



Queensland  
Law Reform Commission

**Public Justice, Private Lives:  
A New Approach to Confidentiality  
in the Guardianship System**

Report  
Volume 1





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A New Approach to Confidentiality in  
the Guardianship System**

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To: The Honourable Kerry Shine MP  
Attorney-General and Minister for Justice and  
Minister Assisting the Premier for Western Queensland

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* Volume 1.

The Honourable Justice R G Atkinson  
Chairperson

Mr J K Bond SC  
Member

Dr H A Douglas  
Member

Mr B J Herd  
Member

Mr G W O'Grady  
Member

Dr B P White  
Member



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Legal Officers: **Ms M T Collier**  
**Ms P L Rogers**  
**Ms S-N Then**

Administrative Officer: **Mrs Z Boldery**

Address: 7th Floor, 50 Ann Street, Brisbane, Qld 4000  
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](mailto:LawReform.Commission@justice.qld.gov.au)  
Website: <http://www qlrc.qld.gov.au>

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*Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (July 2006)

*Public Justice, Private Lives: A Companion Paper*, WP 61 (July 2006)

*Public Justice, Private Lives: A CD-ROM Companion*, WP 62 (August 2006)

*Confidentiality: Key questions for people who may need help with decision-making*, MP 38 (July 2006)

*Confidentiality: Key questions for families, friends and advocates*, MP 39 (July 2006)



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## Introduction

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## TERMS OF REFERENCE

1.1 In October 2005, the Attorney-General requested the Queensland Law Reform Commission to conduct a review of aspects of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). These Acts regulate substitute decision-making by and for adults with impaired decision-making capacity.

1.2 The Commission's terms of reference require it to conduct this review in two stages.<sup>1</sup> In stage one, the Commission is requested by the terms of reference to review the confidentiality provisions of the guardianship legislation, having regard to:

the need to ensure that the confidentiality provisions that apply to the proceedings and decisions of the Guardianship and Administration Tribunal and other decisions under the *Guardianship and Administration Act* strike the appropriate balance between protecting the privacy of persons affected by the Tribunal's proceedings and decisions and promoting accountability of the Tribunal.

1.3 The Commission is required to provide a final report to the Attorney-General on stage one by the end of June 2007. The terms of reference also require the Commission to prepare draft legislation, if relevant, based on its recommendations.

1.4 In stage two, the Commission is to review the guardianship legislation more broadly and, in particular, to review:

- (a) the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* including but not limited to:
- the General Principles;
  - the scope of personal matters and financial matters and of the powers of guardians and administrators;
  - the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
  - the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
  - the processes for review of decisions;
  - consent to special medical research or experimental health care;
  - the law relating to advance health directives and enduring powers of attorney;
  - the scope of the decision-making power of statutory health attorneys;

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<sup>1</sup>

The Commission's terms of reference are set out in Appendix 1 of this Report.

- the ability of an adult with impaired capacity to object to receiving medical treatment; and
- the law relating to the withholding and withdrawal of life-sustaining measures;

...

- (c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity;
- (d) whether there are circumstances in which the *Guardianship and Administration Act 2000* should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

1.5 The terms of reference initially required the Commission to provide a separate, interim report on the General Principles of the guardianship legislation before providing a final report on all of these matters. However, in April 2007, the Attorney-General amended the terms of reference to allow the Commission to report on these matters together. This will ensure the General Principles are examined in the context of the guardianship legislation as a whole.

## THE DISCUSSION PAPER AND CALL FOR SUBMISSIONS

1.6 Stage one of the Commission's review is concerned with particular provisions of the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) dealing with the confidentiality of information generated in relation to proceedings of the Guardianship and Administration Tribunal and within the guardianship system more generally. Those provisions:

- allow the Tribunal to make 'confidentiality orders' in relation to Tribunal hearings, information and documents received by the Tribunal, and the Tribunal's decisions and reasons;
- prohibit the publication of information about Tribunal proceedings and the disclosure of the identity of persons involved in Tribunal proceedings; and
- impose a duty of confidentiality on people who gain certain personal information through their involvement in the administration of the legislation.

1.7 In order to assist it in identifying issues for consideration in relation to these confidentiality provisions, the Commission sought and obtained preliminary information and advice from a number of people and organisations with experience in the operation of the legislation.

1.8 The Commission received 40 submissions from interested individuals and organisations before its formal call for submissions and was invited to participate in

three forums at which it also heard from many people about the guardianship legislation.<sup>2</sup>

1.9 At the end of 2005, the Commission established an informal Reference Group to provide expertise and advice on the review. While it is not possible to represent adequately all of the interests in this area of law, members of the Reference Group reflect a cross-section of people who are affected by, administer, or are otherwise interested in Queensland's guardianship legislation.<sup>3</sup> The Reference Group met twice prior to the finalisation of the Commission's Discussion Paper on confidentiality. The first meeting, in December 2005, assisted the Commission to identify issues for consideration in stage one. In June 2006, the Reference Group met again to provide feedback on a draft of the Commission's Discussion Paper.

1.10 As part of informing itself about the practical operation of the law, the Commission also sought and received empirical information from the Tribunal about the number and type of confidentiality orders that have been made.

1.11 In July 2006, the Commission published a Discussion Paper entitled *Confidentiality in the Guardianship System: Public Justice, Private Lives*.<sup>4</sup> The purpose of that paper was to provide information on the current law and the issues the Commission envisaged would need to be addressed by its review, and to call for submissions on those issues. The Discussion Paper contained a number of questions about whether, and how, the confidentiality provisions should be changed. It also identified three matters the Commission anticipated would guide its review of the confidentiality provisions: the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system.

1.12 In order to facilitate wide and inclusive consultation, the Commission also produced:

- a shorter and independent guide to the Discussion Paper – *Public Justice, Private Lives: A Companion Paper*,<sup>5</sup>
- two pamphlets setting out the key issues – *Confidentiality: Key questions for people who may need help with decision-making*,<sup>6</sup> and *Confidentiality: Key questions for families, friends and advocates*,<sup>7</sup> and

<sup>2</sup> The names of people who have made submissions and the forums that the Commission participated in are listed in Appendices 3 and 4 of this Report.

<sup>3</sup> Membership of the Reference Group is set out in Appendix 2 of this Report.

<sup>4</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006).

<sup>5</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A Companion Paper*, WP 61 (2006).

<sup>6</sup> Queensland Law Reform Commission, *Confidentiality: Key questions for people who may need help with decision-making*, MP 38 (2006).

<sup>7</sup> Queensland Law Reform Commission, *Confidentiality: Key questions for families, friends and advocates*, MP 39 (2006).

- an interactive CD-ROM to allow people who prefer or need to see and/or listen to new information to navigate the review's key issues – *Public Justice, Private Lives: A CD-ROM Companion*.<sup>8</sup>

1.13 The Discussion Paper and its suite of companion publications were officially launched by the Attorney-General in a public ceremony held in Brisbane on 9 August 2006 attended by more than 100 people.<sup>9</sup> The Discussion Paper and its accompanying publications were widely distributed throughout Queensland and were also made available on the Commission's internet homepage.<sup>10</sup>

1.14 The release of the Discussion Paper and the Commission's call for submissions were also announced in a media statement<sup>11</sup> and advertised in *The Courier-Mail*.<sup>12</sup> The Commission also called for submissions in the Queensland Law Society's monthly magazine, *Proctor*,<sup>13</sup> and in the Australian internet journal, *On Line Opinion*.<sup>14</sup> The Commission also participated in a number of television and radio interviews to promote public awareness of the Commission's review and to encourage people in the community to respond to the Discussion Paper.<sup>15</sup> The Commission's consultation process was also the subject of many newspaper articles.<sup>16</sup>

## THE CONSULTATION PROCESS AND RESPONSE

1.15 The Commission has undertaken wide community consultation before making its recommendations to the Attorney-General as to how the law might be improved. The consultation process in this review was designed to help the Commission in:

- identifying all the key issues for the Commission to consider;
- finding out how the law works in practice, including what causes problems;
- generating suggestions for how the law could be improved; and

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<sup>8</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A CD-ROM Companion*, WP 62 (2006).

<sup>9</sup> See the speech given by the Honourable Justice Roslyn Atkinson, Chairperson, Queensland Law Reform Commission, at the launch of the Commission's Discussion Paper: <<http://www qlrc qld gov au/events/Atkinson0806.pdf>> at 26 June 2007.

<sup>10</sup> <<http://www qlrc qld gov au/guardianship/>>.

<sup>11</sup> Queensland Law Reform Commission, 'Community invited to comment on guardianship laws' (Media Statement, 9 August 2006) <<http://www qlrc qld gov au/guardianship/docs/media2.pdf>> at 26 June 2007.

<sup>12</sup> 'The Guardianship Review: Call for Submissions' (12 August 2006).

<sup>13</sup> B White and P Rogers, 'Public Justice, Private Lives' (2006) 26 *Proctor* 11.

<sup>14</sup> B White and P Rogers, 'Accountability with privacy: confidentiality in the guardianship system' (31 October 2006) *On Line Opinion* <<http://www onlineopinion com au/view.asp?article=5060>> at 26 June 2007.

<sup>15</sup> For example, Damien Carrick, ABC Radio National: *The Law Report*, 'Queensland Adult Guardianship and Administration Tribunal' (Brisbane, 15 August 2006); Madonna King, ABC 612 Brisbane: *Mornings with Madonna King* (Brisbane, 25 September 2006); Paul Barclay, ABC Radio National: *Australia Talks Back*, 'Guardianship: Protecting the Vulnerable' (28 September 2006).

<sup>16</sup> For example, Margaret Wenham, 'Guardianship Privacy Study', *The Courier-Mail* (16 September 2006).

- developing, testing, and refining proposed recommendations for change.

1.16 The Commission was aware of the significant community interest in its review and was particularly keen to hear from people whose lives are affected by the guardianship legislation.

1.17 The suite of publications released with the Commission's Discussion Paper was designed to maximise the community response to the issues raised by the review.<sup>17</sup> The Discussion Paper and Companion Paper included possible models for reform and, along with the CD-ROM presentation, used illustrative case studies. The Commission also expressed some preliminary views in its Discussion Paper and Companion Paper to stimulate feedback and debate. The Companion Paper and pamphlets also included prompted answer sheets that could be completed and returned to the Commission. The Commission is grateful for the assistance and advice of Ms Donna McDonald who was engaged to assist with the development of these companion consultation documents.

1.18 In addition to seeking the community's views in these consultation documents, the Commission held ten publicly advertised forums across the State to engage with members of the community. In addition to a forum held in Brisbane, the Commission travelled to the Gold and Sunshine Coasts, Toowoomba, Bundaberg, Rockhampton, Mackay, Townsville, Cairns and Mt Isa. These forums were very well attended and enabled the Commission to hear, in person, from hundreds of people in the community.

1.19 The Commission also held twelve focus group sessions with people interested in, or affected by, the guardianship legislation. Four of these sessions were held with groups of adults who need, or may need, assistance with decision-making. Other sessions were held with people from the Tribunal, the Office of the Adult Guardian, the Community Visitor Program, and the Office of the Public Advocate.

1.20 After the release of its Discussion Paper, the Commission also established a telephone hotline and an on-line submission form, on its internet homepage, to assist people in making submissions.

1.21 The Commission received an enormous response to its call for submissions. In addition to the response it received at community forums and focus groups, the Commission received many written and telephone submissions and met with a number of people in person. In total, the Commission received 260 submissions from 150 individuals and organisations prior to the release of this Report.<sup>18</sup> This is the largest response the Commission has ever received to a single round of consultation.

1.22 The Commission also met with the Reference Group, in June 2007, to seek feedback on a draft of this Report. The Tribunal also provided the Commission with updated empirical information on the number and type of confidentiality orders that have been made. Staff of the Commission also attended a number of Tribunal hearings to gain further understanding of Tribunal practices and procedures.

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<sup>17</sup> See para 1.12 of this Report.

<sup>18</sup> A list of submissions received in response to the Discussion Paper is set out in Appendix 3 of this Report.

1.23 The Commission would like to thank all of those people who participated in its consultation process. The submissions received by the Commission have been of considerable assistance to it in the preparation of this Report and in the formulation of its recommendations.<sup>19</sup>

## ABOUT THIS REPORT

### Methodology

1.24 This is the Commission's final Report for stage one of the review, and it contains the Commission's recommendations about the confidentiality provisions of the guardianship legislation.

1.25 In making its recommendations, the Commission has endeavoured to strike the appropriate balance between the privacy of persons affected by the guardianship system, and in particular by decisions of the Tribunal, and the promotion of accountability and transparency in decision-making within the guardianship system.

1.26 The Commission's recommendations have been informed by the many submissions it received to its Discussion Paper and by its subsequent understanding of the practical context in which the confidentiality provisions operate. The Commission's approach has also been based on a careful consideration of three underlying, and sometimes competing, matters: the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system. The Commission has examined each of the confidentiality provisions in light of these matters in considering whether and to what extent the balance is to be struck in favour of openness or confidentiality in each case.

1.27 Many of the Commission's recommendations propose amendments to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The Commission has also made some recommendations about practice and procedure, which may have resource implications. The Commission considers the steps it has recommended are necessary to ensure the appropriate balance is struck between openness and confidentiality. The Commission believes the scheme put forward by its recommendations will enhance the administration of justice within the guardianship system.

1.28 While this Report deals with issues related to stage one of the review, the Commission's consultation on, and examination of, these issues has also revealed other concerns that were not anticipated for consideration in this stage of the review. The Commission's general approach has been to deal with issues directly connected to stage

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The Commission also notes that its consultation process was, to a great extent, facilitated by amendments made to the guardianship legislation. The confidentiality provisions in s 74 of the *Powers of Attorney Act 1998* (Qld) and ss 112 and 249 of the *Guardianship and Administration Act 2000* (Qld) were amended by the *Justice and Other Legislation Amendment Act 2005* (Qld) to include a limited exception for disclosure of otherwise confidential information to a member of this Commission or to its staff or consultants for the purpose of the Commission's review. This allowed people with direct experience of the guardianship system to share those experiences with the Commission without concerns about breaching the legislation's confidentiality provisions.

one in this Report, and to highlight those issues that are not connected with the confidentiality provisions for consideration in stage two of the review.

1.29 The Commission has again prepared a shorter, independent guide to the Report, entitled *Public Justice, Private Lives: A Companion to the Confidentiality Report*, to assist people in understanding the Commission's recommendations.<sup>20</sup> It has also produced two pamphlets setting out its key findings: *A new approach to confidentiality: A guide for people who may need help with decision-making*<sup>21</sup> and *A new approach to confidentiality: A guide for families, friends and advocates*.<sup>22</sup> The Commission would like to thank Ms Donna McDonald and Ms Katy O'Callaghan who assisted with the development of these companion papers.

1.30 This Report and its companion papers are available on the Commission's internet homepage.<sup>23</sup> Copies are also available upon request to the Commission.

## Structure and content

1.31 This Report examines the current confidentiality provisions contained in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). As part of this examination, the Report discusses the views expressed in submissions and provides comparative information about similar provisions in the guardianship legislation of other Australian, and some overseas, jurisdictions. Where relevant, the Report also discusses practical and procedural issues that inform how the confidentiality provisions currently operate and which the Commission has taken into account in formulating its recommendations.

1.32 The Commission's consultation revealed some confusion in the community about the existence, scope and operation of the confidentiality provisions and the relationship between those provisions and other information privacy mechanisms. Where relevant throughout the Report, the Commission has included some discussion to help inform members of the community about those issues. The Commission has also sought to illustrate, where relevant, how its recommendations would operate in practice.

1.33 Chapter 2 of the Report provides a general introduction to the guardianship system and an overview of the confidentiality provisions that currently apply.

1.34 Chapter 3 of the Report sets out the Commission's guiding principles for its review of the confidentiality provisions. That chapter discusses the nature of privacy and confidentiality and examines the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system. It also examines the

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<sup>20</sup> Queensland Law Reform Commission, *Public Justice, Private Lives: A Companion to the Confidentiality Report*, MP 42 (2007).

<sup>21</sup> Queensland Law Reform Commission, *A new approach to confidentiality: A guide for people who may need help with decision-making*, MP 40 (2007).

<sup>22</sup> Queensland Law Reform Commission, *A new approach to confidentiality: A guide for families, friends and advocates*, MP 41 (2007).

<sup>23</sup> <<http://www qlrc qld gov au/guardianship/>>.

importance of relationships and, in the context of Tribunal proceedings, the role of relevance in determining whether or not to disclose information.

1.35 Chapters 4 to 7 of the Report examine the confidentiality provisions that apply to Tribunal proceedings. Chapter 4 deals with the Tribunal's ability to hold hearings in private or to the exclusion of particular people, and to withhold information discussed at a hearing from an active party. Chapter 5 deals with the Tribunal's ability to displace an active party's statutory right to inspect documents that are before the Tribunal for a proceeding. Chapter 6 examines the Tribunal's ability to displace a person's statutory right to obtain a copy of the Tribunal's decision or reasons. Chapter 7 deals with the restriction of a person's ability to report Tribunal proceedings. The Commission's recommendations about these provisions are set out at the end of each relevant chapter.

1.36 Chapter 8 of the Report examines the general duty of confidentiality imposed on those people who are involved in the administration of the guardianship legislation. The Commission's recommendations are set out at the end of the chapter.

1.37 Volume 2 of the Report contains draft legislation, prepared by the Office of the Queensland Parliamentary Counsel, giving effect to the Commission's legislative recommendations. The Commission would like to thank Ms Theresa Johnson, First Assistant Parliamentary Counsel, for her expertise and assistance in preparing the draft legislation.

1.38 Finally, the law is stated as at 15 June 2007.

## Terminology

1.39 Throughout this Report, the following terminology has been used:

- A reference to 'the adult' means the adult with impaired decision-making capacity;
- The term 'guardianship legislation' is used to refer to the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld);
- 'Tribunal' is used to refer to Queensland's Guardianship and Administration Tribunal and, unless otherwise expressed, to those bodies in other jurisdictions exercising judicial or quasi-judicial functions under the relevant guardianship legislation.

Some jurisdictions have Boards (South Australia and Tasmania) whilst others rely on a court (Northern Territory). Western Australia and Victoria do not have specialised guardianship tribunals and instead each has a generalist tribunal with jurisdiction for a range of matters including guardianship (the State Administrative Tribunal and the Victorian Civil and Administrative Tribunal respectively).

- The term ‘Adult Guardian’ is used to refer to Queensland’s Adult Guardian and, unless otherwise expressed, the equivalent positions in other Australian jurisdictions. In Victoria, Western Australia, South Australia and the Australian Capital Territory, the equivalent of the Adult Guardian is the Public Advocate. New South Wales, Tasmania and the Northern Territory have a Public Guardian.
- Unless otherwise stated, a reference to a view expressed at a community forum or focus group submission is not intended to convey that all (or even most) of the attendees at the forum or focus group expressed the same view. Community forum and focus group submissions are numbered with a capital ‘F’ (for example, submissions F1, F2 and so on).

1.40 Appendix 5 of the Report also contains a glossary of some other terms that appear in the Report.

## **FUTURE ISSUES**

1.41 As mentioned above, the Commission’s consultation and its consideration of the confidentiality provisions highlighted a number of other concerns that fell outside the scope of stage one of the review.<sup>24</sup> The Commission has identified these issues where relevant throughout this Report and intends to consider them in stage two of the review. Briefly, those issues include:

- rights of active parties after a hearing to access documents held by the Tribunal, including access to transcripts of Tribunal hearings;
- non-party access to documents held by the Tribunal;
- the production of written reasons for all of the Tribunal’s decisions;
- the procedures for review and appeal of decisions;
- the recognition of informal substitute decision-makers, including their rights to information;
- the conduct and reporting of investigations by the Adult Guardian;
- the production of site reports by community visitors and the rights of community visitors to obtain information from service providers;
- whistleblower protection in relation to complaints made to community visitors;
- whether the General Principles should include an express reference to the adult’s best interests; and

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See para 1.28 of this Report.

- whether guardians and administrators should be explicitly required to consult with the adult and members of the adult's support network.

1.42 The Commission will commence work on stage two of the review shortly and will produce a consultation document to invite submissions on these and other issues for consideration.

# Chapter 2

## Overview of the law in Queensland

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## INTRODUCTION

2.1 Before examining the law in detail in the chapters that follow, this chapter provides an overview of two important issues: Queensland's system of guardianship, and the guardianship legislation's confidentiality provisions.

2.2 It begins with an overview of the guardianship system in Queensland. Although the confidentiality provisions are the subject of this Report, it is important to consider the wider context and legislative framework in which these provisions operate.

## OVERVIEW OF GUARDIANSHIP IN QUEENSLAND

2.3 Queensland's guardianship legislation is comprised of the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). It provides a framework for decision-making by and for adults with impaired decision-making capacity.

2.4 The guardianship legislation is concerned with the following questions, which are considered in turn:

- When is an adult unable to make his or her own decisions for a matter?
- What decisions can be made for an adult?
- Who can make decisions for an adult?<sup>25</sup>
- How are substitute decisions for an adult to be made?
- What agencies are involved in the guardianship system?

### When is an adult unable to make his or her own decisions for a matter?

2.5 One of the ordinary incidents of being an adult (a person 18 years or older)<sup>26</sup> is the ability to make your own decisions. An adult may, however, be unable to make his or her own decisions if the adult has impaired decision-making capacity. Capacity has been described as 'a gatekeeper concept' in that it is 'a mechanism by which individuals retain or lose authority over and responsibility for decisions that affect their lives'.<sup>27</sup> Impaired capacity may result from an intellectual disability, dementia, acquired brain injury, mental illness, or an inability to communicate, for example, because the person is in a coma.<sup>28</sup>

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25 In addition to specifying who may make substitute decisions for an adult, the legislation also facilitates an adult making decisions for himself or herself in advance of having impaired capacity.

26 *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'adult').

27 P Bartlett and R Sandland, *Mental Health Law Policy and Practice* (2000) [10.5.1].

28 These terms are illustrative of the different causes and effects of damage, disease or impaired development of the brain that can bring about a decision-making incapacity.

2.6 In Queensland, an adult will have ‘capacity’ for a matter if he or she is capable of:<sup>29</sup>

- understanding the nature and effect of decisions about the matter;
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way.

2.7 An adult who does not satisfy these criteria in relation to a matter is described as having ‘impaired capacity’<sup>30</sup> for that matter. Under Queensland’s guardianship legislation, the Tribunal has power to make a declaration about an adult’s capacity<sup>31</sup> on the basis of medical and other evidence.<sup>32</sup>

2.8 There is a presumption, however, that every adult has capacity unless it is otherwise established.<sup>33</sup> The legislative framework also promotes the right of an adult to make all decisions to the extent that he or she is capable.<sup>34</sup> This includes the right to make decisions with which others may not agree.<sup>35</sup>

2.9 Impaired capacity is specific to individual decisions about matters. An adult may have capacity to make decisions about some matters but not others.<sup>36</sup> For example, an adult with mild dementia may not have sufficient capacity to execute a will but may be fully capable of making day-to-day decisions about his or her accommodation or lifestyle.<sup>37</sup>

<sup>29</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘capacity’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘capacity’).

<sup>30</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘impaired capacity’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘impaired capacity’). For other discussions of the concept of capacity, see R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 3–4; R Lewis, *Elder Law in Australia* (2004) [11.69]–[11.73]. Also see *Gibbons v Wright* (1954) 91 CLR 423, 437.

<sup>31</sup> *Guardianship and Administration Act 2000* (Qld) ss 82(1)(a), 146.

<sup>32</sup> For example, *Re MV* [2005] QGAAT 46.

<sup>33</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 1. Also see *Guardianship and Administration Act 2000* (Qld) s 7(a); *Re Bridges* [2001] 1 Qd R 574.

<sup>34</sup> In particular, see *Guardianship and Administration Act 2000* (Qld) ss 5(d), 6(a).

<sup>35</sup> *Guardianship and Administration Act 2000* (Qld) s 5(b).

<sup>36</sup> The definition of ‘capacity’ is tied to the decision that needs to be made as it refers specifically to having capacity ‘for a matter’: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘capacity’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘capacity’). Note also that s 5(c)(ii) of the *Guardianship and Administration Act 2000* (Qld) provides that the Act acknowledges that ‘the capacity of an adult with impaired capacity to make decisions may differ according to ... the type of decision to be made, including, for example, the complexity of the decision to be made’.

<sup>37</sup> For example, *Re FHW* [2005] QGAAT 50, [46] where the Tribunal held: ‘he has capacity for simple and complex personal matters and simple financial matters but he has impaired capacity for complex financial matters’.

## What decisions can be made for an adult?

2.10 An adult with impaired capacity for a matter may require a substitute decision-maker for decisions about that matter. The guardianship legislation makes provision for a wide range of personal and financial decisions to be made for an adult with impaired capacity. The legislation distinguishes between decisions concerning ‘financial matters’, which involve *administration*, and those concerning ‘personal matters’, which involve *guardianship*. The legislation also differentiates between ‘health matters’, ‘special health matters’, and ‘special personal matters’.

### Financial matters

2.11 All matters relating to an adult’s financial or property matters are referred to in the guardianship legislation as ‘financial matters’.<sup>38</sup> These include buying and selling property (including land); paying the adult’s expenses, rates, insurance, taxes and debts; conducting a trade or business on the adult’s behalf; making financial investments; performing the adult’s contracts; and all legal matters relating to the adult’s financial or property matters.

### Personal matters

2.12 All matters (other than ‘special personal matters’ and ‘special health matters’) relating to an adult’s care or welfare are referred to as ‘personal matters’.<sup>39</sup> These include the adult’s accommodation and living arrangements; the adult’s health care; day-to-day issues such as diet and dress; the adult’s employment, education and training; and legal matters that do not relate to the adult’s financial or property matters.

### Health matters

2.13 A type of personal matter, ‘health matters’, concern the ‘health care, other than special health care’ of the adult.<sup>40</sup> ‘Health care’ is defined in the guardianship legislation as:<sup>41</sup>

<sup>38</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 1 (definition of ‘financial matter’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 1 (definition of ‘financial matter’).

<sup>39</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 2 (definition of ‘personal matter’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 2 (definition of ‘personal matter’). This definition has been given a wide interpretation by the Tribunal. It was held in *Re JD* [2003] QGAAT 14, [27] that ‘a guardian who is appointed to make decisions in relation to all personal matters can essentially make all the decisions in relation to a very broad range of matters and should not be read in a restricted or limited way’.

<sup>40</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 4 (definition of ‘health matter’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 4 (definition of ‘health matter’).

<sup>41</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 5 (definition of ‘health care’, although note the different terminology of ‘principal’ rather than ‘adult’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 5 (definition of ‘health care’). ‘Health care’ can include the withholding or withdrawal of life-sustaining measures in some circumstances, but it excludes first aid treatment, non-intrusive examinations made for diagnostic purposes and the administration of non-prescription medication which would normally be self-administered: *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2)–(3); *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2)–(3).

care or treatment of, or a service or a procedure for, the adult—

- (a) to diagnose, maintain, or treat the adult’s physical or mental condition; and
- (b) carried out by, or under the direction or supervision of, a health provider.

### **Special health matters**

2.14 ‘Special health matters’ are those relating to ‘special health care’. They involve decisions about very significant health issues. The guardianship legislation defines ‘special health care’ as:<sup>42</sup>

- (a) removal of tissue from the adult while alive for donation to someone else;
- (b) sterilisation of the adult;
- (c) termination of a pregnancy of the adult;
- (d) participation by the adult in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the adult;
- (f) prescribed special health care of the adult. [note omitted]

### **Special personal matters**

2.15 ‘Special personal matters’ are regarded as being of such an intimate nature that it would generally be inappropriate for another person to make such a decision on behalf of an adult under the guardianship legislation.<sup>43</sup> These matters<sup>44</sup> include voting; consenting to marriage; and making or revoking a will,<sup>45</sup> a power of attorney, an enduring power of attorney, or an advance health directive.<sup>46</sup>

<sup>42</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 7 (definition of ‘special health care’, although note the different terminology of ‘principal’ rather than ‘adult’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 7 (definition of ‘special health care’).

<sup>43</sup> The power to make decisions for an adult about special personal matters cannot be assigned in an enduring document: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). Such power cannot be granted to a substitute decision-maker by order of the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 14(2).

<sup>44</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 3 (definition of ‘special personal matter’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 3 (definition of ‘special personal matter’).

<sup>45</sup> Note, however, that the Supreme Court now has jurisdiction to make an order authorising a will to be made or altered, in the terms stated by the Court, for a person who lacks testamentary capacity, and to revoke the will or part of the will of a person who lacks testamentary capacity: see *Succession Act 1981* (Qld) ss 21–28, which commenced on 1 April 2006. An application for a grant of probate is not a special personal matter: *Re Wild* [2003] 1 Qd R 459, 463 (White J).

<sup>46</sup> The Supreme Court and the Tribunal are empowered, however, to change or revoke an enduring power of attorney or advance health directive, and to remove an attorney and appoint a new one: *Powers of Attorney Act 1998* (Qld) ss 109A, 116. The Supreme Court may also make such orders in relation to powers of attorney generally: *Powers of Attorney Act 1998* (Qld) ss 108, 116.

## Who can make decisions for an adult?

2.16 Adults themselves may be decision-makers, by completing an advance health directive before they lose the requisite capacity for a matter. In such a document, the adult may give directions about future health matters, including ‘special health matters’.<sup>47</sup> An adult may direct, for example, that in particular circumstances a life-sustaining measure be withheld or withdrawn.<sup>48</sup>

2.17 The guardianship legislation also provides for substitute decisions for an adult to be made by several types of decision-makers, depending on the matter involved. The legislation recognises:<sup>49</sup>

- informal decision-makers;
- attorneys appointed in advance by the adult under an enduring document;
- statutory health attorneys;
- guardians and administrators appointed by the Tribunal; and
- in some limited circumstances, the Tribunal.

### **Informal decision-makers**

2.18 The guardianship legislation recognises that substitute decisions for an adult can be made informally by the adult’s ‘existing support network’,<sup>50</sup> that is, the adult’s family and close friends, and other people, as decided by the Tribunal, who provide support to the adult.<sup>51</sup>

2.19 If there is doubt about the appropriateness of a decision, the Tribunal may ratify or approve informal decisions.<sup>52</sup>

2.20 However, sometimes situations can arise where the decision-making process for an adult needs to be formalised. This might be because:

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<sup>47</sup> *Powers of Attorney Act 1998* (Qld) s 35(1).

<sup>48</sup> *Powers of Attorney Act 1998* (Qld) s 35(2)(b). Also see s 36 of the *Powers of Attorney Act 1998* (Qld) for the circumstances that must apply before a direction to withdraw or withhold life-sustaining measures can operate.

<sup>49</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2). That provision also refers to the Supreme Court as a decision-maker: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘court’); *Guardianship and Administration Act 2000* (Qld) s 9(2)(b)(vii), s 3 sch 4 (definition of ‘court’). However, the Supreme Court’s role as a decision-maker for an adult under the guardianship legislation (as opposed to its appeal role) is not considered further in this brief overview of the guardianship system given that such a role is infrequently performed.

<sup>50</sup> *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

<sup>51</sup> *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘support network’).

<sup>52</sup> *Guardianship and Administration Act 2000* (Qld) ss 82(1)(e), 154.

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

2.21 The remainder of the decision-makers considered in this chapter are part of the formal decision-making processes established by the guardianship legislation.

### ***Attorneys appointed in advance by the adult***

2.22 Adults may formalise future substitute decision-making for themselves by appointing a person (an attorney) to make particular decisions on their behalf in the event they subsequently lose capacity. There are two instruments that an adult (the principal) may use to appoint an attorney: an enduring power of attorney and an advance health directive.<sup>53</sup> Adults may only make such a document if they have sufficient capacity.<sup>54</sup>

2.23 In an enduring power of attorney, a principal can assign to a nominated attorney or attorneys decision-making power for some or all financial matters and/or personal matters, including health matters.<sup>55</sup> A principal cannot, however, give power to an attorney for ‘special health matters’ or ‘special personal matters’.<sup>56</sup>

2.24 In an advance health directive, a principal can assign decision-making power to an attorney or attorneys for some or all health matters, other than for ‘special health matters’.<sup>57</sup>

2.25 An attorney can exercise his or her assigned power with respect to personal matters only during a period when the principal no longer has capacity for the particular matter.<sup>58</sup> The power for financial matters becomes exercisable either at the time or in the circumstance the principal nominates in the document, or otherwise, once the

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53 There are particular formal requirements for the execution of such instruments: *Powers of Attorney Act 1998* (Qld) s 44. An adult may also appoint an attorney for financial matters in a general power of attorney although this operates only while the adult has capacity: *Powers of Attorney Act 1998* (Qld) ss 8(a), 18(1).

54 See para 2.6 of this Report as to the general definition of capacity that applies under the guardianship legislation. In relation to the capacity needed to make an enduring power of attorney, see also s 41 of the *Powers of Attorney Act 1998* (Qld). In relation to the capacity needed to make an advance health directive, see also s 42 of the *Powers of Attorney Act 1998* (Qld).

55 *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

56 *Powers of Attorney Act 1998* (Qld) s 32(1)(a).

57 *Powers of Attorney Act 1998* (Qld) s 35(1)(c).

58 *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3).

enduring power of attorney is made.<sup>59</sup> Power for financial matters is also exercisable at any time the principal has impaired capacity.<sup>60</sup>

2.26 The legislation imposes a range of obligations on attorneys as to how they exercise their power. For example, an attorney must act honestly and diligently<sup>61</sup> and must comply with the General Principles set out in the legislation and, for decisions about health matters, the Health Care Principle.<sup>62</sup> Attorneys for financial matters are also required, for example, to avoid conflict transactions<sup>63</sup> and to keep their property separate from that of the adult.<sup>64</sup> An attorney is also regarded as an agent of his or her principal and so would be subject to the general law of agency to the extent that it is not inconsistent with the guardianship legislation.<sup>65</sup>

### **Statutory health attorneys**

2.27 A statutory health attorney is a person in a particular relationship with the adult who is thereby declared by the legislation to be a person with authority to make decisions about health matters for an adult. The legislation lists the relationships in a hierarchical order. The first of the following who is ‘readily available and culturally appropriate’ to make the decision will be an adult’s statutory health attorney.<sup>66</sup>

- the adult’s spouse,<sup>67</sup> if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer<sup>68</sup> of the adult; or

<sup>59</sup> *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

<sup>60</sup> *Powers of Attorney Act 1998* (Qld) s 33(3).

<sup>61</sup> *Powers of Attorney Act 1998* (Qld) s 66(1).

<sup>62</sup> *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are discussed at para 2.39–2.44 of this Report.

<sup>63</sup> *Powers of Attorney Act 1998* (Qld) s 73. A conflict transaction is one in which there may be conflict, or which results in conflict, between the attorney’s duty to the adult and either the interests of the attorney or a person in a close personal or business relationship with the attorney, or another duty of the attorney: *Powers of Attorney Act 1998* (Qld) s 73(2).

<sup>64</sup> *Powers of Attorney Act 1998* (Qld) s 86.

<sup>65</sup> S Fisher, *Agency Law* (2000) [12.2.1], [12.2.5]; R Creyke, *Who Can Decide? Legal Decision-Making for Others* (1995) 92.

<sup>66</sup> *Powers of Attorney Act 1998* (Qld) s 63(1).

<sup>67</sup> A ‘spouse’ includes a person’s de facto partner: *Acts Interpretation Act 1954* (Qld) s 36 (definition of ‘spouse’). A reference in an Act to a ‘de facto partner’ is a reference to one of two persons who are living together as a couple (in either a heterosexual or same sex partnership) on a genuine domestic basis but who are not married to each other or related by family: *Acts Interpretation Act 1954* (Qld) s 32DA(1), (5).

<sup>68</sup> A ‘paid carer’ for an adult is someone who performs services for the adult’s care and who receives remuneration for those services from any source other than a Commonwealth or State Government carer payment or benefit for the provision of home care, or remuneration based on damages that may be awarded for voluntary services for the adult’s care: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘paid carer’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘paid carer’).

- a close friend or relation of the adult 18 years or older and who is not a paid carer<sup>69</sup> of the adult.

2.28 If no-one from that list is readily available and culturally appropriate, the Adult Guardian becomes the adult's statutory health attorney.<sup>70</sup>

2.29 A statutory health attorney is authorised by the legislation to make a decision about an adult's health matter that the adult could have made if he or she had capacity for the matter,<sup>71</sup> but only during a period when the adult has impaired capacity for the matter.<sup>72</sup> A statutory health attorney must comply with the General Principles and the Health Care Principle set out in the legislation when exercising his or her power.<sup>73</sup>

### ***Guardians and administrators appointed by the Tribunal***

2.30 In some circumstances, the Tribunal has power to appoint formal substitute decision-makers for particular matters for an adult.<sup>74</sup> A guardian can be appointed for a personal matter, including a health matter (but not 'special health matters'<sup>75</sup>). An administrator can be appointed for a financial matter. The Tribunal may make such an appointment, on terms it considers appropriate, if:<sup>76</sup>

- (a) the adult has impaired capacity for the matter; and
- (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
- (c) without an appointment—
  - (i) the adult's needs will not be adequately met; or
  - (ii) the adult's interests will not be adequately protected.

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69 See note 68 of this Report.

70 *Powers of Attorney Act 1998* (Qld) s 63(2).

71 *Powers of Attorney Act 1998* (Qld) s 62(1).

72 *Powers of Attorney Act 1998* (Qld) s 62(2).

73 *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are discussed at para 2.39–2.44 of this Report.

74 *Guardianship and Administration Act 2000* (Qld) ss 12(1), 82(1)(c).

75 See *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 ss 4, 6 (definitions of 'health matter' and 'special health matter'); *Guardianship and Administration Act 2000* (Qld) ss 12(1), 3 sch 4, sch 2 ss 4, 6 (definitions of 'health matter' and 'special health matter').

76 *Guardianship and Administration Act 2000* (Qld) s 12(1)–(2).

2.31 A person may only be appointed as a guardian or administrator for an adult if the person is 18 years or older, is not a paid carer or health provider for the adult, and the Tribunal considers the person appropriate for appointment.<sup>77</sup>

2.32 The Tribunal is required by the guardianship legislation to take into account several considerations in deciding whether a person is appropriate for appointment.<sup>78</sup> These include:<sup>79</sup>

- the extent to which the adult's and the person's interests are likely to conflict;
- whether the adult and the person are compatible including, for example, whether the person's communication skills and cultural or social experience is appropriate;
- whether the person would be available and accessible to the adult; and
- the person's appropriateness and competence to perform the functions and exercise the powers conferred by an appointment order.

2.33 A guardian or administrator is conferred with the authority to do anything in relation to a personal or financial matter for which he or she is appointed that the adult could have done if the adult had capacity for that matter. A guardian or administrator must act in accordance with the terms of appointment.<sup>80</sup>

2.34 Given the breadth of this power, the guardianship legislation imposes strict requirements on the exercise of authority by a guardian or administrator. Such a person must exercise his or her power honestly and diligently,<sup>81</sup> must apply the General Principles contained in the legislation (and the Health Care Principle where relevant),<sup>82</sup> is subject to regular review,<sup>83</sup> and, if he or she is an administrator, must submit a management plan<sup>84</sup> and avoid conflict transactions.<sup>85</sup> These requirements are reflective

<sup>77</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(i), (b)(i), (c). Note that the Adult Guardian is eligible for appointment as a guardian for an adult and the Public Trustee of Queensland is eligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(a)(ii), (b)(ii). Also note that a person who is bankrupt 'or taking advantage of the laws of bankruptcy as a debtor' is ineligible for appointment as an adult's administrator: *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(i) and also see *Guardianship and Administration Act 2000* (Qld) s 15(4)(c).

<sup>78</sup> *Guardianship and Administration Act 2000* (Qld) s 15.

<sup>79</sup> *Guardianship and Administration Act 2000* (Qld) s 15(1).

<sup>80</sup> *Guardianship and Administration Act 2000* (Qld) s 33. Also see *Guardianship and Administration Act 2000* (Qld) s 36.

<sup>81</sup> *Guardianship and Administration Act 2000* (Qld) s 35.

<sup>82</sup> *Guardianship and Administration Act 2000* (Qld) s 34(1)–(2). The General Principles and the Health Care Principle are discussed at para 2.39–2.44 of this Report.

<sup>83</sup> *Guardianship and Administration Act 2000* (Qld) ss 28–29.

<sup>84</sup> *Guardianship and Administration Act 2000* (Qld) s 20.

<sup>85</sup> *Guardianship and Administration Act 2000* (Qld) s 37(1). A conflict transaction is one in which there may be conflict, or which results in conflict, between the administrator's duty to the adult and either the interests of the administrator or a person in a close personal or business relationship with the administrator, or another duty of the administrator: *Guardianship and Administration Act 2000* (Qld) s 37(2). For other functions and powers of administrators, see also *Guardianship and Administration Act 2000* (Qld) ch 4 pt 2.

of those imposed in respect of the common law of agency.<sup>86</sup>

### **The Tribunal**

2.35 The guardianship legislation also empowers the Tribunal to make substitute decisions for an adult in relation to some types of ‘special health care’.<sup>87</sup> If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal has power to consent to special health care for an adult, other than electroconvulsive therapy or psychosurgery.<sup>88</sup>

2.36 The Tribunal’s authority to give consent is limited by several specific requirements imposed by the legislation. The Tribunal must be satisfied, for example, that the special health care involves minimal risk to the adult and is the only reasonably available option.<sup>89</sup> In deciding whether to give consent, the Tribunal must also apply the General Principles and the Health Care Principle contained in the legislation.<sup>90</sup>

2.37 The Tribunal may also consent to the withholding or withdrawal of a life-sustaining measure for an adult with impaired capacity (if the matter is not dealt with by a direction given in an advance health directive)<sup>91</sup> and to the sterilisation of a child with an impairment.<sup>92</sup>

2.38 While the Tribunal is granted jurisdiction to be a formal decision-maker only in limited types of matters, its power to give directions to other substitute decision-makers has been construed broadly. In *Re WFM*,<sup>93</sup> the Tribunal concluded that this power ‘extends to how a decision-maker should exercise its powers, and to how a matter for which a decision-maker has been appointed should be decided.’

### **How are substitute decisions for an adult to be made?**

2.39 Queensland’s guardianship legislation contains eleven General Principles, which apply to all decisions for adults, and an additional Health Care Principle which applies only in relation to decisions about health matters.

<sup>86</sup> See S Fisher, *Agency Law* (2000) [7.2.1]–[7.5.6].

<sup>87</sup> *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 82(1)(g).

<sup>88</sup> *Guardianship and Administration Act 2000* (Qld) ss 65, 68. Electroconvulsive therapy and psychosurgery fall within the jurisdiction of the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) ch 6 pt 6.

<sup>89</sup> For example, *Guardianship and Administration Act 2000* (Qld) ss 69(1)(a), (d) (Donation of tissue); 70(1)(a)(i), (3) (Sterilisation); 72(1)(b), (d), (2)(b), (d) (Special medical research or experimental health care).

<sup>90</sup> *Guardianship and Administration Act 2000* (Qld) s 11. The General Principles and the Health Care Principle are discussed at para 2.39–2.44 of this Report.

<sup>91</sup> *Guardianship and Administration Act 2000* (Qld) ss 66(3), 82(1)(f). Other potential substitute decision-makers for such a matter are an adult’s guardian, attorney or statutory health attorney: *Guardianship and Administration Act 2000* (Qld) s 66(3)–(5). See also s 66A of the *Guardianship and Administration Act 2000* (Qld), which provides that this consent cannot operate unless the adult’s health provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

<sup>92</sup> *Guardianship and Administration Act 2000* (Qld) ch 5A, s 82(1)(h).

<sup>93</sup> [2006] QGAAT 54, [33].

2.40 The General Principles and the Health Care Principle must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult.<sup>94</sup> This includes the making of a decision for an adult by the potential decision-makers already discussed. The guardianship legislation also makes specific provision for the application of these principles by the Tribunal,<sup>95</sup> the Adult Guardian,<sup>96</sup> and an adult's guardian or administrator.<sup>97</sup>

2.41 The legislation also states that the 'community is encouraged to apply and promote the general principles'.<sup>98</sup>

2.42 The General Principles include:<sup>99</sup>

- the presumption that an adult has capacity to make decisions;
- recognition of an adult's basic human rights and the importance of empowering an adult to exercise those rights;
- an adult's right to respect for his or her human worth and dignity;
- an adult's right to be a valued member of society and the importance of encouraging an adult to perform valued social roles;
- the importance of encouraging an adult to participate in community life;
- the importance of encouraging an adult to become as self-reliant as possible;
- an adult's right to participate in decision-making as far as possible and the importance of preserving the adult's right to make his or her own decisions wherever possible;
- the use of substituted judgment, so that where it is possible to ascertain from previous actions what an adult's views or wishes would be, those views and wishes are taken into account;
- the exercise of power under the legislation in the way least restrictive of the adult's rights;

<sup>94</sup> *Powers of Attorney Act 1998* (Qld) s 76 (although note the different terminology of 'must be complied with' rather than 'must apply'); *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2).

<sup>95</sup> There is a specific requirement for the Tribunal to consider the General Principles (and Health Care Principle where relevant) when deciding whether a person is appropriate for appointment as an adult's guardian or administrator: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a)–(b).

<sup>96</sup> *Guardianship and Administration Act 2000* (Qld) s 174(3).

<sup>97</sup> *Guardianship and Administration Act 2000* (Qld) ss 34, 74(4).

<sup>98</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3).

<sup>99</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. More than eleven issues are included in this list because some of the General Principles include a number of elements.

- the importance of maintaining an adult's existing supportive relationships;
- the importance of maintaining the adult's cultural, linguistic and religious environment; and
- an adult's right to confidentiality of information about him or her.

2.43 The Health Care Principle provides that power for a health or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power:<sup>100</sup>

- is necessary and appropriate to maintain or promote the adult's health or wellbeing; or
- is, in all the circumstances, in the adult's best interests.

2.44 In deciding whether the exercise of a power is appropriate, the decision-maker must take the adult's views and wishes, and information given by the adult's health provider, into account.<sup>101</sup> In addition, in deciding whether to consent to special health care, the Tribunal, which is the only potential decision-maker for such matters, must take into account the views of the adult's guardian, attorney or statutory health attorney.<sup>102</sup>

### What agencies are involved in the guardianship system?

2.45 Queensland's guardianship legislation confers responsibilities on several agencies and officials. These include:

- the Tribunal;
- the Adult Guardian;
- the Public Advocate;
- community visitors; and
- the Public Trustee of Queensland.

<sup>100</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(1); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 s 12(1).

<sup>101</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(2); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 s 12(2).

<sup>102</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(5); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 s 12(5).

## The Tribunal

2.46 The Tribunal is a quasi-judicial body established by the *Guardianship and Administration Act 2000* (Qld).<sup>103</sup> It has exclusive jurisdiction for the appointment of guardians and administrators for adults,<sup>104</sup> subject to the exercise of the Tribunal's powers by the Supreme or District Courts to make, change, or revoke the appointment of a guardian or administrator in particular civil proceedings.<sup>105</sup> The Tribunal also has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.<sup>106</sup>

2.47 The Tribunal's functions include:<sup>107</sup>

- making declarations about an adult's capacity for a matter;
- hearing applications for the appointment of guardians and administrators and appointing, where necessary, guardians and administrators for an adult;
- making declarations, orders or recommendations, or giving directions or advice in relation to guardians, administrators, attorneys, and enduring documents;
- ratifying or approving an exercise of power by an informal decision-maker for an adult; and
- consenting to some types of special health care for an adult, to the withholding or withdrawal of life-sustaining measures, and to the sterilisation of a child with an impairment.<sup>108</sup>

2.48 Unless the President considers it appropriate that a matter is heard by one or two members, the Tribunal is required to be constituted by three members for a hearing.<sup>109</sup> To the extent that it is practicable,<sup>110</sup> a three-member Tribunal should be constituted by either the President, a Deputy President or a legal member;<sup>111</sup> a

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<sup>103</sup> *Guardianship and Administration Act 2000* (Qld) s 81.

<sup>104</sup> *Guardianship and Administration Act 2000* (Qld) s 84(1).

<sup>105</sup> Section 245 of the *Guardianship and Administration Act 2000* (Qld) provides that the Supreme or District Court may exercise the Tribunal's powers to make, change, or revoke an appointment of a guardian or administrator for an adult if the Court sanctions a settlement between an adult and another person or orders payment to an adult by another person in a civil proceeding and the Court considers the adult has impaired capacity for a matter. See *Willett v Futcher* (2005) 221 CLR 627.

<sup>106</sup> *Guardianship and Administration Act 2000* (Qld) s 84(2).

<sup>107</sup> *Guardianship and Administration Act 2000* (Qld) s 82(1).

<sup>108</sup> *Guardianship and Administration Act 2000* (Qld) s 82(1)(f)–(h).

<sup>109</sup> *Guardianship and Administration Act 2000* (Qld) s 101(1).

<sup>110</sup> *Guardianship and Administration Act 2000* (Qld) s 101(2).

<sup>111</sup> A legal member must be a lawyer of at least five years standing and possess relevant knowledge and skills in the jurisdiction: *Guardianship and Administration Act 2000* (Qld) s 90(4)(a).

professional member;<sup>112</sup> and a personal experience member,<sup>113</sup> although the composition of the Tribunal will also depend on the nature of the matter.<sup>114</sup> In the year 2005–2006, 60 percent of finalised applications were heard by a single member, 35 percent were heard by three members, and the remainder were heard by two members.<sup>115</sup> The Commission understands that applications involving less complex matters, including reviews conducted without a hearing, are dealt with by a single member.<sup>116</sup>

2.49 Proceedings before the Tribunal are to be conducted as simply and quickly as practicable.<sup>117</sup> The Tribunal may inform itself on a matter in any way it considers appropriate,<sup>118</sup> but it must observe the rules of procedural fairness.<sup>119</sup>

2.50 Tribunal orders are enforceable upon being filed in a court of appropriate jurisdiction<sup>120</sup> as if they were orders of that court.<sup>121</sup> A person may appeal against a Tribunal decision to the Supreme Court.<sup>122</sup>

### **The Adult Guardian**

2.51 The Adult Guardian is an independent statutory official whose position is established under the *Guardianship and Administration Act 2000* (Qld) to protect the rights and interests of adults with impaired capacity.<sup>123</sup>

2.52 The Adult Guardian's functions include:<sup>124</sup>

- protecting adults from neglect, exploitation, or abuse;<sup>125</sup>

112 A professional member must possess extensive professional knowledge or experience with people with impaired capacity: *Guardianship and Administration Act 2000* (Qld) s 90(4)(b).

113 A personal experience member is a person who has had experience of a person with impaired capacity for a matter: *Guardianship and Administration Act 2000* (Qld) s 90(4)(c).

114 Information provided by the President of the Guardianship and Administration Tribunal, 25 July 2006.

115 Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 34–5.

116 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007. Also see Guardianship and Administration Tribunal, *Annual Report 2005–2006* (2006) 34.

117 *Guardianship and Administration Act 2000* (Qld) s 107(1).

118 *Guardianship and Administration Act 2000* (Qld) s 107(2).

119 *Guardianship and Administration Act 2000* (Qld) s 108(1).

120 The court in which the Tribunal order is filed will be either 'a court having jurisdiction to make the order' or 'a court having jurisdiction for the recovery of debts up to the amount remaining unpaid': *Guardianship and Administration Act 2000* (Qld) s 172(1)–(2).

121 *Guardianship and Administration Act 2000* (Qld) s 172(3).

122 *Guardianship and Administration Act 2000* (Qld) s 164(1). Leave to appeal from the Supreme Court is required, except in relation to appeals on questions of law only: *Guardianship and Administration Act 2000* (Qld) s 164(2).

123 *Guardianship and Administration Act 2000* (Qld) ss 173, 174(1), 176.

124 *Guardianship and Administration Act 2000* (Qld) s 174(2).

125 *Guardianship and Administration Act 2000* (Qld) s 174(2)(a).

- conducting investigations of complaints of such allegations, and investigations into the actions of an adult's substitute decision-maker;<sup>126</sup>
- mediating and conciliating disputes between an adult's substitute decision-maker and others, such as health providers;
- acting as an attorney for an adult under an enduring document or as an adult's statutory health attorney;
- acting as an adult's guardian if appointed by the Tribunal;
- consenting to the forensic examination of an adult;<sup>127</sup>
- seeking government or organisational assistance for an adult; and
- undertaking educative, advisory, and research activities on the operation of the guardianship legislation.

2.53 The Adult Guardian is also conferred with significant protective powers in relation to adults. For example, the Adult Guardian may:

- temporarily suspend an attorney's powers if there are reasonable grounds to suspect that the attorney is not competent;<sup>128</sup>
- apply to the courts to claim and recover possession of property that the Adult Guardian considers has wrongfully been held or detained;<sup>129</sup> and
- apply to the Tribunal for a warrant to remove an adult from a place if there are reasonable grounds to suspect the adult is at immediate risk of harm due to neglect, exploitation, or abuse.<sup>130</sup>

### **The Public Advocate**

2.54 The Public Advocate is an independent statutory official whose position is established under the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights of adults.<sup>131</sup>

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<sup>126</sup> *Guardianship and Administration Act 2000* (Qld) ss 174(2)(b), 180.

<sup>127</sup> See *Guardianship and Administration Act 2000* (Qld) s 198A. A 'forensic examination' means a medical or dental procedure carried out for forensic purposes other than because the adult is suspected of having committed a criminal offence: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'forensic examination'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'forensic examination').

<sup>128</sup> *Guardianship and Administration Act 2000* (Qld) s 195(1).

<sup>129</sup> *Guardianship and Administration Act 2000* (Qld) s 194.

<sup>130</sup> *Guardianship and Administration Act 2000* (Qld) s 197.

<sup>131</sup> *Guardianship and Administration Act 2000* (Qld) ss 208, 209(a), 211.

2.55 The Public Advocate's other functions include:<sup>132</sup>

- promoting the protection of adults from neglect, exploitation, or abuse;
- encouraging the development of programs that foster and maximise adults' autonomy;
- promoting service and facility provision for adults; and
- monitoring and reviewing service and facility delivery to adults.

2.56 Unlike the Adult Guardian, the Public Advocate's functions are aimed at systemic advocacy rather than advocacy on behalf of individual adults. The Public Advocate seeks to identify issues in the systems that impact on adults, and works towards influencing appropriate change. Those systems include policy, service and legislative systems, across the government and non-government sectors. Systemic advocacy may be conducted through a variety of advocacy strategies including discussions, correspondence, committee representation, submissions, discussion and issues papers, forums and conferences.<sup>133</sup>

2.57 The Public Advocate may do all things necessary and convenient for the performance of its functions<sup>134</sup> and may, with leave, intervene in a proceeding involving the protection of the rights or interests of adults in a court, tribunal, or official inquiry.<sup>135</sup>

### **Community visitors**

2.58 Community visitors are appointed by the Queensland Government under the *Guardianship and Administration Act 2000* (Qld) to safeguard the interests of 'consumers' by regularly visiting 'visitable sites'.<sup>136</sup>

2.59 A 'consumer' means any person who lives or receives services at an authorised mental health service; or an adult with impaired capacity for a matter or with a mental or intellectual impairment and who lives or receives services at a visitable site.<sup>137</sup>

2.60 A 'visitable site' means a place where a consumer lives and receives services and is prescribed to be such a site under a regulation.<sup>138</sup> This includes residences and

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132 *Guardianship and Administration Act 2000* (Qld) s 209.

133 Information provided by the Public Advocate, 20 July 2006.

134 *Guardianship and Administration Act 2000* (Qld) s 210(1).

135 *Guardianship and Administration Act 2000* (Qld) s 210(2)–(3).

136 *Guardianship and Administration Act 2000* (Qld) s 223(1).

137 *Guardianship and Administration Act 2000* (Qld) s 222.

138 *Guardianship and Administration Act 2000* (Qld) s 222.

services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.<sup>139</sup>

2.61 Community visitors' functions include:<sup>140</sup>

- inquiring into and reporting on a range of matters about the visitable sites such as the adequacy of services for the assessment, treatment and support of adults; the appropriateness of services for adults' accommodation, health and wellbeing; the extent to which adults receive services in the way that is least restrictive of their rights; and the adequacy of information given to adults about their rights; and
- inquiring into and seeking to resolve complaints, and referring complaints to other entities for further investigation or resolution.

2.62 Community visitors have power to do all things necessary or convenient in the performance of these functions.<sup>141</sup>

### **The Public Trustee of Queensland**

2.63 The Public Trustee of Queensland is a Queensland Government corporation established under the *Public Trustee Act 1978* (Qld).<sup>142</sup> It may be appointed by the Tribunal as an adult's administrator.<sup>143</sup> If appointed as an administrator, the Public Trustee has the same obligations as any other administrator appointed under the guardianship legislation.<sup>144</sup>

## **OVERVIEW OF THE CONFIDENTIALITY PROVISIONS**

### **Introduction**

2.64 There are three main confidentiality provisions contained in Queensland's guardianship legislation:

- section 249 of the *Guardianship and Administration Act 2000* (Qld) and its mirror provision in section 74 of the *Powers of Attorney Act 1998* (Qld);
- section 112 of the *Guardianship and Administration Act 2000* (Qld); and

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139 *Guardianship and Administration Regulation 2000* (Qld) s 8 sch 2.

140 *Guardianship and Administration Act 2000* (Qld) s 224(2).

141 *Guardianship and Administration Act 2000* (Qld) s 227(1).

142 *Public Trustee Act 1978* (Qld) ss 7–8.

143 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

144 There is no obligation on the Tribunal, however, to review the appointment of the Public Trustee of Queensland (or a trustee company) as administrator as there is for other administrators: *Guardianship and Administration Act 2000* (Qld) s 28.

- section 109 of the *Guardianship and Administration Act 2000* (Qld).

2.65 These provisions deal with the confidentiality of information within the guardianship system generally, and with the confidentiality of information generated by proceedings of the Tribunal.

2.66 Section 249 of the *Guardianship and Administration Act 2000* (Qld) and section 74 of the *Powers of Attorney Act 1998* (Qld) impose a *blanket* duty on people who receive confidential information through their involvement in the guardianship legislation.

2.67 Section 112 also imposes a *blanket* prohibition, but in relation only to information that is disclosed during Tribunal proceedings. It prohibits the publication of what occurs during proceedings *outside* those proceedings.

2.68 Section 109 also applies to Tribunal proceedings but its operation is on a *case-by-case* basis with the Tribunal being able to make ‘confidentiality orders’, for example, in relation to a particular hearing or a particular document at a hearing. It also differs from section 112 because instead of applying only to the publication of information *outside* Tribunal proceedings, section 109 may also regulate the conduct of proceedings *internally* by keeping information confidential from a person participating in proceedings.

2.69 As part of facilitating the flow of information to the Commission for its consultation process, some minor amendments were made to sections 112 and 249 of the *Guardianship and Administration Act 2000* (Qld) and to section 74 of *Powers of Attorney Act 1998* (Qld).<sup>145</sup> These amendments will not be treated as part of the confidentiality provisions for the purposes of this Report and so are not considered further.

## Section 249: the general duty of confidentiality

2.70 The duty imposed by section 249 is the most general of the confidentiality provisions: it prohibits any person who gains ‘confidential information’ through his or her involvement in the administration of the legislation from recording or disclosing that information.<sup>146</sup> Section 74 of the *Powers of Attorney Act 1998* (Qld) mirrors that duty in relation to attorneys.<sup>147</sup>

<sup>145</sup> *Guardianship and Administration Act 2000* (Qld) ss 249(2)(h), (3)(g), (4), 112(3A)–(6); *Powers of Attorney Act 1998* (Qld) s 74(1), (2)(f), (4). The Commission has prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission’s consultation processes in relation to this review. The *Protocol* can be viewed at the Commission’s website <<http://www qlrc qld gov au/guardianship/protocol.htm>>.

<sup>146</sup> *Guardianship and Administration Act 2000* (Qld) s 249(1).

<sup>147</sup> *Powers of Attorney Act 1998* (Qld) s 74(1), (3). An ‘attorney’ means an attorney under a power of attorney, enduring power of attorney or advance health directive, or a statutory health attorney: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘attorney’).

2.71 Together, these provisions apply to such people as:<sup>148</sup>

- Tribunal members and staff;
- the Adult Guardian and staff;
- the Public Advocate and staff;
- guardians, administrators, and attorneys; and
- community visitors.

2.72 The duty relates to confidential information, including ‘information about a person’s affairs’.<sup>149</sup> It does not apply to information that has already been publicly disclosed (unless further disclosure is prohibited by law) or to information that identifies the person to whom the information relates.<sup>150</sup>

2.73 The provisions also contain a number of exceptions to the duty including, for example:<sup>151</sup>

- where the person is acting under the *Guardianship and Administration Act 2000* (Qld) or is discharging a function under another law;
- where the person to whom the information relates has authorised the disclosure; or
- where the Tribunal authorises the disclosure in the public interest because a person’s life or physical safety might otherwise be endangered.

2.74 Section 250 of the *Guardianship and Administration Act 2000* (Qld) also contains an exception to the duty. It relates to the disclosure by the Adult Guardian of information related to investigations. It confers a wide discretion on the Adult Guardian to disclose information, despite the duty, if he or she considers it is ‘necessary and reasonable in the public interest’ and if the disclosure is not likely to prejudice the investigation.<sup>152</sup>

2.75 Section 249 of the *Guardianship and Administration Act 2000* (Qld) provides:

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<sup>148</sup> *Powers of Attorney Act 1998* (Qld) s 74(1), (3); *Guardianship and Administration Act 2000* (Qld) s 249(2).

<sup>149</sup> *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of ‘confidential information’); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of ‘confidential information’).

<sup>150</sup> *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of ‘confidential information’); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of ‘confidential information’).

<sup>151</sup> *Powers of Attorney Act 1998* (Qld) s 74(2); *Guardianship and Administration Act 2000* (Qld) s 249(3).

<sup>152</sup> Note also that s 250(3) of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may disclose an opinion that is critical of an entity only if it has given the entity an opportunity to answer the criticism, and may identify a complainant only if it is necessary and reasonable.

**249 Preservation of confidentiality**

- (1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (3).

Maximum penalty—100 penalty units.

- (2) A person gains information through involvement in this Act's administration if the person gains the information because of being, or an opportunity given by being—

- (a) the president, a deputy president or another tribunal member; or
- (b) the registrar, a member of the tribunal staff or a tribunal expert; or
- (c) the adult guardian or a member of the adult guardian's staff; or
- (d) a professional consulted or employed by the adult guardian or an adult guardian's delegate for an investigation; or
- (e) the public advocate or a member of the public advocate's staff; or
- (f) a guardian or administrator; or
- (g) a community visitor;

...

- (3) A person may make a record of confidential information, or disclose it to someone else—

- (a) for this Act; or
- (b) to discharge a function under another law; or
- (c) for a proceeding in a court or relevant tribunal; or
- (d) if authorised under a regulation or another law; or
- (e) if authorised by the person to whom the information relates; or
- (f) if authorised by the tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

...

- (4) In this section—

...

***confidential information*** includes information about a person's affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or

- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

...

2.76 Section 74 of the *Powers of Attorney Act 1998* (Qld) provides:

**74 Preservation of confidentiality**

- (1) If a person gains confidential information because of being, or an opportunity given by being, an attorney ..., the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (2).

Maximum penalty—200 penalty units.

- (2) A person may make a record of confidential information, or disclose it to someone else—
  - (a) to discharge a function under this Act or another law; or
  - (b) for a proceeding in a court or relevant tribunal; or
  - (c) if authorised under a regulation or another law; or
  - (d) if authorised by the person to whom the information relates; or
  - (e) if authorised by the court in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

...

- (3) This section also applies to a statutory health attorney.

- (4) In this section—

...

**confidential information** includes information about a person's affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

...

2.77 These provisions raise a number of issues for consideration including what type of information should be protected, what type of conduct should be prohibited, to whom the duty should apply, and whether there should be any exceptions to the duty. These provisions are examined in Chapter 8 of this Report.

## Section 112: a prohibition specific to Tribunal proceedings

2.78 The prohibition in section 112 of the *Guardianship and Administration Act 2000* (Qld) is more specific than that contained in section 249 because it applies only to Tribunal proceedings. Section 112 prohibits any person from publishing information about a Tribunal proceeding or disclosing the identity of a person involved in a proceeding.<sup>153</sup> However, while this prohibition relates only to Tribunal proceedings, it is wider in some respects as it applies to everyone and not just those people involved in the administration of the guardianship legislation.<sup>154</sup>

2.79 The prohibition relates to ‘information about a proceeding’ which includes:<sup>155</sup>

- information given before the Tribunal;
- matters contained in documents filed with, or received by, the Tribunal; and
- decisions and reasons of the Tribunal.

2.80 It also applies to information that identifies a person ‘involved in a proceeding’. Such people include:<sup>156</sup>

- a person who makes an application to the Tribunal;
- a person about whom an application is made;
- the active parties to a proceeding;<sup>157</sup>
- a person who gives information or documents to a person performing a function under the legislation for the proceeding; and
- a person who is a witness at a Tribunal hearing of the proceeding.

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153 *Guardianship and Administration Act 2000* (Qld) s 112(3).

154 *Guardianship and Administration Act 2000* (Qld) s 112(3).

155 *Guardianship and Administration Act 2000* (Qld) s 112(4) (definition of ‘information, about a proceeding’).

156 *Guardianship and Administration Act 2000* (Qld) s 112(4) (definition of ‘involved, in a proceeding’).

157 Section 119 of the *Guardianship and Administration Act 2000* (Qld) provides that the active parties to a proceeding are:

- the adult;
- the applicant (if not the adult);
- any proposed guardian, administrator or attorney for the adult if the proceeding is for the appointment or reappointment of such person;
- any current guardian, administrator or attorney for the adult;
- the Adult Guardian;
- the Public Trustee of Queensland; and
- any other person joined as a party to the proceeding.

2.81 A person will not contravene the section 112 prohibition, however, if the person has a reasonable excuse for making the publication or disclosure.<sup>158</sup> The Tribunal may also permit the publication of information about a proceeding or the disclosure of the identity of a person involved in a proceeding if it is satisfied that doing so is in the public interest.<sup>159</sup>

2.82 Section 112 provides:

**112 Publication about proceeding or disclosure of identity**

- (1) If the tribunal is satisfied publication of information about a proceeding is in the public interest, the tribunal may, by order, permit publication of the information.
- (2) If the tribunal is satisfied publication of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit disclosure of the person's identity.
- (3) A person must not, without reasonable excuse, publish information about a proceeding, or disclose the identity of a person involved in a proceeding, unless the tribunal has, by order, permitted the publication or disclosure.

Maximum penalty—200 penalty units.

...

- (4) In this section—

...

*information*, about a proceeding, includes—

- (a) information given before the tribunal; and
- (b) matters contained in documents filed with, or received by, the tribunal; and
- (c) the tribunal's decision or reasons.

*involved*, in a proceeding, includes—

- (a) making an application in the proceeding to the tribunal; and
- (b) being a person about whom an application is made in a proceeding; and
- (c) being an active party for the proceeding; and

<sup>158</sup> *Guardianship and Administration Act 2000* (Qld) s 112(3).

<sup>159</sup> *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

- (d) giving information or documents to a person who is performing a function under this Act relevant to the proceeding; and
- (e) appearing as a witness at the hearing of the proceeding.

...

2.83 This provision raises a number of issues for consideration including whether publication of Tribunal proceedings should be prohibited, whether the identity of people involved in proceedings should be protected, whether the Tribunal should be able to permit publication in some circumstances, and whether there should be any exceptions to the prohibition. Section 112 is examined in Chapter 7 of this Report.

### **Section 109: case-by-case confidentiality orders**

2.84 Section 109 of the *Guardianship and Administration Act 2000* (Qld), like section 112, operates specifically in relation to Tribunal proceedings. There are, however, two important differences. The first is that section 112 is a blanket prohibition on publishing information about proceedings whereas section 109 grants the Tribunal power to make confidentiality orders on a case-by-case basis.

2.85 The second major difference is that instead of applying only to the publication of information *outside* Tribunal proceedings, section 109 permits the imposition of confidentiality in relation to people participating in the proceedings and so may also regulate the conduct of proceedings *internally*.

2.86 Section 109(1) of the *Guardianship and Administration Act 2000* (Qld) provides that generally, hearings of the Tribunal are to be conducted in public. Section 109(2), however, empowers the Tribunal to make ‘confidentiality orders’ in a proceeding to:

- direct who may or may not be present at a hearing;
- direct that a hearing, or part of a hearing, be held in private;
- prohibit or restrict publication of information given before it or matters contained in documents before it; or
- prohibit or restrict disclosure to an active party of information given before it, matters contained in documents before it, or its decision or reasons.

