

1989-90-91

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

GUARDIANSHIP AND MANAGEMENT OF PROPERTY BILL 1991

EXPLANATORY MEMORANDUM

Circulated by Authority of
Terry Connolly MLA
Attorney General

GUARDIANSHIP AND MANAGEMENT OF PROPERTY BILL 1991

1. **Outline:** This Bill provides a simple and informal system for the appointment of a guardian or manager for a person who is unable to make decisions because of intellectual, physical, mental or psychological incapacity. At present in the A.C.T., such orders may only be obtained from the Supreme Court under the archaic and now inappropriately named *Lunacy Act 1898* of New South Wales, in its application in the A.C.T.

2. The purpose of this Bill is to establish a Guardianship and Management Tribunal (the "Tribunal") which will be administered by the Magistrates Court and to empower that Tribunal to hear applications, conduct inquiries and issue orders in relation to the appointment of a guardian or manager. The Tribunal, guardians and managers will be required to perform their duties in accordance with a set of principles which are specified in the legislation. The purpose of these principles is to ensure that the paramount consideration is the welfare and interests of the incapacitated person. The principles include guidance to ensure that orders made by the Tribunal, and the duties exercised by guardians or managers acting under those orders should not be overly intrusive. The orders and duties required must still, of course, provide adequate protection for the incapacitated person. Apart from a filing fee, hearings before the Tribunal will be free.

3. The Tribunal is not part of the Magistrates Court but utilises that existing structure to allow a Magistrate to be appointed President of the Tribunal. The President must be a person experienced in legal matters because important legal rights are under consideration. The President is assisted in his or her deliberations by expert assessors who are appointed as Members of the Tribunal.

4. The Tribunal will review its orders at least once every 3 years but it may, either of its own motion or by application made to the Tribunal, review at an earlier date.

5. The Bill specifies how guardians and managers are appointed and empowers the Tribunal to make such orders as it thinks fit in relation to the powers and duties of a guardian or manager. Managers are involved in administering the financial affairs of an incapacitated person and the Bill specifies that managers must file copies of accounts on an annual basis with a statutory officer known as the Community Advocate. The Community Advocate may apply to the Tribunal to have an item of expenditure disallowed. The Bill precludes the guardian from making decisions in certain specified matters such as voting and giving consent to marriage or to prescribed medical procedures.

6. An aggrieved person may obtain a statement of reasons for a decision of the Tribunal and appeals from decisions of the Tribunal are made to the A.C.T. Supreme Court.

7. **Financial Considerations:** Expenditure to the A.C.T. Government for this initiative is estimated at \$80,000 on a full year basis. Revenue from filing fees is estimated at \$3,000 per annum.

CLAUSES OF THE BILL

Part I - PRELIMINARY

Clause 1: Short Title

The Act may be cited as the "Guardianship and Management of Property Act 1991".

Clause 2: Commencement

The short title of the Act becomes effective on the date of notification in the *Gazette*. The remainder of the Act comes into effect when proclaimed. Where no proclamation is made, the provisions in the Act automatically commence 6 months after notification of the Act in the *Gazette*.

Clause 3: Principles to be observed

The purpose of including specified Principles in the legislation is to ensure that such considerations apply at three distinct stages of decision-making. These stages arise when:

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

The purpose and intent of the principles is to ensure that:

- . until shown otherwise, there is a presumption of competence of the incapacitated person;
- . incapacitated persons are adequately protected;
- . the least restrictive option is taken in guardianship and management; and
- . the paramount consideration is the welfare and interests of the person who is subject to the orders of the Tribunal.

(The entirety of the legislation must be construed by reference to these Principles.)

Clause 4: Interpretation

This clause provides the definitions for certain words and terms used in the legislation.

Clause 5: Limits on findings of disability

This clause specifies that a person is not subject to an order of the Tribunal merely if that person is eccentric, expresses particular political or religious opinions, or has a lifestyle that is inconsistent with conventional expectations. A person must not be deprived of his or her right to make decisions merely because they do not conform with mainstream views or standards of behaviour.

Clause 6: Jurisdiction of Supreme Court not affected

This clause preserves the jurisdiction of the superior court, the A.C.T. Supreme Court, in guardianship matters, including appeals from decisions of the Tribunal.

PART II - GUARDIANS AND MANAGERS*Division 1 - Appointment and powers***Clause 7: Appointment and powers of guardians**

This clause empowers the Tribunal to appoint, when necessary, a guardian with such powers as are necessary to protect an incapacitated person's health or welfare.

