should make an appropriate order, guided by the basic principles discussed above.^{xvi} In

particular, the Tribunal should have regard, so far as possible, to the incapacitated person's wishes, and should make the order which is the least restrictive alternative consistent with the person's interests and needs.^{xvii} As already discussed,^{xviii} in some circumstances the Tribunal would rightly decide not to make an order if it was satisfied that existing arrangements were working well. The terms of the order will be determined by the Tribunal according to the need or needs that have been established as appropriate criteria for intervention. The order may be conditional, if the Tribunal considers this appropriate, and it may be limited as to time. It should specify the particular powers which are being conferred on the guardian or manager. Where the order relates to property it should also specify the property. This requirement will cover the situation where the Tribunal specifies that 'all of X's property' is to be subject to the order. In other cases, where only part of a person's property is subject to an order, the relevant items of property should be set out specifically in the order.

4.32 *Episodic incapacity.* Submissions to the Commission have drawn attention to the difficulty posed by a person who experiences bouts of illness so that he or she is only sometimes legally incapacitated. After careful consideration, the Commission has concluded that legislation cannot be satisfactorily drafted to deal with it. Rather, the solution lies in the Tribunal fashioning an order which is appropriate to such a case. Even this solution will not always work satisfactorily. It should be borne in mind that a guardian or manager, faced with implementing an order which attempts to cater for episodic incapacity, can always come back to the Tribunal for advice or for a modification to the terms of the order.

Emergency situations

4.33 *Emergency orders – proposed s 36.* There will be a need for emergency orders in some cases where the incapacitated person is in danger or is being maltreated. When he or she has been the subject of a treatment order under the Mental Health Act, there is often a need for an emergency management of property order. The difficulty with such orders is that the normal safeguards which guarantee due process cannot operate so effectively. The usual way to overcome this danger is to ensure that emergency or interim orders are of short duration, for example, 10 days.^{xix} The interim order would then be reviewed in a full hearing. Another safeguard is that only the Public Advocate^{xx} may be appointed as an interim guardian.^{xxi} This avoids the possibility of, say, an unscrupulous relative attempting to obtain an emergency order and making use of it before the full hearing. Such an order should be available 24 hours a day. The Commission recommends that new legislation includes a provision for emergency orders and that notice may be waived in such circumstances if the Tribunal thinks fit.

4.34 *Emergency powers – proposed s 52.* When a person is found to be at risk there will sometimes be a need for the Tribunal to grant emergency powers as well as having the capacity to make emergency orders. These powers are necessary for 'rescue' operations in which the Public Advocate, authorised by the Tribunal, with police help, can enter premises and remove the person at risk to a place of safety at any time of the day or night.^{xxii} It may be asked why such powers are necessary. The answer is that in cases of real emergency some body or organisation has to fulfil this role. The police do not normally have the power unless there is evidence that an offence has been committed. No other organisation in the Australian Capital Territory has such powers. The Commission, therefore, recommends that these powers be available, and that where necessary an application to exercise them may be made over the telephone or any other speedy method.

4.35 *Relationship with Mental Health Act 1983 (ACT)*. Under the Mental Health Act 1983 (ACT) there is provision for appointing a prescribed representative (whose function is to act as an advocate) of a person who is subject to a detention order or a treatment order. If a guardian has already been appointed for the person, it may be appropriate to appoint that guardian as the prescribed representative if the person agrees. In some circumstances it will be necessary to appoint a manager or a guardian for a person who is subject to a treatment or detention order. Under the proposals discussed earlier,^{xxiii} either the Director of Mental Health or any other person may apply for an order.

Children – proposed s 4(6), 5(3)

Application to children

4.36 It is not envisaged that a person under the age of 18 should be the subject of a guardianship or management order, as the Family Law Act 1975 (Cth) and the Children's Services Act 1986 (ACT) govern the legal position of children. However, there may be cases where it is apparent that a child with a disability will require a guardian or manager on turning 18. Accordingly, provision should be made allowing orders to be made before the person turns 18 but not to take effect until the child turns 18.

Relationship with Children's Services Act 1986 (ACT)

4.37 In the Discussion Paper the Commission drew attention to the need for guardianship orders for children in cases where it is not necessary to make the child a ward of the Director of Welfare. This matter falls outside the terms of the present reference and it would not be appropriate to include children in the proposed guardianship and management of property regime. The Commission suggests that this problem may be solved by amending the Children's Services Act to provide guardians in these circumstances.

Powers and duties of guardians and managers

Introduction

4.38 In all modern legislation dealing with guardianship and management of property there are detailed provisions spelling out the powers and duties of guardians and managers. These should, as far as possible, be the same as the powers and duties of attorneys appointed under enduring powers of attorney, discussed earlier.^{xxiv}

Guardian's powers – proposed s 4(2)

4.39 *Powers*. In appropriate cases, a guardian should be able to exercise wide powers over the person subject to the order, in keeping with the 'care' model. Certain powers should be specified in the legislation to make it clear that they can be conferred. These are:

to decide where and with whom the person is to live

to decide what education or training the person is to receive
to decide whether the person is to be allowed to work
if the person is to be allowed to work – to decide the nature of the work, the place of employment and the employer; and
to give for the person a consent required for medical or other treatment or procedure.

4.40 *Excluded powers – proposed s 4(2)*. There are some powers which a guardian should not have. In particular, the power to chastise the person should be specifically excluded in the legislation. There are also certain decisions which a guardian should not be able to make on behalf of the represented person. These should also be set out in the legislation. They include the following decisions:

to marry
to vote in an election
to make a will
to consent to adopt a child
to give consent to a prescribed medical procedure.^{xxv}

It is probably unnecessary to include a ‘catch-all’ provision to cover those things which, as a matter of common sense, guardians should not do, such as sitting an examination on behalf of the represented person.

4.41 *‘Behaviour modification’*. Behaviour modification techniques used with incapacitated adults sometimes involve forms of punishment. The Commission suggests that this is a matter which is too difficult to control by legislative prescription. The proposed Tribunal, it will be seen, will have the power to terminate the appointment of a guardian or change the terms of the order. Inappropriate use of punishment would be a reason for terminating the order or changing its terms.

4.42 *Incidental management powers – proposed s 4(5)*. In many cases a person subject to a guardianship order will also experience day-to-day difficulties in such matters as handling money, dealing with banks and entering tenancy agreements. In such cases, if the guardianship order is to be properly exercised and the person’s health and welfare to be adequately protected, the guardian will need incidental management powers. It should therefore be open to the Tribunal to appoint the guardian a manager with the powers necessary to perform the guardianship duties adequately. This would not preclude the Tribunal from appointing the guardian a full manager, if one were required, or from appointing another manager to deal with more complex property transactions such as share dealing or real estate management.

Guardian’s and manager’s duties – proposed s 13

4.43 The fundamental duty of a guardian or manager is to look after the incapacitated person’s interests through the exercise of substituted judgment.^{xxvi} The Victorian legislation provides that the guardian must act in the ‘best interests’ of the person.^{xxvii} This is somewhat different from substituted judgment because it allows the guardian to override the wishes of the incapacitated person if the guardian thinks that this is in his or her best interests. Yet the guardian is also obliged under the Victorian legislation to take into account, so far as possible, the wishes of the represented person.^{xxviii}

This dilemma has already been discussed in the Commission's report on enduring powers of attorney.^{xxxix} It was concluded there that the basic principle to be applied was substituted judgment but that the best interests principle should prevail if there was no way of ascertaining what the person's wishes would have been. On this issue, the law's approach for guardians and managers should be the same as for attorneys.^{xxx}

Medical decisions

4.44 *Need for special provision.* No special provision is made in the 1985 draft legislation to limit the power of guardians to give consent to medical procedures. If a guardian has plenary powers to make these kinds of decisions, there is a possible danger that medical decisions will be made which are more for the convenience of carers than for the good of the incapacitated person.

4.45 *Comparable legislation.* The most elaborate legislation on this issue is to be found in New South Wales which distinguishes between 'minor', 'major' and 'special' medical procedures and provides that consent may be given or withheld by the person responsible for the patient (who is not necessarily the legally appointed guardian), the Guardianship Board or the Public Guardian, depending on the type of procedure.^{xxxxi} The Victorian legislation is simpler.^{xxxii} The guardian may consent to all medical treatment except 'major medical procedures' which require both the consent of the guardian and of the Guardianship and Administration Board. 'Major medical procedures' are not defined in the Act but may be specified from time to time by the Board.^{xxxiii} Neither the New South Wales nor the Victorian legislation states what principle determines whether a procedure is special or major or what policy goal it is trying to achieve in this area. Controversial procedures such as abortions and sterilisations are not specifically mentioned in the Victorian legislation. The New South Wales legislation specifically mentions sterilisation as 'special medical treatment' but leaves other instances to be prescribed by regulation.^{xxxiv} In the Northern Territory the consent of both the guardian and the court are required for medical procedures relating to contraception or termination of pregnancy and 'medical procedures generally accepted by the medical profession as being of a major nature'.^{xxxv}

4.46 *Decisions without consent.* The first question is whether a medical procedure should ever be permissible in relation to a person who is incapable of giving a legal consent or, putting it another way, whether another person should be able to consent. The answer is yes, because otherwise the person will go without treatment or, if treatment goes ahead anyway, the doctor may be committing a crime or, at least in theory, be liable for damages in tort if no legal consent is given. It is therefore necessary to have a legal mechanism for substitute decision-making. In relation to two special cases, the law already provides these mechanisms.

Emergencies. Emergency medical procedures, that is, where it is necessary to carry out a procedure to save a person's life, do not require consent at common law. The doctor is the substitute decision-maker.

Procedures under the Mental Health Act 1983 (ACT). There are elaborate provisions dealing with such treatment as electro-convulsive therapy and lobotomies.^{xxxvi} They should not be affected by the proposed guardianship legislation. As has already been suggested, if the patient already

has a guardian, that guardian may be the best person to represent the patient's interests when the appropriateness of a treatment is being determined.

This leaves many other situations where substituted consent may be needed.

4.47 *Therapeutic medical and dental treatment – proposed s 4(2)(e)*. In a case where either routine medical or dental care, or a specific operation is needed, a guardian should be able to be given power to consent on behalf of the person requiring treatment. The Tribunal would be able to tailor its order to meet the needs of the particular case. It might be appropriate to make a more general order in some cases, for example, when the person is likely to be in need of continuing treatment. In relation to routine, minor medical or dental care and treatment, it would be possible to provide in the legislation that a guardian automatically has power to consent without the Tribunal having to confer a specific power in each case. Only if a particular operation or treatment were needed would the Tribunal have to spell out the power to consent to therapeutic medical treatment. On the other hand, this would generate problems of definition – how to specify what is 'minor' and 'routine' as against other treatment – and, in any case, if a guardianship order is sought, it is not difficult for the Tribunal to include a general power relating to routine medical or dental treatment. On balance, the Commission recommends that any power to consent to medical treatment be spelt out by the Tribunal in each case rather than being automatic. There should be no restrictions on the power except those set out in para 4.48.

4.48 *Prescribed medical procedures – proposed s 53*. There are certain medical procedures – referred to in the draft legislation as 'prescribed medical procedures' – which should not be consented to by a guardian alone. Such decisions as whether or not the person should have an abortion or a sterilisation operation are too difficult or burdensome for one person to bear. In such cases the Commission recommends that the Tribunal should make these decisions. The prescribed medical procedures should be

- abortion
- reproductive sterilisation
- hysterectomy
- contraceptive procedures
- removal of non-regenerative tissue for transplantation.

Because of the sensitive nature of these treatments or procedures, and because they are generally procedures which would be sought on the initiative of the person, the Tribunal should have the sole power to authorise the procedure. The Tribunal must ensure that the person is properly represented. It is to appoint the person's guardian, or the Public Advocate or some other independent person to represent the person in connection with the inquiry relating to the consent. As already indicated, the Tribunal would only be involved in decisions concerning incapacitated adults. Children would continue to be protected by the Family Court or the Supreme Court. The Supreme Court would still have inherent jurisdiction to protect incapacitated adults, and thus it would be possible for an application to be made initially to the Supreme Court if the applicant so wished but this jurisdiction would not generally be invoked except by way of appeal from the Tribunal. The Tribunal should be guided by statutory criteria in these difficult decisions. The Commission suggests the following.^{xxxvii}

The procedure, the question of consent apart, should be otherwise lawful.

The Tribunal should be satisfied that the person cannot give legal consent and that this incapacity is not likely to change in the foreseeable future.

The procedure should be in the person's best interests.

The person, the guardian and any other person who the Tribunal considers should have notice of the proposed procedure should be aware of the application for consent.

4.49 *Non-regenerative tissue transplant or donation – proposed s 53(3)*. While the above criteria should apply to all prescribed procedures, additional criteria should apply to non-regenerative tissue transplant or donation. Is there ever a case for making a decision that an incapacitated person should donate, say, a kidney when that person cannot consent? If the person's sibling's life depended on such a donation, a very difficult dilemma is posed, especially if there is no way of ascertaining what the person's wishes would have been. This is a matter which would arise only rarely. The Commission recommends that the Tribunal should be empowered to consent to non-regenerative tissue transplant or donation only if it is satisfied that

- the risk to the person is small
- the risk of failure of the transplant is low
- the life of the person to whom the organ or tissue is to be transplanted would be endangered if the transplant were not made; and
- it is highly likely that transplanting the organ or tissue from someone else would be unsuccessful.

4.50 *Best interests – proposed s 53(4)*. In determining whether a particular procedure would be in the person's best interests, the matters that the Tribunal is to take into account include:

- the wishes of the person, so far as they can be ascertained
- what would happen if it were not carried out
- what alternative treatments become available
- whether it can be postponed because better treatments may become available
- in the case of a transplantation of tissue – the relationship between the 2 people.

The Transplantation and Anatomy Act 1978 (ACT) would have to be amended to accommodate donation by an incapacitated person.

4.51 *Objection by patient to medical treatment – proposed s 4(3)*. If the person objects to being treated, then, ideally, the treatment should not be carried out. However, patients often express negative feelings or show negative reactions to medical or dental treatment, particularly injections. Should this be taken as an express lack of consent? The difficulty here is that there are so many levels of objection, some stemming from irrational (though nonetheless real) fear, others deriving from irrational, though sincerely held, beliefs and yet others stemming from a careful assessment of the pros and cons. The Commission's final view is that a guardian who can legally give consent to medical treatment on behalf of a patient should also be able to override lack of consent by the patient. Further, where a guardian has the power to give a consent for medical or other treatment or procedure, then the person subject to the order should not be competent to give consent.

Managers

Introduction

4.52 The powers and duties of managers are different from those of guardians. The manager's task is limited to matters of property and money. The Tribunal should be able to appoint a plenary manager or one who has a limited management role. Once appointed, a manager who, under the powers granted, signs a document or enters into a transaction for the incapacitated person binds the person to that transaction.^{xxxviii}

Manager's powers

4.53 *Powers – proposed s 3.* A manager's powers will depend upon the particular circumstances of each case. The Tribunal should have the flexibility to specify whatever powers are appropriate when appointing a manager. The 1985 draft Ordinance enumerates the powers of a manager in a long list running to 15 paragraphs.^{xxxix} What it amounts to is that the manager may do with the person's assets whatever the person could do subject to any limitations imposed by the Court. The Commission sees no point in the legislation containing what is hoped to be an exhaustive list of things which people can do with property or money. Instead, the powers of a manager should be stated in terms of being able to do all those things which the represented person could do with his or her property if legally competent. The Tribunal may then impose specified limits if necessary.

