



Queensland
Law Reform Commission

**Public Justice, Private Lives:
A Companion Paper**

WP No 61
July 2006



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Principal Legal Officer: **Mrs C A Green**

Legal Officers: **Ms C T Arndell**
Ms M T Collier
Ms P L Rogers

Administrative Officers: **Ms K Napa**
Ms J Manthey (part-time)

Address: 7th Floor, 50 Ann Street, Brisbane
Postal address: PO Box 13312
George Street Post Shop Qld 4003
Telephone: (07) 3247 4544
Facsimile: (07) 3247 9045
Email: LawReform.Commission@justice.qld.gov.au
Website: www.qlrc.qld.gov.au

Reform possibilities: we ask for your ideas

The Queensland Law Reform Commission wants your comments, ideas and suggestions. We are reviewing the role that confidentiality plays in the guardianship system and are considering whether the law could be improved. We want your help to:

- Identify the important points for the Commission to consider.
- Find out how the guardianship laws work in practice, including what causes problems.
- Suggest how the guardianship laws could be improved.
- Develop and test our proposed recommendations.

As part of seeking your comments, ideas and suggestions, the Commission will hold a number of public forums in different parts of the State. Details of the Commission's public consultation process, including information about dates, venues and times for public forums, will be posted on the Commission's guardianship website, and advertised widely.

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

<http://www.qlrc.qld.gov.au/guardianship>

Acknowledgement

The Queensland Law Reform Commission would like to acknowledge the contribution made by Ms Donna McDonald to the preparation and writing of this Companion Paper.

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Part 1

The guardianship laws and our review

Introducing the Guardianship Review

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 (people 18 years or older) who are unable to make some or all of their decisions.

The laws call 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 communicate that decision. Impaired capacity can be caused by dementia, intellectual disability, acquired brain injury or damage, mental illness or an inability to communicate in some way, for example, because a person is in a coma.

While a person may have impaired capacity for some types of decisions, such as what financial investment strategy to put in place, they may be able to make other decisions, such as where they will live.

The Attorney-General has asked us, the Queensland Law Reform Commission, to review the guardianship laws. The Commission, which is independent of the Queensland Government, will report to the Attorney-General in three stages. We will review:

1. The confidentiality provisions of the guardianship laws. The final report on confidentiality will be completed by March 2007.
2. The guardianship laws’ General Principles. These are the guidelines for decision-making under the guardianship laws. An interim report on the General Principles will be released in September 2007.
3. Queensland’s guardianship laws more generally. The Commission’s final guardianship report is due in December 2008.

At each of these stages, we will consult with you to get your ideas. Once we have done our research and listened to your ideas, we will write a report with recommendations about how the Queensland Government might improve the guardianship laws.

Our questions on confidentiality

The Commission is currently undertaking stage one of its review: **confidentiality**. In this paper, we want to ask you questions about confidentiality around five main themes. The first four relate to the Guardianship and Administration Tribunal. The last one relates to a general duty of confidentiality imposed on people involved in the guardianship system.

1. Under what circumstances, if any, should the Tribunal be able to keep a person out of a hearing?
2. Under what circumstances, if any, should the Tribunal be able to stop a person involved in the proceeding from seeing documents that the Tribunal is considering?
3. Under what circumstances, if any, should the Tribunal be able to refuse to give its decision or reasons for that decision to a person involved in the proceeding?
4. To what extent, if at all, should Tribunal proceedings be able to be openly discussed by people outside those proceedings?
5. Apart from the situations referred to in questions 1–4 (which deal with Tribunal proceedings), are there other circumstances in which information that is revealed within the guardianship system should be required to be kept confidential?

Details about how you can be involved in this review are set out at the end of this paper. We look forward to hearing from you on this important matter.

This Companion Paper: its purpose

The Queensland Law Reform Commission wants to explain the guardianship laws to many people, all of whom have different needs and expectations of those laws. They include adults who have impaired capacity, their families and friends, carers, advocacy groups, service providers, lawyers, and interested members of the community.

To meet the different needs of so many people, the Commission has sought to explain the guardianship laws and review the issues:

- Comprehensively in a detailed Discussion Paper, called *Confidentiality in the Guardianship System: Public Justice, Private Lives*.
- Simply so that you do not have to be a legal expert to understand it. This short paper, *Public Justice, Private Lives: A Companion Paper*, has been written as a guide to the longer Discussion Paper, but can also be read independently of that paper.
- In pamphlets dealing with the key issues in the review. Two versions are available: *Confidentiality: Key questions for people who may need help with decision-making* and *Confidentiality: Key questions for families, friends and advocates*.
- Visually and aurally on a CD-ROM called *Public Justice, Private Lives: A CD-ROM Companion*. This is for people who need or prefer to see and/or hear new information.

The purpose of all of these formats is to examine the confidentiality provisions contained in the guardianship laws. In each format:

- A reference to ‘the adult’ means a person 18 years or older with impaired capacity.
- The term ‘guardianship laws’ refers to both the *Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000*.
- The term ‘Tribunal’ refers to Queensland’s Guardianship and Administration Tribunal.

A glossary of other terms used is also included at the end of this paper.

Guardianship and decision-making¹

Our decisions define us. They not only shape the practical course of our lives, they also illustrate to others how we see ourselves and what our hopes and dreams are. When our power to make our own decisions is impaired or taken away from us, our sense of self-hood is also at risk.

For most adults with impaired capacity, decisions are made informally within the adult's network of family and friends. It is only if a problem arises that it may be necessary to formalise the decision-making process. This might happen if:

- the person wishing to make a decision on behalf of the adult does not have the necessary authority to do so; or
- the authority of the person making the decision is disputed; or
- there is no appropriate person to make the decision; or
- the decision or decisions being made are considered inappropriate; or
- a conflict occurs over the decision-making process.