The clause specifies the types of powers that may be conferred on that person's guardian, including:

- . to decide where and with whom the person is to live;
- . what education, training, or work the person is to engage in;
- . to give consent for medical or other treatment (other than certain prescribed medical procedures) ; and
- . to institute or maintain legal actions in the name of that person.

The clause precludes the guardian from chastising the person or acting or consenting on behalf of the person in a range of important decisions such as voting, consent to marriage, making a will, adoption, or prescribed medical procedures including sterilisation, abortion or the removal of non-regenerative tissue for transplantation purposes.

A guardianship order can be made for a person under the age of 18 years but the order is not effective until the incapacitated person turns 18.

Clause 8: Appointment and powers of managers

This clause empowers the Tribunal to appoint, when necessary, a manager with such powers as are necessary, to manage the property and financial affairs of an incapacitated person.

A management order may be obtained for a person under the age of 18 years but the order is not effective until the represented person turns 18.

Clause 9: Who may be appointed

This clause specifies that only a natural person (including the Community Advocate) can be appointed as a guardian. A manager can include a body corporate such as a trustee company.

The Community Advocate is a public official and the clause stipulates that the Community Advocate is a guardian or manager of last resort. Where there is a suitable natural person available, such as a relative or close friend, that person takes precedence in terms of appointment, over a public official, or in management matters, over a trustee company.

A suitable natural person can be appointed both guardian and manager, and may be appointed jointly with another guardian or manager. An example is parents who are appointed jointly as both guardian and manager for an incapacitated son or daughter who has attained 18 years of age.

An example of separate appointments is a spouse who is capable of being a guardian for his or her partner for personal matters but who is not in a position to handle property or financial matters and, therefore, an appropriate manager is appointed.

Clause 10: Considerations affecting appointment

This clause stipulates that a guardian or manager must consent in writing to appointment under the legislation. The guardian or manager must have attained 18 years of age and must, under oath or affirmation, inform the Tribunal that they are a fit and proper person. The Tribunal must be satisfied that the person to be appointed will observe the Principles set out in Clause 3 of the Bill. The legislation exempts the Community Advocate and Public Trustee from proving their fitness to perform the duties. The legislation also recognises that there is not necessarily a conflict of interests merely because a spouse or relative of the represented person is appointed as guardian or manager.

Clause 11: Powers to be least restrictive

This clause specifies that the powers conferred on a guardian or manager are to be the least restrictive of the represented person's own freedom of decision and action.

Clause 12: Recognition of interstate etc. guardians and managers

This clause empowers the Tribunal to recognise interstate and overseas orders, provided the relevant law of the other jurisdiction substantially corresponds to this legislation. This provision recognises the move for greater uniformity of laws within Australia and the need for portability of various legal orders. Interstate and overseas orders, to be effective in the A.C.T. must be registered with the Tribunal.

Clause 13: Authority of guardian or manager

This clause deems an act or omission of a guardian to be the same as an act or omission of the person he or she represents.

Clause 14: Obligations

This clause imposes obligations on guardians and managers to exercise their powers, so far as is possible, in a way in which the represented person would have acted had they not have been incapacitated. The clause obliges guardians and managers not to allow the represented person to become destitute and not to act in a way as would create a conflict of interest. Unless the Tribunal permits it, a manager must keep separate from his or her own property, the property (including money or entitlements) of the represented person. There is an exemption where joint ownership may apply, such as between husband and wife.

Clause 15: Fees and expenses

This clause entitles a guardian or manager, where relevant, to charge a fee for services and to be reimbursed for reasonable expenses. Fees are fixed under a determination issued by the Minister and notified in the *Gazette*. The amounts are payable out of the represented person's property.

*Division 2 - Supervision***Clause 16: Directions by Tribunal**

This clause provides authority for the Tribunal, if necessary, to direct a guardian or manager in the performance of his or her duties. Failure to observe a Tribunal's direction constitutes an offence punishable by a fine of \$5,000 or imprisonment for 6 months, or both.

Clause 17: Restrictions on the Tribunal's power to give directions

This clause specifies that the Tribunal shall not make orders inconsistent with an existing order of a Court. If necessary, the Tribunal may seek consent of the Court to vary an order.

Clause 18: Advice by Tribunal

This clause empowers the Tribunal, on application, to give an opinion or advice to a guardian or manager concerning the exercise of his or her powers and duties.