4.54 *Access to will – proposed s 18.* The primary obligation of the manager is to exercise substituted judgment for the person. This would include dealing with the property of the person in a way which is compatible with the testamentary intention of that person eg by preserving a specific property which is to be given to the incapacitated person's relatives or friends under his or her will. To do this, the manager must have access to the will. Under the Victorian legislation the Guardianship and Administration Board is given the power to examine a will, but the manager is not.^{xl} The Commission suggests that it would be preferable for the manager to have access to the will, as well as the Tribunal. The manager would then be obliged under the proposed legislation to give effect, so far as possible, to the wishes of the incapacitated person.

Managers: Tribunal may give directions in relation to accounts – proposed s 24(2)

4.55 The Tribunal may give a manager written directions in relation to the filing of accounts and the manager must comply with the directions.

Manager's duties – proposed s 18-24

4.56 *Duties.* The duties of a manager are extensive and burdensome. To be in charge of another person's assets involves a high degree of responsibility. The general law already contains obligations which ensure good faith, accountability and responsible dealings with the incapacitated person's money and property. Modern guardianship and management of property legislation, and the enduring powers of attorney legislation, spell out these duties.^{xli} There is a case for doing this so that

a statement of a manager's duties is accessible. On this approach the legislation should state the duties of managers relating to

- maintenance payments for or on behalf of the person and to the guardian, if any^{xlii}
- treatment of money received^{xliii}
- investment^{xliv}
- notification of Registrar of Titles^{xlv}
- filing accounts with the Tribunal^{xlvi} and giving a copy to the Public Trustee^{xlvii}
- having accounts audited by an auditor specified by the Public Trustee^{xlviii}
- providing specified information or documents in relation to the accounts on the request of the Public Trustee.^{xlix}

The Commission recommends adoption of this approach.

4.57 ***Substituted judgment – proposed s 13.*** Guardians and managers should exercise substituted judgment when making decisions on behalf of the incapacitated person. However, this principle should be subject to two provisos:

- the need to ensure that the person does not become destitute, and
- the desirability of maintaining, so far as possible, the style of life of the person as it would have been if the person had not been affected by the condition concerned.

The justification for requiring a manager to invest in investments authorised by law for the investment of trust money is that such investment minimises the risk of the assets being lost. At the same time, the manager should be able to ask the Tribunal for an order that some other investment is permitted, for example, investment in a family company. In this way the substituted judgment principle is preserved. In some cases, the substituted judgment principle may have to be modified. For example, in the case of a person who has been severely intellectually disabled since birth, it is not possible to act as the person would have acted in the circumstances if he or she had not been affected by the condition concerned because there is no way of knowing how such a person would have acted. Accordingly, the Commission recommends that if, in a particular case it is not possible to determine how the person would have acted, the guardian or manager is to act in the best interests of the person.

Directions and advice

4.58 ***Tribunal may give directions – proposed s 15(1).*** In some circumstances, a guardian or manager may need a direction for example, concerning his or her powers. A direction from the Tribunal would place the guardian or manager under an obligation to obey it, and may accordingly be contrasted with mere advice, counselling or an outlining of relevant options by the Tribunal. A guardian or manager may, for example, need the scope of a power to be determined, and a direction to that effect from the Tribunal. The Commission recommends that it be possible for the guardian or manager to make an application to the Tribunal for a direction. A penalty should be available as a sanction if the direction were not followed.

4.59 ***Tribunal may give advice – proposed s 16(1).*** A guardian or manager faced with a difficult decision should always be able to turn to the Tribunal for advice. It may be asked, if the

Tribunal gives advice, what sanction there would be if the guardian or manager does not follow the advice. The Commission suggests that it is appropriate for the Tribunal to give advice and to attach no sanction if the advice is not followed. The fact that the advice was not followed might (but not necessarily would) be a factor which the Tribunal could take into account if the guardian's or manager's competence or suitability to continue to act were being considered. A guardian or manager who acts in accordance with the opinion or advice would be considered to have acted properly unless in obtaining the advice he or she concealed material matters or made wilful misrepresentations.

Compensation and remuneration of guardian, manager or Public Trustee – proposed s 14

4.60 A guardian should be able to claim out-of-pocket expenses incurred on behalf of the incapacitated person. The Commission is of the view that the Tribunal should decide whether the guardian should be remunerated in the particular circumstances.¹ A manager should be able to claim out-of-pocket expenses incurred on behalf of the incapacitated person. In some circumstances a manager should also be remunerated, the most obvious example being that of a trustee company. This is a question which the Tribunal should decide in each case. The 1985 draft Ordinance provided for payment to the Public Trustee for his services, either as a guardian or manager. However, in cases of hardship the Public Trustee could waive the fees.¹ⁱ The Commission agrees with this provision.

Termination of appointment of guardian or manager

Need for wide grounds for removal – proposed s 27

4.61 Under the 1985 draft Ordinance, a guardian or manager who becomes bankrupt or who is convicted of certain criminal offences ceases to act in that capacity.¹ⁱⁱ The Commission's view is that this provision is not satisfactory because there is no necessary correlation between the charge or conviction and the suitability of a person to act as guardian or manager. Further, the fact that a person has committed an offence does not necessarily mean that he or she is not suitable to be a guardian or manager. For example, if a person's wife is his guardian and she is then convicted of shoplifting, it may be quite in order for her to continue to be his guardian. It is preferable, therefore, to have a more general provision which states that there are grounds for removal if the person has ceased to be suitable to be a guardian or manager. Other factors may also satisfy the Tribunal that the person should be removed and should be included in the legislation. These are:

- the need for guardianship or management no longer exists
- the person is no longer competent to perform the duties and functions or exercise the powers of guardian or manager
- the person has neglected or failed to perform the duties and functions, or exercise the powers of guardian or manager, or
- the person has failed or refused to comply with the Act.

Other terminations

4.62 *Resignation – proposed s 25.* The guardian or manager should be allowed to resign by notifying the Tribunal in writing. A new guardian or manager can then be appointed.

4.63 *Guardianship and management end on death – proposed s 26.* A person's guardian, and a manager of a person's property, cease to be guardian or manager when the person dies. Management of property is then taken over by the administrator of the estate.

4.64 *Where guardian ceases to be guardian – proposed s 28(2)–(3).* The Public Advocate, on becoming aware that a guardian of a person has ceased (whether by death or otherwise) to be a guardian should give the Tribunal notice of that fact. If the notice indicates the Public Advocate will take over guardianship powers, he or she thereby becomes the guardian.

4.65 *Where manager ceases to be manager – proposed s 28(4)–(5).* The Public Advocate or the Public Trustee, on becoming aware that there is no longer a manager of a person's property should give notice to the Tribunal of that fact. If the notice indicates that the Public Advocate or Trustee will take over the powers, then he or she thereby becomes the manager.

Periodic review and variation of orders

Need for regular review – proposed s 17

4.66 An aspect of the least restrictive alternative is that orders, once made, should be reviewed at reasonably frequent intervals so that, if possible, the restrictions on the person's autonomy can be lessened.^{liii} In addition, periodic review enables the Tribunal to see whether the original order is working satisfactorily and to make modifications if necessary. The Commission recommends that there should be regular reviews of orders made by the Tribunal.

How frequent?

4.67 Periodic review imposes a considerable burden on the Tribunal. In deciding how frequently reviews should be conducted regard needs to be had to the Tribunal's resources and to the needs of persons who are the subjects of orders. A statutory maximum period between mandatory reviews does not prevent the guardian, manager or other interested party from coming back to the Tribunal after a shorter interval. In Victoria the statutory maximum is three years,^{liv} and in New South Wales the order must be reviewed at the end of the period for which the order has effect^{lv} which is 12 months in the case of an initial guardianship order or 3 years in the case of a renewed order.^{lvi} In addition, in New South Wales the person subject to a guardianship order must be assessed within the first half of the relevant period in order to see how the order is operating.^{lvii} Ideally the period should be 12 to 18 months, but this may be too demanding on the Tribunal's resources. Fixing on a particular period is something which is best done after the Tribunal has been in operation for some time. The best way to achieve this is to provide for a statutory maximum period of 3 years but also allow reviews to be held more frequently. The important point is that there should be flexibility to review as needed. A maximum period should not be taken to reflect the actual frequency of review.

Legal capacity of person subject to order

Contracts

4.68 **The problem.** A person who is legally incompetent may still enter into some binding contracts eg for necessities. If that person is the subject of a management order and enters into various transactions about which the manager is ignorant, a chaotic situation could develop. An added complication is that, if such a person enters into transactions that he or she cannot legally enter into, a third party dealing with the incapacitated person in ignorance of the latter's incapacity may be unfairly affected if, for example, he or she cannot recover the cost of goods supplied. The law in this area is complicated enough even before a manager is appointed.^{lviii} A person who is legally incapacitated may enter into some binding transactions. But once a management order has been made, it seems that the person can no longer validly enter into any transactions, even during a lucid interval, unless the relevant legislation states otherwise.^{lix} The question is to determine how contracts entered into by persons subject to an order should be treated.

4.69 **Various models.** The 1985 draft Ordinance^{lx} and the Victorian legislation^{lxi} state that the person in respect of whom a management order has been made cannot enter into binding contracts involving property which is the subject of the management order. The 1985 draft Ordinance makes an exception for the purchase of 'necessaries' by the incapacitated person; that is, if the person buys something which is necessary for his or her daily requirements (except a luxury), the contract is binding. The Victorian legislation allows an exception if the Guardianship and Administration Board has made a special order allowing the transaction. Both the 1985 Ordinance and the Victorian Act protect third parties who in good faith and in ignorance of the management order have dealt with the incapacitated person. The New Zealand legislation^{lxii} allows contracts for necessities but otherwise removes the legal capacity of the person subject to a management order. Like the Victorian legislation, special permission can be obtained for a particular transaction. However, the New Zealand section is different in that a transaction entered into by the incapacitated person is not automatically void. If the other party to the transaction gives written notice to the manager asking him or her to decide whether or not to avoid the transaction, the manager must avoid it, if at all, within 28 days of receiving the notice. Thus it is possible for the other party to the transaction to place the onus on the manager to avoid the transaction. If the transaction is avoided, the legislation gives the Court^{lxiii} wide powers to adjust the parties' rights so as to produce the fairest outcome.

4.70 **Uncertainty.** None of these is altogether satisfactory. The result under each model is that some transactions are valid whilst others are not, with little certainty as to which are and which are not. For example, if the incapacitated person enters into a credit transaction to buy a record player in a jurisdiction where contracts to buy 'necessaries' are valid and binding, the question immediately arises: is a record player a 'necessary'? The answer to this depends on a number of factors and on case law. A trader dealing with the legally incapacitated person may find, if the goods are not necessities, that he or she has to bear a loss which in the circumstances is unfair to the trader. It is probably impossible to remove the element of uncertainty and no regime is going to eliminate the possibility of losses being generated which have to be borne by someone.

4.71 **Power to adjust transactions – proposed s 54.** In very many cases, there is, as a matter of practicality, nothing that can be done to prevent the incapacitated person from making contracts. An adjustment will need to be made in relation to the law of contract as it applies to legally incompetent persons. What is required is to provide the person with protection against exploitation or

ill-considered transactions and, so far as possible, to protect traders who have dealt in good faith. This can be achieved by allowing any transaction made by the person subject to an order to be challenged before the proposed Tribunal. The Tribunal would then have power to set aside the transaction, or make other adjustments to achieve a just result between the parties. In some circumstances, in order to do justice to the person who dealt with the incapacitated person, it would be necessary to allow the transaction to stand. In other circumstances, it may be appropriate to set aside the transaction but award compensation to the person who dealt with the incapacitated person. The Tribunal should be given power to make adjustment orders such that in certain cases a loss is borne equally between the parties or in whatever proportion the Tribunal thinks just. Challenges should be allowed by any party to the transaction and by the appointed manager, but must be brought within three months of the contract. The overall effect of the suggested regime would be that, once a management order has been made, the person in respect of whom the order was made would be in a somewhat better position than persons who are legally incapacitated but not subject to an order. Their capacity to contract will be enhanced and the protection offered by the law will be far more flexible than that offered by the existing rules of common law and equity. Those rules are inflexible in that they offer an all or nothing solution. The contract is either binding on the incapacitated person or it is not. There is no mechanism for making adjustments so as to bring about a fair result.

4.72 *Injunctions – proposed s 55.* Another problem which may arise is where a person who is legally incompetent to enter a contract, but who does not have a manager, attempts to enter a contract with another person. In such cases, there may be a need, if the transaction is unfair or exploitive of the person, for a mechanism to restrain the contract before completion, at least until a manager can be appointed. Accordingly, the Commission recommends that the Tribunal may, on application, restrain such a transaction, if the Tribunal is satisfied that there are grounds for the appointment of a manager for the property. The order should remain in force up to three days, at the Tribunal's discretion, but if an application for the appointment of a manager is made, the Tribunal may continue the order until the application is determined.

Wills

4.73 A problem which was raised in the Discussion Paper was whether the Tribunal should have power to make a will for an incapacitated person.^{lxiv} Problems may arise in relation to the will of a person subject to an order. Assuming that the person has no testamentary capacity, an earlier will made when there was capacity would remain in force, and would not be revoked except by marriage. No new will could be made whatever the change in circumstances. Where no will had been made in the first place, it would be impossible to make one. The provisions of any will which had been made earlier or the rules of intestacy would often dispose of the estate as the deceased would have wished. But this would not invariably be the case. For example, the spouse of the incapacitated person might get a divorce, remarry, and leave the person in the care of children, nephews and nieces. An earlier will which favoured the former spouse by name would still be valid and it would not be possible to alter it. In the result, only those persons entitled to claim under the testator's family maintenance laws^{lxv} could take action after death to secure an interest in the estate. The people who were actually caring for the incapacitated person, even if they were guardians or managers, might not be included in these categories. There is a clear case for amending the testator's family maintenance law, but in the meantime, there appears to be a need for the Tribunal having a limited power in respect of testamentary disposition. If this is to be the case, it is essential that the Tribunal have power to make a ruling as to the testamentary capacity of the person subject to the order. Otherwise, a

situation could occur in which the Tribunal purports to revoke a will but when the matter arises on appeal, the Supreme Court finds that the original will was valid, as the testator had testamentary capacity at the time the will was made. Thus the Tribunal, as a precursor to revoking an existing will, or making a new one, or both, should be bound to make a finding as to testamentary capacity. This finding should be duly appealable to the Supreme Court. Where a new will is to be drawn up, a number of conditions must first be met:

the Tribunal must be satisfied that the person subject to the order would have wished a new will to be made

there has been a change in circumstances warranting a change in testamentary arrangements
the terms of the will must be what the person would have desired, so far as can be ascertained, and should go no further than necessary in achieving that aim.

The Commission is setting forth this proposal for general consideration, but because it has not consulted with interest groups and the legal profession on the details of this proposal, it makes no formal recommendation on the matter.^{lxvi}

Enduring powers of attorney

Introduction

4.74 A number of matters were discussed in the Commission's report on enduring powers of attorney^{lxvii} which could not then be resolved and which were deferred until they were dealt with in this reference.

Court or Tribunal?