The guardianship laws distinguish between decisions about:

1. **Personal matters**, such as where we live, who we live with, where we work, and what sort of lifestyle we have. Decisions for an adult about personal matters can be made by a guardian – a person appointed by the Tribunal for this purpose. This is called 'guardianship'. A guardian cannot make a decision for the adult about financial matters. Decisions about personal matters can also be made by an attorney appointed by the adult under an enduring power of attorney before they had impaired capacity.

¹ This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) Chapter 2.

2. **Health matters.** Decisions about health matters relate to our health care, such as what medical treatment we will receive. They are a type of personal matter. Decisions about health matters can be made by the adult by completing an advance health directive while they have capacity. If no such directive exists, these decisions can be made by an attorney appointed under an enduring power of attorney, by a guardian, or by a statutory health attorney (who might be the adult's spouse, unpaid carer, or close friend or relative). The Tribunal can also make decisions about some types of health matters.
3. **Financial matters,** such as day-to-day financial decisions (like paying bills), buying and selling property, insuring property, making investments and entering into contracts. Decisions for an adult about financial matters can be made by an administrator – a person appointed by the Tribunal for this purpose. This is called 'administration'. An administrator cannot make a decision for the adult about personal or health matters. Financial decisions can also be made by an attorney appointed by the adult under an enduring power of attorney before they had impaired capacity.

Of course, in real life, the boundaries between personal, health and financial matters are not so clear-cut; they tend to blur or overlap.

Queensland's five guardianship agencies: who they are and what they do²

Guardianship and Administration Tribunal (‘the Tribunal’)

The Guardianship and Administration Tribunal is like a court but is less formal. The Tribunal has the authority to appoint guardians and administrators for adults with impaired capacity and can give them directions or advice about what to do. It can also make decisions for an adult about certain special types of health care.

The Tribunal works from the following principles:

- The Tribunal should only become involved when informal decision-making is not working.
- Most adults with impaired capacity do not need a guardian or administrator.
- The Tribunal’s main concern is the welfare of the adult with impaired capacity.

The Adult Guardian

The Adult Guardian is an independent official who protects the rights and interests of adults with impaired capacity. One way the Adult Guardian does this is by acting as guardian for an adult. This happens when the Tribunal appoints the Adult Guardian in this role. If there is no one else who can, the Adult Guardian can also consent to health care decisions for the adult.

The Adult Guardian also investigates allegations of neglect, exploitation or abuse of an adult.

²

This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) Chapter 2.

The Public Advocate

The Public Advocate is an independent official whose role is to promote and protect the rights of adults with impaired capacity. The Public Advocate also has other functions such as monitoring and reviewing service and facility delivery to adults. Unlike the Adult Guardian, the Public Advocate's functions are aimed at systemic advocacy rather than advocacy on behalf of individual adults. This involves identifying problems with the systems in our society that deal with adults with impaired capacity, and working towards the improvement of those systems.

Community Visitor Program

The Community Visitor Program promotes the rights and protects the interests of adults with impaired capacity, and adults with a mental or intellectual impairment. It does this through a network of community visitors who regularly visit the facilities where these people live or receive services.

The Public Trustee

The Public Trustee is sometimes appointed by the Tribunal to make decisions about financial matters for adults with impaired capacity. When acting in this role, the Public Trustee is acting as the administrator of the adult.

Part 2

Thinking about confidentiality

Examining confidentiality: the current law³

The law sometimes protects certain types of private and personal information from being disclosed to other people. At present, the guardianship laws protect information as ‘confidential’ in three ways:

1. The laws protect the personal **information a person gains access to because they are involved in some way with the guardianship system**. This duty to keep information confidential applies to, for example, members of the Tribunal and its staff, the Adult Guardian and Public Advocate and their staff, and guardians and administrators. It also applies to people acting as attorneys, including statutory health attorneys.

Information of this sort is only protected as ‘confidential’ if it could reasonably be expected to identify the person involved. Information can 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 that refers to ‘my son’.

2. The laws also stop people **publishing information about what happens before the Tribunal**. This means information such as who was at a hearing, what they said, what documents were given to the Tribunal, what decision was made and what reasons were given for that decision.

³

This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) Chapter 2.

-
3. The laws also allow the Tribunal to make **‘confidentiality orders’ in relation to some proceedings**. These orders are not commonly made but are very important because of their potential impact on the people involved. They can stop certain people from:
- attending a Tribunal hearing, or part of a hearing;
 - looking at a document that is being considered by the Tribunal;
or
 - seeing a copy of the Tribunal’s decision and/or the reasons it gives for that decision.

Three balancing concepts in confidentiality⁴

Three important concepts influence our choices about how and when to respect the confidentiality of information within the guardianship system: the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system.

1. Open justice

Where there is no publicity there is no justice. Publicity is the very soul of justice.

Jeremy Bentham

The principle of open justice requires that our courts (like the Tribunal) should be open to the public. This includes, for example, conducting hearings in public. The openness required by this principle is at odds with confidentiality.

The main purposes

Accountability: acts as a safeguard against biased or arbitrary decision-making.

Education: increases public understanding of the law and how decisions are made.

⁴

This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) Chapter 3.

Elements	<p>The five elements of open justice are:</p> <ul style="list-style-type: none">• <i>access</i>: that members of the public be allowed to attend proceedings;• <i>reporting</i>: that those attending proceedings be able to report to others what happened;• <i>identification</i>: that the names of those involved in proceedings, such as parties and witnesses, be available to the public;• <i>inspection</i>: that members of the public be able to inspect documents used in proceedings; and• <i>reasons</i>: that reasons given for a decision be produced and made available to the public.
Whose interests are being protected?	<p>Open justice is based on the interests of the public generally.</p>
How open justice affects confidentiality	<p>The principle of open justice favours decision-making that is open to the public in the interests of accountability and public understanding.</p>

2. Procedural fairness

Participation in decision-making ... is one of the universally acclaimed values against which it is hard to find a voice of dissent.