Clause 19: Regular Review etc.

This clause empowers the Tribunal, whether on application or of its own volition, to review an order at any time. All orders must be reviewed at least once every three years.

Regular review is important to ensure that the order made by the Tribunal is still appropriate, and to act where there is an indication that the guardian or manager is not performing his or her duties or not exercising powers in a way which is consistent with the original terms of the order. A review is necessary, of course, if a guardian or manager dies.

Division 3 - Matters relating to management

Clause 20: Access to Records

This clause provides authority for a manager to have access to the will and other property-related documents of the represented person, unless the Tribunal has precluded that access.

Clause 21: Payments for maintenance etc.

This clause empowers the manager to pay maintenance or other necessary payments to any dependants of a represented person. The manager may also make payments to the guardian of the represented person. The manager, in making such payments, must have regard to the represented person's views and wishes and the financial capacity of the represented person to meet such payments.

Clause 22: Receipt of Money

This clause specifies that, unless the Tribunal otherwise orders, all receipts of money from interest or sale of property belonging to the represented person, may be managed by the appointed manager. Any additional property subsequently received by the represented person is subject to the same provision.

Clause 23: Execution of instruments

This clause deems the signature of a manager, when acting as a manager of the represented person, to be as legally binding as if the represented person had signed the document.

Clause 24: Investments

This clause restricts the manager to investments specified under the *Trustee Act 1925 (NSW)* in its application in the Territory. This means that the manager (other than the Public Trustee) must only invest the money of the represented person in specified forms of investments, under the same provisions that apply to a trustee. The purpose of the clause is to prevent the manager from taking investment risks using the money of the represented person.

Clause 25: Real estate

This clause obliges a manager, where real estate is involved, to notify the Registrar of Titles of his or her appointment within 14 days after appointment as manager (including a manager registered under an interstate or overseas order). The purpose

of the clause is to ensure that the manager (or, if necessary, the Registrar of Titles) places a caveat on the title to the real estate. This measure ensures that the manager is informed of any proposed dealings in the land.

Clause 26: Accounts

This clause obliges a manager to file with the Community Advocate such accounts and other documents as are specified in Regulations made under this legislation. The clause also specifies that the Tribunal may issue a direction to a manager concerning filing, content and auditing of accounts and documents.

The purpose of the clause is to ensure that managers file returns, at least on an annual basis, so that a public and independent official may examine how the manager has handled the property of the represented person. If there is an item in the accounts or related documents which causes concern to the Community Advocate, he or she may apply to the Tribunal to obtain a direction or an audit of the accounts. A manager who, without reasonable excuse, contravenes the obligation to file annual accounts, or a direction of the Tribunal, is punishable on conviction by a fine of up to \$1,000.

Clause 27: Examination of Accounts

This clause authorises the Community Advocate to examine the manager's accounts and related documentation and, where necessary, apply to the Tribunal to obtain an order disallowing any item of expenditure. The clause also imposes an examination fee fixed in accordance with a determination issued by the Minister and notified in the Gazette. Where an item is disallowed by order of the Tribunal, the manager is liable to the represented person for the amount of the item. The manager is also responsible for any costs incurred by the Community Advocate in seeking disallowance of an item. The Tribunal may order waiver of the examination fee.

Division 4 - Cessation of guardianship or management

Clause 28: Resignation

This clause specifies that a guardian or manager may resign in writing given to the President of the Tribunal.

Clause 29: Death of represented person

Subject to the following clause, this clause stipulates that the authority for guardianship or management orders ceases when the represented person dies.

Clause 30: Manager may act until notified of discharge etc.

This clause preserves the authority of a guardianship or management order until the guardian or manager receives notice of the death of the represented person or notice of the revocation of the order.

Clause 31: Removal by Tribunal

This clause empowers the Tribunal to remove a guardian or manager if the Tribunal is satisfied that certain factors are present such as that the guardian or manager is no longer suitable, competent or has neglected to perform his or her duties. A contravention of the legislation is a ground for removal of a guardian or manager.

Clause 32: Surviving or substitute guardians etc.

This clause preserves the authority of a joint guardian or manager to continue as sole guardian or manager when a joint guardian or manager dies or otherwise ceases to act.

Where the Community Advocate becomes aware that there is no longer a guardian or manager for a represented person, the Community Advocate may consent to act as guardian or manager and give notice to the Tribunal.