#### ***What rights might a confidentiality order displace?***

2.87 There are three other provisions contained in the *Guardianship and Administration Act 2000* (Qld) that are relevant to the Tribunal’s power to make confidentiality orders under section 109: sections 108, 134, and 158.

2.88 Each of those sections provides that generally, the active parties to a proceeding, including the adult, must be given access to, or copies of, certain information, namely:

- documents that are before the Tribunal and that are directly relevant to an issue in the proceeding (section 108);
- written reports by Tribunal staff that are received in evidence by the Tribunal in the proceeding (section 134); and
- the Tribunal's decision and any written reasons for its decision on an application for a matter (section 158).

2.89 However, those sections also provide that an active party's right to receive that information can be displaced by a section 109(2) confidentiality order.<sup>160</sup>

2.90 Section 108 provides:

**108 Procedural fairness**

- (1) The tribunal must observe the rules of procedural fairness.
- (2) Each active party in a proceeding must be given a reasonable opportunity to present the active party's case and, in particular, to inspect a document before the tribunal directly relevant to an issue in the proceeding and to make submissions about the document.
- (3) However—
  - (a) the tribunal may displace the right to inspect the document in a confidentiality order; and
  - (b) the tribunal rules may prescribe conditions in relation to inspection of the document. [note omitted]

2.91 Section 134 provides:

**134 Report by tribunal staff**

- (1) The tribunal may—
  - (a) receive in evidence in a proceeding a written report by tribunal staff on a matter in the proceeding; and
  - (b) have regard to the report.
- (2) Generally, if the tribunal receives the report in evidence in a proceeding, the adult concerned in the proceeding and each other active party in the proceeding must be—
  - (a) advised of the contents of the report; and
  - (b) upon request, given a copy of the report.
- (3) However, the right to be given a copy may be displaced in a confidentiality order. [note omitted]

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*Guardianship and Administration Act 2000* (Qld) ss 108(3)(a), 134(3), 158(3).

2.92 Section 158 provides:

**158 Decision and reasons to the adult and each active party**

- (1) Generally, the tribunal must give a copy of its decision, and any written reasons for its decision, on an application about a matter to—
  - (a) the adult concerned in the matter; and
  - (b) each other active party in the proceeding.
- (2) Generally, the tribunal must also give a copy of its decision to each person given notice of the hearing of the application.
- (3) However, a confidentiality order may displace the requirement to give copies of its decision or reasons.
- (4) The tribunal may also give a copy of its decision or reasons to anyone else as required by a tribunal order. [note omitted]

***When may a confidentiality order be made?***

2.93 The Tribunal may make a confidentiality order under section 109(2) on its own initiative or on the application of an active party to the proceeding.<sup>161</sup>

2.94 The Tribunal's power to make confidentiality orders is guided by a number of criteria.

2.95 Section 109(2) provides that the Tribunal may make a confidentiality order if it 'is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason'. While this power is worded in very broad terms, it is not an unfettered discretion. The Tribunal must exercise its discretion having regard to what is required in its jurisdiction by open justice and procedural fairness.<sup>162</sup>

2.96 The Tribunal must also apply the General Principles contained in the guardianship legislation in exercising its power to make a confidentiality order,<sup>163</sup> including General Principle 11 which provides that the adult's right to confidentiality of information be recognised and taken into account.<sup>164</sup>

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<sup>161</sup> *Guardianship and Administration Act 2000* (Qld) s 109(5).

<sup>162</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 270–3. See para 4.17–4.20 of this Report.

<sup>163</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2). For example, *Re RJE* [2005] QGAAT 4, [10].

<sup>164</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 11.

2.97 Section 109(4) additionally provides that in a proceeding on an application to obtain the Tribunal's consent to special health care,<sup>165</sup> a confidentiality order must not affect the ability of the adult's relevant substitute decision-maker for health matters to form and express a view about the special health care.

### **Who may make a confidentiality order?**

2.98 Section 109(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Tribunal power to make confidentiality orders.

2.99 The Registrar has power under the legislation to perform the functions and exercise the powers of the Tribunal for 'prescribed non-contentious matters'.<sup>166</sup> The Tribunal rules specify matters relating to section 109(2) as being such matters.<sup>167</sup>

### **When will a person contravene a confidentiality order?**

2.100 Section 109(6) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must not contravene a confidentiality order unless the person has a 'reasonable excuse'. The question of whether a person has a reasonable excuse in a particular case is likely to be assessed in light of the purpose of the legislation<sup>168</sup> and having regard to what a reasonable person would accept as appropriate.<sup>169</sup>

2.101 Section 109 provides:

#### **109 Open**

- (1) Generally, a hearing by the tribunal of a proceeding must be in public.
- (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a **confidentiality order**)—

<sup>165</sup>

*Guardianship and Administration Act 2000* (Qld) s 3, sch 4, sch 2 s 7 provides that 'special health care' means:

- removal of tissue from the adult while the adult is alive for donation to someone else;
- sterilisation of the adult;
- termination of a pregnancy of the adult;
- participation by the adult in special medical research or experimental health care;
- electroconvulsive therapy or psychosurgery for the adult; and
- any special health care of the adult prescribed by regulation.

<sup>166</sup>

*Guardianship and Administration Act 2000* (Qld) s 85(1).

<sup>167</sup>

*Guardianship and Administration Act 2000* (Qld) s 99(3); *Guardianship and Administration Tribunal Rule 2004* (Qld) r 2(1), sch. Note that r 2(2) of the *Guardianship and Administration Tribunal Rule 2004* (Qld) provides that such a matter will cease to be a prescribed non-contentious matter if an active party to the proceeding advises the Registrar of an objection to the matter being dealt with by the Registrar.

<sup>168</sup>

*Taikato v The Queen* (1996) 186 CLR 454, 464–6 (Brennan CJ, Toohey, McHugh and Gummow JJ).

<sup>169</sup>

*Bank of Valletta PLC v National Crime Authority* (1999) 164 ALR 45, 55 (Hely J), affirmed on appeal: *Bank of Valletta PLC v National Crime Authority* (1999) FCR 565. This case was cited with approval in *Callanan v Bush* (2004) A Crim Rep 239. See para 4.360 of this Report.

- (a) give directions about the persons who may or may not be present; and
- (b) direct a hearing or part of a hearing take place in private; and
- (c) give directions prohibiting or restricting the publication of information given before the tribunal, whether in public or in private, or of matters contained in documents filed with, or received by, the tribunal; and
- (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
  - (i) information given before the tribunal; or
  - (ii) matters contained in documents filed with, or received by, the tribunal; or
  - (iii) subject to subsection (3), the tribunal’s decision or reasons.
- (3) The tribunal may make a confidentiality order prohibiting or restricting disclosure of the tribunal’s decision or reasons to the adult concerned only if the tribunal considers disclosure to the adult might be prejudicial to the physical or mental health or wellbeing of the adult.
- (4) In a proceeding to obtain the tribunal’s consent to special health care for an adult, the tribunal may not make a confidentiality order that is likely to affect the ability of any of the following persons to form and express a considered view about the special health care—
  - (a) a guardian for the adult;
  - (b) an attorney for a health matter for the adult under an enduring document;
  - (c) the statutory health attorney for the adult.
- (5) The tribunal may make a confidentiality order on its own initiative or on the application of an active party.
- (6) A person must not contravene a confidentiality order, unless the person has a reasonable excuse.

Maximum penalty—200 penalty units.

2.102 These provisions raise a number of issues for consideration including whether Tribunal hearings should be held in public or private, whether the Tribunal should have power to exclude people from a hearing, and whether the Tribunal should be able to limit the disclosure of documents or its decisions or reasons to active parties to a proceeding. Section 109 is examined in Chapters 4, 5 and 6 of this Report.

### **Confidentiality orders in proceedings relating to children**

2.103 One of the Tribunal's functions under the *Guardianship and Administration Act 2000* (Qld) is consenting to the sterilisation of a child with an impairment.<sup>170</sup> Those matters are dealt with under chapter 5A of the *Guardianship and Administration Act 2000* (Qld). The Act contains two provisions dealing with the confidentiality of proceedings in relation to those matters: sections 80G and 80N. Those sections mirror the provisions of sections 109 and 158 of the Act.

2.104 Section 80G is substantially identical to section 109. It provides that proceedings for chapter 5A matters are generally to be conducted in public but that the Tribunal has power to make a confidentiality order in a proceeding.

2.105 The Tribunal's power to make a confidentiality order under section 80G is guided by the same criteria as for an order under section 109.<sup>171</sup>

2.106 Section 80G provides:

**80G Open**

- (1) Generally, a hearing by the tribunal of a proceeding in relation to a chapter 5A application must be in public.
- (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a *confidentiality order*)—
  - (a) give directions about the persons who may or may not be present; and
  - (b) direct a hearing or part of a hearing take place in private; and
  - (c) give directions prohibiting or restricting the publication of information given before the tribunal, whether in public or in private, or of matters contained in documents filed with, or received by, the tribunal; and
  - (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
    - (i) information given before the tribunal; or
    - (ii) matters contained in documents filed with, or received by, the tribunal; or
    - (iii) subject to subsection (3), the tribunal's decision or reasons.

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<sup>170</sup> *Guardianship and Administration Act 2000* (Qld) s 82(1)(h).

<sup>171</sup> Note that the criterion for matters involving consent to special health care provided in s 80G(4) of the *Guardianship and Administration Act 2000* (Qld) is, though worded differently, substantially similar to that in s 109(4).

- (3) The tribunal may make a confidentiality order prohibiting or restricting disclosure of the tribunal's decision or reasons to the child only if the tribunal considers disclosure to the child might be prejudicial to the physical or mental health or wellbeing of the child.
- (4) The tribunal may not make a confidentiality order that is likely to affect the ability of an active party to form and express a considered view about the proposed sterilisation.
- (5) The tribunal may make a confidentiality order on its own initiative or on the application of an active party.
- (6) A person must not contravene a confidentiality order, unless the person has a reasonable excuse.

Maximum penalty for subsection (6)—200 penalty units.

2.107 Section 80N is substantially identical to section 158. It provides that generally, the active parties to a proceeding must be given a copy of the Tribunal's decision and any written reasons for the decision. However, it also provides that a confidentiality order may displace this requirement.<sup>172</sup>

2.108 Section 80N provides:

**80N Decision and reasons to each active party**

- (1) Generally, the tribunal must give a copy of its decision, and any written reasons for its decision, on a chapter 5A application to each active party in the proceeding.
- (2) Generally, the tribunal must also give a copy of its decision to each person given notice of the hearing of the application.
- (3) However, a confidentiality order may displace the requirement to give copies of its decision or reasons.
- (4) The tribunal may also give a copy of its decision or reasons to anyone else as required by a tribunal order. [note omitted]

2.109 Because these sections effectively mirror the provisions of sections 109 and 158 of the Act, they are not separately examined in this Report but are referred to in the following chapters only to the extent necessary to note any minor differences in drafting between the provisions. Otherwise, references in the following chapters to sections 109 and 158 should be taken as being references also to sections 80G and 80N.

### **Confidentiality orders in practice**

2.110 The Commission was given empirical information by the Tribunal recording the number and type of confidentiality orders that have been made (apart from those

<sup>172</sup>

*Guardianship and Administration Act 2000* (Qld) s 80N(3).

restricting the publication of information outside Tribunal proceedings).<sup>173</sup> The information provided covers the period from 1 July 2005 to 31 May 2007. On the basis of this information, the Commission understands that during the relevant period, 82 confidentiality orders have been made.<sup>174</sup> All but three of those related to the non-disclosure of documents. This empirical information will be discussed further in each of the relevant chapters that deal with particular aspects of confidentiality orders.

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173 Empirical information in relation to the making of orders under s 109(2)(c) of the *Guardianship and Administration Act 2000* (Qld) was not available.

174 Information provided by the President of the Guardianship and Administration Tribunal, 26 May 2006, 12 and 14 June 2007.

## Chapter 3

# Guardianship and confidentiality: guiding principles for reform

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## INTRODUCTION

3.1 In its Discussion Paper, the Commission identified the need for a principle-based approach to guide reform in this area.<sup>175</sup> The question of what role confidentiality should play in Queensland's guardianship system raises not only significant practical issues but also deeper theoretical questions about how the law and legal systems generally should operate. Accordingly, the Commission identified the principles underpinning the role of confidentiality in the guardianship system and sought views on those issues. This chapter discusses the principles that have guided the Commission's recommendations for reform in this Report.

3.2 This chapter begins by considering the nature of confidentiality and the related concept of privacy.

3.3 It then examines the relevant content of, and interaction between, the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system.

3.4 Open justice and procedural fairness are fundamental principles of our legal system. Their strict application tends to limit the role of confidentiality in decision-making. For example, in order to promote accountability, consistency and predictability in decision-making, the principle of open justice will usually require judicial proceedings to be heard in public, and the evidence relied upon and the outcome of the proceeding to be made available to the public. The rules of procedural fairness require decision-makers to follow some or all of a number of well-recognised rules aimed at ensuring fair treatment of people who seek or oppose the making of a decision. This may operate to require the disclosure to one person of information that another person may wish to keep confidential.

3.5 On the other hand, the primary focus of the guardianship system is on promoting and safeguarding the rights and interests of the adult. This differs from the wider legal system which has as its principal function the resolution of disputes between adversaries in relation to their own rights. Although the guardianship system does provide a process for the resolution of disputes about what decisions should be made under it, the focus is on achieving an appropriate outcome for one person, namely the adult, rather than on determining disputes between adversaries in relation to their own rights. Moreover, this area of law also often involves decisions about highly private issues, such as the adult's medical treatment, the adult's financial position, and where and with whom the adult is to live. Both these considerations tend to support the argument that the nature of the guardianship system warrants a greater degree of confidentiality than might otherwise be allowed in the wider legal system.

3.6 However, it may also be contended that it is the very fact that the primary focus of the guardianship system is on promoting and safeguarding the rights and interests of vulnerable people (namely adults) that makes it more important that decisions in the system are open to scrutiny. Given the significance of the decisions

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Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) ch 3.

that are made in the guardianship system, policy choices that tend to enhance the quality of those decisions are highly desirable. Openness tends to enhance the quality of decision-making by promoting accountability, consistency and predictability. Accordingly, it may be argued, openness is highly desirable in the guardianship system.

3.7 It is clear that there is some tension between (and within) the arguments just mentioned. It may not be possible to accord, simultaneously, full recognition to the openness required by open justice and procedural fairness and to the confidentiality that might be favoured by some elements of the nature of the guardianship system. In this chapter, the Commission examines the interaction between these matters and suggests how any conflict that arises should be resolved.

3.8 This chapter then considers whether the relationship that a person or group of people has with the adult should impact upon the level of information they are permitted or entitled to receive. The Commission sought views on this issue in its Discussion Paper and, in this chapter, suggests how relationships might impact upon the disclosure of information.

3.9 Finally, this chapter considers the principles that govern the determination of whether information is relevant or irrelevant to a Tribunal decision. The Commission has observed that some arguments advanced in favour of confidentiality are more properly characterised as arguments in favour of non-disclosure of information because the information is irrelevant. The Commission considers it is important to draw a distinction between confidential information and information that is simply irrelevant, and suggests a framework for how that might be done.

## CONCEPTS OF CONFIDENTIALITY AND PRIVACY

### The nature of privacy

3.10 The Commission's terms of reference require it to have regard to the need to protect the privacy of people involved in the guardianship system.<sup>176</sup> The relevant privacy interest is a person's claim to privacy of *information* about him or her. 'Information privacy' relates to 'control of the availability and flow of personal information' about an individual and has been described as 'perhaps the most significant privacy interest'.<sup>177</sup>

<sup>176</sup> The Commission's terms of reference are set out in Appendix 1 of this Report.

<sup>177</sup> C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 115. Three other categories of privacy are also generally recognised: physical and bodily privacy, privacy of space and territory, and privacy of communications: see C Doyle and M Bagaric, *Privacy Law in Australia* (2005) ch 4; Australian Privacy Charter Council, *Australian Privacy Charter* (1994) <<http://www.privacy.org.au/About/PrivacyCharter.html>> at 27 June 2007; Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Privacy in Queensland*, Report No 9 (1998) [2.1]. See also R Wacks, *Personal Information Privacy and the Law* (1989) 15–6 in which the base components of privacy are described as secrecy (information known about an individual), anonymity (attention paid to an individual) and solitude (physical access to an individual).

3.11 Australia's common law does not recognise a general right to privacy,<sup>178</sup> although the human right to be free from arbitrary interferences with privacy forms part of international law.<sup>179</sup> Information privacy has also become increasingly important to the community<sup>180</sup> and is protected to some extent through federal and state legislation.<sup>181</sup> A number of commentators have also promoted the importance of privacy, arguing that it is a key aspect of human dignity, autonomy and identity.<sup>182</sup>

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Heerey J held in *Kalaba v Commonwealth of Australia* [2004] FCA 763, [6]:

Turning to the first defendant, the Commonwealth of Australia, I accept the submission of counsel that in Australia at the moment there is no tort of privacy, although in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [132] Gummow and Hayne JJ, with whom Gaudron J at [58] agreed, left open that possibility. In a Victorian Supreme Court case, *Giller v Procopets* [2004] VSC 113 at [187] to [189], Gillard J held that the law had not developed to the point where an action for breach of privacy was recognised in Australia. Senior Judge Skoien of the District Court of Queensland was prepared to find that there is such a tort: *Grosse v Purvis* [2003] QDC 151, but I think the weight of authority at the moment is against that proposition.

See also P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [12.99]; C Doyle and M Bagaric, *Privacy Law in Australia* (2005) [3.2], citing *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; N Suzor 'Privacy v Intellectual Property Litigation: preliminary third party discovery on the Internet' (2004) 25 *Australian Bar Review* 227, 234–5. Note, however, that privacy-related interests may be protected incidentally by the general law, for example, through the torts of nuisance, trespass and defamation, and the equitable doctrine of confidence.

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*Universal Declaration of Human Rights* (1948) art 12; *International Covenant on Civil and Political Rights* (1966) art 17; *Convention on the Rights of the Child* (1989) art 16. See also Australian Privacy Charter Council, *Australian Privacy Charter* (1994) <<http://www.privacy.org.au/About/PrivacyCharter.html>> at 27 June 2007, which states, in part, that '[p]rivacy is a basic human right and the reasonable expectation of every person'. Note, in particular, art 22 of the *Convention on the Rights of Persons with Disabilities*, adopted by the United Nations General Assembly on 13 December 2006 and opened for signature on 30 March 2007: *Resolution on the Convention on the Rights of Persons with Disabilities*, GA Res 61/106 of 13 December 2006, UN GA, 61st sess, 76th plen mtg, UN Doc A/Res/60/106 (2006), Annex 1. It provides:

#### Article 22

##### Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Australia signed the Convention (but not its Optional Protocol) on 30 March 2007. The Convention is not yet in force. See <<http://www.un.org/esa/socdev/enable/conventioninfo.htm>> at 27 June 2007.

180

For example, Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) appendix 6.

181

For example, the *Privacy Act 1988* (Cth). For an overview of the legislative, administrative and policy mechanisms regulating the privacy and use of personal information that have been adopted in the federal, state and territory jurisdictions in Australia, see Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [2.18]–[2.83].

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C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 26–50; LL Weinreb, 'The Right to Privacy' in EF Paul, FD Miller and J Paul (eds), *The Right to Privacy* (2000) 34–42, citing J Rachels, 'Why Privacy is Important' 4 (1975) *Philosophy and Public Affairs* 323; C Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475; and JH Reiman, 'Privacy, Intimacy, and Personhood' (1976) 6 *Philosophy and Public Affairs* 32. It is argued that interferences with privacy violate a person's sense of self, that privacy is a necessary function of the development of intimate relationships and that at least some measure of privacy is a necessary condition of individual autonomy. Note, however, criticism of these arguments: C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 26–50; LL Weinreb, 'The Right to Privacy' in EF Paul, FD Miller and J Paul (eds), *The Right to Privacy* (2000) 41–2.

3.12 The concept of privacy has proved difficult to articulate,<sup>183</sup> but a commonly cited definition is that:<sup>184</sup>

Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.

3.13 This concept is distinct from that of ‘confidentiality’.<sup>185</sup> Central to the distinction are the circumstances in which the information is communicated. Information is confidential if it is received in circumstances that impose a duty of confidentiality. In contrast, information that is private (and hence might be protected by a right to privacy) does not depend on how it came to be known or disclosed; information is private because of its nature.<sup>186</sup>

3.14 For example, a person may learn of very personal and sensitive information relating to another’s lifestyle, but not in circumstances that impose a duty of confidentiality.<sup>187</sup> This information is clearly private, in that it deals with personal matters that the individual may not want disclosed, but it is not confidential. Accordingly, private information is not always protected by a duty of confidentiality.<sup>188</sup> Information considered private by a person is confidential, and therefore protected from disclosure, only if a legal duty is imposed in relation to it.<sup>189</sup>

### Duties of confidentiality

3.15 A duty of confidentiality may arise in three ways: in equity, in contract, or by statute.

183 Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [1.88]–[1.119]; R Wacks, *Personal Information Privacy and the Law* (1989) 13–4; GB Melton, ‘Privacy Issues in Child Mental Health Services’ in JJ Gates and BS Arons (eds), *Privacy and Confidentiality in Mental Health Care* (2000) 48. See also C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 15–9 and note Victorian Law Reform Commission, *Defining Privacy*, Occasional Paper (2002).

184 AF Westin, *Privacy and Freedom* (1967) 7.

185 Sometimes the relationship between the two has been blurred by commentators: C Munro, ‘Confidence in Government’ in L Clarke (ed), *Confidentiality and the Law* (1990) 1, 3. See also M Tugendhat, M Nicklin and G Busuttil, ‘Publication of Personal Information’ in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 119, [4.17]–[4.18], citing recent examples of where the courts have used the term ‘confidential’ but the context indicated a reference to ‘privacy’.

186 M Tugendhat, M Nicklin and G Busuttil, ‘Publication of Personal Information’ in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 119, [4.15]–[4.16], citing The Law Commission, *Breach of Confidence*, Report No 110 (1981) [2.1]; G Tucker, *Information Privacy Law in Australia* (1992) 6.

187 For an example of how this might occur, see M Tugendhat, M Nicklin and G Busuttil, ‘Publication of Personal Information’ in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 119, [4.16], citing The Law Commission, *Breach of Confidence*, Report No 110 (1981) [2.1].

188 C Munro, ‘Confidence in Government’ in L Clarke (ed), *Confidentiality and the Law* (1990) 1, 2; M Tugendhat, M Nicklin and G Busuttil, ‘Publication of Personal Information’ in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 119, [4.15]; Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1 [69].

189 See para 2.70–2.77 of this Report as to when legal duties of confidentiality arise in the guardianship system.

## Equity

3.16 An equitable duty of confidence will arise in situations where confidential information is imparted to another person who promises, or is obliged, not to disclose it to a third party because of the special circumstances in which the communication occurred.<sup>190</sup> Predominantly utilised in the commercial context to protect trade secrets and business information,<sup>191</sup> the duty of confidence derives from the principle of equity that:<sup>192</sup>

he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.

3.17 For such a duty to arise, the relevant information must have the necessary quality of being confidential. Some types of information are generally regarded as confidential, such as information about health and medical treatment.<sup>193</sup>

## Contract

3.18 A duty of confidentiality may also arise as an incident of contract. For example, the duty may be imposed as an express term of a contract, such as an employment contract or commercial agreement.<sup>194</sup> Alternatively, the nature of a contractual relationship, such as one between doctor and patient or solicitor and client, may be such that the duty is imposed by an implied contractual term.<sup>195</sup>

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P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [12.1750]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.11]. There are three elements to the equitable action for breach of confidence:

- That the information was objectively confidential or secret and not a matter of common knowledge or public disclosure;
- That the information was received, either by the first or a later person, in circumstances importing an obligation of confidence; and
- That there was an actual or threatened unauthorised use (or misuse) of the information.

See RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (4th ed, 2002) [41-050]; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [6.30], [6.55]–[6.60], citing *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

191

M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.07]; M Thompson, 'Breach of Confidentiality and Privacy' in L Clarke (ed), *Confidentiality and the Law* (1990) 65, 68.

192

*Seager v Copydex Ltd* [1967] 2 All ER 415, 417 (Lord Denning MR), cited in M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.09].

193

RG Toulson and CM Phipps, *Confidentiality* (1996) [13-02]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.12], [6.43]–[6.44].

194

RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (4th ed, 2002) [41-015]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.08], [6.105]; M Thompson, 'Breach of Confidentiality and Privacy' in L Clarke (ed), *Confidentiality and the Law* (1990) 65, 66.

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RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (4th ed, 2002) [41-015]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.08], [6.115]; M Thompson, 'Breach of Confidentiality and Privacy' in L Clarke (ed), *Confidentiality and the Law* (1990) 65, 66.

## Statute

3.19 A duty of confidentiality may also be imposed by statute. Such duties are commonly imposed on officials who receive information in the course of performing their statutory functions.<sup>196</sup> Other examples include the duties imposed on people who serve on juries<sup>197</sup> and on people who receive or deal with complaints from whistleblowers.<sup>198</sup> As discussed earlier, particular people who gain information through their involvement in the guardianship system are prohibited by statute from disclosing confidential information.<sup>199</sup>

## OPENNESS AND CONFIDENTIALITY IN THE GUARDIANSHIP SYSTEM

3.20 In its Discussion Paper, the Commission identified three matters that need to be examined when determining the balance between openness and confidentiality in the guardianship system, namely the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system.

3.21 As has already been discussed,<sup>200</sup> the current confidentiality provisions of the guardianship legislation apply to a wide range of decision-makers, including the Tribunal, the Adult Guardian and other people involved in the administration of the legislation. Accordingly, the relevance and application of the matters discussed in this section of the chapter will vary depending on the decision-maker and the context in which the decision is being made.

3.22 The primary example of this arises in relation to the principle of open justice. As discussed below,<sup>201</sup> this principle does not apply to non-judicial decision-makers such as the Adult Guardian and so is not one of the matters that have guided the Commission's examination of confidentiality in that context. However, the values of accountability, transparency, consistency and predictability that the open justice principle embodies remain relevant to decisions made by public officials outside the judicial and quasi-judicial arena. Accordingly, Chapter 8 of this Report, which considers confidentiality in a non-judicial setting, has regard not to open justice but to the values that open justice seeks to promote.

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196 For example, *Child Protection Act 1999* (Qld) ch 6 pt 6 div 2; *Health Quality and Complaints Commission Act 2006* (Qld) s 214; *Public Sector Ethics Act 1994* (Qld) s 33; *Tourism Services Act 2003* (Qld) s 94; *Electoral Act 1992* (Qld) s 33A.

197 *Jury Act 1995* (Qld) s 70.

198 *Whistleblowers Protection Act 1994* (Qld) s 55.

199 *Powers of Attorney Act 1998* (Qld) s 74; *Guardianship and Administration Act 2000* (Qld) s 249.

200 See para 2.64–2.109 of this Report.

201 See para 3.23 of this Report.

## Open justice

3.23 One of the matters that tend to weigh against confidentiality, at least in a judicial context, is the principle of open justice. It is a basic tenet of the common law that bodies discharging judicial functions<sup>202</sup> conduct their proceedings in public.<sup>203</sup> The principle that judicial proceedings be held in open court has been described as ‘the right of the public to be informed and the corresponding right of the media to inform them’.<sup>204</sup>

### ***What are the elements of open justice?***

3.24 The principle of open justice has been described as comprising the following four elements:<sup>205</sup>

- Access to proceedings – a right of attendance at proceedings by members of the public and by media representatives;<sup>206</sup>
- Reporting of proceedings – a derivative right of those in attendance to report proceedings to others;
- Identification – a requirement that the names of those involved in a proceeding, such as the parties to the proceedings and witnesses, be available to the public; and
- Access to documents – a right of the public to inspect documents that have come into existence for proceedings.

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‘Judicial’ functions are typified by the exercise of power to determine liability or otherwise affect a person’s legal rights by the application of law to particular facts and circumstances: Jowitt (ed), *The Dictionary of English Law* (1959) (definition of ‘judicial’). See also N Rees, ‘Procedure and evidence in “court substitute” tribunals’ (2006) 28 *Australian Bar Review* 41, citing *Solomons v District Court of New South Wales* (2002) 211 CLR 119, [49] (McHugh J).

203

W Holdsworth, *A History of English Law* (1964) Vol XIV, 181; J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 1; P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60]; *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495. As to the history of the principle of open justice see *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47. Note also *International Covenant on Civil and Political Rights* (1966) art 14(1).

204

J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 3.

205

Ibid 2–3. See also S Walker, *The Law of Journalism* (1989) [1.2.01].

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This is said to be the ‘very core of the idea of open justice’: J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 3. See also *Director of Public Prosecutions (Cth) v Thomas (Ruling No 7)* [2006] VSC 18, [13].

3.25 Others have also recognised a fifth element: that the principle of open justice requires reasons for a decision to be produced and made available to the public.<sup>207</sup>

3.26 In practice, the application of the principle of open justice often results in matters which might otherwise be regarded as very private being considered in open court and examined in published decisions.<sup>208</sup> For example, matters involving personal injuries may lead to sensitive evidence about a person's disabilities and the loss he or she has experienced, including information about changes in personal and sexual relationships, being given in public and referred to in reasons for judgment.

3.27 Although open justice is a central feature of our legal system, it is clear that it remains a principle and not a right.<sup>209</sup>

The principle of open justice is a *principle*, it is not a freestanding right. ... As a principle, it is of significance in guiding the court in determining a range of matters including, relevantly, when an application for access should be granted pursuant to an express or implied power to grant access. However, it remains a principle and not a right. [original emphasis]

### **What are the reasons for open justice?**

3.28 The rationales for the principle of open justice may be grouped into three categories: the disciplinary rationale, the educative rationale and the investigative rationale.<sup>210</sup>

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Chief Justice JJ Spigelman, 'Seen to be Done: The Principle of Open Justice – Part 1' (2000) 74 *Australian Law Journal* 290, 294; Chief Justice JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (Paper presented at the Media Law Resource Centre Conference, London, 20 September 2005) 7; Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at the Law via the Internet Conference, Sydney, 28 November 2003) 5; Chief Justice JJ Spigelman, 'Reasons for Judgment and the Rule of Law' (Speech delivered at the National Judicial College, Beijing, 10 November 2003); Committee on Administrative Tribunals and Enquiries, United Kingdom House of Commons, *Report of the Committee on Administrative Tribunals and Enquiries* (1957, Cmnd 218) [76]. See also *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, 442 (Meagher JA); and *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA):

[W]ithout the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision. In my opinion the giving of reasons is correctly perceived as 'a necessary incident of the judicial process' because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law. [note omitted]

That the principle of open justice requires the public availability of reasons for decisions was also recognised by the New Zealand Court of Appeal in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565–6.

208

Kirby J commented in *X v Australian Prudential Regulation Authority* (2007) 232 ALR 421, [89]:

every day, in our courts, parties and witnesses must disclose their names and identities, although this is doubtless often uncongenial and even damaging. It is part of the strong tradition of open justice that characterises the courts of this country. [note omitted]

209

*John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 (Spigelman CJ). Also see *Seven Network Ltd v News Ltd (No 9)* (2005) 148 FCR 1, [26] (Sackville J).

210

J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 34–45. Although Jaconelli only has headings referring to the disciplinary and investigative rationales, he also discusses the educative effect of open justice: 39.

3.29 Central to the *disciplinary rationale* of open justice is that it acts as a safeguard against judicial ‘partiality, arbitrariness, or idiosyncrasy’<sup>211</sup> and is thus a means of accountability.<sup>212</sup> The disciplinary rationale also views open justice as acting as a check on legal counsel<sup>213</sup> and against dishonest testimony.<sup>214</sup>

3.30 An open court has also been said to fulfil an *educative function* by informing the public about the law and legal process,<sup>215</sup> and by prompting judicial arbiters to educate themselves in ‘prevailing public morality and thereby avoid public criticism’.<sup>216</sup> Open justice also promotes predictability and consistency in decision-making in that both decision-makers and those advising people about the law are aware of previous decisions and can act accordingly.<sup>217</sup>

3.31 Finally, under the *investigative rationale*, it has been argued that an open court facilitates the production of additional witnesses<sup>218</sup> and therefore plays an important part in securing completeness of testimony.<sup>219</sup>

211 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15]; J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 36. Note the ubiquitous phrase of Jeremy Bentham, *Judicial Evidence* (1925) 67:

Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.

212 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], citing *R v Davis* (1995) 57 FCR 512, 513–4. Also see GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 10, citing KC Davis, *Discretionary Justice: A Preliminary Inquiry* (1969) 214 in which it is argued that one of the keys to controlling the manner in which discretionary power is exercised is by:

open plans, open policy statements, open rules, open findings, open reasons, open precedents, and a fair informal procedure.

213 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 38.

214 Ibid 36–8; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15]; JH Wigmore, *Evidence in Trials at Common Law*, Vol 6 (Chadborn rev 1976) §1834. Note, however, Jaconelli’s criticism of this view, particularly in relation to ‘particularly sensitive witnesses’ who may be less inclined to testify at all in open court: J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 38.

215 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 39; P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], citing *John Fairfax & Sons v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 481 (McHugh JA); D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15].

216 C Davis, ‘The Injustice of Open Justice’ (2001) 8 *James Cook University Law Review* 92, 96.

217 For example, RA Hughes, GWG Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (2nd ed, 2003) 196, citing L Waller, *Derham, Maher and Waller, An Introduction to Law* (8th ed, 2000) ch 7 in which it is posited that one of the reasons for consistency of decision-making by the courts is that it allows citizens to plan their affairs against a developed and predictable framework of legal rules.

218 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 40; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15].

219 JH Wigmore, *Evidence in Trials at Common Law*, Vol 6 (Chadborn rev. 1976) §1834. A recent example, albeit one not in a judicial context, where potential witnesses were identified due to publicity surrounding an investigation was in relation to the conduct of Jayant Patel in Bundaberg.

### **Are there any exceptions to the principle of open justice?**

3.32 At common law, exceptions to the principle of open justice are limited to those circumstances where the administration of justice would be affected.<sup>220</sup> Closure of the court is justified only if a public hearing ‘is likely to lead, directly or indirectly, to a denial of justice’.<sup>221</sup> It is insufficient justification for an infringement of open justice that public proceedings would cause embarrassment, distress, ridicule or reputational harm to a witness or party.<sup>222</sup> Similarly, the protection of privacy and confidentiality ‘traditionally take second place to the principle of open justice’.<sup>223</sup> One reason for this is that by choosing to pursue ‘their dispute in the forum of a court, the parties inevitably place themselves in a situation in which their privacy is compromised’.<sup>224</sup>

3.33 Examples of where the common law has recognised that open justice poses a risk to the administration of justice include proceedings involving police informers, blackmail or matters of national security.<sup>225</sup>

3.34 A more relevant example to guardianship is the hearing of matters under the *parens patriae* jurisdiction, which is the inherent jurisdiction of superior courts to deal with matters in relation to people who are unable to make their own decisions.<sup>226</sup> Such proceedings have been recognised as an exception to the principle of open justice and may be held in private.<sup>227</sup> One rationale for this exception recognised by the House of Lords in *Scott v Scott* is that the court’s paramount duty in such cases is its duty of care to the adult who is unable to make decisions.<sup>228</sup> In the interests of justice, that duty can override other principles such as the requirement to hear cases publicly.<sup>229</sup> The House

220 W Holdsworth, *A History of English Law*, Vol XIV (1964) 182; C Davis, ‘The Injustice of Open Justice’ (2001) 8 *James Cook University Law Review* 92, 104; P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], [15.150], citing *Johnston v Cameron* (2002) 124 FCR 160.

221 C Davis, ‘The Injustice of Open Justice’ (2001) 8 *James Cook University Law Review* 92, 104, citing *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] QB 227, 235.

222 Ibid citing *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 58, 61, 63; *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, 143. Also see *X v Australian Prudential Regulatory Authority Regulation Authority* (2007) 232 ALR 421, [87]–[89] (Kirby J); P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.195].

223 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], citing *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, 142 (Kirby P); Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1 [961].

224 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 160.

225 C Davis, ‘The Injustice of Open Justice’ (2001) 8 *James Cook University Law Review* 92, 104. Also see C Puplick, ‘How Far Should the Courts be Exempted From Privacy Regulation?’ (2000) 40 *Law Society Journal* 52, 54:

Open justice serves definite functions, ensuring the law is publicly declared, preventing secret courts or publicising public disapproval of anti-social and illegal acts. However, there is also recognition that circumstances may arise where open justice may give way, for example to protect children or victims or the judicial process itself.

226 See para 3.62 of this Report.

227 *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC), 445 (Earl Loreburn), 462 (Lord Atkinson), 483 (Lord Shaw); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.40].

228 *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC).

229 Ibid.

of Lords also considered that the exception was warranted because such matters are essentially domestic and private in nature, and therefore need not be open to the public.<sup>230</sup>

The affairs are truly private affairs; the transactions are transactions truly intra familiar; and it has long been recognised that an appeal for the protection of the Court in the case of such persons does not involve the consequences of placing in the light of publicity their truly domestic affairs.

3.35 In addition to the common law exceptions, the principle of open justice can be curtailed by statute.<sup>231</sup> These statutory exceptions customarily relate to proceedings involving juvenile defendants, adoption proceedings, family law proceedings, committal hearings, sexual offence proceedings and coronial inquests.<sup>232</sup> It has also been recognised that informal tribunals are commonly granted specific powers to depart from the principle of open justice in appropriate circumstances.<sup>233</sup> While there is little consistency between such provisions,<sup>234</sup> some underlying policies have been identified, such as privacy protection and informality of proceedings.<sup>235</sup>

## Procedural fairness

3.36 The second matter discussed in the Commission's Discussion Paper that tends to weigh against secrecy in decision-making is that of procedural fairness. Historically captured by the term 'natural justice',<sup>236</sup> the common law requirement of procedural fairness imposes a set of procedural standards on decision-makers to ensure a fair hearing and determination for the persons affected by the decision.<sup>237</sup>

3.37 Unless displaced by statute, the requirement of procedural fairness will apply, at common law, to the exercise of judicial and quasi-judicial functions.<sup>238</sup> It also

230 Ibid 483 (Lord Shaw). Lord Atkinson also referred to the jurisdiction as 'quasi-domestic': at 462. However, such an analysis has been the subject of some criticism: J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 159.

231 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60]; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995) 129, 130.

232 Walker S, *The Law of Journalism* (1989) [1.2.08], [1.2.22]; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995) 129, 130.

233 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.230]; Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1 [961]. See also M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995) 132.

234 M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995) 129, 130.

235 S Walker, *The Law of Journalism* (1989) [1.2.08], [1.2.22].

236 W Holdsworth, *A History of English Law* (1964) Vol XIV, 199; WB Lane and S Young, *Administrative Law in Queensland* (2001) 53.

237 WB Lane and S Young, *Administrative Law in Queensland* (2001) 53.

238 W Holdsworth, *A History of English Law* (1964) Vol XIV, 199; JRS Forbes, *Justice in Tribunals* (2002) [7.5]. All tribunals, including guardianship tribunals, are required at common law to observe procedural fairness: J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122; JRS Forbes, *Justice in Tribunals* (2002) [7.5]. A number of jurisdictions have also specifically imposed this obligation on their guardianship tribunals through statute: *Guardianship and Management of Property Act 1991* (ACT) s 37(3); *Guardianship and Administration Act 2000* (Qld) s108(1); *Guardianship and Administration Act 1995* (Tas) s 11(2)(b); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(a); *State Administrative Tribunal Act 2004* (WA) s 32(1).

applies to administrative decisions that affect a person's rights, interests or legitimate expectations.<sup>239</sup> This is one way in which procedural fairness differs from open justice; the rights or interests promoted by open justice are those of the public at large whereas procedural fairness is primarily concerned with safeguarding the rights and interests of specific people affected by a decision.<sup>240</sup>

3.38 This does not mean, however, that there is not a wider public interest in the observance of procedural fairness. For example, according individual parties procedural fairness enhances the quality of decision-making, which is a matter in which the public as a whole has an interest. Similarly, an individual may also have a private interest in the application of the principle of open justice in his or her hearing due to the accountability that it promotes.

3.39 Traditionally, the requirements of procedural fairness are based on two maxims:<sup>241</sup>

- *Audi alteram partem* – that both parties must be given an adequate opportunity to present their case (the hearing rule); and
- *Nemo debet esse iudex in propria sua causa* – that the decision-maker must be impartial or free from bias (the bias rule).<sup>242</sup>

### **What is the hearing rule?**

3.40 While the particular procedural requirements flowing from the 'hearing rule' will vary in each case, the 'vital element' is participation.<sup>243</sup> There are generally three aspects to the 'right to be heard', as it is often referred to: adequate prior notice, adequate disclosure of material and an opportunity to respond to that material.<sup>244</sup>

239 JRS Forbes, *Justice in Tribunals* (2002) [7.5].

240 For a discussion of the distinction between procedural fairness and open justice, see J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 31, 33.

241 WB Lane and S Young, *Administrative Law in Queensland* (2001) 56–7; EI Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1501]. These maxims are commonly referred to as the 'twin pillars' of procedural fairness: JRS Forbes, *Justice in Tribunals* (2002) [7.4], citing *Kanda v Government of Malaya* [1962] AC 322, 337 (Lord Denning).

242 There is conflicting authority as to whether procedural fairness imposes other obligations upon decision-makers. For example, Creyke and McMillan note suggestions that procedural fairness should also include a 'probative evidence rule' and a 'duty of inquiry', but conclude that neither have been authoritatively endorsed by the High Court: R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) [10.1.4]. In relation to the existence of a probative evidence rule, see also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 372–5; N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41, 55–7; and WB Lane and S Young, *Administrative Law in Queensland* (2001) 59 (the latter two considering the issue of probative evidence as forming part of the hearing rule). See also the recent High Court case *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171 in which it was held that a breach of procedural fairness can occur through delay in the decision-making process.

243 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 333.

244 N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41, 55, citing R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) [10.4.6].

3.41 A person must be given adequate prior notice of the date, time and location at which the matter will be heard and also of the nature of the issues that are to be decided.<sup>245</sup> Notice must be sufficiently detailed and given sufficiently early to allow the person ‘to make inquiries, to consider his position, and to prepare his response’.<sup>246</sup>

3.42 The person must also be given adequate disclosure of the evidence upon which the decision-maker proposes to base its decision.<sup>247</sup> That is, the person should be given an opportunity to ‘deal with adverse information that is credible, relevant and significant to the decision to be made’.<sup>248</sup> This means that, for example, the person should be apprised of the substance of any documentary evidence<sup>249</sup> and of any oral evidence that is received.<sup>250</sup> Finally, the person must also be given an opportunity to respond to that material and present his or her own case.

3.43 The High Court recently considered this issue in relation to an application before the Refugee Review Tribunal for a protection visa in *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*.<sup>251</sup> The Tribunal had received a letter that contained allegations that the applicant had admitted that he had been accused of killing a person involved in the political affairs of his country of origin and that the applicant was also working for the present Government of that country. The author of the letter requested confidentiality and the Tribunal did not inform the applicant of the letter’s existence nor did it invite comment on the substance of the allegations made.<sup>252</sup> The Tribunal referred to the letter in its reasons for decision but said that because the allegations made could not be tested, it was given ‘no weight’ and the Tribunal’s decision was based solely on other reasons.<sup>253</sup>

245 WB Lane and S Young, *Administrative Law in Queensland* (2001) 57.

246 JRS Forbes, *Justice in Tribunals* (2002) [10.1], citing *Johnson v Miller* (1937) 59 CLR 467, 487; *Etherton v Public Service Board of New South Wales* (1983) 3 NSWLR 297, 301, affirmed on appeal: *Public Service Board of New South Wales v Etherton* (1985) 1 NSWLR 430.

247 WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8.

248 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J). See also *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95.

249 However, procedural fairness may not necessarily require that the person be given a copy of the document itself as it may be sufficient that the substance of the information is brought to the person’s attention. See J Blackwood, ‘Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals’ (2004) 11 *Psychiatry, Psychology and Law* 122, 122–123, 128–9, citing *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417, 413; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 197, 205, 223; *Gilson v Minister for Immigration and Multicultural Affairs* (Unreported, Federal Court of Australia, Lehane J, 21 July 1997) 8–9; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539, 557; and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, 748–9 (which was subsequently appealed to the High Court: *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88). See also JRS Forbes, *Justice in Tribunals* (2002) [12.31]. In the guardianship context, compare *Moore v Guardianship and Administration Board* [1990] VR 902, 912 (Gobbo J) which held that the nature of the document required that it actually be produced, preferably before the hearing.

250 JRS Forbes, *Justice in Tribunals* (2002) [12.30].

251 (2005) 225 CLR 88.

252 *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 91.

253 *Ibid* 92.

3.44 The High Court held that the information contained in the letter was credible, relevant and significant to the decision to be made and so it was not open to the Tribunal to withhold it from the applicant on the basis that there were other grounds to sustain its decision.<sup>254</sup> Accordingly, the substance of the allegations in the letter should have been put to the applicant.<sup>255</sup> However, the Court was of the view that because of the public interest in facilitating the giving of information to the Tribunal that is needed to determine whether visas should be granted, it was appropriate for the Tribunal not to give the applicant a copy of the letter or tell him who wrote it.<sup>256</sup>

3.45 The Court also explained when information should be understood as being credible, relevant and significant:<sup>257</sup>

‘Credible, relevant and significant’ must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made.

### **What is the bias rule?**

3.46 The second element of procedural fairness is the requirement that the decision-maker approach the task with an open mind, free from prejudice and without any interest, pecuniary or otherwise, in the outcome.<sup>258</sup> The question of bias is resolved by asking ‘whether, in the circumstances, the public, including the parties, might entertain a reasonable apprehension of bias in the sense that the decision-maker is incapable of bringing an impartial and unprejudiced mind to the resolution of the issue’.<sup>259</sup> The bias rule is not relevant to the issues of confidentiality considered in this Report and so is not discussed further.

### **What are the reasons for procedural fairness?**

3.47 There are several reasons why procedural fairness, and in particular, the notion of participation in decision-making, is important.

3.48 Some are arguments based in principle. Fairness, whether in legal processes or otherwise, is valued as a quality in its own right.<sup>260</sup> Respect and dignity for others

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254 Ibid 96.

255 Ibid 92.

256 Ibid 92, 100. Such an approach ‘would be fair to the appellant and it would be a procedure which accommodated what Brennan J described in *Kioa* as the “problem of confidentiality” [notes omitted]: at 100. The Court did comment, however, that this meant that the credibility of the person who made the allegations could not be tested, and this may lead to the Tribunal being unable to decide whether the allegations have substance or not: at 100.

257 Ibid 96.

258 WB Lane and S Young, *Administrative Law in Queensland* (2001) 60.

259 Ibid citing *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293–4; *Webb v The Queen* (1994) 181 CLR 41, 47, 51–2, 67–8, 87. See also *Keating v Morris* [2005] QSC 243.

260 EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1988) 63–4.

also suggests people should be included in the decision-making processes that affect them.<sup>261</sup> Participation is also an important political value in a democratic society.<sup>262</sup>

3.49 Other rationales for procedural fairness relate to the quality of decision-making. Minimum guarantees of participation for all parties are important in contributing to the completeness of evidence and, therefore, in going some way to securing accuracy, and fairness, in decision-making.<sup>263</sup> Failing to hear opposing views carries ‘notorious risks’:<sup>264</sup>

slender proofs may falsely seem irrefragable, and the scales of justice may falsely seem to be tipped by the weight of insubstantial factors.

3.50 Another rationale for procedural fairness relates to the legitimacy of the decision and the decision-maker. Legal authorities, including judicial decision-makers, rely on having fair processes for their legitimacy.<sup>265</sup> Research in social psychology suggests that people tend to assess their satisfaction with decisions made by third parties in terms of the fairness of the procedure used to reach the decision, rather than merely the favourability of the decision itself.<sup>266</sup> Critical to that assessment of the process is whether people are given an opportunity to participate.<sup>267</sup>

<sup>261</sup> DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 333–4; LB Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181, 262–4.

<sup>262</sup> DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 334: Participation in decision-making is ‘one of the universally acclaimed values against which it is hard to find a voice of dissent’. Also see A Kessler, ‘Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial’ (2004) 90 *Cornell Law Review* 1181, 1213–4; EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1988) 64.

<sup>263</sup> DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 328; LB Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181, 244–52; TR Tyler et al, *Social Justice in a Diverse Society* (1997) 82; A Kessler, ‘Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial’ (2004) 90 *Cornell Law Review* 1181, 1214.

<sup>264</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 274 (Brennan J). Also see GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 69–70.

<sup>265</sup> TR Tyler, *Why People Obey the Law* (1990) 106; EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1988) 64; RA Hughes, GWG Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (2nd ed, 2003) 195; P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 160–1. Indeed, legal philosophers argue that meaningful participation is a precondition of legitimate adjudication: for example, LL Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 364; and LB Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181, 274: ‘[p]rocedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate’.

<sup>266</sup> TR Tyler, *Why People Obey the Law* (1990) 101–4; TR Tyler et al, *Social Justice in a Diverse Society* (1997) 83; EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1988) 71.

<sup>267</sup> TR Tyler, *Why People Obey the Law* (1990) 163; TR Tyler and HJ Smith, ‘Social justice and social movements’ in DT Gilbert, ST Fiske and G Lindzey (eds), *The Handbook of Social Psychology* (4th ed, 1998) Vol II, 604. Note also that participation by the affected parties in adjudicative processes is also valued because it is essential to people’s dignity and respect: see LB Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181, 262–3.

### **What are the requirements of procedural fairness?**

3.51 Procedural fairness does not dictate adherence to a precise set of rules.<sup>268</sup> What it requires will depend on the circumstances of each case, including:<sup>269</sup>

- the nature of the proposed decision;
- the likely consequences of the decision for the person whose rights, interests or legitimate expectations are affected;
- the rules under which the decision is being made;
- the information and resources available to the decision-maker; and
- the urgency of the matter.

3.52 Given the importance of the circumstances in which a decision is made, the requirements of procedural fairness will vary depending on whether the decision-maker is an administrative one (such as the Adult Guardian), a quasi-judicial body (such as the Tribunal) or a court. However, because of the origins of procedural fairness in evaluating judicial and quasi-judicial decision-making,<sup>270</sup> what is required in the judicial arena is the starting point for making judgments about what is appropriate in a particular case.<sup>271</sup>

3.53 One of the circumstances that will be particularly relevant when determining the content of procedural fairness in the guardianship context is the nature and purpose of the jurisdiction.<sup>272</sup>

<sup>268</sup> WB Lane and S Young, *Administrative Law in Queensland* (2001) 53; JRS Forbes, *Justice in Tribunals* (2002) [7.1].

<sup>269</sup> JRS Forbes, *Justice in Tribunals* (2002) [7.1]; WB Lane and S Young, *Administrative Law in Queensland* (2001) 53; *Kioa v West* (1985) 159 CLR 550, 584–5 (Mason J). See also J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122, citing *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 312 (Gibbs CJ) and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 98 (McHugh J). It has been suggested that determining what is required in a particular case involves a balancing of the interest of the person whose rights or expectations may be affected on the one hand, and the cost of providing particular procedural safeguards on the other: EI Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1513].

<sup>270</sup> W Holdsworth, *A History of English Law* (1964) Vol XIV, 199.

<sup>271</sup> EI Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1513]; DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 326; N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41, 54.

<sup>272</sup> *J v Lieschke* (1987) 162 CLR 447, 456–7 (Brennan J, Mason, Wilson, Deane and Dawson JJ concurring), cited in J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 123. See also, T Henning and J Blackwood, 'Tribunals' Power to Control Their Own Procedures and the Requirements of Procedural Fairness: Some Issues' (Paper presented at the Sixth Annual Australian Institute of Judicial Administration Tribunals Conference, Sydney, 5–6 June 2003) 22:

To over-judicialise an inquiry by insisting on the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair and in considering whether a Tribunal has a duty to disclose documents it is desirable to avoid imposing an obligation on decision making bodies akin to the required pre-trial procedures in litigation in the court. A balance must be pursued between the proper requirements of procedural fairness and imposing undue burdens on administrative bodies. [notes omitted]

If an unqualified application of the principles of natural justice would frustrate the purpose for which the jurisdiction is conferred, the application of those principles would have to be qualified.

3.54 The relevance of the nature of a jurisdiction when determining the content of procedural fairness was considered by the Full Court of the Family Court in *Separate Representative v JHE*.<sup>273</sup> In that case, Nicholson CJ and Fogarty J held that the obligation to treat the child's welfare as paramount together with other obligations set out in the *Family Law Act 1975* (Cth), meant that the 'rights of the disputants to natural justice are therefore qualified to the extent that those rights encroach on or are in conflict with these obligations'.<sup>274</sup>

3.55 The nature of the guardianship system, with its focus on promoting and safeguarding the rights and interests of adults,<sup>275</sup> may also result in the qualification of the rules of procedural fairness. For example, although the requirements of procedural fairness will usually override considerations of individual privacy,<sup>276</sup> the nature of the system may warrant varying levels of confidentiality in some circumstances. A tension arises between providing sufficient information to parties so that they receive a fair hearing, and ensuring an adult's privacy and safeguarding his or her other rights and interests.<sup>277</sup> Conflict between the nature of the system and procedural fairness may also arise in cases where disclosure of information to the adult might cause harm to the adult.

3.56 The courts have recognised that procedural fairness may permit withholding or limiting disclosure of adverse material where there is a compelling need for confidentiality or secrecy.<sup>278</sup> Such an issue might arise where a person has provided information to a guardianship tribunal but has requested that it remain confidential. In

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Note, however, the cautionary comments in *Moore v Guardianship and Administration Board* [1990] VR 902, 913 (Gobbo J). See also *TC v Public Guardian* [2006] NSWADTAP 15, [34]–[35]; *QJ v Public Guardian* [2005] NSWADTAP 45, [19]; *LA v Protective Commissioner* [2004] NSWADTAP 39, [18]–[20]; *KV v Protective Commissioner*; and *KW v KV (No 2)* [2004] NSWADTAP 48, [23].

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(1993) 16 Fam LR 485.

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*Separate Representative v JHE* (1993) 16 Fam LR 485, 499. Strauss J decided the matter on narrower grounds concentrating on the specific statutory provision in question. However, his Honour held that the trial judge had erred in treating natural justice as having overriding significance and also commented that the principles of natural justice did not authorise the 'infliction of physical or psychological damage to a child or any other person': 509, 511.

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For a discussion of the nature of the guardianship system, see para 3.58–3.102 of this Report.

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RD Nicholson, 'Balancing Privacy and Natural Justice in Informal Tribunals: The Case of the Guardianship Boards' (1995) 6 *Public Law Review* 307, 319.

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J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122; T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 100–1.

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J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 123, 130, citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 116 (Kirby J), 100, (McHugh J) and *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

such cases, there is a need to balance the requirements of procedural fairness against the policy goal of encouraging continued disclosure of information.<sup>279</sup>

3.57 The personal and sensitive nature of the information in the guardianship system may also affect what is required by way of procedural fairness.<sup>280</sup> Conversely, it may also be argued that the disclosure of information through the application of the rules of procedural fairness may advance the guardianship system's focus on the adult. High quality decision-making is a critical part of promoting and safeguarding an adult's rights and interests and this is more likely when decisions are based upon full disclosure and discussion of all relevant evidence.<sup>281</sup>

### Nature of the guardianship system

3.58 The third matter relevant to the role of confidentiality is the nature of the guardianship system. This system has some features that distinguish it from other areas of law<sup>282</sup> and which may affect the extent to which it is appropriate for decision-makers within the guardianship system to adhere strictly to the principle of open justice and adversarial notions of procedural fairness. The nature of Queensland's guardianship system is discussed generally in Chapter 2 of this Report, but there are three features of particular importance in the context of confidentiality and that are discussed in this chapter.

3.59 The first relevant feature of the guardianship system is that it empowers the Tribunal and others to make decisions about fundamental rights of vulnerable adults. The significance of these decisions may favour openness and transparency in decision-making rather than confidentiality. The second feature is the adult-focused nature of the guardianship system. The emphasis on promoting and safeguarding the rights and interests of the adult may warrant a greater recognition of confidentiality, although it has been argued that it could point to openness as well. The third feature, and one that was not considered in detail in the Commission's Discussion Paper, is that the Tribunal has been given significant inquisitorial powers. These powers may impact on openness as they may justify an alteration in the way in which the Tribunal accords parties procedural fairness.

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279 Ibid; and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 98–99.

280 T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 100–1; J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122.

281 For example, *TC v Public Guardian* [2006] NSWADTAP 15, [37]; and *KA v Public Guardian* [2004] NSWADTAP 25, [13].

282 T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 5.

### **Decisions about fundamental rights of vulnerable adults**

3.60 Guardianship decisions made by the Tribunal and others in the guardianship system affect the fundamental rights of the adult.<sup>283</sup> For example, the guardianship legislation permits the making of decisions that remove an adult's ability to reproduce.<sup>284</sup> It also enables decisions to be made about refusal of medical treatment that is needed to stay alive.<sup>285</sup> The more significant the decisions being made, the greater the scrutiny required of those decisions,<sup>286</sup> suggesting a need for increased openness. Interestingly, this view is in stark contrast to a view expressed in *Scott v Scott*<sup>287</sup> that these matters involve questions of a domestic nature only.<sup>288</sup>

3.61 Importantly, these decisions are also made in relation to potentially vulnerable people who may not be able to advocate on their own behalf. Although some adults may have support, the accountability, consistency and predictability brought by open decision-making is an important safeguard for people who may be unable to champion their rights effectively and challenge decisions being made about them.

### **Adult-focused nature of the guardianship system**

3.62 The guardianship jurisdiction has an ancient history in the English common law where it was originally recognised as the duty of the monarch as *parens patriae*, or 'parent of the country', to protect vulnerable citizens.<sup>289</sup> It is for this reason that guardianship jurisdictions are sometimes categorised as 'protective' in nature. For example, when classifying areas of law, Carney and Tait have described guardianship jurisdictions as protective rather than constitutional, criminal or civil.<sup>290</sup> A protective jurisdiction is one in which the rights of individuals who cannot care for themselves are

283 Ibid 5–6; and RM Smith, 'Australian Guardianship and Financial Management Boards and Tribunals: are they Fully Accountable in their Decision-making?' (1995) 3 *Australian Journal of Administrative Law* 23, 23, citing *McDonald v Guardianship and Administration Board* [1993] 1 VR 521. Also see *LA v Protective Commissioner* [2004] NSWADTAP 39, [21].

284 The 'special health care' regulated by the guardianship legislation is defined to include 'sterilisation of the adult': *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 7(b) (definition of 'special health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 7(b) (definition of 'special health care'). See also ch 5A of the *Guardianship and Administration Act 2000* (Qld) in relation to the sterilisation of children.

285 The withholding or withdrawal of a life-sustaining measure can fall within the definition of 'health care' which is regulated by the guardianship legislation: *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 5(2) (definition of 'health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 5(2) (definition of 'health care').

286 EI Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1505]; JRS Forbes, *Justice in Tribunals* (2002) [7.7]

287 [1913] AC 417.

288 See para 3.34 of this Report.

289 T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 10. For a history of the development of the guardianship jurisdiction in Australia see T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) ch 2. In Queensland, the *parens patriae* jurisdiction is exercised by the Supreme Court and this jurisdiction is specifically preserved by s 109 of the *Powers of Attorney Act 1998* (Qld) and s 240 of the *Guardianship and Administration Act 2000* (Qld): *VJC v NSC* [2005] QSC 068.

290 T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 5. See also J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 123.

paramount.<sup>291</sup> A statutory example is the Family Court's welfare jurisdiction in relation to children.<sup>292</sup>

3.63 In Queensland, the guardianship legislation has moved away from a paternalistic model to one in which the express purpose is to strike an appropriate balance between:<sup>293</sup>

- the right of an adult with impaired capacity to the greatest possible degree of autonomy; and
- his or her right to adequate and appropriate support for decision-making (although the legislation recognises that providing appropriate support for an adult may include the appointment of a substitute decision-maker for the adult).<sup>294</sup>

3.64 This move away from a paternalistic model is also reflected in the legislative requirement to apply certain General Principles when performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult.<sup>295</sup> These Principles include:<sup>296</sup>

- a presumption of an adult's capacity for a matter;
- recognition of the adult's basic human rights regardless of capacity;
- the right of an adult to be a valued member of society;
- the importance of encouraging and supporting an adult to participate in community life, to achieve his or her maximum potential, and to be self-reliant;
- the adult's right to participate to the greatest extent practicable in decisions affecting the adult's life; and

<sup>291</sup> See *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 ('*Marion's Case*'), 258–9 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Re S (a child) (Identification: Restrictions on Publication)* [2003] EWCA Civ 963, [20] (Lady Justice Hale), affirmed on appeal: *Re S (a child) (Identification: Restrictions on Publication)* [2005] 1 AC 593.

<sup>292</sup> See *Family Law Act 1975* (Cth) pt VII. See HA Finlay, RJ Bailey-Harris and MRA Otlowski, *Family Law in Australia* (5th ed, 1997) [7.267].

<sup>293</sup> *Guardianship and Administration Act 2000* (Qld) s 6.

<sup>294</sup> In relation to the various substitute decision-makers who may be appointed for an adult, see para 2.30–2.34 of this Report.

<sup>295</sup> *Powers of Attorney Act 1998* (Qld) s 76 (although note the different terminology of 'must be complied with' rather than 'must apply'), sch 1; *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2), sch 1. The guardianship legislation also makes specific provision for the application of these principles by:

- the Tribunal – there is a specific requirement for the Tribunal to consider the General Principles (and Health Care Principle where relevant) when deciding whether a person is appropriate for appointment as an adult's guardian or administrator: *Guardianship and Administration Act 2000* (Qld) s 15(1)(a)–(b);
- the Adult Guardian: *Guardianship and Administration Act 2000* (Qld) s 174(3); and
- an adult's guardian or administrator: *Guardianship and Administration Act 2000* (Qld) ss 34, 74(4).

<sup>296</sup> *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1.

- the importance of maintaining the adult's existing supportive relationships.

3.65 However, the General Principles also state that the performance of a function or the exercise of a power must occur in a way that is consistent with the adult's 'proper care and protection'.<sup>297</sup> The legislation also provides that an adult's 'best interests' is one of the criteria to be considered when making decisions about health matters.<sup>298</sup> But this occurs in a system in which the focus is first deliberately cast on recognition and promotion to the greatest extent possible of the adult's rights, including the right to make his or her own decisions.

3.66 There are three elements of this adult-focused nature of the guardianship system that might favour a greater role for confidentiality than in other contexts: the primary focus on the adult's rights and interests, the consideration of the adult's private matters, and the scrutiny given to the otherwise private circumstances of others involved in the adult's life. A fourth element may instead favour greater openness: that the adult-focused nature of the jurisdiction may involve less contesting of issues.

#### *The adult's rights and interests*

3.67 The primary focus in the guardianship system on promoting and safeguarding the rights and interests of the adult may mean that the rights and interests of others should be given less weight in some circumstances.<sup>299</sup>

3.68 Part of this responsibility to safeguard an adult's rights and interests may require steps to be taken in appropriate cases to ensure an adult's privacy.<sup>300</sup> During guardianship proceedings, very private information about an adult is disclosed in a public forum. The adult's privacy interests may justify treating this information, which is disclosed for a limited purpose only, confidentially.<sup>301</sup> It may also mean, for example, imposing an obligation of confidentiality where disclosure of certain information would harm the adult. In exceptional cases, this might involve keeping information from the adult himself or herself.<sup>302</sup>

297 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 7(5); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 7(5). See also the requirement for the Tribunal, when considering whether to appoint a guardian or administrator, to have regard to the question whether an adult's needs will not be adequately met or the adult's interests will not be adequately protected without such an appointment: *Guardianship and Administration Act 2000* (Qld) s 12(1)(c)(i), (ii).

298 *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(1)(b)(ii); *Guardianship and Administration Act 2000* (Qld) s 61(b)(ii), sch 1 pt 2 s 12(1)(b)(ii) and, in relation to the power of the Tribunal to consent to the sterilisation of a child with an impairment, see ch 5A of the *Guardianship and Administration Act 2000* (Qld).

299 *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC). See also *Separate Representative v JHE* (1993) 16 Fam LR 485, 499 (Nicholson CJ and Fogarty J).

300 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 11; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 11.

301 See generally, J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 124; T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101.

302 T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101.

3.69 Advancing an adult's rights and interests will not always, however, favour confidentiality. As was discussed above,<sup>303</sup> one way in which an adult's rights and interests may be advanced is through high quality decision-making promoted by openness and transparency.

#### *Matters private to the adult*

3.70 The second element of the adult-focused nature of the guardianship system is that it necessarily involves delving into the personal life of an adult and disclosing information which would otherwise be kept private.<sup>304</sup> Adults *with capacity* are capable of making decisions about their personal, health and financial matters in private, without exposing intimate details of their lives publicly. It is only because an adult has impaired capacity that sensitive, intimate and private information needs to be disclosed in a public forum.<sup>305</sup> If adults with impaired capacity are to be accorded the same respect for privacy as other members of the community,<sup>306</sup> some degree of confidentiality may be justified.

3.71 Such an approach may be particularly appropriate given that guardianship proceedings are very rarely instigated by the adult. Applications are usually brought by others concerned about the adult. Hence, guardianship matters can be distinguished from other types of litigation as the adult is not making a decision to pursue his or her rights through the courts, which has traditionally been regarded as one of the justifications for permitting open disclosure of a person's private information.<sup>307</sup>

303 See para 3.57 of this Report.

304 For example, *Korp (Guardianship)* [2005] VCAT 779, [6] (Morris J):

It is only in recent years that privacy has become a matter of greater focus, although I would hazard to say it has always been important. Matters in which a person seeks an administrator or guardian under the Guardianship and Administration Act often involve the disclosure of personal and sensitive information. The revelation of that information can significantly infringe legitimate rights to privacy, even when it occurs in the context of a tribunal proceeding.

There have been some criticisms about the misuse of guardianship proceedings as a way of obtaining information about the adult that the adult, if he or she had capacity, would not have shared with those people. For example, the New South Wales Guardianship Tribunal referred to its proceedings being used a 'fishing expedition' by a nephew wishing to obtain financial information about his aunt: the Tribunal's reasons for its decision are quoted in the appeal of that decision in *TC v Public Guardian* [2006] NSWADTAP 15, [21]. Note, however, that the Appeal Panel of the Administrative Decisions Tribunal overturned the Guardianship Tribunal's decision and held that the nephew was entitled to procedural fairness whether he was on a 'fishing expedition' or not: *TC v Public Guardian* [2006] NSWADTAP 15, [36].

305 J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 124; T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 100-1; *MB* [2004] WAGAB 25, [34]-[35].

306 Privacy Commissioner and Office of the Public Advocate, *Private Lives? An Initial Investigation of Privacy and Disability Issues* (1993) 5, 12. This is the combined effect of General Principles 2 and 11 of the *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld). Also note art 22 of the *Convention on the Rights of Persons with Disabilities*, adopted by the United Nations General Assembly on 13 December 2006 and opened for signature on 30 March 2007: *Resolution on the Convention on the Rights of Persons with Disabilities*, GA Res 61/106 of 13 December 2006, UN GA, 61st sess, 76th plen mtg, UN Doc A/Res/60/106 (2006), Annex 1.

307 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 160. The Commission notes some limitations of this argument. It could not be argued, for example, that a catastrophically injured person seeking compensation to provide for his or her future care genuinely has a 'choice' as to whether to pursue his or her rights through litigation or not.

3.72 Some judicial support for this view is found in a rationale advanced by members of the House of Lords in *Scott v Scott*<sup>308</sup> for recognising the exception to open justice in cases invoking the *parens patriae* jurisdiction. It was considered that such matters are essentially domestic and private in nature and therefore need not be open to the public:<sup>309</sup>

The affairs are truly private affairs; the transactions are transactions truly intra familiar; and it has long been recognised that an appeal for the protection of the Court in the case of such persons does not involve the consequences of placing in the light of publicity their truly domestic affairs.