4.75 It was proposed in the report on enduring powers of attorney that a court (either the Supreme Court or the Magistrates Court) should exercise control over attorneys appointed under the enduring powers of attorney legislation. The question whether a court or Tribunal should conduct guardianship and management of property proceedings is fully discussed below.^{lxviii} The Commission recommends that the body which presides over guardianship and management of property cases should also exercise control over attorneys appointed under the enduring powers of attorney legislation. This is because the issues which have to be dealt with by the court or Tribunal are similar. This will require an amendment to the Powers of Attorney Act 1956 (ACT).

Relationship of attorney and guardian or manager

4.76 *The issue.* If an attorney has been appointed and it is subsequently necessary to appoint a guardian or manager, the question arises whether the attorney should cease to act or whether he or she should be answerable to the guardian or manager.

4.77 *Recommendation.* The Commission recommends that this issue should be left to the court or Tribunal to decide what is best in the particular case.

Appointment of attorney after guardian or manager appointed

4.78 *The issue.* Another issue which may arise is whether it should be possible for a person, who is already the subject of a guardianship or management order, to appoint an attorney. Under the present law, it appears that a person cannot appoint an attorney after his or her affairs are subject to a management order^{lxix} unless the contrary is specifically provided for in legislation.^{lxx} Allowing a person to create a power of attorney after a guardianship or management order has been made would recognise that people should exercise whatever capacities they have. In some cases, the power of attorney would not be effective because of the person's lack of legal capacity. But in other cases the person may have sufficient legal capacity, for example, if his or her disability was sporadic. The problem which then arises is that the authority to manage that person's affairs is split between the attorney and the guardian or manager. This could give rise to conflicting decisions.

4.79 *Recommendation.* The Commission recommends that, if a person who is already subject to a management or guardianship order wishes to appoint an attorney, he or she could only do so under the supervision of the court or Tribunal. The latter should have power, in appropriate cases, to refuse to allow the appointment of an attorney. This will require an amendment to the Powers of Attorney Act 1956 (ACT).

ENDNOTES

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- i. *Re M & R and the Guardianship and Administration Board* (1988) VAR 213; *Re E and the Guardianship and Administrative Board* (1988) 2 VAR 222.
 - ii. Guardianship and Administration Board Act 1986 (Vic) s 22(1)(a); 46(1)(a)(i).
 - iii. Guardianship and Administration Board Act 1986 (Vic) s 3(1).
 - iv. Protection of Personal and Property Rights Act 1988 (NZ) s 6, 25(1)(b).
 - v. Disability Services and Guardianship Act 1987 (NSW) s 14(1).
 - vi. Adult Guardianship Act 1988 (NT) s 15; Intellectually Handicapped Citizens Act 1985 (Qld) s 27; Mental Health Act 1977 (SA) ss 26 and 28; Mental Health Act 1963 (Tas) s 22.
 - vii. Draft Guardianship and Management of Property Ordinance (ACT) s 39–40.
 - viii. Guardian and Administration Board Act 1986 (Vic) s 19, 43.
 - ix. cf Guardianship and Administration Board Act 1986 (Vic) s 23(2)(a).
 - x. Draft Guardianship and Management of Property Ordinance (ACT) s 7(1), s 16(1).
 - xi. cf Protection of Personal and Property Rights Act 1988 (NZ) s 31(4).
 - xii. See Guardianship and Administration Board Act 1986 (Vic) s 23(1)(b), 47(1)(c)(ii); Adult Guardianship Act 1988 (NT) s 14(1)(b).
 - xiii. s 23(3), 47(3).
 - xiv. Disability Services and Guardianship Act 1987 (NSW) s 17(1).
 - xv. See eg Guardianship and Administration Board Act 1986 (Vic) s 34–5.
 - xvi. See para 2.8 above.
 - xvii. See Guardianship and Administration Board Act (1986) (Vic) ss 22, 46.
 - xviii. Para 2.4.
 - xix. 21 days in the Guardianship and Administration Board Act 1986 (Vic) s 33(2).
 - xx. See below ch 6.
 - xxi. Guardianship and Administration Board Act 1986 (Vic) s 32–3.
 - xxii. See eg Disability Services and Guardianship Act 1987 (NSW) s 11–2; Guardianship and Administration Board Act 1986 (Vic) s 27.
 - xxiii. See para 4.17 above.
 - xxiv. See para 1.9 above.
 - xxv. See para 4.48.

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- xxvi. See above para 2.7.
- xxvii. Guardianship and Administration Board Act 1986 (Vic) s 28(1).
- xxviii. Guardianship and Administration Board Act 1986 (Vic) s 28(2)(e).
- xxix. ALRC 47 para 33-6.
- xxx. See also para 4.57.
- xxxi. Disability Services and Guardianship Act 1987 (NSW) Pt V.
- xxxii. Guardianship and Administration Board Act 1986 (Vic) Pt 4 Div 6.
- xxxiii. Guardianship and Administration Board Act 1986 (Vic) s 37(3). The Board has issued guidelines specifying sterilisation, abortion and tissue donation as being 'major medical procedures'.
- xxxiv. Disability Services and Guardianship Act 1987 (NSW) s 33(1).
- xxxv. Adult Guardianship Act 1988 (NT) s 21.
- xxxvi. Mental Health Act 1983 (ACT) Pt VI-VII.
- xxxvii. Adapted from *In re Jane* (1989) 85 ALR 409 in which Nicholson CJ relied on *Re Grady* 426 A 2d 467 (Sup Crt of New Jersey).
- xxxviii. \See proposed s 21 of Draft Act.
- xxxix. Draft Guardianship and Management of Property Ordinance (ACT) s 20(1). An even more elaborate list appears in Protection of Personal and Property Rights Act 1988 (NZ) Sch 1.
- xl. Guardianship and Administration Board Act 1986 (Vic) s 54.
- xli. Powers of Attorney Act 1956 (ACT) s 14(3) and (4).
- xlii. Proposed s 19.
- xliii. Unless the Tribunal otherwise orders, if a manager receives money as interest on income in respect of the property or as the proceeds of the realisation of the property, the manager becomes manager of the property, proposed s 20.
- xliv. A manager should only invest in investments authorised by law for the investment of trust money, or as the Tribunal otherwise orders.
- xlv. Where a manager is appointed to manage property which includes land, the Registrar of Titles must be notified within 14 days of the appointment proposed s 23.
- xlvi. Proposed s 24(1).
- xlvii. Proposed s 24(3). These provisions are broadly similar in effect to those recommended in the ALRC 47 where the Public Trustee was permitted to require a donee to produce accounts: ALRC 47, para 41.
- xlviii. Proposed s 24(4).
- xlix. Proposed s 24(5).
- i. The 1985 draft Ordinance contemplated that a guardian should in certain circumstances be remunerated if the Court so ordered: draft Guardianship and Management of Property Ordinance (ACT) s 35.
- ii. Draft Guardianship and Management of Property Ordinance (ACT) s 35(4).
- iii. Draft Guardianship and Management of Property Ordinance (ACT) s 42.
- iiii. This is consistent with the United Nations declaration on the Rights of Mentally Retarded Persons art 7.
- lv. Guardianship and Administration Board Act 1986 (Vic) s 61(2). In practice orders are reviewed much more frequently.
- lv. Disability Services and Guardianship Act 1987 (NSW) s 25(2)(b).
- lvi. Disability Services and Guardianship Act 1987 (NSW) s 18.
- lvii. *Id.*, s 24.
- lviii. See Starke, Seddon & Ellinghaus 1988 ch 14.
- lix. See *Re Barnes* [1983] 1 VR 605.
- lx. Draft Guardianship and Management of Property Ordinance (ACT) s 27.
- lxi. Guardianship and Administration Board Act 1986 (Vic) s 52.
- lxii. Protection of Personal and Property Rights Act 1988 (NZ) s 53.
- lxiii. The Family Court of New Zealand.
- lxiv. ALRC DP39 para 101.
- lxv. Administration and Probate Act 1929 ACT.
- lxvi. See NSW Law Reform Commission, *Wills for Persons Lacking Will Making Capacity*, DP 20 1989.
- lxvii. ALRC 47.
- lxviii. See paras 5.7-5.9.
- lxix. *Re Barnes* [1983] 1 VR 605.

lxx. eg Protected Estates Act 1983 (NSW) s 76(4)

5. Procedure

Court or Tribunal?

The issue

5.1 ***The issue.*** An important question which must be resolved is: in what forum should guardianship and management of property proceedings take place? The 1985 draft Ordinance designated the Supreme Court as the body which would make guardianship and management of property orders. Undoubtedly the thinking behind this was that the Court maintains impeccable procedural safeguards. It is of paramount importance that there should be due process in proceedings of this kind. Despite this, community reaction to the 1985 draft Ordinance showed considerable disquiet at the prospect of the Supreme Court continuing in this role. It was primarily this feature of the Ordinance which delayed its implementation.

5.2 ***Submissions.*** The Commission has received submissions on this question. The effect of these submissions can be summarised thus: people from the Australian Capital Territory legal profession want a court (though the submissions received did not purport to represent any corporate view of the legal profession);ⁱ the general community and the people who work with and for the disabled want a Tribunal.ⁱⁱ

Required features of the decision-making body

5.3 ***Due process.*** The most important safeguard of the incapacitated person's rights is what is described as 'due process'. This means that, before the court or Tribunal comes to a decision, which may be restrictive of the person's rights, all relevant matters are put before it and all arguments are heard if there is a dispute about what is the best course of action. The incapacitated person and any other person affected by the eventual decision must be heard, either directly or through an advocate who is properly qualified.

5.4 ***Accessibility – proposed s 31.*** The determining body must be accessible. This means that the body must be accessible in terms of cost to the parties. But, just as importantly, accessibility also encompasses procedure, architecture, lack of delays, proper communication and atmosphere.ⁱⁱⁱ It should also be accessible to people who are bed-ridden or otherwise incapable of attending a court. The Commission, therefore, recommends that the Tribunal be able to sit anywhere.

5.5 ***Flexibility in procedure.*** Various special procedures are needed in guardianship or management of property applications:

- non-adversarial hearings when there are no disputing parties or when the determining body wishes to initiate enquiries in a particular case;
- providing guidance and advice to guardians and managers;
- periodic reviews of orders.^{iv}

5.6 *Specialised membership – proposed s 30(2).* The members of the proposed body should have expertise in at least two areas. Legal expertise is needed because of the importance attached to due process. Expertise in working with the disabled is also required. This combination of skills would mean that hearings would generally be conducted by a panel, probably of three members. The Commission recommends that a person should not be appointed to the Tribunal unless by reason of training, experience and personality, he or she is a suitable person to deal with matters of guardianship and management of property.

The existing courts

5.7 *The Supreme Court.* The Supreme Court is the determining body in applications under the Lunacy Act 1898 (NSW). The Court does provide due process and could also adopt flexible procedures. The requirement of specialised membership would be difficult, but not impossible, to satisfy if the Supreme Court were to hear these cases. It would be possible to constitute the Court as a judge assisted by two lay assessors. But the Commission's view is that this Court should not hear cases under the proposed new laws and procedures. The principal reason for this is the problem of accessibility. It has already been noted that legal costs of an application under the Lunacy Act are prohibitively high, so much so that there have been very few applications made. Even if the proposed new procedures were simpler than those under the Lunacy Act, the cost would still be very high. But, as pointed out above, accessibility is not just a question of cost. The Supreme Court does not have an atmosphere of informality nor would it be easy to foster such an atmosphere because of its physical environment and traditions.

5.8 *The Magistrates' Court.* The problem of accessibility would not be so difficult to solve in relation to the Magistrates' Court. It is an accessible forum both procedurally and in terms of the cost to the parties.^v The Court has had experience with relatively informal hearings when sitting as a Children's Court and under the Mental Health Act 1983 (ACT). Where possible, 'extra' court proceedings have been used, resulting in early settlement to the satisfaction of the parties, but with the court's authority. The Magistrates' Court proceedings are of a less formal nature than those in the Supreme Court. Further, the Magistrates' Court (Civil Jurisdiction) Act 1982, contains provisions whereby the rules of evidence may be waived. It would be necessary to constitute the Court as a panel if it were to hear Guardianship and Management of Property applications. The Court has not so far been constituted as such, but if given the resources to deal with the projected case load^{vi} the Commission believes that it would be feasible for this Court to hear guardianship and management of property cases.

A specialist Tribunal

5.9 *A Tribunal.* The Commission, however, recommends that a Tribunal would be the most appropriate body to fulfil the required features set out above. A Tribunal would develop the necessary expertise as it would only be dealing with guardianship and management of property issues. It would be able to ensure that due process is observed while at the same time fostering an atmosphere of informality. It could preside over both adversarial and inquisitorial hearings as the requirements of the case dictate. It would be able to initiate lines of inquiry. This is particularly important when the Tribunal must determine the precise functions which the person who is the subject of the enquiry lacks and the people who, and services which, are available to support the person. A Tribunal would, because of its expertise in dealing with problems relating to disability, be

better suited than a court to the task of periodic review of orders and to the role of providing advice and guidance to guardians and manager. It is for these reasons that Tribunals have been chosen in Victoria, South Australia, Queensland and New South Wales. There is no evidence, that the Commission is aware of, that Tribunals are inappropriate or that it was a mistake to establish Tribunals in these jurisdictions. Quite the contrary. In its discussions with the President of the Guardianship and Administration Board (Vic),^{vii} the Commission has been very impressed with the work of that body both in relation to due process, efficiency and the less tangible but extremely important element of empathetic and sensitive handling of what are inevitably difficult problems.

5.10 *Recommendation – proposed s 29(1).* The Commission recommends the establishment of a Guardianship and Management of Property Tribunal in the Australian Capital Territory.

5.11 *Membership – proposed s 30.* Because the hearings of the proposed Tribunal will be legal in nature and because of the importance attached to due process, it is essential that there be a lawyer of some experience on the Tribunal. In Victoria the President of the Guardianship and Administrative Board is a legally qualified person, as are 3 of the part-time Board members. The Commission recommends that any person appointed as a presiding member be a judicial officer or lawyer who has been admitted to practice for at least five years.

5.12 *Cost.* The Commission is acutely aware of the cost implications of establishing a new Tribunal. The population base of the Australian Capital Territory is small and cannot support an entirely new Tribunal with its own Registry and support staff. For this reason it is preferable to associate the Tribunal with an existing administrative structure.^{viii} The Commission accordingly recommends that the proposed Tribunal be established using the facilities of the Magistrates Court. The Tribunal should be located in the existing Family and Children’s Court building. Its Registry and other administrative infra-structure should be run by the Magistrates Court staff with additional resources to accommodate the extra work generated by the Tribunal.

5.13 *Aspects of procedure.*^{ix} There are a number of particular matters of procedure which should apply in relation to hearings in the Tribunal.

5.14 *Costs of proceedings.* The Commission received a number of submissions about the cost to the parties of proceedings before the Tribunal. Concern was expressed about the problem of accessibility if the parties are charged for the ‘services’ of the Tribunal.^x The recommended reforms are intended to make the law more accessible to the community. If people are deterred by cost from seeking an order, then reform of the law will be futile. The present law and cost of proceedings has caused people to adopt questionable and possibly illegal practices in their day to day affairs. Government should accept the cost of the machinery necessary to protect the interests of persons under a disability.

5.15 *Recommendation – proposed s 44.* The Commission recommends that applications for guardianship or management orders be free, that is, the Tribunal should not charge a fee. Further, any legal costs should be borne by the parties except where an application is frivolous or vexatious.