DJ Galligan

Procedural fairness is a legal rule that says everyone should have a chance to present their case and comment on any relevant adverse statements made about them before a decision is made. It is unfair to decide an issue without giving someone a chance to respond. This means, for example, that a person accused of mistreating an adult should be able to explain their side of the story.

Procedural fairness is a challenge for confidentiality because a person cannot respond to information that is being used against them unless they know what that information is.

The main purposes	<p><i>Fairness:</i> it is not fair to make a decision affecting someone without their participation.</p> <p><i>Better decisions:</i> decisions based on hearing all of the relevant points of view are likely to be better.</p>
Elements	<p>Procedural fairness usually requires that people:</p> <ul style="list-style-type: none"> • know what information a decision-maker will consider; and • be given an opportunity to respond to that information.
Whose interests are being protected?	<p>Procedural fairness protects any person whose rights or interests may be affected by a decision.</p>
How procedural fairness affects confidentiality	<p>Procedural fairness requires information to be provided to others as part of giving them a fair hearing and so conflicts with confidentiality.</p>

3. Nature of the guardianship system

By resort to such jurisdiction the court is empowered to protect the human dignity and rights of individuals who ... cannot protect such dignity and rights for themselves.

*Justice O'Keefe*⁵

The protective nature of the guardianship system means that its whole purpose is to safeguard the rights and interests of adults with impaired capacity. This includes protecting their privacy.

During a Tribunal hearing, and in the guardianship system generally, very private information about an adult is disclosed. Just because an adult needs the help of the guardianship system, however, may not mean their private life should then be made public.

The main purpose

Protection: the guardianship system has a duty to safeguard the rights and interests of adults with impaired capacity. This includes protecting their privacy where appropriate.

Whose interests are being protected?

The guardianship system is intended to protect the rights and interests of adults with impaired capacity.

How the nature of guardianship affects confidentiality

The guardianship system may prefer to keep information confidential if disclosing it would harm an adult's rights or interests.

⁵

Northbridge v Central Sydney Area Health Service (2000) 50 NSWLR 549, 553. This comment was made about the *parens patriae* jurisdiction of the courts to make decisions for adults (and others) with impaired capacity. This jurisdiction (which still exists) was sometimes used to resolve guardianship matters before the guardianship laws were passed.

The sting in the tail of confidentiality

But confidentiality in the guardianship system might not always be the best way to promote the rights and interests of adults with impaired capacity.

The guardianship system affects the fundamental rights of adults with impaired capacity. For example, it can permit decisions to stop providing life-sustaining medical treatment.

Given the significance of these decisions, an adult's rights and interests may be better served by openness in decision-making and the accountability that it brings.

How do we strike a balance?

These three concepts – open justice, procedural fairness and the nature of the guardianship system – are designed to protect the interests of different groups of people. Sometimes those interests come into conflict.

For example, open justice allows people to report what happens at hearings as part of accountable decision-making. But is it fair that an adult's private life becomes a topic of public discussion simply because they need help with decisions that would otherwise be made in private?

Similarly, procedural fairness requires that people be allowed to respond to negative comments made about them. But what if that disclosure could harm an adult with impaired capacity, for example, by negatively affecting their medical treatment or condition?

The question arises: how do we balance the protection of an adult's rights and interests and the promotion of accountability through openness and fairness? The law has to make compromises. One of the challenges of this review is that people have different ideas about what the law should do and what the appropriate compromises should be.

Another issue to consider is the relationship a person has with the adult. Although not always the case, it may be that the closer the relationship between the adult and another person, the more appropriate it may be to reveal information to that person. For example, information may more properly be disclosed to people who are close to an adult than to members of the general community.

We ask you to think about these things when you consider the questions in Part 3 of this paper.

Part 3

Our questions on confidentiality

The Commission is asking questions around five main themes. Four of them relate to the Tribunal, and the last one relates to a general duty of confidentiality imposed on people involved in the guardianship system.

For each of these five themes, we have a short story that might help you to think about the issues. These stories aren't real. We are using them to try to show some of the issues that can arise with confidentiality. We know these stories involve a lot of conflict and so don't reflect the majority of cases in the guardianship system.

The Commission has also included its 'early comments' on each of the five themes. These are not our final opinions on what the law should be. We are not trying to influence your views, but thought you might like to know what we are thinking at this stage of the review.

Each of the five themes the Commission is considering raises other issues. If you want to think more about them, you might like to read the Commission's full Discussion Paper, *Confidentiality in the Guardianship System: Public Justice, Private Lives*. That document discusses the issues, the law and possible reform approaches in more detail.

Excluding people from Tribunal hearings⁶

Here we are asking, under what circumstances, if any, should the Tribunal be able to keep a person out of a hearing? This raises issues like:

- whether Tribunal hearings should always be conducted in public;
- whether the Tribunal should ever be able to hold hearings in private or to keep a person out of a hearing; and
- whether the Tribunal should ever be able to keep information presented at a hearing from a person who is involved in the proceeding.

A short story

Marlene is a 31 year old woman with an intellectual disability. She lives with, and is cared for by, her mother, Gwen. Marlene's cousin, Jim, who is an accountant, lives next door to them. He was appointed last year by the Tribunal as Marlene's administrator to manage an inheritance she had received.

Gwen, who has recently learned that Marlene is pregnant, says, 'It's impossible for Marlene to have agreed to have sex with anyone. She's just not capable of making that decision'. Jim has been charged by police with a sexual offence against Marlene and the matter is about to proceed to a Magistrate's Court hearing. Jim says, 'I'm innocent. I've never had sex with Marlene. She must have had sex with someone else'.

Gwen has applied to the Tribunal to:

- end the pregnancy; and
- remove Jim as administrator on the basis of the criminal charges against him.

⁶

This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper WP 60 (2006) Chapter 4.