### *Matters private to others*

3.73 This leads to the third element of the adult-focused nature of the jurisdiction, which applies not to the private information of the adult, but to the private information of other parties involved in the guardianship system. This element is based on the fact that the guardianship system does not, like other types of litigation, involve parties who are pursuing rights for their own benefit.<sup>310</sup>

3.74 Instead, proceedings are generally brought by a person who cares about an adult with a view to safeguarding that adult's rights and interests.<sup>311</sup> If the parties to a proceeding participate on this basis, and are not pursuing personal interest, it may be inappropriate to suggest that such action would result in their private information being made public. One of the concerns may be that if one or more of the consequences of seeking the assistance of the guardianship system is seen as undesirable, then this may impair its effective functioning because people will be discouraged from using it.

3.75 Similar arguments can be made in relation to information which is before the Tribunal during proceedings. It is desirable that decision-makers have access to all relevant information needed to decide a matter. However, because these proceedings raise such private matters, there are concerns that people may be reluctant to participate in a frank and genuine way without some assurance of confidentiality.<sup>312</sup> These concerns might arise in relation to private assessments about an adult made by a health

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308 [1913] AC 417.

309 Ibid 483 (Lord Shaw). Lord Atkinson also referred to the jurisdiction as 'quasi-domestic': 462. However, such an analysis has been the subject of some criticism: J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 159.

310 T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 100–1. Also see J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 160.

311 The Commission is aware, however, that this is not always the case as some guardianship hearings involve people seeking to advance personal interests rather than those of the adult. For example, note 304 of this Report.

312 *LT (Deceased) and JTW* [2005] WASAT 264, [26], [28]; *Re MM* (2001) 28 SR (WA) 320, 332; Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 4. In *LT (Deceased) and JTW* [2005] WASAT 264, [28] (albeit in the slightly different context of a refusal to allow a party to inspect documents in relation to a concluded proceeding of the State Administrative Tribunal), Mr Mansveld said:

[T]his is important in maintaining the integrity of the processes of the Tribunal, to ensure that people continue to feel confident to provide candid information to the Tribunal without fear that the information will, as a matter of course, find its way into other forums.

professional or in relation to disclosures by family members of an adult about relevant conduct or behaviour within that family.

### *Less contesting of issues*

3.76 In the wider legal system, the parties to a dispute contest issues of fact and law with the goal of persuading a court to decide a matter in favour of one party's rights. It has been argued that this contest ensures that all avenues of inquiry that may be of advantage to a party are identified and tested.<sup>313</sup> Further, in the wider legal system, the absence of a 'contradictor' is often seen as giving rise to a need for greater care to be taken by the side presenting an argument<sup>314</sup> and greater scrutiny to be given to an argument by the court or other tribunal determining the case.<sup>315</sup>

3.77 In contrast, the primary focus of the guardianship system is on pursuing an outcome that promotes and safeguards the rights and interests of the adult. Because the focus of all parties participating in guardianship proceedings is the same – achieving an appropriate outcome for the adult – issues of fact or law may not be raised or tested before the Tribunal. In other words, the adult-focused nature of the guardianship system could lead to disputes being resolved without the rigorous testing of issues that can occur when there are two parties engaged in a contest with each seeking to vindicate their own rights.

3.78 This is particularly so in proceedings where all active parties agree with a particular course of action and so do not contest issues before the Tribunal. In those cases, the Tribunal will test the relevant matters of which it must be satisfied before it can make an order, although its scope for doing so is affected by the challenges facing this jurisdiction such as its high-volume caseload.

3.79 This problem of contesting matters may still arise even where there is some dispute as to what outcome best advances an adult's rights and interests. The rigorous contesting of issues in the wider legal system is underpinned by the notion that it is a person himself or herself who is the best person to pursue his or her rights. In guardianship proceedings, it will not generally be the case that the adult is one of the main protagonists arguing for a particular outcome; rather the dispute will usually be between people other than the adult who are seeking to argue their view of what would advance that adult's rights and interests. Accordingly, even in those cases where there is a dispute, the issues may not be tested to the same extent or in the same way that they may be in the wider legal system.

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313 Australian Law Reform Commission, *Review of the federal civil justice system*, Discussion Paper No 62 (1999) [2.30], note 58, citing J Frank, *Courts on trial: Myth and reality in American justice* (1949) 80: adversaries 'sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked'.

314 For example, *Legal Profession (Barristers) Rule 2004* (Qld) rr 25–26; *Surefire Holdings Pty Ltd v Oxley Sportsdrome Pty Ltd* [2001] QSC 085 (Atkinson J) [14]–[16], citing *Re Griffiths* [1991] 2 Qd R 29, 35 (Byrne J).

315 For example, see the observations of Bergin J of the New South Wales Supreme Court as to how she approaches ex parte interlocutory injunctions: Justice PA Bergin, 'Interlocutory Procedures' (Paper presented at New South Wales College of Law CLE, Sydney, 28 November 2000) 5–6.

3.80 This element of the adult-focused nature of the guardianship system may favour greater openness. If the issues before the Tribunal are not being tested as they would be in the wider legal system, other safeguards designed to ensure high-quality decision-making may be needed. One of these is openness and the transparency, accountability, consistency and predictability it promotes.

### ***The inquisitorial features of the Tribunal***

3.81 The third feature of the guardianship system that may impact upon the role of confidentiality is the Tribunal's inquisitorial attributes.<sup>316</sup>

3.82 Granting jurisdiction to a tribunal is commonly motivated by a desire that it deal with matters differently from the courts.<sup>317</sup> This was the intention for the Guardianship and Administration Tribunal. The Commission's 1996 report, which recommended the establishment of the Tribunal, favoured such an approach because of its increased accessibility due to reduced cost and formality, the ability of the Tribunal to ensure for itself that it had all of the necessary information for a decision, and the value of having Tribunal members with skills and expertise in the area of impaired capacity.<sup>318</sup>

#### ***'Inquisitorial' tribunals***

3.83 Tribunals have sometimes been described as having 'inquisitorial' powers,<sup>319</sup> with reference to the approach taken by the legal systems of Europe.<sup>320</sup> The distinguishing characteristic of such an approach is that greater control over the way in which a case is formulated and presented resides with the judge or decision-maker than in the adversarial system which instead situates primary responsibility for the running of disputes with the parties.<sup>321</sup> Although there are significant differences between

<sup>316</sup> The Commission's terms of reference require it to examine the function and powers of the Tribunal in stage two of its review so this discussion is based on the Tribunal's current legislative framework. The Commission's terms of reference are set out in Appendix 1 of this Report.

<sup>317</sup> N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41, 42; N O'Neill, 'Tribunals – They Need to be Different' (Paper presented at the Fourth Australian Institute of Judicial Administration Conference, Sydney, 8 June 2001) 6; R Creyke, 'Better decisions and federal tribunals in Australia' (2004) 84 *Reform* 10, 10. See also Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 (1996) 218.

<sup>318</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 (1996) 218–20. All Australian States and Territories, apart from the Northern Territory, also have guardianship tribunals (or boards). Even in the Northern Territory, where the Local Court hears guardianship matters, the court is permitted to regulate its own procedures, which includes the freedom to depart from the rules of evidence: *Adult Guardianship Act* (NT) s 12. See also T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 2–3.

<sup>319</sup> For example, G Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal – A Comparative Perspective' (1982) 13 *Federal Law Review* 150; J Dwyer, 'Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal's Use of Inquisitorial Processes' (2002) 22 *Journal of the National Association of Administrative Law Judges* 81.

<sup>320</sup> N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 4–5.

<sup>321</sup> Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89 (2000) [1.117]; G Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal – A Comparative Perspective' (1982) 13 *Federal Law Review* 150, 150. For a discussion of the features of an inquisitorial system, see Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking the federal civil litigation system*, Issues Paper No 20 (1997) [2.5]–[2.9]; A Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial' (2004) 90 *Cornell Law Review* 1181, 1187–8, citing A Engelmann, *A History of Continental Procedure* (1927) 3–81.

adversarial and inquisitorial systems, there is a trend towards ‘convergence’ where the two systems draw upon and incorporate aspects of one another into their own systems.<sup>322</sup>

3.84 Despite being referred to as ‘inquisitorial’, it is important to note that such tribunals in Australia still embody many of the features of the adversarial system. For example, most tribunals still rely heavily on the holding of hearings and taking of oral evidence.<sup>323</sup> These tribunals are therefore better described as adopting *elements* of inquisitorial practice.<sup>324</sup>

3.85 Bedford and Creyke, in *Inquisitorial Processes in Australian Tribunals*, identify 13 legislative indicators that a tribunal has inquisitorial elements:<sup>325</sup>

1. A duty to inquire;
2. The ability to inform itself;
3. The power to compel the production of witnesses;
4. The power to compel the production of documents;
5. The discretion of the tribunal to determine its own procedure;
6. The informality of hearings;
7. The absence of an obligation to abide by the rules of evidence;
8. The requirement to provide fair process;
9. The ability to make a decision on the papers;
10. The need for the proceedings to be reasonably prompt;
11. The absence of a burden of proof on the parties;

<sup>322</sup> N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 5; Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No 89 (2000) [1.126]–[1.130]. As a result, adversarial courts have been increasingly given some powers that might be regarded as inquisitorial in nature. A recent example is pt VII div 12A of the *Family Law Act 1975* (Cth) which grants the Family Court greater control over ‘child-related proceedings’. See also *Uniform Civil Procedures Rules 1999* (Qld) ch 10 (Court supervision), r 391 (Court may call evidence), r 414 (Power to issue subpoena).

<sup>323</sup> One of the research methodologies employed by Bedford and Creyke’s study of eight tribunals was to attend tribunal hearings. The discussion of the results of that research makes clear the continued significance of this adversarial element in the practice of those tribunals: N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 20–4. In a true inquisitorial system, the formal hearing and the process of receiving oral evidence is of much less significance: Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking the federal civil litigation system*, Issues Paper No 20 (1997) [2.7]. For an historical account of how the use of juries led to the reliance by the adversarial system on a formal trial with oral evidence, see JA Jolowicz, *On Civil Procedure* (2000) 373–4.

<sup>324</sup> N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 5–11.

<sup>325</sup> *Ibid* 15.

12. The requirement for the standard of proof that the tribunal be ‘satisfied’ as to its decision; and
13. The absence of legal representation for parties and their right to self-represent.

3.86 The presence of these legislative indicators may not reflect accurately the extent to which a tribunal operates inquisitorially in *practice*. Bedford and Creyke’s study revealed a gap between the legislative inquisitorial powers granted to a tribunal and the relatively modest use of those powers.<sup>326</sup> For example, the tribunals with the power to summon witnesses or compel production of documents that were examined in that study used those powers infrequently.<sup>327</sup> Reasons identified for not utilising inquisitorial powers include insufficient resources to seek further information,<sup>328</sup> concerns about actual or apprehended bias<sup>329</sup> and the expectations of parties that an adversarial approach will be adopted.<sup>330</sup>

3.87 Nevertheless, a more inquisitorial approach is sometimes adopted when there is only one party at a hearing (and so there is no contradictor),<sup>331</sup> or if the parties are not legally represented.<sup>332</sup> The need to use inquisitorial powers may also arise where there are facts of which the tribunal must be satisfied but either no evidence or insufficient evidence has been adduced by the parties.<sup>333</sup>

#### *The Guardianship and Administration Tribunal*

3.88 The Guardianship and Administration Tribunal has nearly all of Bedford and Creyke’s legislative inquisitorial features<sup>334</sup> and has additionally been given power to

326 Ibid 25. For a discussion of examples where a tribunal (the Administrative Appeals Tribunal) has utilised its inquisitorial powers, see J Dwyer, ‘Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use of Inquisitorial Processes’ (2002) 22 *Journal of the National Association of Administrative Law Judges* 81, 97–129.

327 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 25.

328 Ibid 27, 64. See also J Dwyer, ‘Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use of Inquisitorial Processes’ (2002) 22 *Journal of the National Association of Administrative Law Judges* 81, 83.

329 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 25. See also N Rees, ‘Procedure and evidence in “court substitute” tribunals’ (2006) 28 *Australian Bar Review* 41, 58.

330 J Dwyer, ‘Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use of Inquisitorial Processes’ (2002) 22 *Journal of the National Association of Administrative Law Judges* 81, 83.

331 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 20–1; N O’Neill, ‘Tribunals – They Need to be Different’ (Paper presented at the Fourth Australian Institute of Judicial Administration Conference, Sydney, 8 June 2001) 12 (arguing that adversarial approaches in tribunals will be more appropriate where there is ‘a protagonist making a case against an opponent’).

332 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 15, 18, 21; J Dwyer, ‘Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use of Inquisitorial Processes’ (2002) 22 *Journal of the National Association of Administrative Law Judges* 81, 115–20; N O’Neill, ‘Tribunals – They Need to be Different’ (Paper presented at the Fourth Australian Institute of Judicial Administration Conference, Sydney, 8 June 2001) 11.

333 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 66; J Dwyer, ‘Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use of Inquisitorial Processes’ (2002) 22 *Journal of the National Association of Administrative Law Judges* 81, 103–15.

334 The one legislative feature not expressly included is the ability to determine matters on the papers without a hearing. However, such an approach may be permitted by s 131 of the *Guardianship and Administration Act 2000* (Qld), which is a wider power.

make orders on its own initiative.<sup>335</sup> These features can be classified into three broad categories permitting the Tribunal to:

- determine its own procedure at hearings;
- introduce new evidence; and
- make substantive orders on its own initiative.

#### TRIBUNAL CONTROL OVER PROCEDURE

3.89 The Tribunal has wide discretion as to how it conducts its hearings. It has the power to determine its own procedure,<sup>336</sup> it is not required to follow the rules of evidence,<sup>337</sup> and it is required to resolve matters ‘simply and quickly’.<sup>338</sup> Also, legal representation (or representation of any kind) requires the leave of the Tribunal.<sup>339</sup> These powers do not, of course, absolve the Tribunal from observing the rules of procedural fairness. That obligation is expressly preserved.<sup>340</sup>

#### TRIBUNAL CONTROL OF EVIDENCE<sup>341</sup>

3.90 The Tribunal has a general power to inform itself on a matter in a way that it considers appropriate.<sup>342</sup> It is also given specific powers to inform itself in particular

<sup>335</sup> Permitting the Tribunal to make orders on its own initiative, which are not sought by the parties, is a clear departure from the adversarial model where the parties control the scope of their dispute. See JA Jolowicz, ‘Adversarial and Inquisitorial Models of Civil Procedure’ (2003) 52 *International and Comparative Law Quarterly* 281, 289 where he says of the adversarial system:

it is for the parties to define the subject matter of their dispute ... [This] is essential to preservation of the dispositive principle – the principle that the parties are (generally) free to dispose of their rights and that it is not for the judge to readjust the terms of the litigation to make it conform to his view of the substance of the dispute between the parties.

<sup>336</sup> *Guardianship and Administration Act 2000* (Qld) ss 100, 104, 107, 110. See also s 31(1) of the *Guardianship and Administration Act 2000* (Qld) which provides that the Tribunal may conduct a review of an appointment of a guardian ‘in the way it considers appropriate’.

<sup>337</sup> *Guardianship and Administration Act 2000* (Qld) s 107(2).

<sup>338</sup> *Guardianship and Administration Act 2000* (Qld) s 107(1).

<sup>339</sup> *Guardianship and Administration Act 2000* (Qld) ss 123, 124.

<sup>340</sup> *Guardianship and Administration Act 2000* (Qld) s 108(1). This could also be regarded as a marker of a tribunal with inquisitorial features. The operation of the adversarial system, through its procedural rules and the laws of evidence, ordinarily ensures that procedural fairness is accorded to parties: N Rees, ‘Procedure and evidence in “court substitute” tribunals’ (2006) 28 *Australian Bar Review* 41, 55, 86. In contrast, the procedures of inquisitorial systems do not of themselves do so, and for this reason inquisitorial systems commonly address this issue specifically and impose an explicit requirement that parties must be able to see all of the evidence and make submissions on it: JA Jolowicz, ‘Adversarial and Inquisitorial Models of Civil Procedure’ (2003) 52 *International and Comparative Law Quarterly* 281, 282–3; A Kessler, ‘Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial’ (2004) 90 *Cornell Law Review* 1181, 1214–5.

Note that some have questioned, however, how far this procedural flexibility and the freedom to depart from the rules of evidence permits a tribunal to diverge from the procedures of a court given the overriding obligation to accord parties procedural fairness: N Rees, ‘Procedure and evidence in “court substitute” tribunals’ (2006) 28 *Australian Bar Review* 41, 75–6.

<sup>341</sup> The power to control the method of proceedings can also affect what evidence is before the Tribunal. For example, not being required to follow the rules of evidence can result in a wider range of material being before the Tribunal.

<sup>342</sup> *Guardianship and Administration Act 2000* (Qld) s 107.

circumstances, for example, to inquire as to the appropriateness and competence of a particular person to be appointed as a guardian or administrator.<sup>343</sup>

3.91 In addition to these *powers* to undertake inquiries, the legislation also imposes a *duty* on the Tribunal to inquire.<sup>344</sup> Section 130(1) of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to ‘ensure, as far as it considers it practicable, it has all the relevant information and material’.<sup>345</sup> Again, further specific duties to inquire are imposed in particular circumstances such as the Tribunal’s obligation to seek views of particular people when hearing an application for the sterilisation of a child with an impairment.<sup>346</sup>

3.92 Other powers that permit the Tribunal to receive its own evidence include specific powers to call its own witnesses<sup>347</sup> and to seek particular documents.<sup>348</sup> As noted above, the Tribunal is not bound by the rules of evidence.<sup>349</sup>

3.93 A final inquisitorial feature of the Tribunal relates to the standard and burden of proof. The Tribunal is required when making a decision to be ‘satisfied’ as to its

343 *Guardianship and Administration Act 2000* (Qld) ss 18, 30. The *Guardianship and Administration Act 2000* (Qld) also includes other provisions that permit the Tribunal to seek further information or inform itself in specific circumstances: ss 76 (Health providers to give information), 80P (Health providers to give information), 134 (Report by tribunal staff), 148 (Application for entry and removal warrant) and 153 (Records and audit). See also s 122 of the *Powers of Attorney Act 1998* (Qld) which is in similar terms to s 153 of the *Guardianship and Administration Act 2000* (Qld), although it relates to both the Supreme Court and the Tribunal exercising powers under that Act: *Powers of Attorney Act 1998* (Qld) s 109A.

344 Such a duty to inquire is a less common inquisitorial feature of tribunals in Australia. Of the eight tribunals examined by Bedford and Creyke, only the New South Wales Administrative Decisions Tribunal was granted such a power: N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 17.

345 Section 131 of the *Guardianship and Administration Act 2000* (Qld) permits the Tribunal, however, to proceed without further information if there are special or urgent circumstances, or if the active parties to the proceeding agree. See also s 120 of the *Powers of Attorney Act 1998* (Qld) which is in virtually identical terms, although it relates to both the Supreme Court and the Tribunal exercising powers under that Act: *Powers of Attorney Act 1998* (Qld) s 109A.

346 *Guardianship and Administration Act 2000* (Qld) s 80D(3). The *Guardianship and Administration Act 2000* (Qld) also includes other provisions that impose a duty on the Tribunal to inquire in specific circumstances: ss 118(2)(c)(ii) (Tribunal advises persons concerned of hearing), 146(3) (Declaration about capacity), sch 1 pt 2 s 12 (Health care principle).

347 *Guardianship and Administration Act 2000* (Qld) ss 110, 130, 135. For a recent discussion of the common law power of courts to call witnesses of their own motion, see *Huang v University of New South Wales (No 3)* (2006) 154 FCR 16, 21–3.

348 *Guardianship and Administration Act 2000* (Qld) ss 110, 130, 135. Again, in addition to the general power, the legislation also refers to powers to seek particular documents or documents in a specific situation: *Guardianship and Administration Act 2000* (Qld) ss 18 (Inquiries about appropriateness and competence), 49 (Keep records), 153 (Records and audit).

349 *Guardianship and Administration Act 2000* (Qld) s 107(2).

decision<sup>350</sup> and there is no burden of proof placed on a party by the *Guardianship and Administration Act 2000* (Qld).<sup>351</sup> In the absence of the parties' responsibility to prove a particular case, the Tribunal may need to make further inquiries before it can be 'satisfied' of the particular matters necessary for a decision.

#### DECISIONS ON THE TRIBUNAL'S INITIATIVE

3.94 In addition to resolving the issues placed before it by the parties, the Tribunal is also given quite extensive powers to make orders 'on its own initiative'.<sup>352</sup> For example, the Tribunal may, on its own initiative, make declarations as to a person's capacity,<sup>353</sup> appoint guardians and administrators,<sup>354</sup> and review those appointments.<sup>355</sup>

#### *What might this mean for confidentiality?*

3.95 One way in which the inquisitorial nature of the Tribunal may impact on confidentiality in the guardianship system is in relation to the Tribunal's requirement to observe the rules of procedural fairness.<sup>356</sup> One factor that shapes the content of that

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The following provisions of the *Guardianship and Administration Act 2000* (Qld) provide that the Tribunal must be 'satisfied' as to a relevant matter: ss 12(1) (appointing a guardian or an administrator), 13(1) (appointing a guardian or an administrator six months in advance of the adult turning 18), 31(2)–(3) (reviewing the appointment of a guardian or an administrator), 69–73 (making a range of decisions about special health matters such as sterilisations and terminations), 80C(2) (whether sterilisation of a child is in his or her best interests), 80G(2) (making a confidentiality order in relation to the sterilisation of a child), 80J(3) (reducing time for notice of a hearing in relation to the sterilisation of a child), 109(2) (making a confidentiality order), 112(1)–(2) (permitting publication of information about a proceeding), 129(1) (making an interim order), 138A(1)(b) (dismissing an application as frivolous, trivial or vexatious), 149(1) (issuing a warrant for removal of adult), sch 2 s 13(3) (approving clinical research).

The *Powers of Attorney Act 1998* (Qld) also contains references to the Tribunal being 'satisfied' as to certain matters: ss 18(2) (confirming the operation of a power of attorney when the principal becomes incommunicate), 113(2) (declaration about validity of a power of attorney, enduring power of attorney or advance health directive), 123(1) (dismissing an application as frivolous, trivial or vexatious). Those provisions of the *Powers of Attorney Act 1998* (Qld) also apply to the Supreme Court: *Powers of Attorney Act 1998* (Qld) s 109A.

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This does not mean, however, that there is not a practical onus on a party to prove his or her case: N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 59, citing for example, *McDonald v Director-General of Social Security* (1984) 1 FCR 354; and *Butler v Fourth Medical Services Review Tribunal* (1997) 47 ALD 647.

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*Guardianship and Administration Act 2000* (Qld) ss 12(3) (appointing a guardian or an administrator), 13(8) (appointing a guardian or an administrator six months in advance of the adult turning 18), 29(a) (reviewing an appointment of a guardian or an administrator), 74(3) (changing the appointment order of a guardian to make subsequent special health care decisions), 80G(5) (making a confidentiality order in relation to the sterilisation of a child), 109(5) (making a confidentiality order), 138A(2) (dismissing frivolous, trivial or vexatious applications), 146(2) (making a declaration of capacity), 153(3) (seeking records or an audit of an administrator), 154(3) (ratifying informal decision-making), 161(1) (reviewing the registrar's decision), 241(3) (transferring proceedings to the Supreme Court – the Court is also given power to act on its own initiative to transfer proceedings to the Tribunal), 243(2) (making an interim appointment when there are active Supreme Court proceedings).

See also s 122(2) of the *Powers of Attorney Act 1998* (Qld) which is in similar terms to s 153(3) of the *Guardianship and Administration Act 2000* (Qld), although it relates to both the Supreme Court and the Tribunal exercising powers under that Act: *Powers of Attorney Act 1998* (Qld) s 109A.

The power of a Tribunal to make final orders on its own initiative was not one of the indicators identified by Bedford and Creyke as suggestive of an inquisitorial character. However, the power to make orders not sought by the parties is an inquisitorial feature: see note 335 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 146(2).

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*Guardianship and Administration Act 2000* (Qld) ss 12(3), 13(8).

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*Guardianship and Administration Act 2000* (Qld) s 29(a).

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*Guardianship and Administration Act 2000* (Qld) s 108(1).

requirement is the Tribunal's legislative framework.<sup>357</sup> Being granted some powers to act inquisitorially (and therefore differently from a court) may alter what steps are required of the Tribunal to accord active parties procedural fairness. In *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court said:<sup>358</sup>

The content to be given to that obligation to accord procedural fairness must, of course, accommodate the particular provisions made in the Act which regulated how the Tribunal was to go about its task.

3.96 An inquisitorial power that could be relevant in this context is the Tribunal's powers (and sometimes duties) to inform itself of certain matters.<sup>359</sup> If the parties have not, or cannot, provide information that the Tribunal regards as necessary to determine whether it can be satisfied as to particular matters, then the Tribunal can (and perhaps must in some circumstances) take steps to ascertain that information.

3.97 An example of when the Tribunal sometimes undertakes its own inquiries is when ascertaining the views and wishes of the adult by speaking to him or her at a hearing in the absence of other active parties. When this is done, a summary of the information given by the adult is then relayed orally to the active parties on their return to the hearing.<sup>360</sup> Such an approach is said to be justified as best practice for obtaining information from the adult where the adult may be easily influenced by others, where there are allegations of abuse, or where the adult does not wish to speak in the presence of others, and as a practice that accords with the General Principles.<sup>361</sup> The absence of other active parties might be thought appropriate on the basis that the requirements of procedural fairness may be different for an inquisitorial tribunal than for a court. The gathering of information in this manner also has implications for the principle of open justice as the hearing is closed while the Tribunal speaks with the adult. The Commission discusses this practice in Chapter 4 of this Report.<sup>362</sup>

3.98 Other elements of the Tribunal's inquisitorial nature that may influence how procedural fairness is accorded include the Tribunal's power to determine its own procedure,<sup>363</sup> the requirement to resolve matters 'simply and quickly',<sup>364</sup> and the

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357 N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (2006) 29. In relation to factors that inform what is required by way of procedural fairness in particular contexts, see para 3.51–3.53 of this Report.

358 (2005) 225 CLR 88, 93.

359 See para 3.90–3.92 of this Report.

360 Information provided at a focus group with members of the Tribunal: submission F18.

361 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007. In particular, the President noted the importance of General Principles 7 (maximum participation, minimal limitations and substituted judgment), 8 (maintenance of existing supportive relationships) and 11 (confidentiality). See *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1.

362 See para 4.30–4.32, 4.195–4.201 of this Report.

363 *Guardianship and Administration Act 2000* (Qld) ss 100, 104, 107, 110. See also s 31(1) of the *Guardianship and Administration Act 2000* (Qld) which provides that the Tribunal may conduct a review of an appointment of a guardian 'in the way it considers appropriate'.

364 *Guardianship and Administration Act 2000* (Qld) s 107(1).

Tribunal's freedom to depart from the rules of evidence.<sup>365</sup> The formal procedures of courts and their rules of evidence are the mechanisms by which procedural fairness is accorded to parties to court proceedings.<sup>366</sup> The requirement for the Tribunal to be less formal and more flexible in its proceedings does not absolve it from being fair,<sup>367</sup> but may permit it to accord the required procedural fairness in a more flexible manner.<sup>368</sup>

3.99 A second way in which the Tribunal's inquisitorial powers may impact upon confidentiality arises in relation to the information that is generated or produced prior to hearing. In an adversarial setting, party control over evidence tends to ensure its relevance to the dispute. The disclosure of documents by a party to other parties is only required if the documents are relevant to issues to be resolved in the proceeding.<sup>369</sup> The parties then exercise further control over the relevance of information by determining which evidence is before the court and may be relied upon in making its decision.<sup>370</sup>

3.100 In contrast, information is received by the Tribunal without the same degree of control by parties. Requests by the Tribunal prior to the hearing for information from the person making the application or from the adult's family and friends can result in a significant body of sensitive material being produced that is irrelevant to the questions to be resolved. Further, parties before the Tribunal are generally not legally represented and so individuals presenting their own cases may be inclined to present all of the information they have to avoid omitting relevant material.

3.101 This issue is more properly characterised as one about facilitating disclosure of information to active parties on the basis of *relevance* rather than one about imposing confidentiality. As discussed above, only information that is 'credible, relevant and significant' needs to be disclosed to active parties.<sup>371</sup> Information that is irrelevant falls

365 *Guardianship and Administration Act 2000* (Qld) s 107(2).

366 See note 340 of this Report.

367 The Tribunal is expressly bound to observe the rules of procedural fairness: *Guardianship and Administration Act 2000* (Qld) s 108(1).

368 *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 93–4. See also GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 8, citing RE Wraith and PG Hutchesson, *Administrative Tribunals* (1973) 131; WB Lane and S Young, *Administrative Law in Queensland* (2001) 148–9. Also see *Virgin Airlines Pty Ltd v Hopper* [2007] QSC 075, [78]–[80] where Moynihan J commented, in relation to s 208 of the *Anti-Discrimination Act 1991* (Qld), that the requirement for the Anti-Discrimination Tribunal to act with less formality and greater flexibility 'cannot effect the "irreducible minimum" of procedural fairness spoken of in *Kioa v West*' and that the question 'involves a commonsense approach not constrained by technical or procedural considerations, but focussed on whether the appellant was afforded a proper opportunity in the circumstances'. Note, however, that this flexibility granted to tribunals can also make their task of ensuring that they have accorded parties procedural fairness very difficult. For a discussion of some of the problems that can arise see N Rees, 'Procedure and evidence in "court substitute" tribunals' (2006) 28 *Australian Bar Review* 41, 54.

369 Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking the federal civil litigation system*, Issues Paper No 20 (1997) [7.14]–[7.29] which discusses a range of different approaches to the issue of what is considered a relevant document. In Queensland, see *Uniform Civil Procedures Rules 1999* (Qld) r 211.

370 JA Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International and Comparative Law Quarterly* 281, 289.

371 See para 3.40–3.45 of this Report as to when information must be disclosed as being 'credible, relevant and significant' and a discussion of the High Court's decision in *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88.

Further, an active party's right to inspect documents is limited to those documents that are 'directly relevant to an issue in the proceeding': *Guardianship and Administration Act 2000* (Qld) s 108(2).

outside that test and does not give rise to questions of confidentiality. However, there may be an impact upon confidentiality, in practice, if a distinction is not made between non-disclosure of information because it is irrelevant and non-disclosure that occurs because the information is treated as confidential. The Commission's view on how this issue should be handled is outlined later in this chapter under the heading 'Confidentiality and relevance'.<sup>372</sup>

3.102 The above discussion suggests that, in terms of confidentiality, the inquisitorial features of the Tribunal may not impact upon *what* should be disclosed in that there is still a requirement to disclose relevant information to the parties. However, its impact may be felt in terms of *how* that disclosure occurs. In other words, the nature of the Tribunal and its inquisitorial powers do not allow information to be withheld, but may permit a different approach to how information is disclosed.

## The Discussion Paper

3.103 In its Discussion Paper, the Commission sought submissions on the matters it proposed as being relevant to determining the role of confidentiality in the guardianship system, namely the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system.<sup>373</sup> In particular, the Commission sought submissions on whether these matters should guide this stage of the Commission's review and, if so, how any conflict or tension between and within them should be resolved.

## Submissions

3.104 Only a modest number of submissions specifically considered which matters should guide this stage of the Commission's review but of those that did, all agreed with the relevance of the three matters identified by the Commission.<sup>374</sup> These respondents included the Adult Guardian, the Public Trustee of Queensland, the Public Advocate, the Department of Justice and Attorney-General, Carers Queensland, Queensland Advocacy Incorporated, Endeavour Foundation, Royal College of Nursing Australia, two media organisations and a parent of an adult with impaired capacity.

3.105 One submission, however, considered that the extent to which the nature of the guardianship system is 'protective' was overstated in the Commission's Discussion Paper.<sup>375</sup> Queensland Advocacy Incorporated was concerned that such an approach gave undue weight to confidentiality. It acknowledged the protective elements of the

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<sup>372</sup> See para 3.145–3.155 of this Report.

<sup>373</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [3.66]–[3.69] Q3-1, Q3-2.

<sup>374</sup> Submissions 1H, 60, 73A, 85, 97, 98, 100, 101, 102, 118, 119, 120, 122A, 124, 126, 127, 134, 135, 137, 149. A few of these submissions did not mention procedural fairness (focusing instead on open justice) but they did not dispute its relevance. Submission F8 also suggested a fourth matter was relevant: that taking responsibility for the adult meant providing care for, and supervision of, the adult rather than just making decisions on his or her behalf.

<sup>375</sup> Submission 102. Submission 149 also generally favoured a move away from 'overprotecting' people with impaired capacity.

system but felt that greater emphasis should be given to ‘modern disability thinking along the lines of empowerment and inclusion’.

3.106 Although there was agreement as to the matters that were relevant when considering the role of confidentiality in the guardianship system, the submissions diverged as to how any tension or conflict between them should be resolved.

3.107 Staff of the Office of the Adult Guardian, the Public Advocate, the Department of Justice and Attorney-General, the President of the New South Wales Guardianship Tribunal and Australian Lawyers Alliance resolved the conflict between these matters by preferencing the rights and interests of the adult.<sup>376</sup> The main argument advanced in support of this view was that the nature of the guardianship system required that the paramount consideration be promoting and safeguarding the rights and interests of adults with impaired capacity. Australian Lawyers Alliance argued:<sup>377</sup>

the paramount consideration in all instances must be what is best for and in the interests of the adult with impaired decision-making capacity (‘the adult’) about whom sometimes complex and always sensitive and personal decisions are being made — where a conflict arises the balance should be struck in favour of the adult. [note omitted]

3.108 Similar arguments were made by the Public Advocate and the Department of Justice and Attorney-General.<sup>378</sup>

3.109 The Public Advocate and Australian Lawyers Alliance also based their conclusion on the importance of respecting the adult’s human rights, including his or her privacy.<sup>379</sup> The President of the New South Wales Guardianship Tribunal put forward other arguments: the adult has not chosen to bring his or her situation into the guardianship arena,<sup>380</sup> the information about the adult would not be in the public domain but for his or her disability, and disclosure of information may expose the adult to abuse or permit abuse to continue.<sup>381</sup>

3.110 A final argument advanced by the Public Advocate for giving priority to the rights and interests of the adult was based on an analysis of the requirements of procedural fairness at common law.<sup>382</sup> She argued that people other than the adult would not be regarded as having a *legal* ‘right, interest or legitimate expectation’ in

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376 Submissions 1H, 97, 126, 137, F23.

377 Submission 97.

378 Submissions 1H, 126.

379 Submissions 1H, 97.

380 See also submission 126.

381 Submission 137.

382 Submission 1H.

guardianship proceedings sufficient to attract procedural fairness at common law.<sup>383</sup> The Public Advocate instead characterised the interest of such people as a strong *personal* interest. In contrast, in her view, the adult will nearly always have legal rights or interests that are affected by guardianship proceedings. The Public Advocate suggested that the recognition by the common law of the greater interest of the adult in proceedings is a further argument for greater priority to be given to the adult's interests when determining the role of confidentiality.

3.111 The majority of submissions that considered these three matters emphasised those that promoted greater openness in the guardianship system: open justice and procedural fairness. A few of the submissions couched this in terms of the priority to be given to particular matters. Submissions from three media organisations gave primacy to the principle of open justice,<sup>384</sup> while a submission from an individual resolved any conflict between the principles by preferring procedural fairness over the nature of the guardianship system and giving the principle of open justice least weight.<sup>385</sup> The Royal College of Nursing Australia seemed to take a similar approach:<sup>386</sup>

There should always be caution in dealing with vulnerable people — their rights to privacy must take priority over the more esoteric rights of ‘the public’ to information. Certainly, where information that concerns another individual who is party to the proceedings is being considered, that person must be given procedural fairness, and be provided with the information as well as an opportunity to present their case to an impartial Tribunal.

3.112 Most submissions that favoured greater openness tended, however, to do so by making reference to how the balance is currently struck in the guardianship system. A number of submissions accepted that the nature of the system will impact upon the level of confidentiality that should be recognised, but felt that greater openness was needed and so suggested that more weight should be given to either open justice or procedural fairness or both.<sup>387</sup> Staff of the Office of the Adult Guardian, while regarding the interests of the adult as paramount,<sup>388</sup> also favoured a shift towards greater openness.<sup>389</sup>

3.113 The major argument advanced in favour of this view was that open justice and procedural fairness need not be in competition with safeguarding the rights and interests of adults, but may instead promote the achievement of this goal. This point was made

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383 The Public Advocate commented critically on the decisions of the New South Wales Administrative Decisions Tribunal that have recognised that people other than the adult may have rights, interests or legitimate expectations that can be affected by guardianship proceedings and so attract the requirements of procedural fairness: submission 1H. For example, *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [29]–[35] which is discussed at para 5.46–5.49 of this Report.

384 Submissions 98, 100, 118.

385 Submission 85.

386 Submission 60.

387 Submissions 73A, 101, 119, 124, 127, 134 (open justice only).

388 Submission F23.

389 Submission 122A.

in the Commission's Discussion Paper,<sup>390</sup> but a number of submissions gave particular weight to the argument that an adult's rights and interests (of which privacy is only one) are advanced by openness as this enhances the quality of decision-making in the guardianship system. For example, in its submission, Carers Queensland noted its preference for:<sup>391</sup>

legislative provisions that encourage open justice and procedural fairness in the guardianship system. The application of these concepts will result in greater accountability, consistency, transparency and scrutiny of the process and the decisions made. Importantly, through open justice and procedural fairness, better determinations will be reached about significant issues in the life of an adult and those close to the adult. This ultimately serves the primary purpose of the guardianship jurisdiction in protecting and safeguarding the rights and interests of people with impaired decision-making capacity.

3.114 A parent of an adult with impaired capacity made a similar point:<sup>392</sup>

Where the adult's needs are not being adequately met or protected it would seem in the interest of the adult to be more reasonable and rational not to impose confidentiality from the aspects of accountability and education. Both of these may be compromised and the right decision for the adult threatened under the present legislation. While this could affect the privacy of the adult on balance this is felt to be a more reasonable and better approach. How is it known that the primary focus of the guardianship system, safeguarding the adult's rights, is being achieved? Without openness and procedural fairness this may not be known. To me it is important enough that this take preference to the protection of privacy.

3.115 The ability of greater openness to safeguard the rights and interests of adults was also endorsed by Caxton Legal Centre and three media organisations.<sup>393</sup> One submission from a parent of an adult with impaired capacity expressed the view that greater openness would be a desirable shift away from 'overprotecting' adults with impaired capacity.<sup>394</sup>

3.116 Carers Queensland and Caxton Legal Centre also argued for a greater emphasis on according procedural fairness because the rights of people other than the adult are affected by the guardianship system.<sup>395</sup> Carers Queensland submitted.<sup>396</sup>

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390 For example, Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [3.47].

391 Submission 101.

392 Submission 73A.

393 Submissions 98, 100, 118, 124. Some of the submissions that favoured the primacy of the nature of the guardianship system also made this point: submissions 1H, 97.

394 Submission 149.

395 Submissions 101, 124. The Public Trustee of Queensland also emphasised the importance of procedural fairness: submission 127.

396 Submission 101.

While the primary purpose of the guardianship system is to protect and safeguard the rights and interests of the adult, the legislation also affects the fundamental rights and lives of those close to the adult, often family members and friends. Because of this, the guardianship system has additional responsibilities to consider apart from the privacy of the adult.

3.117 In making this argument, Caxton Legal Centre gave the following example:<sup>397</sup>

[A]n order changing the accommodation of an adult may dramatically impinge on other members of the family – who may have relocated to be close to the adult’s services, structured employment arrangements to suit the adult’s needs, or invested considerable energy and funds in converting a house into a disability-accessible home purely to cater for the needs of the disabled family member.

3.118 Two submissions also favoured greater openness to ensure community confidence in the guardianship system. Although giving primacy to the interests of the adult, the Adult Guardian noted that it ‘is important the community have confidence in the guardianship regime’ and that a ‘more open system may assist to relieve these [community] anxieties’.<sup>398</sup> Carers Queensland also argued that:<sup>399</sup>

A central argument against open justice in the guardianship jurisdiction is that the disclosure of such information would discourage people from participating where there is a genuine need. While this may be true for some people, there is also merit in the view that many people are currently already dissuaded from engaging with the system because they lack confidence in it to deliver a fair outcome. In this context, a system that applies open justice and procedural fairness might be construed to provide greater transparency and more scrutiny and therefore reach better and fairer decisions. This will ultimately increase people’s confidence and willingness to participate in the system.

3.119 Other arguments put forward in favour of greater openness were to address concerns about accountability in decision-making<sup>400</sup> and to enhance community education and understanding.<sup>401</sup>

3.120 As noted above, only a modest number of submissions specifically addressed the matters relevant to the role of confidentiality in the guardianship system as a discrete issue. Nevertheless, in the course of commenting on particular aspects of the confidentiality provisions, several submissions expressed general views about the balance between openness and confidentiality. These submissions are examined further in the relevant chapters that follow, but it is valuable to draw out some of the broad themes that emerged from the consultation in this chapter.

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397 Submission 124.

398 Submission 122A.

399 Submission 101.

400 Submissions 73A, 101.

401 Submissions 73A, 127.

3.121 The submissions as a whole revealed very strong support for increased openness in the guardianship system. Many of the submissions spoke of having mistrust in the system, with issues of confidentiality often underpinning those concerns. Many individuals and advocacy groups who have had contact with the system were of this view and the arguments put forward by these submissions reflect those outlined above. For example, many submissions called for greater accountability and transparency to ensure the quality of decision-making.<sup>402</sup> There was significant concern about the confidentiality provisions, designed for the protection of adults, instead protecting the statutory guardianship bodies and others.<sup>403</sup> It was also argued by a number of submissions that confidentiality was in fact impeding the support and care of the adult.<sup>404</sup>

3.122 There were also many submissions from individuals and advocacy groups who argued that they, or people they had supported, had been denied procedural fairness. For example, many members of the public who made submissions expressed concern about not being able to comment on, or have access to, information that was being considered in a decision-making process.<sup>405</sup> Many of these submissions also called for greater access to information in the guardianship system to make it fairer.<sup>406</sup>

3.123 The submissions as a whole did include some endorsement for the retention of confidentiality in the guardianship system, but it received considerably less support than achieving greater openness. Some submissions raised concerns about information about the adult, or those close to him or her, becoming available to the public or to other people who do not have an interest in the matter.<sup>407</sup> Some of these submissions also gave priority to safeguarding the rights and interests of the adult.<sup>408</sup> In general, however, the submissions as a whole favoured a shift towards greater openness in the guardianship system.

## The Commission's view

3.124 The Commission considers that the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system are the matters that should guide consideration of the role of confidentiality in the guardianship system.

3.125 The Commission's starting point for considering how these matters interact is that open justice and procedural fairness are fundamental principles of legal systems generally. However, the law concerning the application of both principles recognises that a measure of confidentiality can be appropriate in particular circumstances. The

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402 For example, submissions 16, 31, 50, 96, 98, 100, 123, 124, F7, F9, F12, F13, F15, F21.

403 For example, submissions 19B, 31B, 35B, 65, 100, 115A, F5, F6, F7, F10.

404 For example, submissions 16, 40B, 61, 107.

405 For example, submissions 11A, 11D, 14, 19B, 36A, 88, 100, 141.

406 For example, submissions 73, 80, 82, 96, F7, F8, F13, F15.

407 For example, submissions F4, F6.

408 For example, submissions 67, F8, F22.

Commission accepts that the nature of the guardianship system sufficiently differentiates it from other areas of law to permit some level of confidentiality greater than that which exists in legal systems generally. In reaching this conclusion, the Commission notes the purpose of the system is to promote and safeguard the rights and interests of the adult, including his or her privacy interests. It also notes that information about the adult is disclosed in this system which would ordinarily be kept private if he or she had capacity.

3.126 The question arises, though, as to how any tension or conflict between these matters should be resolved. The Commission considers that the current balance is weighted too heavily towards confidentiality and that the legislative framework governing the guardianship system should give greater emphasis to openness. As noted above, a move towards greater openness was strongly supported by the Commission's consultation.

3.127 In reaching this conclusion, there are two factors that the Commission considers decisive. The first is the need for the community to have confidence in the guardianship system. The submissions as a whole revealed some mistrust in the system, and issues of confidentiality often underpinned those concerns. The Commission is of the view that an effective guardianship system must not only be functioning properly, but be seen to be doing so. It considers that greater openness will bring both the accountability and transparency that will strengthen community confidence. Further, an integral part of community confidence in the guardianship system is increasing public awareness of its role, and greater openness will also facilitate the achievement of this goal.

3.128 The second factor relates to how the guardianship system can best promote and safeguard the rights and interests of the adult. The most compelling reason advanced to permit some level of confidentiality in the guardianship system is that some disclosures of information can harm the interests of the adults the system is designed to support. The Commission accepts that the disclosure of information may harm the privacy and other interests of the adult, but is also aware that a *failure* to disclose information can result in harm.

3.129 In this context, the Commission is of the view that insufficient weight has been given to the important role that open justice and procedural fairness play in promoting and safeguarding the rights and interests of adults with impaired capacity, both individually and as a group. Open justice fosters greater accountability and transparency which can improve decision-making by and for the adult. Similarly, procedural fairness ensures high quality decision-making by minimising the risk of determining matters on incomplete or untested evidence. In giving greater weight to the role that openness in decision-making can play in promoting and safeguarding the adult's rights and interests, the Commission acknowledges that there may be less priority given to some of the adult's interests, such as his or her privacy. It nevertheless considers such an approach, which enhances the quality of decision-making, will serve to advance the adult's interests overall.

3.130 Accordingly, in the following chapters of this Report, the Commission has been guided by these three matters, and in formulating its recommendations has given greater emphasis than is currently reflected in the legislation to promoting openness in the guardianship system.

## CONFIDENTIALITY AND RELATIONSHIPS

### The Discussion Paper

3.131 In its Discussion Paper, the Commission sought submissions on whether the closeness of the relationship that a person or group of people has with the adult is a relevant consideration in identifying the principles to guide the Commission's review of the confidentiality provisions.<sup>409</sup> Although not always the case, it was suggested in the Discussion Paper that the closer the relationship between the adult and the relevant person, the more likely it is that disclosure of information to that person is appropriate.

3.132 In its Discussion Paper, the Commission identified six categories of people in the guardianship system who are likely to have different rights and interests in relation to information about the adult:

- the adult himself or herself;
- any person who is empowered to make the relevant decision for the adult;<sup>410</sup>
- those who are actively involved and participating in decision-making for an adult. In the context of a decision being made by the Tribunal, this category might be captured by the definition of those who are an 'active party'<sup>411</sup> and so have a right to appear before the Tribunal.<sup>412</sup> This might include members of an adult's family;
- other people not already mentioned but who are close to the adult or involved in his or her life. The definition of an 'interested person' might be one way in which this category could be defined, that is a person who has a 'sufficient and

409 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [3.62]–[3.65], [3.69] Q3-3, Q3-4.

410 Guardians and administrators are entitled to all of the information that an adult would have been entitled to if he or she had capacity and which is necessary to be able to make an informed exercise of a power: *Guardianship and Administration Act 2000* (Qld) s 44. Section 81 of the *Powers of Attorney Act 1998* (Qld) confers a similar right on attorneys.

411 In addition to the adult, an 'active party' may be: the applicant; a person proposed for appointment or reappointment as guardian, administrator or attorney (if that is what the proceeding is for); any current guardian, administrator or attorney; the Adult Guardian; the Public Trustee of Queensland; or any person joined to the proceeding by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 119.

412 *Guardianship and Administration Act 2000* (Qld) s 123.

continuing interest' in the adult.<sup>413</sup> This category might include service providers;

- people who report publicly on the Tribunal and how it operates;<sup>414</sup> and
- everyone else, that is, members of the general public.

3.133 It was not necessarily suggested in the Discussion Paper that any legislative regime needed to make specific provision for each of these six categories of people. Indeed, there is often good reason for legislation to be cast in general terms with the discretion of a decision-maker being relied upon to tailor decisions to the specific circumstances.

## Submissions

3.134 Only a small number of submissions addressed this issue but of those that did, all were of the view that the relationship that a person has with the adult is relevant to decisions about what information is disclosed to them.<sup>415</sup> The Department of Justice and Attorney-General cautioned, however, that while it is relevant, the relationship a person has with the adult will not be determinative as to whether information should be disclosed to the person.<sup>416</sup>

3.135 In terms of identifying which relationships are relevant to the disclosure of information, the Adult Guardian and the Public Trustee of Queensland endorsed those categories of people identified in the Commission's Discussion Paper.<sup>417</sup> Another submission noted that medical practitioners and consulting specialists might also be included specifically in the fourth group of people who were described above as having 'a sufficient and continuing interest' like other service providers.<sup>418</sup> The Public Advocate suggested other categories of people may include representatives of public interest bodies or organisations which have or take a monitoring role, and lay advocates and lawyers representing active parties.<sup>419</sup> The Public Advocate also considered that 'appointed decision-makers must have a right to access all relevant information to enable them to effectively perform their functions'.

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413 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'interested person'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'interested person').

414 This is a wider description than that which appeared in the Commission's Discussion Paper: 'members of the press'. See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [3.63].

415 Submissions 1H, 73A, 85, 101, 122A, 126, 127.

416 Submission 126.

417 Submissions 122A, 127.

418 Submission 85.

419 Submission 1H.

3.136 Carers Queensland suggested that the role played in the lives of adults with impaired capacity by families and carers would permit wider disclosure of information to those people:<sup>420</sup>

The relevance and application of the confidentiality provisions should, understandably, vary depending on the person's relationship to the adult and their commensurate level of interest and responsibility. Generally, a more limited duty of confidentiality should be required in respect to those close to the person. The more involved in the life of the adult, the more reasonable is the person's access to and disclosure of confidential information. Because of their close association to the adult, families' and carers' access to and disclosure of information should generally be less restricted than others.

3.137 Another submission from a parent of an adult with impaired capacity also suggested a greater family focus by identifying a set of categories of people who should be entitled to information.<sup>421</sup>

A relationship that a person, particularly family, has with the adult is a very important consideration when determining confidentiality. Information as a matter of course should be provided to:

- The adult;
- Guardians/administrators;
- All parents where they are not the guardians/administrators;
- Members of the adult's family who have a close relationship with the adult;
- Other people who are close to the adult or are involved in the adult's life. This should exclude service providers except where they are fulfilling the role of family/carer in the case of close family bereavement.

3.138 A few submissions that considered this issue recognised that the quality and nature of the relationship was of greater significance than the existence of a family relationship with the adult.<sup>422</sup> The Public Advocate commented:<sup>423</sup>

Of itself, the relationship is not necessarily considered a proper determinant ... For example, not all daughters or sons or spouses should necessarily be entitled to access all information. The reality is that an adult may have been close to some family members and shared information freely with them, and not at all with others.

3.139 Although the number of submissions that addressed the impact of relationships upon confidentiality as a discrete issue was small, there were strong views expressed about relationships in particular contexts during the consultation process. These submissions are considered in the specific chapters to which they relate, but it is worth identifying in this chapter two general themes that emerged.

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420 Submission 101.

421 Submission 73A.

422 Submissions 1H, 85, 127.

423 Submission 1H.

3.140 The first is that those people who are close to the adult should be given relevant information about the adult, or at least that their entitlement to that information is stronger than that of other people without a close relationship.<sup>424</sup>

3.141 Some submissions couched this in more specific terms and said that the interest of family members in the adult permitted or required the disclosure of this information.<sup>425</sup> A number of these submissions did acknowledge, however, that not all family members were involved or interested in the adult's life and that this would mean those people did not have the same interest in receiving information. The support for the first theme, that people close to the adult (which will often be his or her family) will have a greater claim to receiving information about the adult, was very strong.

3.142 This support was qualified, though, by the second theme, which was that it can be complicated to identify who these people are in practice.<sup>426</sup> Some submissions noted particular challenges in blended families, especially where there was some pre-existing mistrust or hostility.<sup>427</sup> Other submissions identified cultural issues that might impact upon who is regarded as being close to the adult. A number of submissions specifically noted this in the context of Indigenous relationships.<sup>428</sup> The Aboriginal and Torres Strait Islander Legal Service (Qld South) commented:<sup>429</sup>

Aboriginal and Torres Strait Islander people have kinship links that are different from mainstream society and this difference can result in mainstream institutions failing to recognise, or even to acknowledge, those kinship links.

## The Commission's view

3.143 The Commission considers that one of the principles that should guide this stage of its review is that the adult should have access to information about himself or herself. It also endorses the current statutory right for a formal decision-maker for the adult to have all of the information to which the adult would have been entitled if he or she had capacity, and which is necessary to make an informed decision.<sup>430</sup>

3.144 In terms of people who fulfil more informal roles, the Commission considers that the review should be guided by the principle that the greater the involvement and interest by a person in the life of the adult, the greater claim that person will have to receive information about the adult.<sup>431</sup> The Commission also considers that it will

424 For example, submissions 53, 58, 90, 102, 120, 124, F4, F5, F6, F9, F10, F11, F12, F14, F15, F19.

425 For example, submissions 31, 64, 77, 145, F1.

426 For example, submissions 90, 110.

427 For example, submission F22.

428 Submissions 96, F7, F11, F13, F15.

429 Submission 96.

430 *Powers of Attorney Act 1998* (Qld) s 81; *Guardianship and Administration Act 2000* (Qld) s 44.

431 This principle is considered, for example, in Chapter 7 of this Report which deals with the issue of what information about Tribunal proceedings may be published and to whom. See para 7.161 of this Report.

ordinarily be the case that the adult's family will be an integral part of the adult's support network, although it recognises that this will not always be so.

## CONFIDENTIALITY AND RELEVANCE

3.145 In this stage of its review, the Commission is examining the guardianship legislation's confidentiality provisions.<sup>432</sup> However, it has not been possible to review these provisions entirely in isolation and consideration of at least some other related matters has proved necessary. For example, respondents to the Commission's Discussion Paper identified issues which, although not strictly about the confidentiality provisions, had significant implications for how those provisions operate. In Chapter 1 of this Report, the Commission outlined its approach to these matters. Some of them will be considered in this stage of the Commission's review and will be the subject of formal recommendations. Other matters will be identified for the more general review of the legislation that the Commission will undertake in stage two of its review.<sup>433</sup>

3.146 The issue of relevance is one of the matters that will be considered in this stage of the review although it is not strictly part of the confidentiality provisions. It is considered here in the context of the Commission's guiding principles because of its significance to approaching the issue of confidentiality in a principled way.

3.147 This issue relates to the information that is relevant to the matters that are to be decided by the Tribunal. The issue arose when examining confidentiality because differing views were expressed about accessing information before the Tribunal and the processes through which that does or does not occur in practice.

3.148 On the one hand, there is some recognition that the Tribunal need not give active parties information if it is irrelevant to the issues to be resolved by the proceedings. This is most clearly stated in section 108 of the *Guardianship and Administration Act 2000* (Qld), which provides that an active party's right to inspect documents relates to those documents before the Tribunal 'directly relevant to an issue in the proceeding'.<sup>434</sup>

3.149 As discussed above in relation to the inquisitorial features of the Tribunal, one of the challenges the Tribunal faces is the relevance of the information it receives to the decision to be made.<sup>435</sup> Unlike an adversarial system, where the parties control the flow of relevant information to the court, the more active role of this Tribunal means that a wide range of irrelevant information may be revealed prior to, or during, a hearing. Views expressed during a focus group with members of the Tribunal were that information that is not relevant to the issues should not be disclosed to active parties.<sup>436</sup>

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432 The Commission's terms of reference are set out in Appendix 1 of this Report.

433 See para 1.28 of this Report.

434 *Guardianship and Administration Act 2000* (Qld) s 108(2).

435 See para 3.99–3.100 of this Report.

436 Submission F18.

In their view, this is because the information is irrelevant to the decision-making process and its disclosure unnecessarily interferes with the privacy of the adult.<sup>437</sup>

3.150 On the other hand, concerns have been expressed about the Tribunal having information, whether it is contained in a document or given orally at a hearing, of which active parties are not aware.<sup>438</sup> Some of the processes that the Tribunal has adopted to manage the documents it receives have also been criticised.<sup>439</sup> One criticism of these processes was that they had the effect of imposing confidentiality without formally making a confidentiality order.<sup>440</sup>

### The Commission's view

3.151 The Commission has considered these specific issues in Chapters 4 and 5 of this Report, which deal with orders limiting the participation of active parties in relation to hearings and documents respectively. However, the Commission considers there is value in articulating, in this chapter, the principles that will guide its consideration of these issues.

3.152 The Commission considers that, as an incident of procedural fairness, information that is 'credible, relevant and significant'<sup>441</sup> in relation to an issue in the proceeding before the Tribunal must be disclosed to active parties. This includes documentary and oral evidence given before the Tribunal. Information is credible, relevant and significant if it 'cannot be dismissed from further consideration by the decision-maker before making the decision'.<sup>442</sup> The obligation to disclose this information arises regardless of whether the Tribunal purports to rely on the information.<sup>443</sup> Information that does not meet this test is not capable of informing the Tribunal's decision and so need not be disclosed to active parties for them to comment on it.

3.153 The Commission notes, however, that information may be disclosed to active parties prior to a Tribunal hearing. Document inspection, in particular, would ordinarily take place before the hearing is held. In the absence of a rigorous pre-hearing process, the credibility and significance of such information cannot be assessed before it is made available to the active parties. At this pre-hearing stage, the Commission considers it is

437 The Commission understands that the Tribunal Registry's file management and document inspection policy has recently been revised to ensure active parties are able to inspect all documents contained on a file that are relevant to an issue in the proceeding: information provided by the Registrar of the Guardianship and Administration Tribunal, 28 May 2007. See Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007); and Guardianship and Administration Tribunal, *Administration Practice 4 of 2007*, 'File Maintenance' (9 March 2007).

438 Submissions 1H, 105, and submissions discussed in para 4.171–4.174, 5.127–5.131 of this Report.

439 Submissions 1H, 105, and submissions discussed in para 5.70–5.76, 5.129 of this Report.

440 Submissions discussed in para 5.70–5.76 of this Report

441 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J); *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95.

442 *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96.

443 Ibid.

more practical and appropriate to require simply that all relevant information be available to the active parties. The credibility and significance of that information will then be a matter for the Tribunal's consideration at the hearing. On the other hand, information that comes before the Tribunal for the first time during the hearing can, and will, be assessed for credibility and significance. At the hearing stage, therefore, the Tribunal's obligation to make information available to the active parties can more appropriately be limited to information that is credible, relevant and significant. This distinction will inform the Commission's recommendations in the following chapters of this Report.

3.154 The Commission notes that the way in which Tribunal processes have been structured means that the Tribunal members for a hearing have information presented to them in advance of the hearing, as part of the case file prepared by the Registry, that may not be relevant to the issues in the proceeding. Because active parties are entitled to inspect documents only if they are relevant to the proceeding, the Tribunal members and the parties may have different information before them when the hearing begins. In light of the concerns identified earlier, the Commission considers that greater confidence in the Tribunal will be fostered if its procedures ensure that this is avoided. Instead, the Commission suggests that the information compiled and presented to the Tribunal members in advance of the hearing be limited to information that is relevant to the resolution of the proceeding. This same information should be available to the active parties. The means through which this may be achieved are discussed in Chapters 4 and 5 of this Report.

3.155 It is only once the issue of relevance has been resolved that the question of confidentiality can arise. Given the concerns identified during consultation that 'confidentiality' was arising in circumstances where it appeared that the real issue was one of relevance, the Commission believes it is critical to keep these issues separate both conceptually and also in practice.

## GUIDING PRINCIPLES

3.156 The Commission considers that the following principles should guide its recommendations for reform in this stage of its review. These principles constitute a general framework for considering how to improve the law and practice governing the issue of confidentiality in the guardianship system.

### **3-1 The three matters relevant to determining the role of confidentiality in the guardianship system are:**

- **the principle of open justice;<sup>444</sup>**

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As discussed above, the principle of open justice does not apply to administrative decision-makers. However, the values of accountability, transparency, consistency and predictability that the open justice principle embodies will guide the recommendations made by the Commission in relation to administrative decision-making.

- **the requirements of procedural fairness; and**
- **the nature of the guardianship system.**

**3-2 The guardianship legislation should provide for a greater level of openness than that which currently exists.**

**3-3 The adult is entitled to know and have access to information about himself or herself.**

**3-4 The greater the involvement and interest by a person in the life of the adult, the greater the person's claim to receive information about the adult.**

**3-5 In relation to information before the Tribunal, there should be a clear distinction between information that is irrelevant to the proceedings and information that is confidential. The question of confidentiality only arises once it is determined that the information is relevant and so must be disclosed to active parties.**

# Chapter 4

## Tribunal hearings

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## INTRODUCTION

4.1 As part of its review of the guardianship legislation's confidentiality provisions, the Commission examined those provisions that deal with confidentiality in hearings of the Tribunal. Although hearings are generally required to be held in public,<sup>445</sup> the Tribunal may, by order, on application by an active party or on its own initiative:<sup>446</sup>

- direct that a hearing or part of a hearing occur in private;<sup>447</sup>
- direct who may or may not be present at a hearing;<sup>448</sup> or
- prohibit or restrict disclosure of information given at a Tribunal hearing to some or all of the active parties to the proceeding.<sup>449</sup>

4.2 The power to make these orders (described in the legislation as 'confidentiality orders') in relation to the conduct of a hearing and the disclosure of information given at a hearing is considered in this chapter.

4.3 The guardianship legislation also currently enables the Tribunal to make confidentiality orders in relation to other matters. In Chapters 5 and 7 of this Report, the Commission has recommended that the Tribunal have power to make confidentiality orders in relation to documents received by the Tribunal and non-publication orders in relation to information about proceedings, respectively.<sup>450</sup>

4.4 This chapter also considers two matters that are not about confidentiality, but require consideration in this stage of the review. One of these matters, already noted in Chapter 3 of this Report, is the distinction between the relevance of information and confidentiality of information. The second matter is the exclusion of a person from a hearing if his or her conduct disrupts a hearing.

4.5 Finally, this chapter also notes some of the issues raised during the Commission's consultations that fall outside its review of the confidentiality provisions, but that may be considered in stage two of the review.

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445 *Guardianship and Administration Act 2000* (Qld) s 109(1).

446 *Guardianship and Administration Act 2000* (Qld) s 109(5).

447 *Guardianship and Administration Act 2000* (Qld) s 109(2)(b).

448 *Guardianship and Administration Act 2000* (Qld) s 109(2)(a).

449 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(i).

450 See para 5.143–5.150, 7.288–7.290 of this Report. In Chapter 6 of this Report, the Commission has recommended that the Tribunal's discretion to withhold its decision or reasons, by making a confidentiality order, be removed: see para 6.85–6.97 of this Report.

## THE LAW IN QUEENSLAND

### Public and private hearings

4.6 Section 109(1) of the *Guardianship and Administration Act 2000* (Qld) provides that Tribunal hearings are generally to be held in public. Section 109(2)(b), however, provides that the Tribunal may make a ‘confidentiality order’ directing that a hearing, or part of a hearing, be conducted in private.

4.7 Sections 109(1) and 109(2)(b) provide:

#### 109 Open

- (1) Generally, a hearing by the tribunal of a proceeding must be in public.
- (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a *confidentiality order*)—
  - ...
  - (b) direct a hearing or part of a hearing take place in private;
  - ...

### Excluding a person from a hearing

4.8 Section 109(2)(a) also gives the Tribunal power to direct, in a confidentiality order, that a particular person may or may not be present at a hearing. The Tribunal may direct, for example, that despite the hearing being held in public, a particular person must not attend. Alternatively, a confidentiality order might direct that pursuant to section 109(2)(b) (outlined above) the hearing, or some part of the hearing, is to be held in private, but that under section 109(2)(a), a particular person may nonetheless attend the hearing.

4.9 The legislation does not limit the power to exclude persons from a hearing to particular categories of people, such as members of the public without an interest in the proceeding; nor does the legislation specify particular people who cannot be excluded from a hearing, such as active parties to the proceeding.<sup>451</sup>

4.10 While hearings must generally be held in public, section 109(2)(a) provides that the Tribunal may ‘give directions about the persons who may or may not be present’.

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Note, however, that the Tribunal may be prevented in a particular case from excluding certain persons in proceedings related to special health care. This is discussed at para 4.22–4.23 of this Report. In the Northern Territory, South Australia, Tasmania, and Western Australia certain persons, such as those involved in the proceedings, cannot be excluded from a hearing: see para 4.41–4.43 of this Report.

## Limiting disclosure to an active party of information given at a hearing

4.11 Section 109(2)(d)(i) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may make a confidentiality order directing that disclosure of ‘information given before the Tribunal’ to an active party<sup>452</sup> be prohibited or restricted. Although broadly worded, this appears to refer only to oral information received by the Tribunal at a hearing. Other information given before the Tribunal could be documentary, but the Tribunal’s power to limit an active party’s access to documents is dealt with under a different provision.<sup>453</sup>

4.12 The Tribunal’s power to make an order under section 109(2)(d)(i) may be used to complement an order giving directions about who may or may not be present at a hearing. For example, in order to prevent a party from hearing particular evidence, the Tribunal may give a direction excluding the party from the relevant part of the hearing, as well as prohibiting disclosure of the information to that party.

4.13 While hearings must generally be in public, section 109(2)(d) provides that the Tribunal may:

- (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
    - (i) information given before the tribunal; or
    - (ii) matters contained in documents filed with, or received by, the tribunal;<sup>454</sup>
- ... [note added]

## Criteria for making a confidentiality order

4.14 The Tribunal’s power to make confidentiality orders under section 109(2) of the *Guardianship and Administration Act 2000* (Qld) is guided by a number of criteria.

4.15 Section 109(2) provides that the Tribunal may make a confidentiality order if it ‘is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason’. While this power is worded in very broad

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<sup>452</sup> Section 119 of the *Guardianship and Administration Act 2000* (Qld) provides that the active parties to a proceeding are:

- the adult;
- the applicant (if not the adult);
- any proposed guardian, administrator or attorney for the adult if the proceeding is for the appointment or reappointment of such person;
- any current guardian, administrator or attorney for the adult;
- the Adult Guardian;
- the Public Trustee of Queensland; and
- any other person joined as a party to the proceeding.

<sup>453</sup> *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(ii). That provision is discussed in Chapter 5 of this Report.

<sup>454</sup> This is examined in Chapter 5 of this Report.

terms, the discretion must be exercised judicially and in accordance with accepted principles.

4.16 A similarly worded power is given to the Administrative Appeals Tribunal ('AAT').<sup>455</sup> Significantly, that provision also includes a specific requirement for the AAT to take the principle of the desirability of public hearings as the basis for its consideration as to whether such an order should be made.<sup>456</sup> Section 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) relevantly provides:

**35 Hearings to be in public except in special circumstances**

...

*Private hearing etc.*

(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:

(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and

...

(3) In considering:

(a) whether the hearing of a proceeding should be held in private;

...

the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

4.17 The AAT's power to hold hearings in private and to exclude people from a hearing was considered in *Re Pochi and Minister for Immigration and Ethnic Affairs*.<sup>457</sup> In that case, Brennan J held that the exercise of the AAT's discretion is informed by the principle of open justice and the requirements of procedural fairness.<sup>458</sup> Accordingly, Brennan J stated that certain 'strict criteria' governed the making of such an order.<sup>459</sup>

<sup>455</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 35(2)(a).

<sup>456</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 35(3).

<sup>457</sup> (1979) 26 ALR 247.

<sup>458</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 270–3.

<sup>459</sup> *Ibid* 272–3. See also *Re An Applicant and Australian Prudential Regulation Authority* (2005) 89 ALD 643, 661–2.

4.18 When examining the AAT's discretion to exclude the *public*, Brennan J considered that such an order could be made only if it was satisfied that:<sup>460</sup>

- there is 'a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public'; or
- 'publication of the proceedings would be contrary to the public interest'.

4.19 In relation to the AAT's discretion to exclude a *party*, Brennan J considered that 'a further criterion' would need to be satisfied, namely, that 'the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party'.<sup>461</sup>

4.20 The principles outlined by Brennan J in relation to the AAT would also govern decisions made by the Guardianship and Administration Tribunal to close a hearing to the public or to exclude an active party. It is noted, however, that the identification of the 'basis of [the AAT's] consideration' in section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) expressly tips the balance further in favour of open hearings. At present, the guardianship legislation does not contain such a provision.