5.16 *Witnesses' expenses.* There remains the cost of expert witnesses, such as doctors. The present practice in other jurisdictions is that these costs are sometimes borne by the Tribunal when the Tribunal has called for a medical report. The Commission makes no recommendation on this question apart from that the Tribunal's budget should be sufficient to pay for expert witnesses' expenses if they are called by the Tribunal itself.

5.17 *Representation – proposed s 37(3), s 37(4).* Persons appearing before the Tribunal should be permitted legal representation or representation by a person who, though not a qualified lawyer, is competent to act as an advocate.^{xi} The question arises whether the person should be allowed legal representation as of right or only with leave of the Tribunal. If lawyers regularly represent people in the proposed Tribunal, the atmosphere of informality, and the de-emphasising of adversary proceedings where appropriate, could be compromised.^{xii} The importance of due process requires that persons should be able to employ lawyers if they wish and the Commission so recommends. It is the job of the Tribunal members to maintain an appropriate informality and to control lawyers who unnecessarily slip into an adversarial mode. The Commission recommends that the Tribunal may appoint a person to represent a person who is not otherwise represented.

5.18 *Informality – proposed s 38.* These types of hearings are inevitably distressing, particularly for the person who is possibly in need of an order. An informal procedure minimises the intimidatory aspects of the hearing. The experience of the Victorian Guardianship and Administrative Board is instructive. Originally, it conducted its hearings around a coffee table. However, it was soon found that this degree of informality did not work very well in some cases. The authority of the Tribunal members was lost and some hearings deteriorated into chaos. The Board now sits in a slightly more formal way with the Tribunal members at a separate table with the Victorian coat of arms behind them. But, in other respects informality is maintained. The Commission recommends that an inquiry must be conducted informally and with as little regard to legal technicalities and forms as is just.

5.19 *Investigative procedure.* The Tribunal must be able to initiate lines of enquiry. In traditional court proceedings the court is in the hands of the lawyers. If an argument is not raised the court cannot usually force the issue. The Tribunal should not be confined in this way.^{xiii} The formal rules of evidence should not bind the Tribunal. It should be permitted to ascertain the facts as best it can. This procedure does not mean that the Tribunal will inevitably be subjected to ill-informed rumour or innuendo. The members will have to exercise proper control over witnesses in this regard.

5.20 *Recommendation – proposed s 39.* The Commission recommends that the Tribunal is not bound by the rules of evidence but may inform itself of any matter relevant to an inquiry as it thinks fit. The waiving of the rules of evidence is quite consistent with the adducing of reliable evidence.^{xiv} The Tribunal will also have power to obtain evidence on oath or affirmation where required.^{xv}

5.21 *Public hearings – proposed s 34.* The proceedings should be open to the public unless the Tribunal otherwise orders in a particular case.^{xvi}

5.22 *Secrecy – proposed s 46.* The names of parties and witnesses to Tribunal proceedings should not be published because of the sensitive nature of these types of cases.^{xvii}

5.23 *Reasons to be given – proposed s 45.* The Tribunal should always be prepared to give reasons for its decisions. This is a basic safeguard against arbitrary decision-making and provides an appeal body with the proper information for determining the appeal. This does not necessarily mean that it must publish its reasons in every case. Reasons can be given orally or put in writing if requested by a person entitled to appear or adduce evidence at the relevant inquiry.

5.24 *Transcripts of proceedings.* A transcript of Tribunal proceedings should be available on request. The Commission recommends that tape recordings be made of proceedings (as in other courts and Tribunals in the Australian Capital Territory). The tapes should be kept but not rendered into transcripts unless that is necessary. This would save costs. The Commission received submissions on the cost of transcripts.^{xviii} The point was made that parties to proceedings would be unable to afford the cost of transcripts in many cases. This is a problem which is of general importance in the Australian Capital Territory. The Commission cannot solve this problem but recommends that, in guardianship and management of property cases, the Tribunal has the power to waive the costs of transcripts in circumstances where the cost would be prohibitive to the party concerned and where that party has established a need to have the transcript.

Appeals – proposed s 47

5.25 *Appellate body.* Appeals from the Tribunal could be either to the Supreme Court or to the Australian Capital Territory Administrative Appeals Tribunal. Submissions on this question were varied, some favouring the former,^{xix} others favouring the latter^{xx} and still others favouring both.^{xxi} Because of the judicial nature of the original hearing, the Commission recommends that appeals go to the Supreme Court.

5.26 *Mode of appeal.* Appeals could be by way of a re-hearing of all issues considered by the Tribunal. Alternatively, an appeal as of right could be allowed only on questions of law and by leave of the Supreme Court on any other question. The Supreme Court should then be able to remit the case back to the Tribunal or substitute its own decision.^{xxii} The Commission recommends this latter model because it leaves as much of the adjudication as possible in the hands of the specialist, expert Tribunal whilst at the same time allowing for a flexible procedure where it would be convenient or efficient not to remit the case back to the Tribunal.

Administrative matters

5.27 There are a number of non-controversial matters of detail which need to be dealt with in the proposed legislation. These include the formal setting up of a Tribunal, its staffing and terms of employment for members; more detailed procedural rules dealing with such things as management of the Tribunal's day to day operations;^{xxiii} perjury and contempt of the Tribunals;^{xxiv} orders for costs^{xxv} and annual reports of the Tribunal.^{xxvi}

ENDNOTES

i. eg Cahill *Submission* 9 October 1989; Faulks *Submission* 24 July 1989; Brewster *Submission* 24 July 1989.

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- ii. eg ACT Council on Intellectual Disability *Submission* 28 July 1989; Sutherland *Submission* 24 July 1989; Steeper *Submission* 24 July 1989; Denner *Submission* 10 January 1989; Linford *Submission* 24 July 1989; Upton/Vivian *Submission* 9 August 1989.
 - iii. See Guardianship and Administration Board (Vic) *Annual Report 1987-8*, 21-3.
 - iv. See para 4.66-4.67 above.
 - v. Cahill *Submission* 9 October 1989.
 - vi. See above para 3.1.
 - vii. Mr Tony Lawson.
 - viii. ACT Administration Central Office *Submission* 3 August 1989.
 - ix. For other aspects of procedure concerning the appointment of guardians and managers, see ch 4.
 - x. eg Faulks *Submission* 24 July 1989; Sutherland *Submission* 24 July 1989.
 - xi. Guardianship and Administration Board Act 1986 (Vic) s 12(1) and Disability Services and Guardianship Act 1987 (NSW) s 58.
 - xii. Note that the new Immigration Review Tribunal precludes legal representation for these reasons: it has attracted a certain amount of criticism on this ground.
 - xiii. See Guardianship and Administration Board Act 1986 (Vic) s 10(7) and Disability Services and Guardianship Act 1987 (NSW) s 60.
 - xiv. See Guardianship and Administration Board Act 1986 (Vic) s 10(3) and Disability Services and Guardianship Act 1987 (NSW) s 55(1).
 - xv. Draft Bill s 39(2).
 - xvi. See Guardianship and Administration Board Act 1986 (Vic) s 7 and Disability Services and Guardianship Act 1987 (NSW) s 56.
 - xvii. See Disability Services and Guardianship Act 1987 (NSW) s 57.
 - xviii. Eg Sutherland *Submission* 24 July 1989; Faulks *Submission* 24 July 1989.
 - xix. eg ACT Council on Intellectual Disability *Submission* 28 July 1989.
 - xx. eg Sutherland *Submission* 24 July 1989.
 - xxi. eg Faulks *Submission* 24 July 1989.
 - xxii. Compare Disability Services and Guardianship Act 1987 (NSW) s 67.
 - xxiii. eg s 43.
 - xxiv. See s 32, 33 of the Draft Act.
 - xxv. s 44 Draft Act.
 - xxvi. S 56 Draft Act

6. A Public Advocate

Should there be a Public Advocate?

6.1 The 1985 draft Ordinance did not make any provision for a Public Advocate. The Commission has since encountered almost unanimous support for the idea that a Public Advocate, modelled on the one in Victoria, should operate in the Australian Capital Territory.

Role of a Public Advocate

Guardianship

6.2 *The guardianship role.* A primary function of the Public Advocate would be to act as a guardian of last resort where no individual is ready, able or willing to act as the guardian of a person. The Public Advocate would also be able to act as an alternate guardian.

6.3 *Victorian model.* In Victoria, the key objectives for guardianship services have been stated asⁱ

- providing guardianship of last resort ensuring appropriate decision-making in the best interests of the represented persons
- recruiting and training volunteer guardians to take over the role of guardian of last resort and advising and supporting them
- providing information to the Guardianship and Administration Board to enable appropriate decision-making when it reviews its orders appointing the Public Advocate as guardian.

During the first year of the operation of the Guardianship and Administration Board Act 1986 in Victoria, it was found that the demand for the Advocate's guardianship services was greater than anticipated. Approximately half of all guardianship orders resulted in the Public Advocate being appointed. As a consequence of the strain on the Office of the Public Advocate's resources a second Advocate was appointed in February 1988.

Advocacy role

6.4 *Promoting community involvement decision making.* Another important task of the Public Advocate should be to promote family and community responsibility for guardianship. In part, this could be achieved through a process of community education. In Victoria, the objectives of the Office of the Public Advocate include

- increasing understanding within the community of people with disabilities about the existence of the services provided by and the modes of access to the Office of the Public Advocate and other agencies which protect the rights of the disabled
- increasing understanding within the general community of the rights, needs and vulnerabilities of people with disabilities

conducting research relating to people with disabilities to promote their rights and dignity.

In Victoria, the Office of the Public Advocate has pursued its community education objectives in a number of ways which include speaking engagements, seminars, printed material, posters and a video outlining the functions of the office.ⁱⁱ

6.5 *Liasing with other agencies.* The Public Advocate would be the likely recipient of a great deal of information about actual or perceived abuse or exploitation of disabled persons. In some cases, it would be appropriate for this information to be passed on to other offices such as the Office of the Ombudsman or the Human Rights and Equal Opportunity Commission.ⁱⁱⁱ In Victoria the Public Advocate's involvement has been requested in a number of cases for hearings in courts and Tribunals. This is occurring as judges, magistrates and lawyers more frequently recognise the forms of assistance available for people with disabilities. The types of involvement include appointment as guardian for disabled people involved in criminal trials, to instruct their solicitors and barristers, and appointment as guardian or 'next friend' in cases before the Family Court. The Public Advocate has also been involved in appeals against orders of the Guardianship and Administration Board which are heard by the Administrative Appeals Tribunal.

6.6 *General advocacy.* The Public Advocate should be able to seek assistance in the best interests of a disabled person from any government department, institution, welfare organisation or other service provider. He or she should also be able to make representations on behalf of, or act for, a developmentally disabled person. An example cited by the Victorian Office of the Public Advocate was of Meg P, a brain-damaged woman in her forties, who was ineligible for developmental activities provided by a local agency because her intellectual disability occurred after the age of 18. The Public Advocate initiated a meeting with various Commonwealth and State agencies and the local hospital. A co-ordinated service plan was drawn up which included rehabilitative activities and respite care.^{iv}

6.7 *Public Trustee.* In the Discussion Paper the Commission raised the option of expanding the Public Trustee's role to include the Public Advocate's functions and duties. After consultation with the Acting Public Trustee the Commission is of the view that this would not be appropriate. The Trustee's role, as it is presently exercised, relates to property management and administration and the role of manager of a disabled person's property falls naturally within these functions. The Advocate's role is quite distinct, requiring specialised knowledge of the needs of the disabled and involves promoting their welfare within the general community. Since it calls for different expertise, the position of Public Advocate should be kept separate from that of the Public Trustee. On the other hand, as many of the functions of the Public Advocate coincide with those a Mental Health Advocate would exercise, it should be possible, in the event of a Mental Health Advocate being appointed, for these positions to be held by the one officer. The appointment of a Public Advocate should not depend on the existence of a Mental Health Advocate, however, since the work of a Public Advocate is essential in ensuring that the objects of the proposed Guardianship and Management Act are achieved.

Public Advocate --- proposed s 48, 49

6.8 The Commission recommends that a Public Advocate providing guardianship services and having an advocacy role be appointed. He or she should be empowered to investigate,

report and make recommendations to the appropriate Ministers (such as Health or Community Services) on any aspect of the operation of the Act. The other functions of the Public Advocate would place him or her in an excellent position to provide an overall picture of community services for disabled persons in the Australian Capital Territory.

ENDNOTES

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- i. Public Advocate (Vic) Annual Report, 59.
 - ii. id, 72.
 - iii. eg to the Sex Discrimination Commissioner.
 - iv. id 52

Appendix A

Guardianship and Management of Property Bill 1989 (ACT)

GUARDIANSHIP AND MANAGEMENT OF PROPERTY BILL 1989

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- 58. Regulations
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 - Repeal of Lunacy Act, 1898 (NSW) and transitional provisions
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AUSTRALIAN CAPITAL TERRITORY

Guardianship and Management of Property Bill 1989

No. of 1989

An Act to provide for the appointment of guardians for, and the management of the property of, certain persons, and for related purposes

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART 1 PRELIMINARY

Short title

1. This Act may be cited as the *Guardianship and Management of Property Act 1989*.

Principles to be observed

2. It is the intention of the Legislative Assembly that, in performing a duty or function, or exercising a power, in relation to persons who, because of some physical, mental, psychological or intellectual condition, need protection from abuse, exploitation or neglect, or who are legally incompetent unable to enter into particular transactions:

- (a) the Tribunal, guardians and managers are to apply the following principles:
 - (i) that such persons should be appropriately protected;
 - (ii) that their views and wishes, so far as they can be ascertained, should be respected;
 - (iii) that their lives should not be interfered with except to the least extent necessary;
 - (iv) that they should be encouraged to look after themselves;
 - (v) that they should live in the general community and join in community activities; and
 - (iv) that the decisions that are made about such persons should be, as nearly as possible, the decisions that they themselves would have made if they had not been affected by the condition concerned; and
- (b) the Tribunal is to apply the principle that, unless the contrary is proved, such persons are legally competent and their decisions are reasonable.

Interpretation provisions

3. In this Act, unless the contrary appears:

doctor means a person registered as a medical practitioner under the *Medical Practitioners Registration Act 1930*;

Executive has the meaning it has under the *Australian Capital Territory Self-Government Act 1988* of the Commonwealth;

judicial officer means a Judge of the Supreme Court, a justice of a federal court or a magistrate;

lawyer means a barrister or solicitor whose name is on the Roll of Barristers and Solicitors under the *Legal Practitioners Act 1970*;

management powers, in relation to a person's property, means the powers that the person would have in relation to the property if he or she were legally competent to exercise them;

member means a member or the President of the Tribunal;

non-regenerative tissue has the meaning it has under the *Transplantation and Anatomy Act 1978*;

Note

1. It means any tissue, organ, part of the body or substance extracted from the body that is not replaced naturally after removal or injury: see *Transplantation and Anatomy Act 1978* section 4(1), (2): definitions of "non-regenerative tissue", "regenerative tissue" and "tissue".

prescribed medical procedure means:

- (a) an abortion;
- (b) reproductive sterilisation;
- (c) a hysterectomy;
- (d) a medical procedure concerned with contraception; or
- (e) removal of non-regenerative tissue for transplantation to the body of another living person;

Note

1. See sections 4, 53.

property includes:

- (a) money or a right to money;
- (b) an estate or interest in real or personal property; and
- (c) things in action;

spouse, in relation to a person, includes a person of the opposite sex to the person who is not legally married to the person but who lives with the person on a *bona fide* domestic basis;

Tribunal: see section 29;

trustee company has the meaning it has under the *Trustee Companies Act 1947*.