Marlene, Gwen and Jim are the main people involved in the Tribunal proceedings. Two members of the public who are unconnected with the family and a member of the press are also present at the hearing. Gwen is worried because Marlene seems to be frightened of Jim. Gwen is also embarrassed about talking about Marlene's pregnancy in public. 'It's all so personal. It's no one else's business.' Gwen asks the Tribunal to conduct the hearing in private; or, at least, to exclude Jim from the hearing.

Jim protests, 'This is the first I ever heard of Marlene being afraid of me'. He says he has a right to be there.

What might the people in this story say?

Jim: *I don't want to be turfed out of a Tribunal hearing that affects my rights. That's not fair.'*

Gwen: *If Jim is at the hearing, Marlene will get scared. She'll get all jittery and won't know what to say. All this is so embarrassing.'*

Marlene: *I don't want Jim to be there. He is scary and I think he is angry with me. Mum tells me he shouldn't be there.'*

Member of the press: *How will the Tribunal be held accountable if it is allowed to keep some things private or to keep some people out of its hearings?'*

What does the law currently say?

Section 109 of the *Guardianship and Administration Act 2000* says that Tribunal hearings are generally to be conducted in public.

However, section 109 also allows the Tribunal to make a confidentiality order to keep people out of the hearing or to direct that all or part of the hearing take place in private. The Tribunal may also prohibit or limit the disclosure of information given at a Tribunal hearing to some or all of the people involved in the proceeding.

How might the law be changed?

The Commission has identified four possible approaches for how the law might deal with the issue of openness in Tribunal hearings.

1. Open hearings with no power to close them

Hearings would be conducted in public in all cases, with no exceptions. No Australian State currently does this.

2. Open hearings with power to exclude the public or any person

Hearings would generally be conducted in public but the Tribunal would have power to exclude the public or any person from a hearing. There would be no restriction on who could be excluded. This is the current position in Queensland, New South Wales, Victoria and the Australian Capital Territory.

3. Open hearings with limited power to exclude the public or any person

Hearings would generally be conducted in public and the Tribunal would have power to exclude the public or any person from the hearing. However, the Tribunal would not be able to exclude particular categories of people from a hearing, such as the people directly interested or involved in the proceeding. This is the approach taken in Western Australia, the Northern Territory, Tasmania and South Australia.

4. Closed hearings with power to admit the public or any person

All hearings would be held in private. Power to permit the public or particular people to attend a hearing might also be provided. None of the Australian States take this approach, but New Zealand does, where guardianship proceedings are dealt with by the Family Court.

The Commission's early comments

Open hearings are important because the principle of open justice and the accountability that openness brings is critical given the significance of the decisions being made. Being able to attend a hearing is also a significant part of a person's right to a fair hearing.

However, power to close proceedings to the public and to exclude particular people should be available given the protective nature of the guardianship system and the private and sensitive information that is often discussed before the Tribunal. Although such a step is serious, some situations may warrant it.

At this stage of its review, the Commission prefers the second approach: hearings should generally be open, subject to the Tribunal's power to exclude the public or particular people. That power should be guided by specific criteria set out in the guardianship laws.

What do you think? . . .

- 1(a)** Under what circumstances, if any, should the Tribunal be able to keep a person out of a hearing, and why?
- 1(b)** Under what circumstances, if any, should information given at a Tribunal hearing be able to be kept from a person involved in the proceeding, and why?
- 1(c)** Which of the approaches should the law take, and why?
- 1(d)** What other ways to tackle this issue do you suggest?

Refusing access to Tribunal documents⁷

Here we are asking, under what circumstances, if any, should the Tribunal be able to stop a person involved in the proceeding from seeing documents that the Tribunal is considering?

A short story

Edward is an 84 year old man living at an aged care facility. He had been living independently until a year ago when he acquired brain damage as a result of a stroke. Edward is also experiencing clinical depression and is being treated by Padam, a psychiatrist.

Edward's son, Peter, applies to the Tribunal to be appointed as Edward's guardian and administrator because he thinks that:

- Edward is unable to make decisions about matters involving a moderate level of complexity; and
- Edward's needs are not being fully met.

However, Edward's daughter, Emily, is contesting Peter's application as she wants to be appointed instead. She says, 'Peter is hopeless. What would he know about what's best for Dad?'

The Tribunal has several documents to consider, including:

- a statement by Jo, a staff member at the aged care facility who looks after Edward; and
- a report by Edward's psychiatrist, Padam.

In her statement, Jo claims, 'I overheard Emily yelling at her father and being really aggressive. She is a real bully'. Jo doesn't want Emily to find out what she has said because it might mean that Edward is taken away.

⁷

This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper WP 60 (2006) Chapter 5.

The report prepared by Edward's psychiatrist, Padam, indicates that Edward appears to have a fixed delusion that his son, Peter, is trying to poison him. Padam notes in her report, 'Edward refuses to accept that his belief is a delusion'. Padam knows that Edward will feel betrayed and be angered by her opinion. She is worried that his feelings will affect their ongoing therapeutic relationship. So Padam's report states, 'I am providing this report to the Tribunal on the specific basis that it is kept confidential'.

The Tribunal has to consider whether a confidentiality order should be made about these documents, and to whom any order/s should apply.

What might the people in this story say?

Emily: *If someone is going to say these lies about me, I should know so I can have my say and set the record straight.'*

Jo: *I'm worried about Edward. What if Emily finds out what I wrote in the statement for the Tribunal and tries to move him somewhere else? That's not good for him.'*

Padam: *My first priority is Edward and his depression. I know that if he sees my report, he won't trust me again. Then I can't help him get better.'*

Edward: *But this report is about me. Are you telling me that I can't even know the state of my own health?'*

What does the law currently say?

Section 108 of the *Guardianship and Administration Act 2000* says that people involved in a Tribunal proceeding must be given a reasonable chance to present their case. This includes being able to look at relevant documents held by the Tribunal.