The purpose of the clause is to enable the Community Advocate to be the guardian or manager of last resort and to immediately commence to act in that capacity (or specify another person to act) as soon as notification is given to the Tribunal. This provision allows necessary action to be taken without waiting for the Tribunal to convene a formal hearing. (The Tribunal has the ultimate authority to subsequently order a variation to such substitutions.)

PART III- INQUIRIES BY TRIBUNAL*Division 1 - Procedure***Clause 33: Need for inquiry**

This clause specifies that the Tribunal shall not make an order unless it has first conducted an inquiry. An inquiry brings into play the need to give notice to the incapacitated person, the person's spouse, immediate relatives of the person, any guardian or manager, the Community Advocate and, where property is involved, the Public Trustee.

Clause 34: Sittings

This clause empowers the President of the Tribunal to convene a sitting of the Tribunal at such time and place in the Territory as he or she thinks fit. The purpose of this provision is to enable the Tribunal, when necessary, to sit at a location and at a time that may suit the special needs of a represented person.

Clause 35: Notice of inquiry

This clause provides that, unless the President otherwise determines, the Tribunal shall give at least 7 days notice in writing to the incapacitated person, the person's

spouse, immediate relatives of the person, any guardian or manager, the Community Advocate and, where property is involved, the Public Trustee.

Clause 36: Appearance and representation

This clause provides that any of the persons mentioned in clause 35 are entitled to appear and give evidence to the Tribunal at an inquiry. Other persons may appear and give evidence by leave of the Tribunal. A person appearing before the Tribunal may be represented by an agent or lawyer and the Tribunal may also appoint a representative.

Clause 37: Conduct of inquiry

This clause specifies that inquiries shall be held in public unless the Tribunal orders otherwise. Inquiries shall be informal but the Tribunal is bound by the rules of natural justice. Briefly stated, the rules of natural justice impose obligations to act fairly, to hear both sides and to act impartially.

Clause 38: Evidence

This clause specifies that the Tribunal is not bound by the rules of evidence but, if necessary, the Tribunal may require a person giving evidence to take an oath or make an affirmation.

Clause 39: Authority for medical or other examinations

This clause empowers the President to order a medical or other examination of a person who is the subject of an inquiry by the Tribunal.

Clause 40: Assistance for Tribunal

This clause empowers the Tribunal to appoint a professional person (such as a lawyer or doctor) or a person with appropriate expertise to assist the Tribunal.

Clause 41: Power to obtain information and documents

The clause empowers the President of the tribunal to call for persons and papers where the President is satisfied that a person is capable of providing information or documents which are relevant to an inquiry. The President must give that person notice in writing of the time and place for presentation of the information. Information tendered in writing by a person must be signed by that person, or in the case of a body corporate, by an officer of the body corporate.

Clause 42: Retention of documents

This clause empowers the President of the Tribunal to take possession of, make copies of, or take extracts from documents produced to the Tribunal in an inquiry. The President may retain the documents for such a period as is necessary and in that period may allow inspection of the documents by a person entitled to inspect them.

Clause 43: Form of orders

This clause specifies that orders of the Tribunal shall be in writing and signed by the Member or Members who constitute the Tribunal in that matter.

The purpose of the clause is to ensure that orders of the Tribunal are reduced to writing and that they specify the powers conferred on a guardian or manager, the limitations or conditions which apply and identification of the incapacitated person's property.

Clause 44: Proof of orders

This clause specifies that a copy of an order signed by the Tribunal is admissible as evidence in proceedings that such an order was made.

Clause 45: Obtaining reasons for decisions

This clause provides a person who is entitled to appeal against a decision of the Tribunal with the right to seek a statement of reasons for that decision. The President of the Tribunal has 28 days to respond to a request for reasons commencing after the day that the request was received. The applicant for a statement of reasons must apply in writing and within 28 days of the decision.

Clause 46: Withdrawal of applications

This clause empowers the Tribunal to allow a matter to be withdrawn at any time before it is determined. The purpose of this clause is to recognise situations where an application may be lodged because of a personality clash which has subsequently been resolved and the person seeking the order is satisfied that, say, a revised order is no longer required.

Clause 47: Costs

This clause empowers the Tribunal to order a frivolous or vexatious applicant to compensate a person who has had to incur costs to attend upon the tribunal for an inquiry.