4.21 The Guardianship and Administration Tribunal must also apply the General Principles contained in the legislation in exercising its power to make a confidentiality order.<sup>462</sup> This includes General Principle 11, which provides that the adult's right to confidentiality of information be recognised and taken into account.<sup>463</sup>

### **Views about special health care**

4.22 A final criterion for the making of a confidentiality order must be satisfied in proceedings to obtain the Tribunal's consent to 'special health care'. Special health care

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<sup>460</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 273. Brennan J also considered that the AAT could exclude the public from a hearing if the information to be given in the proceedings was of the kind described in s 36 of *Administrative Appeals Tribunal Act 1975* (Cth): 273. That section provides that the Attorney-General may certify that disclosure of particular material (that would prejudice national security, defence or international relations, would disclose Cabinet deliberations or decisions, or could form the basis of a claim for Crown privilege) would be contrary to the public interest.

<sup>461</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 273. Note that this criterion is derived from Brennan J's interpretation of the Administrative Appeals Tribunal's discretion being one that is intended to facilitate the flow of information to it while preserving the confidentiality of that information: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 272.

<sup>462</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2). For example, *Re RJE* [2005] QGAAT 4, [10].

<sup>463</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. Note that none of the equivalent 'General Principles' contained in the guardianship legislation of other Australian jurisdictions contain a similar principle about confidentiality.

includes such medical procedures as sterilisation and termination of pregnancy.<sup>464</sup> In proceedings in relation to those matters, section 109(4) provides that a confidentiality order must not affect the ability of the adult's relevant substitute decision-maker for health matters to form and express a view about the special health care.<sup>465</sup> This might mean, in a particular case, that those persons should not be excluded from the hearing.<sup>466</sup>

4.23 Section 109(4) provides:

**109 Open**

...

- (4) In a proceeding to obtain the tribunal's consent to special health care for an adult, the tribunal may not make a confidentiality order that is likely to affect the ability of any of the following persons to form and express a considered view about the special health care—
- (a) a guardian for the adult;<sup>467</sup>
  - (b) an attorney for a health matter for the adult under an enduring document;<sup>468</sup>

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*Guardianship and Administration Act 2000* (Qld) s 3, sch 4, sch 2 s 7 provides that 'special health care' means:

- removal of tissue from the adult while the adult is alive for donation to someone else;
- sterilisation of the adult;
- termination of a pregnancy of the adult;
- participation by the adult in special medical research or experimental health care;
- electroconvulsive therapy or psychosurgery for the adult; and
- any special health care of the adult prescribed by regulation.

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Note that s 80G(4) of the *Guardianship and Administration Act 2000* (Qld), which applies in relation to proceedings for consent to sterilisation of a child with an impairment, provides that the Tribunal may not make a confidentiality order that is likely to affect the ability of any active party to form and express a considered view about the proposed sterilisation. The active parties in such matters are the child, the applicant, the child's parent or guardian, the child's primary carer (if the child's parent or guardian is not the child's primary carer), the child's treating doctor, the child representative for the child, and any person joined as a party by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 80K.

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There is a similar provision in South Australia: *Guardianship and Administration Act 1993* (SA) s 61(5). See para 4.43 of this Report.

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A 'guardian' means a person appointed as a guardian for a personal matter for an adult under s 12(1) of the *Guardianship and Administration Act 2000* (Qld): *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'guardian').

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An 'enduring document' means an enduring power of attorney or an advance health directive: *Powers of Attorney Act 1998* (Qld) s 28 and *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'enduring document').

- (c) the statutory health attorney for the adult.<sup>469</sup> [notes added]

### Who has power to make a confidentiality order

4.24 Section 109(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Tribunal power to make confidentiality orders, including orders in relation to hearings. However, such an order may also be made by the Registrar.

4.25 Section 99(3) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal Rules may specify ‘non-contentious matters’ under the legislation that may be dealt with by the Registrar. Such matters are described as ‘prescribed non-contentious matters’.<sup>470</sup> Section 85(1) of the Act provides that the Registrar may perform the functions and exercise the powers of the Tribunal in relation to such prescribed non-contentious matters.<sup>471</sup>

4.26 Rule 2(1) of the *Guardianship and Administration Tribunal Rule 2004* (Qld) specifies that matters related to a number of provisions in the *Guardianship and Administration Act 2000* (Qld) are prescribed non-contentious matters for section 99(3) of the Act. One of those provisions is section 109(2), which deals with confidentiality orders.<sup>472</sup> However, rule 2(2) provides that such a matter will cease to be a prescribed non-contentious matter if an active party to the proceeding advises the Registrar of an objection to the matter being dealt with by the Registrar.

4.27 The Commission understands that the purpose of this rule was to permit the Registrar to facilitate the inspection of documents in accordance with the Presidential Direction entitled ‘General Information in relation to the Inspection of Files and Confidentiality Orders’.<sup>473</sup> However, it appears the rule also empowers the Registrar to make confidentiality orders. The Commission questions whether the rule-making power in section 99(3) of the *Guardianship and Administration Act 2000* (Qld) should be construed as authorising the delegation of powers under section 109(2) on the grounds that such matters may not properly be regarded as ‘non-contentious’.

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A ‘statutory health attorney’ for an adult means the first of the following who is readily available and culturally appropriate to exercise power for a health matter:

- the adult’s spouse, if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer of the adult; or
- a close friend or relation of the adult 18 years or older and who is not a paid carer of the adult.

If no-one from that list is readily available and culturally appropriate, the Adult Guardian becomes the adult’s statutory health attorney. See *Powers of Attorney Act 1998* (Qld) s 3, sch 3, s 63(1)–(2).

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*Guardianship and Administration Act 2000* (Qld) s 99(3).

471

Section 85 of the *Guardianship and Administration Act 2000* (Qld) also addresses other matters relating to the Registrar’s power to deal with prescribed non-contentious matters. For example, the President may direct the Registrar to refer a particular matter to the Tribunal and the Registrar may also refer such a matter if he or she considers it more appropriate for the Tribunal to deal with that matter: *Guardianship and Administration Act 2000* (Qld) s 85(3)–(5).

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*Guardianship and Administration Tribunal Rule 2004* (Qld) r 2, sch.

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Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, ‘General Information in relation to the Inspection of Files and Confidentiality Orders’ (amended 9 January 2007); Information provided by the President of the Guardianship and Administration Tribunal, 29 March 2006. The Presidential Direction is discussed at para 5.11–5.12, 5.64–5.67 of this Report.

However, the Commission has not considered this issue as it has later recommended that the Registrar's power be removed.<sup>474</sup> The Commission understands that no confidentiality orders have in fact been made by the Registrar.<sup>475</sup>

### Non-compliance with a confidentiality order

4.28 Section 109(6) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must not contravene a confidentiality order unless the person has a reasonable excuse.<sup>476</sup> The Act stipulates a maximum penalty of 200 penalty units for breach of an order.<sup>477</sup> What may constitute a 'reasonable excuse' has not been considered in the context of the guardianship legislation.<sup>478</sup> However, at common law, the phrase 'reasonable excuse' has been given its ordinary meaning.<sup>479</sup> The question of whether a person has such an excuse in a particular case is to be determined in the light of the purpose of the legislation<sup>480</sup> and having regard to what a reasonable person would accept as appropriate.<sup>481</sup> The concept is not capable of being exhaustively judicially defined and is essentially a question of fact.<sup>482</sup>

### Confidentiality orders in practice

4.29 The Tribunal has provided the Commission with empirical information about confidentiality orders made during the period from 1 July 2005 to 31 May 2007.<sup>483</sup> The Commission understands that in that period, the Tribunal made only one confidentiality order to close a hearing.<sup>484</sup> That order was made to enable the Tribunal to take the

474 See para 4.308–4.309 of this Report.

475 Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006. See also Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007) in which no reference is made to the Registrar's power to make a confidentiality order.

476 The Commission has considered whether the defence of reasonable excuse should be retained at para 4.368–4.372 of this Report.

477 *Guardianship and Administration Act 2000* (Qld) s 109(6).

478 None of the Tribunal decisions published on the AustLII website provides a detailed discussion of what might amount to a 'reasonable excuse': <<http://www.austlii.edu.au/au/cases/qld/QGAAT/>> at 26 June 2007. The phrase is referred to very briefly in *Re ONF* [2004] QGAAT 19 when the Tribunal revoked the appointment of an administrator, but there was no need to discuss its meaning.

479 *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423, 436 (Kirby P); *Weeks v Nominal Defendant* (2005) 43 MVR 417, [7] (McPherson JA).

480 *Taikato v The Queen* (1996) 186 CLR 454, 464–6 (Brennan CJ, Toohey, McHugh and Gummow JJ).

481 *Bank of Valletta PLC v National Crime Authority* (1999) 164 ALR 45, 55 (Hely J), affirmed on appeal: *Bank of Valletta PLC v National Crime Authority* (1999) FCR 565. This case was cited with approval in *Callanan v Bush* (2004) A Crim R 239 (Douglas J).

482 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 247 (Abadee J).

483 See para 2.110 of this Report.

484 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006, 12 and 14 June 2007.

evidence of the adult in the absence of others.<sup>485</sup>

4.30 Outside that period, the Tribunal has also made at least one confidentiality order to exclude a person from the hearing.<sup>486</sup> In addition, the Tribunal has, in some hearings, spoken with the adult in the absence of some or all of the active parties without making a confidentiality order. After speaking with the adult, the Tribunal has then informed those parties who were asked to absent themselves of the substance of the adult's evidence.<sup>487</sup>

4.31 It has been suggested to the Commission that this approach was adopted on the basis of the decision of *Re SU*.<sup>488</sup> The Commission examines the effect of this New South Wales Supreme Court decision later in this chapter.<sup>489</sup> It suffices presently to note that the decision does not provide a basis for concluding that there has been either a general or specific approval of that practice.

4.32 A further question which arises is whether, in the absence of a confidentiality order being made, the adoption of such a process accords with the legislative intention expressed in section 109(1) of the *Guardianship and Administration Act 2000* (Qld) that hearings must be in public. The Commission's view is that if the procedure is to be adopted under the existing legislation it should only be adopted consequent upon the making of a specific order under section 109(2). As will be seen, the Commission recommends that the legislation be amended to confer specific power to make an order affecting the manner in which the evidence of the adult is obtained.<sup>490</sup>

## LEGISLATION IN OTHER JURISDICTIONS

4.33 The guardianship legislation in other jurisdictions also contains provisions dealing with closed hearings and the exclusion of particular people from hearings. These provisions fall into three general categories that are discussed below:

- open proceedings with power to hold them in private and/or to exclude particular people;
- open proceedings with power to hold them in private and/or to exclude particular people except for specific individuals who cannot be excluded; and
- closed proceedings with power to permit particular people to attend.

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485 Information provided by the President of the Guardianship and Administration Tribunal, 12 and 14 June 2007.

486 *Re RJE* [2005] QGAAT 4.

487 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006 and 5 June 2007.

488 Unreported, Supreme Court of New South Wales, Windeyer J, 17 September 2001, [17].

489 See para 4.199–4.201 in this Report.

490 See para 4.195–4.198 in this Report.

4.34 None of the other jurisdictions in Australia specifically provide for the prohibition or restriction of disclosure of information or evidence given at a hearing to any of the *parties* to the proceeding. Of course, the access of parties to information and evidence given at a hearing may be indirectly restricted by an order excluding that party from the hearing. However, whether such information can be kept from those active parties who are excluded will depend on the rules of procedural fairness at common law.<sup>491</sup>

4.35 In *GM v Guardianship Tribunal*,<sup>492</sup> the Appeal Panel of the New South Wales Administrative Decisions Tribunal considered the obligation at common law on the Guardianship Tribunal of that State to accord procedural fairness in circumstances that included a failure to disclose to a party evidence that was received in his absence. In concluding that the relevant order should be set aside, the Appeal Panel acknowledged that the content of the hearing rule should be viewed in light of the Tribunal's jurisdiction and its statutory requirements but that normally, at a minimum, the 'substance or gravamen' of adverse information that is credible, relevant and significant must be disclosed to a person. It was noted that this general rule could be displaced only in 'exceptional circumstances'. This case is also examined in the context of documents before the Tribunal in Chapter 5 of this Report.<sup>493</sup>

### Open hearings with power to close, or to exclude particular people

4.36 In jurisdictions falling into this category, hearings are required generally to be held in public but the legislation confers discretion on the Tribunal to close a hearing to members of the public, or to exclude particular people from a hearing.<sup>494</sup>

4.37 In New South Wales, hearings are to be open unless the Tribunal determines in a particular case that the hearing shall be conducted wholly or partly in the absence of the public.<sup>495</sup>

4.38 In Victoria, hearings must be held in public unless the Tribunal directs that the hearing or part of it be held in private.<sup>496</sup>

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491 *GM v Guardianship Tribunal* [2003] NSWADTAP 59.

492 Ibid.

493 See para 5.46–5.49 of this Report.

494 For example, *Coroners Act 2003* (Qld) ss 31, 43(1): inquests must be held in open court except when the coroner orders otherwise 'while particular evidence is given' and the Court may exclude a person from an inquest 'if the court considers it is in the interests of justice, the public or a particular person to do so'; *Federal Court of Australia Act 1976* (Cth) s 17: hearings shall be in open court but the Court may exclude the public or specified persons 'where the Court is satisfied that the presence of the public or of those persons, as the case may be, would be contrary to the interests of justice'; and *Family Law Act 1975* (Cth) s 97: hearings shall be in open court but the Court may make an order to exclude a specified person, a specified class of persons, or all persons other than the parties, their legal representatives and any other specified persons from a hearing or part of a hearing.

495 *Guardianship Act 1987* (NSW) s 56.

496 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(1)–(2).

4.39 In the Australian Capital Territory, hearings are to be open to the public unless the Tribunal orders otherwise.<sup>497</sup>

### Open hearings with power to close, or to exclude, but not particular people

4.40 In jurisdictions in this category, hearings are again generally required to be conducted in public and the Tribunal is empowered to close a hearing or to exclude particular people. The additional element is that the power to exclude does not apply to certain categories of people.

4.41 In Western Australia, while hearings are generally to be held in public,<sup>498</sup> the Tribunal has power to direct that the hearing, or part of it, be closed other than to persons it specifies may be present.<sup>499</sup> The Tribunal may make such an order under the *State Administrative Tribunal Act 2004* (WA) in a number of circumstances, including where it is necessary to avoid prejudicing the administration of justice, to avoid endangering property, or to avoid the publication of confidential information or information the publication of which would be contrary to the public interest.<sup>500</sup> In addition, the Tribunal may close a hearing, other than to persons who are directly interested in the proceedings or are otherwise authorised by the Tribunal to be present, if it is in ‘the best interests of the person’ to whom the proceedings relate for the hearing, or part of it, to be closed to the public.<sup>501</sup> The Tribunal is precluded, however, from excluding the news media from a hearing.<sup>502</sup>

4.42 In the Northern Territory and Tasmania, proceedings are required to be open to the public unless a person directly interested in the proceedings requests otherwise. Such a request enlivens a discretion to exclude a person or people from the hearing.<sup>503</sup> The discretion to exclude people from a hearing does not, however, extend to people who are directly interested in the proceedings or who are otherwise authorised to be present at the hearing.<sup>504</sup>

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497 *Guardianship and Management of Property Act 1991* (ACT) s 37(1).

498 *State Administrative Tribunal Act 2004* (WA) s 61(1).

499 *State Administrative Tribunal Act 2004* (WA) s 61(2); *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2). Note that the provisions of sch 1 pt B cl 11 of the *Guardianship and Administration Act 1990* (WA) operate in addition to the provisions of the *State Administrative Tribunal Act 2004* (WA) in relation to proceedings of the State Administrative Tribunal, but that to the extent of any inconsistency between them, the provisions of the *Guardianship and Administration Act 1990* (WA) are to prevail: *Guardianship and Administration Act 1990* (WA) s 17; *State Administrative Tribunal Act 2004* (WA) s 5.

500 *State Administrative Tribunal Act 2004* (WA) s 61(4).

501 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2).

502 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(3): ‘Any person bona fide engaged in reporting or commenting upon the proceedings of the State Administrative Tribunal commenced under this Act for dissemination through a public news medium shall not be excluded from the place where the hearings are being held’. This provision is unique among the Australian guardianship jurisdictions.

503 *Adult Guardianship Act* (NT) s 25; *Guardianship and Administration Act 1995* (Tas) s 12. The Northern Territory provision adds the words ‘if the court thinks fit’ when granting the discretion to exclude: *Adult Guardianship Act* (NT) s 25(3).

504 *Adult Guardianship Act* (NT) s 25; *Guardianship and Administration Act 1995* (Tas) s 12.

4.43 The legislation in South Australia requires the Board to hold open hearings, but grants it an ‘absolute discretion’ to exclude the public or particular people.<sup>505</sup> The Board must not, however, exclude people who are involved in the proceedings.<sup>506</sup> Additionally, in proceedings regarding prescribed medical treatment,<sup>507</sup> the Board must allow the adult’s parents a reasonable opportunity to make submissions to the Board ‘if it thinks it appropriate to do so’ and unless it does not consider it to be in the adult’s best interest.<sup>508</sup>

### Closed hearings with power to admit people

4.44 In jurisdictions falling into this category, the general rule is reversed so that proceedings are required to be closed to the public except as otherwise permitted by the court or tribunal. None of the Australian jurisdictions take this approach.<sup>509</sup>

4.45 In contrast, in New Zealand, where the guardianship jurisdiction is vested in the Family Court, the relevant legislation provides that hearings are generally to be closed to the public, but expressly permits the attendance of certain specified persons such as the adult and other parties to the proceeding.<sup>510</sup> However, the Court also has the power to require the adult’s parent or guardian, or his or her representative, to withdraw from the Court while the adult addresses the Court.<sup>511</sup> It also has discretion to permit other people to attend a hearing.<sup>512</sup>

## THE DISCUSSION PAPER

4.46 In its Discussion Paper, the Commission raised a number of issues for consideration, examined three matters to guide reform in this area (namely, the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system) and identified possible models for reform. This section outlines those possible legal models and guiding matters, before turning to the various issues for consideration that form the remainder of this chapter.

505 *Guardianship and Administration Act 1993* (SA) s 14(10)–(11).

506 *Guardianship and Administration Act 1993* (SA) s 14(10)–(11).

507 ‘Prescribed medical treatment’ is analogous to ‘special health care’ under the *Guardianship and Administration Act 2000* (Qld). See *Guardianship and Administration Act 1993* (SA) s 3 (definition of ‘prescribed medical treatment’).

508 *Guardianship and Administration Act 1993* (SA) s 61(5).

509 See, however, the approach taken under the *Mental Health Act 2000* (Qld) for proceedings of the Mental Health Review Tribunal which are to be held in private unless the Tribunal otherwise orders. The Act imposes conditions on the Tribunal’s exercise of its discretion to open proceedings: *Mental Health Act 2000* (Qld) s 460. Also see, for example, s 71 of the *Justices Act 1886* (Qld) which provides that committal hearings are not to be held in open court and that persons may be excluded from a hearing if it appears ‘that the ends of justice’ require it. Also see *Childrens Court Act 1992* (Qld) s 20; *Adoption of Children Act 1964* (Qld) s 58; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

510 *Protection of Personal and Property Rights Act 1988* (NZ) s 79(1). See also *Family Court Act*, RSNS 1989, c 159 (Nova Scotia) s 10(3).

511 *Protection of Personal and Property Rights Act 1988* (NZ) s 75(2).

512 *Protection of Personal and Property Rights Act 1988* (NZ) ss 79(1)(f), 63(3).

### Possible legal models

4.47 In its Discussion Paper, the Commission identified four possible models for how the law might deal with the openness of Tribunal hearings.<sup>513</sup>

- Model 1: hearings must be conducted in public in all cases, with no exceptions.
- Model 2: hearings are generally required to be conducted in public but the Tribunal would have power to close a hearing and hold it in private and/or to exclude particular persons from a hearing.
- Model 3: hearings are generally required to be conducted in public as with model 2 but the Tribunal's power to close a hearing and/or exclude particular people from a hearing cannot be used to exclude particular categories of people, such as the parties or other people directly interested or involved in the proceeding.
- Model 4: hearings are generally required to be held in private but the Tribunal would have power to permit the public or particular people to attend a hearing.

4.48 These models were posed as a starting point for a general approach to this issue and as a guide for submissions. In its Discussion Paper, the Commission expressed a preliminary preference for model 2.<sup>514</sup> It considered open hearings were necessary because of the accountability that openness fosters but that the nature of the guardianship system meant that there would be circumstances where the Tribunal needed to close a hearing or exclude a particular person. The Commission also expressed the preliminary view that the exercise of such a power should be guided by specific legislative criteria. A further preliminary view was that a power to prohibit or restrict disclosure of information to a party may, in some cases, be necessary to give effect to a direction to exclude a person from part of a hearing.

### Openness and confidentiality in the guardianship system

4.49 This part of the chapter briefly considers, in the context of the openness of Tribunal hearings, the three matters examined in Chapter 3 of this Report that need to be balanced when determining the role of confidentiality in the guardianship system: open justice, procedural fairness, and the nature of the guardianship system.

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Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.75]–[4.82].

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*Ibid* [4.88].

## Open justice

4.50 The right of members of the public, and therefore of media representatives, to attend at judicial proceedings and hear the evidence given is regarded as ‘the very core of the idea of open justice’.<sup>515</sup> It is a fundamental principle of the common law that judicial and quasi-judicial proceedings be conducted in public.<sup>516</sup> The primary goal of open justice, to promote accountability in decision-making, depends on the scrutiny that an open hearing allows. However, open justice is not an absolute concept. For example, the traditional recognition that the courts’ *parens patriae* jurisdiction need not always be exercised in public is an exception to the principle of open justice.<sup>517</sup>

## Procedural fairness

4.51 Restrictions on a party’s access to a hearing may result in a failure to accord procedural fairness.<sup>518</sup> The hearing rule requires that the evidence upon which a decision-maker intends to rely in making its decision must be disclosed to the person whose interests are to be affected and that the person must be given the opportunity to respond to the evidence.<sup>519</sup> A party may be denied this opportunity if he or she is excluded from the hearing.<sup>520</sup> This may not only be unfair, it may also reduce the quality of decision-making.<sup>521</sup>

4.52 However, what is required by procedural fairness depends on what is fair in the circumstances.<sup>522</sup> It may be that procedural fairness can be accorded if a summary

515 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2. See also A Monson, ‘Privacy and the Administration of Justice’ in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 477, [12.10]; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995) 128. However, note the discussion of some of the limitations of achieving open justice through open hearings in PW Young, ‘Open Courts’ (2006) 80 *Australian Law Journal* 83.

516 *R v Hamilton* (1930) 30 SR (NSW) 277; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs CJ).

517 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.40]; *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane), 445 (Earl Loreburn). See para 3.34 of this Report.

518 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 270–3 (Brennan J). See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (2004) 529 for a discussion as to whether procedural fairness should play a role in determining whether a hearing should be public or not.

519 WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8; J Blackwood, ‘Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals’ (2004) 11 *Psychiatry, Psychology and Law* 122, 122; *Kioa v West* (1985) 159 CLR 550, 587 (Mason J), 629 (Brennan J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 653 (Kirby J).

520 For example, *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [51], [63] in which it was held that the Tribunal breached the requirements of procedural fairness by failing to disclose to the applicant certain adverse evidence received in the applicant’s absence and by failing to give the applicant an opportunity to respond to that evidence. Also see *PRA v MA* [2004] VSCA 20, [39] in which it was held that the parties’ failure to attend the hearing was a result of inadequate prior notice of the hearing and meant that the parties were denied the opportunity to put their case, in breach of the rules of procedural fairness. Compare with *PS v Public Guardian* [2005] NSWADTAP 23, [9]; *RJ v Public Guardian* [2005] NSWADTAP 70, [8], [11]; and *Bruce v Guardianship Board* [1997] SADC 3603 in which it was held that adequate prior notice of the hearing and the opportunity to participate had been given. It is also possible that a party’s exclusion from a hearing may result in a lack of procedural fairness through a breach of the bias rule: M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (2004) 529, n 458.

521 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 274 (Brennan J). Also see GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 69–70.

522 WB Lane and S Young, *Administrative Law in Queensland* (2001) 53; JRS Forbes, *Justice in Tribunals* (2002) [7.1]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49, [10]–[56] (Martin CJ); see note 754 of this Report.

of the information received in a party's absence is subsequently provided to that party.<sup>523</sup>

### **Nature of the guardianship system**

4.53 While open justice and procedural fairness generally favour non-exclusion of people from hearings and the disclosure of information given at a hearing to active parties, the nature of the guardianship system may weigh in favour of some degree of confidentiality.

4.54 The guardianship system's primary focus is safeguarding the rights and interests of the adult. It has been argued that this may warrant excluding either the public or particular people from a hearing because the adult may 'feel they cannot speak freely in front of other people'.<sup>524</sup> It may also be desirable to exclude a person from a hearing 'to prevent them from intimidating or embarrassing another by their presence'.<sup>525</sup> Safeguarding an adult's rights and interests might also require steps to be taken to avoid unnecessary intrusions into the adult's privacy.<sup>526</sup>

4.55 In contrast, the fact that Tribunal adjudications relate to questions about fundamental legal rights, such as those involved in matters dealing with the withdrawal or withholding of life-sustaining measures, may favour open hearings and the accountability that openness affords.

### **Issues for consideration**

4.56 In its Discussion Paper, the Commission identified a number of issues for consideration when examining the Tribunal's discretion to hold hearings in private, to exclude people from a hearing, and to prevent active parties from receiving information given at a hearing:

- Should hearings normally be conducted in public or in private?
- If hearings should be held in public, should the Tribunal have power to close a hearing or exclude particular persons from a hearing?
- Should the Tribunal have power to limit, or otherwise place restrictions on, the disclosure of information given at a hearing to an active party to the proceeding?

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See JRS Forbes, *Justice in Tribunals* (2002) [12.30]; T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 99, n 79; J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 128; Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 5.

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Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 5.

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*Ibid* 6; *Re RJE* [2005] QGAAT 4, [10].

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Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 5. See also General Principle 11: *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 11; *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 11.

- If the Tribunal should have these powers, when should they be exercised?
- Should information that has been withheld from an active party be disclosed to the party's representative?

4.57 In its Discussion Paper, the Commission also sought submissions on issues that are relevant generally to orders made under section 109 of the Act. Some of the issues considered in this chapter are:

- Should the Tribunal be able to initiate a confidentiality order?
- Who should have power to make a confidentiality order?
- Should it be an offence to breach a confidentiality order?
- Should there be a defence of 'reasonable excuse' for breach of a confidentiality order?

4.58 Before considering these issues in detail, however, it is necessary to address some of the concerns raised during consultation that do not relate to confidentiality and so are most appropriately dealt with outside the confidentiality provisions.

## ISSUES NOT ABOUT CONFIDENTIALITY

4.59 In this stage of its review, the Commission is examining the guardianship legislation's confidentiality provisions.<sup>527</sup> However, as was discussed in Chapter 1 of this Report, it is not possible to review these provisions entirely in isolation and consideration of at least some other related matters has proved necessary.<sup>528</sup> Two of those matters that relate to Tribunal hearings and that are considered in this chapter are:

- the exclusion of a person for disruption of a hearing; and
- the distinction between information that is not relevant to the Tribunal's decision, that which is relevant and not confidential (although it may be received in the absence of an active party), and that which is relevant but has been made confidential.

## Disrupting a hearing

4.60 Although the Tribunal has broad powers to control its own proceedings<sup>529</sup> and to do 'all things necessary or convenient' to perform its functions,<sup>530</sup> and although there are other provisions in the guardianship legislation that make certain conduct in relation

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<sup>527</sup> The Commission's terms of reference are set out in Appendix 1 of this Report.

<sup>528</sup> See para 1.28 of this Report.

<sup>529</sup> For example, *Guardianship and Administration Act 2000* (Qld) s 104.

<sup>530</sup> *Guardianship and Administration Act 2000* (Qld) s 83(2).

to a hearing an offence,<sup>531</sup> there is no power that is directed specifically at permitting the Tribunal to exclude a person who is disrupting a hearing.

4.61 At present, section 109 of the *Guardianship and Administration Act 2000* (Qld) allows the Tribunal to make a confidentiality order excluding a person from a hearing because of the ‘confidential nature of particular information or matter or for another reason’. The reference to ‘another reason’ may be wide enough to permit the Tribunal to exclude a person who is disrupting a hearing. The Tribunal has previously used the power granted under the confidentiality provisions to exclude a person, at least partially on the ground that the person was likely to disrupt the hearing.<sup>532</sup>

### Submissions

4.62 The Commission did not expressly seek views on this issue but a number of submissions appeared to support the Tribunal having the power to exclude a person if he or she is disrupting a hearing<sup>533</sup> or preventing the proper functioning of the Tribunal.<sup>534</sup> Some respondents considered this to be the only justification for the exclusion of a person from a hearing.<sup>535</sup>

4.63 *The Courier-Mail* suggested an additional provision be added to the guardianship legislation giving the Tribunal power to exclude a person for conduct equivalent to contempt.<sup>536</sup>

We submit that the current sections 142, 143 and 144 of the Act are sufficient to prevent the disruption of Tribunal hearings. These offence provisions entrench the law of contempt in the face of court and include separate provisions to address both the improper influence of participants in and obstruction of Tribunal hearings. The Act could then be amended to include the addition of a section providing the Tribunal with the power to exclude or remove persons contravening or considered, based on past behaviour, to be likely to contravene sections 142, 143 and 144 from proceedings.

<sup>531</sup> Section 143 of the *Guardianship and Administration Act 2000* (Qld) makes it an offence to insult Tribunal members in relation to their performance of that role, to interrupt a proceeding, to create a disturbance where the Tribunal is sitting, or to do anything that would, if the Tribunal were a court, be a contempt of court. Section 144 of the *Guardianship and Administration Act 2000* (Qld) creates a further offence of obstructing or improperly influencing the conduct of a proceeding. Note that the Justice and Other Legislation Amendment Bill 2007 (Qld) has been introduced which, if enacted, will amend s 143 of the *Guardianship and Administration Act 2000* (Qld) to specify that a person must not disobey a lawful order or direction of the Tribunal without reasonable excuse: pt 14 cl 80.

<sup>532</sup> *Re RJE* [2005] QGAAT 4, [10]. The decision to make a confidentiality order excluding the person from the hearing was upheld on appeal: *Rickleman v Public Trustee of Queensland* [2005] QSC 336, [23] (Douglas J).

<sup>533</sup> Submission 1H. Similar views were expressed by submissions 31B, 48A, 63, 69, 79B, 98 118, 124, 125, 135, 137, F22. Submission 81 considered that where a person broke the law during a hearing, such as committing violence against someone, he or she should be excluded. Submission 75 considered that where the presence of a person at a hearing will undermine the smooth running of the hearing, this may justify exclusion, referring to *Dromey v Guardianship Board* [1997] SADC 3625.

<sup>534</sup> Submission 26D. Similar views were expressed by submission 137.

<sup>535</sup> For example, submissions 81, 135, F22.

<sup>536</sup> Submissions 98, 118.

4.64 The Department of Justice and Attorney-General agreed that a specific provision was needed as it considered reliance on section 109(2) of the *Guardianship and Administration Act 2000* (Qld) to be inappropriate when excluding for disruption of a proceeding.<sup>537</sup>

It has been suggested by the QLRC that the words ‘other reason’, may be used by the Tribunal to exclude a person from a hearing because of the misconduct of the person at the hearing. There is presently no provision in the current legislation for this circumstance. As section 109(2) concerns the making of confidentiality orders because of the nature of the confidential information, it is inappropriate for this provision to be used to exclude people from a hearing because of misconduct. The legislation should provide for a specific provision authorising the Tribunal to exclude a person because of their misconduct at a hearing.

4.65 One respondent suggested that prior behaviour could also be taken into account where a person ‘is intimidating, disruptive or threatening to anyone before or during proceedings’.<sup>538</sup>

### **The Commission’s view**

4.66 Although there is a reasonable argument that the breadth of the powers conferred on the Tribunal to control its own process would authorise the Tribunal to exclude a person for conduct that disrupts a proceeding, the Commission considers that the Tribunal should have express power to take this course.

4.67 However, such a power does not relate to confidentiality, despite the possible breadth of the current criterion in section 109(2) of the Act for making a confidentiality order. Rather, it relates to the power of the Tribunal to exclude, if necessary, persons who interfere with the Tribunal’s ability to conduct its hearings properly. Because of this conceptual difference, the provision permitting the exclusion of a person on this basis should be separate from the confidentiality provisions.

4.68 Accordingly, the Commission considers that a provision should be included in the *Guardianship and Administration Act 2000* (Qld) that permits the Tribunal to exclude a person whom it considers has engaged in conduct proscribed by section 143 of that Act.<sup>539</sup> The provision should also provide that a member of the Tribunal’s staff, acting under order, may, using necessary and reasonable help and force, exclude the person from the place where the hearing is being conducted.

4.69 The Commission notes that the use of such a power by the Tribunal will vary depending on the interest the person being considered for exclusion has in the proceedings. For example, the Tribunal should be more reluctant to exclude an adult or an active party given his or her central role in the proceedings. The Commission also notes that because exclusion of a person on these grounds does not raise issues of

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537 Submission 126.

538 Submission 68. Similar views were expressed by submissions 98, 118.

539 See note 531 of this Report.

confidentiality, that person's right to information given to the Tribunal in his or her absence will not be affected.<sup>540</sup>

## Confidentiality and relevance

4.70 In Chapter 3 of this Report, the Commission explained the importance of distinguishing between information that is relevant and that which is not.<sup>541</sup> It considered that all of the information before the Tribunal that is credible, relevant and significant to the proceeding should be available to the active parties. Information that is not credible, relevant and significant is not capable of affecting the Tribunal's decision and so need not be disclosed. In the pre-hearing stage when credibility and significance cannot be assessed, the Commission considers information should be available if it is relevant. Confidentiality is a separate issue and arises only after a determination of the relevance of information has been made. Ensuring the clarity of this distinction between information that is irrelevant and that which is made confidential is one of the Commission's guiding principles for this stage of the review.<sup>542</sup>

4.71 This approach reflects the requirements of procedural fairness, which oblige decision-makers to disclose information that is 'credible, relevant and significant',<sup>543</sup> to the decision to be made. Information is credible, relevant and significant if it 'cannot be dismissed from further consideration by the decision-maker before making the decision'.<sup>544</sup>

4.72 Information that is credible, relevant and significant can come before the Tribunal either because it is given orally at a hearing or because it is contained in documents filed with, or received by, the Tribunal that are relied on by the Tribunal at the hearing or subsequently. The former is considered in this chapter and the latter is considered in Chapter 5 of this Report.<sup>545</sup>

4.73 The context of hearings adds another dimension to issues of confidentiality and relevance. If active parties are present at a hearing, they have an opportunity to hear all of the information that is given before the Tribunal at that hearing. However, active parties who are excluded by the Tribunal from a hearing may not hear information presented that is credible, relevant and significant. This does not mean, however, that the information is confidential from that party. The Commission considers that questions of relevance and confidentiality should be assessed separately. The consequence of this is that an active party's exclusion from the hearing when information that is credible, relevant and significant is presented does not displace any

<sup>540</sup> See para 4.74, 4.79 of this Report.

<sup>541</sup> See para 3.151–3.155 of this Report.

<sup>542</sup> See para 3.156, 3-5 of this Report.

<sup>543</sup> *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J); *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95.

<sup>544</sup> *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96.

<sup>545</sup> This is examined in Chapter 5 of this Report.

rights that active party has to access this information. Those rights are displaced only if an order imposing confidentiality in relation to that information is made.

4.74 An active party might be excluded from a hearing by the Tribunal for one of a number of reasons. For example, the Commission has earlier recommended that the Tribunal have power to exclude a person, including an active party, who is disrupting a hearing.<sup>546</sup> As noted above, this step is not taken because of the confidentiality of information but to ensure that a hearing can be conducted properly. Accordingly, there is no reason in these circumstances to preclude an active party from accessing information heard or received in his or her absence that is relevant to the issues being decided.

4.75 The Commission has recommended later in this chapter that the Tribunal also have power to exclude a person, including an active party, in circumstances where it is necessary to avoid serious harm or injustice to any person.<sup>547</sup> It has also recommended that the public and active parties may additionally be excluded from a hearing so that the Tribunal may speak with the adult in the absence of others where such a step is necessary to obtain relevant information that the Tribunal considers it would not otherwise receive.<sup>548</sup> Exclusion in either of these circumstances may arise due to a need for confidentiality, although this need not be the case, particularly in relation to speaking with the adult in the absence of others. Accordingly, the Commission considers that such an order to exclude an active party does not displace the Tribunal's obligation to permit an active party to access information that is credible, relevant and significant.

4.76 Where an active party is excluded from a hearing in the circumstances outlined above, the Commission considers that a right to access information that is credible, relevant and significant should remain.<sup>549</sup> The Commission notes that section 108(1) of the *Guardianship and Administration Act 2000* (Qld) requires the Tribunal to observe the rules of procedural fairness and that this entitles active parties to access credible, relevant and significant information that is received while the active party is excluded.

4.77 The Commission considers, however, that the guardianship legislation should clarify this obligation by way of a specific provision. The rules of procedural fairness are necessarily general so some specific legislative guidance as to what is required in this situation would be of assistance. This is particularly so as the nature of the Tribunal's jurisdiction, with its focus on the adult's rights and interests and the granting of inquisitorial powers, means that active parties may be absent for part or all of a hearing more often than in most other judicial or quasi-judicial settings. This means that the issue of information given before the Tribunal in the absence of an active party is a real issue.

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<sup>546</sup> See para 4.66–4.69 of this Report.

<sup>547</sup> See para 4.181–4.183, 4.257–4.259 of this Report.

<sup>548</sup> See para 4.196, 4.263 of this Report.

<sup>549</sup> The Commission has recommended a limited power to withhold information: see para 4.202–4.204, 4.257–4.259 of this Report.

4.78 The Commission notes too that section 108 of the *Guardianship and Administration Act 2000* (Qld) already contains specific clarification of the content of procedural fairness in relation to documents. It considers that the other source of information before the Tribunal, that given orally at a hearing, should be similarly addressed. Accordingly, the Commission considers that section 108 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the obligation to observe the rules of procedural fairness includes the obligation to give an active party access to information given before the Tribunal during a hearing that is ‘credible, relevant and significant’ to an issue in the proceeding.

4.79 The Commission has, however, recommended that the Tribunal have power to make a confidentiality order prohibiting disclosure to active parties of information given before the Tribunal where it is necessary to avoid serious harm or injustice to any person.<sup>550</sup> This is a specific order that imposes confidentiality in relation to information that is credible, relevant and significant and that an active party would otherwise be entitled to access. The Commission is of the view that the requirement to make an additional order specifically addressing the confidentiality of the information is necessary because the considerations that might warrant an order excluding an active party from a hearing can be different from those that might permit imposing confidentiality in relation to information. Such a requirement ensures a distinction is made between information that is genuinely confidential, and information that is not heard by an active party, because he or she was excluded from the hearing, but which has not been made confidential.

4.80 The effect of the Commission’s recommendations in this chapter is that even when an active party is excluded from a hearing, his or her right to access information given during the hearing that is credible, relevant and significant will remain. However, the Tribunal can displace this right provided it makes an order specifically imposing confidentiality in relation to the information. The Commission considers that such an approach ensures that a distinction is made in the *Guardianship and Administration Act 2000* (Qld) between information that is irrelevant to the Tribunal’s decision (and is outside the scope of consideration by the Tribunal and the active parties), and information that is credible, relevant and significant and must be available to the active parties (whether or not they are excluded from the hearing) unless a confidentiality order is made.

4.81 The Commission now turns to examine the issues for consideration specific to confidentiality identified earlier in this chapter.<sup>551</sup>

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550 See para 4.202–4.204, 4.257–4.259 of this Report.

551 See para 4.56–4.57 of this Report.

## SHOULD HEARINGS BE HELD IN PUBLIC OR PRIVATE?

### The Discussion Paper

4.82 In its Discussion Paper, the Commission sought submissions on whether Tribunal hearings should be held in public or private.<sup>552</sup> It noted that a fundamental common law principle is that judicial proceedings are conducted in public.<sup>553</sup> The primary reason for this is that public access to open hearings enhances accountability in decision-making.<sup>554</sup> Both the common law and statute, however, provide exceptions to this principle in recognition of the fact that some circumstances may justify a level of confidentiality.<sup>555</sup> This may be the case in guardianship proceedings because of the nature of the system and the sensitive and inherently private issues that are considered at Tribunal hearings.

### Submissions

#### Open hearings

4.83 There was strong support for Tribunal hearings being generally open to the public from the majority of respondents including the Public Advocate, the Adult Guardian and Queensland Advocacy Incorporated.<sup>556</sup> This was also the view of a number of media organisations.<sup>557</sup> One journalist commented:<sup>558</sup>

I am mindful of the argument that the privacy of vulnerable people with decision-making incapacity is a right warranting protection, however, it is my view that of equal if not greater value is their right to appearances before a determining tribunal that is functioning optimally by virtue of its adherence to the open justice principle.

4.84 Caxton Legal Centre also supported a presumption of open hearings to promote high standards of decision-making.<sup>559</sup>

[W]e consider that in an area of law such as guardianship – which is so crucially important to the protection of vulnerable persons and their families and carers/other supporters – it is critical to maintain the highest standards of decision-making. This is best achieved through transparent, accountable, open proceedings and decision-making that emphasises the importance of the right to be heard and the right to test evidence.

<sup>552</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.45]–[4.46].

<sup>553</sup> *Scott v Scott* [1913] AC 417, 438 (Lord Haldane LC). See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [3.18].

<sup>554</sup> See para 3.29 of this Report.

<sup>555</sup> See para 3.32–3.35 of this Report.

<sup>556</sup> For example, submissions 1H, 31, 44, 47, 48A, 53, 60, 62, 63, 73A, 74, 77, 80, 81, 83A, 85, 87, 98, 100, 101, 102, 106, 117, 118, 119, 120, 121, 122, 124, 126, 127, 134, 135, 149, F4, F6, F9, F12, F13, F14, F15, F16, F17, F21, F22.

<sup>557</sup> Submissions 95, 98, 100, 118, 134.

<sup>558</sup> Submission 100.

<sup>559</sup> Submission 124.

4.85 Some respondents considered that open hearings would make the Tribunal more accountable<sup>560</sup> and provide an opportunity for increased public awareness and education.<sup>561</sup> One respondent noted that people might wish to attend the Tribunal as observers before appearing in their own matter,<sup>562</sup> while another noted that allowing people to observe the operations of the Tribunal would lead to an increase in public confidence in the guardianship system.<sup>563</sup> However, some respondents noted that members of the public rarely attend Tribunal hearings.<sup>564</sup>

4.86 One respondent considered that, at least with respect to the decisions available through the AustLII website, access to information about hearings is already publicly available so the public should also be able to attend hearings.<sup>565</sup>

### **Closed hearings**

4.87 Some respondents, including some adults with impaired capacity, considered that hearings should generally be held in private.<sup>566</sup>

4.88 Some attendees at community forums considered that there is no justification for not respecting the privacy of adults simply because they may have impaired capacity.<sup>567</sup> Other respondents considered the matters discussed at hearings to be essentially personal or private in nature and that attendance by the public would be invasive to people's privacy and embarrassing for the adult.<sup>568</sup>

4.89 A number of respondents noted that obtaining evidence in closed proceedings might be more effective, especially in relation to the adult. A view expressed at a community forum was that public attendance should not be permitted as the atmosphere at the Tribunal should be one that encourages and protects, not threatens, the adult. Another forum attendee commented that some adults might be intimidated simply by having to appear in front of a large group of people.<sup>569</sup> Another respondent stated that, from an Indigenous perspective, a closed court would be more effective than an open court as the Tribunal would be more likely to get information from the parties than if members of the public were present.<sup>570</sup>

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560 Submissions F9, F12, F21

561 Submissions F6, F10, F12, F15.

562 Submission F12.

563 Submission F6.

564 For example, submissions 27E, 102, F14, F15, F17, F18.

565 Submission F6.

566 Submissions 141, F5, F6, F9, F11, F12, F13, F14, F15, F19, F20, F21.

567 Submissions F12, F14.

568 Submissions 141, F8, F9, F14, F21.

569 Submission F5. Similar views were expressed in submission F21.

570 Submission F11.

4.90 Other reasons given in support of closed hearings were that any allegations of wrongdoing against a person that are not tested at a hearing may result in damage to the person's reputation,<sup>571</sup> and that allowing public attendance might permit people who prey on the vulnerable to learn details about an adult's disability.<sup>572</sup>

4.91 A number of respondents who favoured closed hearings specified particular persons whom they considered should be allowed to attend:

- advocates;<sup>573</sup>
- persons close to the adult such as guardians, advocates, lawyers and family members;<sup>574</sup>
- all 'key stakeholders';<sup>575</sup>
- all family members.<sup>576</sup>

4.92 Australian Lawyers Alliance considered that hearings should generally be conducted in private with only the persons involved in proceedings (as defined in section 112(4) of the *Guardianship and Administration Act 2000* (Qld)) being entitled to be present, but with the Tribunal having the power to allow other people to be present if it is thought appropriate.<sup>577</sup>

4.93 A number of respondents who favoured closed hearings acknowledged that the lack of public scrutiny could raise concern about the accountability of the Tribunal. However, some respondents suggested that this concern could be dealt with other than by making hearings public.<sup>578</sup> Suggestions included ensuring that at least one Tribunal member was a 'lay member' who could represent the public,<sup>579</sup> recording or videotaping all hearings to ensure they are conducted properly, or having an independent person attend to ensure procedural fairness and natural justice are accorded to all parties.<sup>580</sup> One respondent also considered that public education could be achieved through other means such as the use of training videos.<sup>581</sup>

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571 Submission F6. Similar views were expressed in submissions F11, F22.

572 Submission F23.

573 Submission 11D.

574 Submissions 79B, F19. Submission F9 also advocated allowing 'significant people' in the life of the adult, such as family members and carers, to participate in a hearing.

575 Submission F5.

576 Submission 69.

577 Submission 97.

578 For example, submissions 141, F5, F12, F21.

579 Submission F5.

580 Submissions 141, F21.

581 Submission F12. Similar views were expressed in submission F15.

### **Hearings open or closed depending on circumstances**

4.94 Some respondents identified benefits of both open and closed hearings and considered that different approaches could be taken depending on the circumstances.<sup>582</sup>

4.95 One respondent suggested that a hearing's location might affect whether it should be open and that in small communities hearings should be automatically closed.<sup>583</sup> Another respondent suggested that hearings should be open for 'straight forward' cases but closed when there is 'sensitive' material.<sup>584</sup> One respondent suggested that a case-by-case approach should be adopted and that parties should be consulted to determine whether a hearing should be open.<sup>585</sup>

4.96 At a focus group attended by Tribunal members, different opinions were expressed as to whether hearings should be open or closed. It was noted that closed hearings and secrecy can breed mistrust and that open hearings have resulted in successful outcomes. However, it was also recognised that the Tribunal deals with personal and sensitive issues that may not be appropriate for open hearings. Some members considered that it was easier to gain necessary information when there were only active parties in the hearing room.<sup>586</sup>

4.97 The Public Advocate, while generally supportive of open proceedings acknowledged that there were certain circumstances where it could be argued that a closed hearing with power to admit people should be preferred.<sup>587</sup> She considered that it may be appropriate to adopt an approach similar to that under the *Mental Health Act 2000* (Qld), where hearings are closed with a power to permit people to attend, for applications in relation to special health matters, such as sterilisations or terminations of pregnancy. However, she argued that safeguards would be needed, such as allowing attendance by agencies with interest in the matter and perhaps representatives of the press, to allow public scrutiny.<sup>588</sup>

Arguably, private or closed hearings would properly respect an adult's privacy, but important safeguards offered by public scrutiny should be built into the system design if such an approach was taken. In relation to an application of this nature, it would be reasonable to expect that a small number of the immediate support network might be allowed to attend. It is suggested that agencies/public bodies with a public interest in the subject matter could be automatically notified of the hearing and allowed to attend as observers, and perhaps some of them as interveners with leave/upon request.

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582 Submissions 89, F10, F11, F13.

583 Submission F11.

584 Submission F10.

585 Submission F13.

586 Submissions F17, F18.

587 Submission 1H.

588 Ibid.

4.98 The Public Advocate recognised, however, that ‘those who should attend are not as immediately identifiable’ as those in relation to the Mental Health Review Tribunal, and that in guardianship proceedings ‘a wide group of persons may conceivably bring an application’.<sup>589</sup> She went on to state:

If hearings were closed in relation to these applications, it would be essential that the Tribunal be required to provide and publish reasons for decision in a de-identified format and that there be scope for the attendees to make public comment about the proceedings in a de-identified way.

### ***Practical issues about the openness of hearings***

#### ***Submissions***

4.99 A number of submissions raised practical issues that relate to the openness of Tribunal hearings. One related to the public’s ability to attend a Tribunal hearing if there is no public notification of when it is to be held. One respondent queried how a member of the public is meant to know when a Tribunal hearing is scheduled.<sup>590</sup> Another respondent noted that Tribunal hearings are not advertised in newspapers.<sup>591</sup> One respondent considered it strange that you could walk into the Magistrates Court at any time to view a hearing but could not at the Tribunal as you did not know when it was sitting.<sup>592</sup> However, one adult with impaired capacity stated that he or she would not want a hearing in relation to him or her to be advertised.<sup>593</sup>

4.100 Another practical issue raised was the process that the Tribunal adopts prior to its hearing requiring those who wish to attend to complete a form giving the person’s name, his or her relationship to the adult and whether he or she had received a notice of the hearing.<sup>594</sup> Two respondents, who had attended hearings previously, were surprised to learn that hearings were currently required to be open. Their opinion was that they would be refused entry to a hearing if they did not fill out the attendance form or could not demonstrate an interest in the proceeding to Tribunal staff.<sup>595</sup> Those respondents also noted their experience that the doors to the hearing room were locked during the hearing and that it is necessary for someone within the room to allow a person outside to enter.<sup>596</sup>

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589 Ibid.

590 Submission F4.

591 Submission F14.

592 Submission F4.

593 Submission F22.

594 Submissions F11, F16.

595 Submission 27E.

596 Ibid.

4.101 Another respondent, who supported limiting attendance at hearings to interested persons, also described the pre-hearing attendance form and considered its purpose was to ensure that disinterested members of the public did not attend Tribunal hearings.<sup>597</sup> In contrast, however, a community social worker noted that Tribunal hearings were often held at a community health centre where she worked and that it was easy for anyone to ‘wander in’ and watch a hearing.<sup>598</sup>

4.102 A final practical issue in relation to openness of hearings raised in consultation related to those conducted in rural settings. One respondent noted that these hearings usually take place by telephone so that public attendance is not an issue as there is no-one else around.<sup>599</sup>

#### *Information provided by the Tribunal*

4.103 The Commission sought the Tribunal’s views on these practical issues during a focus group with some Tribunal members and Registry staff.<sup>600</sup> In relation to public notification of hearings, the Tribunal advised that it does not publish a ‘law list’ stating the time and location of its hearings and the parties involved, because of concerns about confidentiality and the need to protect the identity of the adults to whom the proceedings relate. Practical difficulties in relying on a law list were also identified: newspapers will omit the listings of tribunals in favour of courts if there are space constraints and regional newspapers do not publish a law list for regional sittings.

4.104 The Tribunal does, however, display notices on the day of the hearing in the Brisbane Registry or, for regional hearings, on a notice board in the venue where the hearing is being conducted. The Tribunal informed the Commission that it is currently developing a website, independent of the one maintained by the Department of Justice and Attorney-General, and that it is examining whether it is appropriate to include a law list on that website.<sup>601</sup>

4.105 The Commission also sought information from the Tribunal about its procedure when a person telephones the Registry seeking information about an upcoming hearing. The Commission was informed that the practice of Registry staff is to ask for details of the person’s relationship with the relevant adult before providing any information about a hearing. This is done because the current confidentiality provisions prevent them from disclosing information about a person involved in a Tribunal proceeding. Those who have a relationship with the adult are, however, told about the hearing.

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597 Submission F14.

598 Submission F22.

599 Submission F8.

600 Submission F18.

601 Ibid.

4.106 The Commission also sought information from the Tribunal about its pre-hearing procedures, and particularly its attendance form. The Commission noted that, when its staff attended Tribunal hearings, they were asked prior to each hearing to provide reasons for their attendance. In most cases, the Tribunal's hearing support officer checked with the presiding member before confirming that Commission staff could attend. In one case, before being permitted to attend, the hearing support officer commented that Tribunal hearings were 'usually closed'. The Tribunal informed the Commission that the purpose of its attendance form was to:<sup>602</sup>

- ensure names were spelled correctly;
- enable Tribunal members to set up a hearing room appropriately, for example, so that it could accommodate the number of people attending or avoid having parties in entrenched conflict sitting beside each other; and
- identify the relevant person's interest in the adult and determine if he or she may need to be heard from during the hearing.

4.107 The Commission also sought information from the Tribunal in relation to its hearing room doors and whether they are locked. The Commission noted that when attending hearings, some of its staff had noticed that the door was locked. The Tribunal informed the Commission that this was unintentional and that the hearing room doors automatically lock upon closing to prevent the technical equipment in the room from being stolen. The doors can be adjusted so that they do not lock upon closing although the Tribunal noted that there have been occasions where this may not have been done. However, the Tribunal stated that the fact that a door was locked would not prevent someone attending and that a person seeking admission would be allowed to enter.

## **The Commission's view**

### ***Public hearings***

4.108 Section 109(1) of the *Guardianship and Administration Act 2000* (Qld) requires that Tribunal hearings be held in public. This provision gives effect to the fundamental tenet of the common law that justice must be dispensed in public.<sup>603</sup> The Commission agrees with the view strongly expressed by submissions that this should remain the law. The Commission also notes that one of the guiding principles for its review set out in Chapter 3 of this Report is that there should be a greater level of openness than that which currently exists. The Commission therefore considers that a provision should be included in the *Guardianship and Administration Act 2000* (Qld) specifying that Tribunal hearings must be held in public but that, in accordance with its recommendations elsewhere in this chapter, the Tribunal may make an 'adult evidence order' or a 'closure order'.<sup>604</sup>

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602 Ibid.

603 See para 3.23 of this Report.

604 See para 4.189–4.201 of this Report.

4.109 The Commission notes that some respondents, particularly those who attended community forums, expressed concerns that public hearings would result in an invasion of the adult's and others' privacy. There were also concerns about the disclosure of private information to persons with no interest in those appearing before the Tribunal. The Commission acknowledges that the Tribunal deals with sensitive issues and that public hearings necessarily mean that members of the public can attend and hear this information. However, the Commission also considers that public hearings are one way in which to enhance the accountability of the Tribunal and so represent an important safeguard for those who appear before it.

4.110 The Commission also notes it has made other recommendations to provide privacy protection for those involved in Tribunal proceedings. One such recommendation, made later in this chapter, is that the Tribunal should retain its power to close hearings in specified circumstances.<sup>605</sup> In Chapter 7 of this Report, the Commission has also recommended that there be a prohibition on publication of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published.<sup>606</sup>

### ***Practical issues about the openness of hearings***

4.111 The Commission notes the concerns expressed in submissions about the extent to which Tribunal hearings are sufficiently open to the public in practice. It considers that the policy underpinning the law should be supported by the policies and procedures of the Tribunal. The relevant benchmark for testing openness is whether a member of the public could ascertain when and where Tribunal hearings occur and be able to attend a hearing.

4.112 In terms of ascertaining the time and location of a hearing, the Commission considers that the Tribunal should promulgate a law list. This may be done through the news media or a website (or preferably both). This is particularly important for regional hearings. A member of the public in Brisbane could find out where the Tribunal sits and could reasonably expect to attend on any particular day and view a hearing. In regional areas, where the Tribunal has irregular hearing dates and might sit in a hotel or community centre rather than a purpose-built venue,<sup>607</sup> it would be virtually impossible for a member of the public to find and attend a Tribunal hearing.

4.113 The Commission recognises the limits on publicising hearings imposed by section 112 of the *Guardianship and Administration Act 2000* (Qld), which prohibits the publication of information about Tribunal proceedings.<sup>608</sup> However, that prohibition does not prevent publication of the fact that the Tribunal is sitting in a particular location during certain times. The Commission notes that other courts and tribunals that

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<sup>605</sup> See para 4.189–4.192 of this Report.

<sup>606</sup> See para 7.204 of this Report.

<sup>607</sup> Submission F18.

<sup>608</sup> This provision is discussed in Chapter 7: see para 7.3–7.6 of this Report.

are subject to prohibitions on publishing information about proceedings have law lists that alert members of the public as to when and where they may attend a hearing.<sup>609</sup> The Commission also notes that its recommendations, outlined in Chapter 7 of this Report, to change this prohibition would not affect the promulgation of a law list as just described.<sup>610</sup>

4.114 The Commission does recognise the difficulty that arises where a specific enquiry is made to the Registry as to when a particular matter is to be heard. A positive response that a guardianship proceeding in relation to a particular adult is to be heard may breach the prohibition in section 112 of the *Guardianship and Administration Act 2000* (Qld) because it may involve the publication of information about a Tribunal proceeding. The Commission considers that the Tribunal's current practice to ascertain the interest of the person enquiring before considering whether to provide the information is appropriate. The Commission notes that one of its recommendations in Chapter 7 of this Report, that the prohibition only apply to publishing information to the public or a section of the public, will provide greater certainty for Registry staff who are disclosing information in these circumstances.<sup>611</sup> A person such as a family member who has a sufficient interest in the information is not part of the public or a section of the public and so would not be caught by the recommended prohibition.

4.115 In terms of a member of the public being able to attend a hearing, the Commission considers that there should not be any unreasonable physical impediments that discourage attendance. For example, this means that the doors of a hearing room should not be locked while a hearing is in progress. Although those seeking to gain entry may always be permitted to enter, a locked door is an unreasonable physical impediment that discourages possible public attendance, which is an integral part of the requirement that hearings be open and held in public.

4.116 In relation to the pre-hearing attendance form, the Commission notes that the Tribunal has an interest in knowing who might be attending and likely to participate in a hearing. However, the Commission is aware that some people have considered the completion of this form to be a condition precedent to being granted access to the hearing room. Whether or not this is in fact the case, the perception is sufficient, in the Commission's view, to justify changing this practice. The Commission considers that while it may be valuable to know who is in attendance prior to a hearing, this is secondary to the requirement that hearings be open to the public. Accordingly, the Commission considers that any procedure prior to hearing should make clear that

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For example, the Western Australian State Administrative Tribunal, which deals with guardianship and administration matters, publishes a law list on its website which only identifies the relevant hearing room, the Tribunal member hearing the matter and a file number: see State Administrative Tribunal, *Daily Hearings* <<http://www.sat.justice.wa.gov.au/apps/courtlists/Default.aspx?uid=1092-7489-8621-9269>> at 27 June 2007. Similarly, in the Queensland Supreme and District Courts Brisbane Law List the only information provided about matters before the Childrens Court of Queensland is the number of matters to be heard, the Judge hearing the matter and the time and place of hearing: see Queensland Courts, *Supreme and District Courts Brisbane Law List* <<http://www.courts.qld.gov.au/practice/lawlist/brisbane.htm>> at 27 June 2007.

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The Commission has recommended that a provision should be included in the guardianship legislation that prohibits the publication of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published: see para 7.204 of this Report.

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See para 7.155–7.168 of this Report.

attendance is open to the public at large and should not deter those who wish to attend from doing so.

4.117 A final practical issue raised during consultation was achieving openness in relation to telephone hearings. The Commission considers that all hearings, whether conducted in person or via telephone should be open to the public. This could be achieved by conducting telephone hearings in a room that is open to the public, like any other hearing.

## SHOULD THE TRIBUNAL HAVE POWER TO CLOSE HEARINGS, EXCLUDE PEOPLE, OR WITHHOLD INFORMATION?

### The Discussion Paper

4.118 In its Discussion Paper, the Commission sought submissions on whether, if hearings were generally to be open, the Tribunal should have power to:

- exclude the public by closing a hearing;<sup>612</sup>
- exclude particular persons from a hearing (including active parties);<sup>613</sup> or
- restrict or prohibit disclosure of information given at a hearing to an active party to the proceeding.<sup>614</sup>

4.119 In relation to closing a hearing or excluding a person, such an order is a significant step, although it has been suggested that there are times when it may be appropriate to prevent harm to the adult, or when highly sensitive and private matters are under discussion. Intimidation or the inability of an adult to speak freely in the presence of particular people may also be an issue. The Commission noted, however, that there may be other ways, such as using telephone or video link-up facilities,<sup>615</sup> to address some of these concerns.<sup>616</sup>

4.120 The Commission also sought submissions on whether, if a power were granted to exclude the public or particular persons from a hearing, there are any persons who should never be excluded.<sup>617</sup> Such persons might include the adult, other active parties

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<sup>612</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.47].

<sup>613</sup> Ibid.

<sup>614</sup> Ibid [4.59].

<sup>615</sup> The Tribunal has wide powers as to how it conducts its hearings. For example, the Tribunal is not bound by the rules of evidence and may inform itself as it considers appropriate, and it is expressly permitted to utilise technology to allow people to participate in its hearings or to give evidence: *Guardianship and Administration Act 2000* (Qld) ss 107, 111.

<sup>616</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.48], [4.50].

<sup>617</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.56]–[4.58], [4.91] Q4-6.

to the proceeding or representatives of the media. In Queensland, there are no legislative limitations on the categories of people who may be excluded.<sup>618</sup> In the Northern Territory, South Australia, Tasmania, and Western Australia, however, people who are involved or directly interested in the proceedings cannot be excluded from the hearing.<sup>619</sup> Additionally, the legislation in Western Australia specifically provides that members of the press cannot be excluded from a hearing.<sup>620</sup>

4.121 In relation to the power to restrict or prohibit disclosure of information given at a hearing to an active party to the proceeding, such an order is likely to be considered in conjunction with an order to exclude that active party from the hearing. However, there may also be circumstances where the reasons that compel the party's non-attendance at the hearing do not additionally justify depriving him or her of access to the information heard in his or her absence. Queensland is the only jurisdiction whose guardianship legislation grants the Tribunal such a discretion.

## Submissions

### *Closing a hearing or excluding a person*

4.122 A number of submissions considered generally the issue of whether the Tribunal should have the power to exclude persons, without expressly distinguishing between closing a hearing to the public and excluding particular persons such as active parties. The majority of respondents who considered this issue were of the view that the Tribunal should have the power to close a hearing to the public, or generally exclude a person or persons.<sup>621</sup> Further, as discussed earlier, the Commission notes that a number of respondents also considered that hearings should generally be closed.<sup>622</sup> Accordingly, relatively few respondents were of the view that the Tribunal should not have a power of some kind to exclude a person from a hearing.<sup>623</sup>

4.123 Numerous reasons were advanced as to why the Tribunal should have the power to close a hearing to the public or exclude a person.

4.124 A number of respondents considered the exclusion of a person may be necessary to address concerns about the safety of the adult or another person, or because harm could result from the presence of a person or persons in the hearing.<sup>624</sup> Some

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618 But see para 4.22–4.23 in relation to proceedings regarding consent to special health care.

619 *Adult Guardianship Act* (NT) s 25; *Guardianship and Administration Act 1993* (SA) s 14(10)–(11); *Guardianship and Administration Act 1995* (Tas) s 12; *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2)–(3). See para 4.41–4.43 of this Report.

620 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2)–(3). See para 4.41 of this Report.

621 For example, submissions 18B, 31, 44, 54B, 60, 65, 66, 68, 70, 74, 79A, 83A, 87, 88, 98, 99, 106, 118, 121, 122, 125, 127, 137, F4, F6, F8, F19, F23.

622 See para 4.87 of this Report.

623 Submissions 50B, 62, 82, 117, 136.

624 For example, submissions 1H, 16B, 60, 67, 71, 83A, 85, 87, 99, 121, F6, F9. Submissions 21C, 38B, 45 considered that a history of mistreatment of the adult was enough to exclude a person from a hearing.

respondents focused specifically on harm to the adult, while others considered that harm to other persons is sufficient justification for such a power.

4.125 For example, Queensland Health considered that where a patient discloses highly contentious information to staff, such as sexual or physical abuse, the content of that information and its disclosure in front of the person alleged to have committed such abuse ‘may result in further harm to the adult’.<sup>625</sup>

4.126 Some respondents considered that exclusion of a person may be appropriate because the presence of a particular person leads to the adult being intimidated or subjected to undue influence.<sup>626</sup>

4.127 Other respondents considered that the power to close a hearing or exclude a person is needed because of the confidential, sensitive or private nature of the information discussed in hearings.<sup>627</sup> A number of respondents also considered that a power to exclude should be available in relation to a person who is not relevant to a hearing or who does not have a sufficient interest in the adult.<sup>628</sup>

4.128 Some respondents considered that it is important that the wishes or interests of the adult be taken into account when the Tribunal decides whether to exclude a person.<sup>629</sup> Some considered that an adult’s preference for a person not to attend a hearing could justify exclusion of those persons.<sup>630</sup>

4.129 A number of submissions also suggested that a power to close the hearing or exclude a person is needed where the presence of a person or persons could detrimentally affect the way in which evidence is taken.<sup>631</sup> Queensland Advocacy Incorporated considered that the Tribunal needs to be cognisant of the fact that the presence of family, friends, support workers and media may have positive or negative effects on the evidence given by people.<sup>632</sup>

4.130 The Public Advocate supported the Tribunal being able to close a hearing to the public or exclude a person in some circumstances. She considered that where a

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<sup>625</sup> Submission 87.

<sup>626</sup> Submissions 125, 126, F4, F10, F14. Submission F13 considered that intimidation of the adult due to the presence of someone was a matter of concern. Submission 65 supported the Tribunal excluding persons where those with a vested interest, such as supported accommodation providers, bring extra staff to a hearing to provide ‘undue representation’ before the Tribunal when the adult is alone and legally unrepresented.

<sup>627</sup> Submissions 1H, 74, 87, 123, 126, 145.

<sup>628</sup> Submissions 21C, 45, 64, 69, 90C. Submission 66 considered that those who do not have the adult as their primary interest should be able to be excluded. Submission 59B considered that the media should be able to be excluded.

<sup>629</sup> Submissions 21C, 69, 88, 99, F14, F15. Submission 75 also suggested that circumstances where the best interests of the person with a disability were undermined may warrant exclusion of some persons, referring to *Dromey v Guardianship Board* [1997] SADC 3625.

<sup>630</sup> Submission 69. Submission 99 agreed that the Tribunal should consider a request from the adult regarding excluding another person.

<sup>631</sup> Submissions 98, 102, 118, 121.

<sup>632</sup> Submission 102.

person was attending a hearing for the purpose of obtaining information for another legal proceeding, that person should be able to be excluded.<sup>633</sup>

[W]here an adult has an acquired brain injury as a result of a motor vehicle accident, a defendant may perceive possible advantages in attending guardianship proceedings to gather information. However, any discovery process in respect of the claim should appropriately be dealt with in accordance with established procedures for claims of this nature. Excluding a person from the guardianship hearing in circumstances such as these, would place an adult in guardianship proceedings, who is also involved in a legal dispute, as far as possible in the position of a person about whom there is no guardianship proceedings. This seems appropriate and in accordance with current international human rights principles articulated in Article 22(2) of the Convention.

4.131 Members of the Tribunal at a focus group favoured retaining a power to close a hearing and exclude a person. They identified a number of circumstances where such a power had been needed and used by the Tribunal to exclude a person:<sup>634</sup>

- where a person attended a hearing to find out about the adult’s financial circumstances for the purposes of other litigation;
- where a person had previously been declared a vexatious litigant in the Supreme Court;<sup>635</sup>
- where there was concern that the family members who wished to attend may cause harm to the adult;
- where a member of the public attended a hearing involving the consideration of highly sensitive financial information and provided no reason for his or her attendance.

4.132 The Public Advocate suggested that representatives from public interest groups (possibly including the press) should be excluded from definitions of the ‘public’ for ‘reasons of open justice and accountability’.<sup>636</sup> There was also support from *The Courier-Mail* and other media organisations for the Tribunal to have no power to exclude from hearings certain categories of persons such as public observers or the media.<sup>637</sup> However, other respondents expressed concerns about attendance by the media<sup>638</sup> with one respondent being of the view that the media should be excluded from all hearings.<sup>639</sup>

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633 Submission 1H.

634 Submission F17.

635 See note 532 of this Report. In that case, a person was excluded, partly on the basis that the person had been declared a vexatious litigant in the Supreme Court.

636 Submission 1H.

637 Submissions 73A, 98, 118, 134.

638 Submissions F8, F13. Submission 59B considered that the media should be able to be excluded.

639 Submission F8.

4.133 Queensland Advocacy Incorporated submitted that the media should be treated in the same manner as other persons:<sup>640</sup>

There seems little basis for treating members of the press any differently. If their presence appears to be affecting the evidence gathering process they might be excluded, with a précis of the evidence given related for their benefit by the Tribunal upon their return. Issues of confidentiality would be better solved in relation to their potential reports by confidentiality orders rather than total exclusion which is the antithesis of open justice.