PART 2 – GUARDIANS AND MANAGERS

Division 1 – Appointment and powers of guardians and managers

Appointment and powers of guardians

4. (1) If, on application, the Tribunal is satisfied that:

- (a) a person who resides in the Territory is unable, because of some physical, mental, psychological or intellectual condition:
 - (i) to make reasonable judgments about matters relating to his or her health or welfare; or
 - (ii) to do any thing necessary for his or her health or welfare; and
- (b) because of that inability, the person's health or welfare is or is likely to be substantially at risk;

the Tribunal may, by order, appoint a guardian for the person, with such powers as are necessary adequately to protect the person's health or welfare.

Notes

1. For limits on findings of relevant physical, mental, psychological and intellectual conditions see section 7.
2. For the Tribunal's procedure on applications, see Part 3, Division 2.

(2) The powers may include the power:

- (a) to decide where and with whom the person is to live;
- (b) to decide what education or training the person is to receive;
- (c) to decide whether the person is to be allowed to work;
- (d) if the person is to be allowed to work – to decide the nature of the work, the place of employment and the employer;
- (e) to give for the person a consent required for a medical procedure or other treatment; and
- (f) to institute and maintain legal proceedings for and in the name of the person;

but do not include the power to chastise the person or the power to do any of the following for the person:

- (g) vote in an election;
- (h) make a will or other testamentary instrument;

- (i) consent to the adoption of a child;
- (j) give a consent in relation to a marriage;
- (k) give for the person a consent required by law for a prescribed medical procedure.

(3) If a guardian is appointed for a person, the Tribunal may, by order, declare that the person is not competent to give a consent required for a prescribed medical procedure.

Note

1. For the definition of prescribed medical procedure see section 3.
2. If the declaration is made, only the Tribunal may give the required consent: see section 53.

(4) If:

- (a) a guardian has the power to give for the person a consent required for medical procedure or other treatment; or
- (b) the Tribunal has the power to give for the person a consent required for a prescribed medical procedure;

the person is not competent to give such a consent for the procedure or treatment.

(5) The order may also appoint the guardian as a manager of some or all of the person's property, with specified management powers, if the Tribunal is satisfied that the powers are necessary to ensure that the guardian can exercise the powers he or she has as guardian.

(6) A guardianship order may be made for a person below the age of 18, but it does not take effect until the person reaches that age.

Note

1. Section 6 allows guardianship orders from other Australian jurisdictions, and certain overseas countries, to be registered and to be effective in the Territory.

Appointment and powers of managers

5. (1) If, on application, the Tribunal is satisfied that:

- (a) a person who resides in the Territory is, because of some physical, mental, psychological or intellectual condition, legally incompetent to enter into a transaction relating to the person's property; and
- (b) either:

- (i) it is likely that the question whether the person should enter into the transaction will arise; or
- (ii) it is in the person's interests to preserve the person's property by preventing a purported disposition of the property;

the Tribunal may, by order, appoint a person to manage all or a specified part of the property, with such management powers as are necessary to allow the manager to enter into the transaction for the person or to prevent the disposition.

Notes

1. For limits on findings of relevant physical, mental, psychological and intellectual conditions see section 7.
2. This power allows the Tribunal to confer on the manager powers in relation to all transaction with the person's property, some specified class of transactions or a single transaction, whichever is appropriate in the circumstances.
3. For the definition of management powers see section 3. For further provision for manager's powers, see Part 2, Division 3.
4. For the Tribunal's procedure on applications, see Part 3, Division 2.

(2) The Tribunal may, in accordance with subsection (1), appoint a manager for property in the Territory of a person who resides outside the Territory if:

- (a) the Tribunal is satisfied that it is impracticable for a manager for the property to be appointed in the place where the person resides; or
- (b) an order appointing a manager for the property under the law of that place cannot be registered under section 6.

(3) A management order may be made for a person below the age of 18, but it does not take effect until the person reaches that age.

Note

1. Section 6 allows management orders from Australian jurisdictions and certain overseas countries to be registered and to be effective in the Territory.

Registration of appointments of guardians and managers for persons resident outside the Territory

6. (1) If a person who has been appointed:

- (a) a guardian for another person who resides outside the Territory; or
- (b) a manager of property of another person who resides outside the Territory;

lodges with the Tribunal a copy of the instrument of appointment, the Tribunal is to register the copy and thereupon the person is to be taken to be guardian or manager as if the appointment had been made by the Tribunal.

(2) The appointment must have been made under a law of a State or of another Territory, or under the law of a prescribed foreign country, that substantially corresponds to this Act.

Note

1. For a list of prescribed foreign countries see [insert reference to relevant regulations].

Limit on findings of physical, mental etc, conditions

7. A person is not to be taken to have a physical, mental, psychological or intellectual condition relevant to this Part merely because the person:

- (a) is eccentric;
- (b) does or does not express a particular political or religious opinion;
- (c) is of a particular sexual orientation or expresses a particular sexual preference;
- (d) engages or has engaged in illegal or immoral conduct; or
- (e) takes or has taken drugs, including alcohol (but the effects of a drug may be taken into account).

Requirements for orders

8. (1) An order appointing a guardian or a manager may be conditional and may be limited as to time.

(2) It is to specify the powers conferred on the guardian or manager.

(3) If it relates to property, it is to specify the property.

Powers to be the least restrictive

9. The powers conferred on a person's guardian or on a manager of a person's property are to be no more restrictive of the person's freedom of decision and action than is necessary to achieve the purpose of the order.

Who may apply for the appointment of a guardian or a manager

10. Any person, including the Public Advocate, the Director of Mental Health and the Public Trustee, may apply for an order appointing a guardian or a manager.

Note

1. The Tribunal can strike out frivolous etc, applications and can order costs to be paid by applicants: see section 44.

Who may be appointed as guardian or manager

11. (1) The Public Advocate or a natural person may be appointed as a guardian.

(2) The Public Advocate, the Public Trustee, a trustee company or a natural person may be appointed as a manager.

(3) A person may be appointed both guardian and manager, and persons may be appointed jointly as guardians, managers or both.

What is to be considered in appointing a guardian or a manager

12. (1) A person is not to be appointed as a guardian or a manager unless the person has consented in writing to the appointment.

(2) A person (except the Public Advocate, the Public Trustee or a trustee company) is not to be appointed as a guardian of another person or a manager of another person's property unless the person is of or above the age of 18 and has informed the Tribunal on oath or affirmation whether the person:

- (a) has been convicted or found guilty of an offence involving violence, fraud or dishonesty;
- (b) has been, either in the Territory or elsewhere, refused appointment as a guardian or manager, or removed from office as a guardian or manager; or
- (c) is an undischarged bankrupt, has applied to take the benefit of a law for the relief of bankrupt or insolvent debtors or has compounded with creditors or made an assignment of income for their benefit; and if so, given particulars.

(3) A person (except the Public Advocate or the Public Trustee) is not to be appointed as a guardian for another person or a manager of another person's property unless the Tribunal is satisfied that the person will observe the principles set out in section 2 and is suitable to be appointed.

(4) In determining whether it is so satisfied, the matters that the Tribunal is to take into account include:

- (a) the views and wishes of the person to be subject to the order;
- (b) the desirability of preserving existing family relationships;
- (c) whether the 2 persons are compatible;
- (d) whether the proposed guardian or manager resides in the Territory;
- (e) whether the proposed guardian or manager will be available and accessible to the other person;

- (f) the nature of the duties and functions to be performed, and the powers to be exercised, under the order and whether the proposed guardian or manager is competent to perform and exercise them; and
- (g) whether the proposed guardian's or manager's interests and duties are likely to conflict with the other person's interests to the detriment of the person's interests.

(5) The interests and duties of the spouse or a relative of a person are not to be taken to be likely to conflict with the interests of the person merely because of the fact of being the spouse or relative.

(6) The Public Advocate, the Public Trustee or a trustee company is not to be appointed as a person's guardian or as a manager of a person's property if a natural person who is otherwise suitable has consented to be appointed.

The obligations of guardians and managers

13. (1) In exercising his or her powers as guardian for a person or as manager of a person's property, the guardian or manager is to exercise substituted judgment, that is, to act, so far as is proper, as the person would have acted in the circumstances if he or she had not been affected by the condition concerned.

(2) In doing so, the matters that the guardian or manager is to take into account include:

- (a) the need to ensure that the person does not become destitute; and
- (b) the desirability of maintaining, so far as is proper, the style of life of the person as it would have been if the person had not been affected by the condition concerned.

(3) If, in a particular case, it is not possible to determine how the person would have acted, the guardian or manager is to act in the best interests of the person.

(4) Unless the Tribunal, by order, permits:

- (a) a manager of a person's property is not to enter into a transaction in relation to the property if the interests of the manager are in conflict, or may conflict, with the interests of the person; and
- (b) a manager of a person's property is to keep the manager's property separate from the person's property, but this does not apply to property jointly owned by the manager and the person.

Remuneration of guardians and managers

14. (1) The Public Advocate or the Public Trustee:

- (a) is entitled to receive fees calculated as prescribed for acting as guardian or manager; and
- (b) is entitled to the reasonable expenses he or she incurs in acting as guardian or manager.

Note

1. For fees, see [*insert reference to relevant regulations*].

(2) Other guardians and managers:

- (a) are entitled to receive fees as determined by the Tribunal for acting as guardians or managers; and
- (b) are entitled to the reasonable expenses they incur in acting as guardian or manager.

(3) Amounts payable under this section are payable out of, and are a charge on, the person's property or, if the manager is manager of part only of the person's property, that part.

(4) The Public Advocate or the Public Trustee may dispense with payment of some or all of any amount payable under this section on the ground of hardship or on other grounds.

Division 2 – Supervision of guardians and managers

Tribunal may give directions

15. (1) The Tribunal may, on application, give a direction to a guardian or to a manager about the exercise of his or her powers or the performance of his or her duties.

(2) The guardian or manager must obey the direction.

Penalty: ???

Tribunal may give opinions, advice etc.

16. (1) The Tribunal may, on application by a guardian or a manager, give an opinion or advice about the exercise of the guardian's or the manager's powers or the performance of the guardian's or the manager's duties.

(2) A guardian or manager who acts in accordance with such an opinion or advice is to be taken to have acted properly and in accordance with this Act unless, in obtaining the opinion or advice, he or she acted fraudulently or wilfully misrepresented or concealed a material matter.

Guardianship and management to be regularly reviewed

17. (1) The Tribunal may at any time inquire whether an order appointing a guardian or a manager should be varied or revoked.

(2) The Tribunal is to hold such an inquiry in respect of each such order at least once every 3 years.

(3) If:

- (a) a guardian or a manager dies; and

- (b) because of the provisions of the order of appointment, some other person thereupon becomes a replacement guardian or manager;

the Tribunal is to hold an inquiry into the suitability of the replacement guardian or manager as soon as practicable.

Note

1. The procedure on inquiries is set out in Part 3, Division 2.

Division 3 – Provisions relating to management

Manager may have access to records

18. Unless the Tribunal otherwise orders, a manager of a person's property is entitled to access to a will or other testamentary instrument made by the person and to any other document relating to the property.

Manager may make payments for maintenance etc.

19 (1) The manager of a person's property may, out of the property, pay reasonable amounts for the maintenance, advancement or education, or otherwise for the benefit, of the person and of the person's dependants.

(2) The payments may be made to or on behalf of the person and, if the person has a guardian, to the guardian.

(3) The payments may be made out of income or capital.

(4) In determining whether to make a payment, the matters that the manager is to take into account include:

- (a) the person's views and wishes;
- (b) the amount and nature of the property;
- (c) the amount and nature of any other of the person's property; and
- (d) the present and the likely future needs of the person and the dependants.

Treatment of money etc, received by manager

20. (1) Unless the Tribunal otherwise orders, if a manager of a person's property receives money:

- (a) as interest on income in respect of the property; or
- (b) as the proceeds of the realisation of the property;

the manager becomes manager of the money.

(2) Unless the Tribunal otherwise orders, if there is an accretion to property in respect of which a manager has been appointed, the manager becomes manager of the extra property.

Effect of instruments executed by manager

21. An instrument executed by a manager of a person's property acting as manager has the same effect, and may be registered, as if it had been executed by the person.

Only trustee investments allowed

22. A manager (except the Public Trustee) is not to invest money held in his or her capacity as manager except:

- (a) in investments authorised by law for the investment of trust money; or
- (b) as the Tribunal, by order, permits.

Note: A list of authorised trust investments can be found in the *Trustee Act, 1925*

Notification of management to be entered on the Register Book

23. (1) If the property for which a manager is appointed includes land under the *Real Property Act 1925*, the manager is, within 14 days after being appointed, to file a memorandum with the Registrar of Titles.

(2) The Registrar is then to enter a memorial of the memorandum in the Register Book.

Accounts

24. (1) A manager must file with the Tribunal accounts as prescribed.

Penalty: ???

Note: See [insert reference to relevant regulations].

(2) The Tribunal may give a manager written directions in relation to the filing of accounts and the manager must comply with the directions.

Penalty: ???

(3) If the Public Trustee is not the manager, the manager must, within 3 days after filing the accounts, give a copy of the accounts to the Public Trustee.

Penalty: ???

(4) If the Public Trustee gives the manager a written direction to have the accounts audited by a specified auditor, the manager must comply with the direction.

Penalty: ???

(5) The Public Trustee may, by notice in writing, require the manager within 14 days after service of the notice or such longer period as is specified in the notice:

- (a) to provide specified information concerning the accounts; and
- (b) to produce specified documents in relation to the accounts.

(6) The manager must not, without reasonable excuse, refuse or fail to comply with the notice. Penalty for an offence against subsection (6): ???

Division 4 – When guardianship and management end

Guardians and managers may resign

25. A guardian or a manager may resign by writing given to the Tribunal.

Guardianship and management end on death

26. A person's guardian, and a manager of a person's property, cease to be guardian or manager when the person dies.

Removal of guardians and managers

27. A person appointed as a guardian or manager may be removed by order of the Tribunal if the Tribunal is satisfied that:

- (a) the need for guardianship or management no longer exists;
- (b) the person is no longer suitable to be a guardian or a manager;
- (c) the person is no longer competent to perform the duties and functions, or exercise the powers, of guardian or manager;
- (d) the person has neglected or failed to perform the duties and functions, or exercise the powers, of guardian or manager; or
- (e) the person has failed or refused to comply with this Act.

Note: For suitability, see section 12.

When guardians etc, cease to be guardians etc.

28. (1) Where 2 or more persons are joint guardians for a person or joint managers of a person's property and one or more of them ceases or cease (whether by death or otherwise) to be guardian or manager, the others remain, or the survivor remains, guardians or managers.

(2) The Public Advocate, on becoming aware that there is no longer a guardian for a person (but not because of the revocation of the order appointing the guardian or guardians), is to give notice to the Tribunal of that fact.

(3) If the notice indicates that the Public Advocate will act as guardian, then, by force of this section, the Public Advocate becomes, when the notice is given, the person's guardian as if he or she had been appointed under this Act.