*Division 2 - Miscellaneous***Clause 48: Removal of persons disrupting inquiries**

This clause empowers the President to order the removal of a person who is substantially disrupting an inquiry and to call upon a police officer to assist in removing that person. Failure to observe an order renders a person liable to a fine of \$5,000 or imprisonment for 6 months or both.

Clause 49: Prohibited publications

This clause provides that no person without the written authority of the President of the Tribunal is permitted to publicly identify by sound recording or pictorially, a person who is to be or who is the subject of a guardianship or management order. The prohibition also applies to hearings of the Tribunal.

The clause applies a penalty for contravention of \$5,000 or 6 months imprisonment or both.

Clause 50: Failure to answer questions etc.

This clause provides that a person shall not, without reasonable excuse, fail to give an answer to a question or produce a document to the Tribunal when required to give evidence, or fail to give information or documents when required to do so. The clause contains a penalty provision of \$5,000 or 6 months imprisonment or both, for a person who contravenes the provision.

The clause specifies that it is not a reasonable excuse for not answering that to do so would be self-incrimination. Such answers are not, however, admissible in civil or criminal proceedings, except in the following proceedings:

- . giving false evidence to the Tribunal itself, or improperly influencing participants in an inquiry;
- . any other offence in respect of falsity of the answer, document or information; or
- . offences under Part VIII of the *Crimes Act 1900 (NSW)* in its application in the Australian Capital Territory (these offences include making false oaths and perjury with the intent to procure a conviction or acquittal of another person).

Clause 51: Failure to attend before Tribunal

This clause provides that a person shall not, without reasonable excuse, fail to attend the Tribunal when given written notice to provide information and documents relevant to an inquiry. The penalty for contravention of this provision is \$5,000 or 6 months imprisonment or both.

Clause 52: Refusing to be sworn etc.

This clause provides that a person shall not, without reasonable excuse, fail to take an oath or make an affirmation when required to give evidence to the Tribunal. The penalty for contravention of this provision is \$5,000 or 6 months imprisonment, or both.

Clause 53: False information etc.

This clause provides that a person shall not knowingly lodge a false or misleading document, or give false evidence, with the intention of misleading the Tribunal. The clause provides a penalty of \$5,000 or 6 months imprisonment, or both, in relation to a person who is an offender.

Clause 54: Influencing participants in inquiry

This clause provides that a person shall not improperly influence another in relation to his or her participation in an inquiry. The clause includes improperly influencing a Member of the Tribunal. The clause provides a penalty of \$5,000 or 6 months imprisonment, or both, for an offender.

Clause 55: Obstructing Tribunal

This clause provides that a person shall not, without reasonable excuse, obstruct the Tribunal or a Member of the Tribunal in performance of a function or exercise of a power under the legislation. It is also an offence to disrupt proceedings before the Tribunal. The clause provides a penalty of \$5,000 or 6 months imprisonment, or both, for an offender.

*Division 3 - Appeals***Clause 56: Appeals**

This clause provides that appeals from an order, direction or decision of the Tribunal may be brought to the Supreme Court. An appeal may be brought by:

- . the person who is the subject of an order, direction or decision;
- . a person who appeared before the Tribunal; or
- . a person who, with leave of the Tribunal, would have been entitled to appear.

The clause stipulates that the grounds of appeal shall be an appeal on a question of law, or with leave of the Court, any other question. A person has 28 days to appeal. The Supreme Court may confirm the Tribunal's order, determination or decision, or may set it aside and return it to the Tribunal with directions, or the Supreme Court may substitute its own order, determination or decision.

**PART IV - GUARDIANSHIP AND MANAGEMENT OF PROPERTY
TRIBUNAL**

Clause 57: Establishment

This clause establishes the Guardianship and Management Tribunal.

Clause 58: Membership

This clause specifies that the Tribunal shall consist of a President and 2 other Members appointed by the Executive. The President must be a Magistrate or an experienced legal practitioner. This stipulation is necessary as legal issues and rights are under consideration. The President is appointed for a period not exceeding 5 years.

The clause stipulates that Members other than the President must be, in the opinion of the Executive, persons who have appropriate expertise, training, experience or ability to deal with the needs of an incapacitated person. These Members are appointed by the Executive for a period not exceeding 3 years.

Terms and conditions of appointment of Members are specified in the instrument of appointment.