However, section 109 of the *Guardianship and Administration Act 2000* lets the Tribunal make a confidentiality order to prevent people involved in the proceeding from looking at Tribunal documents.

How might the law be changed?

The Commission has identified three possible approaches for how the law might deal with the issue of confidentiality in relation to Tribunal documents.

1. No power to limit disclosure of documents to people involved in the proceeding

The Tribunal would have no power to make an order prohibiting or restricting disclosure of documents before it. This approach has not been adopted in the guardianship laws of any Australian State.

2. Power to limit disclosure of documents to people involved in the proceeding but no criteria to guide discretion

This is the current position in Western Australia where the Tribunal is able to limit disclosure of documents to people involved in the proceeding, but no criteria are established for the exercise of that power.

3. Power to limit disclosure of documents to people involved in the proceeding with criteria to guide discretion

The Tribunal would be empowered to limit disclosure of documents before it in accordance with specific criteria. This reflects the current law in Queensland and Victoria.

The Commission's early comments

Procedural fairness requires that a person be given an opportunity to deal with, or respond to, adverse information being considered by the Tribunal that affects his or her rights or interests. The principle of open justice also favours open access to documents, as part of securing accountability in decision-making and public understanding of the law.

However, in some circumstances, it may be appropriate to hold back information from certain people, especially if the adult is at risk of being harmed. This harm might be, for example, a breach of the adult's privacy or it might be that the adult would suffer retaliation because of something he or she has said.

At this stage of its review, the Commission prefers the third approach: giving the Tribunal the power to limit disclosure of documents to people involved in the proceeding, but that power should be guided by specific criteria set out in the guardianship laws.

What do you think? . . .

- 2(a) Under what circumstances, if any, should the Tribunal be able to stop a person involved in the proceeding from seeing documents that the Tribunal is considering, and why?
- 2(b) Which of the approaches should the law take, and why?
- 2(c) What other ways to tackle this issue do you suggest?

Refusing access to Tribunal decisions and reasons⁸

Here we are asking, under what circumstances, if any, should the Tribunal be able to refuse to give its decision or reasons for that decision to a person involved in the proceeding?

A short story

Stephen is a 24 year old man with a mental illness. He lives with his parents, Carmella and Allan. Stephen is unable to manage his own finances and so Allan has been managing Stephen's money informally. Their relationship is turbulent and has sometimes resulted in Allan being physically violent. Despite this, Stephen idolises his father. He tells his friends, 'I think he's great. He's the best Dad anyone could ever have'.

After several unhappy years, Carmella and Allan decided to separate. This was partly because of Carmella's anger about the way in which Allan has been managing Stephen's money. She has told Allan, 'You are too free and easy about it all. You are not thinking enough about Stephen's future'.

After they separated, Carmella applied to the Tribunal to be appointed as Stephen's administrator. Despite Allan's opposition, Carmella has been appointed. Stephen was not present at the hearing and so does not know about the decision. When Allan is told of the decision at the end of the hearing, he asks for written reasons because he wants to appeal the decision.

During the Tribunal hearing, Carmella and Allan gave conflicting evidence. In reaching its decision, the Tribunal made adverse findings about Allan's management of Stephen's money and also found him to be an untruthful witness. These findings could upset Stephen and affect his medical treatment. There is also a concern that giving the reasons to Allan may trigger an assault on Stephen or, perhaps, Carmella, in view of his past history of aggressive behaviour.

The Tribunal has to decide whether it should make a confidentiality order about its decision and reasons in relation to Stephen or Allan.

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This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper WP 60 (2006) Chapter 6.

What might the people in this story say?

Allan: *The Tribunal has got this all wrong. I'm going to appeal – but how can I, if I don't know why the decision was made?*

Stephen: *If they are going to make a decision about me, then shouldn't someone tell me what's happened?*

Carmella: *I'm worried about the impact it might have on Stephen. And Allan doesn't take kindly to criticism. What if he lashes out at one of us?*

What does the law currently say?

Section 158 of the *Guardianship and Administration Act 2000* says that, generally, the Tribunal must give a copy of its decision and any written reasons for that decision to the adult concerned in the proceeding and to certain other people.

However, section 109 of the *Guardianship and Administration Act 2000* lets the Tribunal keep its decision and reasons confidential from some or all of the people involved in the proceeding.

How might the law be changed?

The Commission has identified three possible approaches for how the law might deal with confidentiality about the Tribunal's decisions and reasons.

1. No power to make decisions or reasons confidential

The Tribunal would not be able to make an order prohibiting or restricting disclosure of a decision or its reasons. Most guardianship systems in Australia, other than Queensland, have this approach.

2. Power to make reasons confidential only

The right to know the Tribunal's *decision* would remain, but the Tribunal would be able to prohibit or restrict disclosure of its *reasons* for the decision. Queensland's *Mental Health Act 2000* takes this approach.

3. Power to make both decisions and reasons confidential

The Tribunal would be able to prohibit or restrict disclosure of both its reasons *and* decisions. This is the current Queensland law.

The Commission's early comments

There is a strong case for people involved in the proceeding being able to know the Tribunal's decision and the reasons it gives for that decision. First, if a person doesn't know what decision has been made and why, it is very difficult to dispute (or appeal) the decision. Second, the principle of open justice supports the accountability that comes from public scrutiny of decisions and reasons. Third, a fair process generally explains to people why a decision that affects them was made. These arguments are significant in the guardianship system because the decisions made are very important and can affect the adult's fundamental rights.

However, the protective nature of the guardianship system might mean that the Tribunal considers it necessary, on occasion, to keep reasons or decisions from the adult or other people, for example, to avoid harming the adult.

At this stage of its review, the Commission prefers the second approach: the Tribunal must always state its decisions to people involved in the proceeding, but it is able to decide when to provide its reasons and to whom. That power should be guided by strict criteria set out in the guardianship laws.

What do you think? . . .