### ***Excluding people involved in proceedings***

4.134 Some respondents noted that different considerations apply when making an order to exclude the public and when making an order to exclude people involved in a proceeding. These submissions addressed the issue of whether the Tribunal should be able to exclude an active party or an interested person from a hearing.

4.135 The President of the New South Wales Guardianship Tribunal and the Public Advocate considered that non-parties should be distinguished from parties.<sup>641</sup> The Public Advocate noted that although members of the public have an interest in open justice and accountability, they are not entitled to procedural fairness.<sup>642</sup>

4.136 A number of respondents, including Caxton Legal Centre and Endeavour Foundation, considered that the Tribunal should have a power to exclude active parties but that the discretion should be very limited.<sup>643</sup> The Public Advocate, while supporting a limited discretion to exclude active parties, considered that this should only be possible for part of a hearing otherwise it would not be possible to accord those persons procedural fairness.<sup>644</sup> Queensland Advocacy Incorporated agreed, stating that exclusion ‘should almost never be absolute but instead be considered merely for parts of the hearing’.<sup>645</sup>

4.137 Two submissions focused on the needs or interests of the adult as reasons for justifying the exclusion of an active party or an interested person.<sup>646</sup> At a focus group of adults with impaired capacity, the view was expressed that active parties should be able to be excluded if they would cause the adult distress or would intimidate the adult.<sup>647</sup> The Public Advocate also considered that the adult’s participation in a hearing should be facilitated as this accords the greatest degree of dignity to him or her. In her view, this would include the adult giving evidence if possible and taking steps to permit

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640 Submissions 102, F15.

641 Submissions 1H, 137.

642 Submission 1H.

643 Submissions 101, 124. Submission 120 considered that an active party should be excluded only if the person has been convicted of a criminal act against the adult.

644 Submission 1H.

645 Submission 102.

646 Submissions 1H, F22.

647 Submission F22.

this to occur. Accordingly, she considered that giving the adult's interests priority may warrant the exclusion of a party in some circumstances.<sup>648</sup>

4.138 A number of respondents were concerned about the ability of the Tribunal to exclude people involved in proceedings where allegations are made against them in their absence.<sup>649</sup> One respondent considered that an active party or interested person should not be excluded if allegations are made against them.<sup>650</sup> Some respondents who were involved in proceedings but were excluded from the hearing reported that they were not told what was said in their absence despite wanting an opportunity to respond.<sup>651</sup> One respondent stated:<sup>652</sup>

I believe that section 109 was unfairly invoked and procedural fairness was ignored when the members of the tribunal banned [X] and I from the telephone conference hearing.

4.139 The Public Advocate considered that where active parties are excluded, procedural fairness will be accorded provided they are advised of 'credible, relevant and significant allegations' made while they are excluded. However, she noted.<sup>653</sup>

Issues will arise if there is not a legal member on the Tribunal, since non-legal members probably cannot reasonably be expected to have the skills to identify what procedural fairness requires in a particular matter, nor the information which must be given to each party to afford procedural fairness

4.140 Some respondents noted that the importance of certain people attending a hearing should govern the Tribunal's willingness or ability to exclude those people. The Aboriginal and Torres Strait Islander Legal Service (Qld South) considered the Tribunal should exercise caution in deciding whether or not a person should be excluded from proceedings relating to an Aboriginal or Torres Strait Islander person as different kinship links can be relevant.<sup>654</sup>

Aboriginal and Torres Strait Islander people have kinship links that are different from mainstream society and this difference can result in mainstream institutions failing to recognise, or even to acknowledge, those kinship links. For example, though a person may not have a direct bloodline relationship with the adult who has impaired facilities (the 'adult'), a person's status, say as 'Aunty' may mean that they are indeed the proper representative of an Aboriginal or Torres Strait Islander adult before the Tribunal proceedings.

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648 Submission 1H.

649 For example, submissions 11D, 36, 149.

650 Submission F12. Similar views were expressed by submission 149.

651 Submissions 11D, 36B.

652 Submission 11D.

653 Submission 1H.

654 Submission 96. Submission F7 also questioned whether the Tribunal took Indigenous cultural issues into account in deciding whether to exclude parties.

An Aboriginal or Torres Strait Islander adult would also want a respected member of their community, in the nature of an ‘Elder’ to be present at Tribunal proceedings and be informed of matter concerning the adult.

4.141 As a consequence, the Aboriginal and Torres Strait Islander Legal Service (Qld South) recommended that:<sup>655</sup>

In particular, the Tribunal should allow the adult to be represented by the person who by custom has the mantle for that position ... We further recommend that the Tribunal permit an Elder from the adult’s community to attend and participate in Tribunal hearings.

4.142 The Royal College of Nursing Australia considered that any power the Tribunal has to exclude people from hearings should *not* include the adult or the adult’s statutory health attorney where decisions are being made about an adult’s health.<sup>656</sup>

4.143 Some respondents identified the following categories of persons whom they considered should always be present at a hearing:

- guardians;<sup>657</sup>
- people directly interested or involved in the proceedings or otherwise authorised by the Tribunal to be present, relevant service providers and expert medical witnesses if necessary;<sup>658</sup>
- interested persons such as the adult, the spouse of the adult (if relevant), the parents of the adult, the siblings of the adult and the children of the adult.<sup>659</sup>

#### *Excluding the adult*

4.144 A number of respondents specifically expressed the view that the Tribunal should have power to exclude from a hearing the adult to whom the proceedings relate.<sup>660</sup> Some parents of adults with impaired capacity considered that information should be able to be given to the Tribunal in the adult’s absence.<sup>661</sup> These respondents were concerned that if the adult hears the information it would (and in two cases did) cause hurt and embarrassment, or would create conflict between the parent and the adult. One mother of an adult with impaired capacity stated:<sup>662</sup>

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<sup>655</sup> Submission 96.

<sup>656</sup> Submission 60. Similar views were expressed by submission 85.

<sup>657</sup> Submission 145.

<sup>658</sup> Submission 85.

<sup>659</sup> Submission 31B.

<sup>660</sup> For example, submissions 18B, 74, 99, F12.

<sup>661</sup> Submissions 19B, 111, 112.

<sup>662</sup> Submission 19B.

Some people with a disability react adversely to discussion involving them. Too often people with a disability have to listen to discussion about their well being and feel they have no privacy. Unfortunately, well meaning people in the disability services do not understand how this full on discussion revealing every minute detail of the person can be a traumatic experience and create avoidable behaviour problems.

4.145 An attendee at a community forum provided an example where the Tribunal questioned a person who was present at a hearing in a support role for the adult with impaired capacity. The support worker did not wish to speak about the adult in front of the adult but the Tribunal refused to make a confidentiality order in relation to the evidence which resulted in the adult becoming exceptionally distressed.<sup>663</sup> Another parent of an adult with impaired capacity stated she had been able to talk to the New South Wales Guardianship Tribunal without the adult being present and considered this practice to be beneficial.<sup>664</sup>

4.146 Two respondents considered that an adult with no capacity need not be involved or attend a Tribunal hearing.<sup>665</sup> One of these was the Australian Capital Territory Public Advocate who considered that the adult might be excluded.<sup>666</sup>

where the represented person has a disability to such a degree that they will not gain anything by their presence other than high distress, or [where the] represented person has a mental health disability with no insight or capacity to gain insight and it would be detrimental to their health or welfare.

4.147 The Public Advocate in Queensland considered that only in very rare circumstances would the Tribunal be warranted in excluding an adult from a hearing, and only then for part of the hearing.<sup>667</sup>

#### *No exclusion of the adult*

4.148 In contrast to the views expressed above, a small number of respondents considered that the Tribunal should not have power to exclude an adult from a hearing that relates to him or her.<sup>668</sup> The President of the New South Wales Guardianship Tribunal considered that it would be 'difficult to envisage circumstances which would justify the exclusion of the subject person'.<sup>669</sup> Another respondent similarly considered that there may be sound reasons for excluding the adult only in the 'gravest circumstances'.<sup>670</sup> That respondent considered that withholding evidence or excluding

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663 Submission F12. Submission F16 contained a similar example.

664 Submission 113.

665 Submissions 74, 99.

666 Submission 99.

667 Submission 1H.

668 Submissions 103, 145.

669 Submission 137.

670 Submission 119.

the adult would ‘depart radically from the principles of natural justice’.<sup>671</sup>

4.149 Queensland Advocacy Incorporated submitted that there should be a presumption that adults the subject of a proceeding would be present at a hearing.<sup>672</sup>

*Speaking with the adult in the absence of others*

4.150 A few submissions addressed the Tribunal’s current practice in speaking with the adult in the absence of others and, therefore, necessarily excluding other persons from the hearing.<sup>673</sup>

4.151 Some respondents, including adults with impaired capacity, considered that this practice should be permitted.<sup>674</sup> It was noted that those who are in positions of dependence upon others can be easily led or dominated and that everything should be done to empower the giving of evidence by the adult.<sup>675</sup> Queensland Advocacy Incorporated noted the difficulties of assessing the effectiveness of this practice (given that all other persons are excluded from the hearing room),<sup>676</sup> but was generally supportive of it:<sup>677</sup>

In a more inquisitorial environment like the Tribunal other methods like the panel simply speaking to the adult alone can be effective, with the corresponding relating of particulars to other parties by the Tribunal satisfying the natural justice considerations to some extent. It is noted that often there are assumptions made in relation to adults with impaired capacity by parents, support workers and others who purport to speak for them. The Tribunal needs to satisfy itself by speaking to the adult as to the reality or otherwise of the adverse effects of various persons’ presence. Again this ideally will be raised with the person alone or in the presence of support persons chosen by the person.

4.152 The President of the New South Wales Guardianship Tribunal explained that the practice of speaking to the adult in the absence of others had been used in that jurisdiction when it was needed to prevent the adult ‘from being intimidated or overborne by others’.<sup>678</sup> After speaking to the adult in the absence of others, the New South Wales Tribunal then summarises the relevant evidence received to allow the parties and others to comment.<sup>679</sup> The President of the New South Wales Tribunal

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671 Ibid.

672 Submission 102. That respondent also considered that an adult should be provided with the ‘legislative and financial’ means of getting to the hearing. Similar views expressed in submission F21.

673 Submissions 110, 114, 147, F15 identified circumstances where this practice occurred. Submission 114 noted that parties were asked to leave the room and that no confidentiality order was made.

674 Submissions 102, F4, F10, F12, F22, F23. Submission F10 suggested that other parties should be able to observe the Tribunal speaking to the adult from another room or via closed-circuit television.

675 Submissions F21, F22. Similar views expressed in submissions F14, F23. Those respondents considered that it was important for the Tribunal to be able to speak to the adult in the absence of others to avoid the undue influence of others over the adult.

676 Submission F15.

677 Submission 102.

678 Submission 137.

679 Ibid.

considered that this practice, which she noted has been considered by the New South Wales Supreme Court,<sup>680</sup> is ‘an appropriate way of facilitating accurate and useful evidence’.<sup>681</sup> The effect of this New South Wales Supreme Court decision is examined later in this chapter.<sup>682</sup> As has already been mentioned, the Commission does not consider that the New South Wales Supreme Court has provided either general or specific approval for the practice. The effect of that Court’s decision is actually quite narrow.

4.153 During a focus group, some members of the Tribunal identified the main reasons for speaking with the adult in the absence of others: to put the adult at ease, to alleviate any intimidation or influence over the adult, and to reduce any power imbalance that may exist between the adult and other parties.<sup>683</sup> It also provided Tribunal members with an opportunity to test the capacity of the adult. The President of the Tribunal recalled one recent case in which a confidentiality order was made in order to speak with the adult, and the adult’s case manager, in a closed hearing to obtain the adult’s views free from the undue influence of the adult’s spouse.<sup>684</sup>

4.154 A view expressed at a focus group with staff of the Office of the Public Advocate considered that speaking with the adult in the absence of others was done to make the adult comfortable and to enable them to give full and frank evidence.<sup>685</sup>

4.155 Tribunal members described the practice adopted by the Tribunal as:<sup>686</sup>

- asking the parties whether there was any objection to the Tribunal speaking with the adult in the absence of others. The President of the Tribunal noted that at times the parties have encouraged the Tribunal to speak with the adult in the absence of others;<sup>687</sup>
- speaking with the adult in the absence of the other active parties, but usually with a support worker or a staff member from the Office of the Adult Guardian or, if the adult is represented, his or her legal representative present;
- on the return of all active parties to the hearing room, providing a summary of the conversation that took place in their absence; and

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680 *Re SU* (Unreported, Supreme Court of New South Wales, Windeyer J, 17 September 2001).

681 Submission 137.

682 See para 4.199–4.201 of this Report.

683 Submission F18. One respondent had attended a hearing where consideration was given to speaking with the adult in the absence of others because he had expressed to various people that he was intimidated by one of the parties. However, in that case the Tribunal decided it was not necessary to speak with the adult in the absence of others: submission 78.

684 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007. In that case, a summary of the information obtained in the active parties’ absence was subsequently provided.

685 Submission F16.

686 Submission F18. This practice was described in broadly the same way at a forum of staff of the Office of the Public Advocate: submission F16.

687 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

- inviting the observer to verify the accuracy of the summary given to the other active parties by the Tribunal.

4.156 The Tribunal's practice does not usually involve making a confidentiality order under section 109 of the *Guardianship and Administration Act 2000* (Qld) to exclude the public and active parties when speaking with the adult in the absence of others.<sup>688</sup> Tribunal members described this practice as one used by guardianship tribunals nationally and considered it is broadly accepted.<sup>689</sup> The Commission has already mentioned that its view is that unless an order has been made pursuant to section 109 the practice is inconsistent with the requirement that the hearings be held in public.<sup>690</sup>

4.157 Two respondents, who are parents of an adult with impaired capacity, considered this practice to be unfair.<sup>691</sup> They accept that the Tribunal spoke with their son to find out what he thought but considered that the information gathered was flawed. Their son's views change from day to day and he could say 'yes' to a particular question on some days and 'no' on others.

4.158 At a focus group with staff from the Office of the Adult Guardian it was noted that care needed to be taken by the Tribunal in nominating an independent support person or observer to be present while the adult was giving evidence in the absence of others, as it was often the case that this was the person exerting influence over the adult.<sup>692</sup>

4.159 Another respondent, while not expressing an opinion about speaking with the adult in the absence of others, considered that the adult's reaction to the environment of the Tribunal is an important consideration.<sup>693</sup>

In some instances, clients have poor labile emotions and would find the Tribunal experience stressful. People, who may have dual diagnoses, would find the process stressful and even frightening. Reactions in this environment may significantly increase the risk of self-harm before, during and after. In these cases it may be best to offer the client a quiet and controlled environment.

### *Private or preliminary hearings*

4.160 Some respondents suggested other ways in which hearings might be structured or conducted when the adult or other active parties are excluded. At a focus group of adults with impaired capacity, it was suggested that the Tribunal be able to see the adult and others in private before the hearing starts to prevent the adult from being

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688 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

689 Submission F18.

690 See para 4.32, 4.198 of this Report.

691 Submission 110.

692 Submission F23.

693 Submission 86.

intimidated during the hearing.<sup>694</sup> It was further suggested that a neutral advocate should be present during these conversations.<sup>695</sup>

4.161 Another respondent similarly suggested that a preliminary hearing be held where the adult and applicant are heard separately to ‘expose problems that will adversely affect the operation of the hearing’.<sup>696</sup> In order to determine who should be present during a hearing, one respondent suggested that submissions could be made prior to the hearing or at the hearing so that the adult and other active parties have an opportunity to put their views to the Tribunal.<sup>697</sup>

4.162 Some respondents, including an adult with impaired capacity, also suggested that the Tribunal could hear the evidence of each of the parties individually and in private.<sup>698</sup> One respondent suggested that the Tribunal could report back generally to all of the active parties after it had heard from everyone individually.<sup>699</sup>

### **Power to withhold information**

4.163 A small number of respondents, including the Adult Guardian, the Public Advocate, the Public Trustee of Queensland and the Department of Justice and Attorney-General,<sup>700</sup> considered that there should be a power to withhold information given before the Tribunal from an active party and that this power should be constrained by criteria.

4.164 Some respondents suggested that a power to withhold information from active parties was needed because:

- information could be used to the ‘advantage of one and for the detriment of another’, in particular the adult;<sup>701</sup>
- it may be necessary to enable professional and family relationships to continue functioning;<sup>702</sup>
- the disclosure of information may result in harm to the adult,<sup>703</sup> and

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694 Submission F21.

695 Ibid.

696 Submission 38B. Similar views were expressed in submission F22.

697 Submission 99.

698 Submissions F7, F8. Similar views were expressed in submission F19.

699 Submission F8.

700 Submissions 1H, 47, 122, 124, 126.

701 Submission 123.

702 Submission 107.

703 Submission 87.

- providing information can have a detrimental effect on the mental health of that person.<sup>704</sup>

4.165 In relation to this last reason, some respondents were of the view that the consequences of providing the information to the adult needed to be considered.<sup>705</sup> One respondent was of the view that information could be kept from an adult if it would ‘truly cause distress’, but this should only be done ‘after a lot of consideration’ and the Tribunal would need to:<sup>706</sup>

ask itself what damage could be done by giving certain information to the client?  
Should/would this client have known anyway? (We all get bad news) Who benefits from information being withheld from the client?

4.166 Another respondent considered that information may need to be ‘reformulated’ or ‘rephrased’ to be more comprehensible to an adult, but that disclosure of information should not be prohibited.<sup>707</sup>

*Information obtained when speaking with the adult in the absence of others*

4.167 Some submissions specifically addressed the issue of withholding information that is given to the Tribunal when it speaks with the adult in the absence of others.

4.168 At a focus group of adults with impaired capacity, it was suggested that the Tribunal should not disclose to other parties what the adult has told them in confidence.<sup>708</sup> Rather, the Tribunal should use its powers to investigate any allegations made by the adult against another party.

4.169 At a focus group of Tribunal members and staff, it was acknowledged that if an adult asks the Tribunal not to tell the other active parties about what was discussed in their absence, the Tribunal may omit material from its summary. The Tribunal does this very rarely and will do so only if there is good reason to withhold the information or if it is not relevant to the decision.<sup>709</sup> Usually the Tribunal will test in other ways during the hearing the information given by the adult in order to assess its credibility.<sup>710</sup>

4.170 Some submissions also noted that care needs to be taken in assessing the credibility of what an adult says and whether there are other factors that need to be taken into account, such as whether he or she is being influenced by others or is delusional.<sup>711</sup> Two respondents, who are parents of an adult with impaired capacity,

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704 Submission 37B. Similar views were expressed by submissions 38B and 59B.

705 Submission 19B.

706 Submission 21C.

707 Submission 85.

708 Submission F21.

709 Submission F18.

710 Submission F18.

711 See para 4.230 of this Report.

considered that information received from their son in their absence was unreliable because his views can fluctuate significantly over short periods of time.<sup>712</sup>

### **No power to withhold information**

4.171 Some respondents considered that information should be made available to all persons involved in a proceeding,<sup>713</sup> and so favoured the Tribunal not having power to withhold information from active parties. Some respondents considered that failing to disclose information to all persons would ‘go against the laws of natural justice’.<sup>714</sup>

4.172 Australian Lawyers Alliance noted the consequences such an order may have on the quality of evidence obtained and the decision made:<sup>715</sup>

The Australian Lawyers Alliance does not consider that there are any circumstances where the Tribunal should be able to keep from a person involved in the proceedings information and evidence that has formed part of the proceedings, especially where such evidence involves information pertaining to them or about which they might be able to provide important information for the consideration of the Tribunal. If people who are involved in the proceedings do not have access to all the information, the Tribunal may inadvertently be restricting itself in relation to evidence and information which it rightly needs in order to formulate a decision which is in the best interest of the incapacitated person.

4.173 Many respondents expressed the view that where information given before the Tribunal alleges or infers criminal or inappropriate conduct by a person or a failure to fulfil responsibilities, he or she should know the nature of the allegation and who made it, and be given an opportunity to respond.<sup>716</sup> Carers Queensland stated that the ability to refute adverse information provided to the Tribunal has, in the past, been ‘denied to people involved with the guardianship system’.<sup>717</sup> Guardianship and Administration Reform Drivers considered that there had been circumstances where an opportunity to respond had not been given by the Tribunal leading to a denial of procedural fairness.<sup>718</sup> A few respondents reported being excluded from a hearing but not told what was said in their absence.<sup>719</sup>

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<sup>712</sup> Submission 110.

<sup>713</sup> Submissions 48B, 63, 64, 73A, 81, 88, 100. Submission 100 also considered that the public should not be denied information disclosed at a hearing.

<sup>714</sup> Submissions 49, 100.

<sup>715</sup> Submission 97. Similar views were expressed by submission 16B regarding the impact of the lack of procedural fairness on the final decision of the Tribunal, and submission 149 regarding the difficulty in making informed decisions if access to information is denied.

<sup>716</sup> Submission 31B. Similar views were expressed by submissions 24, 36A, 48A, 60, 88, 100, 101, 120, 124, 141, 142A, 149, F4, F7, F14, F20.

<sup>717</sup> Submission 101. Submission 141 provided an example where that respondent felt denied the opportunity to refute adverse information provided to the Tribunal.

<sup>718</sup> Submission 24. Guardianship and Administration Reform Drivers is an informal alliance of the following non-Government organisations: Caxton Legal Centre, Queensland Advocacy Incorporated, Queensland Parents for People with a Disability, Speaking Up for You, Carers Queensland and Queenslanders with Disability Network.

<sup>719</sup> For example, submissions 11D, 36B.

4.174 The Royal College of Nursing Australia advocated that the person who makes health decisions and the adult should be provided with all information.<sup>720</sup>

There may be arguments for withholding a particular document (for example, to protect the privacy of an individual) but the person who is making health decisions about the adult must be provided with the content of any document relating to the health of that adult. Similarly, there would be very few, if any, reasons for denying the adult access to any information being presented at a hearing concerning them/their health. They may need to be supported when hearing the information, rather than receiving it directly and without explanation, but individuals must have access to all information affecting their health in a form that is suitable for them.

### **Use of 'special witness' procedures**

4.175 A large number of respondents considered the use of alternative procedures to address some of the concerns raised by the making of confidentiality orders in the Tribunal. Many advocated for the types of mechanisms provided by the special witness provisions in the *Evidence Act 1977* (Qld) to apply in the Tribunal.<sup>721</sup> For example, Australian Lawyers Alliance stated:<sup>722</sup>

Special protection mechanisms that the Tribunal could allow include:

- The use of screens in the courtroom to shield the incapacitated person or other witness;
- Giving evidence away from the courtroom through a live television link;
- Clearing the public gallery;
- The use of communication aids, for example, an alphabet board or hearing loop;
- Giving evidence by affidavit;
- Giving evidence through an intermediary; and
- Giving video recorded evidence.

4.176 Respondents also suggested using independent support persons before and during the hearing to make the adult feel at ease<sup>723</sup> or to prevent an adult feeling intimidated or threatened.<sup>724</sup> Another suggestion was to allow the adult to familiarise

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<sup>720</sup> Submission 60.

<sup>721</sup> Submissions 1H, 85, 97, 102. Similar views were expressed by submissions 48A, 73A, 98, 100, 101, 106, 118, 119, 120, 149, F12, F13, F15, F19, F22. One respondent was of the view that the Tribunal arguably had the power to adopt normal procedures to protect witnesses from improper questioning and badgering, despite it not being contained in the legislation: submission 124.

<sup>722</sup> Submission 97.

<sup>723</sup> Submission F15. Similar views were expressed by submission 149.

<sup>724</sup> Submissions 106, F11, F12.

himself or herself with the room prior to the hearing commencing.<sup>725</sup>

4.177 Caxton Legal Centre recognised that some of these procedures may already be used in the Tribunal and supported their use:

We understand that it is already the case that parties/witnesses may, with permission, appear by way of phone linkup or video-conferencing. This is one way to protect against undue pressure being inappropriately placed on a vulnerable witness where physical proximity to another person in the hearing causes problems for that adult/witness.

4.178 Some respondents, including Queensland Aged and Disability Advocacy and the Department of Justice and Attorney-General, considered that these mechanisms could also be utilised to ensure procedural fairness is accorded to active parties.<sup>726</sup> For example, it was suggested that if a person excluded is the subject of adverse allegations, the excluded party should be able to view proceedings from another room or via closed-circuit television<sup>727</sup> or have access to transcripts.<sup>728</sup>

4.179 Others noted that that these procedures should be preferred by the Tribunal to making confidentiality orders as they represent a less restrictive approach.<sup>729</sup> For example, the Tribunal could use a video link rather than closing a hearing.<sup>730</sup> Carers Queensland generally advocated this approach.<sup>731</sup>

In the application of all confidentiality provisions, there should be an imposition placed on them so that the least restrictive option is employed. This would require, in the making of a confidentiality order, that less restrictive options are considered prior to the use of more restrictive options. In practice this would mean that access to, or disclosure of, information would, in the main, be unrestricted, then restricted and, only in very few cases, prohibited. Further, it should have to be demonstrated what options have been attempted or reasonably considered and why they were not appropriate.

4.180 A focus group of advocacy groups noted, however, that the use of some of these procedures such as video evidence may inhibit the evidence the adult gives if he or she is aware that his or her evidence will later become known by others.<sup>732</sup> A similar view was expressed at a focus group of staff of the Office of the Public Advocate who considered that adults may still be reluctant to give information even if these alternative

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<sup>725</sup> Submission F15.

<sup>726</sup> Submissions F5, 106, 126.

<sup>727</sup> Submission F5. Similar views were expressed in submissions F6, F8, F9, F11, F14.

<sup>728</sup> Submissions 106, 126.

<sup>729</sup> Submissions 101, 126, 134, F20. Similar views were expressed in submission F4.

<sup>730</sup> Submission 134.

<sup>731</sup> Submission 101. Similar views were expressed in submission F4.

<sup>732</sup> Submission F15.

procedures are put in place.<sup>733</sup> The Public Advocate also stated in her written submission:

It would prima facie appear unjustifiable for an adult in guardianship proceedings intended to protect his or her own interests and rights to not be afforded similar protections [to the Evidence Act] when giving information.

Of course, arrangements may (and must in criminal proceedings) be made for video-taping of evidence of a special witness. It is probably undesirable to introduce a degree of formality in Tribunal hearings such that video-taping of evidence occurs on a regular basis, but there may be situations in which this is appropriate/desirable.

## The Commission's view

### *A general approach*

4.181 The Commission considers the Tribunal should retain a limited power to close hearings to the public, to exclude persons from a hearing (including active parties) and to withhold information from active parties. The retention of these powers is necessary for the effective functioning of the Tribunal, particularly given the nature of the guardianship system. The Commission's reasoning in relation to each of these powers is outlined below.

4.182 The Commission notes, however, that these powers are significant as they displace the principle of openness required of judicial and quasi-judicial decision-making and impact significantly upon the way in which active parties are accorded procedural fairness. The Commission also notes the significant concern expressed in the submissions about these powers.<sup>734</sup> A number of respondents considered their exclusion from a hearing to be unfair and that they should have been present to hear the relevant information. Others were concerned about what information was received in their absence and that they did not know what information the Tribunal was relying upon.

4.183 Accordingly, the Commission considers that while the default position is for public hearings and public reception of evidence, there should be express power to modify that position. However, that power should be capable of being exercised only in accordance with strict criteria and a series of procedural safeguards, which are discussed later in this chapter.<sup>735</sup> Further, the provision that confers power to modify the default position should contain an express statement that the Tribunal is to take as the basis of its consideration whether or not to exercise the power the principle that it is desirable that hearings of proceedings before the Tribunal should occur in public and may be publicly reported, along the lines of that stated in section 35 of the *Administrative*

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<sup>733</sup> Submission F16.

<sup>734</sup> See para 4.171–4.174 of this Report.

<sup>735</sup> See para 4.257–4.263, 4.315–4.353 of this Report. The Commission notes that it has recommended that only some of these safeguards will apply to the making of adult evidence orders: see para 4.318, 4.328, 4.352 of this Report.

*Appeals Tribunal Act 1975* (Cth). The precise manner in which that proposition should be expressed is discussed later in this chapter.<sup>736</sup>

4.184 This is consistent with one of the Commission's guiding principles set out in Chapter 3 of this Report, that there should be a shift towards greater openness to promote community confidence in the guardianship system and to advance the rights and interests of adults through enhanced decision-making.<sup>737</sup> The Commission considers that the principle of greater openness should apply not only to the extent to which information may be made confidential, but also to the process by which the Tribunal imposes that confidentiality.

4.185 At present, section 109 of the *Guardianship and Administration Act 2000* (Qld) treats closing a hearing to the public, excluding a person from a hearing and withholding information from an active party in the same way, and describes them all as 'confidentiality orders'. The Commission's general approach to these powers also includes distinguishing more clearly between the different types of orders that can be made and which have the effect of modifying the default position of public hearings.

4.186 The Commission considers, as discussed above, that the only 'true' confidentiality order is one that withholds information from an active party to which he or she would otherwise be entitled.<sup>738</sup> Closing a hearing or excluding a person from a hearing may be done for reasons of confidentiality, but that need not be the case. Similarly, the Commission notes that the practice of speaking with the adult in the absence of others is generally not done for reasons of confidentiality but instead to ensure that the Tribunal can obtain information it would not otherwise receive. The Commission also notes that submissions favoured treating speaking with the adult in the absence of others differently from closing a hearing and excluding active parties generally.

4.187 Accordingly, the Commission considers that the term 'confidentiality orders' should not apply to all orders currently made under section 109 of the Act because the term does not reflect the different reasons why these orders may be made. The Commission considers that section 109 and the general power to make 'confidentiality orders' be replaced with separate provisions conferring the power to make 'closure orders', 'adult evidence orders' and 'confidentiality orders'. This terminology will be used in the remainder of this Report. Each of these orders, collectively called a 'limitation order', is considered separately below.

4.188 The Commission also notes that in Chapter 5 of this Report, it has considered the term 'confidentiality order' appropriate for describing an order to withhold, from an active party, a document that he or she would otherwise be entitled to inspect.<sup>739</sup> In Chapter 7 of this Report, however, the Commission has considered that such a term is

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736 See para 4.255 of this Report.

737 See para 3.156, 3-2 of this Report.

738 See para 4.79 of this Report.

739 See para 5.149 of this Report.

not applicable to an order prohibiting the publication of information about proceedings and has recommended instead that it be called a ‘non-publication order’.<sup>740</sup> These two types of orders are also ‘limitation orders’.

### **Closure orders**

#### *Closing a hearing to the public or excluding particular persons (other than active parties)*

4.189 The Commission has recommended earlier that Tribunal hearings should remain open to the public in accordance with the principle of open justice.<sup>741</sup> However, the Commission considers that the Tribunal should have the power in limited circumstances to close hearings to the public or to exclude particular persons. This view is supported by the majority of submissions. As noted earlier,<sup>742</sup> the Commission considers that the only effect of such an order will be to close the hearing. A further order is required in relation to the information given before the Tribunal for it to be confidential.<sup>743</sup>

4.190 The most common reason advanced as to why such a power should exist is to avoid potential harm to a person. The Commission considers that harm or injustice to a person may be sufficient justification for granting a power to close a hearing to the public or to exclude particular persons. It is of the view, however, that the harm must be serious and this is reflected in the criteria the Commission has recommended for the exercise of this power.<sup>744</sup>

4.191 The Commission also considers that the Tribunal should have the power to permit certain people to be present in an otherwise closed hearing. This might be appropriate, for example, in the case of ‘interested persons’, who are people defined in the guardianship legislation as those with a ‘sufficient and continuing interest’ in the adult.<sup>745</sup>

4.192 There was only limited support from submissions for preventing the media from being excluded from a Tribunal hearing in appropriate circumstances. The Commission does not consider that media representatives should be treated differently from other members of the public and so does not consider a specific provision preventing the exclusion of the media to be appropriate.

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<sup>740</sup> See para 7.290 of this Report.

<sup>741</sup> See para 4.108 of this Report.

<sup>742</sup> See para 4.74–4.75 of this Report.

<sup>743</sup> See para 4.79, 4.202–4.205 of this Report.

<sup>744</sup> See para 4.255, 4.257–4.259 of this Report.

<sup>745</sup> ‘Interested person’ for a person, means a person who has a sufficient and continuing interest in the other person: *Guardianship and Administration Act 2000* (Qld) sch 4. See also s 126 of the *Guardianship and Administration Act 2000* (Qld), which provides that the Tribunal may decide whether a person is an interested person under the guardianship legislation.

### *Excluding active parties*

4.193 The Commission notes that, ordinarily, procedural fairness will require that active parties be entitled to be present during a hearing. The exclusion of an active party is therefore a more serious step than closing a hearing to the public or excluding other persons. Despite this, there was support from submissions for the Tribunal to have a limited power to exclude active parties from a hearing. Circumstances where this might be appropriate are when an active party's attendance would result in serious harm to the adult or other persons. The Commission agrees and considers that the Tribunal should have such a power, although it considers that it would be exercised only very rarely.

4.194 Again, as noted above,<sup>746</sup> such an order will not make the information confidential and so will not affect the right of active parties to receive information given before the Tribunal during that period. A further order is required for that to occur.<sup>747</sup>

### **Adult evidence orders**

4.195 The Commission notes that a theme in the submissions was to treat circumstances where the adult is spoken with in the absence of others differently from those where an order is made generally to close a hearing or to exclude particular persons (including active parties). In addition to circumstances that involved harm to a person, many respondents were in favour of permitting such a step, in appropriate cases, to obtain information from the adult that would not otherwise be available and as part of respecting the adult's right to participate in proceedings about him or her.

4.196 The Commission agrees with the majority of submissions and considers that it should be possible for the Tribunal to make an order to obtain information from the adult at a hearing in the absence of others in limited circumstances, notwithstanding that proceedings are usually to be held in public. The Commission is persuaded that speaking with the adult in the absence of others is justified where it is necessary to avoid serious harm or injustice, or where it is necessary to obtain relevant information from the adult that would not otherwise be available. This is reflected in the criteria the Commission has recommended for the exercise of this power.<sup>748</sup> Although such a step is very unusual in judicial and quasi-judicial proceedings, the Commission considers that the nature of the guardianship system permits its limited use.

4.197 The Commission considers that the making of a closure order, which is an order that governs closing a hearing to the public and excluding particular persons (including active parties) generally, is not appropriate when the Tribunal proposes to speak with the adult in the absence of others. As noted above, submissions treated this step differently and focused not only on avoiding harm, but also on obtaining information from the adult and respecting the adult's right to participate in proceedings. The Commission agrees that speaking with the adult in the absence of others should be

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<sup>746</sup> See para 4.79 of this Report.

<sup>747</sup> See para 4.202–4.205 of this Report.

<sup>748</sup> See para 4.260–4.263 of this Report.

treated differently and accordingly proposes this situation be governed by an ‘adult evidence order’ and not by the provisions that govern a closure order generally. The creation of a separate order to deal with the Tribunal’s power to speak with the adult in the absence of others is desirable to indicate the different circumstances in which such an order may be made and the corresponding difference in criteria.<sup>749</sup> Again, as noted above,<sup>750</sup> an adult evidence order will not make any information that is credible, relevant and significant received while speaking with the adult confidential as a further order is required for that to occur.<sup>751</sup>

4.198 Although it should be possible for the Tribunal to speak with the adult in the absence of others, the Commission considers that the Tribunal should ensure that the Tribunal’s order is made within a structured framework governed by clear criteria. At present, the Tribunal generally takes this step without making orders closing a hearing or excluding active parties, instead relying on the parties’ acquiescence.<sup>752</sup> Such a course does not accord with the statutory requirement that hearings be held in public unless modified by order. As noted already, the Commission considers that the making of an ‘adult evidence order’ should be required when the Tribunal speaks with the adult in the absence of others.

4.199 Finally, the Commission notes that submissions have been made to it that the practice whereby the Tribunal speaks to the adult in the absence of others and then summarises the relevant evidence received from the adult to allow the parties and others to comment has been considered and approved by the New South Wales Supreme Court in *Re SU*.<sup>753</sup> The Commission’s view is that this decision could not be regarded as a decision which considered and approved that practice because the question whether such a practice was an appropriate exercise of discretion either generally or on the particular facts of the case concerned was not examined by the Court.

4.200 *Re SU* was an appeal against orders made by the New South Wales Guardianship Tribunal. The question which had been before the Tribunal was who should be appointed as guardian of the adult ‘SU’. The appellants had sought appointment as guardian and one of the grounds of appeal concerned their complaint that they had not been present when ‘SU’ was giving evidence before the Tribunal. Relevantly, section 67 of the *Guardianship Act 1987* (NSW) permits an appeal on questions of law as of right, but appeals on any other question (which would include questions of fact or the exercise of discretion) require leave. No leave had been sought and, accordingly, the only question before the Court was whether the approach which the Tribunal had taken could be impugned on the grounds of error of law.

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749 See para 4.255, 4.257–4.259, 4.260–4.263 of this Report.

750 See para 4.79 of this Report.

751 See para 4.202–4.205 of this Report.

752 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

753 Unreported, Supreme Court of New South Wales, Windeyer J, 17 September 2001.

4.201 The appellants argued that there had been an error of law because section 59 of the *Guardianship Act 1987* (NSW) provided that a party may cross-examine a witness called by another party and they had not been afforded that opportunity. The Court rejected that argument and concluded that section 59 did not apply to confer a right to cross-examine the person who was the subject of the proceedings and not a witness called by another party. The Court did not otherwise consider the approach which the Tribunal had taken and certainly did not express approval of it. There is nothing in that decision inconsistent with the approach which the Commission has recommended in relation to adult evidence orders.

### **Confidentiality orders: withholding information from active parties**

4.202 The Commission notes the divergence in opinion in submissions as to whether the Tribunal should have power to withhold information from an active party to which that party would otherwise be entitled. Those submissions that opposed such a power generally did so on the basis of procedural fairness. Some respondents, on the other hand, considered it may be necessary to withhold information from an active party where the adult or others could be harmed.

4.203 The Commission regards procedural fairness as an integral part of ensuring high quality decision-making. However, it notes that the requirements of procedural fairness will depend on the circumstances of the case. The hearing rule recognises that there may be limited occasions where a party's right to know information may be qualified where competing interests exist.<sup>754</sup> This has specifically been recognised in the context of guardianship proceedings.<sup>755</sup> Accordingly, the Commission considers that the Tribunal should have power to make an order to withhold information that is credible, relevant and significant from an active party, but that it should be exercised only in rare circumstances. The gravity of taking such a step is reflected in the criteria proposed for making such an order that non-disclosure of the information be necessary to avoid serious harm or injustice to a person.<sup>756</sup>

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*Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49, [10]–[56] (Martin CJ). Martin CJ reviewed the authorities on this issue and concluded, [56]–[57]:

No Australian authority has been cited in support of the proposition that unrestricted access by a party to all the information upon which a court relies for its adjudication of the case before it, is an essential or indispensable aspect of a fair trial. My review of the decisions of the European Court of Human Rights, and the courts of the United Kingdom, New Zealand, Canada and the United States leads me to conclude that the courts in those jurisdictions have not concluded that the right of a party to have unrestricted access to all the information, upon which a court relies, is an essential or indisputable component of a fair trial.

Rather, my review of those jurisdictions leads me to conclude that in each of the jurisdictions, it has been acknowledged that the content of the requirements of procedural fairness or fundamental justice will depend upon the particular circumstances of the case and cannot be prescribed in the abstract. Further, in each jurisdiction, it has been expressly recognised that the ordinary requirements of procedural fairness, including the ability of a party to know the case that he or she has to meet, must sometimes yield to a countervailing public interest in the protection of the confidentiality of evidentiary material, even as against a party to the proceedings.

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See *GM v Guardianship Tribunal* [2003] NSWADTAP 59 discussed at para 4.35, 5.46–5.49 of this Report.

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See para 4.255, 4.257–4.259 of this Report.

4.204 Because making an order to withhold information from an active party involves the imposition of confidentiality, the Commission considers this type of order should continue to be called a ‘confidentiality order’. As explained above, the making of such an order is the only basis upon which credible, relevant and significant information may be withheld from an active party. The Commission notes, however, that where an active party has been denied information and the ability to respond to it, the weight that it can be given by the Tribunal may be very limited.<sup>757</sup>

4.205 These recommendations are consistent with those made by the Commission in Chapter 5 of this Report, in relation to the Tribunal’s power to impose confidentiality in relation to documents received by it.<sup>758</sup>

### **Alternative mechanisms**

4.206 The Commission notes the strong support from submissions for the Tribunal to use mechanisms, such as those provided for special witnesses in the courts,<sup>759</sup> to enhance the comfort of adults during proceedings and at the same time ensure active parties are accorded procedural fairness.

4.207 The Commission encourages the Tribunal to utilise such mechanisms, where available, to assist an adult or other vulnerable persons during a hearing. The Commission notes that the *Guardianship and Administration Act 2000* (Qld) expressly permits the Tribunal to allow a person to take part in a proceeding using technology.<sup>760</sup>

4.208 The Commission also encourages the Tribunal to adopt an approach that facilitates an active party’s ability to participate in hearings as much as possible and, where feasible, to use the least restrictive method for managing issues that arise during a hearing. For example, before excluding an active party, the Tribunal should consider whether, given the reasons for making the closure order, it is possible and appropriate for that party to view what occurs in his or her absence via video link.

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*Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 100. In that case, the High Court noted that where the identity of the author of the letter containing allegations about the applicant was withheld, this meant that the credibility of the person who made the allegations could not be tested, and this may lead to the Tribunal being unable to decide whether the allegations have substance or not. See para 3.43–3.45 of this Report.

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See para 5.147–5.150 of this Report.

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See *Evidence Act 1977* (Qld) s 21A.

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*Guardianship and Administration Act 2000* (Qld) s 111.

## WHEN SHOULD A LIMITATION ORDER BE MADE?

### The Discussion Paper

4.209 In its Discussion Paper, the Commission sought submissions on what criteria should guide the Tribunal when exercising its power to close a hearing, exclude particular persons from a hearing or withhold information from an active party.<sup>761</sup>

#### *Closing a hearing and excluding particular persons*

4.210 At present, the Tribunal may direct that a hearing be held in private or that certain persons not be present at a hearing only in certain circumstances.<sup>762</sup> The same test is applied in relation to both powers. The Tribunal must be satisfied ‘it is desirable to do so because of the confidential nature of information or matter or for another reason’.<sup>763</sup> What is required to satisfy that criterion is partly to be assessed in light of the common law’s interpretation of similar provisions in other legislative regimes, which will include having regard to the principle of open justice and the requirements of procedural fairness.<sup>764</sup> The Tribunal would also need to consider the General Principles, including General Principle 11 which deals with confidentiality.<sup>765</sup>

4.211 The only other Australian jurisdiction that provides legislative criteria for the exercise of the Tribunal’s discretion is Western Australia. It provides, for example, that the Tribunal may close a hearing only if it is in the best interests of the person to whom the proceedings relate.<sup>766</sup>

4.212 A different approach, which focuses on the likelihood of harm, is found in Ontario. In that jurisdiction, the court may exclude the public from guardianship hearings where there is a possibility of serious harm or injustice to any person that justifies departure from the general principle that proceedings be open.<sup>767</sup>

4.213 The Commission also sought submissions on whether different criteria should apply to the power to exclude the *public* and the power to exclude a *party* from a hearing.<sup>768</sup> It also identified for consideration the question whether a provision similar to section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth), which requires

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<sup>761</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.49], [4.59].

<sup>762</sup> See para 4.6–4.10 of this Report.

<sup>763</sup> *Guardianship and Administration Act 2000* (Qld) s 109(2).

<sup>764</sup> See para 4.15–4.20 of this Report.

<sup>765</sup> *Guardianship and Administration Act 2000* (Qld) s 11(1). See para 4.21 of this Report.

<sup>766</sup> *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2). In relation to the other criteria that may guide the Tribunal’s discretion to close a hearing, see para 4.41 of this Report.

<sup>767</sup> *Courts of Justice Act*, RSO 1990, c 43, s 135(1)–(2).

<sup>768</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.56]–[4.58], [4.91] Q4-5.

that the desirability of public hearings be the basis for considering whether to close a hearing,<sup>769</sup> should be included in the legislation.

### **Withholding information from active parties**

4.214 In Queensland, the exercise of the power to limit or restrict an active party's access to information is governed by the same legislative criterion as that for closing a hearing or excluding particular persons: the Tribunal must be satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason.<sup>770</sup> Queensland is the only jurisdiction that grants its Tribunal such a discretion.

4.215 A power to prohibit or restrict disclosure of information given at a hearing is also conferred upon Queensland's Mental Health Review Tribunal. The role of that Tribunal is quite different<sup>771</sup> from that of the Guardianship and Administration Tribunal, and the ability of people to attend its hearings is significantly more restricted.<sup>772</sup> However, it is useful to examine its power to make confidentiality orders because of the lack of other comparative jurisdictions and also because it has jurisdiction over some adults with impaired capacity.

4.216 The Mental Health Review Tribunal has power to make a confidentiality order prohibiting or restricting disclosure of information given before it to the person the subject of the proceeding or the patient the subject of the application.<sup>773</sup> It may make such an order, however, only if it is satisfied the disclosure would:<sup>774</sup>

- cause serious harm to the health of the person or patient; or
- put the safety of someone else at risk.

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769 Ibid [4.49], [4.91] Q4-4.

770 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d).

771 The role of the Mental Health Review Tribunal includes reviewing whether a person should continue to be subject to involuntary treatment or detention (or both) and reviewing a person's fitness for trial if previously found to be unfit. For the Tribunal's jurisdiction, see *Mental Health Act 2000* (Qld) s 437.

772 Proceedings of the Mental Health Review Tribunal are to be held in private unless the Tribunal orders otherwise and there are conditions for the Tribunal's exercise of its discretion to open proceedings: *Mental Health Act 2000* (Qld) s 460. Section 460A of the Act deals with the attendance of an 'observer' at a hearing. See also ss 450–455 of the *Mental Health Act 2000* (Qld) regarding rights of appearance. Only the patient (or person subject to a treatment order) and the applicant have a right of appearance in treatment applications and applications for notification orders: *Mental Health Act 2000* (Qld) ss 451, 453. For appeals against decisions to exclude a visitor, rights of appearance are limited to the appellant and the administrator of a mental health service: *Mental Health Act 2000* (Qld) s 454. For reviews and applications to move a patient out of Queensland, the right of appearance is slightly broader to include, for example, sometimes the Attorney-General: ss 450, 452. In most instances, a person who appears may be represented by a lawyer or, with the Tribunal's leave, an agent: ss 450–452, 454. However, note that s 453 requires an applicant to have the Tribunal's leave to be represented by either a lawyer or agent. Section 455 of the *Mental Health Act 2000* (Qld) also provides that an allied person or someone else to whom the Tribunal grants leave, may attend a hearing to help an involuntary patient express his or her views, wishes and interests.

773 *Mental Health Act 2000* (Qld) s 458(1)(a).

774 *Mental Health Act 2000* (Qld) s 458(2).

4.217 In addition, if the Tribunal makes such an order, it must disclose the information to the person's lawyer or agent along with written reasons for making the confidentiality order.<sup>775</sup>

### **Special health care**

4.218 In addition to the general criterion of which the Tribunal must be satisfied before it may make an order under section 109(2) of the *Guardianship and Administration Act 2000* (Qld), the Queensland legislation provides an additional criterion in proceedings relating to consent to special health care. In such proceedings, the Tribunal must not make an order under section 109 if it is likely to affect the ability of the adult's guardian, attorney, or statutory health attorney to form and express a view on the proposed special health care.<sup>776</sup> This may mean that, in a particular case, the Tribunal may not exclude the adult's guardian, attorney, or statutory health attorney from a hearing.

4.219 Similarly, in South Australia, the Board must, if it thinks it appropriate and unless it considers it is not in the adult's best interest, allow the adult's parents a reasonable opportunity to make submissions to the Board in proceedings regarding prescribed medical treatment.<sup>777</sup>

## **Submissions**

### **Current criteria**

4.220 A number of submissions expressed views about the appropriateness of the current legislative criterion in section 109(2) of the *Guardianship and Administration Act 2000* (Qld) for making a confidentiality order. Some respondents, including the Public Advocate, media organisations and Carers Queensland, considered the current criterion to be too broad.<sup>778</sup> Endeavour Foundation described the current criterion as 'too open ended' and considered it would be of benefit if the legislation was specific and set out what circumstances could constitute 'another reason' referred to in section 109(2) of the *Guardianship and Administration Act 2000* (Qld).

4.221 At a focus group of Tribunal members, one member commented that currently most orders made by the Tribunal rely on 'the confidential nature of particular information or matter'. That member considered that the meaning of this phrase could be clarified in the legislation.<sup>779</sup>

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<sup>775</sup> *Mental Health Act 2000* (Qld) s 458(3).

<sup>776</sup> *Guardianship and Administration Act 2000* (Qld) s 109(4). See para 4.22–4.23 of this Report.

<sup>777</sup> *Guardianship and Administration Act 1993* (SA) s 61(5).

<sup>778</sup> Submissions 1H, 73A. Similar views were expressed by submissions 98, 101, 118, 120.

<sup>779</sup> Submission F17.

4.222 In contrast, Queensland Corrective Services and the Department of Justice and Attorney-General considered the current criterion to be appropriate,<sup>780</sup> as it is flexible<sup>781</sup> and allows exclusion where there is risk of harm to a party or where the presence of a person may hinder the proper consideration of the matters in issue.<sup>782</sup> The Department of Justice and Attorney-General considered that:<sup>783</sup>

If the legislation contained specific criteria for, or a limitation on, the power it may result in the interests of the adult or other person being adversely affected.

4.223 The Department also supported retaining the current criterion under section 109(4) of the *Guardianship and Administration Act 2000* (Qld) with respect to special health matters.<sup>784</sup>

### **General criteria for limitation orders**

#### *Criteria for all limitation orders*

4.224 Some respondents considered generally what the criteria should be for the making of a limitation order. Carers Queensland stated as a general proposition in relation to all such orders:<sup>785</sup>

The legislation should require that, in making a confidentiality order, the basis of the consideration should be that it is desirable to act in accordance with the principles of open justice and procedural fairness.

4.225 Many respondents considered that the most important consideration was the best interests of the adult.<sup>786</sup> Queensland Aged and Disability Advocacy suggested that set criteria premised on the ‘best interests of the party as its fundamental principle’ be used.<sup>787</sup> It was suggested that to assist the Tribunal to determine what is in the best interests of the adult, it should consult with the adult or an advocate of the adult’s during any ‘exclusion process’.<sup>788</sup>

4.226 Queensland Advocacy Incorporated considered that any criteria should be based upon ‘the necessity to gather the best evidence’, bearing in mind the importance

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780 Submissions 121, 126.

781 Submission 126.

782 Submission 121.

783 Submission 126.

784 Ibid.

785 Submission 101.

786 Submissions 79B, 106, F7, F10, F12, F22. Similar views were expressed in submissions F4, F14 and submission F5 considered an active party could be excluded from a hearing based on what is in the best interest of the adult with impaired capacity.

787 Submission 106.

788 Ibid.

of open justice and procedural fairness.<sup>789</sup> In addition, Queensland Advocacy Incorporated also considered that the best interests of the adult should be taken into account in the circumstances of each case.<sup>790</sup>

4.227 One respondent suggested the following could govern the making of limitation orders for exclusion of the public or a person and restriction of access to information generally.<sup>791</sup>

- 1) The potential for harm/disadvantage to occur to any person or persons (or in relation to the public, etc) should present not merely as ‘possible’ or ‘likely’, but as relatively certain (‘a real possibility’ ...) – or highly likely.
- 2) The degree of potential harm/disadvantage to any person or persons (or in relation to the public, etc) should present as significant or extreme (‘cause serious harm’ ...)
- 3) Of primary concern should be the potential for such harm/disadvantage to the adult.
- 4) Of subsequent concern should be the potential for such harm/disadvantage to an interested party – particularly (and perhaps only) – where the safeguarding of that party’s interests does not appear likely to result in an outcome for the adult that is not in the interests of the adult.
- 5) The issues of public interest, public safety and national security, should be the subject of concern that is consistent with the possible gravity and extent of any perceived risk in relation to those issues.
- 6) The safety (etc) of a person or persons not directly involved in the proceedings should be the subject of concern that is consistent with the possible gravity and extent of any perceived risk in relation to such person(s).

4.228 The Adult Guardian considered that the relevant criterion should be the legislative test from Ontario, that is, the Tribunal may make an order if it is satisfied it is necessary to avoid the possibility of serious harm or injustice to any person.<sup>792</sup>

4.229 A number of respondents, without specifically identifying them as criteria, considered the following matters to be relevant in the making of a confidentiality order.<sup>793</sup>

- harm to the adult or another person;
- the confidential or sensitive nature of information disclosed during a hearing;

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Submissions 102, F15. Queensland Advocacy Incorporated also noted that there was an ongoing concern that vulnerable adults assume that what is said by people in positions of authority is always correct and submitted that Tribunal staff require training to know the right questions to ask adults with impaired capacity to get the best evidence.

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Submission F15.

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Submission 119.

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Submission 122A.

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See para 4.124–4.129 of this Report.

- the presence of a person having a detrimental affect on the quality of evidence received;
- the wishes or interests of the adult;
- intimidation of the adult.

4.230 In relation to the intimidation of the adult, one respondent considered that an independent person should assess whether an adult was actually intimidated or simply acting in response to another person's directions.<sup>794</sup> In addition, some respondents noted that care would need to be taken so that the adult was not being pressured into making a request that a person be excluded<sup>795</sup> and that the adult was not experiencing delusions that a person was threatening them.<sup>796</sup> One attendee at a community forum stated that a person should not be completely excluded on the basis of the adult's untested allegations.<sup>797</sup>

#### *Criteria for closure orders*

4.231 A number of submissions specifically considered criteria that could be applied by the Tribunal when closing a hearing or excluding a person. There was some support generally for the Tribunal to have guidelines<sup>798</sup> or criteria in these circumstances to 'guide and promote consistency and transparency'.<sup>799</sup>

4.232 One attendee at a community forum suggested that transparency should be the starting point and that any exclusion must be considered carefully by the Tribunal and justified on the grounds that it would result in a serious detriment to the adult.<sup>800</sup>

4.233 In New South Wales, the legislation does not contain specific criteria for closing, or partially closing a hearing. The President of the New South Wales Guardianship Tribunal identified some of the factors that are considered when exercising that power:<sup>801</sup>

This discretion is exercised taking into account the objects and principles of the guardianship legislation. The following factors may be considered:

- the need to ensure protection of the interests of a person with a disability;

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794 Submission F9.

795 Submission 21C.

796 Submission F4.

797 Ibid.

798 Submission 67. Similar views were expressed by submission 100.

799 Submission 125. Similar views were expressed in submissions F15, F16.

800 Submission F8.

801 Submission 137.

- the views and wishes of the person with a disability, for example, do they object to the presence of a particular person at a hearing or feel uncomfortable or intimidated by being in their presence;
- whether the person who may be excluded has a legal right to attend the hearing, such as a party to the proceedings;
- whether the person has a legal right to have the opportunity to respond to information being presented at the hearing;
- whether those attending the hearing have a genuine and personal interest in the subject matter of the proceedings rather than being an interested or ‘curious’ observer;
- the nature of the information or issues to be discussed at the hearing, and the potential for the information to be used to exploit or abuse the person with a disability; and
- the need for informal and user friendly proceedings for people with disabilities.

4.234 One respondent supported the criterion articulated by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs*,<sup>802</sup> that the Tribunal may make an order if it is satisfied there is a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public.<sup>803</sup> Another respondent agreed with the inclusion of this criterion, but considered that the Tribunal should also have power to make an order if it is satisfied it is in the best interests of the person to whom the proceedings relate or because of the confidential nature of the particular information or matter or for another reason.<sup>804</sup>

4.235 Other circumstances identified by respondents as justifying exclusion of the public or a person were where the information dealt with in the hearing is ‘privileged’ information,<sup>805</sup> where conflicts of interest or personalities could cause friction,<sup>806</sup> or where ‘criminal motives are intended’.<sup>807</sup>

#### *Criteria for closure and confidentiality orders in relation to an active party*

4.236 The Public Advocate favoured consistent criteria for the exclusion of an active party from a hearing and when information is denied to that party. The Public Advocate considered that the appropriate criteria to govern when active parties are excluded or

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802 (1979) 26 ALR 247.

803 Submission 47.

804 Submission 85.

805 Submission 26D.

806 Submission 69. Similar views were expressed by submissions 28E, 71. Submission 99 agreed that the Tribunal should consider a request from the adult regarding excluding another person.

807 Submission 80.

denied information should be if ‘serious harm’ or ‘substantial injustice’ could result.<sup>808</sup> The Public Advocate considered that indirect as well as direct harm should be taken into account and recognised that there may be competing interests so that a balancing test would need to be applied. She stated:<sup>809</sup>

it is suggested that when conducting the exercise where there is a balance to be struck between the relative rights/interests/legitimate expectations of parties, priority should be given to protecting the rights and interests of the adult.

#### *Issues not relevant to making limitation orders*

4.237 Some respondents identified criteria or circumstances that they considered should *not* be relevant when making a limitation order. Carers Queensland stated that the Tribunal should not make these orders merely based on the fact that there is conflict within a family.<sup>810</sup> It suggested that mediation is more appropriate in those circumstances.<sup>811</sup>

Confidentiality orders also appear to be used by the Tribunal to exclude or withhold information from other family members where there is discord, conflict or dissension within the family. This often serves to perpetuate or aggravate the problem. It can also lead to possible miscarriages of justice. Conflict within the family is not, on its own, a sufficient reason to warrant confidentiality.

4.238 Queensland Advocacy Incorporated considered that arbitrary reasons, such as overcrowding in a hearing room, were insufficient to exclude a person.<sup>812</sup> Another respondent stated that a person under the age of eighteen should not be denied entry to the Tribunal.<sup>813</sup>

#### ***Criteria for closure order in relation to an active party***

4.239 While some respondents considered criteria generally,<sup>814</sup> others examined the criteria for excluding an active party separately from that which should govern the exclusion of other persons. Carers Queensland and Caxton Legal Centre generally considered that there would have to be ‘exceptional circumstances’ for the exclusion of active parties.<sup>815</sup> Caxton Legal Centre stated:<sup>816</sup>

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808 Submission 1H.

809 Ibid.

810 Submission 101.

811 Ibid. Submission 121 also suggested following the family law system which has introduced changes to the litigation process including a greater focus on conciliation and mediation processes.

812 Submissions 102, F15.

813 Submission 88.

814 See para 4.224–4.230 of this Report.

815 Submissions 101, 124. Submission 120 considered that active parties should only be excluded from a hearing ‘if that person has been convicted of a criminal act against the person who is at the centre of the matter’.

816 Submission 124.

While we appreciate the argument that there may be times when it is wholly inappropriate for ‘disinterested public observers’ to be allowed to become privy to the highly sensitive personal and private details about the lives of the adult and parties/witnesses, we do not believe that directly involved or interested parties – especially the adult and active parties – should be able to be excluded from proceedings, except in the most exceptional circumstances, or for behaviour amounting to contempt of court.

4.240 Caxton Legal Centre then considered that the appropriate test for when such a step may be taken is Brennan J’s criteria in *Re Pochi and Minister for Immigration and Ethnic Affairs*,<sup>817</sup> namely where:<sup>818</sup>

- there is ‘a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public’; or
- ‘publication would be contrary to the public interest’; and
- ‘the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party’.

4.241 The President of the New South Wales Guardianship Tribunal noted that the exclusion of a party raises issues of procedural fairness in a protective jurisdiction and considered that the following factors needed to be considered:<sup>819</sup>

- Guardianship hearings regularly involve the presentation of what is generally considered to be highly confidential and personal information. It may relate to the disabled person’s medical history, personal financial records, social or family relationships. In some circumstances, compromising the person’s privacy may expose them to (further) abuse, manipulation or exploitation.
- Applications for guardianship and financial management orders are rarely made by the person with a decision-making disability. That person is often brought into the guardianship arena as a result of an application made by someone else, a family member or service provider.
- People with a disability may be severely compromised in their ability to take steps to protect their own interests and, unlike litigants in other jurisdictions, they may not be able to object to certain information being presented to the Tribunal.

4.242 The Public Trustee of Queensland agreed that criteria should be included in the legislation but noted that generally it is desirable that hearings should be held in public. This respondent stated that all the criteria suggested by Brennan J, outlined above,<sup>820</sup> might be included in some form, but considered its inclusion in legislation

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<sup>817</sup> (1979) 26 ALR 247, 273.

<sup>818</sup> Submission 124.

<sup>819</sup> Submission 137.

<sup>820</sup> See para 4.240 of this Report.

required ‘further consideration’.<sup>821</sup> The Public Trustee of Queensland noted that these criteria may have been developed in the context of more formal proceedings where legal representatives are always present and so may not be appropriate in the more informal guardianship setting.<sup>822</sup> The Public Trustee of Queensland also saw merit in the approach of the Western Australia guardianship legislation which provides that the Tribunal may make an order if it is satisfied it is in the best interests of the person to whom the proceedings relate.

4.243 Two media organisations supported the approach in the Administrative Appeals Tribunal, where the Tribunal is required to take as its starting point the desirability of hearings being held in public.<sup>823</sup> They also considered that the Tribunal should make orders excluding a person only where that person’s behaviour during proceedings carries a genuine possibility of disadvantaging a party, a witness or a person giving information.<sup>824</sup>

4.244 Some respondents suggested that the only circumstances where a person should be excluded are when there is an order in existence that would prevent a person from being present at the hearing<sup>825</sup> or if an active party has ‘been convicted of a criminal act’ against adult.<sup>826</sup>

### **Criteria for closure orders in relation to the public**

4.245 Some respondents specifically addressed criteria that should govern when the Tribunal may close a hearing to the public. The Public Advocate noted that excluding the public is different from excluding active parties because the public, although having an interest in open justice and accountability, is not entitled to procedural fairness. She considered that such a power should be exercised ‘sparingly’.<sup>827</sup>

Accordingly it is suggested that the Tribunal should have the power to exclude a member of the public or close part or all of a hearing to the public in appropriate circumstances. It is suggested that these may include:

- Because of the nature of the particular sensitive personal and medical information relating to the adult;
- Because of a real possibility of disadvantage/injustice to the adult the subject of the proceedings;

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821 Submission 127.

822 Ibid.

823 *Administrative Appeals Tribunal Act 1975* (Cth) s 35(3).

824 Submissions 98, 118.

825 Submission 88.

826 Submission 120.

827 Submission 1H.

- To preserve an adult's rights to proper preparation of a case in other legal or quasi-legal proceedings;
- Because the person is disrupting the hearing.

4.246 Some respondents supported the criterion articulated by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs*<sup>828</sup> that the Tribunal may make an order excluding the public if it is satisfied there is a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public.<sup>829</sup>

4.247 Caxton Legal Centre and the Public Trustee of Queensland supported this criterion, but also considered that a second criterion suggested by Brennan J in that case, that 'publication of the proceedings would be contrary to the public interest',<sup>830</sup> should be included as an alternative criterion for excluding the public.<sup>831</sup>

4.248 A journalist was of the view that the Tribunal could have discretion to close hearings but considered that the circumstances in which this could occur should be limited and clearly defined.<sup>832</sup>

### **Criteria for confidentiality orders to withhold information**

4.249 Some respondents specifically addressed criteria that should govern when the Tribunal may make an order withholding information given before the Tribunal from an active party. The Department of Justice and Attorney-General supported retaining the current legislative criterion.<sup>833</sup>

4.250 The Public Trustee of Queensland considered that only in the 'clearest and most compelling circumstances' should information not be available; for example, if disclosure would 'otherwise cause serious harm to the adult or to another person or to put the safety of someone at risk'.<sup>834</sup>

The Public Trustee certainly endorses such an approach provided that the issue of harm and safety is either very broadly defined or other terms used in their place (for example the types of words used in section 12 of the current *Guardianship and Administration Act 2000* – that there would be an unreasonable risk to the adult's health, welfare or property).

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828 (1979) 26 ALR 247.

829 Submissions 47, 124.

830 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 273.

831 Submissions 124, 127. This criterion also applies to the situation where information revealed in a closed hearing should be confidential.

832 Submission 100.

833 Submission 126.

834 Submission 127.

4.251 Another respondent considered that the Tribunal should be able to make such an order if it is satisfied:<sup>835</sup>

- there is a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information;
- it is in the best interests of the person to whom the proceedings relate;
- it is desirable because of the confidential nature of the particular information or matter or for another reason; or
- disclosure would cause serious harm to the adult's health or put a person's safety at risk.

4.252 Caxton Legal Centre suggested that mere non-attendance at a hearing should not be a sufficient reason for a person to be deprived of information disclosed at that hearing if the party has an ongoing interest in the case consistent with the adult's.<sup>836</sup> An adult with impaired capacity considered that an adult who chooses not to attend a hearing should have a right to a transcript of proceedings.<sup>837</sup> This can be particularly important for people with an acquired brain injury where memory problems can be an issue.<sup>838</sup>

### **The Commission's view**

4.253 Most respondents considered the current legislative criterion that governs the making of confidentiality orders is too broad and unclear. Most respondents were also of the view that these orders should be made only in very limited or exceptional circumstances and that strict criteria should guide the exercise of any power to make such orders by the Tribunal. The Commission agrees and has recommended stricter criteria for making such orders. It also considers that openness should be the explicit starting point for the Tribunal when considering whether to make an adult evidence order, closure order or confidentiality order.

### ***Openness as the starting point***

4.254 The Commission notes that a number of submissions were strongly of the view that open justice and procedural fairness are critical considerations when making a limitation order. The Commission agrees and considers that the importance of these matters warrants their inclusion in the legislative criteria that govern the making of such orders.

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835 Submission 85.

836 Submission 124.

837 Submission F19.

838 Ibid.

4.255 Accordingly, the Commission considers that the *Guardianship and Administration Act 2000* (Qld) should provide that the Tribunal is required, prior to making an adult evidence order, closure order or confidentiality order, to take as the basis of its consideration that it is desirable that hearings before the Tribunal should be held in public and may be publicly reported, and that active parties have an entitlement to information that is credible, relevant and significant to an issue in the proceeding.

4.256 This requirement, which is similar to that imposed in relation to the Administrative Appeals Tribunal,<sup>839</sup> expressly tips the balance in favour of open justice and according active parties procedural fairness. The Commission notes that such an approach is consistent with one of the principles identified in Chapter 3 of this Report to guide this review: that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>840</sup>

### **Closure orders and confidentiality orders**

4.257 The Commission notes that one of the themes in submissions was that some level of harm to a person would be necessary before a closure order or confidentiality order could be made. The Commission has already explained that making these orders, particularly a closure order in relation to an active party or a confidentiality order withholding information from an active party, is a serious step and would be warranted only in rare circumstances.<sup>841</sup>

4.258 The Commission considers the criterion that captures the gravity of the circumstances required for making such an order is where it is necessary to avoid serious harm or injustice to a person.<sup>842</sup> The Commission notes that the harm in question must be ‘serious’ rather than trivial or even moderate. The making of the order must be *necessary* to avoid this serious harm or injustice; a mere possibility or risk of it occurring will be insufficient. This means that closure and confidentiality orders would be made very rarely. An example of a situation that would amount to serious harm or injustice to a person would be where the evidence revealed a credible threat to cause a person grievous bodily harm. Another example of serious harm or injustice is where the consideration of information at a public hearing would lead to a real risk of an adult being abducted.<sup>843</sup>

4.259 Accordingly, the Commission considers that the criterion for making a closure order or a confidentiality order should be that it is necessary to avoid serious harm or injustice to a person. The Commission notes that relevant to assessing whether serious

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839 *Administrative Appeals Tribunal Act 1975* (Cth) s 35(3)(a). The Commission previously discussed the relevant Administrative Appeals Tribunal provision: see para 4.16–4.20 of this Report.

840 See para 3.156, 3-2 of this Report.

841 See para 4.193, 4.203 of this Report.

842 This is based upon the test that exists in Ontario where the court may exclude the public from guardianship hearings where there is a possibility of serious harm or injustice to any person that justifies departure from the general principle that proceedings be open: *Courts of Justice Act*, RSO 1990, c 43, s 135(1)–(2).