Clause 59: Constitution for exercise of powers

This clause provides that the Tribunal shall be constituted by the President and 2 Members, or the President sitting alone. In urgent matters, or where there is a minor matter under consideration, the President must be able to convene the Tribunal as he or she thinks fit. If, during a hearing, a Member other than the President ceases to be available, the remaining Members shall complete the proceedings.

Clause 60: Determination of questions

This clause stipulates that, when a question of law arises, the President of the Tribunal shall give his opinion to decide the matter.

Where the Tribunal consists of the President and the 2 other Members, and there is a division of opinion, the majority opinion shall prevail.

Where a Member other than the President ceases to be available, and there is a division of opinion, the President has a casting vote.

Clause 61: Expenses

This clause authorises the reimbursement of a Member, other than the President, for expenses reasonably incurred in the performance of his or her duties or functions.

Clause 62: Resignation

This clause specifies that a Member may resign by writing given to the Executive.

Clause 63: Acting Members

This clause empowers the Executive to appoint a person as an acting Member of the Tribunal (other than the President), but only for a period of up to 12 months.

The Executive, in appointing an acting Member, must be of the opinion that the person has the qualities and abilities desired of a Member of the Tribunal.

Clause 64: Staff

This clause specifies that the staff of the Tribunal are public servants.

Clause 65: Protection of members etc.

This clause provides immunity from legal suit for the President, a Member of the Tribunal, a person acting under the authority of the Tribunal, such as a guardian or manager and a person participating in proceedings of the Tribunal, provided they have acted in good faith.

The immunity from legal suit applies to the exercise (including purported exercise) of powers, and the performance of duties and functions under the legislation.

Clause 66: Secrecy

This clause provides that, other than in the course of duty, a Member of the Tribunal or a person authorised to perform a power, duty or function under the legislation, shall not otherwise disclose information concerning a person without that person's consent.

The purpose of this clause is to maintain confidentiality of information received by the Tribunal. The confidentiality is not breached, however, where the disclosure is necessary for the performance of a power, duty or function.

The clause also extends the non-disclosure to an exemption from furnishing information to a Court, unless it is necessary for the purposes of the Act.

The penalty for a breach of secrecy renders a person liable for a fine of \$5,000 or imprisonment for 6 months or both.

PART V - MISCELLANEOUS**Clause 67: Emergency appointments**

This clause empowers the Tribunal (without a hearing) to make an emergency appointment of no longer than 10 days, of a public official to be a guardian or manager for an incapacitated person. The public officials are the Community Advocate as a guardian or manager, or the Public Trustee as a manager.

The purpose of this provision is to cover those emergency situations where a person without a guardian or manager is found in need of protection. An example is an elderly person who has been living alone and has suffered an incapacitating illness or trauma. The person may need hospitalisation or care, as well as protection of his or her property.

Clause 68: Emergency removal of disabled persons

This clause empowers the President or a judicial officer (a Judge of the Supreme Court or a Magistrate), on application by the Community Advocate, to issue a warrant authorising the Community Advocate with such police officers as are necessary, to enter and remove an incapacitated person from a place where the incapacitated person's health or safety is at risk.

Such a warrant shall identify the incapacitated person, the purpose for which it is issued, the place where the incapacitated person is located and the time during which removal is sought. The warrant ceases to have effect after 14 days.

The warrant runs for 14 days because there may be circumstances when an incapacitated person has become confused and has wandered away from his or her place of abode. The Community Advocate needs time to locate the person or to revisit the place of abode at a subsequent time.

A warrant may be issued even though a guardian has been appointed. In normal circumstances, all information to support an application (in writing) for a warrant shall be given under oath or affirmation. The clause authorises the issue of a warrant, by telephone, where circumstances preclude the usual formalities. In such cases the President or a judicial officer prepares and signs the warrant and advises the Community Advocate, by telephone or other appropriate means, who prepares an instrument in similar form. That instrument is deemed to be as valid as a warrant. The Community Advocate is obliged to comply with the usual requirement (in terms of a written statement and information under oath) no later than 24 hours after the issue of the "telephone warrant".

Clause 69: Capacity to consent to medical etc. procedures

This clause specifies that where a guardian has power to consent to an ordinary medical procedure or other ordinary treatment, or the Tribunal has declared an incapacitated person as not competent to consent to a prescribed medical procedure (e.g. sterilisation or abortion), then the incapacitated person is not considered competent to consent to such a procedure or treatment.