(4) The Public Advocate or the Public Trustee, on becoming aware that there is no longer a manager of a person's property (but not because of the revocation of the order appointing the manager or managers), is to give notice to the Tribunal of that fact.

(5) If the notice indicates that the Public Advocate or the Public Trustee (whoever gave the notice) will act as manager, then, by force of this section, the Public Advocate or the Public Trustee, respectively, becomes, when the notice is given, the manager of the person's property as if he or she had been appointed under this Act.

PART 3 – THE TRIBUNAL

Division 1 – Constitution etc, of the Tribunal

The Guardianship and Management Tribunal

29. (1) There is established a Tribunal to be known as the Guardianship and Management Tribunal.

(2) The Tribunal is constituted by the President and 2 other members, appointed by the Executive.

Appointment of members

30. (1) The President is to be a judicial officer or a lawyer who has been admitted to practice for at least 5 years.

(2) The members are to be persons who have, in the opinion of the Executive, appropriate expertise, training or experience in relation to, and are otherwise suitable to deal with, the needs of persons who, because of physical, mental, psychological or intellectual conditions, need protection from abuse, exploitation or neglect.

(3) Members may be appointed as full time members or part time members.

*Other provisions relating to the appointment of members,
their tenure of office, remuneration and other conditions
to be included at this point*

The Tribunal can sit anywhere

31. The Tribunal may sit at any place in the Territory.

Removal of persons disrupting inquiries

32. (1) The member of the Tribunal presiding at an inquiry may, if the member is of the opinion that a person is substantially disrupting the conduct of the inquiry, order the person to leave the place where the inquiry is being held.

(2) The person must obey the order.

Penalty: ???

(3) If the person does not obey the order, the member may authorise a police officer to remove the person and the police officer may use such force, and obtain such assistance, as is necessary to remove the person.

Other offences relating to the Tribunal

33. (1) A person must not, with intent to mislead the Tribunal, file or lodge with the Tribunal a declaration, statement or other document knowing it to be false or misleading in a material respect.
Penalty: ???

(2) A person appearing to give evidence to the Tribunal in an inquiry must not, without reasonable excuse:

- (a) fail or refuse to be sworn or make an affirmation when so required by a member;
- (b) fail or refuse to answer a question that the person is required by a member to answer; or
- (c) fail or refuse to appear from day to day, unless excused by a member from further appearance.

Penalty: ???

(3) A person who knowingly gives false evidence to the Tribunal in an inquiry is guilty of perjury.

Note:

1. Perjury is punishable under the Crimes Act 1900 section 342.

(4) A person must not attempt improperly to influence a person who is participating in any way (including as a member of the Tribunal or as a person giving evidence to the Tribunal) in an inquiry to act otherwise than in the course of the person's duty in relation to the inquiry.

Penalty for an offence against subsection (3): ???

Division 2 – The Tribunal's procedure

Orders to be made only after inquiry in public

34. (1) The Tribunal is not to make an order on a matter unless it has held an inquiry into the matter.

(2) The inquiry is to be held in public unless the Tribunal orders otherwise.

Note:

1. For emergency orders see section 36.

Who is to have notice of an inquiry}

35. (1) Within 7 days before holding an inquiry into a matter concerning a person, the Tribunal (unless it determines otherwise), is to give notice of the inquiry to:

- (a) the person;

- (b) the person's spouse;
- (c) the person's parents;
- (d) the person's brothers and sisters;
- (e) each child of the person who is of or over the age of 18;
- (f) if a guardian has been appointed for the person – the guardian;
- (g) if a manager of the person's property has been appointed – the manager;
- (h) the Public Advocate; and
- (i) if the matter relates to property – the Public Trustee.

(2) The Tribunal may give notice of the inquiry to any other person.

Note: For emergency orders see section 36.

Emergency orders

36. (1) The Tribunal may make an order appointing:

- (a) the Public Advocate to be the guardian for a person; or
- (b) the Public Advocate or the Public Trustee to be the manager of a person's property;

without the inquiry required by section 34 or the notice required by section 35 if the Tribunal is satisfied that there are special circumstances of urgency that make it proper to do so.

Note: The other grounds for appointment (see sections 4 and 5) will still need to be made out.

(2) The order has effect for the time specified in the order, which is not to be longer than 10 days.

Who is entitled to appear at an inquiry

37. (1) A person who was given notice of an inquiry under subsection 35(1) is entitled to appear and adduce evidence at the inquiry.

(2) Other persons may only appear or adduce evidence by leave of the Tribunal.

(3) A person appearing at an inquiry may be represented by an agent or by a lawyer.

(4) The Tribunal may appoint a person to represent a person who is not otherwise represented.

Inquiries to be informal

38. An inquiry is to be conducted informally and with as little regard to legal technicalities as is just.

Evidence

39. (1) The Tribunal is not bound by the rules of evidence but may inform itself on any matter relevant to an inquiry as it thinks fit.

(2) Evidence adduced in an inquiry:

(a) may be given orally or tendered in writing; and

(b) may be given on oath or on affirmation.

(3) A member may administer an oath.

Tribunal may authorise medical or other examinations

40. The President of the Tribunal may, for the purposes of an inquiry, authorise a medical or other examination of the person who is the subject of the inquiry.

Note:

1. Authority under this section will have the same effect as a valid consent for anything done in the course of the examination.

Appointment of persons to assist the Tribunal

41. The Tribunal may appoint a lawyer or a doctor or any other person with appropriate expertise to assist it in an inquiry.

Summons to give evidence or produce documents

42. (1) The Tribunal may cause to be served on a person a summons to appear at an inquiry before the Tribunal to give evidence or to produce a document specified in the summons.

(2) The Tribunal may give directions for the manner of service, including substituted service, of a summons.

(3) A person must not, without lawful excuse, disobey a summons that has been served as so directed.
Penalty: ???

Applications may be withdrawn

43. The Tribunal may allow an application to be withdrawn at any time before it is determined.

Costs

44. The Tribunal may order an applicant to pay the costs, as determined by the Tribunal, of an application if it is satisfied that the application was frivolous, vexatious or not made in good faith.

Orders to be in writing etc.

45. (1) Orders of the Tribunal are to be in writing and signed by a member.

(2) The Tribunal is to give reasons for an order if asked to do so by a person entitled to appear and adduce evidence at the relevant inquiry.

(3) An order may be conditional.

(4) A document purporting to be a copy of an order and signed by a member is admissible as evidence that the order was made as the document purports it to have been made.

Reports of inquiries not to published etc.

46. (1) A person must not publish to the public, or to a section of the public, a report of an inquiry before the Tribunal.

Penalty: ???

(2) A person must not broadcast or play to the public, or to a section of the public, a sound recording of an inquiry.

Penalty: ???

(3) It is a defence to a prosecution for an offence against subsection (1) or (2) that the report or recording would not enable a person to be identified as a person for whom a guardian had been or was to be appointed, or of whose property a manager had been or was to be appointed.

(4) A person must not publish to the public, or to a section of the public, a photograph of, or taken at, an inquiry.

Penalty: ???

(5) Photograph includes a film, negative, videotape or other record of visual images.

(6) It is defence to a prosecution for an offence against a provision of this section that the Tribunal authorised the publication or the broadcast.

Appeals

47. (1) A person who appeared at an inquiry may appeal to the Supreme Court from an order, determination or other decision of the Tribunal in the inquiry:

(a) on a question of law – as of right;

(b) on any other question – only with the leave of the Supreme Court.

(2) The appeal is to be instituted:

(a) not later than 28 days after the order, determination or decision was made, or within such further time as the Supreme Court (whether before or after that time) allows; and

- (b) as prescribed by rules of court made under the *Australian Capital Territory Supreme Court Act 1933* of the Commonwealth.

Note: See [insert reference to relevant rules of court].

(3) The Supreme Court is to hear and determine the appeal and may make such order as is just, including an order confirming the order, determination or other decision, setting it aside and remitting the matter to the Tribunal with directions or substituting its own order, determination or decision.

PART 4 – THE PUBLIC ADVOCATE

Appointment etc, of Public Advocate

48. (1) There is to be a Public Advocate, who is to be appointed by the Executive.

(2) The Public Advocate has the following functions:

- (a) to promote among the public the objects of this Act;
- (b) to promote, facilitate and encourage the provision, development and co-ordination of services and facilities for persons who are suffering from a physical, mental, psychological or intellectual condition that impairs their ability to act independently;
- (c) to support the establishment of organisations involved with such persons and with their family, guardians and friends;
- (d) to institute and promote the operation of programs (including citizen advocacy programs, other advocacy programs and community education programs) in the interests of such persons and of their families and guardians;
- (e) to promote the protection of such persons from abuse and exploitation and the protection of their rights;
- (f) to investigate, report and make recommendations to the Minister on any aspect of the operation of this Act referred to the Public Advocate by the Minister.

Powers and duties of the Public Advocate

49. (1) The Public Advocate may:

- (a) represent, at an inquiry before the Tribunal, a person who is suffering from a physical, mental, psychological or intellectual condition that impairs his or her ability to act independently;

- (b) deal, on behalf of a person who is suffering from a physical, mental, psychological or intellectual condition that impairs his or her ability to act independently, with persons or bodies providing services;
- (c) give advice about the operation of this Act;
- (d) investigate complaints and allegations about the operation of this Act in respect of a person, or about the actions of a guardian, manager or person acting or purporting to act under an enduring power of attorney; and
- (e) provide information for persons who are, or who propose to be, appointed as guardians or managers.

Note:

1. For enduring powers of attorney see *Powers of Attorney Act 1956* sections [insert reference to appropriate provisions].

(2) If the Tribunal requires the Public Advocate to report to it on a matter concerned with an inquiry before the Tribunal, the Public Advocate is to give the required report.

(3) If the Public Advocate is appointed as a person's guardian:

- (a) the person for the time being holding the office or performing the functions of the Public Advocate is the person's guardian; and
- (b) the Public Advocate is to do his or her best to find a suitable natural person to be appointed as guardian.

Delegation

50. The Public Advocate may by writing delegate to a person employed in the office of the Public Advocate a power or function of the Public Advocate except this power of delegation.

Periodic report

51. The Public Advocate is to give to the Minister a periodic report on his or her activities as Public Advocate for each year ending on 30 June, for presentation to the Legislative Assembly.

Note: For provisions relating to annual reports see *Interpretation Act 1967* section 30A.

PART 5 – MISCELLANEOUS

Emergency powers to remove persons}

52. (1) The President of the Tribunal or a judicial officer may, on application by the Public Advocate, if:

- (a) the President or judicial officer is satisfied that:
 - (i) a guardian has been appointed for a person; or
 - (ii) grounds exist for the appointment of a guardian for a person; and
- (b) the person:
 - (i) is, because of some physical, mental, psychological or intellectual condition, likely to suffer serious damage to his or her physical, mental or emotional health if not removed; or
 - (ii) is being unlawfully detained;

issue a warrant authorising the Public Advocate, with such police officers as may be required, to enter a place specified in the warrant and remove the person.

Note: The grounds are set out in section 4.

(2) The application is to be in writing accompanied by a statement in writing setting out information in support of the application.

(3) All information, whether oral or in writing, given in support of the application is to be given on oath or affirmation.

(4) If it is impracticable to apply as mentioned in subsection (2), the application may be made by telephone or other appropriate means. In such a case:

- (a) the President or the judicial officer is to prepare and sign the warrant and tell the Public Advocate its terms;
- (b) the Public Advocate is to prepare an instrument in the same terms and write on it:
 - (i) the time at which and the day on which the warrant was signed; and
 - (ii) the name of the person who signed the warrant;
- (c) the Public Advocate is to give to the person who signed the warrant, not later than 24 hours after it was signed, the statement mentioned in subsection (2) and the instrument mentioned in paragraph (b);
- (d) while the warrant remains in force, the instrument may be used instead of the warrant; and
- (e) a court is not to find that the premises were entered in accordance with the warrant unless the warrant signed as mentioned in paragraph (a) is admitted in evidence.

(5) If the Public Advocate has not already applied to be appointed as the person's guardian, the Public Advocate is to do so as soon as practicable after the person has been removed.

Prescribed medical procedures

53. (1) If the Tribunal has made an order mentioned in subsection 4(3) in respect of a person, it may, on application, by order, consent to a prescribed medical procedure for the person if it is satisfied that:

- (a) the procedure is otherwise lawful;
- (b) the person is not competent to give consent and is not likely to become competent in the foreseeable future;
- (c) the procedure would be in the person's best interests; and
- (d) the person, the guardian and any other person who the Tribunal considers should have notice of the proposed procedure are aware of the application for consent.

Note:

1. The effect of an order under subsection 4(3) is that only the Tribunal may give a consent legally required for a prescribed medical procedure (for definition see section 3).

(2) The Tribunal is to appoint the person's guardian or the Public Advocate or some other independent person to represent the person in connection with the inquiry relating to the consent.

(3) In the case of the removal of non-regenerative tissue for transplantation to the body of another living person, the Tribunal is also to be satisfied that:

- (a) the risk to the person from whom the tissue is to be taken is small;
- (b) the risk of failure of the transplant is low;
- (c) the life of the person to whose body the tissue is to be transplanted would be endangered if the transplant were not made; and
- (d) it is highly likely that transplanting such tissue from someone else would be unsuccessful.

Note:

1. For other provisions relating to transplants see *Transplantation and Anatomy Act 1978*.

(4) In determining whether a particular procedure would be in the person's best interests, the matters that the Tribunal is to take into account include:

- (a) the wishes of the person, so far as they can be ascertained;
- (b) what would happen if it were not carried out;
- (c) what alternative treatments are available;

- (d) whether it can be postponed because better treatments may become available; and
- (e) in the case of a transplantation of tissue – the relationship between the 2 people.

Powers to adjust transactions

54. (1) This section applies where a person for whose property a manager has been appointed purports to enter into a transaction concerning the property.

(2) The transaction is not void on the ground that the person was not legally competent to enter into the transaction, but the Tribunal, the Supreme Court or the Magistrates Court may, on application by the guardian or the manager or by some other person concerned in the transaction, by order, confirm the transaction, declare the transaction void or adjust the rights of the parties to the transaction, as is just.

(3) The Tribunal, the Supreme Court or the Magistrates Court may order an application made to it to be transferred to another of the Tribunal, the Supreme Court or the Magistrates Court.

(4) The application is then to be dealt with as if it had been commenced in the Tribunal or in the relevant Court and the Tribunal or the Court may make any proper order for the further steps to be taken before it.

(5) An order under this section has effect according to its tenor.

Injunctions to restrain dealings

55. (1) The Tribunal may, on application, by order, restrain a person from entering into, completing or registering or otherwise giving effect to a transaction with another person concerning property of the other person if the Tribunal is satisfied that there are grounds for the appointment of a manager for the property.

Note:

1. The grounds are set out in section 5.

(2) An order remains in force for 3 days or a shorter period specified in the order but if, within that period, an application for the appointment of a manager is made to the Tribunal, the Tribunal may, by order, continue the first order until the application is determined.

(3) A person who has notice of an order must not act contrary to it.
Penalty: ???

Periodic report on Tribunal's operations and on operation of the Act

56. The Tribunal is to give to the Minister a periodic report on its operations and on the operation of this Act for each year ending on 30 June, for presentation to the Legislative Assembly.