843 This is based on an Ontario case which draws on similar wording: *MSK v TLT* (Unreported, Court of Appeal for Ontario, Catzman, Weiler and Moldaver JJA, 7 February 2003).

harm or injustice will occur is whether there are other mechanisms such as those contemplated by the special witness provisions that could be utilised instead of making such an order.<sup>844</sup>

### **Adult evidence orders**

4.260 The Commission notes, as identified earlier in this chapter, that the basis upon which adult evidence orders are made is conceptually different from that justifying closure and confidentiality orders.<sup>845</sup> The Commission therefore recommends different criteria for orders permitting the Tribunal to speak with the adult in the absence of others.

4.261 The Commission considers that the criterion of serious harm or injustice to a person should be a potential basis for making an adult evidence order. Although the Commission has recommended that speaking with the adult in the absence of others be governed solely by an adult evidence order and not a closure order, the circumstances that might warrant the making of a closure order generally could also arise in this context.

4.262 The Commission considers, however, that there is also a wider basis for making adult evidence orders. As discussed above, one of the compelling reasons for permitting the Tribunal to speak with the adult in the absence of others is because it may be necessary to obtain relevant information that the Tribunal would not otherwise receive. This should also be reflected in the criteria that permit the making of such an order.

4.263 Accordingly, the Commission considers that the criteria for making an adult evidence order should be that it is necessary to avoid serious harm or injustice to a person, or because it is necessary to obtain relevant information that the Tribunal would not otherwise receive.

### **Other criteria issues**

#### *Special health criterion*

4.264 The Commission notes that section 109(4) of the *Guardianship and Administration Act 2000* (Qld) currently imposes a further criterion in relation to special health matters. The Tribunal must not make an order under that provision if it is likely to affect the ability of the adult's guardian, attorney, or statutory health attorney to form and express a view on the proposed special health care.<sup>846</sup>

4.265 The Commission recognises the significance of special health matters but considers the imposition of a further criterion for making limitation orders unnecessary. The Commission has recommended strict criteria for the making of these orders,

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844 See para 4.206–4.208 of this Report.

845 See para 4.197–4.198 of this Report.

846 *Guardianship and Administration Act 2000* (Qld) s 109(4). See para 4.22–4.23 of this Report.

including that the Tribunal must take the active parties' entitlement to credible, relevant and significant information as the basis for its consideration in making an order. These requirements provide an adequate safeguard against the inappropriate withholding of information from, or exclusion of, an adult's substitute decision-makers. Accordingly, the Commission considers that further criteria for special health matters are unnecessary. This is consistent with the approach taken in relation to confidentiality orders in respect of documents and non-publication orders in respect of information about proceedings in Chapters 5 and 7 of this Report.<sup>847</sup>

#### *Criterion for the adult*

4.266 Similarly, the Commission is of the view that the criteria it has proposed are sufficient without the need to include any additional criteria to limit the circumstances in which an order can be made to withhold information from, or exclude, the adult involved in the proceedings. The Commission considers that the strictness of its proposed criteria will ensure that orders to exclude the adult or to withhold information from the adult are made in exceptional circumstances only. In applying the criteria, the Commission also notes that the Tribunal will necessarily have regard to the adult's situation and will be required to comply with the General Principles, which are directed to the rights and interests of the adult.<sup>848</sup> Accordingly, the Commission considers it unnecessary to include an additional criterion when an order is made in relation to the adult.

4.267 This is consistent with the approach taken in relation to confidentiality orders in respect of documents in Chapter 5 of this Report.<sup>849</sup>

### **SHOULD THE TRIBUNAL HAVE POWER TO PLACE 'RESTRICTIONS' ON DISCLOSURE OF INFORMATION?**

4.268 An issue to consider is whether the Tribunal should have power to impose conditions on an active party's receipt of information by restricting, rather than prohibiting, disclosure of the information.

4.269 At present, the Tribunal's power to make a confidentiality order in relation to information given before the Tribunal includes the power to 'restrict' as well as to 'prohibit' disclosure to an active party.<sup>850</sup>

4.270 The power to restrict disclosure of information could extend to the imposition of conditions on an active party's receipt of information. The use of the word 'restrict' might also indicate that an order can be made in relation to some, rather than all, of the information before the Tribunal.

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<sup>847</sup> See para 5.143–5.150, 7.288–7.290 of this Report.

<sup>848</sup> See para 4.21 of this Report.

<sup>849</sup> See para 5.202 of this Report.

<sup>850</sup> *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(i). That provision is set out at para 4.13 of this Report.

4.271 The Commission did not seek submissions specifically on this issue.

## The Commission's view

### Limited orders

4.272 The Commission has recommended earlier in this chapter that the Tribunal should be able to withhold information in exceptional circumstances only.<sup>851</sup> The Commission has also previously suggested that the least restrictive approach should be taken when a confidentiality order is made.<sup>852</sup>

4.273 The Commission considers that information should be kept confidential from an active party only to the extent to which the criteria for making the confidentiality order are met. A confidentiality order withholding information from an active party should be as specific as possible to avoid the imposition of confidentiality on other information that should be available to the party. That is, only the information that is the cause for concern should be withheld from the active party. Blanket confidentiality orders should be avoided.

4.274 The Commission considers this is the effect of the proper application of the criteria it has proposed for the making of such an order. It does not, therefore, consider it necessary to retain a reference to 'restricting' disclosure. The *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.

4.275 This is consistent with the approach taken in Chapter 5 of this Report to confidentiality orders made in relation to documents.<sup>853</sup>

### Facilitation

4.276 In the context of active parties' access to documents and the Tribunal's decisions and reasons, concerns were raised in submissions that a party may react badly to the information they contain unless the party is given particular support. This is discussed in Chapters 5 and 6 of this Report, respectively.<sup>854</sup> The same concern might arise in relation to the disclosure of information before the Tribunal.

4.277 The Commission appreciates the desirability, in the guardianship system, of disclosing information to the adult, or other parties, in a way that minimises the distress or harm that might come with learning the information. The Commission does not, however, consider it appropriate for information disclosure to be made conditional other than where a confidentiality order is made. As with the disclosure of documents, the Commission is of the view that where such concerns do not meet the test for a

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851 See para 4.263 of this Report.

852 See para 4.206–4.208, 4.263 of this Report.

853 See para 5.219–5.220 of this Report.

854 See para 5.221–5.225, 6.111–6.114 of this Report.

confidentiality order, they should be addressed by facilitating a supportive environment in which the information is heard or disclosed.<sup>855</sup>

4.278 The Commission instead considers that the Tribunal should give consideration to the way in which information before it is heard by, or disclosed to, the adult or other active parties and whether it is desirable that disclosure be facilitated in some way in particular cases. Earlier in this chapter, the Commission made recommendations about the Tribunal's use of mechanisms and procedures, such as those used in the courts for special witnesses, to enable active parties to participate in Tribunal hearings comfortably.<sup>856</sup>

4.279 This is consistent with the approach taken in Chapters 5 and 6 of this Report.<sup>857</sup>

## SHOULD CONFIDENTIAL INFORMATION BE DISCLOSED TO AN ACTIVE PARTY'S REPRESENTATIVE?

### The Discussion Paper

4.280 In its Discussion Paper, the Commission sought submissions on whether the Tribunal should be authorised or required to disclose information that has been withheld by a confidentiality order from an active party, to the party's representative.<sup>858</sup>

4.281 At present, there is no legislative provision stipulating whether an active party's representative should be given access to information that has been withheld from the active party. (Although, the Tribunal's Presidential Direction recognises a right for an active party's legal representative to inspect documents.<sup>859</sup>)

### Submissions

4.282 A number of submissions addressed this issue. The Department of Justice and Attorney-General considered that a provision of this nature was not necessary as the Tribunal could make such an order under the current legislation.<sup>860</sup> One respondent considered that, at the very least, a summary of the information that has not been disclosed to an active party should be made available to that party's representative.<sup>861</sup>

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855 See para 5.221–5.225 of this Report.

856 See para 4.206–4.208 of this Report.

857 See para 5.221–5.225, 6.111–6.114 of this Report.

858 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.91] Q4-9.

859 Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007).

860 Submission 126.

861 Submission 85.

4.283 Carers Queensland considered providing information to agents or representatives, when it has been denied to a party, would ensure ‘some degree of procedural fairness’, but considered that providing information to them and not the interested party would be a last resort.<sup>862</sup>

4.284 Caxton Legal Centre did not support requiring the Tribunal to provide information to a person’s legal representative in circumstances where a confidentiality order was made:

In relation to the suggestion that confidential information should be provided to the adult’s lawyer but not the adult, we have grave concerns about such a suggestion. To honour the Principles in the Schedule about respecting the adult’s dignity and autonomy (to the extent possible) we believe that legal representatives should consult with clients as fully as possible and should not be expected to withhold information from a client. [Notwithstanding the particular nature of the relationship legal practitioners have with clients in these circumstances, such a policy contradicts the traditional fiduciary relationship between legal representatives and their clients.]

4.285 The Adult Guardian also did not consider that the Tribunal should be required to disclose information withheld from an active party to a representative of that party. She stated that ‘[p]rocedural fairness should inform this decision.’<sup>863</sup>

4.286 The Public Advocate examined the approach under the *Mental Health Act 2000* (Qld), which requires information the subject of a confidentiality order to be disclosed to a person’s lawyer,<sup>864</sup> but noted that there were:<sup>865</sup>

practical and policy issues which cannot be ignored in respect of the public funding of, if the MHRT [Mental Health Review Tribunal] model is adopted, legal representation for parties who will most often be unrepresented.

4.287 The Public Advocate supported the approach of the *Mental Health Act 2000* (Qld) in relation to when a confidentiality order is made restricting information to the adult, as the adult’s fundamental rights will be affected by any appointment made by the Tribunal. She went on to state:<sup>866</sup>

In circumstances where the rights of a party other than the adult may be affected by the order of the Tribunal, it may be appropriate for a lawyer or other representative for the party to be given the information. It is suggested that it may be appropriate for the legislation to prescribe the need for this to occur for the adult and (on rare occasions) other parties only in those cases where the party’s rights may be affected by the order. This would require detailed consideration. Perhaps, it would be sufficient to prescribe that the Tribunal must give the information to a lawyer/other representative for the party if the party’s rights may be affected. Difficulty may arise with this generalised approach when there are no lawyers on the particular Tribunal: it may not be reasonable

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862 Submission 101.

863 Submission 122.

864 See para 4.215–4.217 of this Report.

865 Submission 1H.

866 Ibid.

to expect the Tribunal to identify which parties have rights that may be affected in these circumstances.

### The Commission's view

4.288 Section 108(2) of the *Guardianship and Administration Act 2000* (Qld) provides that each active party must be given a reasonable opportunity to present his or her case.<sup>867</sup> The Commission considers access to information by an active party's representative is appropriate, and is already provided for.

4.289 The Commission considers, however, that it would be inappropriate for information that has been withheld from an active party, by a confidentiality order, to be disclosed to the party's legal representative, given that active parties are infrequently represented at hearings of the Tribunal.<sup>868</sup>

4.290 This is consistent with the approach taken to this issue in Chapter 5 of this Report in relation to confidentiality orders made in relation to documents.<sup>869</sup>

### ISSUES CONCERNING ALL LIMITATION ORDERS

4.291 As mentioned earlier in this chapter,<sup>870</sup> the Commission raised, in its Discussion Paper, some issues for consideration about the making of limitation orders generally.

4.292 Throughout this Report, the Commission has made recommendations about the Tribunal's power to make limitation orders. In particular, the Commission has recommended in this chapter that the Tribunal should have power to make closure orders, adult evidence orders and confidentiality orders about the disclosure of non-documentary information given before the Tribunal to active parties.<sup>871</sup> In Chapters 5 and 7 of this Report, the Commission has recommended that the Tribunal should also have power to make confidentiality orders in relation to documents and non-publication orders in relation to the publication of information given before the Tribunal respectively.<sup>872</sup>

4.293 All such orders limit the openness of Tribunal proceedings, either to the public at large or to active parties or other participants in proceedings and, as such, are to be made in accordance with strict criteria. The Commission considers it appropriate that the procedures that govern the making of such orders be the same. This section of the

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<sup>867</sup> Section 108 of the *Guardianship and Administration Act 2000* (Qld) is set out at para 5.9 of this Report.

<sup>868</sup> Note s 124 of the *Guardianship and Administration Act 2000* (Qld) which provides that leave of the Tribunal is required for an active party to be represented by a lawyer or agent.

<sup>869</sup> See para 5.235–5.236 of this Report.

<sup>870</sup> See para 4.57 of this Report.

<sup>871</sup> See para 4.189–4.204 of this Report.

<sup>872</sup> See para 5.143–5.150, 7.288–7.290 of this Report.

chapter considers those issues. It also considers liability for breach of limitation orders as well as available defences.

## Should the Tribunal be able to initiate a limitation order?

### *The Discussion Paper*

4.294 In its Discussion Paper, the Commission sought submissions on whether the Tribunal should be able to make an order under section 109 of the *Guardianship and Administration Act 2000* (Qld) on its own initiative and in the absence of any application made by an active party.<sup>873</sup>

4.295 At present, section 109(5) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal ‘may make a confidentiality order on its own initiative or on the application of an active party’.

### *Submissions*

4.296 Few submissions considered this issue. Of those that did, the majority considered that the Tribunal should have power to make a limitation order on its own initiative.<sup>874</sup>

4.297 Some submissions noted that the parties at a hearing are often either unaware that they may apply for such an order or are unable to do so. The Department of Justice and Attorney-General noted that:<sup>875</sup>

Often, given the family dynamics and conflicting interests of parties at hearings, the consideration of making a confidentiality order is overlooked by parties.

4.298 The Public Advocate recognised that the adult may be unable to initiate an application.<sup>876</sup>

The adult’s interests will commonly underlie the reasons for making the order, but the adult will often not be in a position to initiate the application. In appropriate circumstances, the Tribunal should be empowered to do so on its own initiative.

4.299 Another submission suggested, however, that the Tribunal should not be able to make a limitation order on its own initiative.<sup>877</sup> This submission questioned what the Tribunal would be protecting if the parties had not asked for confidentiality.

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<sup>873</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.65], [4.91] Q4-14.

<sup>874</sup> Submissions 1H, 85, 122A, 126, 127.

<sup>875</sup> Submission 126. Similar views were expressed by submission 127.

<sup>876</sup> Submission 1H.

<sup>877</sup> Submission 149.

### **The Commission's view**

4.300 In light of the Commission's recommendations elsewhere in this Report about the circumstances in which the Tribunal should have power to make a limitation order,<sup>878</sup> the Commission notes that such orders will usually, though not always, be made to safeguard the adult's rights or interests. The Commission also notes the view expressed in submissions that the adult, or the other active parties, may not be in the position to request such an order.

4.301 It is also noted that Tribunal proceedings are to be conducted simply and quickly, and often without legal representation.<sup>879</sup> In those circumstances, it may be unreasonable to expect that the active parties will be aware of the opportunity to apply for a limitation order. The Commission also notes that in high conflict situations, an active party may be unwilling to ask for such an order directed against another participant in the hearing.

4.302 Given the context in which the Tribunal operates and, in particular, the focus of the guardianship system on advancing the rights and interests of the adult, the Commission is of the view that the Tribunal should be able to make a limitation order on its own initiative.

4.303 The Commission notes that this carries with it a risk that limitation orders may be contemplated by the Tribunal more readily than otherwise. However, the Commission considers the flexibility to make an order on its own initiative is necessary to ensure that orders can be made when required. The risk that limitation orders may too readily be made is addressed by the procedural safeguards the Commission has recommended below.<sup>880</sup>

4.304 The Commission therefore considers that the Tribunal's power to make a limitation order on its own initiative should be retained.

### **Who should have power to make a limitation order?**

#### **The Discussion Paper**

4.305 In its Discussion Paper, the Commission sought submissions on whether the Registrar should have the power to make an order under section 109 of the *Guardianship and Administration Act 2000* (Qld) or whether this power should be reserved for the Tribunal.<sup>881</sup>

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<sup>878</sup> See para 4.189–4.205, 5.146–5.150, 7.285–7.292 of this Report.

<sup>879</sup> See ss 107 and 124 of the *Guardianship and Administration Act 2000* (Qld) which deal with the informality of proceedings and the requirement for leave to appear with a representative.

<sup>880</sup> See para 4.315–4.352 of this Report.

<sup>881</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.66], [4.91] Q4-15.

4.306 At present, section 109(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Tribunal power to make these orders. The guardianship legislation also empowers the Registrar to make such orders, unless an active party raises an objection, although the validity of such an approach may be questioned.<sup>882</sup> The Commission understands that the Registrar has not, to date, exercised this power.<sup>883</sup>

### **Submissions**

4.307 Few submissions addressed this issue but of those that did, all agreed that the power to make a limitation order should reside with the Tribunal only.<sup>884</sup> No support was expressed for the Registrar also to have this power.

### **The Commission's view**

4.308 At present, the Registrar's power to make an order under section 109(2) of the *Guardianship and Administration Act 2000* (Qld) is based upon such orders being prescribed, in the Tribunal rules, as 'non-contentious matters'.<sup>885</sup> The Commission does not consider it appropriate to describe the making of such orders as non-contentious. On the contrary, the Commission considers that orders limiting the openness of Tribunal proceedings are *likely* to be contentious and so are not matters appropriately delegated to the Registrar.

4.309 The Commission is therefore of the view that the *Guardianship and Administration Tribunal Rule 2004* (Qld) should be amended to remove the Registrar's power to make limitation orders.

## **Procedural safeguards for making limitation orders**

4.310 Some of the submissions received by the Commission raised procedural issues in relation to the making of limitation orders that were not specifically addressed in the Discussion Paper. These issues concerned standing to be heard, reasons for decisions about limitation orders, and appeal of decisions about limitation orders. This section of the chapter considers those issues.

### **Submissions**

4.311 The standing of the general public and the media to contest the making of a limitation order was addressed in submissions from some media organisations. The

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882 This is the combined effect of ss 85(1) and 99(3) of the *Guardianship and Administration Act 2000* (Qld) and r 2(1)–(2) of the *Guardianship and Administration Tribunal Rule 2004* (Qld). See para 4.24–4.27 of this Report.

883 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

884 Submissions 1H, 73A, 85, 124, 126, 127, 149.

885 *Guardianship and Administration Act 2000* (Qld) ss 85(1), 99(3); *Guardianship and Administration Tribunal Rule 2004* (Qld) r 2(1). See para 4.24–4.27 of this Report.

Australian Press Council, for example, submitted that any member of the public who raises an objection to a limitation order should be entitled to be heard.<sup>886</sup>

There may be instances where it is in the public interest to disclose information pertaining to tribunal proceedings, even where the ‘active parties’ do not seek such disclosure. In such instances non-parties should have the right to object to the tribunal’s restrictions upon disclosure. Rule 2 and section 99 should be amended to give recognition to the right of non-parties to object to the imposition of confidentiality, thereby ensuring that the tribunal is required to consider the appropriateness of confidentiality where any member of the public raises an objection.

Where an individual objects to the tribunal’s order restricting disclosure or publication, that individual should be entitled to have their objection heard and determined in a timely fashion.

4.312 *The Courier-Mail* also submitted that, upon request, media publishers should be ‘afforded standing to appeal all Tribunal decisions (as defined in section 164 of the Act) prohibiting or restricting access to and/or publication of Tribunal hearings, documents, decisions and/or reasons’.<sup>887</sup> A journalist expressed a similar view saying that ‘clear appeal mechanisms, for interested parties who oppose the closure, should be available’.<sup>888</sup>

4.313 Some other submissions also expressed the view that a decision to make a limitation order should be capable of appeal.<sup>889</sup> One submission stipulated that the appeal mechanism must be accessible.<sup>890</sup>

4.314 It was also submitted by some respondents that the Tribunal should be required to give reasons for a decision to make a limitation order.<sup>891</sup> One of those respondents submitted that the reasons should be publicly available.<sup>892</sup>

### ***The Commission’s view***

4.315 Throughout this Report, the Commission has recommended that the Tribunal retain its power to make limitation orders in relation to certain matters.<sup>893</sup> The Commission has also made recommendations about the criteria that should govern the making of those orders.<sup>894</sup>

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886 Submission 95.  
 887 Submissions 98, 118.  
 888 Submission 100.  
 889 Submissions 60, 73A, 135 (in relation to documents), F12.  
 890 Submission 73A.  
 891 Submissions 73A, F23.  
 892 Submission 73A.  
 893 See para 4.189–4.205, 5.143–5.150, 7.288–7.290 of this Report.  
 894 See para 4.255, 4.257–4.263, 5.200, 7.291 of this Report.

4.316 The Commission also considers that the gravity of such orders warrants the inclusion of procedural mechanisms to ensure that the making of such orders is given sufficient scrutiny. Accordingly, the Commission proposes that the following safeguards should apply in relation to the making of limitation orders generally.

4.317 The Commission notes, however, the different purpose of adult evidence orders. While the other types of limitation orders are directed at avoiding serious harm or injustice, adult evidence orders are also permitted so as to obtain information that would otherwise not be available to the Tribunal.

4.318 The Commission considers that the procedural safeguards discussed below should not generally apply to adult evidence orders unless specifically stated otherwise. The different purpose (and criteria) for making adult evidence orders means that they are likely to be made more frequently than the very limited circumstances where other types of limitation orders are contemplated. It is undesirable that the procedures described below be required every time such an order is made. The Commission also notes the importance in a jurisdiction such as the guardianship system of being able to speak with the adult in the absence of others in appropriate circumstances and considers that the imposition of a series of procedural safeguards may unduly restrict such a course of action.

#### *Standing to be heard and to appeal*

4.319 At present, the *Guardianship and Administration Act 2000* (Qld) does not specify if anyone has a right to be heard when the Tribunal makes an order under section 109(2) of the Act.<sup>895</sup> At common law, a person will usually have standing in relation to a matter only if he or she has a ‘special interest’ in the subject matter.<sup>896</sup>

4.320 Under the *Guardianship and Administration Act 2000* (Qld), the right to appeal a decision of the Tribunal, including a declaration, order or direction of the Tribunal, is limited to ‘eligible’ persons, namely:<sup>897</sup>

- (a) the person whose capacity for a matter was under consideration in the proceeding; or
- (b) the applicant in the proceeding; or
- (c) a person proposed for appointment by the proceeding; or

<sup>895</sup> Section 109(5) of the *Guardianship and Administration Act 2000* (Qld) provides simply that the Tribunal may make a confidentiality order on its own initiative or on the application of an active party. Note ss 123 and 132 of the *Guardianship and Administration Act 2000* (Qld) which provide that ‘an active party in a proceeding before the tribunal may appear in person’ but that the Tribunal ‘may proceed in the absence of an active party who has had reasonable notice of a proceeding’.

<sup>896</sup> *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 146 CLR 493, 530–1 (Gibbs J). That is, where the person is likely to gain some advantage if he or she succeeds and suffer a disadvantage if he or she is unsuccessful: *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1980) 146 CLR 493, 530–1 (Gibbs J); *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ). Note, this general rule is a flexible one and determination of whether a person has sufficient interest to give rise to standing will depend on the facts of the case: *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172, [11] (Chesterman J).

<sup>897</sup> *Guardianship and Administration Act 2000* (Qld) s 164(3).

- (d) a person whose power as guardian, administrator or attorney was changed or removed by the tribunal decision; or
- (e) the adult guardian; or
- (f) the public trustee; or
- (g) the Attorney-General; or
- (h) a person given leave to appeal by the court.

4.321 At common law, a person will ordinarily have standing to appeal a decision if the person is a party to the judgment or is aggrieved by the judgment and thereby has a sufficient interest in the matter.<sup>898</sup>

4.322 The Commission considers that the Tribunal should hear from active parties as to the making of a limitation order. This would assist in informing the Tribunal whether, and to what extent, the order being contemplated is actually necessary. This is particularly important given that a limitation order directed against an active party may serve, in practice, to displace or modify the active party's right to appear at the Tribunal hearing.<sup>899</sup> The active parties, as those whose participation in the proceeding is central, will also have an interest in an order that might limit the disclosure of information given at a proceeding or the persons in attendance at a hearing.

4.323 The Commission acknowledges that the nature of the inquiry, namely, whether particular information should be kept confidential, is likely to impact on the specificity of the dialogue between the Tribunal and the active parties. Nevertheless, the Commission considers that this should not prevent the active parties from being heard. Rather, the extent to which potentially confidential information is revealed in the course of hearing from the active parties is a matter for the Tribunal's judgment and management in each case.

4.324 The Commission also considers that active parties should be able to appeal a decision to make, or refuse to make, a limitation order. At present, this is not clearly specified in the legislation. For example, guardians, administrators and attorneys are not given standing to appeal as of right even though the adult's current guardian, administrator or attorney is an active party for the proceeding.<sup>900</sup> Also, the right to appeal is not extended to a person who is joined by the Tribunal as an active party.<sup>901</sup>

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<sup>898</sup> *Attorney-General of Queensland v Wilkinson; Re R v Industrial Court of Queensland* (1958) 100 CLR 422, 434 (Fullagar J); *Peter v Shipway* (1908) 7 CLR 232, 259 (Higgins J). Also, for example, in the context of standing with regard to certiorari, *Ferdinands v Attorney-General of South Australia (Sitting in Executive Council)* [2007] SASC 53, [22] (Layton J): 'I note that "sufficient interest" is very broad but that there must be a link between the "sufficient interest" and the "decision" complained of'.

<sup>899</sup> *Guardianship and Administration Act 2000* (Qld) s 123. See note 895 of this Report.

<sup>900</sup> *Guardianship and Administration Act 2000* (Qld) s 164(3). See para 4.320 of this Report. Note s 119 of the *Guardianship and Administration Act 2000* (Qld) provides that any current guardian, administrator or attorney for an adult is an active party for a proceeding in relation to the adult.

<sup>901</sup> *Guardianship and Administration Act 2000* (Qld) s 164(3). See para 4.320 of this Report. Note s 119 of the *Guardianship and Administration Act 2000* (Qld) provides that a person joined as a party to the proceeding is an active party for a proceeding in relation to an adult.

4.325 The Commission is also of the view that any other entity who would be adversely affected by a limitation order, if it is made, should have standing to be heard on the making of the order, and that any entity who is adversely affected by an order that has been made should have standing to appeal the decision to make the order.

4.326 The Commission considers this could include media organisations or journalists and that this is appropriate given that the media may have a legitimate interest in publishing material the subject of a non-publication order.<sup>902</sup> This is likely to be limited to situations in which the limitation order excludes the media organisation or journalist from attending a hearing or prevents the media organisation or journalist from disclosing information given at a hearing.

4.327 At common law, a media organisation will generally have standing if a limitation order binds it, for example, if the order is imposed on media organisations that have representatives present at a hearing. However, the position is less clear when a general order is made.<sup>903</sup> Different approaches have been taken in different jurisdictions.<sup>904</sup> Given this uncertainty, the Commission considers it desirable for legislative provision to be made.

4.328 The Commission therefore proposes that the *Guardianship and Administration Act 2000* (Qld) be amended to clarify that active parties, and any entity who would be adversely affected by a limitation order if it is made, have standing to be heard on the making of the order and that active parties, and any entity who is adversely affected by a limitation order that has been made, have standing to appeal the decision about the order. The legislation should also be amended to clarify that this could include a media organisation or journalist. The Commission also considers that these recommendations should apply to the making of an adult evidence order.

4.329 Members of the Tribunal raised with the Commission the issue of how a right of appeal against the making of a limitation order might operate in practice during a Tribunal hearing.<sup>905</sup> The Commission notes that a Tribunal order stands unless and until it is set aside on appeal. However, where a party intimates that he or she intends to appeal a limitation order, the Tribunal may wish to consider whether to exercise its discretion under the *Guardianship and Administration Act 2000* (Qld) to stay such an order.<sup>906</sup> The Tribunal is empowered to grant a stay to ‘secure the effectiveness of an

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The Commission also notes that in its review of contempt by publication, the New South Wales Law Reform Commission recommended that the media have standing to be heard on an application for non-publication and to be able to appeal from decisions about suppression orders: New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003) [10.22], [10.24]. Also New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper 43 (2000) [10.100].

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*Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486, 489–90 (Mahoney P).

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For example, in Western Australia, the media will have sufficient interest to establish standing in relation to suppression orders: *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153. In New South Wales, it has been held that the media have no absolute right to be heard and the question is a matter for the discretion of the court: *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486.

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Information provided by the President of the Guardianship and Administration Tribunal, 12 June 2007.

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*Guardianship and Administration Act 2000* (Qld) s 163(1).

appeal against a tribunal decision<sup>907</sup> and to do so on terms it considers appropriate.<sup>908</sup> Factors to be considered by the Tribunal in deciding whether it should grant a stay are whether:<sup>909</sup>

- there is a good arguable case on appeal;
- the applicant will be disadvantaged if a stay is not ordered; and
- there is some competing disadvantage to the respondent should the stay be granted which outweighs the disadvantage suffered by the applicant if the stay is not granted.

4.330 The Commission also notes that concerns about the accessibility and availability of review mechanisms were raised in some of the submissions received by the Commission in response to its Discussion Paper.<sup>910</sup> The question whether the guardianship legislation should provide for more accessible procedures for review and appeal of decisions will be examined in stage two of the Commission's review.<sup>911</sup>

#### *Involvement of the Public Advocate*

4.331 The Commission considers the Public Advocate should also have a role in proceedings in which limitation orders are made. In particular, the Commission considers that the Tribunal should be required to inform the Public Advocate when it is considering making a limitation order and invite the Public Advocate to appear and make submissions to the Tribunal on the making of the order.

4.332 As noted earlier, the gravity of limitation orders warrants the imposition of safeguards to ensure orders are made after proper scrutiny and consideration.<sup>912</sup> The Commission considers it desirable to allow the Public Advocate to appear and make submissions to assist the Tribunal in testing the necessity of making the order. This role would be similar, to some extent, to that performed by the Public Interest Monitor on

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907 *Guardianship and Administration Act 2000* (Qld) s 163(1).

908 *Guardianship and Administration Act 2000* (Qld) s 163(2).

909 *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Limited* [1999] 2 Qd R 458, 463 (Chesterman J), which considered the issue in the specific context of an interlocutory judgment pending appeal. See also *Yoshida v Ishikawa* [2007] QSC 133 (Atkinson J). In relation to stays generally, see *Alexander v Cambridge Credit Corporation Ltd (Receivers Appointed)* (1985) 2 NSWLR 685, 694–5 (Kirby P, Hope and McHugh JJA); BC Cairns, *Australian Civil Procedure* (6th ed, 2005) 571–3; and *Jennings Construction Limited v Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 681.

910 For example, submission 73A.

911 The Commission's terms of reference specifically require it to consider the need to ensure that there are adequate and accessible procedures for review of decisions made under the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). The Commission's terms of reference are set out in Appendix 1 of this Report.

912 See para 4.316 of this Report.

applications for surveillance and covert search warrants.<sup>913</sup>

4.333 While the Commission has recommended that the active parties, including the adult, have standing to be heard in relation to limitation orders,<sup>914</sup> the Commission considers the nature of Tribunal proceedings warrants the involvement of an additional ‘contradictor’.

4.334 In Chapter 3 of this Report, the Commission noted that one of the distinguishing characteristics of Tribunal proceedings is that they tend to involve less contesting of issues by the parties than in the wider legal system.<sup>915</sup> Because of the adult-focused nature of the guardianship system, Tribunal proceedings do not usually involve a contest between different parties seeking to vindicate or pursue their own rights and, as a consequence, issues of fact or law may not be raised or tested.

4.335 Hearing from the active parties and persons who may be the subject of a limitation order is important for alerting the Tribunal to the views of those persons. The Commission recognises, however, that limitation orders involve considerations that may go beyond the immediate interests of the individuals concerned. This is reflected in the criteria the Commission has proposed for the making of such orders.<sup>916</sup>

4.336 The Commission considers the Public Advocate, as an independent statutory official tasked with systemic advocacy functions under the guardianship legislation,<sup>917</sup> is in an ideal position to test the appropriateness of a limitation order. In particular, the Commission considers the Public Advocate could usefully assist the Tribunal in testing whether the criteria for making the order would be satisfied. To do this effectively, the Commission considers that the Public Advocate should, upon request, be entitled to all the information before the Tribunal in its consideration of making a limitation order, including any information or document that is being considered as the subject of a confidentiality order. While it may not always be possible to give all other active

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The Public Interest Monitor is appointed under s 740 of the *Police Powers and Responsibilities Act 2000* (Qld). Section 742(2)(c) of that Act provides that one of the Public Interest Monitor’s functions is:

- (c) to appear at any hearing of an application to a Supreme Court judge for a warrant or approval mentioned in paragraph (a) or (b), or to a magistrate for a warrant mentioned in paragraph (b), to test the validity of the application, and for that purpose at the hearing, to—
  - (i) present questions for the applicant to answer and examine or cross-examine any witness; and
  - (ii) make submissions on the appropriateness of granting the application; and

...

The Public Interest Monitor’s approach to this function has been to address the following questions: whether the material sufficiently addresses the criteria for the grant of the warrant, whether the balance in the particular case lies with the public interest in privacy or the public interest in the detection of serious crime, whether and to what extent the application for the warrant should be supported or opposed, and whether the warrant will be formally or technically valid if issued: Public Interest Monitor, *Annual Report of the Public Interest Monitor Delivered Pursuant to the Police Powers and Responsibilities Act and the Crime Commission Act* (1998) 5–7.

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See para 4.322, 4.328 of this Report.

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See para 3.76–3.80 of this Report.

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See para 4.255, 4.257–4.263, 5.200, 7.291 of this Report.

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*Guardianship and Administration Act 2000* (Qld) ss 209, 211.

parties the information or document in relation to which confidentiality is being considered, full disclosure to the Public Advocate ensures an independent person, who has access to all the information, is able to contest properly the making of an order where appropriate.

4.337 The Public Advocate has indicated to the Commission that, subject to resources, her involvement in Tribunal proceedings when limitation orders are being made is broadly consistent with the functions and power of the Public Advocate to intervene in court and Tribunal proceedings involving the protection of rights and interests of adults with impaired capacity.<sup>918</sup> The Public Advocate also suggested that her involvement and general observations about the making of limitation orders should be reported in her Annual Report.

4.338 The Commission also considers that, where the Public Advocate has made submissions to the Tribunal on the making of a limitation order, he or she should have standing to appeal the decision.

4.339 The Commission is therefore of the view that the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that before it makes a limitation order, the Tribunal must inform the Public Advocate and invite the Public Advocate to appear and make submissions to the Tribunal on the making of the order. The Commission also considers that the *Guardianship and Administration Act 2000* (Qld) should grant the Public Advocate standing to appeal where the Public Advocate has made submissions to the Tribunal on the making of a limitation order.

#### *Time of hearing in relation to the order*

4.340 At present, confidentiality orders in relation to documents filed with the Tribunal Registry for a proceeding are often sought pre-hearing and heard in chambers by the President or the presiding member.<sup>919</sup> The Commission considers that, generally, this is an appropriate response to the practicalities of the inspection and hearing process. In particular, the Commission notes that if a document is to be confidential from some, or all, of the active parties, that document must not be available for pre-hearing inspection by those parties. It may also be appropriate to make a non-publication order prior to a hearing.

4.341 However, the Commission considers that the parties, and others such as the Public Advocate, must have an opportunity to be heard on the making of the order.<sup>920</sup>

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918 Information provided by the Public Advocate, 15 February 2007. See *Guardianship and Administration Act 2000* (Qld) s 210(2).

919 See Guardianship and Administration Tribunal, *Administration Practice 7 of 2005*, 'Confidentiality Orders' which is discussed at para 5.20–5.24 of this Report.

920 See para 4.322–4.338 of this Report. Note Guardianship and Administration Tribunal, *Administration Practice 7 of 2005*, 'Confidentiality Orders', which provides that the Tribunal hearing the substantive matter may change or revoke a confidentiality order made prior to the hearing in its discretion.

4.342 One way to ensure the parties are heard would be to convene a separate hearing, before the substantive hearing for the proceeding, in relation to the proposed confidentiality or non-publication order. However, this would add a layer of complexity to proceedings and would require parties to attend more than one hearing. The Commission does not consider this desirable, particularly given the current legislative requirement to conduct proceedings simply and quickly,<sup>921</sup> and so does not consider that the recommended procedural safeguards should apply to the making of such orders prior to a hearing. However, the Tribunal would be obliged to consider the same substantive criteria before making a confidentiality order and exercise the caution appropriate to the making of an uncontested order.

4.343 Accordingly, the Commission considers the Tribunal should be able to make a confidentiality order or a non-publication order prior to the substantive hearing. However, the legislation should also provide that a confidentiality order or non-publication order made prior to a hearing of the proceeding is vacated at the start of the hearing unless otherwise ordered by the Tribunal at the hearing. This would allow the active parties, and others who are entitled, to be heard on the matter. If a confidentiality order or a non-publication order is then made during a hearing, the order will remain in force for subsequent hearings unless varied or revoked. The Commission considers the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.

#### *Written reasons for decision*

4.344 At present, there is no obligation on the Tribunal to produce reasons for a decision, including a decision about an order made under section 109(2) of the *Guardianship and Administration Act 2000* (Qld), unless directed by the President or requested by a person aggrieved by the decision.<sup>922</sup>

4.345 The Commission considers, however, that a requirement to produce written reasons for a final decision to make a limitation order is a desirable safeguard to ensure that such orders are made after proper regard to the circumstances and the criteria to be followed. As has been commented in other contexts, for example:<sup>923</sup>

To have to provide an explanation of the basis for their decision is a salutary discipline for those who have to decide anything that adversely affects others. The giving of reasons is widely regarded as one of the principles of good administration in that it encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making. [notes omitted]

<sup>921</sup> *Guardianship and Administration Act 2000* (Qld) s 107(1).

<sup>922</sup> *Guardianship and Administration Act 2000* (Qld) s 157(1)–(2). Note that the requirement for the Tribunal to give a copy of its decision and any written reasons for its decision to the adult and each other active party in the proceeding applies only in relation to a decision ‘on an application about a matter’: *Guardianship and Administration Act 2000* (Qld) s 158(1). A ‘matter’ is a personal, special personal, special health, or financial matter: see *Guardianship and Administration Act 2000* (Qld) ss 3, 10, sch 4 (definition of ‘matter’).

<sup>923</sup> S de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) [9-042]. Put more briefly, ‘[h]aving to give reasons concentrates the mind wonderfully’: *Tramontana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, 872 (Donaldson J). As to other advantages of producing and giving reasons for decisions, particularly in the context of the guardianship system, see para 6.27–6.34, 6.36–6.37 of this Report.

4.346 These arguments have particular force in this context given that the potential imposition of confidentiality may limit the scrutiny that a decision to make a limitation order could otherwise receive. The Commission notes that the Mental Health Review Tribunal is required to produce written reasons for its decisions to make orders equivalent to those under section 109 of the *Guardianship and Administration Act 2000* (Qld).<sup>924</sup>

4.347 The Commission acknowledges that the confidential nature of the information the subject of the order will sometimes present a challenge for the production of reasons. However, the Commission considers the manner in which the reasons are written, and the extent to which confidential information is inappropriately revealed, is a matter for the Tribunal's judgment and management in each case. While the level of detail required will be influenced by the nature of the decision and the arguments presented by the parties,<sup>925</sup> reasons must be sufficiently intelligible and detailed to demonstrate why the decision was taken and to enable the appellate court to discharge its functions.<sup>926</sup>

4.348 The Commission considers that the Tribunal, if it makes a limitation order, should be required to notify each active party, any entity heard on the making of the order, and the Public Advocate of its decision as soon as practicable after the decision is made. The Tribunal should also be required to give them a copy of that decision. The Tribunal must also give written reasons for making a limitation order (other than an adult evidence order). The Commission considers that the Tribunal should be required to give a copy of those reasons within 28 days after making the order to each active party, any entity heard on the making of the limitation order, and the Public Advocate.

4.349 Any other person who requests a copy of a decision in relation to a limitation order (including an adult evidence order) and any reasons that have been given, should also be entitled to receive a copy in a form that does not breach the prohibition recommended in Chapter 7 on publication of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult.<sup>927</sup>

4.350 The Commission proposes that the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

924 *Mental Health Act 2000* (Qld) s 458(3)(b).

925 S de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) [9-051]; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 137. See *Elliott v Southwark London Borough Council* [1976] 1 WLR 499.

926 S de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) [9-049]–[9.051]; P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 189. See *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, 477–8 (Megaw J); *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1. Also see s 27B of the *Acts Interpretation Act 1954* (Qld), and note *Camden v McKenzie* [2007] QCA 136, [31] where Keane J commented that observance of this requirement 'is necessary to demonstrate that litigation has been determined fairly and rationally' and 'ensures that rights of appeal are not rendered meaningless, and that a party affected by a decision adverse to his or her interests is not left with a justified sense of grievance that the case has not been properly considered. In short, these standards promote the conscientious public discharge of the responsibilities of a judge to litigants, as well as to the community, which has a vital interest in the integrity of the judicial process'.

927 See para 7.204 of this Report.

4.351 The Commission also notes the Tribunal's current practice of publishing some of its reasons, in a de-identified manner, on the AustLII website.<sup>928</sup> The Commission considers the Tribunal should consider extending that practice, as a matter of course, in relation to the reasons for any decision about a limitation order.<sup>929</sup> The Commission notes that the Tribunal would need to remove any references to information that, because of a limitation order having been made, could not be disclosed. While this may mean the published reasons are less detailed than usual, the Commission considers it an appropriate measure of accountability and transparency. It would also enhance community awareness of the frequency of such orders and the circumstances in which they are made.

4.352 For the same reasons, the Commission considers that the Tribunal should report on the number and type of limitation orders it has made, if any, in its Annual Report. The Commission considers that the number of adult evidence orders should also be included in the Tribunal's Annual Report. The Commission considers that section 98 of the *Guardianship and Administration Act 2000* (Qld), which deals with the Tribunal's Annual Report, should be amended accordingly.

4.353 The Commission notes that these recommendations are consistent with one of the guiding principles identified in Chapter 3 of this Report that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>930</sup>

### **Should it be an offence to breach a limitation order?**

4.354 An issue to consider is whether it is appropriate for the legislation to provide that it is an offence to breach a limitation order made by the Tribunal.

#### ***The guardianship legislation***

4.355 At present, it is an offence to contravene a confidentiality order made by the Tribunal under section 109 of the *Guardianship and Administration Act 2000* (Qld).<sup>931</sup> The Act stipulates a maximum penalty of 200 penalty units (currently \$15,000) for breach of an order.<sup>932</sup>

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928 See para 7.4 of this Report.

929 In Chapter 7 of this Report, the Commission recommended that the *Guardianship and Administration Act 2000* (Qld) impose a prohibition on publication of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published: see para 7.204 of this Report. The Commission notes that such a prohibition would not prevent the publication of the Tribunal's decision or reasons provided the information is de-identified.

930 See para 3.156, 3-2 of this Report.

931 *Guardianship and Administration Act 2000* (Qld) s 109(6). See s 41 of the *Acts Interpretation Act 1954* (Qld) which provides, inter alia, that a penalty specified at the end of a subsection indicates that a contravention of the subsection constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) by a penalty not more than the specified penalty.

932 *Guardianship and Administration Act 2000* (Qld) s 109(6); *Penalties and Sentences Act 1992* (Qld) s 5.

## Submissions

4.356 Although the Commission did not expressly seek submissions on whether it should be an offence to breach a confidentiality order, some submissions addressed the issue of penalty.

4.357 One respondent was of the view that generally any breach of the confidentiality provisions, including a breach of a confidentiality order, should result in enforceable penalties against those in breach.<sup>933</sup> Others considered that adequate penalties were needed to make people adhere to the legislation.<sup>934</sup> It was noted, however, by other respondents that it would be very difficult for individuals, especially those on low incomes, to afford a fine of \$15,000.<sup>935</sup>

## The Commission's view

4.358 The Commission considers it appropriate that the *Guardianship and Administration Act 2000* (Qld) continue to provide that it is an offence to contravene a limitation order made by the Tribunal. The possibility of incurring a penalty is an appropriate deterrent against breaches of an order. The Commission considers the current maximum penalty of 200 penalty units to be appropriate.

## Should there be a defence of reasonable excuse for breach of a limitation order?

### The Discussion Paper

4.359 In its Discussion Paper, the Commission sought submissions on whether the legislation should include a defence of 'reasonable excuse' for failure to comply with an order made under section 109 of the *Guardianship and Administration Act 2000* (Qld).<sup>936</sup>

4.360 The phrase 'reasonable excuse' has been given its ordinary meaning<sup>937</sup> and the issue of whether a person has such an excuse in a particular case is determined in light of the purpose of the legislation,<sup>938</sup> having regard to what a reasonable person would

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<sup>933</sup> Submission 38B.

<sup>934</sup> For example, submission F12.

<sup>935</sup> For example, although not specifically raised in the context of confidentiality orders under s 109 of the *Guardianship and Administration Act 2000* (Qld), submissions 40C, 124 made comments suggesting that most individuals would not be able to afford the current penalties in the Act.

<sup>936</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.67], [4.91] Q4-10; [7.112] Q7-12.

<sup>937</sup> *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423, 436 (Kirby P); *Weeks v Nominal Defendant* (2005) 43 MVR 417, [7] (McPherson JA).

<sup>938</sup> *Taikato v The Queen* (1996) 186 CLR 454, 464-6 (Brennan CJ, Toohey, McHugh and Gummow JJ).

None of the Tribunal decisions published on the AustLII website provide a detailed discussion of what might amount to a 'reasonable excuse' in the guardianship jurisdiction: <<http://www.austlii.edu.au/au/cases/qld/QGAAT/>> at 26 June 2007. The phrase is referred to very briefly in *Re ONF* [2004] QGAAT 19 when the Tribunal revoked the appointment of an administrator, but there was no need to discuss its meaning.

accept as appropriate.<sup>939</sup> The concept is not capable of being exhaustively judicially defined and is essentially a question of fact.<sup>940</sup>

4.361 At present, section 109(6) of the *Guardianship and Administration Act 2000* (Qld) provides that ‘a person must not contravene a confidentiality order, unless the person has a reasonable excuse’.

### **Submissions**

4.362 Only a modest number of submissions addressed this issue. Some submissions considered that a ‘reasonable excuse’ defence should be retained in the guardianship legislation in relation to all limitation orders.<sup>941</sup>

4.363 The Department of Justice and Attorney-General submitted, for example, that:<sup>942</sup>

Although the words ‘reasonable excuse’ may lead to some uncertainty because of their objectivity, this phrase is useful given the complexity of family situations and circumstances that may give rise to a ‘reasonable excuse’.

4.364 Some other submissions thought a reasonable excuse defence should be available in relation to orders restricting the publication of information given before the Tribunal.<sup>943</sup> The Adult Guardian submitted that the defence should be available for non-publication orders but not for orders made in relation to the disclosure of information given at a hearing or the exclusion of a person from a hearing.<sup>944</sup>

4.365 Another submission thought the reasonable excuse defence should be retained for orders about disclosure of information given at a hearing or the exclusion of a person from a hearing.<sup>945</sup>

4.366 One respondent submitted that ‘reasonable excuse’ should be defined.<sup>946</sup> That submission suggested, for example, that a reasonable excuse could cover a breach made in the adult’s best interests or that was necessary to avoid serious harm or injustice to a person.

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939 *Bank of Valletta PLC v National Crime Authority* (1999) 164 ALR 45, 55 (Hely J), affirmed on appeal: *Bank of Valletta PLC v National Crime Authority* (1999) FCR 565. This case was cited with approval in *Callanan v Bush* (2004) A Crim R 239 (Douglas J).

940 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 247 (Abadee J).

941 Submissions 1H, 126, 127.

942 Submission 126.

943 Submissions 60, 94, 122A. Also see, for example, submissions 98, 118.

944 Submission 122A.

945 Submission 85.

946 *Ibid.*

4.367 The Public Advocate provided the following examples that could be covered by the defence.<sup>947</sup>

For example, if information the subject of a confidentiality order was disclosed to protect the physical safety or life of the adult or another party in the face of a credible risk, this would appear reasonable. Also, it is foreseeable that the Adult Guardian or the Public Advocate or the Public Trustee may need to disclose the information in the performance of their duties.

### **The Commission's view**

4.368 Unlike a legislative imposition of confidentiality applying in respect of all Tribunal proceedings, limitation orders will be made on a case-by-case basis. Throughout this Report, the Commission has made recommendations limiting the circumstances in which the Tribunal may make a limitation order. The Commission has recommended that these orders be made for certain purposes only and in accordance with strict criteria.<sup>948</sup> The Commission anticipates, therefore, that limitation orders will be infrequently made.

4.369 Given that a limitation order will be made in exceptional circumstances, it may be unnecessary to provide a special defence for non-compliance with an order. The Commission notes, for example, that the defences available under the *Criminal Code* (Qld) would apply.<sup>949</sup>

4.370 However, the flexibility of the 'reasonable excuse' defence means that liability would not be rigidly imposed in circumstances where it would be unjust to do so. The Commission considers this flexibility useful given the complexity and unpredictability of the situations that may be involved and the multiplicity of potential disclosures that could be caught by a limitation order. The Commission is therefore persuaded by the view expressed by the submissions that the defence of reasonable excuse should be retained.

4.371 The Commission does not consider it is necessary or desirable, however, to include examples in the legislation of what would constitute a reasonable excuse. What constitutes a 'reasonable excuse' is incapable of exhaustive judicial definition and is essentially a question of fact.<sup>950</sup>

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947 Submission 1H.

948 See para 4.255, 4.257–4.263, 5.200, 7.291 of this Report.

949 *Criminal Code* (Qld) ch 5. The provisions of ch 5 apply to all persons charged with any criminal offence against the statute law of Queensland: *Criminal Code* (Qld) s 36. Criminal offences comprise crimes, misdemeanours and simple offences: *Criminal Code* (Qld) s 3(2). Also note the existing provisions of the guardianship legislation dealing with liability under those Acts: *Powers of Attorney Act 1998* (Qld) s 105 (which allows the court to relieve attorneys from 'personal liability' for breaches of that Act if the court considers the attorney 'has acted honestly and reasonably and ought fairly to be excused for the breach'); *Guardianship and Administration Act 2000* (Qld) s 248 (which provides that a person is not civilly liable for an act done or an omission made 'honestly and without negligence' under that Act of the *Powers of Attorney Act 1998* (Qld)).

950 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 247 (Abadee J).

4.372 The Commission is therefore of the view that a provision to the general effect of section 109(6) of the *Guardianship and Administration Act 2000* (Qld), that a person must not contravene a limitation order, unless the person has a reasonable excuse, should be included.

## FUTURE ISSUES

4.373 Through its consultation, the Commission identified a number of other matters that do not raise issues of confidentiality, but which relate to the conduct of Tribunal hearings. Those matters include:

- Notification of hearings – concern was expressed about the sufficiency of notice of hearings both in terms of the period of time prior to hearing and the persons who are given notice that a hearing will occur. These issues were raised particularly in relation to interim orders.
- Legal representation – questions were asked about the role of legal representatives at Tribunal hearings. Some respondents considered that active parties should not require leave from the Tribunal to be legally represented at a hearing.
- Representation by others – similar issues were raised in relation to non-legal representation, for example, whether there should be any impediments to an adult or other active party being represented at a hearing by an advocacy group.

4.374 These issues will be considered, and further submissions sought, in stage two of the Commission's review.

## RECOMMENDATIONS

4.375 The Commission makes the following recommendations:

### ***Disrupting proceedings***

**4-1 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to:**

- (a) permit the Tribunal to make an order excluding a person whom it considers has engaged in conduct proscribed by section 143 of that Act in relation to a Tribunal hearing; and**

- (b) allow a member of the Tribunal's staff, acting under the authority of such an order, to use necessary and reasonable help and force to remove the person from the place at which the Tribunal hearing is being held.<sup>951</sup>

### ***Right to information***

- 4-2 Section 108 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal's obligation to observe the rules of procedural fairness includes the right of an active party to access information given before the Tribunal during a hearing that is credible, relevant and significant to an issue in the proceeding, and that the Tribunal may displace this right only by making a 'confidentiality order'.<sup>952</sup>

### ***Public hearings***

- 4-3 Section 109 of the *Guardianship and Administration Act 2000* (Qld) should be repealed and a new provision included in the Act to provide that a hearing by the Tribunal of a proceeding must be in public, but that the Tribunal may make an adult evidence order or a closure order.<sup>953</sup>
- 4-4 The Tribunal should promulgate a law list to enable members of the public to ascertain the time and location of Tribunal hearings.<sup>954</sup> Disclosure of this information must take account of the requirements currently imposed by section 112 of the *Guardianship and Administration Act 2000* (Qld) in relation to the publication of information about Tribunal proceedings.
- 4-5 The Tribunal should revise its practices to ensure they do not present any unreasonable physical impediments that discourage a person's attendance at a hearing, such as a locked door to the hearing room, and to ensure that any pre-hearing procedures do not deter people who may wish to attend the hearing. To ensure all hearings are held in public, telephone hearings should be conducted in a hearing room that is open to the public.<sup>955</sup>

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951 See para 4.66–4.68 of this Report.

952 See para 4.78–4.80 of this Report. See Recommendation 4-11 as to the circumstances in which the Tribunal may make a confidentiality order.

953 See para 4.108, 4.187 of this Report.

954 See para 4.112–4.113 of this Report.

955 See para 4.115–4.117 of this Report.

### ***Departure from public hearings***

- 4-6 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that prior to making an ‘adult evidence order’, ‘closure order’ or ‘confidentiality order’, the Tribunal must take as the basis of its consideration that it is desirable that hearings before the Tribunal should be held in public and may be publicly reported, and that active parties have an entitlement to information that is credible, relevant and significant to an issue in the proceeding.<sup>956</sup>

### ***Closure orders: closing a hearing or excluding particular persons***

- 4-7 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order, close a hearing to members of the public, or exclude a particular person from a hearing, if the Tribunal considers it is necessary to avoid serious harm or injustice to a person.<sup>957</sup> The *Guardianship and Administration Act 2000* (Qld) should refer to this order as a ‘closure order’. An active party may be excluded from a hearing by a closure order.<sup>958</sup>
- 4-8 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, where it makes an order closing a hearing to members of the public, permit a person to remain at the hearing despite the order.<sup>959</sup>

### ***Adult evidence orders***

- 4-9 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order, obtain information from the adult at a hearing in the absence of others (including in the absence of members of the public, particular persons or active parties) if the Tribunal considers it is necessary to avoid serious harm or injustice to a person or to obtain relevant information the Tribunal would not otherwise receive.<sup>960</sup> The *Guardianship and Administration Act 2000* (Qld) should refer to this order as an ‘adult evidence order’.

<sup>956</sup> See para 4.254–4.256 of this Report. See Recommendations 4-7, 4-9, 4-11 as to ‘closure orders’, ‘adult evidence orders’, and ‘confidentiality orders’.

<sup>957</sup> See para 4.189, 4.257–4.259 of this Report.

<sup>958</sup> See para 4.193 of this Report.

<sup>959</sup> See para 4.191 of this Report.

<sup>960</sup> See para 4.195–4.201, 4.260–4.263 of this Report.

### ***Alternative mechanisms***

4-10 The Tribunal should utilise mechanisms, where available, such as those used by the courts for special witnesses to assist adults or other vulnerable persons during a hearing. The Tribunal should also adopt an approach that facilitates an active party's ability to participate in a Tribunal hearing as much as possible.<sup>961</sup>

### ***Confidentiality orders: withholding information from an active party***

4-11 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order, withhold information disclosed at a Tribunal hearing from an active party to the proceeding if the Tribunal considers it is necessary to avoid serious harm or injustice to a person.<sup>962</sup> The *Guardianship and Administration Act 2000* (Qld) should refer to this order as a 'confidentiality order'.

### ***No other restrictions on disclosure of information***

4-12 If a confidentiality order is made to withhold information before the Tribunal from an active party, the order should be as specific as possible so that information is confidential from the party only to the extent to which the criteria for making the confidentiality order is met. The provision conferring power to make a confidentiality order should not include a reference to 'restricting' disclosure.<sup>963</sup>

4-13 The Tribunal should give consideration to the way in which information is heard by, or disclosed to, the adult and other active parties and whether it is desirable that disclosure be facilitated in some way in particular cases.<sup>964</sup>

### ***Special health criteria***

4-14 The *Guardianship and Administration Act 2000* (Qld) should not include a provision, such as the current provision in section 109(4) of the Act, imposing additional criteria on the making of an adult evidence order, closure order or confidentiality order in proceedings involving special health matters.<sup>965</sup>

<sup>961</sup> See para 4.207–4.208 of this Report.

<sup>962</sup> See para 4.203–4.204, 4.257–4.259 of this Report.

<sup>963</sup> See para 4.272–4.275 of this Report.

<sup>964</sup> See para 4.276–4.279 of this Report.

<sup>965</sup> See para 4.264–4.265 of this Report.

### ***Disclosure to representatives***

**4-15** The *Guardianship and Administration Act 2000* (Qld) should not include a provision requiring or authorising the Tribunal to disclose information that has been withheld by a confidentiality order from an active party, to the party's representative.<sup>966</sup>

### ***Issues concerning all limitation orders***

Note that, except as otherwise indicated, Recommendations 4-16–4-24 apply to all limitation orders being:

- (a) 'adult evidence orders', 'closure orders' and 'confidentiality orders' recommended in this chapter;
- (b) 'confidentiality orders' recommended in Chapter 5 of this Report; and
- (c) 'non-publication orders' recommended in Chapter 7 of this Report.

**4-16** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may make a limitation order on its own initiative or on the application of an active party.<sup>967</sup>

**4-17** The *Guardianship and Administration Rule 2004* (Qld) should be amended so that the Registrar will not have the power to make a limitation order.<sup>968</sup>

**4-18** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the active parties, and any entity who would be adversely affected by a limitation order, if it is made, have standing to be heard on the making of the order and that the active parties, and any entity who is adversely affected by a limitation order that has been made, have standing to appeal the decision about the order. This provision should clarify that this could include a media organisation or journalist.<sup>969</sup>

<sup>966</sup> See para 4.288–4.290 of this Report.

<sup>967</sup> See para 4.300–4.304 of this Report.

<sup>968</sup> See para 4.308–4.309 of this Report.

<sup>969</sup> See para 4.319–4.328 of this Report.

- 4-19** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that before it makes a limitation order (other than an adult evidence order), the Tribunal must inform the Public Advocate and invite the Public Advocate to appear and make submissions to the Tribunal on the making of the order. The Public Advocate may request, and is to be given, all the information before the Tribunal in its consideration of making a limitation order, including any information or document that is being considered as the subject of a confidentiality order. The *Guardianship and Administration Act 2000* (Qld) should also provide that the Public Advocate has standing to appeal a decision about a limitation order where the Public Advocate has made submissions to the Tribunal on the making of the order.<sup>970</sup>
- 4-20** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may make a confidentiality order or non-publication order prior to a hearing but that it is vacated at the start of the hearing unless otherwise ordered by the Tribunal at the hearing. If a confidentiality order or a non-publication order is then made during a hearing, the order will remain in force for subsequent hearings unless varied or revoked. The recommended procedural safeguards for making limitation orders do not apply to the making of such orders prior to a hearing.<sup>971</sup>
- 4-21** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal must:
- (a)** if it makes a limitation order, notify each active party, any entity heard on the making of the order, and the Public Advocate, as soon as practicable, of its decision and give them a copy of the decision;
  - (b)** give written reasons for the making of a limitation order (other than an adult evidence order), and give a copy of those reasons to each active party, any entity heard on the making of the order, and the Public Advocate within 28 days of making the decision; and
  - (c)** give a copy of its decision in relation to a limitation order and any written reasons given for its decision to any person, upon request, provided the prohibition recommended in Chapter 7 of this Report on publication of information about proceedings is not contravened.<sup>972</sup>

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970 See para 4.331–4.339 of this Report.

971 See para 4.340–4.343 of this Report.

972 See para 4.344–4.350 of this Report.

- 4-22** The Tribunal should consider publishing its reasons in relation to decisions about limitation orders, in an appropriately de-identified manner, on the AustLII website.<sup>973</sup>
- 4-23** Section 98 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the Tribunal is to report on the number and type of limitation orders it has made, if any, in its Annual Report.<sup>974</sup>
- 4-24** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that it is an offence to contravene a limitation order, unless the person has a reasonable excuse.<sup>975</sup> The Act should stipulate a maximum penalty of 200 penalty units.<sup>976</sup>

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973 See para 4.351 of this Report.

974 See para 4.352 of this Report.

975 See para 4.358, 4.368–4.372 of this Report.

976 See para 4.358 of this Report.

# Chapter 5

## Documents before the Tribunal

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## INTRODUCTION

5.1 As part of its review of the guardianship legislation's confidentiality provisions, the Commission is required to consider the provisions that deal with the confidentiality of documents before the Tribunal.

5.2 At present, the *Guardianship and Administration Act 2000* (Qld) creates a statutory right for active parties to a Tribunal proceeding to inspect documents that are directly relevant to an issue in the proceeding.<sup>977</sup> However, the Tribunal is empowered to displace that right by making a confidentiality order, on its own initiative or on application by an active party, prohibiting or restricting the disclosure of documents to an active party.<sup>978</sup> The power of the Tribunal to displace an active party's current right to inspect documents is considered in this chapter.

5.3 The Tribunal is also empowered to make a confidentiality order in relation to the publication of information contained in documents filed with or received by the Tribunal.<sup>979</sup> That issue is examined in Chapter 7 of this Report.

5.4 The Commission, in Chapter 8 of this Report, has also made recommendations about facilitating access to documents by active parties after a hearing is completed and by non-parties.<sup>980</sup> In particular, the Commission recommends that, although there may be questions about whether an active party's right to inspect documents continues after a hearing concludes, for certain purposes (including for the purpose of considering whether to appeal) active parties should be permitted to inspect the documents which were considered by the Tribunal.<sup>981</sup>

## THE POSITION IN QUEENSLAND

5.5 This section of the chapter sets out the current position under the guardianship legislation in relation to the right of active parties to inspect documents and the Tribunal's power to displace that right by making a confidentiality order. It also outlines the Tribunal's Presidential Direction and Administration Practice which address confidentiality orders and inspection of files, and provides some empirical information about the number and type of confidentiality orders that have been made by the Tribunal.

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977 *Guardianship and Administration Act 2000* (Qld) s 108(2).

978 *Guardianship and Administration Act 2000* (Qld) ss 108(3), 109(2)(d)(ii).

979 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c). The Commission has recommended that this order be called a 'non-publication' order: see para 7.290 of this Report.

980 See para 8.514–8.519 of this Report.

981 See para 8.509–8.510 of this Report.

## Active parties' right of inspection

### *The guardianship legislation*

5.6 Section 108(2) of the *Guardianship and Administration Act 2000* (Qld) provides that each active party<sup>982</sup> must be given a reasonable opportunity 'to inspect a document before the tribunal directly relevant to an issue in the proceeding and to make submissions about the document'. The legislation does not give non-parties a right to inspect documents.<sup>983</sup>

5.7 The right of inspection is conferred as part of giving the active party a 'reasonable opportunity to present his or her case' in relation to a proceeding and is to be read in light of section 108(1), which provides that the Tribunal must observe the rules of procedural fairness. As such, this right of inspection applies only to documents, directly relevant to the proceeding, that relate to the active party's case.<sup>984</sup> It has been suggested that this right to inspect will lapse after the Tribunal has made its decision on the grounds that there would no longer be a 'proceeding' for which a person is an active party and in relation to which the person has a right to be heard.<sup>985</sup> However, the Commission has recommended, in Chapter 8 of this Report, that an administrative access policy be developed which provide that for certain purposes (including for the

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Section 119 of the *Guardianship and Administration Act 2000* (Qld) provides that the 'active parties' to a Tribunal proceeding are:

- the adult;
- the applicant (if not the adult);
- the proposed guardian, administrator or attorney for the adult if the proceeding is for the appointment or reappointment of such person;
- any current guardian, administrator or attorney for the adult;
- the Adult Guardian;
- the Public Trustee of Queensland; and
- any other person joined as a party to the proceeding.

983

Non-party access to documents is discussed further at para 5.238 of this Report.

984

See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.7]–[5.8].

985

Ibid [5.12]–[5.20]. Where the Tribunal has made its decision, the only avenue of appeal is to the Supreme Court: *Guardianship and Administration Act 2000* (Qld) s 164(1). After handing down its decision, the Tribunal no longer has a role in the matter, which may suggest the 'proceeding' has concluded. Also note Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007) which provides:

After the Tribunal has determined a matter, there are no longer any active parties with a case before the Tribunal and there are no documents before the Tribunal within the meaning of section 108.

...

However, access to the file by an aggrieved party for the purposes of securing the effectiveness of an appeal will be considered on a case by case basis.

Note also the view that the hearing rule of procedural fairness applies in relation to the hearing itself, and would not require post-hearing inspection of documents: *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95–6; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ). See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 561; *Perkins v County Court of Victoria* [2000] 2 VR 246, 272 (Buchanan JA).

purpose of considering whether to appeal) active parties are able to inspect the documents which were considered by the Tribunal.<sup>986</sup>

5.8 The right of inspection under section 108(2) is also subject to any conditions imposed in the Tribunal rules.<sup>987</sup> In addition, section 108(3) provides that the Tribunal may displace the right to inspect a document by making a confidentiality order.

5.9 Section 108 provides:

**108 Procedural fairness**

- (1) The tribunal must observe the rules of procedural fairness.
- (2) Each active party in a proceeding must be given a reasonable opportunity to present the active party's case and, in particular, to inspect a document before the tribunal directly relevant to an issue in the proceeding and to make submissions about the document.
- (3) However—
  - (a) the tribunal may displace the right to inspect the document in a confidentiality order; and
  - (b) the tribunal rules may prescribe conditions in relation to inspection of the document. [note omitted]

5.10 In addition to active parties' general right of inspection, section 134(2) of the *Guardianship and Administration Act 2000* (Qld) provides a right to see reports prepared by Tribunal staff that are received in evidence in a proceeding.<sup>988</sup> It provides that the adult and each other active party in the proceeding must be advised of the contents of the report and, upon request, be given a copy of it. Section 134(3) provides, however, that the Tribunal may, in a confidentiality order, displace the right to receive a copy of the report. Section 134 provides:

**134 Report by tribunal staff**

- (1) The tribunal may—
  - (a) receive in evidence in a proceeding a written report by tribunal staff on a matter in the proceeding; and
  - (b) have regard to the report.

<sup>986</sup> See para 8.506–8.510, 8.514–8.519 of this Report.

<sup>987</sup> *Guardianship and Administration Act 2000* (Qld) s 108(3)(b). At present, no such conditions are imposed, but note para 5.11–5.12 of this Report on the Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007).

<sup>988</sup> The Commission understands that a report is usually only prepared by Tribunal staff when the Registry's Financial Assessment Officer prepares a financial summary report in a matter where there are limited assets: information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006, 16 June 2006, and 5 June 2007.

- (2) Generally, if the tribunal receives the report in evidence in a proceeding, the adult concerned in the proceeding and each other active party in the proceeding must be—
- (a) advised of the contents of the report; and
  - (b) upon request, given a copy of the report.
- (3) However, the right to be given a copy may be displaced in a confidentiality order.

### **The Presidential Direction**

5.11 Section 108(3)(b) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal rules may prescribe conditions in relation to the inspection of a document. At present, no such rules have been made. However, the Tribunal has issued a Presidential Direction entitled ‘General Information in relation to the Inspection of Files and Confidentiality Orders’<sup>989</sup> to ‘provide information to parties as to the general procedures the Tribunal has adopted’ in relation to file inspection.<sup>990</sup>

5.12 The Presidential Direction summarises the position under the legislation for active parties’ inspection of filed documents, prior to and during a hearing, that are directly relevant to an issue in the proceeding. It also contains a list of the common types of documents available for inspection, and outlines the practical arrangements for file inspection prior to hearings. It also refers to inspection by representatives of active parties.<sup>991</sup> The Presidential Direction is discussed in further detail below.<sup>992</sup>

## **Confidentiality orders displacing the right to inspect**

### **The guardianship legislation**

5.13 Section 109(2)(d)(ii) of the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to give directions in a ‘confidentiality order’ prohibiting or restricting the disclosure of matters contained in documents filed with or received by the Tribunal to some or all of the active parties in a proceeding. A confidentiality order may be limited, in that it applies only to particular parts of, or ‘matters contained in’, a document.

989 Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, ‘General Information in relation to the Inspection of Files and Confidentiality Orders’ (amended 9 January 2007).