The purpose of this clause is to ensure that consent is not obtained personally from the incapacitated person where an order states that only the guardian or Tribunal may consent on that person's behalf. A doctor does not contravene the provision if he or she acted in good faith or did not know, or could not reasonably be expected to know, that the person was not competent to consent to the medical procedure.

Clause 70: Tribunal may consent to prescribed medical procedures

This clause empowers the Tribunal to consent, on behalf of an (adult) incapacitated person, to a prescribed medical procedure, subject to certain specified safeguards. A prescribed medical procedure is defined in the legislation (see clause 4). Such procedures include an abortion, reproductive sterilisation and removal of non-regenerative tissue for transplantation.

The Tribunal is obliged to appoint the guardian, the Community Advocate or some other independent person to represent the incapacitated person when conducting its inquiry in such a matter.

The Tribunal is obliged, in such an inquiry, to have regard to specific considerations in determining whether such a procedure is appropriate. Considerations that must be taken into account include, the wishes of the incapacitated person (so far as they can be ascertained), alternative treatments and whether the procedure should be postponed.

In the matter of the removal of non-regenerative tissue, the Tribunal must have regard to further considerations including the risk to the donor, whether the risk of failure of the transplant is low, the relationship between donor and recipient, and the danger to the likely recipient if the transplantation is not carried out.

One example would be a kidney transplant from an incapacitated person to a brother or sister where the relationship was close before the incapacitated person became incapacitated and there is reasonable evidence to show that he or she would have assisted the sibling who has developed kidney failure.

The Tribunal may only consent to prescribed medical procedures which are lawful.

Clause 71: Power to adjust transactions

This clause provides a mechanism whereby the Tribunal, a Court, or another relevant tribunal may, if necessary, reverse property transactions entered into by an incapacitated person.

The purpose of the clause is to recognise that situations can arise where a person who does not have the necessary legal competence may transact with a party who, in good faith, is not aware of the incapacitated person's disability. The clause allows broad options to transfer the matter between the Tribunal and a Court, or another relevant tribunal and to :

- . confirm the transaction;
- . declare the transaction void; or
- . adjust the matters between the parties in such a way as is just.

Clause 72: Injunctions to restrain dealings

This clause empowers the Tribunal to restrain a person from entering into, completing, registering a transaction or otherwise dealing in the property of another, if the Tribunal is satisfied that transaction involves a person who should have a manager. Such an injunction remains in force for 3 days but within that period, if an application is made to appoint a manager, the Tribunal may continue the period of the restraining order.

The clause provides that a person who, without reasonable excuse, contravenes such an order is guilty of an offence. For a natural person, the penalty is \$5,000 or 6 months imprisonment, or both.

Clause 73: Conduct of directors, servants and agents

This clause provides that where it is necessary to establish the state of mind of a person or body corporate for the purposes of the legislation, it is sufficient to show that, say, a director of the body corporate had that state of mind and that he or she was acting within his or her actual or apparent authority. The purpose of the provision is to prevent a person or body corporate from denying liability where the conduct was carried out by an agent of the person, or an officer of the body corporate.

The clause imputes the conduct of, say, an agent or director to the person who or body corporate which should accept responsibility for that conduct. A defence is available if the person or body corporate can show that reasonable precautions were taken and due diligence was exercised to avoid the conduct.

Where a natural person has such conduct imputed to them and they are convicted of an offence under this legislation, or of perjury, or under Part VIII of the Crimes Act (NSW), the convicted person is not liable to imprisonment.

Clause 74: Corporations - penalties

This clause provides that the pecuniary penalties for bodies corporate for offences under this Act shall be a fine not exceeding 5 times the penalty stipulated for a natural person.

Clause 75: Determination of fees

This clause empowers the Minister to issue a determination which is notified in the Gazette, and which specifies:

- . the amounts of fees payable to a guardian or manager, and the rate at which or method by which such fees shall be calculated; and
- . the examination fees payable for the examination of accounts filed by managers.

This determination must be tabled and may be disallowed by the Legislative Assembly.

Clause 76: Annual Report

This clause stipulates that the Tribunal must furnish an annual report to the Minister for presentation to the Legislative Assembly.

Clause 77: Regulations

This clause empowers the Executive to make regulations for carrying out or giving effect to the provisions of the legislation.

The regulations may make provision for the making of applications to the Tribunal (e.g. the type of form), the imposition of filing fees and charges for copies of the records of the Tribunal and prescribing minor penalties for offences against the regulations.