Note:

1. For provisions relating to annual reports see *Interpretation Act 1967* section 30A.

Commencement

57. This Act comes into operation on a day fixed by the Minister by notice in the *Gazette*.

Regulations

58. The Minister may make regulations, not inconsistent with this Act, prescribing all matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Repeals, transitional provisions and amendments of other laws

59. (1) On and from the commencement of this Act, Parts VII and VIII and section 169 of the Lunacy Act, 1898 of the State of New South Wales in its application to the Territory (called **the repealed law**) cease to have effect in the Territory as laws of the Territory.

(2) A person who, immediately before the commencement of this Act, was:

- (a) a committee of another person; or
- (b) a guardian of another person;

under the repealed law is, by force of this section, the guardian for the other person as if he or she had been so appointed under this Act on the day when he or she became committee or guardian, with the powers as guardian under this Act that he or she had under the repealed law.

(3) A person who, immediately before this Act comes into operation, was:

- (a) a committee of the estate of another person;
- (b) a person appointed to undertake the care and management of another person's property;
- (c) a person appointed as a guardian or receiver of another person's estate; or
- (d) a person appointed to receive the property, or the proceeds of the property, of another person;

under the repealed law is, by force of this subsection, the manager of the relevant property of the other person as if he or she had been so appointed under this Act on the day when he or she became committee or was so appointed, with the powers as manager under this Act that he or she had under the repealed law.

(4) The *Powers of Attorney Act 1956* is amended:

(a) by inserting in section 3 the following definition:

“Tribunal means the Guardianship and Management Tribunal established by the *Guardianship and Management of Property Act 1989*”;

Note:

1. This amendment defines “Tribunal”, for the purposes of the amendments made by this subsection, as the Guardianship and Management Tribunal.

(b) by omitting from section 17 “Court” (wherever occurring) and substituting “Court or the Tribunal”; and

Note:

1. This amendment empowers the Tribunal, as well as the Court, to give directions to donees of enduring powers of attorney, to terminate enduring powers of attorney and to make declarations as to the effect of enduring powers of attorney.

(c) by adding at the end the following section:

Relationship between enduring powers of attorney and guardianship and management orders

“18. (1) If the Tribunal makes an order appointing a guardian for a person or a manager for a person’s property, it may also make such order as it thinks fit affecting the continued operation of an enduring power of attorney executed by the person. Such an order has effect according to its tenor.

Note:

1. This subsection empowers the Tribunal to adjust the operation of enduring powers of attorney when it appoints a guardian or a manager.

“(2) A person for whom a guardian has been appointed, or for whose property a manager has been appointed, is not capable of executing an enduring power of attorney unless the Tribunal has approved the provisions of the power.

Note:

1. This subsection empowers the Tribunal to act to ensure that there is no conflict between the terms of a guardianship or management order and the terms of a later power of attorney.”.

(5) The *Transplantation and Anatomy Ordinance 1978* is amended:

(a) by inserting after section 16 the following section:

Effect of consent by Guardianship and Management Tribunal

“16A. Subject to section 19, an order under section 53 of the *Guardianship and Management of Property Act 1989* consenting to the removal of specified non-regenerative tissue from a person for transplantation is sufficient authority for a medical practitioner to remove, at any time after 24 hours after the time the order was made, the non-regenerative tissue specified in the order for the purpose of transplantation of the tissue to the body of another living person.”; and

Note:

1. This section ensures that a consent to a transplantation given by the Guardianship and Management Tribunal is effective.

(b) by adding at the end of section 19 the following subsection:

“(2) A document that purports to be an order of the kind mentioned in section 16A is not sufficient authority for a medical practitioner to remove tissue if the medical practitioner has been informed that the order has been revoked.”.

Explanatory Memorandum

Draft Guardianship and Management of Property Bill 1989

OUTLINE

1. This Bill provides for the appointment of guardians for persons, and for the appointment of managers of the property of persons, who because of some condition need protection or who are legally incompetent to enter into particular transactions. It also provides special protection for these people. It repeals the existing law (the Lunacy Act, 1989 (NSW)) and the Transplantation and Anatomy Act 1978 and the Powers of Attorney Act 1956.

NOTES ON CLAUSES

PART 1 – PRELIMINARY

Clause 1 – Short title

2. This clause provides for a short title to the Bill.

Clause 2 – Principles to be observed

3. Clause 2 sets out the principles that should be applied the Tribunal and by guardians and managers. These are, broadly, that:

they should be appropriately protected
their views and wishes, so far as they can be ascertained, should be respected
their lives should be interfered with to the least extent possible
they should be encouraged to look after themselves as much as possible
they should live in the general community and participate in community activities and
the decisions that are made about such persons should be, as nearly as possible, the decisions that they themselves would have made if they had not been affected by the condition concerned.

The Tribunal is also to apply the principle that, unless the contrary is proved, such persons are legally competent and their decisions are reasonable.

Clause 3 – Interpretation provisions

4. Clause 3 defines certain terms for the purposes of the Bill. Significant ones are:

management powers, in relation to a person's property, means the powers that the person would have in relation to the property if he or she were legally competent to exercise them

prescribed medical procedure means

an abortion
reproductive sterilisation
a hysterectomy
removal of a non-regenerating tissue for transplantation

spouse includes de facto spouse.

PART 2 – GUARDIANS AND MANAGERS

Division 1 – Appointment of guardians and managers

Clause 4 – Appointment and powers of guardians

5. This clause is central to the appointment of a guardian for a person. It provides the criteria to be satisfied before a guardian can be appointed. These are, chiefly, that the person is in need of a guardian. The clause also restricts the powers a guardian may exercise.

6. Clause 4(1) provides that the Tribunal must be satisfied that a person who resides in the Territory suffers from a condition that causes the person to be unable to make reasonable judgments about his or her health or welfare or to do any thing necessary for his or her health or welfare and because of that inability, the health or welfare of the person is at risk. The condition may be physical, mental, psychological or intellectual. If the Tribunal is satisfied, it may appoint a guardian for the person. The appointment is made by order of the Tribunal. The order will specifically state the guardian's powers – these will not extend beyond the powers that are necessary to ensure adequate protection of the person's health and welfare.

7. The powers that the guardian of a person may exercise, set out in subclause (2), include:

- to decide where and with whom the person is to live
- to decide the education and training the person is to receive
- to decide if the person is to be allowed to work
- if the person is to be employed, to decide the nature of the work, the employer and the place of employment
- to give for the person a consent required for medical or other treatment or procedure and
- to institute and maintain legal proceedings for and in the name of the person.

8. The powers that the guardian of a person may *not* exercise include:

- the power to chastise the person
- the power to marry, vote, make a will, consent to adoption of a child and consent to a prescribed medical procedure.

9. To avoid conflict, the person is not competent to give consent required for medical or other treatment or procedure or for a prescribed medical procedure while the guardian of the person or the Tribunal has the power to give the consent (clause 4).

10. Under clause 4(5) the Tribunal may appoint the guardian as manager of some or all of the person's property if the powers are necessary to ensure that the guardian can exercise the powers he or she has as guardian. The management powers will be specified in the order.

11. A guardianship order is not effective in relation to a person who is under the age of 18, but under clause 4(6), the order may be made in advance to come into effect when that age is reached.

Clause 5 – Appointment of managers

12. Clause 5(1) provides that the Tribunal must be satisfied that a person who resides in the Territory suffers from a condition that causes the person to be legally incompetent to enter into a transaction relating to the person's property and the question is likely to arise whether the person should enter into the transaction or it may be necessary to preserve the property. The condition may be physical, mental, psychological or intellectual.

If the Tribunal is satisfied, it may appoint a manager for all or a specified part of the person's property. The appointment is made by order of the Tribunal. The order will specifically state the management powers that the manager may exercise which will not extend beyond the powers that are necessary to allow the manager to enter into the transaction or prevent disposition of the property.

13. Under clause 5(2), if a person does not reside in the Territory but has property in the Territory, and if the Tribunal is satisfied that it is not practicable for a manager for the property to be appointed where the person resides, or that an instrument of appointment cannot be registered under clause 6, the Tribunal may appoint a manager for all or a specified part of the person's property within the Territory.

14. A management order is not effective in relation to a person who is under the age of 18, but under clause 5(3), the order may be made in advance to come into effect when that age is reached.

Clause 6 – Registration of appointments of guardians and managers for persons resident outside the Territory

15. Clause 6 deals with the case of persons outside the Territory. It provides for registration by the Tribunal of an instrument of appointment of a guardian for a person, or of the manager of the property of a person, who resides outside the Territory. The effect of registration is that the appointment is taken to have been made by the Tribunal. The appointment must have been made in accordance with the law of another State or Territory, or with the law of a prescribed foreign country that substantially corresponds with this Bill. The Tribunal may appoint a person to be a joint guardian or joint manager.

Clause 7 – Limit on findings of physical, mental etc, conditions

16. Clause 7 sets out types of activity that do not of themselves constitute a physical, mental, psychological or intellectual condition for the purposes of this Part. They are:

- behaviour that is eccentric
- expressions of a particular political or religious opinion
- being of a particular sexual preference or orientation
- engaging in illegal or immoral conduct and
- taking drugs, including alcohol.

While the taking of drugs or alcohol may not be taken into account, the effects of taking such a drug is a matter that can be considered.

Clause 8 – Requirements for orders

17. Clause 8 sets out some particulars concerning orders of appointment. An order may be conditional and may be limited as to time (subclause (1)). It must specify the powers conferred on the guardian and on the manager (subclause (2)), and a management order must specify the property to which it relates (subclause (3)).

Clause 9 – Powers to be the least restrictive

18. Clause 9 is fundamental to the concept in the Bill of guardianship and management powers. It states that the powers conferred by the order appointing a person's guardian or the manager of a person's property must be the least restrictive of the person's freedom of decision and action as are necessary to achieve the purposes of the order.

Clause 10 – Who may apply for the appointment of a guardian or a manager

19. Under clause 10, any person, including the Public Advocate, the Director of Mental Health and the Public Trustee, may apply for an order appointing a guardian or a manager.

Clause 11 – Who may be appointed as guardian or manager

20. Under clause 11(1), the Public Advocate or a natural person may be appointed as guardian. Under clause 11(2), in addition to the Public Advocate or a natural person, the Public Trustee or a trustee company may be appointed as a manager. In all cases joint appointments of eligible persons may be made (clause 11(3)).

Clause 12 – What is to be considered in appointing a guardian or a manager

21. Clause 12 sets out the conditions for appointment as a guardian or manager. First, unless the person has consented in writing (clause 12(1)), he or she may not be appointed as guardian of another person or manager of another person's property.

22. Particular conditions in relation to a natural person are set out in clause 12(2). The person must be at least 18 years old and have informed the Tribunal (and given particulars to it) if the person

has been convicted or found guilty of an offence involving violence, fraud or dishonesty,
has, in the Territory or elsewhere, been refused or removed from the position of guardian or manager or
has committed an act of bankruptcy.

23. The Tribunal must be satisfied that the person will observe the principles set out in clause 2. The person must be suitable for the appointment (subclause (3)). Clause 12(4) sets out particular matters that the Tribunal must take into account.

the views and wishes of the person subject to the order
the desirability of preserving family relationships
whether the 2 persons are compatible
whether the proposed guardian or manager resides in the Territory and whether he or she will be available and accessible to the other person
the nature of the duties and functions and powers under the order and whether the person is competent to perform and exercise them and
whether there is likely to be a conflict of the person's interests with those of the other person to the detriment of that other person's interests.

The interests and duties of the spouse or a relative of the other person are not to be taken to be likely to conflict with the interests of the person for that reason alone (clause 12(5)).

24. Because of the personal nature of guardianship and management, clause 12(6) provides that the Public Advocate, the Public Trustee or a trustee company are not to be appointed as a guardian or manager if a suitable natural person has consented to be appointed.

Clause 13 – The obligations of guardians and managers

25. Clause 13(1) places on guardians and managers the obligation to act, so far as possible, as the person would have acted in the circumstances if the person had not been affected by the condition that had made the

appointment necessary. This is called substituted judgment. Clause 13(2) provides for a guardian or manager, in the exercise of substituted judgment, to take into account the need to protect the person from becoming destitute, and the desirability, so far as possible, to maintain the person's lifestyle.

26. Clause 13(3) states that if it is not possible to determine how the person would have acted, the guardian or manager is to act in the best interests of the person.

27. Clause 13(4) states that, unless the Tribunal permits, a manager of a person's property is not to enter into a transaction in relation to the property if the interests of the manager are or may be in conflict with the person. It also provides that a manager of a person's property is to keep the manager's property separate from the person's property, except in the case of property jointly owned by the manager and the person.

Clause 14 – Remuneration of guardians and managers

28. Clause 14(1) states that the Public Advocate or Public Trustee is entitled to receive prescribed fees for acting as guardian or manager. They are also entitled to reasonable expenses incurred in acting as guardian or manager.

29. Under clause 14(2) other guardians and managers are entitled to receive fees as determined by the Tribunal. They are also entitled to reasonable expenses incurred in acting as guardian or manager. Amounts so payable are payable out of the person's property subject to the order (clause 14(3)). Payment to the Public Advocate or the Public Trustee may be waived on hardship or other grounds (clause 14(4)).

Division 2 – Supervision of guardians and managers

Clause 15 – Tribunal may give directions

30. Clause 15(1) allows the Tribunal at any time to give a direction concerning the exercise or performance of guardianship or management powers or duties. Clause 15(2) provides for a penalty for failure by a guardian or manager to comply with a direction of the Tribunal.

Clause 16 – Tribunal may give opinions, advice etc.

31. Clause 16(1) allows the Tribunal to give an opinion or advice about the exercise or performance of guardianship or management powers or duties on application by a guardian or manager. Clause 16(2) gives protection to the guardian or manager who acts in accordance with the advice of the Tribunal. He or she is to be taken to have acted properly and in accordance with the Bill. The guardian or manager will not be taken to have acted properly if, in the course of obtaining the opinion or advice, he or she acted fraudulently. Further, the guardian or manager must not wilfully misrepresent or conceal material matters in obtaining the Tribunal's opinion or advice.

Clause 17 – Management and guardianship to be regularly reviewed

32. Clause 17 provides that the Tribunal may at any time inquire if an order appointing a guardian or manager should be varied or revoked, and that an inquiry into each order must be made at least once every 3 years. If a guardian or manager dies and some other person becomes a replacement guardian or manager, the Tribunal should hold an inquiry into the suitability of the replacement as soon as practicable.

Division 3 – Provisions relating to management

Clause 18 – Manager may have access to records

33. Clause 18 provides that, unless the Tribunal otherwise orders, the manager of a person's property may have access to the person's will or other testamentary disposition, or to any other document relating to the property.

Clause 19 – Manager may make payments for maintenance etc.

34. Clause 19(1) allows the manager of a person's property to make payments for the benefit of the person and the person's dependants. They may be for maintenance, advancement or education or otherwise. If the person has a guardian, the payments are to be paid to the guardian (clause 19(2)). Clause 19(3) gives the manager a discretion to make the payments out of income or capital.

35. The matters to be taken into account by the manager in determining whether to make a payment are set out in clause 19(4) and include the person's wishes, the amount and nature of the property and of any other property of the person and the present and likely future needs of the person and the dependants.

Clause 20 – Treatment of money etc, received by manager

36. Clause 20 applies unless the Tribunal otherwise orders. If a manager of a person's property receives money, whether as interest on income or as proceeds of a dealing in, the person's property, or comes into or receives other property as an accretion to the person's property, the manager becomes manager of the money received or of the extra property.

