

Confidentiality in consultation protocol

The Commission is of the view that participation in its review in accordance with this protocol will not breach the confidentiality provisions contained in the guardianship legislation. However, this protocol only describes the law and does not replace or modify it.

Introduction

The Attorney-General has asked the Queensland Law Reform Commission to review Queensland's guardianship legislation and make recommendations as to how it could be improved. As part of its review, the Commission is consulting with a wide range of people.

The guardianship legislation requires that certain information be kept confidential. The Commission and those who are participating in its consultation process need to follow the law. This document establishes a protocol to assist people to comply with the law's confidentiality provisions.

What does the law make confidential?

The law

Confidential information disclosed under the guardianship regime is generally required to be kept confidential. The legislation does this in three ways:

1. The legislation protects confidential information that a person gains through their involvement with the guardianship regime. This includes information gained by those involved in administering the guardianship legislation such as members of the Guardianship and Administration Tribunal and its staff, the Adult Guardian and Public Advocate and their staff, and guardians and administrators.¹ It also includes those people who are acting as attorneys, including statutory health attorneys.²

Information will be regarded as confidential only if it could reasonably be expected to identify the person involved. However, care must be taken in disclosing information because it may still identify a person even if he or she has not been named. For example, the identity of a person may be revealed if someone tells a story which refers to 'my son'.

2. The legislation prohibits people publishing information about a proceeding that occurred before the Guardianship and Administration Tribunal.³ This includes information about who was involved in a proceeding (such as witnesses or parties to an application), information given

before the Tribunal, matters in documents before the Tribunal and the Tribunal's decision or reasons for its decision.

3. Sometimes, the Tribunal may additionally make a specific 'confidentiality order' about the proceedings (for example, protecting a document because it would only be given in confidence).⁴ A specific order that particular information not be disclosed must also be followed.

Limited exceptions for the Commission's review

There are limited exceptions in the law that allow a person to disclose confidential information to the Commission while participating in its consultation process.⁵ This means that, for example, a person participating in the Commission's review in accordance with this protocol may discuss proceedings of the Guardianship and Administration Tribunal.

The one exception to this arises in relation to 'confidentiality orders'. If the Tribunal has made a specific confidentiality order that certain information from proceedings not be disclosed, then that order will also preclude disclosure to the Commission.

Has a confidentiality order been made?

Confidentiality orders are not commonly made, but if you would like to find out whether the Tribunal has made such an order, consult the Tribunal's reasons for decision (if you have a copy). Such an order will generally begin with the following words (or some such similar wording): 'Pursuant to section 109 of the *Guardianship and Administration Act 2000* (Qld), the Tribunal orders that ...' Alternatively, you may wish to contact the Tribunal registry.

It is important to distinguish a confidentiality order from the general prohibition on publishing information about Tribunal proceedings. Tribunal documents will often state (or some such similar wording):

'The Tribunal has made this document available to you because you have a sufficient interest in the proceedings to receive it. The Guardianship and Administration Act contains provisions to protect the privacy of people involved in the Tribunal's proceedings. You are requested to respect this privacy.'

This is not a specific confidentiality order, but rather is referring to the more general prohibition on publishing information about Tribunal proceedings.

Accordingly, that notice does not prohibit disclosure to the Commission in the course of its consultation.

The Commission's 'Confidentiality in consultation protocol'

The Commission's 'Confidentiality in consultation protocol' sets out how confidential information is to be received to ensure that it is not published more widely than is absolutely necessary, but at the same time facilitating a wide and inclusive consultation process.

The guiding principle underpinning this protocol is that disclosure of confidential information should be limited to disclosures made to the Commission. This document also makes clear that disclosure to people other than members of the Commission and its staff or consultants, albeit in the course of the Commission's consultation, falls outside the scope of this protocol.

Confidential information: Private consultations

These are consultations where the only people receiving the information, other than the person who is providing it, are the members of the Commission and its staff or consultants. Examples of a private consultation include a meeting with the Commission, making a written submission directly to the Commission and discussing issues over the telephone with the Commission.

'Private consultations' will also include consultations where more than one person from outside the Commission is present, but only if all of those people at the consultation are aware of the confidential information that is to be disclosed, or are otherwise entitled to receive that information. One example would be a meeting of family members where all of that family is already aware of the confidential information.

For the purposes of participating in the Commission's review, a person may disclose confidential information to the members of the Commission and its staff or consultants at a private consultation. This does not apply, however, to information that is the subject of a confidentiality order. As discussed above, that information is not allowed to be disclosed to the Commission (or anyone).

Confidential information: Public consultations

Examples of public consultations include public forums, focus groups and meetings where there are people who are not aware of the confidential information that is to be disclosed, or are not otherwise entitled to receive that information.

In these public consultations, confidential information must not be disclosed as this would breach the law. Instead, this protocol requests people to provide whatever information they are able to without breaching the confidentiality provisions. If a person present at a public consultation wishes to provide confidential information to the Commission which cannot be provided publicly, he or she should seek a private consultation with the Commission. At that private consultation, confidential information can be disclosed in accordance with this protocol as discussed above without breaching the confidentiality provisions.

Information that is not confidential

Information that is not confidential can be legally disclosed, including to the Commission in the course of its consultation.

However, the Commission notes that the guardianship legislation contains general principles, one of which requires an adult's right to confidentiality of information to be recognised and taken into account.⁶ These principles must be applied by a person who makes a decision under the guardianship legislation, and that legislation also encourages the wider community to apply and promote these principles.⁷ Generally, this would mean giving the same level of respect to the privacy of an adult with impaired capacity as the privacy of other members of the community. One way that this could be achieved is to ensure that any information you discuss in a public consultation does not identify any of the people involved.

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1. *Guardianship and Administration Act 2000* (Qld) s.249.
2. *Powers of Attorney Act 1998* (Qld) s.74.
3. *Guardianship and Administration Act 2000* (Qld) ss.112 and 80G.
4. *Guardianship and Administration Act 2000* (Qld) s.109.
5. *Guardianship and Administration Act 2000* (Qld) ss.112(3A)–(6) and 249(2)–(4); *Powers of Attorney Act 1998* (Qld) s.74(1)–(2), (4).
6. *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) Schedule 1, General principle 11.
7. *Guardianship and Administration Act 2000* (Qld) s.11.