990 To ensure the ‘quick and efficient discharge of the tribunal’s business’, the Tribunal President may give directions of general application about the Tribunal’s procedure: *Guardianship and Administration Act 2000* (Qld) s 100(1)–(2). See also *Guardianship and Administration Act 2000* (Qld) s 110 (procedural directions). For the power of courts to make practice directions generally, see E Campbell, *Rules of Court* (1985) 40–4.

991 Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, ‘General Information in relation to the Inspection of Files and Confidentiality Orders’.

992 See para 5.64–5.67 of this Report.

5.14 In making a confidentiality order, the Tribunal must be ‘satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason’,<sup>993</sup> having regard to what is required in its jurisdiction by open justice and procedural fairness.<sup>994</sup>

5.15 The Tribunal must also apply the General Principles, including General Principle 11, which refers to the adult’s right to confidentiality of information, in deciding whether to make an order.<sup>995</sup> If the matter in the proceeding relates to ‘special health care’, the Tribunal must also ensure that any confidentiality order it makes does not affect the ability of the adult’s relevant substitute decision-maker for health matters to form and express a view about the proposed special health care.<sup>996</sup>

5.16 Section 109 of the *Guardianship and Administration Act 2000* (Qld) relevantly provides:

**109 Open**

...

- (2) ... if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a *confidentiality order*)—

...

- (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—

...

- (ii) matters contained in documents filed with, or received by, the tribunal ...

...

- (4) In a proceeding to obtain the tribunal’s consent to special health care for an adult, the tribunal may not make a confidentiality order that is likely to affect the ability of any of the following persons to form and express a considered view about the special health care—

- (a) a guardian for the adult;
- (b) an attorney for a health matter for the adult under an enduring document;
- (c) the statutory health attorney for the adult.

<sup>993</sup> *Guardianship and Administration Act 2000* (Qld) s 109(2).

<sup>994</sup> See para 4.15–4.20 of this Report.

<sup>995</sup> See para 4.21 of this Report.

<sup>996</sup> *Guardianship and Administration Act 2000* (Qld) s 109(4). See para 4.22–4.23 of this Report.

- (5) The tribunal may make a confidentiality order on its own initiative or on the application of an active party.
- (6) A person must not contravene a confidentiality order, unless the person has a reasonable excuse.

Maximum penalty—200 penalty units.

5.17 Section 109(2)(d)(ii) of the *Guardianship and Administration Act 2000* (Qld) has not been considered judicially. Similar provisions in other jurisdictions, however, have received judicial and quasi-judicial consideration.

5.18 An almost identical power is conferred on the New South Wales Administrative Decisions Tribunal,<sup>997</sup> the Appeal Panel of which has jurisdiction to hear appeals of certain decisions of that State's Guardianship Tribunal.<sup>998</sup> When considering whether it was 'desirable' to make such an order, the Appeal Panel considered that '[t]he fundamental principles of open justice and procedural fairness mean that [the relevant provision] should be construed narrowly'.<sup>999</sup>

5.19 The Administrative Appeals Tribunal also has a similarly worded power.<sup>1000</sup> In relation to that power, the Federal Court has held that even where a confidentiality order is made, the Tribunal's obligation to accord procedural fairness remains.<sup>1001</sup> The Tribunal must act as fairly as possible given the existence and content of the confidentiality order it has made.<sup>1002</sup>

### **The Tribunal's Administration Practice**

5.20 The Tribunal has developed an Administration Practice on the process to be followed by the Registry when a request for a confidentiality order is made prior to hearing and when confidentiality orders are made.<sup>1003</sup>

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*Administrative Decisions Tribunal Act 1997* (NSW) s 75(2)(d) which provides that 'if the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party)' make an order 'prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings'.

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See *Administrative Decisions Tribunal Act 1997* (NSW) s 8; *Guardianship Act 1987* (NSW) s 67A.

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*TP v TR* [2006] NSWADTAP 7, [6]. Accordingly, the Appeal Panel made a non-disclosure order in relation to those documents that contained 'highly sensitive personal information ... not relevant to any issue that was before the Guardianship Tribunal': [8]. It did not, however, make such an order in relation to other documents relevant to an issue in the proceeding and for which it considered there was no compelling reason for non-disclosure that outweighed the public interest in open justice and procedural fairness: [11]–[13]. Note that the Appeal Panel also made a non-disclosure order in relation to other documents to which the relevant party consented: [7].

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*Administrative Appeals Tribunal Act 1975* (Cth) ss 35(2)(c), 39(1) which provide that the parties to the proceeding must be given a reasonable opportunity to present their case and to inspect documents to which the Tribunal proposes to have regard, but that the Tribunal may prohibit or restrict the disclosure of the contents of a document lodged with, or received in evidence by, the Tribunal if the Tribunal 'is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason'.

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*Applicant S214 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 38 AAR 425, 446.

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*Ibid* 446, 458.

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Guardianship and Administration Tribunal, *Administration Practice 7 of 2005*, 'Confidentiality Orders'.

5.21 The Administration Practice provides that requests for documents to be treated by the Tribunal as confidential are to be made in writing and the matter then heard in chambers by the President or the presiding member. If the request for confidentiality is denied, the person must nominate whether the document will either be returned to him or her and not be considered by the Tribunal or will remain with the Tribunal and be available for inspection by the active parties.

5.22 If a confidentiality order is made, the document or part of the document to which the order relates is placed on the confidential section of the Tribunal file.<sup>1004</sup>

5.23 The Administration Practice also includes three examples of when the Tribunal may be satisfied it is desirable to make a confidentiality order, namely, where the inspection or access may:<sup>1005</sup>

- cause serious harm to the health or safety of a person; or
- involve the unreasonable disclosure of information relating to a person's personal affairs; or
- breach a confidentiality provision imposed by a person who supplied the information.

5.24 The Administration Practice is also discussed below.<sup>1006</sup>

### **Empirical information about confidentiality orders**

5.25 The Commission was given empirical information by the Tribunal about the number and type of confidentiality orders made during the period from 1 July 2005 to 31 May 2007. All but three of the confidentiality orders made during that period relate to the non-disclosure of documents. In total, 79 such orders were made.<sup>1007</sup> Three of those orders were made on the Tribunal's initiative and almost all (75 out of 79) were made prior to the hearing.<sup>1008</sup> The Commission understands that the confidentiality order is reviewed at the hearing if it has been made beforehand.<sup>1009</sup>

1004 Prior to the Tribunal's revision of its file structure, confidentiality orders were placed in the 'inaccessible' section of the file. This revision of file structure is discussed below at para 5.64–5.67 and is outlined in Guardianship and Administration Tribunal, *Administration Practice 4 of 2007*, 'File Maintenance'.

1005 Guardianship and Administration Tribunal, *Administration Practice 7 of 2005*, 'Confidentiality Orders'. Note that these examples are very similar to the criteria set out in the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) for non-disclosure of documents in Victoria: see para 5.34 of this Report.

1006 See para 5.63–5.67 of this Report.

1007 Information provided by the President of the Guardianship and Administration Tribunal, 26 May 2006, 12 and 14 June 2007.

1008 Information provided by the President of the Guardianship and Administration Tribunal, 26 and 31 May 2006, 12 and 14 June 2007.

1009 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

*Who is applying for confidentiality orders and what documents are they seeking to protect?*

5.26 The Commission understands that the majority of the Tribunal's confidentiality orders were sought by health and other professionals in respect of reports and other documents containing information about the adult.<sup>1010</sup> Many of the other orders were sought by the adult's family members and by the Adult Guardian.<sup>1011</sup> Some were also sought by the Public Trustee of Queensland.<sup>1012</sup> Many of these requests concerned persons' contact details or identities.<sup>1013</sup>

*Why is the Tribunal making confidentiality orders?*

5.27 From the information provided to the Commission, it appears the most common reason for the making of a confidentiality order is the risk of harm to the adult, including the risk of harm to the therapeutic relationship between the adult and his or her treating health professional.<sup>1014</sup> Other reasons include the confidentiality of the source of the information, the risk of harm to a third party, professional privilege, and the irrelevance of the information to the proceeding.<sup>1015</sup>

5.28 The Commission also understands that in applying the General Principles the Tribunal has, on one occasion, granted a confidentiality order preventing the adult and his or her family from inspecting a medical or related health report on the ground there was a history of the family misusing the adult's confidential information.<sup>1016</sup>

*Who is the Tribunal precluding from document inspection?*

5.29 The Commission understands that most often, confidentiality orders have been made to prevent disclosure to the adult, the adult's family or all of the other parties.<sup>1017</sup> Some orders have been made in relation to specific persons only, such as a particular family member or carer.<sup>1018</sup> The Commission understands that in one case, everyone except for the parties' legal representatives was precluded from viewing a document.<sup>1019</sup>

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1010 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006, 12 and 14 June 2007.

1011 Ibid.

1012 Ibid.

1013 Ibid.

1014 Ibid.

1015 Ibid.

1016 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006.

1017 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006, 12 and 14 June 2007.

1018 Ibid.

1019 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006.

## THE POSITION IN OTHER JURISDICTIONS

5.30 Victoria and Western Australia are the only other Australian jurisdictions in which parties to a proceeding for a guardianship matter have a statutory right of document inspection.<sup>1020</sup> The legislation in those States also permits the discretionary limitation of those rights.

5.31 In the other Australian jurisdictions that do not have equivalent legislative provisions, such as New South Wales, the rights of parties to access documents, and the circumstances in which those rights can be displaced, are governed by the common law requirements of procedural fairness.<sup>1021</sup>

### Victoria

5.32 Section 146 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that a party in a proceeding may inspect the file of the proceeding,<sup>1022</sup> which contains all documents lodged in the proceeding.<sup>1023</sup> On payment of a fee, a party may also obtain a copy of part of the file.<sup>1024</sup> These rights are subject to:<sup>1025</sup>

- any contrary direction of the Tribunal,<sup>1026</sup>
- any order of the Tribunal under section 101 of the Act,<sup>1027</sup> or

<sup>1020</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146; *Guardianship and Administration Act 1990* (WA) s 112.

<sup>1021</sup> All tribunals, including guardianship tribunals, are required at common law to observe procedural fairness: J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122; JRS Forbes, *Justice in Tribunals* (2002) [7.5]. A number of jurisdictions have also specifically imposed this obligation on their guardianship tribunals through statute: *Guardianship and Management of Property Act 1991* (ACT) s 37(3); *Guardianship and Administration Act 2000* (Qld) s108(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(a); *Guardianship and Administration Act 1995* (Tas) s 11(2)(b); *State Administrative Tribunal Act 2004* (WA) s 32(1). See also the discussion of the position in other States in J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 126. See para 3.40–3.45 of this Report as to what is required by the 'hearing rule' of procedural fairness.

<sup>1022</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(2).

<sup>1023</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(1).

<sup>1024</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(3)(b). Note also that non-parties may, on payment of a fee, inspect the file and obtain a copy of any part of the file: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(3).

<sup>1025</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(4).

<sup>1026</sup> For a discussion of the scope of the Tribunal's power to make a 'contrary direction', see *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7.

<sup>1027</sup> Under s 101(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal may, in certain circumstances, order that any evidence given before it, the contents of any documents produced to it, or any information that might enable a person who has appeared before it to be identified must not be published except in the manner and to the people (if any) specified by the Tribunal. See para 7.30–7.32 of this Report.

- any certificate under section 53 or 54 of the Act.<sup>1028</sup>

5.33 The entitlement to inspect and obtain copies from a file is also subject to any conditions specified in the Tribunal rules.<sup>1029</sup> Such conditions are imposed by rule 6.23 of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic), which deals with the inspection of documents by parties.<sup>1030</sup> The rule distinguishes between a represented or proposed represented person (the adult) and other parties to the proceeding.

### **The adult**

5.34 Rule 6.23(a) provides that the adult may inspect or obtain a copy of the file ‘except to the extent’ that a member of the Tribunal is satisfied that the adult ‘should not be entitled personally to inspect or otherwise have access to all or any part of the file’ because the inspection or access would:<sup>1031</sup>

- cause serious harm to the health of the adult or to the health or safety of another person; or
- involve the unreasonable disclosure of information relating to the personal affairs of any person; or
- breach a confidentiality provision imposed by a person who supplied information that is contained in that part of the file.

5.35 However, if the adult is unable to inspect the file or a document on the file under that rule, the Tribunal may permit a person who is representing the adult before the Tribunal to inspect or obtain a copy of the file or otherwise have access to the document.<sup>1032</sup>

### **Other parties**

5.36 Rules 6.23(c) and 6.23(d) impose limits on the right of a party, other than the adult, to inspect and obtain a copy of the file. Those limitations differ depending on the stage of the proceeding at which the inspection is sought.

<sup>1028</sup> Under s 53 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), disclosure of information or a matter contained in a document may be certified by the Premier as being contrary to the public interest because it would involve disclosure of Cabinet deliberations. Section 54 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) makes provision for similar certification by the Attorney-General in relation to Crown privilege. The Tribunal must ensure that information to which such a certificate applies is not disclosed to any person other than a Tribunal member: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 53(2), 54(2).

<sup>1029</sup> The power granted to the Rules Committee of the Tribunal to make those rules is limited to the regulation of ‘practice and procedure’: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 157(1). As to the scope of this power, see *The Herald and Weekly Times Ltd v The Victorian Civil and Administrative Tribunal* (2005) 11 VR 422.

<sup>1030</sup> These rules are made by the Victorian Civil and Administrative Tribunal’s Rules Committee pursuant to ss 146(4)(a) and 157 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

<sup>1031</sup> *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(a).

<sup>1032</sup> *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(b).

5.37 Prior to the hearing, a party may inspect and obtain a copy of specific documents on the file, including those containing adverse criticism of the party.<sup>1033</sup> However, inspection may occur only if a Tribunal member is satisfied the inspection would not:<sup>1034</sup>

- cause serious harm to the health or safety of another person; or
- involve the unreasonable disclosure of information relating to the personal affairs of any person; or
- breach a confidentiality provision imposed by a person who supplied information that is contained in the documents or document.

5.38 After the hearing, a party's right of inspection applies to all documents that were relied on by the Tribunal in making its decision.<sup>1035</sup> In this situation, inspection may occur, except where the Tribunal is satisfied that inspection would have one of the effects listed above.<sup>1036</sup>

## Western Australia

5.39 Section 112 of the *Guardianship and Administration Act 1990* (WA) deals with parties' rights to inspect documents before the Tribunal, and the Tribunal's power to displace a party's right of inspection.<sup>1037</sup> The legislation distinguishes between the rights of the adult (or the person representing him or her) and other parties.<sup>1038</sup>

### The adult

5.40 Section 112(1) of the *Guardianship and Administration Act 1990* (WA) provides that a represented person, a person in respect of whom an application under the Act is made, or a person representing any such person in a proceeding is entitled to inspect or otherwise have access to documents and material lodged with or held by the Tribunal for the purposes of an application in respect of the person. The same

1033 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(c). The other documents specified are the application form, any report from the Public Advocate, and any report from an administrator.

1034 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(c).

1035 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(d).

1036 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(d). See the list set out at para 5.37 of this Report.

1037 Unless authorised by the Tribunal, inspection of or other access to a document, other than in accordance with s 112 of the *Guardianship and Administration Act 1990* (WA), is an offence: *Guardianship and Administration Act 1990* (WA) s 112(3).

1038 Note also that s 112(4) of the *Guardianship and Administration Act 1990* (WA) allows the Tribunal to authorise a non-party, upon application, to inspect or otherwise have access to documents or material lodged with or held by the Tribunal for the purpose of an application. The circumstances in which the Tribunal may authorise such inspection are not specified. It has been held, however, that the person must demonstrate a 'cogent' reason for the disclosure and 'a reasonable relationship between the purpose to which the requested information is to be put and [the] intentions and objectives' of the legislation: *MB* [2004] WAGAB 25, [66]; *IR* [2005] WASAT 111, [12]; *LT (Deceased) and JTW* [2005] WASAT 264, [32]. Also see *BJP* [2005] WASAT 137; and *Public Trustee* [2005] WASAT 199 in relation to s 112(4) of the *Guardianship and Administration Act 1990* (WA).

entitlement applies to any accounts submitted by an administrator to the Public Trustee.<sup>1039</sup>

5.41 This entitlement to inspect documents and other material applies unless the Tribunal ‘otherwise orders’.<sup>1040</sup> The circumstances in which the Tribunal may exercise that discretion are not specified.<sup>1041</sup>

### **Other parties**

5.42 Section 112(2) of the *Guardianship and Administration Act 1990* (WA) provides that other parties to a proceeding, and their representatives, may inspect or access documents and material lodged with or held by the Tribunal for the purpose of the proceeding except:

- if a document or material is or contains a medical opinion not concerning that party; or
- if the Tribunal otherwise orders.

5.43 Again, the circumstances in which the Tribunal may exercise the discretion to order that a party not inspect or have access to certain material are not specified. The Tribunal has suggested, however, that in some circumstances, the right of inspection might be limited to documents ‘commensurate with the nature of their [the party’s] interest in the matter’.<sup>1042</sup>

### **New South Wales**

5.44 The *Guardianship Act 1987* (NSW) does not specify whether or when a party to a proceeding should be given access to documents before the Guardianship Tribunal. Nevertheless, the Tribunal is required at common law to observe the rules of procedural fairness.<sup>1043</sup>

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1039 *Guardianship and Administration Act 1990* (WA) ss 112(1)(b), 80(1).

1040 *Guardianship and Administration Act 1990* (WA) s 112(1).

1041 The power to displace the right of inspection ‘reinforce[s] two important policies: firstly, the protection of the privacy of the person involved in the proceedings before the Board and in particular a proposed represented or a represented person; and secondly, the public interest in the integrity of the Board processes which relies on the ability to obtain sensitive information from a variety of sources’: *MB* [2004] WAGAB 25, [35].

1042 See *MB* [2004] WAGAB 25, [54]. This statement was made with reference to the wide definition of who is a ‘party’, which includes any person with a proper interest in the proceedings who is heard by the Board: *Guardianship and Administration Act 1990* (WA) s 3, sch 1 pt B cl 13(2)(a). In *MB* [2004] WAGAB 25, the Board considered that where a person is a party but he or she has been given only a limited right to be heard in the proceedings, it was within the Board’s power to limit that person’s right to access documents ‘on a need to know basis’.

1043 While the *Guardianship Act 1987* (NSW) does not contain a provision to this effect, the obligation to accord procedural fairness will apply unless a contrary intention is clearly expressed in the legislation: *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J). It has been held that no such intention is manifest in the *Guardianship Act 1987* (NSW) and that the Tribunal must, accordingly, comply with the rules of procedural fairness: *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [37]; *KV v Protective (No 2)* [2004] NSWADTAP 48, [22]; and *TC v Public Guardian* [2006] NSWADTAP 15, [22].

5.45 A number of recent decisions of the Appeal Panel of the New South Wales Administrative Decisions Tribunal have examined what is required by procedural fairness in relation to documents relied on by the Guardianship Tribunal of that State.<sup>1044</sup>

5.46 The leading decision on procedural fairness in the Guardianship Tribunal is *GM v Guardianship Tribunal*.<sup>1045</sup> Although that decision did not deal specifically with access to documents,<sup>1046</sup> the Appeal Panel set out a two-step process of inquiry in determining the Guardianship Tribunal's obligation to accord procedural fairness and, in particular, the hearing rule, which has subsequently been applied in other decisions in the context of parties' rights to inspect documents.<sup>1047</sup>

5.47 The first inquiry is whether the particular person is entitled to procedural fairness.<sup>1048</sup> This involves two questions:

- Whether the person's rights, interests, or legitimate expectations are affected.<sup>1049</sup> The Appeal Panel found that the making of an order by the Guardianship Tribunal (for example to appoint a guardian) will always affect the rights of the adult, and that the rights, interests or legitimate expectations of others may also be affected, although this will not occur simply because a person is a party to the proceedings.<sup>1050</sup>
- Whether the requirements of procedural fairness are excluded by the legislation.<sup>1051</sup> The Appeal Panel concluded that no intention to exclude the rules of procedural fairness is demonstrated in the *Guardianship Act 1987* (NSW).<sup>1052</sup>

5.48 The second inquiry, if the rules of procedural fairness do apply, is to determine what steps the Guardianship Tribunal must take.<sup>1053</sup> In *GM v Guardianship*

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1044 The Appeal Panel of the Administrative Decisions Tribunal has jurisdiction to hear appeals of certain decisions of the Guardianship Tribunal including guardianship and financial administration orders: *Administrative Decisions Tribunal Act 1997* (NSW) s 8; *Guardianship Act 1987* (NSW) s 67A.

1045 [2003] NSWADTAP 59.

1046 The grounds of appeal instead included being given insufficient time to instruct a solicitor or prepare for the hearing, and a failure to disclose evidence given in the absence of a person seeking an appointment as guardian and financial manager: *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [23].

1047 *KA v Public Guardian* [2004] NSWADTAP 25; *KV v Protective (No 2)* [2004] NSWADTAP 48; *NG v Protective Commissioner* [2005] NSWADTAP 11; *Carew v Protective Commissioner* [2005] NSWADTAP 13; *Cachia v Public Guardian* [2005] NSWADTAP 16; *QJ v Public Guardian* [2005] NSWADTAP 45; *TC v Public Guardian* [2006] NSWADTAP 15; *TP v TR (No 2)* [2006] NSWADTAP 12; and *VP v Public Guardian* [2006] NSWADTAP 30.

1048 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [26].

1049 *Ibid* [27], citing *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

1050 *Ibid* [29]–[35].

1051 *Ibid* [36], citing *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

1052 *Ibid* [37].

1053 *Ibid* [26].

*Tribunal*,<sup>1054</sup> the Appeal Panel considered the following principles in determining the operation of the hearing rule:

- The hearing rule will only arise in relation to adverse information that is ‘credible, relevant and significant to the decision’.<sup>1055</sup>
- The content of the hearing rule must be ‘appropriate and adapted to the circumstances of the particular case’.<sup>1056</sup> The Appeal Panel considered the task ‘is to determine the content of the hearing rule in light of the Tribunal’s jurisdiction, the statutory requirements about how that jurisdiction is to be exercised and judicial statements concerning the meaning of the obligation to abide by the rules of natural justice’.<sup>1057</sup>
- At a minimum, the ‘substance or gravamen’ of the adverse evidence should be disclosed to the person.<sup>1058</sup>
- The general rule that the person be given an opportunity to respond to adverse information may be displaced in ‘exceptional circumstances’ such as where there is a ‘need to keep material confidential, to maintain secrecy or to hear a matter urgently’.<sup>1059</sup>

5.49 One issue raised in some of the Appeal Panel decisions following *GM v Guardianship Tribunal* is the role of procedural fairness in the guardianship jurisdiction. While some commentators have suggested that the rights and interests of the adult may override the strict application of the requirements of procedural fairness,<sup>1060</sup> the Appeal Panel has instead suggested that disclosure of documents to a

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1054 [2003] NSWADTAP 59.

1055 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [59].

1056 *Ibid* [39], citing *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

1057 *Ibid* [39]. In considering the nature of the Guardianship Tribunal’s jurisdiction, the Appeal Panel stated in *TC v Public Guardian* [2006] NSWADTAP 15, [23]:

The Guardianship Tribunal’s jurisdiction is a protective one. That means that one of its primary aims is to protect vulnerable people from neglect, abuse and exploitation. ... But that is not its only obligation. The Guardianship Tribunal is also obliged to ensure that people who are parties to applications receive a fair hearing from an impartial decision-maker.

Also note *WO v Protective Commissioner* [2006] NSWADTAP 47, [20] in which the Appeal Panel commented that advance disclosure of the content of a report is ‘particularly important where ... a party suffers from a disability which could impair their ability to rapidly absorb the contents of a report’.

1058 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [57], citing *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247; *Re Pergamon Press Ltd* [1971] Ch 388; and *Ansell v Wells* (1982) 43 ALR 41. Also note *WO v Protective Commissioner* [2006] NSWADTAP 47, [21]: ‘procedural fairness does not demand that a hard copy of all reports be given in advance to the parties. It is sufficient if the substance or gravamen of the reports is disclosed to parties.’

1059 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [62], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 116 (Kirby J), 100 (McHugh J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 633–4 (McHugh J); and *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

1060 See para 3.55 of this Report.

party whose interests are affected will ordinarily help to ensure the best decision for the adult is made.<sup>1061</sup>

A fairer and more transparent approach, which accords with the principles of procedural fairness, is to give parties access to documents (or communicate the substance of those documents) so that they can respond to the material and raise any concerns they may have. In doing so, the interests of the subject person in being free from exploitation and abuse, will generally be promoted.

## THE DISCUSSION PAPER

5.50 In its Discussion Paper, the Commission identified some possible models for reform, examined three matters (namely, the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system) to guide reform in this area, and raised a number of issues for consideration. This section of the chapter outlines these matters.

### Possible legal models

5.51 In its Discussion Paper, the Commission identified three possible models for an approach in the guardianship legislation to the displacement of an active party's statutory right to inspect documents:<sup>1062</sup>

- Model 1: the current statutory entitlement to inspect documents could not be overridden by a confidentiality order made by the Tribunal to limit the disclosure of matters contained in documents to active parties. This would remove the Tribunal's current power to make such orders.
- Model 2: the Tribunal would retain its power to displace an active party's right to inspect documents by making a confidentiality order, but the legislation would not contain express criteria for the exercise of that power.
- Model 3: the Tribunal would retain its power to displace an active party's right to inspect documents by making a confidentiality order, and the legislation would specify criteria for the exercise of that power. This would reflect the general position that currently applies in Queensland.

<sup>1061</sup>

*TC v Public Guardian* [2006] NSWADTAP 15, [37]. See also *KA v Public Guardian* [2004] NSWADTAP 25, [13]:

It is the duty of everyone exercising functions under the *Guardianship Act* to observe the principle that 'the welfare and interests' of the person who is the subject of the application should be given 'paramount consideration'. Affording procedural fairness to KA does not elevate his interests beyond those of his son, KC. On the contrary, acknowledging that KA has an interest in the decision and allowing him the opportunity to address any adverse material ensures that the Guardianship Tribunal will make the best informed decision possible as to KA's suitability to be KC's guardian or financial manager. Without KA's input on relevant issues, the Guardianship Tribunal would have only one side of the story. KC's interest in having the most suitable guardian or financial manager making decisions for him are therefore enhanced by giving KA the opportunity to be heard, and in particular to address any adverse material.

<sup>1062</sup>

Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.84]–[5.88].

5.52 These models were posed as a starting point for a general approach to this issue and as a guide for submissions. In its Discussion Paper, the Commission expressed a preliminary preference for model 3.<sup>1063</sup> The Commission considered that there may be circumstances in which it is appropriate to withhold information contained in a document from an active party, particularly if disclosure would be harmful to the adult.

### Openness and confidentiality in the guardianship system

5.53 In Chapter 3 of this Report, the Commission set out several guiding principles for its review, including that the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system are the three matters relevant to determining the role of confidentiality in the guardianship system.<sup>1064</sup> These matters were also discussed in the Commission's Discussion Paper.<sup>1065</sup> This section of the chapter briefly considers these matters in the context of the displacement of an active party's right to inspect documents before the Tribunal.

#### Open justice

5.54 The principle of open justice requires that members of the public should be able to inspect documents that have come into existence for the purpose of judicial proceedings.<sup>1066</sup> To achieve the goals of open justice, namely, accountability of decision-making through public scrutiny<sup>1067</sup> and public education about the law and legal processes,<sup>1068</sup> members of the public must be able to follow the court or tribunal's decision-making process. This is difficult without knowing what is contained in documents being considered by the court or tribunal, particularly if documents are read by the judicial officer prior to the hearing and are not discussed in detail during proceedings.<sup>1069</sup>

5.55 These arguments about open justice relate to access by the public, but apply with greater force in relation to the parties to a proceeding. As such, open justice would favour the inspection of documents by parties to a proceeding.

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1063 Ibid [5.97]–[5.98].

1064 See para 3.156 of this Report.

1065 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.74]–[5.83].

1066 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2–3. Also see S Walker, *The Law of Journalism* (1989) [1.2.01]; PW Young, 'Open Courts' (2006) 80 *Australian Law Journal* 83.

1067 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], citing *R v Davis* (1995) 57 FCR 512, 513–4.

1068 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 39; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15]; JH Wigmore, *Evidence in Trials at Common Law*, Vol 6 (Chadbourn rev 1976) §1834.

1069 PW Young, 'Open Courts' (2006) 80 *Australian Law Journal* 83.

### Procedural fairness

5.56 The hearing rule requires that any ‘credible, relevant and significant’ evidence adverse to a person be disclosed to the person, and that he or she be given an opportunity to respond to that evidence.<sup>1070</sup> Precisely what is required will depend on the circumstances of each case.<sup>1071</sup>

5.57 It may be sufficient that a person be given an opportunity to respond to the substance of a document.<sup>1072</sup> But, the nature of the document may be such as to require its actual production in order that a party has a meaningful opportunity to deal with the information.<sup>1073</sup> It might also be necessary to allow the person to ask questions and to adjourn proceedings to enable him or her to consider the document and to obtain further evidence of his or her own.<sup>1074</sup>

5.58 Although it is possible to make a confidentiality order and still meet the requirements of procedural fairness,<sup>1075</sup> depriving a party of access to a relevant document sits uncomfortably with the notion of the fair and transparent decision-

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*Kioa v West* (1985) 159 CLR 550, 587 (Mason J), 629 (Brennan J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 653 (Kirby J); and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88. Also see WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8; J Blackwood, ‘Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals’ (2004) 11 *Psychiatry, Psychology and Law* 122, 122. Also note, for example, *Canham* [2002] SADC 88, [16] in which it was held that the Guardianship Board had denied the adult procedural fairness by failing to inform him of certain evidence upon which it relied and by failing to give him an opportunity to respond to that evidence.

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JRS Forbes, *Justice in Tribunals* (2002) [7.1]; WB Lane and S Young, *Administrative Law in Queensland* (2001) 53; *Kioa v West* (1985) 159 CLR 550, 584–5 (Mason J).

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Procedural fairness may not necessarily require that the person be given a copy of the document itself as it may be sufficient that the substance of its contents be brought to the person’s attention: J Blackwood, ‘Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals’ (2004) 11 *Psychiatry, Psychology and Law* 122, 122, 123, 128–9; JRS Forbes, *Justice in Tribunals* (2002) [12.31].

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*Moore v Guardianship and Administration Board* [1990] VR 902. In that case, Gobbo J held that more than a ‘limited invitation’ to view the document was required given the particular nature of the document, namely, that much of the material contained in the document constituted unsubstantiated allegations and was highly prejudicial, but of minimal probative value: *Moore v Guardianship and Administration Board* [1990] VR 902, 912 (Gobbo J). See the discussion in T Henning and J Blackwood, ‘The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals’ (2003) 10 *Australian Journal of Administrative Law* 84, 102–3; and R Kune and G Kune, ‘Expert medico-scientific evidence before tribunals: Approaches to proof, expertise and conflicting opinions’ (2006) 13 *Australian Journal of Administrative Law* 69, 76. Also see *Cachia v Public Guardian* [2005] NSWADTAP 16, [33]; and *KV v Protective (No 2)* [2004] NSWADTAP 48, [27], [30]. In *KV v Protective (No 2)* [2004] NSWADTAP 48, [27], [30] it was held that the New South Wales Guardianship Tribunal breached the hearing rule of procedural fairness by failing to give a full copy of the medical report, upon which it relied, to the party in order to give him an adequate opportunity to obtain expert evidence responding to the report:

there are times when a party will need to respond to a document and cannot realistically do so unless they have access to a copy of the whole document. ... Unless there is a persuasive reason for not disclosing a medical report, a copy of the whole report should be disclosed if the content is disputed.

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For example, *KV v Protective (No 2)* [2004] NSWADTAP 48, [28]; *NG v Protective Commissioner* [2005] NSWADTAP 11; [13]; *Cachia v Public Guardian* [2005] NSWADTAP 16, [34]; and *TP v TR (No 2)* [2006] NSWADTAP 12, [28], [30]–[31]. Also see *Hess v Public Guardian* [2005] NSWADTAP 43, [28]–[29]. In that case, the person, who was unrepresented, did not read English. He was given a copy of an expert report at the hearing, upon which the Tribunal relied, but it was not interpreted. In addition, the person was not made aware that he could seek an adjournment in order to consider the expert evidence and to obtain expert evidence of his own. The Appeal Panel of the New South Wales Administrative Decisions Tribunal held that the Guardianship Tribunal had accordingly failed to afford the person procedural fairness.

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Indeed, the making of a confidentiality order does not exempt a court or tribunal from according parties procedural fairness: see para 5.19 of this Report.

making process favoured by the hearing rule.<sup>1076</sup> Concerns have also been raised about the quality of decision-making that is not based on complete and tested evidence.<sup>1077</sup>

### **Nature of the guardianship system**

5.59 The nature of the guardianship system may call for documents received by the Tribunal to be kept confidential in some circumstances. Of primary concern in this jurisdiction are the rights and interests of the adult. Disclosure of information in a document may significantly affect an adult's privacy interests. There may also be concerns that disclosure of a document may be harmful to the adult.<sup>1078</sup> For example, disclosure to the adult of a medical report may damage the therapeutic relationship between the adult and his or her treating health professional.<sup>1079</sup>

5.60 Decisions by the Tribunal, however, affect fundamental rights of the adult<sup>1080</sup> and ought to attract greater scrutiny.<sup>1081</sup> This is especially important in dealing with vulnerable people who may be unable to advocate on their own behalf. The Tribunal also deals with claims adverse to other parties that may sometimes relate to serious, or potentially criminal, misbehaviour. The significance of these matters suggests that a party should not be deprived of an opportunity to respond to a prejudicial document that is relevant to the proceeding. Allowing a person to respond to relevant documents is also likely to assist the Tribunal to make a decision that best meets the adult's needs by ensuring the decision is based upon all available evidence.<sup>1082</sup>

<sup>1076</sup> For example, *TC v Public Guardian* [2006] NSWADTAP 15, [33]–[35]:

Contrary to the Tribunal's approach of balancing the right to privacy of a person against the right to procedural fairness, the correct approach is that the rules of procedural fairness prevail unless there are exceptional circumstances which override those rules. ... the acceptance of secret evidence should be an exceptional rather than a routine event.

In making these comments, the Appeal Panel of the New South Wales Administrative Decisions Tribunal specifically noted that the Guardianship Tribunal does not have an express statutory power to withhold evidence from a party: [34]. See para 5.44–5.49 of this Report. This is different from Queensland's Tribunal which has been granted such a power.

<sup>1077</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 274 (Brennan J). Also see GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 69–70.

<sup>1078</sup> In the context of information generally causing harm to an adult, see T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101.

<sup>1079</sup> See generally, Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 4; and J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 129.

<sup>1080</sup> T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 5.

<sup>1081</sup> EI Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1505]; JRS Forbes, *Justice in Tribunals* (2002) [7.7].

<sup>1082</sup> See *TC v Public Guardian* [2006] NSWADTAP 15, [23], [37]; and *KA v Public Guardian* [2004] NSWADTAP 25, [13]. See para 5.49 of this Report.

## Issues for consideration

5.61 In its Discussion Paper, the Commission also raised several issues for consideration in relation to when a confidentiality order may displace an active party's right to inspect documents before the Tribunal, including:<sup>1083</sup>

- Should the Tribunal have power to make a confidentiality order in relation to documents?
- If so, when should the Tribunal be able to make such a confidentiality order?
- Should the Tribunal have power to place other restrictions on the disclosure of documents?
- Should documents that have been withheld from an active party be disclosed to the party's representative?

5.62 Before considering these issues in detail, however, it is necessary to address some of the concerns raised during consultation that do not relate to the Tribunal's power to make a confidentiality order in relation to documents, but instead relate to the antecedent right of an active party to inspect documents.

## INSPECTION OF DOCUMENTS BY ACTIVE PARTIES

5.63 As noted already, in this stage of its review, the Commission is examining the guardianship legislation's confidentiality provisions.<sup>1084</sup> However, as was discussed in Chapter 1 of this Report,<sup>1085</sup> it is not possible to review these provisions entirely in isolation and so consideration of some practical issues that arise in relation to inspection of documents by active parties has proved necessary. The most significant practical issues relate to the ability of active parties to inspect the various sections of a Tribunal file and the extent to which documents that cannot be inspected by active parties are before the Tribunal when it is making a decision.

5.64 Prior to February 2007, Tribunal files were divided into an accessible section, a financial section and a non-accessible (sometimes called inaccessible) section.<sup>1086</sup> Documents placed in the financial section were all those that related to financial issues such as bank statements and financial records. Documents placed in the non-accessible section included the Tribunal records of proceeding (the notes taken and forms completed by Tribunal members during a hearing), file notes by Registry staff,

<sup>1083</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.59]–[5.73].

<sup>1084</sup> The Commission's terms of reference are set out in Appendix 1 of this Report.

<sup>1085</sup> See para 1.28 of this Report.

<sup>1086</sup> Information provided by the President of the Guardianship and Administration Tribunal, 29 March 2006. That some sections of a file were accessible and others were not is reflected in the Tribunal's Presidential Direction and Administration Practice: Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007); and Guardianship and Administration Tribunal, *Administration Practice 4 of 2007*, 'File Maintenance'.

documents subject to confidentiality orders and information regarded as private such as an adult's will or a person's private contact details. Some of this information may have been relevant to an issue in the proceeding. The accessible section of the file contained all of the other documents.

5.65 The submissions below raise concerns about the fact that active parties were not able to inspect material placed in the non-accessible section of Tribunal files. This assumes significance because the Tribunal members hearing a matter used to receive the entire file, including the non-accessible section.

5.66 In February 2007, the Tribunal revised the structure of its files. A file is now separated into the sections described below, which contain the following documents:<sup>1087</sup>

- Hearing – this section includes the application made to the Tribunal, reports by medical or health professionals, reports from the Adult Guardian, and case management file notes taken by Registry staff. This section is available for inspection by the active parties and is sent to the Tribunal members hearing a matter.
- Financial – this section contains documents relevant to financial issues such as financial management plans, accounts of administration and bank statements. This section is also available for inspection by the active parties and sent to the Tribunal members hearing a matter.
- Tribunal – this section contains the Tribunal records of proceeding. It is sent to the Tribunal members hearing a matter but is not available for inspection by active parties.
- Confidential – this section is generated if the file contains a document that is subject to a confidentiality order. This section is sent to the Tribunal members hearing a matter but is not available for inspection by active parties against whom a confidentiality order has been made.<sup>1088</sup>
- Mediation – this section contains documents relating to mediations conducted under Chapter 7, Part 4A of the *Guardianship and Administration Act 2000* (Qld). This section is not available for inspection by active parties and is not sent to the Tribunal members hearing a matter. This is because section 145G of the *Guardianship and Administration Act 2000* (Qld) provides that evidence of anything that is said or done in the course of a dispute resolution is

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Information provided by the Registrar of the Guardianship and Administration Tribunal, 28 May 2007 and 12 June 2007; Information provided by the President of the Guardianship and Administration Tribunal, 20 June 2007. See also Guardianship and Administration Tribunal, *Administration Practice 4 of 2007*, 'File Maintenance'; and submission F18.

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The Commission has made recommendations, in Chapter 4 of this Report, about the making of confidentiality orders in relation to documents prior to a hearing. The Commission considers that it should be possible for such orders to be made but that the making of the order should be vacated at the start of the hearing unless otherwise ordered by the Tribunal at the hearing: see para 4.343 of the Report.

inadmissible.<sup>1089</sup> There are, however, two documents relating to dispute resolution that are placed in the hearing section: the mediator's report under section 145I and where a document records a settlement under section 145J. Accordingly, these documents are available to both the Tribunal members hearing a matter and active parties.

- Registry – this section includes documents generated by the Registry such as outgoing correspondence of an administrative nature and overviews of the file. It also is where an adult's will is placed along with any criminal history checks or bankruptcy searches undertaken. It is not available for inspection by active parties prior to a hearing and is not copied and sent to the Tribunal members hearing a matter. The Registry section is, however, available on the day of the hearing to members of the Tribunal and may also be inspected at that time by active parties.

5.67 The result of the above file structure and the availability for inspection by active parties of the various sections of the file is that the documents the Tribunal members hearing a matter will receive that will not be available to active parties are those in the Tribunal and Confidential sections. Neither the Tribunal members nor active parties will have access to the Registry section prior to the hearing.

## Submissions

5.68 Submissions raised two categories of concerns about the inspection of documents. The first is that there are documents before the Tribunal and considered by it that active parties have not been permitted to inspect. The second is a series of different concerns about practical impediments that inhibit the effective inspection of documents.

5.69 The Commission notes that, to the extent these concerns are based on how the Tribunal has structured its files and the corresponding ability of active parties to inspect different sections of a file, the submissions received by the Commission address Tribunal practice prior to its revised file structure.

### ***Active parties not permitted to inspect certain documents***

5.70 The submissions revealed concerns about the ability of parties to access documents that may be credible, relevant and significant to issues to be determined at a

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Note, however, s 145G(2) of the *Guardianship and Administration Act 2000* (Qld) which provides that evidence of anything said or done in the course of a dispute resolution is admissible in a proceeding in the following circumstances:

- all active parties agree to the admission of the evidence; or
- an active party makes a threat against another person and the threat is relevant to the proceeding; or
- an active party admits to emotionally, mentally or physically abusing an adult.

hearing.<sup>1090</sup> In particular, the Tribunal's practice of placing certain documents on an 'inaccessible spike', without making a confidentiality order, was criticised.<sup>1091</sup>

5.71 The Public Advocate described her understanding of the Tribunal's document management and inspection practice:<sup>1092</sup>

It is understood that in accordance with this Direction, documents which are on the inaccessible or non-accessible file are not made available. These inaccessible documents are considered generally not relevant to the substance of the matter before the Tribunal. The inaccessible documents include documents generated or received by the registry in the course of preparing the file for hearing. However, it is understood to be the practice for the Tribunal to make available to the parties 'in the course of the hearing' any documents from the inaccessible file which it considers are relevant to the proceedings and are relied upon by the Tribunal. It has been suggested that this practice satisfies the requirements of according procedural fairness.

5.72 The Public Advocate considered that such an approach gave rise to the following problems or issues:<sup>1093</sup>

1. The documents actually made available are made available on an arbitrary basis. A registry officer, not the Tribunal, identifies what he or she considers is relevant and these are the documents made available for inspection prior to the hearing day.
2. Again, as an indication of the arbitrary nature of the documents made available, documents remain on the accessible file indefinitely. Although there may have been six hearings subsequent to the hearing in which particular documents were relied upon, they remain accessible. Some may remain relevant in respect of the subsequent hearing, others likely do not.
3. It is considered that making any additional documents from the inaccessible file available at the hearing will not necessarily discharge the responsibility to provide procedural fairness. Procedural fairness requires (amongst other things) not only inspection, but a reasonable opportunity to present the party's case. Reflection upon documents and preparation is essential to providing a reasonable opportunity.
4. 'Relevance' of a particular document to the issues, may not always be obvious to someone other than a party. It may arguably be reasonable for the party to be able to see the inaccessible documents and to assess relevance him or herself and make submissions accordingly. For example, a file note of a conversation between a registry officer and a party referring to the circumstances of the adult may be considered irrelevant by the registry, but an issue may be touched upon in the memo which another party considers highly controversial, although this is not raised elsewhere in the documents. Alternatively, details in a file note may colour the interpretation of what appears in other documents which are made available, although essentially covering the same substance. Could either of these be considered irrelevant? It is suggested that they are not, but the document may not be given to the parties to inspect. It is clear from *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* that it is not sufficient that the Tribunal may consider itself to give

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1090 For example, submissions 1H, 105, 124, 141, 147, F15.

1091 For example, submissions 1H, 105.

1092 Submission 1H.

1093 Ibid.

no weight to the document or state that it relies only upon the other documents made available for inspection. The document is still relevant and should therefore be made available in order to satisfy the requirements of procedural fairness.

5. Technically, all of the documents on the file are ‘before the Tribunal’ within the meaning of section 108(2), irrespective of whether, as is the practice, the Tribunal nominates a particular document as being a document relied upon.

6. With respect to the requirement in section 108(2) that inspection must be allowed of a document ‘directly relevant to an issue,’ it is acknowledged that it appears there is a basis not to make all documents available. This is consistent with the common law which requires opportunity to respond to adverse information which is credible relevant and significant. However, if a confidentiality order has not been made in respect of a particular document which is on the registry file and is therefore available to the Tribunal, it may be difficult to resist an argument that the documents on the file are relevant to the issues. After all, they have been generated with a view to preparing the matter for hearing and accordingly, might be expected to be directly relevant to the issues. [note omitted]

5.73 In terms of how these issues might be addressed, the Public Advocate commented:<sup>1094</sup>

Some criticism of the Tribunal appears to be founded in perception, whether justified or not, of unfairness. It is suggested that the better practice may be for all of the documents to be made available, unless there is a confidentiality order made in respect of them. Then there can be no perceived unfairness in respect of documents made available. If in fact the documents on the inaccessible file are largely not relevant, but procedural in nature, there seems to be no down side to making them available to active parties even if technically it may not be required to meet section 108(2).

Alternatively, consideration could be given to maintaining a separate registry file which is not given to the Tribunal. If the parties had access to all of the documents the Tribunal has access to, this would avoid any perception of unfairness in respect of documentation not made available for inspection. However, were this procedure adopted, there may be occasions when a registry officer fails to recognise the significance of a particular document and does not provide a copy to the Tribunal file. Registry staff cannot necessarily be expected to do so.

5.74 Caxton Legal Centre submitted that they were ‘aware of several cases where access to documents on the Tribunal file has proven particularly difficult’.<sup>1095</sup> A view expressed at a focus group of advocacy groups was that there was a great deal of evidence to suggest that the rights of people attending the Tribunal were being eroded and that confidentiality was being used as the mechanism to camouflage people’s rights, particularly when documents are kept confidential.<sup>1096</sup>

5.75 One respondent with some professional experience in the guardianship jurisdiction described being unaware of the existence of an ‘inaccessible spike’ on a file until it was discovered by accident.<sup>1097</sup> This respondent considered it inappropriate that

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1094 Ibid.

1095 Submission 124.

1096 Submission F15.

1097 Submission 105.

material which is not the subject of a confidentiality order could be kept from a party in this way ‘on the basis of an administrative decision, not a legal order’. Some staff members from the Office of the Public Advocate also expressed concern about junior members of the Registry staff making decisions about which documents are placed on the inaccessible spike.<sup>1098</sup>

5.76 A number of respondents, all parties to Tribunal proceedings, considered that the Tribunal’s reasons for a decision revealed that the Tribunal relied on documentary material in its decision-making that the parties had not seen during document inspection or been informed about during the Tribunal hearing.<sup>1099</sup>

### ***Practical impediments to effective inspection***

#### *Timeframe for inspection of documents*

5.77 Several submissions considered that the period of time between receiving notice of a hearing and the hearing itself was too short for adequate document inspection to occur.<sup>1100</sup> Queensland Advocacy Incorporated explained:<sup>1101</sup>

QAI believes that people who are active parties to proceedings should be given substantially more access and more timely access to documents before the Tribunal, rather than less. We suggest the present system of parties being required to attend the Tribunal to view the file with no surety as to the availability of copies or of notification of subsequently arriving documents is positively primitive and frankly is unprecedented in any modern court or tribunal. We observe that in disability circles it is widely accepted that where rights are diminished, confidentiality is often the means of camouflaging it.

5.78 One respondent informed the Commission that he received a telephone call advising of a hearing date seven days before the hearing.<sup>1102</sup> However, the written notification of the hearing date, including notification of the right to inspect documents, was delivered only three days prior to the hearing. The respondent considers this timeframe did not give him adequate opportunity to conduct document inspection or to prepare material to rebut any allegations that might have been contained in documents.

5.79 Another respondent told of a similar experience where notification was received on a Friday to attend a Tribunal hearing the following Wednesday. The respondent stated that, as a consequence, she experienced difficulties in obtaining legal representation.<sup>1103</sup>

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1098 Submission F16.

1099 For example, submissions 141, 142A.

1100 For example, submissions 105, 142A, 148.

1101 Submission 102.

1102 Submission 142A.

1103 Submission 148.

5.80 Some respondents indicated that the lack of time to carry out document inspection was exacerbated in regional areas where documents could only be viewed in the few hours prior to the commencement of the hearing.<sup>1104</sup>

*Awareness of the document inspection process*

5.81 Some respondents informed the Commission that they were unaware that documents filed with the Tribunal could be inspected.<sup>1105</sup>

5.82 Carers Queensland noted that people's access to and disclosure of information, including a right to document inspection, is influenced by their knowledge and understanding of the system. They considered that 'without assistance to effectively navigate the system, the operational processes and procedures effectively deny people access to important information'.<sup>1106</sup>

5.83 One respondent, an active party to proceedings, stated he did not receive notification informing him of a right to document inspection.<sup>1107</sup>

*Notification of material filed after document inspection*

5.84 Two submissions expressed concern about active parties not knowing that material has been received by the Tribunal after they have conducted a file inspection.<sup>1108</sup> It was suggested that the Tribunal should record when inspections are carried out so that active parties can be notified of any material that arrives after their last inspection.

*Privacy during document inspection*

5.85 Some respondents were concerned that they were not afforded privacy during the document inspection process.<sup>1109</sup> A person in attendance at a community forum considered that parties should be free to inspect documents 'in private' and without the presence of Tribunal staff.<sup>1110</sup> Another respondent considered the presence of a security officer in the room during the inspection process was 'unnecessary and intrusive'.<sup>1111</sup>

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1104 For example, submission F14.

1105 Submissions 101, 105.

1106 Submission 101.

1107 Submission 141.

1108 Submissions 102, 105.

1109 For example, submissions 141, 142.

1110 Submission F10.

1111 Submission 142.

5.86 However, Caxton Legal Centre considered that limiting the conditions under which file inspection occurs ‘is reasonable where there is any risk that material could otherwise be easily removed from a file during this process’.<sup>1112</sup>

## The Commission’s view

### **Active parties not permitted to inspect certain documents**

5.87 In Chapter 3 of this Report, the Commission identified as one of its guiding principles for this stage of its review the importance of distinguishing between the issues of relevance and confidentiality.<sup>1113</sup> Information that is ‘credible, relevant and significant’,<sup>1114</sup> which means that it ‘cannot be dismissed from further consideration by the decision-maker before making the decision’,<sup>1115</sup> must be available for inspection by active parties. Information that does not meet this test is not capable of informing the Tribunal’s decision and so need not be available for inspection. The Tribunal’s filing system and the inspection policy should reflect this.

5.88 The Commission notes, however, that prior to information being considered at hearing it is very difficult to assess its credibility and significance.<sup>1116</sup> This assessment may depend, for example, on what other information is before the Tribunal. Accordingly, the Commission considers that the Tribunal’s filing system and pre-hearing inspection policy should be guided by the criterion of ‘relevance’ and that all information that is relevant should be available to the active parties. Information that is not relevant to the proceeding should not be available. The Commission acknowledges that this has resource implications because it would require material to be sorted into relevant and irrelevant documents. It may be that this process could be undertaken by senior staff in the Registry or by a legal member of the Tribunal who is not part of the hearing panel. Nevertheless, this is considered important. A failure to provide access to relevant information may be a breach of procedural fairness while unlimited access to irrelevant information does not accord appropriate respect to the privacy interests of the adult.

5.89 The Commission also considers that this analysis requires that the Tribunal and the active parties receive the same material for a hearing. Prior to February 2007, the Commission understands that the Tribunal members hearing a matter received the entire file, including the non-accessible section that active parties were not able to inspect. It notes the practice described by the Tribunal that any credible, relevant and significant document located on the non-accessible section could be given to the active parties at the hearing. Nevertheless, the Commission considers this approach undesirable.

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1112 Submission 124.

1113 See para 3.156, 3-5 of this Report.

1114 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J); *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95.

1115 *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96.

1116 See para 3.153 of this Report.

5.90 The way in which Tribunal processes have been structured means that the Tribunal members for a hearing have information presented to them in advance of the hearing, as part of the file prepared by the Registry, that may not be relevant to the issues in the proceeding. Because active parties are entitled to inspect documents only if they are relevant to the proceeding, the Tribunal members and the parties may have different information before them when the hearing begins. In light of the concerns outlined above, the Commission considers that greater confidence in the Tribunal will be fostered if its procedures ensure that this is avoided. Instead, the Commission suggests that the information compiled and presented to the Tribunal members in advance of the hearing be limited to information that is relevant to the resolution of the proceeding. This same information should be available for inspection by active parties prior to a hearing. The Commission therefore considers that apart from documents the subject of confidentiality orders and the Tribunal's own notes of the hearing, the Tribunal and the active parties should receive the same information. The Commission notes that this may be the effect of the revised file structure adopted in February 2007.

5.91 In addition to these changes in practice, the Commission also considers that a legislative provision entrenching an active party's right to inspect relevant documents should be retained. Section 108 of the *Guardianship and Administration Act 2000* (Qld) creates a right of inspection in relation to documents that are directly relevant to an issue in the proceeding. To ensure that this provision is consistent with the recommendation in Chapter 4 of this Report that active parties have a right to access information given before the Tribunal during a hearing that is credible, relevant and significant,<sup>1117</sup> some rewording of this provision is required.

5.92 First, section 108(2) should clarify that an active party is entitled to inspect documents, before the start of the hearing, that are relevant to the proceeding. As noted above, it is very difficult to ascertain the credibility and significance of a document at the pre-hearing stage of a proceeding. That provision should also be amended to remove the word 'directly' so that it refers to information that is 'relevant to an issue in the proceeding'. The Commission considers that 'relevant', wherever used in the legislation, should be defined to mean 'directly relevant'. This ensures that this concept is still reflected in relation to the Commission's recommendation about the inspection of documents but does not alter the wording of 'credible, relevant and significant' that is recommended in Chapter 4 of this Report. Second, section 108(2) of the Act should clarify that, after the start of the hearing, an active party is entitled to access documents before the Tribunal that are credible, relevant and significant to an issue in the proceeding.

### ***Practical impediments to effective inspection***

5.93 The Commission notes the concerns expressed above about difficulties that can arise in the Tribunal's inspection process. The Commission appreciates the Tribunal is directed to conduct proceedings 'as simply and quickly as the requirements of this Act and an appropriate consideration of the matters before the tribunal allow'<sup>1118</sup>

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1117 See para 4.78 of this Report.

1118 *Guardianship and Administration Act 2000* (Qld) s 107(1).

and that this may involve a less formal process of document inspection. However, the Commission considers that the Tribunal should examine the issues identified above and give consideration to how they might be addressed.

5.94 In relation to the time provided for inspection, the Commission notes that there may be matters where there are limited issues for consideration and only a small amount of documentation. In those cases, a relatively short period of notification before the hearing may not present difficulties for the inspection of documents. Other matters, however, are more complex and more time may be required to permit meaningful inspection. The Commission also notes the problems posed by inspection in regional areas. This is generally provided for only on the morning of the hearing and this is likely to be insufficient time for an active party to read all of the relevant material and consider his or her response to it.

5.95 It may be that, in particular circumstances, the Tribunal should consider providing the active parties with copies of documents rather than relying on inspection alone. The Commission notes that the Presidential Direction entitled 'General Information in relation to the Inspection of Files and Confidentiality Orders'<sup>1119</sup> states that 'the Registrar or a member of the Tribunal may permit an active party or their representative to obtain copies of documents available for inspection in some circumstances' and provides the following examples:

- 1) when the active party or their representative is not able to inspect the file in person due to distance, ill health, a medical disability or other practical reasons; or
- 2) when the proceedings are complex and the Tribunal is satisfied that it is desirable that the active party or their representative should have the documents in advance of the hearing; or
- 3) when providing copies of documents from the file is necessary under the circumstances so that the active party can adequately prepare for the hearing.

5.96 The Commission also understands that copies are made available to active parties where a request is made by a legal representative or where the request can be reasonably accommodated.<sup>1120</sup> As is the case with inspection, an active party provided with copies of documents must give an express undertaking to use the information obtained from those documents only to assist that party to present his or her case before the Tribunal.<sup>1121</sup>

5.97 The Commission acknowledges that the provision of copies has resource implications for the Tribunal. However, it may be that copies can be provided by way

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1119 Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007).

1120 Information provided by the President of the Guardianship and Administration Tribunal, 12 and 20 June 2007.

1121 Information provided by the Registrar of the Guardianship and Administration Tribunal, 21 June 2007. See also para 5.222 of this Report.

of photocopies or scanned copies. The issue of providing active parties with copies is an issue that will be examined in stage two of this review.<sup>1122</sup>

5.98 The Commission also notes the concern expressed in submissions, that active parties may not be aware of their right to inspect documents. The Commission considers that the Tribunal should take steps to ensure an awareness of this right prior to the hearing. The Commission also considers the suggestion made about recording when inspections by various active parties have occurred, to be a useful one. In a jurisdiction with inquisitorial features, it is likely that documents will not necessarily arrive before the Tribunal in an orderly manner and it may often be the case that material is received late. It would be of assistance to the Tribunal and the active parties to know which parties have had an opportunity to inspect which documents.

5.99 In relation to the inspection of Tribunal files in private, the Commission considers that the Tribunal has an obligation to ensure the integrity of its file and that accordingly, it is appropriate that Registry staff be present during a file inspection.

## **SHOULD THE TRIBUNAL HAVE POWER TO MAKE A CONFIDENTIALITY ORDER IN RELATION TO DOCUMENTS?**

### **The Discussion Paper**

5.100 In its Discussion Paper, the Commission sought submissions on the threshold question whether the Tribunal should have power to order that the content of a document, or part of a document, be kept confidential from some or all of the active parties.<sup>1123</sup>

5.101 The Commission's preliminary view in the Discussion Paper was that there may be circumstances in which it is appropriate to withhold information contained in a document from an active party where disclosure would cause harm to the adult.<sup>1124</sup>

### **Submissions**

5.102 The submissions received by the Commission were divided on whether it is appropriate for the Tribunal to order that a document be kept confidential from active parties to a proceeding.

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1122 See para 5.238 of this Report.

1123 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.60], [5.100] Q5-2.

1124 Ibid [5.97].

## Power to withhold access to documents

5.103 There was strong support for the Tribunal to maintain a power to make confidentiality orders in relation to documents filed with or received by the Tribunal,<sup>1125</sup> including support from the Adult Guardian, Public Trustee of Queensland, Public Advocate, and the Tribunal.

5.104 However, a significant number of submissions prefaced their support for the retention of a power to keep documentary material confidential from active parties on the basis that the requirements of procedural fairness and open justice, as exercised in the guardianship jurisdiction, meant that the power should only be used in exceptional circumstances.<sup>1126</sup>

5.105 The Public Advocate commented:<sup>1127</sup>

Limiting the disclosure of the documents to an active party is a serious matter. It is considered that it should be clear on the face of the legislation to both the Tribunal and users of the guardianship system when the Parliament considers it is appropriate to deny access to documents. This is in the interests of accountability and transparency, is protective of rights, and recognises a commitment to provision of procedural fairness to parties and open justice.

5.106 Similar sentiments were also expressed by the Department of Justice and Attorney-General, Endeavour Foundation, Australian Lawyers Alliance and the President of the New South Wales Guardianship Tribunal.

5.107 Carers Queensland also agreed and commented on the adverse consequences of relying on untested evidence:<sup>1128</sup>

The imposition of procedural fairness improves the evidence provided to the Tribunal and the decision making of the Tribunal. Otherwise, incorrect information may go unchallenged and be accepted as true. For this reason, those who are directly interested or affected should not be excluded from hearings or restricted in their access to documents unless there are exceptional circumstances that necessitate otherwise.

... we have been extremely concerned by the many examples we have become aware of through our advocacy activities where, as a result of unsubstantiated claims, the family has been relieved of their caring responsibility resulting in a disadvantageous position for not only the family but also the family member with disability. In some cases there has been irreparable damage to the only consistent relationship in the adult's life without due consideration for establishing alternatives.

5.108 Numerous reasons were advanced for why it is desirable to allow an order to be made imposing confidentiality in relation to a document. These are discussed below.

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1125 For example, submissions 1H, 26, 28, 38, 45, 47, 59, 64, 66, 67, 68, 71, 75, 79, 83A, 85, 86, 87, 97, 99, 101, 102, 105, 106, 119, 120, 121, 126, 127, 135, 137, F8.

1126 For example, submissions 1H, 97, 101, 135, 137.

1127 Submission 1H.

1128 Submission 101.

### *Receipt of quality information by the Tribunal*

5.109 Several respondents considered that the Tribunal's power to make confidentiality orders in relation to documents helps ensure the Tribunal receives the best available evidence.<sup>1129</sup> A view expressed at a focus group of advocacy groups considered that the right to inspect documents:<sup>1130</sup>

should be subject to the Tribunal exercising a discretion, taking into account the circumstances of the case, to withhold documents if the Tribunal is of the view that is the only way they can be assured of receiving all the relevant information from the parties.

5.110 Queensland Health noted:<sup>1131</sup>

If this legislation was not retained, people involved in the guardianship process may not be willing to provide any information or the depth of information that may be required by the Tribunal to protect the adult and inform the Tribunal.

### *Desirability of maintaining relationships*

5.111 Several respondents considered that keeping documents confidential might be necessary to maintain good familial relationships after the Tribunal hearing.<sup>1132</sup>

5.112 Disability Services Queensland noted that the Tribunal's power to keep documents confidential also assists service providers to maintain good working relationships with clients. It observed:<sup>1133</sup>

Information provided to the Tribunal should be frank, accurate and clear and it may at times contain information that might be construed as a personal criticism of a party to the proceedings. Any concern that information provided to the Tribunal may reduce the department's ability to provide effective services to the adult, as a result of harm to the good and workable relations with a member, or members of an adults support network, may be alleviated if the department is able to request that the Tribunal not disclose, all or a portion of, the information it provides.

5.113 The submissions also revealed support for withholding documents from active parties in circumstances where the release of a document might harm the therapeutic relationship between an adult with impaired capacity and his or her treating medical professional.<sup>1134</sup>

5.114 Members of the Tribunal informed the Commission that they were concerned that if the Tribunal was unable to keep medical reports or doctors' evidence confidential, treating medical professionals may not express their true opinions and only

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1129 For example, submissions F5, F6, F7, F22.

1130 Submission F5.

1131 Submission 87.

1132 For example, submissions 28E, 68, 112, F11, F13.

1133 Submission 125.

1134 For example, submissions 66, 75, F9.

provide sanitised information.<sup>1135</sup>

5.115 However, some submissions rejected these arguments.<sup>1136</sup> A focus group conducted with advocacy groups raised concerns that service providers and doctors may use the issue of maintenance of the therapeutic relationship as a tool when they do not wish to have an aspect of their service or care discussed.<sup>1137</sup>

#### *Preventing harm to the adult or another person*

5.116 Several respondents considered it was necessary for the Tribunal to have a power to make documents confidential as the release of documents may potentially cause the adult, or another person, to suffer physical or emotional harm.<sup>1138</sup> This view received strong support at the community forums conducted by the Commission.<sup>1139</sup>

5.117 Similarly, other submissions<sup>1140</sup> commented that confidentiality plays a role in deterring elder abuse and may ‘stop people preying on vulnerable adults and taking their money or [causing] other harm’.<sup>1141</sup>

#### *Preventing use of documents for another purpose*

5.118 Some respondents expressed concerns that, without the ability for the Tribunal to keep certain information confidential, documents might be accessed by parties to hearings and subsequently used for other purposes.<sup>1142</sup>

5.119 The President of the New South Wales Guardianship Tribunal explained the need to ensure the right to inspect documents was not used as a ‘fishing expedition’ to uncover information relevant to another proceeding.<sup>1143</sup>

Parties to the proceedings may request access to documents held by the Tribunal because they wish to use them for purposes unrelated to the proceedings before the Tribunal. In some cases, the information is sought so that it can be used to support proceedings in another jurisdiction, for example, property or custody proceedings in the Family Court. In other cases, applicants may lodge an application where they do not have any evidence in support of that application but are interested in having access to the details of the subject person’s personal, medical or financial affairs. In such cases, the applicants hope that the documents provided to the Tribunal by health professionals or others will provide sufficient evidence to either substantiate their concerns or reassure them that such concerns are unfounded.

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1135 Submission F17.

1136 For example, submissions 149, F7, F15.

1137 Submission F15.

1138 For example, submissions 59, 63, 67, 87, 97.

1139 For example, submission F6.

1140 For example, submissions 112, 137.

1141 Submission 112.

1142 For example, submissions 137, 141, F4, F9, F13.

1143 Submission 137.

*Support limited to particular circumstances*

5.120 Some respondents limited their support for the Tribunal to make confidentiality orders in relation to documents to very specific circumstances.

5.121 Some submissions supported the ability of the Tribunal to keep information confidential from all parties, except the adult with impaired capacity.<sup>1144</sup>

5.122 One respondent considered that a confidentiality order should never be made to restrict an adult's or statutory health attorney's right to access documents relating to the health of the adult. This respondent commented:<sup>1145</sup>

Arguments that the health of the adult could be adversely affected by such knowledge need to be very carefully weighed, as they are very paternalistic. In most, if not all, cases an individual, if properly supported, is quite capable of dealing with information that is presented to them in a way that is appropriate for their level of understanding.

5.123 Some respondents argued that only certain types of documents should be capable of being kept confidential, for example, wills<sup>1146</sup> and documents filed by whistleblowers.<sup>1147</sup>

5.124 One respondent considered the Tribunal should only make a confidentiality order in circumstances where the person seeking access to the documents has been convicted of a criminal offence against the person at the centre of the application.<sup>1148</sup>

5.125 Another person stated it would be appropriate where release of the documents would expose the Tribunal and lay open a claim for damages.<sup>1149</sup>

5.126 Views expressed at a focus group with advocacy groups considered that:<sup>1150</sup>

there should be a clear process of internal review from that decision and the tribunal should have to provide written reasons for making a confidentiality order. The bar should be set very high.

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1144 For example, submissions 103, F21.

1145 Submission 7.

1146 Submissions 22B, F10. Similar views were expressed by submission F16, where the Public Advocate indicated support for preserving the confidentiality of a will during a person's life. The President of the Tribunal also indicated that an adult's will should remain confidential, except to the extent the adult's substitute decision-maker needs to know the information contained within it, consistent with the highly personal nature of the information and the fact it would not normally be available until after the adult's death: information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

1147 Submissions 88, 112, F12, F22.

1148 Submission 120.

1149 Submission 26.

1150 Submission F15.

### ***No power to withhold access to documents***

5.127 A significant number of submissions were of the view that documents should never be withheld from the active parties to a proceeding.<sup>1151</sup> The submissions identified several different factors in support of this view.

#### ***Procedural fairness and the right to test evidence***

5.128 A large number of submissions reasoned that the requirement to afford parties procedural fairness and to ensure that any evidence before the Tribunal is adequately tested is best achieved by all documents being available to all parties, without exception.<sup>1152</sup> Caxton Legal Centre stated:

We acknowledge the Discussion Paper's discussion about the importance of protecting the adult and of the value of health professionals feeling free to make reports and to express concerns before the Tribunal. While we accept that it is desirable for such people to be willing to make notifications and provide reports about affected adults, we nevertheless believe that the rules of 'procedural fairness' must take precedence. Natural justice requires that evidence put before a decision-maker (and upon which that decision-maker intends to rely) must be disclosed to the person whose interests are to be affected and that person must be given an opportunity to be heard in response to the evidence.

In terms of the Tribunal's power to limit disclosure of documents to parties, we appreciate the arguments raised to the effect that there may be circumstances when it is appropriate to withhold information from a party, particularly in cases where disclosure would result in harm to an adult. However, on balance we believe that it is critical to the quality of decision-making in this guardianship arena that the decision-making process should be, as far as practicable, fair and transparent – *ie* that all documents should be fully disclosed.

5.129 The desirability of ensuring that evidence is tested properly was the strongest theme revealed in the submissions. It received widespread support at community forums<sup>1153</sup> and from numerous individuals with personal experience of attending Tribunal hearings.<sup>1154</sup> For example, one respondent commented:<sup>1155</sup>

An active party needs to have the opportunity to respond and to do this they require all the information that the Tribunal has been given. I had documents withheld by the Office of the Public Trust and other letters which I feel placed me at a disadvantage and left the Tribunal open to biased opinions.

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1151 Submissions 16, 18B, 19B, 28D, 31B, 48A, 49, 50B, 54B, 62, 63, 70, 80, 81, 82, 88, 96, 100, 117, 136, 142, 145, 149, F9, F10, F19, F20.