Clause 21 – Effect of instrument executed by manager

37. Clause 21 makes it clear that execution of an instrument by a manager acting as manager of a person's property has the same effect, and may be registered, as if executed by the person.

Clause 22 – Only trustee investments allowed

38. Clause 22 prohibits investment by a manager of a person's property of money held in the capacity of manager except in an investment authorised by law for the investment of trust money or as permitted by order of the Tribunal. This clause does not apply to the Public Trustee.

Clause 23 – Notification of management to be entered on the Register Book

39. Clause 23 applies if the property for which a manager is appointed includes land under the *Real Property Act 1925*. It requires notice of the appointment to be registered. Compliance with this clause is necessary to enable dealings with the land to be registered under that Act.

Clause 24 – Accounts

40. Clause 24 deals with the accounts that the manager of a person's property must file. Clause 24(1) requires the manager to file with the Tribunal accounts as prescribed. Clause 24(2) provides that the Tribunal may give the manager written directions in relation to the filing of the accounts, and the manager must comply with the directions.

41. Clauses 24(3), (4) and (5) are applicable if the Public Trustee is not the manager. They allow the Public Trustee to oversight and audit managers' accounts.

42. The manager is subject to a penalty for failure to comply with the requirements concerning filing of accounts and providing information or producing documents in connection with the accounts.

Division 4 – When do guardianship and management end?

Clause 25 – Guardians and managers may resign

43. Clause 25 permits a guardian or manager to resign by writing given to the Tribunal.

Clause 26 – Guardianship and management end on death

44. Clause 26 provides that guardianship, in relation to a person, and management, in relation to a person's property, end on the death of the person.

Clause 27 – Removal of guardians and managers

45. Under clause 27, the Tribunal may, by order, remove a person appointed as guardian or manager if it is satisfied that the need for guardianship or management no longer exists, or, in relation to the person who has been appointed guardian or manager, that he or she has ceased to be suitable, is not competent or has neglected or failed to perform the guardianship or management duties and functions or exercise the powers, or has failed or refused to comply with the Bill.

Clause 28 – When guardians etc, cease to be guardians etc.

46. Clause 28 provides for the continuance of the exercise of guardianship or management powers or duties if there is no longer a guardian or manager. Clause 28(1) deals with the situation of 2 or more joint guardians. The survivor remains, or the survivors remain, guardians or managers after the other ceases to be a guardian or manager. The reason for the person ceasing to be guardian or manager (whether by death or otherwise) does not affect the survivor.

Guardians: Clause 28(2) places a duty on the Public Advocate to give notice to the Tribunal on becoming aware that the guardians of a person have ceased to be guardians. If the notice indicates that the Public Advocate will take over the powers of guardian, then by force of this section, the Public Advocate becomes, under clause 28(3), the guardian as if appointed as guardian under the Bill.

Managers: Under clause 28(4), the Public Advocate or the Public Trustee must give notice to the Tribunal on becoming aware that the managers of a person's property have ceased to be managers. If the notice indicates that the Public Advocate or the Public Trustee will take over the powers of manager, then by force of this section, the Public Advocate or the Public Trustee becomes, under clause 28(5), the manager as if appointed as manager under the Bill.

PART 3 – THE TRIBUNAL

Division 1 – Constitution etc, of the Tribunal

Clause 29 – The Guardianship and Management Tribunal

47. This clause establishes the Guardianship and Management Tribunal. It is constituted by a President and 2 other members appointed by the Executive.

Clause 30 – Appointment of members

48. Under clause 30(1), the President must be a judicial officer or a lawyer of at least 5 years standing. All members must, in the opinion of the Executive, be persons who are qualified by training or experience to be members of the Tribunal (clause 30(2)). The members may be appointed as full time or part time members.

Clause 31 – The Tribunal can sit anywhere

49. Clause 31 provides that the Tribunal may sit at any place in the Territory.

Clause 32 – Removal of persons disrupting inquiries

50. Clause 32(1) gives the member of the Tribunal presiding at an inquiry the power to order a person to leave the inquiry if the member thinks that the person is disrupting the conduct of the inquiry. The person must obey the order (clause 32(2)). Under clause 32(3), if a person does not obey the order to leave, the member may authorise a police officer to remove the person.

Clause 33 – Other offences relating to the Tribunal

51. Clause 34(1) provides a penalty for a person who, with intent to mislead, files or lodges with the Tribunal a document knowing it to be false or misleading in a material respect. Under clause 34(2), a person who is appearing before the Tribunal must not fail or refuse to be sworn or make an affirmation, to answer a question or to appear from day to day unless excused by the Tribunal.

52. Clause 34(3) provides that anyone who knowingly gives false evidence to the Tribunal is guilty of perjury (which is a crime under the Crimes Act 1900).

53. Clause 34(4) provides a penalty for a person who attempts improperly to influence a member of the Tribunal or a person giving evidence in an inquiry before it or who acts in a way that is not according to the person's duty.

Division 2 – The Tribunal's procedure

Clause 34 – Orders to be made only after inquiry in public

54. Clause 34 provides that the Tribunal must not make an order unless it has held a inquiry into the matter. The inquiry is to be held in public unless the Tribunal otherwise orders.

Clause 35 – Who must have notice of an inquiry

55. Under clause 35, the Tribunal may give notice of an inquiry into a matter concerning a person to
the person
the person's spouse

the person's brothers and sisters
the person's children who are or over the age of 18
the person's guardian (if any)
the manager (if any) of the person's property
the Public Advocate and
if the matter relates to property – the Public Trustee.

This is not an exhaustive list – the Tribunal may give notice to any other person. The notice should be given within 7 days before holding the inquiry unless the Tribunal determines otherwise.

Clause 36 – Emergency orders

56. Under clause 36 the Tribunal may appoint the Public Advocate as a guardian or the Public Advocate or the Public Trustee as a manager without holding an inquiry or giving notice, if the Tribunal is satisfied the matter is urgent.

Clause 37 – Who is entitled to appear at an inquiry

57. Under clause 37(1) a person to whom the Tribunal has given notice of an inquiry under clause 35 may appear at the inquiry. Any other person who wishes to appear must have leave of the Tribunal (clause 37(2)). A person who appears may be represented by an agent or a lawyer (clause 37(3)). The Tribunal may appoint someone to represent a person who is not otherwise represented (clause 37(4)).

Clause 38 – Inquiries to be informal

58. Clause 38 excuses the Tribunal from legal formality.

Clause 39 – Evidence

59. Clause 39 emphasises the informal nature of inquiries before the Tribunal. The Tribunal is not bound by the rules of evidence and may inform itself as it thinks fit (clause 39(1)). Evidence before the Tribunal may be oral or in writing, on oath or on affirmation (clause 39(2)). Under clause 39(3), a member of the Tribunal may administer an oath.

Clause 40 – Tribunal may authorise medical or other examinations

60. Clause 44 provides for the Tribunal to authorise a medical examination or another examination of a person for the purposes of an inquiry. This has the effect of a valid consent.

Clause 41 – Appointment of persons to assist the Tribunal

61. Clause 41 provides that the Tribunal may appoint any person with appropriate expertise to assist it in an inquiry.

Clause 42 – Summons to give evidence or produce documents

62. Under clause 42, the Tribunal may cause a summons to be served on a person to appear before the Tribunal or produce a document. The Tribunal may give directions for service including substituted service. There is a penalty for disobedience to a summons.

Clause 43 – Applications may be withdrawn

63. Under clause 43, the Tribunal may permit an application to be withdrawn at any time before it is determined.

Clause 44 – Costs

64. Clause 44 provides that if the Tribunal is satisfied that an application was not made in good faith, it may order the applicant to pay costs.

Clause 45 – Orders to be in writing etc.

65. Clause 45 provides that an order of the Tribunal must be in writing signed by a member. An order may be made with or without conditions. A document signed by a member that purports to be a copy of an order is admissible as evidence that the order was made.

Clause 46 – Reports of inquiries not to be disclosed

66. It is an offence under section 46 to publish a report of an inquiry which may result in the identities of the parties being disclosed. Sound recordings of an inquiry are not permitted to be broadcast. Clause 46(3) permits a defence for a prosecution for an offence against clause 46(1) or (2) that the report or recording would not enable a party to be identified. It is prohibited to publish a photograph taken at an inquiry (clause 46(4)). It is also a defence to a prosecution for an offence against this clause that the Tribunal authorised the publication or broadcast.

Clause 47 – Appeals

67. Clause 47(1) provides that a person who appeared at an inquiry before the Tribunal may appeal to the Supreme Court on a question of law, or with the leave of the court on any matter relating to an order, determination or other decision of the Tribunal. Clause 47(2) limits the time for appeal to 28 days but allows the Court to extend the time. On an appeal the Court may make such order as is just, which may include making an order confirming the order, determination, or decision, or setting it aside, making a substitute order, or remitting the matter to the Tribunal with directions.

PART 4 – THE PUBLIC ADVOCATE

Clause 48 – Appointment etc, of Public Advocate

68. Clause 48(1) provides for the office and appointment by the Executive of the Public Advocate. The functions of the Public Advocate are set out in clause 48(2). Briefly, the function of the Public Advocate are to protect persons who are suffering from a condition that makes them persons in need, and to promote the objects of the Bill and to encourage persons and organisations connected with persons in need. The Public Advocate has a duty to investigate, report and make recommendations to the Minister on the operation of the Bill.

Clause 49 – Powers and duties of the Public Advocate

69. Clause 49(1) sets out the powers of the Public Advocate, including power to act on behalf of a person who is suffering from a condition that impairs the ability to act independently. The Public Advocate may give

advice about the operation of the Bill, investigate matters connected with a person to whom the Bill may apply and provide information to persons who are to be appointed guardians or managers. The Public Advocate must comply with a request from the Tribunal to provide it with information connected with an inquiry (clause 49(2)). The Public Advocate may be appointed as a person's guardian, but should try to find a suitable natural person who will consent to the appointment (cf clause 12(6)).

Clause 50 – Delegation

70. Clause 50 permits the delegation by the Public Advocate of any of his or her powers and functions to a person employed in the office of the Public Advocate. Provisions of general application relating to delegations are set out in sections 29A, 29B and 30 of the *Interpretation Act 1967*.

Clause 51 – Annual report on operation of the Act

71. Under clause 51, the Public Advocate is to prepare an annual report on the operation of the Act and the Minister will table it in the Legislative Assembly. Provisions of general application relating to periodic reports are set out in section 30A of the *Interpretation Act 1967*.

PART 5 – MISCELLANEOUS

Clause 52 – Emergency powers to remove persons

72. Clause 52 provides for the President of the Tribunal or a judicial officer to issue a warrant authorising the Public Advocate to enter a place and remove a person in respect of whom a guardian has been appointed or where grounds exist to appoint a guardian. The Public Advocate must apply in writing with a statement setting out information in support of the application. The information, whether written or oral, must be given on oath or affirmation. The issuing authority must be satisfied that the person is likely to suffer damage to health or welfare if not removed from the place, or that he or she is being unlawfully detained.

73. Clause 52(4) sets out the requirements when it is not practicable to make written application for the warrant, such as in a case of emergency. If the application may be made by telephone or otherwise, the issuing authority must prepare and sign the warrant and inform the Public Advocate of its terms. The Public Advocate prepares an instrument in the same terms noting the time of signing and date of the warrant, and the name of the signatory. The Public Advocate is to give the signatory the statement setting out the information supporting the application for the warrant and the instrument made out in the terms of the warrant. The instrument may be used instead of the warrant so long as the warrant remains in force. Paragraph 52(4)(e) makes it clear that entry for the purposes of this clause must be in accordance with a signed warrant.

74. Under clause 52(5), the Public Advocate must apply to be appointed as the guardian as soon as practicable after the person has been removed.

Clause 53 – Prescribed medical procedures

75. Clause 53 permits the Tribunal to consent to a prescribed medical procedure for a person if it is satisfied that it is in the best interests of the person and it has made an order that the person is not competent to give such consent. The Tribunal has further to be satisfied that the person is not likely to become legally competent to consent for himself or herself soon, that the procedure is lawful and that certain persons have received notice of the proposal and the application for consent.

76. Clause 53(2) states the person's guardian, the Public Advocate or some other independent person is to represent the person at the inquiry relating to consent.

77. Clause 53(3) deals with removal of an organ or tissue for transplantation. In such a case the Tribunal has to be satisfied that the transplant is likely to be successful, with minimum risk to the person. It must take into account the relationship between the persons involved in the transplant, and circumstances surrounding the procedure. Clause 53(4) specifies factors to be taken into account in establishing what is in the best interests of the person.

Clause 54 – Powers to adjust transactions

78. Clause 54 allows for intervention by the Tribunal or a court if a person for whose property a manager has been appointed purports to enter into a transaction concerning the property. The person's guardian or manager or a party to the transaction may apply to the Tribunal or a court which may, by order, declare the transaction void or adjust the rights of the parties to the transaction as is just.

Clause 55 – Injunctions to restrain dealings

79. Clause 55 permits the Tribunal, on application, to restrain a person from entering into, completing or giving effect to a transaction relating to property if the Tribunal is satisfied that there are reasonable grounds for appointing a manager for the property. This is an emergency measure and the order only remains in effect for a maximum of 3 days, subject to an order of the Tribunal. A person who has notice of the order must comply with it.

Clause 56 – Tribunal to report – Periodic report on Tribunal's operation and on operation of the Act

80. Clause 56 requires the Tribunal to give the Minister a periodic report on its own activities and on the Act's working.

Clause 57 – Commencement

81. Clause 57 provides for the commencement of the Bill which, when enacted, will come into operation on a day fixed by the Minister by notice in the *Gazette*.

Clause 58 – Regulations

82. Clause 58 is the usual regulation making provision.

Clause 59 – Repeal and transitional provisions

83. Clause 59(1) repeals those parts of the Lunacy Act 1898 of the State of New South Wales in its application to the Territory that are no longer suitable and for which alternative arrangements are made in the Bill. Clauses 59(2) and (3) are transitional provisions maintaining any arrangements for the exercise of powers similar to guardianship and management powers made under the repealed laws as if made under the Bill. Clause 59(4) amends the Powers of Attorney Act 1956 consequentially and the Transplantation and Anatomy Act 1978 is amended by clause 59(5).

Appendix B

Schedule of Organisations and Persons who made submissions

Written submissions

RJ Cahill, Chief Magistrate, Law Courts of the Australian Capital Territory
JF Campbell, Public Trustee, Australian Capital Territory
RL Denner, Koomarri Association, Australian Capital Territory
M Enchelmaier
W Everson, Australian Capital Territory Council on Intellectual Disability
J Faulks, Solicitor
EF Frohlich, society of St Vincent de Paul
J Goldhar, Office of the Public Advocate, Victoria
S Kellett, Perpetual Trustees
T Lawson, Guardianship and Administration Board, Victoria
RGL Newcombe
L Sorbello, Australian Capital Territory Government Law Office
J Stratton & D Morris
P Sutherland, Welfare Rights & Legal Centre
J Upton & R Vivian, Mental Health Services

Oral submissions

Public hearings were held in Canberra (24 July 1989)

M Brewster
Mr Delaney
W Everson
J Faulks
J Hart
R Lindford
L Marr
Ms McCauley
P Moore
E Rowe
J Simpson
L Steeper
P Sutherland

The Commission has also had the benefit of examining submissions made to the Attorney-General's Department in relation to the 1985 Draft Ordinance. Those submissions are not listed here.