- 3(a) Under what circumstances, if any, should the Tribunal be able to refuse to give its decision or reasons for that decision to a person involved in the proceeding, and why?
- 3(b) Which of the approaches should the law take, and why?
- 3(c) What other ways to tackle this issue do you suggest?

Publicising Tribunal proceedings⁹

Here we are asking, to what extent, if at all, should Tribunal proceedings be able to be openly discussed by people outside those proceedings? This raises issues like:

- whether people should be able to discuss or publish information about Tribunal proceedings outside the Tribunal and, if so, to whom; and
- whether the identity of people involved in Tribunal proceedings should be kept confidential.

A short story

Li is a 54 year old man with Alzheimer's disease who is now unable to manage his financial affairs. A former self-employed businessman in the telecommunications industry, Li is quite wealthy. He lives with his 42 year old wife, Justine, who has applied to the Tribunal seeking to be appointed as Li's administrator.

Li's 25 year old daughter, Mei-Ching, works as a clerk for a small suburban law firm. She has also applied to be appointed as Li's administrator. She believes Justine has tricked Li into giving Justine large sums of money in the past and is worried she will continue to use Li's money for her own ends. 'I don't trust her. She only married Dad for his money.' Justine denies this and also claims that Mei-Ching's interest is mainly financial. 'She is just worried about her future inheritance.'

Li, Justine, and Mei-Ching are the main people involved in the Tribunal proceeding, which results in Justine being appointed as Li's administrator.

⁹ This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper WP 60 (2006) Chapter 7.

Mei-Ching, who is tearful about the Tribunal's decision, wants the story to be made public, 'This is devastating. I'm his daughter!' She approaches a television reporter and camera-man outside the Tribunal with her story. Mei-Ching's interview is broadcast although her face is obscured and no identifying information is provided. Mei-Ching also wants to get legal advice to appeal the Tribunal's decision. 'The law firm I work for will look after me.'

Justine is opposed to any public reporting of the story. 'It's wrong for Mei-Ching to be giving interviews to the media. This is a private family matter. It's no one else's business. Li has always been discreet and I see no reason why we shouldn't continue to respect his privacy now.' However, Justine is stressed by it all and so confides in her sister and her neighbour.

What might the people in this story say?

Mei-Ching: *'I have the right to tell my story. People should know what is going on here.'*

Journalist: *'Freedom of the press is crucial to a democratic society. Who else is going to hold this Tribunal accountable?'*

Justine: *'My husband's right to privacy is more important than either Mei-Ching's right to voice her grievances publicly or freedom of the press.'*

What does the law currently say?

Section 112 of the *Guardianship and Administration Act 2000* generally prohibits:

- publishing information about a Tribunal proceeding; and
- revealing the identity of a person involved in a Tribunal proceeding.

There is some uncertainty in the law about whether 'publishing' information about proceedings means discussing it with *anyone* or only publicising it to a large number of people or the general public.

Section 109 of the *Guardianship and Administration Act 2000* also lets the Tribunal make a confidentiality order to keep certain information and documents it has received confidential from members of the public.

How might the law be changed?

The Commission has identified four possible approaches for how the law might deal with the issue of people publishing information about Tribunal proceedings, including the identities of the people involved, outside those proceedings.

1. No ban but power to order that information, including a person's identity, not be published

Publishing information about proceedings, including identifying information, would be generally allowed, unless the Tribunal ordered that the information must not be published. No State in Australia currently uses this approach.

2. Blanket ban with power to permit publication of de-identified information

Information about Tribunal proceedings could not be published but the Tribunal could permit publication that does not identify the people involved. In this approach, the most that may ever be published is a report in which no-one can be identified. This approach is used in the Northern Territory and South Australia.

3. Blanket ban with power to permit publication of all information

This is the same approach as number 2 above, except the Tribunal has power to allow wider publication. It could permit the publication of all information about proceedings, even identifying information. This is the current law in Queensland.

4. Ban only on disclosing identifying information without Tribunal's permission

Information about proceedings could be published provided the information does not identify the people involved. But the Tribunal would also have power to permit the publication of that identifying information. This is the approach in the Australian Capital Territory, New South Wales, Tasmania and Western Australia.

The Commission's early comments

The principle of open justice favours public discussion and reporting of Tribunal proceedings. This public scrutiny ensures accountability in decision-making and wider community understanding of the law and how it operates. However, the nature of the guardianship system may favour protecting personal and sensitive information about an adult and people close to the adult, especially if the publicity could harm the adult.

At this stage of its review, the Commission prefers the fourth approach: publication of Tribunal proceedings should be allowed but only in a way that does not identify the people involved, unless the Tribunal permits the publication of that identifying information.

What do you think? . . .

- 4(a) To what extent, if at all, should Tribunal proceedings be able to be openly discussed by people outside those proceedings, and why?
- 4(b) What limits, if any, should there be on disclosing the identity of a person involved in Tribunal proceedings, and why?
- 4(c) Should any ban on publishing information relate to telling that information to a single person or only to telling it to a large group of people such as the general public (for example, by the media)?
- 4(d) Which of the approaches should the law take, and why?
- 4(e) What other ways to tackle this issue do you suggest?

A general duty of confidentiality in the guardianship system¹⁰

Here we are asking, apart from the situations discussed above (which deal with confidentiality in relation to Tribunal proceedings), when should information that is revealed within the guardianship system be required to be kept confidential? This raises issues like:

- whether personal information that is gained by someone when acting under the guardianship laws should be kept confidential;
- whether someone who gains this information should ever be able to reveal it to another person or body.

A short story

Olga is a 78 year old woman with dementia. She lives with her daughter, Laura, and has another daughter, Sue, who lives around the corner. Laura has been Olga's primary carer for many years. Olga's daughters have always cooperated in decisions involving their mother which has pleased Olga. 'We've muddled along very well all these years by talking things out and being open-hearted to each other.'

