

A new approach to confidentiality

A guide for families, friends and advocates

The Queensland Law Reform Commission has finished reviewing the role of **confidentiality in the guardianship system**.

We thank you for your help during this review. We now want to tell you how we think the law should be improved.

The Commission's full report will be tabled in Parliament. The Queensland Government will then consider whether it wants to make the Commission's recommendations into law.

What is guardianship?

Queensland has two laws about guardianship: the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*. The guardianship laws apply to adults—that is, people 18 years or older—who are unable to make some or all of their decisions.

The law calls this having 'impaired capacity'. Someone has impaired capacity if they cannot go through the process of reaching their own decision (free from inappropriate influence), having understood what that decision will mean for them, and then communicating that decision.

For most adults with impaired capacity, decisions are usually made informally within the adult's network of family and friends. But sometimes these arrangements don't work so families and others might seek formal decision-making help from the guardianship system.

This might mean going to the Guardianship and Administration Tribunal, which is like a court but is less formal. The Adult Guardian might also be involved. This is an independent official whose role is to protect the rights and interests of adults with impaired capacity.

What information is confidential?

The guardianship laws currently make certain personal information confidential by:

- 1. Letting the Guardianship and Administration Tribunal make a 'confidentiality order'** in some cases to stop people:
 - Attending a hearing, or part of a hearing.
 - Seeing a document being considered by the Tribunal.
 - Knowing the Tribunal's decision or the reasons it gives for a decision.
- 2. Stopping people publishing information** about what happens at the Tribunal. This includes information such as who was at a hearing, what they said, and what documents were considered by the Tribunal.
- 3. Protecting the confidential information** that a person has access to because they are involved in some way with guardianship. This covers, for example, members of the Tribunal, the Adult Guardian and an adult's administrator or guardian. But this duty of confidentiality only stops the sharing of information that is likely to identify a person.

Reporting back to you

To help us work out what the law on confidentiality in the guardianship system should be, the Commission consulted widely throughout Queensland. We received 260 submissions from 150 individuals and organisations in response to our consultation documents. We also invited people to share their views at ten publicly advertised community forums held throughout the State and at fifteen focus groups. As a result, we heard the views of many hundreds of people. We thank you for your contribution to the review.

We now want to tell you how we think the guardianship laws relating to confidentiality should be improved. Our major recommendations are summarised in this pamphlet and also in a pamphlet for people who may need help with decision-making. More detailed information can also be found in two other documents:

- A comprehensive report called *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*.
- A shorter paper, *Public Justice, Private Lives: A Companion to the Confidentiality Report*, which is a guide to the longer report, but can also be read independently of that report.

These papers can be downloaded from our website at: www.qlrc.qld.gov.au/guardianship

What did we find out?

We asked people how the law should balance some important concepts. On one hand, decisions that affect people's lives must be transparent and accountable. Open justice (public hearings and unrestricted reporting of them) and procedural fairness (a right to have your say about decisions that affect you) are fundamental principles of our legal system.

On the other hand, people want to protect their individual privacy, and in the guardianship system very private information is often disclosed. There could also be circumstances where revealing information might negatively affect an adult's interests.

When consulting with people, we found there was strong support for greater openness in the guardianship system. The Commission agrees that the system currently leans too heavily towards confidentiality. Two key factors guide the Commission's view:

- The community must have confidence in the guardianship system—greater openness will increase public confidence by bringing more accountability and transparency to decision-making processes. It will also increase public awareness of the role of the guardianship system.
- Good outcomes for the adult are put at risk by the failure to disclose information—greater openness leads to better decision-making because decisions are based on complete and tested information. Open decision-making is also more accountable. While some of the adult's interests (such as privacy) may be negatively affected, the adult's interests as a whole will be better served.

How should the law change?

The Commission thinks these principles should guide any changes to the role of confidentiality in the guardianship system:

- There should be greater openness in the guardianship system.
- An adult is entitled to information about himself or herself.
- People greatly involved in the adult's life have a greater claim to information about him or her.

Tribunal proceedings

The Guardianship and Administration Tribunal should keep its power to stop people attending hearings and to stop people looking at documents or knowing information being considered by the Tribunal. These powers will sometimes be needed in an area like guardianship. But to make the system more open, we recommend:

1. Replacing 'confidentiality orders' with four new types of orders (called 'limitation orders') that are more specific and better reflect the sort of order being made:

Adult evidence orders: to speak with an adult in the absence of others if, for example, this is needed to obtain information that the Tribunal would otherwise not receive.

Closure orders: to stop people attending a hearing.

Non-publication orders: to stop people publishing information about a proceeding.

Confidentiality orders: to keep information or documents confidential from a person involved in a case.

2. Stating in the guardianship laws that people involved in a case are allowed to have all relevant information and documents being considered by the Tribunal, unless a confidentiality order is made.
3. Establishing a presumption in favour of openness and also restricting when limitation orders (except for adult evidence orders) can be made to when they are needed to avoid serious harm or injustice. This means these orders will be made only in very limited circumstances.

4. Setting up safeguards for making limitation orders to promote community confidence in the Tribunal. The safeguards include allowing people affected by an order (including the media) to say why it should not be made, and to appeal an order.

The Tribunal must also invite an independent official—the Public Advocate—to say whether the order should be made. Finally, the Tribunal must give written reasons for making a limitation order.

Tribunal decisions and reasons

The Tribunal should not keep its power to stop people involved in a case from knowing the Tribunal's decision or the reasons for the decision. It is important that people who are affected by a decision know what the decision is and why it was made.

But we recommend that the Tribunal have the power to *delay* telling people about a decision where, for example, the disclosure of that information would cause serious harm to a person. This delay (of up to 14 days) allows steps to be taken to ensure people's safety when the decision is released.

Public discussion of Tribunal proceedings

People should be able to publicly discuss Tribunal proceedings. This includes allowing the media to report on what happens at Tribunal hearings. This will promote accountability and transparency in decision-making. It will also improve community understanding of the Tribunal and its role in the guardianship system.

But the Commission recognises the potential vulnerability of adults with impaired capacity. We recommend that information can be published only if it will not identify the adult involved in the case.

We also recommend that the Tribunal have the power to change this in specific cases. Sometimes it might be appropriate to allow the adult's identity to be published. At other times, it might be appropriate to make a non-publication order to stop publication of *all* information about a Tribunal proceeding.

General duty of confidentiality

The current general duty of confidentiality that applies when a person receives information while performing a role under the guardianship laws should be kept.

But a problem with the current law is that it seems to stop people sharing information even when it is necessary or appropriate to do this. This is because the current law forbids people telling others information unless this is allowed by an exception. To fix this problem, we recommend that the duty be reframed so that its focus is the *appropriate use* of information.

We also recommend that the guardianship laws include more exceptions about when people can tell others confidential information. For example, people should be able to share confidential information with the police and guardianship agencies, and when seeking legal or financial advice.

We still need your help

This is not the end of the Guardianship Review. The review has two stages. The first, which dealt with confidentiality, is now complete. We have started work on the second stage, which involves reviewing the rest of the guardianship laws.

During stage two, we will write a paper asking people what they think the law should be.

You can contact us to register an interest in the review and we will send you information when it is available.

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For more information about the Commission's Guardianship Review or about guardianship generally, visit our website at:

www.qlrc.qld.gov.au/guardianship