However, Olga's daughters recently disagreed strongly about a proposed change to Olga's medication. An application was brought to the Tribunal, which appointed the Adult Guardian as Olga's guardian, with the agreement of the children. The Adult Guardian has told Laura and Sue, 'I will make a decision about the proposed change in Olga's medication based on advice that I have received from Olga's GP and from a specialist doctor'. Laura and Sue want to see this information.

Olga's estranged brother, Bastian, also wants to satisfy his curiosity about Olga's health by seeing the medical information. He and Olga fell out with each other about twenty years ago.

¹⁰

This is discussed in more detail in Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper WP 60 (2006) Chapter 8.

Now that the Adult Guardian has been appointed, Laura and Sue are also unsure whether they are allowed to tell anyone (including their Uncle Bastian) information they already have about Olga's medical history.

What might the people in this story say?

Laura: *'It all feels a bit bureaucratic. How does the Adult Guardian really know what's right for Mum? We have looked after her all these years and we know what she wants. Why can't the Adult Guardian just give Sue and me the information?'*

Sue: *'I want to do what's best for Mum – I know she certainly wouldn't want Uncle Bastian knowing about her dementia. But what do I say if he asks me about it?'*

Bastian: *'I've not been a very good brother, I know that. I guess I just want to make sure that any decisions take into account Olga's childhood difficulties. Our family has a medical history that needs to be considered.'*

What does the law currently say?

Section 74 of the *Powers of Attorney Act 1998* and section 249 of the *Guardianship and Administration Act 2000* aim to keep certain information confidential when it is gained by people acting under the guardianship laws. This includes people such as attorneys, guardians and administrators, Tribunal members and staff, the Adult Guardian and staff, the Public Advocate and staff, and community visitors.

However, both sections also have general exceptions, and allow a person to record or tell confidential information if they are:

- acting under the guardianship laws;
- performing a responsibility under another law;
- involved in a court or tribunal hearing;
- allowed to do so by a regulation or other law;
- allowed to do so by the person about whom the confidential information relates; or
- allowed to do so by the Tribunal in the public interest because a person's life or safety is at risk.

A further important exception is also provided for the Adult Guardian in section 250 of the *Guardianship and Administration Act 2000*. That exception allows the Office of the Adult Guardian to disclose information in the course of its investigations if it is 'necessary and reasonable in the public interest'.

How might the law be changed?

The Commission has identified four possible approaches for how the law might deal with the issue of confidentiality of information gained by a person when acting under the guardianship laws.

1. No duty of confidentiality

There would be no duty to keep information about a person's affairs gained when acting under the guardianship laws confidential. This information may still be subject to other obligations of confidentiality under the general law or, for example, under the *Privacy Act 1988* or the Government's information privacy principles. This is the position in the Northern Territory.

2. Duty of confidentiality without exceptions

There would be an absolute duty to keep information about a person's affairs that is gained when acting under the guardianship laws confidential. There would be no exceptions for when this information could be disclosed. None of the States in Australia adopt this approach.

3. Duty of confidentiality with general exceptions

There would be a duty of confidentiality but with some general exceptions (perhaps like the ones discussed above) that would allow information to be disclosed in appropriate circumstances. This approach is taken in New South Wales, Victoria, South Australia and Western Australia.

4. Duty of confidentiality with specific exceptions for the Adult Guardian (with or without other general exceptions)

This is the same as the duty in number 3 above, but there would also be specific exceptions that would allow the Adult Guardian to disclose confidential information in certain circumstances. This is the current position in Queensland and is also reflected in the Australian Capital Territory and Tasmania.

The Commission's early comments

The protective nature of the guardianship system may mean that personal information gained when a person is acting under the guardianship laws should remain confidential. Telling others about information that was only revealed for a limited purpose disregards an adult's privacy. Procedural fairness, however, might require this information to be disclosed. Giving a person a fair hearing before making a decision that affects them means giving that person an opportunity to respond to adverse information.

At this stage of its review, the Commission prefers the fourth approach: there would be a duty of confidentiality with specific exceptions for the Adult Guardian (with or without other general exceptions). The Commission seeks your ideas about the content or extent of the duty, and any exceptions.

What Do You Think? . . .

- 5(a)** Apart from the Tribunal, when should information that is revealed within the guardianship system be required to be kept confidential, and why?
- 5(b)** Should there be any exceptions that allow a person to tell this information to another person or body?
- 5(c)** Which of the approaches should the law take, and why?
- 5(d)** What other ways to tackle this issue do you suggest?

Consultation: have your say

The Queensland Law Reform Commission would like to hear your comments, ideas and suggestions about the confidentiality provisions of the guardianship laws. You can tell us what you think by filling out the enclosed **answer sheet** and sending it to us, or by writing to us. You can also talk with us by telephone, or in person by making an appointment.

Postal address: Queensland Law Reform Commission
PO Box 13312
George Street Post Shop QLD 4003

Fax: (07) 3247 9045
[marked 'Attention: Guardianship Review']

Telephone: (07) 3247 4544

Email: qlrcguardianship@justice.qld.gov.au

The closing date for submissions is 31 October 2006.

CONFIDENTIALITY

The Commission may refer to or quote from submissions in future publications. If you do not want your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

The Commission also lists in an appendix the names of those people who have made a submission. Please indicate clearly if you would not like your name to be included in this list.

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

Any information you provide in a submission will only be used for the purpose of the Commission's review. It will not be disclosed to others without your consent.

Glossary

Administration means making decisions for an adult about financial matters.

Administrator is a person appointed by the Tribunal to make decisions for an adult about financial matters.

Adult in this review means a person with impaired capacity who is 18 years or older.

Adult Guardian is an independent official who works under the guardianship laws to safeguard the rights and interests of adults. The Adult Guardian can investigate complaints that adults are being neglected, exploited, or abused. The Adult Guardian can also sometimes make decisions about an adult's personal matters or health matters.

Advance health directive is a formal document made by an adult giving directions about their future health care. The document is made when the adult has capacity, but applies only if the adult later has impaired capacity.

Attorney is someone who is appointed by an adult (with capacity) in an enduring power of attorney to make decisions about personal, health or financial matters for the adult. An attorney can only make decisions if the adult has impaired capacity.

Attorney-General is a Member of Parliament, Queensland's first law officer and the Minister for Justice.

Commission means the Queensland Law Reform Commission, the body conducting the Guardianship Review.

Community Visitor Program is a program that promotes the rights and protects the interests of adults with impaired capacity, and adults with a mental or intellectual impairment. It does this through regular visits by community visitors to places where these adults live or receive services.

Confidentiality provisions are the provisions in the guardianship laws that:

- stop people telling others about personal information that they gain when acting under the laws;

- stop information about what happens at Tribunal hearings being published; and
- allow the Tribunal to make confidentiality orders.

Confidentiality order is an order made by the Tribunal to stop a person from:

- attending a Tribunal hearing, or part of a hearing;
- looking at a document that is being considered by the Tribunal; or
- seeing a copy of the Tribunal's decision and the reasons it gives for that decision.

Enduring power of attorney is a formal document made by an adult appointing an attorney or attorneys to make decisions about their personal, health or financial matters. The document is made when the adult has capacity, but applies only if the adult later has impaired capacity.

Financial matters are matters about an adult's finances or property. This includes paying rent or bills, running a business, and buying or selling property.

General Principles are a list of 11 guidelines in the guardianship laws that must be applied when a person makes decisions for an adult. The General Principles will be considered in stage two of this review.

Guardian is a person appointed by the Tribunal to make decisions for an adult about personal or health matters.

Guardianship means making decisions for an adult about the adult's personal or health matters.

Guardianship laws in Queensland are: the *Powers of Attorney Act 1998* and the *Guardianship and Administration Act 2000*.

Guardianship and Administration Tribunal ('the Tribunal') is like a court but is less formal. It can decide if an adult needs a guardian or administrator. Sometimes, it can also make decisions for an adult about certain special types of health care.

Guardianship system is the system of laws and practices about guardianship and administration for adults, and the agencies that carry them out.

Health Care Principle is a guideline in the guardianship laws that must be applied when a person makes decisions about health matters for an adult.

Health matters are those matters about an adult's health care, including any care needed for a physical or mental condition.

Hearing is when people meet with the Tribunal so that it can make a decision. The Tribunal 'hears' information from people who attend.

Impaired capacity means when a person 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 communicate that decision. An adult may have impaired capacity for some decisions but not for others.

Public Advocate is an independent official who works under the guardianship laws to improve the systems in our society that deal with adults with impaired capacity. This focus on systems is different from the Adult Guardian who looks after individual adults.

Public Trustee is a State Government official who is sometimes appointed by the Tribunal as an administrator for an adult.

Open justice is the idea that courts and tribunals should sit in public so that anyone can attend and hear what happens.

Personal matters are those matters about an adult's care or welfare. This includes deciding where an adult will live and what work they will do. It also includes most health matters.

Procedural fairness is a set of legal rules about fair decision-making by courts, tribunals and other decision-makers. It says that everyone affected by a decision should have a chance to have their say.

Statutory health attorney is a person who can make decisions about an adult's health matters. A statutory health attorney is the first available person of: an adult's spouse, an unpaid carer, or a close friend or relation. If these people are not available, the Adult Guardian is the statutory health attorney.



Have your say

The Commission would like to hear your comments, ideas and suggestions about the confidentiality provisions. You can tell us what you think by writing to us. You may wish to use this answer sheet. Or you can contact the Commission by email, by telephone, or you can make a time to meet with one of our staff.

Postal address: Queensland Law Reform Commission
PO Box 13312, George Street Post Shop QLD 4003
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For more information about the Commission's Guardianship Review or about guardianship generally, visit our website at: <http://www.qlrc.qld.gov.au/guardianship>.

The closing date for submissions is **31 October 2006**.

SEND TO:

Post: Queensland Law Reform Commission
PO Box 13312, George Street Post Shop QLD 4003
Fax: (07) 3247 9045

ANSWER SHEET

Excluding people from Tribunal hearings

1(a) Under what circumstances, if any, should the Tribunal be able to keep a person out of a hearing, and why?

1(b) Under what circumstances, if any, should information given at a Tribunal hearing be able to be kept from a person involved in the proceeding, and why?

1(c) Which of the approaches should the law take, and why?

1(d) What other ways to tackle this issue do you suggest?

Refusing access to Tribunal documents

2(a) Under what circumstances, if any, should the Tribunal be able to stop a person involved in the proceeding from seeing documents that the Tribunal is considering, and why?

2(b) Which of the approaches should the law take, and why?

2(c) What other ways to tackle this issue do you suggest?

Refusing access to Tribunal decisions and reasons

3(a) Under what circumstances, if any, should the Tribunal be able to refuse to give its decision or reasons for that decision to a person involved in the proceeding, and why?

3(b) Which of the approaches should the law take, and why?

3(c) What other ways to tackle this issue do you suggest?

Publicising Tribunal proceedings

4(a) To what extent, if at all, should Tribunal proceedings be able to be openly discussed by people outside those proceedings, and why?

4(b) What limits, if any, should there be on disclosing the identity of a person involved in Tribunal proceedings, and why?

4(c) Should any ban on publishing information relate to telling that information to a single person or only to telling it to a large group of people such as the general public (for example, by the media)?

4(d) Which of the approaches should the law take, and why?

4(e) What other ways to tackle this issue do you suggest?

A general duty of confidentiality in the guardianship system

5(a) Apart from the Tribunal, when should information that is revealed within the guardianship system be required to be kept confidential, and why?

5(b) Should there be any exceptions that allow a person to tell this information to another person or body?

5(c) Which of the approaches should the law take, and why?