1152 For example, submissions 73, 80, 82, 96, 117, F5, F7, F8, F10, F12, F13, F14.

1153 For example, submissions F5, F7, F8, F10, F12, F13, F14.

1154 For example, submissions 18, 49, 117.

1155 Submission 82.

5.130 Some respondents also considered that people might exaggerate allegations or make false statements if they know a document will remain confidential.<sup>1156</sup> One respondent noted:<sup>1157</sup>

Prior knowledge that anything stated in any document will be protected by confidentiality emboldens people making such statements to be wild and fanciful in doing so. To permit such a document a seal of confidentiality is to display bias against the person adversely affected and in favour of one whose accusations have not been tested but are presumed true by the imposition of the seal of confidentiality.

5.131 Respondents also expressed concern that if documents are kept confidential not only would the information contained in the document not be capable of being fully tested, but the credibility of the person providing the information would also not be capable of being tested. Respondents considered that in the context of difficult familial relationships, it was important for the Tribunal to consider the credibility of the person making an application for guardianship or administration.<sup>1158</sup>

*Receipt of quality evidence and promotion of quality decision-making*

5.132 Several submissions argued that if access to documents is denied the ‘full picture’ will not be revealed and the Tribunal will not have all the relevant evidence before it in a proceeding.<sup>1159</sup>

5.133 A view expressed at two focus groups conducted with adults with impaired capacity was that the Tribunal would not be able to make the best decision without the best information and this is achieved by allowing access to all documents.<sup>1160</sup> Caxton Legal Centre agreed:<sup>1161</sup>

The factual contexts of guardianship disputes are so complex that identifying what is, in fact, true can prove very difficult. The best process for discovering truth in the justice system is surely the traditional one where evidence is robustly examined and tested, having regard for each side’s account of events.

5.134 Several submissions agreed that by promoting receipt of all available information the Tribunal would be able to ensure that the decisions it made were in the best interests of the adult.<sup>1162</sup>

5.135 Caxton Legal Centre explained:<sup>1163</sup>

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1156 For example, submissions 31B, 149, F15.

1157 Submission 31B.

1158 For example, submissions 19B, 150.

1159 For example, submissions 48, 49, 50, 62, 81, 100, 124.

1160 Submissions F19, F20.

1161 Submission 124.

1162 For example, submissions 73A, 101, 124.

1163 Submission 124.

to provide an avenue in guardianship law whereby people are allowed to make seriously prejudicial or damning allegations without having to ‘prove’ such matters is simply, in our experience, ill advised and more importantly, is often actually against the best interests of the ‘adult’.

### *Adequate preparation for a hearing*

5.136 Numerous respondents considered that parties require access to all documents to allow them the opportunity to prepare adequately for the Tribunal hearing.<sup>1164</sup>

5.137 The Aboriginal and Torres Strait Islander Legal Service (Qld South) relied on this reasoning to conclude that ‘the circumstances when a party should be refused access to documents would need to be so exceptional that in practice those circumstances would not occur’.<sup>1165</sup>

### *Open justice*

5.138 Several respondents also commented that keeping documents confidential may lead to perceptions of secrecy and does not accord with the principle of open justice.<sup>1166</sup> One respondent argued:<sup>1167</sup>

All documents must be made available to anyone involved in the proceedings. Not to do so smacks of a ‘secret society’ where groundless accusations and claims can be made. Secret documents and secret hearings are open to abuse.

5.139 The importance of document inspection to the notion of open justice was also supported by a journalist and *The Courier-Mail*.<sup>1168</sup>

5.140 However, other respondents did not agree that open justice necessitated the disclosure of personal information to members of the public. The President of the New South Wales Guardianship Tribunal observed:<sup>1169</sup>

The Discussion Paper also considers the argument that members of the public should have access to documents tendered in evidence to ensure open justice. It is difficult to envisage a situation where allowing members of the public to view highly personal and confidential documents as a matter of course could support the interests of people with disabilities. Such exposure may in fact compromise their best interests and even the safety of the person who is the subject of the application.

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1164 For example, submissions 80, 81, 82, 96.

1165 Submission 96.

1166 For example, submissions 48, 49, 50, 62, 81, 100.

1167 Submissions 49, 81.

1168 Submissions 98, 100.

1169 Submission 137.

### *Other*

5.141 Other reasons identified by the submissions in favour of a right of active parties to inspect documents, without exception, include:

- the necessity to examine all documents to establish whether legal representation is required;<sup>1170</sup>
- the possibility that if all information is available it might facilitate resolution of the issues;<sup>1171</sup> and
- the promotion of understanding and acceptance of proceedings. One respondent noted:<sup>1172</sup>

if people don't have full access they can't make a full argument for these proceedings therefore causing people to have limited understanding of the proceedings and ... injustice.

5.142 Some submissions, including views expressed at focus groups conducted with adults with impaired capacity, argued that the denial of access to documents may cause emotional harm to parties by exacerbating feelings of alienation and injustice.<sup>1173</sup>

### **The Commission's view**

5.143 The Commission notes that the submissions were divided on the question whether the Tribunal should have power to withhold a document, or part of a document, from an active party to the proceeding to which he or she would otherwise be entitled.<sup>1174</sup> Many of the submissions that opposed such a power considered procedural fairness ought to override other concerns. Submissions in support of the power to make confidentiality orders also considered that the disclosure required by procedural fairness should ordinarily occur, other than in exceptional circumstances.

5.144 The Commission is of the view that procedural fairness and, in particular, the requirement to disclose information that is credible, relevant and significant, is essential to high quality decision-making.<sup>1175</sup> As was noted in submissions, disclosure of information allows evidence, and the credibility of persons supplying information, to be tested. In turn, the Tribunal's decision-making is informed by more complete and more accurate information.

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1170 Submission F7.

1171 Submission F9.

1172 Submission 88.

1173 For example, submission F21.

1174 Submissions that considered this issue are set out at para 5.102–5.142 of this Report.

1175 See also para 3.57, 3.152 of this Report.

5.145 Disclosure to the active parties of information before the Tribunal, including information contained in documents, is also important in ensuring the Tribunal operates in a transparent and accountable way. The Commission considers that, generally, full disclosure is appropriate in facilitating open resolution of the issues and in promoting an understanding and acceptance of the proceeding and its outcomes.

5.146 The Commission notes, however, that there may be some circumstances, albeit rarely, in which it is necessary and appropriate to withhold a document or part of a document from an active party. The requirements of procedural fairness will depend on the circumstances of the case.<sup>1176</sup> It is recognised, for example, that a party's right to information may be qualified by deference to a competing interest.<sup>1177</sup> In the context of guardianship proceedings, the Commission considers a competing interest in protecting the adult or another person from serious harm or injustice may sometimes arise.

5.147 Accordingly, the Commission considers that the Tribunal should have power to make a document, or part of a document, that is relevant to an issue in the proceeding confidential from an active party, but that this power should be exercised only in those exceptional circumstances in which it is necessary to avoid serious harm or injustice to a person. The gravity of exercising this power is reflected in the criteria that are proposed for making such an order, which include that it be necessary to avoid serious harm or injustice.<sup>1178</sup> This would significantly narrow the Tribunal's existing power to make an order prohibiting or restricting the disclosure of matters contained in documents to an active party under section 109(2)(d)(ii) of the *Guardianship and Administration Act 2000* (Qld).

5.148 This position, in which the Tribunal has power to make confidentiality orders in relation to documents in only very exceptional circumstances, reflects the Commission's guiding principles set out in Chapter 3 of this Report, in particular, that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>1179</sup> The Commission also considers this position strikes an appropriate balance between the openness required by procedural fairness and open justice and the concern of the guardianship system to safeguard the rights and interests of the adult. This is also consistent with the approach taken by the Commission in

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1176 See note 1071 and para 5.56–5.58 of this Report. It has been suggested that determining what is required in a particular case involves a balancing of the interest of the person whose rights or expectations may be affected on the one hand, and the cost of providing particular procedural safeguards on the other: El Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1513].

1177 For example, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49, [57] (Martin CJ):

[I]t has been acknowledged that the content of the requirements of procedural fairness or fundamental justice will depend upon the particular circumstances of the case and cannot be prescribed in the abstract. Further, in each jurisdiction, it has been expressly recognised that the ordinary requirements of procedural fairness, including the ability of a party to know the case that he or she has to meet, must sometimes yield to a countervailing public interest in the protection of the confidentiality of evidentiary material, even as against a party to the proceedings.

1178 The criteria for making a confidentiality order in relation to a document are discussed at para 5.197–5.203 of this Report.

1179 See para 3.156, 3-2 of this Report.

Chapter 4 of this Report in relation to the Tribunal's power to withhold other information from the active parties.<sup>1180</sup>

5.149 Because an order to withhold a document, or part of a document, from an active party imposes confidentiality, the Commission considers it should continue to be called a 'confidentiality order'. The Commission also considers that, given the seriousness of these orders, the procedural safeguards proposed in Chapter 4 of this Report for the making of 'limitation orders' should apply to a confidentiality order made in relation to a document.<sup>1181</sup>

5.150 The Commission recommends that the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

5.151 The Commission also notes that in Chapter 4 of this Report it has recommended that the Tribunal must, before it makes a confidentiality order, take as the basis of its consideration a number of matters including that active parties have an entitlement to information that is credible, relevant and significant to an issue in the proceeding.<sup>1182</sup> Later in this chapter, the Commission has recommended that this requirement also apply to confidentiality orders made in relation to documents.<sup>1183</sup>

5.152 An active party's entitlement to credible, relevant and significant information will also impact on how a confidentiality order made in relation to a document operates.<sup>1184</sup> A confidentiality order may displace an active party's entitlement only in relation to certain information contained in the document. This may require that the active party be allowed to access a redacted version of the document or be given a summary of the relevant information that has not been made confidential.

5.153 The Commission also notes that information contained in a document that has been made confidential from an active party will impact on the weight that can reasonably be given by the Tribunal to that information.<sup>1185</sup>

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1180 See para 4.259 of this Report.

1181 See para 4.315–4.353 of this Report.

1182 See para 4.254–4.256 of this Report.

1183 See para 5.197 of this Report.

1184 Note that in Chapter 4 of this Report, the Commission has recommended that s 108 of the *Guardianship and Administration Act 2000* (Qld), which deals with the Tribunal's obligation to observe the rules of procedural fairness, be amended to include a provision to the effect that an active party is entitled, at the hearing, to information before the Tribunal that is credible, relevant and significant to an issue in the proceeding: see para 4.78 of this Report. This will apply in addition to s 108(2) of the Act which provides that active parties must be given a reasonable opportunity to inspect documents before the Tribunal that are directly relevant to an issue in the proceeding. Section 108 is set out at para 5.9 of this Report.

1185 For example, *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 100.

5.154 The Commission has also made recommendations in Chapter 4 of this Report that breach of a ‘limitation order’, including a confidentiality order made in relation to documents, should be an offence, unless there is a reasonable excuse.<sup>1186</sup>

5.155 At present, section 108(3)(b) of the *Guardianship and Administration Act 2000* (Qld) specifically allows for conditions to be prescribed in the Tribunal rules in relation to the inspection of a document by an active party. The Commission does not consider it appropriate that the Tribunal rules operate to fetter the active parties’ rights to inspect relevant documents. To the extent it is appropriate and desirable to provide for procedures to facilitate document inspection, the Commission considers the general power to make rules about the practices and procedure of the Tribunal or its Registry, conferred by section 99 of the Act, is adequate. The Commission therefore recommends that the provision in section 108(3)(b) of the Act be omitted.

## WHEN SHOULD A CONFIDENTIALITY ORDER IN RELATION TO DOCUMENTS BE MADE?

### The Discussion Paper

5.156 In its Discussion Paper, the Commission sought submissions on what legislative criteria, if any, should govern the Tribunal’s power to order that information contained in a document be withheld from an active party.<sup>1187</sup> The Commission also sought submissions on whether different criteria should apply to orders withholding a document, or part of a document, from the adult.<sup>1188</sup> While the Commission expressed a preliminary preference for the inclusion of express criteria, the Commission did not express a view in the Discussion Paper about what those criteria should be.<sup>1189</sup>

5.157 At present, the Tribunal may make a confidentiality order if it is ‘satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason’.<sup>1190</sup> The Tribunal must also have regard to what is required in its jurisdiction by open justice and procedural fairness,<sup>1191</sup> and apply the General Principles, including General Principle 11 which refers to the adult’s right to confidentiality of information.<sup>1192</sup>

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1186 See para 4.358, 4.368–4.372 of this Report.

1187 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.61]–[5.68], [5.100] Q5-3.

1188 Ibid [5.66], [5.100] Q5-4.

1189 Ibid [5.98]–[5.99].

1190 *Guardianship and Administration Act 2000* (Qld) s 109(2). Note also that if the matter is one relating to special health care, the Tribunal must ensure that any confidentiality order does not affect the ability of the adult’s relevant substitute decision-maker for health matters to form and express a view about the proposed special health care: *Guardianship and Administration Act 2000* (Qld) 109(4). Section 109 is set out at para 5.16 of this Report.

1191 See para 5.14 of this Report.

1192 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1. See para 5.15 of this Report.

5.158 One issue raised for consideration was whether a more detailed set of legislative criteria should be adopted. As noted above, the Tribunal's Administration Practice provides three examples of situations where the Tribunal may consider it appropriate to make an order.<sup>1193</sup> Another issue raised was whether orders that are directed against the adult should be governed by different criteria.<sup>1194</sup>

## Submissions

5.159 The vast majority of submissions that supported the retention of the Tribunal's discretion to keep documents confidential were also in favour of adopting legislative criteria to guide its exercise.<sup>1195</sup>

## Current criteria

5.160 Several submissions considered that the current criterion in section 109(2) of the *Guardianship and Administration Act 2000* (Qld) for making an order to keep documents confidential is too broad.<sup>1196</sup> The Public Advocate considered the current criterion 'insufficient' and explained:<sup>1197</sup>

it should be clear on the face of the legislation that it is anticipated that confidentiality orders will only rarely be made, where the circumstances require it to avoid serious consequences.

5.161 Another respondent considered that 'making an order to withhold documents "for any other reason" cannot be substantiated'.<sup>1198</sup>

5.162 However, the Department of Justice and Attorney-General supported the retention of the current criterion, as it is general in nature and therefore sufficiently flexible to deal with the 'complex and varied circumstances of families'.<sup>1199</sup>

## General comments on criteria

5.163 The necessity to have regard to procedural fairness and open justice, as they operate in the guardianship jurisdiction, received widespread support in the submissions. The President of the New South Wales Guardianship Tribunal commented:<sup>1200</sup>

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1193 See para 5.23 of this Report.

1194 Such an approach is taken in Victoria. See para 5.34–5.35 of this Report.

1195 For example, submissions 28, 67, 73, 74, 79, 85, 97, 99, 101, 102, 119, 120, 122, 126, 135.

1196 For example, submissions 1H, 73A, 74, 98, 101, 118, 120.

1197 Submission 1H.

1198 Submission 73.

1199 Submission 126.

1200 Submission 137.

The rules of procedural fairness and natural justice establish a framework within which a guardianship tribunal must conduct its business, including the disclosure of documentary evidence before the Tribunal.

In general if documents provide evidence which is relevant, credible, significant and adverse to the interests of a party, that party must be given the opportunity to respond to the material.

However there are common law exceptions to the rules of procedural fairness – urgency, necessity, the risk of physical harm and public policy considerations which have particular importance and application in a protective jurisdiction.

In the context of guardianship legislation which focuses on the best interests of people with a disability, the rules of procedural fairness should be interpreted to serve those interests while enabling a process which is fair to all parties to proceedings.

5.164 The Public Advocate noted that the provision of all credible, relevant and significant evidence to the parties will depend on the skill of the individual Tribunal member in assessing evidence.<sup>1201</sup>

5.165 A significant number of submissions, regardless of their preferred criteria, expressed the need for the criteria in the legislation to be ‘strict’, ‘stringent’ and ‘clear’ or to indicate a presumption in favour of openness.<sup>1202</sup>

5.166 Queensland Advocacy Incorporated commented:<sup>1203</sup>

We feel it would be useful to set out a presumption in favour of openness regarding documents as between active parties. Significant arguments would need to be put forward and properly examined before access to documents was denied.

5.167 Another respondent commented:<sup>1204</sup>

There must be provision to allow the Tribunal to prevent disclosure, but these times should be clearly spelled out so that no subjective attitude can influence what’s happening.

5.168 Specific criteria suggested by the submissions are examined below.

### **Best interests of the adult**

5.169 Many respondents considered that it would be appropriate to allow the Tribunal to make an order to keep a document confidential if the Tribunal considered such an order was in the best interests of the adult.<sup>1205</sup> One respondent noted:<sup>1206</sup>

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1201 Submission F16.

1202 For example, submissions 67, 97, 101, 102, 105, 109, 119.

1203 Submission 102.

1204 Submission 67.

1205 For example, submissions 79, 99, 125, F5, F8, F9, F10, F13, F14, F15, F22.

1206 Submission 67.

It is near impossible to always cover every contingency. Ultimately, powers of withholding or releasing information need to be far reaching, with guidelines to cover exemptions where they occur. What is best, and fairest, for the central person, the person who will ultimately wear the brunt of all the decisions by all the participants – that is what needs to be achieved. That is the result these Guardianship Laws need to aim for.

5.170 Queensland Advocacy Incorporated considered that any criteria should focus ‘very much upon all of the adult’s rights rather than some vague notion of “protection”’.<sup>1207</sup>

### **Harm to the adult or another person**

5.171 A significant number of submissions argued that documents should be able to be kept confidential if their release would result in harm to the adult or another person.<sup>1208</sup> The submissions considered that harm could include physical or emotional harm.

5.172 Significantly, views expressed at focus groups conducted with adults with impaired capacity favoured the ability to keep documents confidential if their release would result in harm to the adult.<sup>1209</sup>

5.173 A focus group conducted with advocacy groups considered:<sup>1210</sup>

it is difficult to think of an example where a document should be withheld. Perhaps an example may be in circumstances where it is known that the information will cause serious harm to the adult.

5.174 Australian Lawyers Alliance considered that the type of harm and the likelihood of that harm occurring must be assessed by the Tribunal, prior to making a confidentiality order.<sup>1211</sup>

The Tribunal should be able to withhold documentary evidence from people involved in the proceeding where disclosure of evidence will harm the adult. Before the Tribunal makes such a determination, however, they must be satisfied that the risk to the adult is real. It must also be satisfied that the decision not to disclose the documentary evidence to a person who may be able to contribute meaningful information necessary for the determination of the Tribunal, does not result in relevant evidence being denied the Tribunal by the exclusion. The Tribunal must also be satisfied that the harm to the adult will considerably outweigh the disadvantage to other persons involved in the proceedings and, indeed, to the Tribunal itself. Instances where this discretion is exercised should be rare because it is effectively a denial of natural justice. The Australian Lawyers Alliance considers that the criteria for exercising this discretion should be specific and reassessed on a regular basis.

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1207 Submission 102.

1208 For example, submissions 1H, 97, 106, 121, 122, 127, 135, F6, F11.

1209 For example, submissions F21, F22.

1210 Submission F15.

1211 Submission 97.

5.175 Festival of Light Australia commented:<sup>1212</sup>

The specific criteria should restrict limiting disclosure to those circumstances where the Tribunal has a reasonable basis for apprehension that disclosure may lead to actual harm to a person.

5.176 Queensland Advocacy Incorporated also identified that harm may be caused to an adult in a situation where access to certain documents might lead to vilification of an adult.<sup>1213</sup>

### **Victorian Model**

5.177 Several submissions, including the Adult Guardian and the Public Trustee of Queensland, supported adopting criteria similar to the conditions for the inspection of documents contained in rule 6.23 of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic).<sup>1214</sup>

5.178 The Public Advocate considered that the reference in the Victorian rules to ‘serious harm to the health or safety’ of the adult or another person is an appropriate basis for making a confidentiality order but expressed reservations about whether the criterion of unreasonable disclosure of personal information should be adopted.<sup>1215</sup> The Public Advocate also considered the criterion in the Victorian rules that permitted the imposition of confidentiality when required by the person who supplied the information to be inappropriate as the decision whether or not to make information confidential is one for the Tribunal.<sup>1216</sup>

5.179 The Public Trustee of Queensland also argued that any criteria modelled on the Victorian rules should also retain a reference to ‘any other reason’, in the event that circumstances fell outside the criteria.<sup>1217</sup>

### **Other**

5.180 One respondent considered the legislative criterion should provide that the Tribunal should only make an order to keep a document confidential where there is a real possibility of doing injustice or inflicting a serious disadvantage.<sup>1218</sup> This criterion reflects the test espoused by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs*.<sup>1219</sup>

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1212 Submission 135.

1213 Submission 102.

1214 This provision is discussed at para 5.34–5.35 in this Report. For example, submissions 85, 122, 127.

1215 Submission 1H.

1216 Ibid.

1217 Submission 127.

1218 For example, submission 73.

1219 (1979) 26 ALR 247, 273.

5.181 A view expressed at a focus group considered that appropriate criteria might include the necessity to maintain family relationships.<sup>1220</sup>

5.182 Endeavour Foundation stated it was desirable for clear criteria to be included in the legislation which ‘in no way prevents any active party access to the information before the Tribunal, except where a person has been convicted of a criminal offence against the person at the centre of the application’.<sup>1221</sup>

5.183 Some respondents also identified circumstances that they considered would not justify the making of a confidentiality order. For example, Carers Queensland stated that conflict within a family is not, on its own, a sufficient reason for the Tribunal to keep documents confidential.<sup>1222</sup>

Confidentiality orders also appear to be used by the Tribunal to exclude or withhold information from other family members where there is discord, conflict or dissension within the family. This often serves to perpetuate or aggravate the problem. It can also lead to possible miscarriages of justice.

5.184 A view expressed at a focus group was that it is unacceptable to make documents confidential merely because the information may cause a person discomfort or embarrassment.<sup>1223</sup>

5.185 Another respondent commented that the preservation of a therapeutic relationship should not warrant the making of an order.<sup>1224</sup>

5.186 Other possible criteria for withholding documents from active parties included:

- if the release of a document would result in the unreasonable disclosure of personal affairs,<sup>1225</sup>
- if the information contained in the document comes from a confidential source; and<sup>1226</sup>
- if a ‘witness’ (for example, a person who referred the situation to the Adult Guardian for investigation) needs protection.<sup>1227</sup>

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1220 Submission F11.

1221 Submission 120.

1222 Submission 101.

1223 Submission F10.

1224 Submission 149.

1225 Submissions 119, 122. The Adult Guardian referred to an example of keeping an attorney’s criminal record confidential.

1226 Submission 121.

1227 Submission F23.

### **Specific criteria for adult**

5.187 Several respondents considered that it would be appropriate for different criteria to operate in relation to withholding documents from an adult with impaired capacity than from other persons.<sup>1228</sup>

5.188 One respondent suggested separate criteria based on ‘minimising harm to the person and taking account of the person’s capacity to understand the content and intent of the documents’.<sup>1229</sup>

5.189 The Public Trustee of Queensland considered that different legislative criteria should apply to the adult and gave some support for the approach outlined in the *Victorian Civil and Administrative Tribunal Rules 1998 (Vic)*.<sup>1230</sup> The Public Trustee argued that the ‘distinction in Victoria in relation to harm, should be reflected in the Queensland legislation’. However, the Public Trustee did not support the shift of onus that occurs under the Victorian rules when withholding a document from the adult as opposed to other parties.

5.190 The Public Advocate also commented on the application of the Victorian approach in relation to specific criteria for the adult. She considered, as noted above,<sup>1231</sup> that the criterion of ‘serious harm to the health or safety’ of the adult or another person is an appropriate basis for withholding a document from an adult, but that imposing confidentiality simply because of a request made by the person providing the document is not. In relation to the criterion of unreasonable disclosure of personal information, the Public Advocate was of the view that it should not be adopted as a basis for withholding a document from an adult, given that the proceedings are about the adult.<sup>1232</sup>

5.191 Queensland Aged and Disability Advocacy argued:<sup>1233</sup>

The Tribunal should be able to prevent the adult from seeing documents the Tribunal is considering, if seeing the document will foreseeably affect the person’s on-going medical treatment or well being. Criteria should be developed to assist the Tribunal to assess this. For example, independent specialist reports (or two separate practitioners) could be sought. This would enable independent evaluation of how the information may affect the adult, and thus ensure an extra measure before compromising the adult’s right to view documents.

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1228 For example, submissions 85, 106, 119, 127.

1229 Submission 85.

1230 Submission 127.

1231 See para 5.178 of this Report.

1232 Submission 1H.

1233 Submission 106.

5.192 However, the Adult Guardian and the Department of Justice and Attorney-General did not consider it necessary for the legislation to specify separate criteria for the adult. The Adult Guardian observed:<sup>1234</sup>

Although the adult and the other active parties have a different standing in the proceedings, it does not seem possible to identify different criteria to apply to limit disclosure. It may be preferable to simply rely upon the principles of open justice, procedural fairness and the nature of the guardianship regime to inform the difference.

5.193 The Department of Justice and Attorney-General considered that it was ‘preferable for the legislative criteria contained in the Act to be consistent between the various provisions of the Act’.<sup>1235</sup>

### The Commission’s view

5.194 The Commission notes that several of the submissions that addressed this issue considered the criteria on which to make a confidentiality order in relation to documents should be strict and specific.<sup>1236</sup> Several submissions also suggested that the legislation include a presumption of openness in respect of document disclosure to active parties.

5.195 The Commission agrees with these views and considers the Tribunal’s power to make a confidentiality order withholding information contained in a document from an active party should be informed by strict criteria.

5.196 The Commission is of the view that the disclosure required by procedural fairness and promoted by open justice should be taken as the starting point in considering whether to make an order to withhold information contained in a document from an active party. This accords with the guiding principle adopted by the Commission in Chapter 3 of this Report that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>1237</sup>

5.197 In Chapter 4 of this Report, the Commission recommended that the Tribunal should be required, prior to making a ‘limitation order’, to take as the basis of its consideration that it is desirable that hearings before the Tribunal should be held in public and may be publicly reported, and that active parties have an entitlement to information that is credible, relevant and significant to an issue in the proceeding.<sup>1238</sup> That recommendation applies to an adult evidence order, a closure order and a confidentiality order withholding non-documentary information given before the Tribunal from some or all of the active parties.<sup>1239</sup> The Commission considers this requirement should also apply to confidentiality orders made in relation to documents.

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1234 Submission 122.

1235 Submission 126.

1236 Submissions on this issue are set out at para 5.159–5.186 of this Report.

1237 See para 3.156, 3-2 of this Report.

1238 See para 4.254–4.256 of this Report.

1239 These orders are collectively referred to as ‘limitation orders’: see para 4.187 of this Report.

A legislative requirement to this effect will expressly tip the balance in favour of disclosure as the usual position. The Commission recommends that the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

5.198 The Commission considers this starting point should be departed from only in exceptional circumstances. The Commission notes that many of the submissions considered that confidentiality orders in relation to documents should be used in the adult's best interests or to avoid harm to the adult or another person.<sup>1240</sup> In the Commission's view, a test that allows documents to be withheld from an active party on the basis that it would be of some benefit to the adult is open to subjective interpretation and a significant lowering of the threshold. The Commission considers a more appropriate test is one based on the necessity to avoid a serious harm or injustice.

5.199 The Commission notes that some of the submissions also expressed support for a criterion allowing the Tribunal to make an order to protect information that has been supplied on the basis that the information is confidential. This is the position in Victoria.<sup>1241</sup> The Commission is not persuaded, however, that this is desirable or necessary. If the Tribunal has credible, relevant and significant information before it, the active parties are prima facie entitled to it.<sup>1242</sup> Prior to the hearing, active parties are also entitled to inspect documents that are relevant to the proceeding. Control over whether such a document is to be kept confidential from an active party should reside with the Tribunal. It is inappropriate for the Tribunal to simply give effect, without proper consideration as to the making of a confidentiality order, to a person's request for confidentiality.

5.200 The Commission is of the view that the criterion for making a confidentiality order in relation to a document should be that it is necessary to avoid serious harm or injustice to a person. The Commission considers this test is sufficiently strict to ensure that relevant documents are not withheld from active parties other than in exceptional circumstances. In particular, the harm must be 'serious' rather than trivial or moderate. The order must also be 'necessary' to avoid such harm or injustice, so that more than a remote possibility that the harm will otherwise occur is required. The Commission also considers this test, by referring to both harm and injustice, is sufficiently wide to capture many of the bases for making an order that were suggested by submissions, depending on the seriousness and circumstances of each case. This test is also consistent with that recommended in Chapter 4 of this Report for the making of confidentiality orders in relation to other information given before the Tribunal.<sup>1243</sup>

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1240 Similar views were expressed in submissions in relation to confidentiality orders made to withhold other information from active parties, as discussed in Chapter 4 of this Report. See para 4.124, 4.128, 4.225 of this Report.

1241 See para 5.177–5.179 of this Report.

1242 See para 4.70, 4.254–4.256 of this Report.

1243 In Chapter 4 of this Report, the Commission recommended that the Tribunal should have power to make an order to withhold information given before the Tribunal from an active party (a 'confidentiality order') if the Tribunal considers it is necessary to avoid serious harm or injustice to a person. See para 4.258–4.259 of this Report. Examples given in that chapter of serious harm or injustice resulting from disclosure were a real risk that a person will be killed or seriously injured, or that an adult would be abducted.

5.201 The Commission also considers that complying with this test will ensure the Tribunal takes the least restrictive approach available when fashioning a confidentiality order in relation to a document. For example, a confidentiality order might be made in relation only to particular parts of a document, rather than to the document as a whole.

5.202 The Commission is also of the view that the criteria it has proposed are sufficient on their own without the need to include additional criteria to limit the circumstances in which an order can be made to withhold information contained in a document from the adult. The Commission notes that there was some support expressed in submissions for such separate criteria. The Commission does not consider this necessary. The proposed criteria will ensure that confidentiality orders are made in relation to documents in exceptional circumstances only. Further, in applying the criteria, the Tribunal will necessarily have regard to the adult's situation. In making a confidentiality order, the Tribunal will also be required to comply with the General Principles which are directed to the rights and interests of the adult.<sup>1244</sup>

5.203 Similarly, the Commission is of the view that it is unnecessary to include any additional criteria when the proceeding involves a special health matter as is currently provided in section 109(4) of the *Guardianship and Administration Act 2000* (Qld). That section provides that a confidentiality order must not be made if it is likely to affect the ability of the adult's guardian, attorney, or statutory health attorney to form and express a view on the proposed special health care.<sup>1245</sup> While special health matters are particularly significant, the Commission considers the criteria it has proposed, including the requirement that the Tribunal take the active parties' entitlement to credible, relevant and significant information as the basis for its consideration, provide an adequate safeguard against the inappropriate withholding of documents from an adult's substitute decision-makers. This is consistent with the view expressed in Chapter 4 of this Report in respect of confidentiality orders in relation to other information given before the Tribunal.<sup>1246</sup>

5.204 The *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.

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1244 See para 5.15 of this Report.

1245 Section 109(4) of the *Guardianship and Administration Act 2000* (Qld) is set out at para 5.16 of this Report.

1246 See para 4.264–4.265 of this Report.

## SHOULD THE TRIBUNAL HAVE POWER TO PLACE ‘RESTRICTIONS’ ON DISCLOSURE OF DOCUMENTS?

### The Discussion Paper

5.205 In its Discussion Paper, the Commission sought submissions on whether the Tribunal should have power to impose conditions on an active party’s entitlement to a document by restricting, rather than prohibiting, disclosure of the document.<sup>1247</sup>

5.206 At present, the Tribunal’s power to make a confidentiality order in relation to matters contained in a document includes the power to ‘restrict’ as well as to ‘prohibit’ disclosure to the active party.<sup>1248</sup>

5.207 In its Discussion Paper, the Commission suggested that the power to ‘restrict’ disclosure of the matters contained in a document might extend to the imposition of conditions on the disclosure of the document. For example, access to the document might be granted on the condition the party does not provide a copy of the document to another person.<sup>1249</sup>

5.208 The Commission also noted in the Discussion Paper that the power to restrict disclosure may be intended to convey that a confidentiality order can be made in relation to a part or parts of a document, rather than to the document in its entirety.<sup>1250</sup>

### Submissions

5.209 The submissions that addressed this issue were of the view that it is desirable to permit the Tribunal to be able to restrict access to documents, either by allowing access to only parts of a document or by imposing conditions on the document inspection process.<sup>1251</sup>

5.210 The President of the New South Wales Guardianship Tribunal commented:<sup>1252</sup>

One practical approach to the delicate balancing of competing interests is to consider whether access should be granted to the whole of a document, only part of the document or indeed whether conveying the substance of the material is sufficient. There is High Court authority to support the approach that only the substance of information provided to a tribunal needs to be conveyed in circumstances where there are concerns about confidentiality.

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1247 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.100] Q5-5.

1248 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(ii). This provision is set out at para 5.16 of this Report.

1249 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.69]–[5.70].

1250 *Ibid* [5.70] note 497.

1251 For example, submissions 1H, 85, 119, 122, 127.

1252 Submission 137.

5.211 Other respondents agreed with this approach.<sup>1253</sup> A few respondents considered, for example, that extracts of a document could be provided without naming the source of the document.<sup>1254</sup> One respondent observed:<sup>1255</sup>

the safeguarding of an adult's (or other persons') interests, certainly, must be achievable through '*partial*' measures – i.e., the *omission* from documentary evidence of only those parts that present a significant risk; or, alternatively, the conveying of the *substance* of the relevant information to the adult. [original emphasis]

5.212 Several respondents, including the Public Advocate, considered that the power for the Tribunal to restrict information should 'limit the need for complete prohibition' of information.<sup>1256</sup>

5.213 Both the Public Advocate and the Adult Guardian informed the Commission that, in their experience, most applications for confidentiality orders are only for partial non-disclosure, for example, the withholding of the name of a doctor or part of a medical report.<sup>1257</sup>

5.214 The Adult Guardian cited another example where the request for a confidentiality order only involved removing the adult's address from a document in circumstances where a non-contact order had been made and revealing the address would have permitted a particular person to find the adult again.<sup>1258</sup>

5.215 The ability to restrict access to documents was supported for the flexibility it provided. The Department of Justice and Attorney-General stated:<sup>1259</sup>

The ability to either restrict or prohibit disclosure of documents to parties, enables a more flexible confidentiality order to be made and one which can be adapted to suit the particular circumstances of the matter. The ability to impose conditions upon the disclosure of documents will enable the Tribunal to permit a party to access documents, while providing for measures to be put in place for the adult or other parties' protection.

5.216 Carers Queensland agreed with this reasoning.<sup>1260</sup>

In the application of all confidentiality provisions, there should be an imposition placed on them [the Tribunal] so that the least restrictive option is employed. This would require, in the making of a confidentiality order, that less restrictive options are considered prior to the use of more restrictive options. In practice this would mean that access to, or disclosure of, information would, in the main, be unrestricted, then restricted and, only in very few cases, prohibited. Further, it should have to be

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1253 For example, submissions 67, 122, F14.

1254 Submissions F5, F6, F16.

1255 Submission 119.

1256 For example, submission 1H.

1257 Submissions F16, F23.

1258 Submission F23.

1259 Submission 126.

1260 Submission 101.

demonstrated what options have been attempted or reasonably considered and why they were not appropriate.

5.217 Some of the attendees at a focus group of members and staff of the Tribunal commented that limiting the parties' use of documents is important to avoid 'fishing expeditions' for other proceedings, such as family law or succession disputes.<sup>1261</sup> One attendee expressed the view, though, that it is not the Tribunal's role to facilitate disclosure of information or documents to parties.<sup>1262</sup> In his view, it is for service providers or others close to the adult to take appropriate measures to assist the adult in receiving information.

## The Commission's view

### *Limited orders*

5.218 The Commission has recommended earlier in this chapter that the Tribunal should be able to withhold information contained in a document that is relevant to a proceeding in exceptional circumstances only, in accordance with strict criteria.<sup>1263</sup> The Commission has also previously suggested that the least restrictive approach should be taken when a confidentiality order is made in relation to a document.<sup>1264</sup>

5.219 The Commission is of the view that confidentiality should be imposed on a document only to the extent to which the criteria for making the confidentiality order are met. Wherever sufficient, a limited confidentiality order should be made. That is, only the information contained in the document that is the cause for concern should be withheld from the party. This may mean that a redacted version of the document is provided (for example, with references to a person's identity removed) or, where this is unreasonably impractical, that an oral summary of the relevant information is given.

5.220 The Commission considers this is the effect of the proper application of the criteria it has recommended for the making of such an order. It does not, therefore, consider it necessary that a reference to 'restricting' disclosure be retained in the formulation of the power to make a confidentiality order and recommends that the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

### *Facilitation*

5.221 The Commission notes the submissions revealed two main concerns which may justify the ability to impose conditions on disclosure of documents to active parties.

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1261 Submissions F4, F17, F18.

1262 Submission F18.

1263 See para 5.195–5.200 of this Report.

1264 See para 5.201 of this Report.

5.222 One concern is that parties may seek access to a document as part of a ‘fishing expedition’ for use in unrelated proceedings. The Commission considers this is a legitimate concern. The Commission understands that, at present, the Tribunal has attempted to address this concern by restricting the provision of copies of documents.<sup>1265</sup> The Commission also notes that the Tribunal requires an active party to sign a written undertaking on the inspection of documents prior to the hearing and to give a verbal undertaking on the inspection of a document during the hearing to the effect that ‘any information obtained from the file will only be used to assist that party to present its case to the Tribunal’.<sup>1266</sup> This is consistent with the implied undertaking that applies to parties to civil litigation, and to their legal representatives, that documents obtained on discovery will not be used for a collateral or ulterior purpose, breach of which is a contempt of court.<sup>1267</sup>

5.223 Given the operation of the undertaking, the Commission does not consider it necessary for the Tribunal to have any additional power specifically enabling it to impose conditions on disclosure of documents to an active party about the use of a document.

5.224 The second concern is that a party may react badly to information contained in a document unless the party is given adequate support. The Commission recognises that it is desirable, within the guardianship system, that information be disclosed to the adult in a way that minimises distress or harm that may be caused by learning the information. However, the Commission does not consider disclosure of information contained in a document to which an active party is otherwise entitled should be made conditional except to the extent a confidentiality order is made. As with the disclosure of the Tribunal’s decisions and reasons, discussed in Chapter 6 of this Report,<sup>1268</sup> the Commission considers such concerns, which do not meet the test for a confidentiality order, should be addressed by facilitating a supportive environment in which information is disclosed.

5.225 The Commission considers, therefore, that the Tribunal should give consideration to the way in which documents are disclosed to the adult, and other active parties, and whether it is desirable that disclosure be facilitated in some way in particular cases. The extent to which this is possible, for example, by suggesting a support person be present when the party inspects the file, will depend on the

<sup>1265</sup> Submissions F17, F18. See para 5.95–5.96 as to the provision of copies of documents by the Tribunal to active parties. The question whether or when copies of documents should be required to be given to the active parties will be considered in stage two of this review.

<sup>1266</sup> Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, ‘General Information in relation to the Inspection of Files and Confidentiality Orders’ (amended 9 January 2007).

<sup>1267</sup> *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Nicol v Brisbane City Council* [1969] Qd R 371, 377. Note also that it has been suggested that the implied undertaking should also apply to tribunals ‘because the production of material for tribunal proceedings is equally as intrusive as in judicial proceedings’: M Groves, ‘The implied undertaking restricting the use of material obtained during legal proceedings’ (2003) 23 *Australian Bar Review* 1. It has been held to apply in proceedings of the Victorian Civil and Administrative Tribunal, the New South Wales Administrative Decisions Tribunal, and the Commonwealth Administrative Appeals Tribunal: see *Kelly v Department of Treasury and Finance* [2002] VCAT 1019; *Daintree Café Pty Ltd v Jacfun Pty Ltd* [2002] NSWADT 188; *Otter Gold Mines Ltd v McDonald* (1997) 76 FCR 467 respectively.

<sup>1268</sup> See para 6.111–6.114 of this Report.

circumstances of each case and the Tribunal's resources. The Commission also notes the comment that support for an adult when receiving information is ultimately a matter for those people with responsibility for the adult's care.

## SHOULD CONFIDENTIAL DOCUMENTS BE DISCLOSED TO AN ACTIVE PARTY'S REPRESENTATIVE?

### The Discussion Paper

5.226 In its Discussion Paper, the Commission sought submissions on whether the Tribunal should be authorised or required to disclose information contained in a document that has been withheld by a confidentiality order from an active party, to the party's representative.<sup>1269</sup>

5.227 There is no legislative provision stipulating whether an active party's representative should be given access to a document that has been withheld from the active party. The Commission understands, however, that such an approach has been taken by the Tribunal on at least one occasion.<sup>1270</sup> In Victoria, the Tribunal has power to allow a person who is representing the adult before the Tribunal to inspect a document that the adult is not entitled to inspect.<sup>1271</sup>

### Submissions

5.228 The majority of submissions that addressed this issue considered it appropriate to allow a party's legal representative to conduct document inspection where the document has been withheld from the party.<sup>1272</sup>

5.229 The Public Trustee of Queensland noted:<sup>1273</sup>

if a decision of the tribunal adversely affects a person which in part is premised upon information withheld, the person's representative should be able to consider the information.

5.230 Many submissions supported the right of a party's representative to inspect documents as a tool to assist in delivering procedural fairness to the parties.<sup>1274</sup> Carers Queensland commented:<sup>1275</sup>

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<sup>1269</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [5.73], [5.100] Q5-6.

<sup>1270</sup> Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006, 16 June 2006, and 5 June 2007. The example given was where the adult objected to the contents of his or her will being seen.

<sup>1271</sup> *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(b). See para 5.35 of this Report.

<sup>1272</sup> For example, submissions 1H, 85, 101, 119, 122, 126.

<sup>1273</sup> Submission 127.

<sup>1274</sup> For example, submissions 1H, 101.

<sup>1275</sup> Submission 101.

In not contravening procedural fairness, the use of agents or representatives is important. Their use, in those rare instances where a confidentiality order is placed on any adverse information, will ensure some degree of procedural fairness. Such a course of action however, would likely be a last resort.

5.231 The Public Advocate expressed a preference for allowing a party's representative to conduct document inspection only where the confidentiality order is in respect of the adult.<sup>1276</sup> She stated:

As the proceedings affect the fundamental rights of the adult, it is thought that this additional safeguard should attach to the adult. ... Because of the potential to affect fundamental rights of the adults by Tribunal orders (whereas in respect of other parties, generally their rights will not be affected), procedural fairness to the adult arguably requires more, than in respect of the other parties.

5.232 However, the Public Advocate conceded:<sup>1277</sup>

there may be circumstances, for example, when an active party is an attorney, guardian or administrator, and where serious allegations are made against them or another active party, when the Tribunal may consider that procedural fairness dictates inspection of the documents not made available to the particular party because of a confidentiality order, should be available to the party's legal representative.

5.233 Other respondents agreed that it was essential for an adult's representative to have access to documents in circumstances where part or all of the material had been withheld from the adult.<sup>1278</sup>

5.234 A member of the Tribunal cautioned that if documents or reports are given to a legal representative rather than the adult with impaired capacity, the adult might feel alienated from the hearing process and any feelings of paranoia may be reinforced.<sup>1279</sup> The President of the Tribunal expressed the view, however, that an express power to enable the Tribunal to disclose a document to an active party's legal representative would be a useful clarification.<sup>1280</sup>

### The Commission's view

5.235 Section 108(2) of the *Guardianship and Administration Act 2000* (Qld) provides that each active party must be given a reasonable opportunity to present his or her case and to inspect relevant documents.<sup>1281</sup> The Commission considers access to documentary information by an active party's legal representative is appropriate, and is already provided for.

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1276 Submission 1H.

1277 Ibid.

1278 For example, submission 119.

1279 Submission F17.

1280 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

1281 Section 108 of the *Guardianship and Administration Act 2000* (Qld) is set out at para 5.9 of this Report.

5.236 The Commission considers, however, that it would be inappropriate for a document that has been withheld from an active party, by a confidentiality order, to be disclosed to the party's legal representative, given that active parties are infrequently represented at proceedings of the Tribunal.<sup>1282</sup>

5.237 This is consistent with the approach taken in Chapter 4 of this Report in relation to confidentiality orders made to withhold information from an active party.<sup>1283</sup>

## FUTURE ISSUES

5.238 Through its consultation, the Commission identified a number of other matters that do not raise issues directly related to the guardianship legislation's confidentiality provisions, but which are still about access to and inspection of documents generally. These matters fall outside the scope of this stage of the review but will be considered in stage two:

- Post-hearing access to documents by active parties – as discussed earlier, doubts have been raised about whether an active party's right to inspect documents continues after a hearing concludes.<sup>1284</sup> In Chapter 8 of this Report, the Commission has recommended that an administrative access policy be developed to provide for access to documents by active parties after a hearing is completed. The Commission will revisit this issue in stage two and consider whether the legislation should provide an express right of post-hearing document inspection to active parties.<sup>1285</sup>
- Non-party access to documents – questions were raised as to whether non-parties should have rights of inspection. At present, the right to inspect documents conferred by section 108(2) of the *Guardianship and Administration Act 2000* (Qld) applies to active parties only. There is no other provision in the legislation giving non-parties a right to inspect or access documents on a Tribunal file,<sup>1286</sup> unless the person is joined as an active party to the

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1282 Note s 124 of the *Guardianship and Administration Act 2000* (Qld) which provides that leave of the Tribunal is required for an active party to be represented by a lawyer or agent.

1283 See para 4.288–4.290 of this Report.

1284 See para 5.7 of this Report.

1285 This issue is also discussed in Chapter 8 of this Report. See para 8.506–8.511, 8.514–8.519 of this Report.

1286 A right of access is also unlikely to be implied under the test of necessity: see the discussion in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 522–3 (Spigelman CJ) and, in particular, the statement that while the test may be approached as one of 'reasonable necessity', more is required than the implication of a right or power being 'merely desirable or useful'. Given the overall approach to confidentiality taken by the *Guardianship and Administration Act 2000* (Qld), noting, for example, the prohibition in s 112 on publication of Tribunal proceedings, it would be difficult to argue that a right of non-party access to Tribunal files should be implied as 'reasonably necessary'. See also Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007).

proceeding.<sup>1287</sup>

- Interim Orders – concerns have been expressed about the power of the Tribunal to make interim orders under section 129 of the *Guardianship and Administration Act 2000* (Qld) and that such orders are being made too readily.
- Refusal to accept documents – some submissions stated that active parties have been unable to place documents before the Tribunal both prior to a hearing and during the hearing itself.
- Copies of documents – suggestions have been made that the right to inspect documents conferred by section 108(2) of the *Guardianship and Administration Act 2000* (Qld) should include a right to copy the documents.
- Service of documents – it has also been suggested that copies of all documents should be served on active parties to a proceeding.
- Parties to proceedings – queries were raised during consultation about the desirability of allowing any individual, regardless of his or her interest or involvement with an adult, to be joined as an active party to a proceeding before the Tribunal.

## RECOMMENDATIONS

5.239 The Commission makes the following recommendations:

### ***Inspection of documents by active parties***

- 5-1 The Tribunal’s filing system and pre-hearing document inspection policy should ensure that all information contained on the file that is relevant should be available to the active parties to the proceeding.<sup>1288</sup>**
- 5-2 Apart from documents the subject of a confidentiality order and the Tribunal’s own notes of a proceeding, the documents received prior to a hearing by the Tribunal members hearing a matter and the documents available for inspection by active parties should be the same.<sup>1289</sup>**

<sup>1287</sup> Section 110(2)(a) of the *Guardianship and Administration Act 2000* (Qld) provides that a procedural direction by the President or the presiding member of the Tribunal may include a direction joining a person as a party to proceedings. A person so joined becomes an active party: *Guardianship and Administration Act 2000* (Qld) s 119(g).

<sup>1288</sup> See para 5.87–5.89 of this Report.

<sup>1289</sup> See para 5.90 of this Report.

- 5-3 Section 108(2) of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that an active party is entitled to inspect documents, before the start of the hearing, that are relevant to an issue in the proceeding, and to remove the word ‘directly’. Section 108(2) of the *Guardianship and Administration Act 2000* (Qld) should also be amended to clarify that after the start of the hearing, an active party is entitled to access documents before the Tribunal that are credible, relevant and significant to an issue in the proceeding. A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to define ‘relevant’, for the purposes of the Act, to mean ‘directly relevant’.<sup>1290</sup>
- 5-4 The current provision in section 108(3)(b) of the *Guardianship and Administration Act 2000* (Qld) which allows conditions to be prescribed in the Tribunal rules in relation to the inspection of documents by active parties, should be omitted.<sup>1291</sup>
- 5-5 The Tribunal should take steps to minimise or remove the practical impediments to pre-hearing document inspection by allowing sufficient time for document inspection, notifying active parties of the right to inspect documents, and keeping a record of active parties’ inspection of documents.<sup>1292</sup>

#### ***Confidentiality orders made in relation to documents***

- 5-6 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order, make a document or part of a document confidential from an active party if it considers it is necessary to avoid serious harm or injustice to a person. The *Guardianship and Administration Act 2000* (Qld) should refer to this order as a ‘confidentiality order’.<sup>1293</sup>

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1290 See para 5.91–5.92 of this Report.

1291 See para 5.155 of this Report.

1292 See para 5.93–5.99 of this Report.

1293 See para 5.147–5.153, 5.198–5.202 of this Report.

- 5-7** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal is required, before making a confidentiality order in relation to a document, to take as the basis of its consideration that it is desirable that hearings before the Tribunal should be held in public and may be publicly reported, and that active parties have an entitlement to information that is credible, relevant and significant to an issue in the proceeding.<sup>1294</sup>
- 5-8** The *Guardianship and Administration Act 2000* (Qld) should not include a provision, such as the current provision in section 109(4) of the Act, imposing additional criteria on the making of a confidentiality order in relation to a document in proceedings involving special health matters.<sup>1295</sup>
- 5-9** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that a confidentiality order in relation to documents may be made only in accordance with the procedural safeguards recommended in Chapter 4 of this Report for the making of ‘limitation orders’.<sup>1296</sup>

***No other restrictions on disclosure of documents***

- 5-10** If a confidentiality order is made in relation to a document, the order should be as specific as possible so that information contained in the document is confidential from an active party only to the extent to which the criteria for making the confidentiality order are met. The provision conferring power to make a confidentiality order in relation to a document should not refer to ‘restricting’ disclosure.<sup>1297</sup>
- 5-11** The Tribunal should give consideration to the way in which documents are disclosed to the adult and other active parties and whether it is desirable that disclosure be facilitated in some way in particular cases, such as by suggesting that a support person be present when the party inspects the file.<sup>1298</sup>

<sup>1294</sup> See para 5.151, 5.197 of this Report.

<sup>1295</sup> See para 5.203 of this Report.

<sup>1296</sup> See para 5.149 of this Report.

<sup>1297</sup> See para 5.218–5.220 of this Report.

<sup>1298</sup> See para 5.224–5.225 of this Report.

***Disclosure to representatives***

**5-12** The *Guardianship and Administration Act 2000* (Qld) should not include a provision requiring or authorising the Tribunal to disclose information contained in a document that has been withheld by a confidentiality order from an active party, to the party's representative.<sup>1299</sup>

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See para 5.235–5.236 of this Report.

# Chapter 6

## Tribunal decisions and reasons

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## INTRODUCTION

6.1 As part of its review of the confidentiality provisions of the guardianship legislation, the Commission has considered those provisions that permit the Tribunal to prohibit or restrict disclosure of a decision made in a proceeding, or the reasons for that decision, from a person who is otherwise entitled to this information. Generally, Queensland's guardianship legislation creates a statutory right for particular people involved in a proceeding to receive a copy of the Tribunal's decision and reasons. However, that right may be displaced by a confidentiality order made by the Tribunal.

6.2 The focus of this chapter is the question of whether the Tribunal should be able to displace a person's *current* statutory entitlement to receive a copy of the Tribunal's decision and/or reasons. In the next stage of the review, the Commission will consider the related issues of whether and, if so, when the Tribunal should be required to give reasons for a decision, and to whom Tribunal decisions and reasons should be given.<sup>1300</sup> The Commission notes, however, its earlier recommendation that the production of written reasons should be mandatory when the Tribunal makes a limitation order (other than an adult evidence order).<sup>1301</sup> The Commission has also recommended that a person is entitled to request a Tribunal's decision and any written reasons it has given, and to receive them in a form that does not contravene the prohibition recommended in Chapter 7 of this Report on publication of information about proceedings.<sup>1302</sup>

## THE LAW IN QUEENSLAND

6.3 Section 158 of the *Guardianship and Administration Act 2000* (Qld) provides that, generally, the Tribunal must give a copy of its decision and any written reasons for the decision to the adult concerned in the matter and to each other active party in the proceeding.<sup>1303</sup> Those other active parties are:<sup>1304</sup>

- the applicant (if not the adult);
- the proposed guardian, administrator or attorney for the adult if the proceeding is for the appointment or reappointment of such person;

1300 The Commission's terms of reference and the timelines for the two stages of this review are discussed at para 1.1–1.5 of this Report. See also para 6.128–6.130 of this Report.

1301 See para 4.344–4.350, 5.149 of this Report.

1302 See para 6.95, 6.98 of this Report.

1303 *Guardianship and Administration Act 2000* (Qld) s 158(1). Note also that s 80N(1) of the *Guardianship and Administration Act 2000* (Qld), which applies in relation to proceedings for consent to the sterilisation of a child with an impairment, provides that the Tribunal is generally required to give a copy of its decision and any written reasons for its decision to each active party in the proceeding. The active parties in such matters are the child, the applicant, the child's parent or guardian, the child's primary carer (if the child's parent or guardian is not the child's primary carer), the child's treating doctor, the child representative for the child, and any person joined as a party by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 80K.

1304 *Guardianship and Administration Act 2000* (Qld) s 119.

- any current guardian, administrator or attorney for the adult;
- the Adult Guardian;
- the Public Trustee of Queensland; and
- any other person joined as a party to the proceeding.

6.4 The Tribunal is required to give its decision within a reasonable time after the matter is heard,<sup>1305</sup> but there will not always be written reasons as the Tribunal is not required to produce them in all cases. This obligation arises if either the Tribunal is directed to do so by the President of the Tribunal<sup>1306</sup> or if requested in writing by a person aggrieved by the decision.<sup>1307</sup> The Tribunal is required, when giving persons a copy of a decision, to notify them of the need to request written reasons for the decision within 28 days.<sup>1308</sup>

6.5 A copy of the Tribunal's decision (although not a copy of any written reasons for the decision) must also be given to each of the people who were given notice of the hearing.<sup>1309</sup> The effect of this is that, in addition to those who receive the Tribunal's decision as an active party listed above, members of the adult's family, any primary carer of the adult, and anyone else the Tribunal considers should have been notified of the hearing will also receive a copy of the decision.<sup>1310</sup>

6.6 The Tribunal is also empowered to order that anyone else may be given a copy of its decision or its reasons for the decision in a proceeding.<sup>1311</sup>

6.7 The rights which a person has to the Tribunal's decisions or reasons may, however, be displaced. Section 158(3) of the *Guardianship and Administration Act 2000* (Qld) provides that a requirement to give copies of a decision or reasons may be displaced by a confidentiality order made by the Tribunal under section 109.<sup>1312</sup>

6.8 Under section 109(2) of the *Guardianship and Administration Act 2000* (Qld), the Tribunal may give directions 'prohibiting or restricting the disclosure to some or all

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1305 *Guardianship and Administration Act 2000* (Qld) s 156.

1306 The Tribunal then has 28 days to give its written reasons: *Guardianship and Administration Act 2000* (Qld) s 157(1).

1307 *Guardianship and Administration Act 2000* (Qld) s 157(2).

1308 *Guardianship and Administration Act 2000* (Qld) s 157(3), except if the Tribunal gives the person a copy of its written reasons when it gives him or her a copy of its decision: s 157(4). The Tribunal then has a further 28 days to produce its written reasons: *Guardianship and Administration Act 2000* (Qld) s 157(5).

1309 *Guardianship and Administration Act 2000* (Qld) s 158(2). The same is required for proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80N(2).

1310 *Guardianship and Administration Act 2000* (Qld) s 118(1).

1311 *Guardianship and Administration Act 2000* (Qld) s 158(4). This also applies to proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80N(4).

1312 This also applies to proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80N(3).

of the active parties in a proceeding’ of the Tribunal’s decision or reasons.<sup>1313</sup> Before making such an order to withhold a decision or reasons, the Tribunal must be ‘satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason’.<sup>1314</sup> The Tribunal will also need to consider what is required in its jurisdiction by open justice and procedural fairness,<sup>1315</sup> and must apply the General Principles.<sup>1316</sup>

6.9 If the Tribunal wishes to make an order withholding a decision or reasons from an adult, a further criterion must be satisfied. The Tribunal may take such a step only if it considers the disclosure ‘might be prejudicial to the physical or mental health or wellbeing of the adult’.<sup>1317</sup>

6.10 Section 109 of the Act relevantly provides:

**109 Open**

...

(2) ... if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a *confidentiality order*)—

...

(d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—

...

(iii) subject to subsection (3), the tribunal’s decision or reasons.

(3) The tribunal may make a confidentiality order prohibiting or restricting disclosure of the tribunal’s decision or reasons to the adult concerned only if the tribunal considers disclosure to the adult might be prejudicial to the physical or mental health or wellbeing of the adult.

...

6.11 The Commission understands that the Tribunal has only once displaced a person’s right to reasons and never permanently displaced a party’s right to the decision by making a confidentiality order.<sup>1318</sup> However, the Tribunal has made a confidentiality

1313 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(iii).

1314 *Guardianship and Administration Act 2000* (Qld) s 109(2).

1315 See the discussion of this issue at para 4.15–4.20 of this Report.

1316 See para 4.21 of this Report.

1317 *Guardianship and Administration Act 2000* (Qld) s 109(3). Note that the same restriction applies in relation to the child in proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80G(3).

1318 Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006 and 5 June 2007.

order that operated to delay the receipt of a decision by active parties for a period of five days.<sup>1319</sup> This case is discussed further below at paragraph 6.116.

## LEGISLATION IN OTHER JURISDICTIONS

6.12 In all Australian jurisdictions, except the Northern Territory, the guardianship or other relevant legislation creates rights for a party to a proceeding (and sometimes others) to receive (either as of right or by request) a decision made in that proceeding and the reasons for the decision. In addition to Queensland, such provisions exist in the Australian Capital Territory,<sup>1320</sup> New South Wales,<sup>1321</sup> South Australia,<sup>1322</sup> Tasmania,<sup>1323</sup> Victoria<sup>1324</sup> and Western Australia.<sup>1325</sup> However, in the Northern Territory, the guardianship legislation creates a right for people involved in the proceedings to receive the court's order, but not its reasons.<sup>1326</sup>

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1319 Inspection by the Commission of files of the Guardianship and Administration Tribunal, 7–8 December 2006; and information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

1320 In the Australian Capital Territory, a statement of reasons must be given within 28 days after a request from a person entitled to appeal the decision: *Guardianship and Management of Property Act 1991* (ACT) s 45(2). People entitled to appeal a decision are the parties and any of the people who were entitled to notice of the proceeding: *Guardianship and Management of Property Act 1991* (ACT) ss 56(1), 36(1), 35(1).

1321 In New South Wales, each party must be furnished with a copy of the decision and reasons as soon as is practicable, although the obligation to provide reasons does not arise in relation to certain minor decisions unless a party requests them within 14 days or an appeal is instituted: *Guardianship Act 1987* (NSW) s 68(1A)(b)–(1C). Note also that amendments in June 2007 permit the Registrar to exercise the function of the Tribunal in relation to a limited range of decisions: *Guardianship Act 1987* (NSW) s 67C. Any such decision of the Registrar is to be confirmed via a written instrument and furnished to each of the parties, 'unless, in the particular case, the Registrar considers that there is an appropriate reason not to furnish such an instrument to any or all parties': *Guardianship Act 1987* (NSW) s 67D(1). This provision appears, in relation to some types of decisions, to confer on the Registrar the discretion to not provide the decision to parties.

1322 In South Australia, a written statement of reasons must be given to people with a right of appeal or who have a proper interest in the matter, upon a request being made within three months of the decision: *Guardianship and Administration Act 1993* (SA) s 14(13). A statement of the effect of the decision or order must also be given to a person when a decision or order is made in relation to the person: *Guardianship and Administration Act 1993* (SA) s 55. The people with a right of appeal against a decision of the Board are the applicant, the person to whom the proceeding relates, any person who gave evidence or made submissions, the Public Advocate and any other person the Board is satisfied has a proper interest in the matter: *Guardianship and Administration Act 1993* (SA) s 67(1).

1323 In Tasmania, a statement of reasons must be given to a person aggrieved by the decision within 21 days after the person has requested the statement (if that request is made within 21 days of the decision): *Guardianship and Administration Act 1995* (Tas) s 74(1)–(2).

1324 In Victoria, each party and each of the people who were entitled to notice of the proceeding must be furnished with a copy of the decision and reasons: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 116(2), 117(1), (6). This must generally be done within 60 days of making the decision: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117(1).

1325 In Western Australia, the State Administrative Tribunal must give all final decisions (and some other types of decisions) in writing and provide a copy of the decision to each party, each person entitled to notice of the proceedings, the relevant hearing or of the decision and anyone else prescribed under the rules: *State Administrative Tribunal Act 2004* (WA) ss 74, 75(1). The Tribunal must also give reasons for all final decisions: *State Administrative Tribunal Act 2004* (WA) s 77(1). Requests for these reasons to be in writing may be made by a party within 28 days of the decision and the Tribunal must give those reasons within 90 days of that request: *State Administrative Tribunal Act 2004* (WA) s 78.

1326 *Adult Guardianship Act* (NT) s 15(3). However, see para 6.27 of this Report in relation to the common law obligation for the courts, including the Local Court which has jurisdiction for guardianship matters in the Northern Territory, to produce reasons for its decisions.

6.13 None of the other Australian jurisdictions provides for the displacement of these statutory rights to allow a tribunal to withhold from a party (or any other person so entitled) its decision or accompanying reasons.

## Western Australia

6.14 Apart from Queensland, Western Australia is the only jurisdiction that addresses the issue of confidentiality in relation to decisions or reasons. It is, however, only a limited recognition of confidentiality in that it applies only to the *content* of the reasons for decisions given by the State Administrative Tribunal.

6.15 Under section 80 of the *State Administrative Tribunal Act 2004* (WA), the giving of reasons must be complied with in a way that:

- is consistent with any order that was made under section 61(2) to hold the proceeding in private and in the absence of a particular person;<sup>1327</sup> and
- gives effect to the Tribunal's general obligation not to disclose 'protected matter' under section 160.

6.16 The effect of the first limb of section 80 is that it permits the exclusion of material considered during non-public proceedings from the reasons for the decision.<sup>1328</sup> However, it is suggested that this provision does not permit a blanket exclusion of all such material. The grounds for excluding a particular person or members of the public will determine whether the reasons for the decision need to be modified to be consistent with the order to have a non-public hearing. If the order was made to protect confidential information, then it may be appropriate that the reasons for the decision reflect that confidentiality. However, if the order was made to allow the adult to participate in the hearing free from the influence of a particular person, and there was no issue of confidentiality, the reasons for the decision may not need to be modified.

6.17 The second limb of section 80 of the *State Administrative Tribunal Act 2004* (WA) requires that any reasons given must give effect to the Tribunal's obligation under section 160 not to disclose 'protected matter'. 'Protected matter' means:<sup>1329</sup>

- certain types of information in relation to which the Attorney-General has certified that disclosure is contrary to the public interest for reasons such as

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This might also include an order made under s 17, sch 1 pt B cl 11(2) of the *Guardianship and Administration Act 1990* (WA) to close the hearing other than to persons who are directly interested in the proceedings or who have been authorised by the Tribunal to be present. That provision is to apply in addition to the provisions of the *State Administrative Tribunal Act 2004* (WA) except to the extent of any inconsistency, in which case the provisions of the *Guardianship and Administration Act 1990* (WA) are to prevail.

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The power of the State Administrative Tribunal to hold a guardianship proceeding in private or in the absence of a particular person was discussed at para 4.41 of this Report.

1329

*State Administrative Tribunal Act 2004* (WA) s 3 (definition of 'protected matter').

endangering national security or revealing information protected by parliamentary privilege;<sup>1330</sup> and

- information that is exempt from disclosure under the freedom of information legislation.<sup>1331</sup>

6.18 The duty in section 160 prevents disclosure of such matter other than to a sitting member of the Tribunal.<sup>1332</sup> A further exception to the duty is that the Tribunal may give a party access to matters that have been certified by the Attorney-General, unless the matter is exempt under freedom of information legislation.<sup>1333</sup> The effect of the second limb of section 80 is that the State Administrative Tribunal must exclude ‘protected matter’ from its reasons for decisions.<sup>1334</sup>

### ***Mental Health Act 2000 (Qld)***

6.19 The Mental Health Review Tribunal was established by the *Mental Health Act 2000* (Qld) to safeguard the rights of people with a mental illness who are receiving involuntary treatment under that Act.<sup>1335</sup> This Tribunal’s role is quite different from that of the Guardianship and Administration Tribunal.<sup>1336</sup> However, in the absence of comparable legislative provisions dealing with guardianship proceedings, and given that some of the people who fall within its jurisdiction have impaired capacity, an examination of the Mental Health Review Tribunal’s power to make confidentiality orders in relation to reasons for its decisions may be instructive.

6.20 Under section 458 of the *Mental Health Act 2000* (Qld), the Mental Health Review Tribunal may make confidentiality orders prohibiting or restricting the disclosure of reasons for a decision (but not the decision itself) to the adult who is the subject of the proceeding.<sup>1337</sup> However, the Tribunal may make such orders only if it is satisfied the disclosure would:<sup>1338</sup>

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1330 *State Administrative Tribunal Act 2004* (WA) ss 3 (definition of ‘protected matter’), 159.

1331 *State Administrative Tribunal Act 2004* (WA) s 3 (definitions of ‘protected matter’ and ‘exempt matter’); *Freedom of Information Act 1992* (WA) s 9, sch 1 (definition of ‘exempt matter’). Exempt matter includes, for example, certain types of personal information.

1332 *State Administrative Tribunal Act 2004* (WA) s 160(2).

1333 *State Administrative Tribunal Act 2004* (WA) s 160(3).

1334 There is, perhaps, one exception to this. The relevant duty to keep protected matter confidential may still be met if all parties have already been given access to particular certified material and the reasons will not be available to people other than the parties.

1335 Mental Health Review Tribunal, *Annual Report 2004–2005* (2005) 8; *Mental Health Act 2000* (Qld) ch 12 pt 1.

1336 The role of the Mental Health Review Tribunal includes reviewing whether a person should continue to be subject to involuntary treatment or detention (or both) and reviewing a person’s fitness for trial if previously found to be unfit. For the Tribunal’s jurisdiction, see s 437 of the *Mental Health Act 2000* (Qld).

1337 *Mental Health Act 2000* (Qld) s 458(1)(c).

1338 *Mental Health Act 2000* (Qld) s 458(2).

- cause serious harm to the health of the adult; or
- put the safety of someone else at serious risk.

6.21 Unlike the relevant provision in Queensland's guardianship legislation, the *Mental Health Act 2000* (Qld) provides that if such an order is made, the Mental Health Review Tribunal must disclose the information or matters that have been withheld from the adult to the adult's lawyer or agent along with written reasons for making the confidentiality order.<sup>1339</sup>

## THE DISCUSSION PAPER

### Possible legal models

6.22 In its Discussion Paper, the Commission outlined three possible models for how the law might deal with the issue of confidentiality in relation to the Tribunal's decisions and reasons.

6.23 Model 1 involves not granting the Tribunal power to make a confidentiality order in relation to a decision or its reasons. This is the position in most of the guardianship systems in Australia, other than Queensland.<sup>1340</sup>

6.24 Under model 2, the current statutory entitlement to the Tribunal's decision remains, but there is power to withhold the Tribunal's reasons for the decision. This is the approach adopted under the *Mental Health Act 2000* (Qld).

6.25 Model 3 reflects the current law in Queensland and permits the Tribunal to make confidentiality orders in relation to both its decisions and the reasons for those decisions.

6.26 The Commission's preliminary view was that the law should change to model 2.<sup>1341</sup> At that time, it considered that a decision of the Tribunal should never be withheld from a person otherwise entitled to be notified, but was of the view that there may be circumstances where it is appropriate to withhold the reasons for a decision. The Commission considered that those occasions would be exceptional, and so favoured a tightly constrained discretion.

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1339 *Mental Health Act 2000* (Qld) s 458(3).

1340 See para 6.12–6.13 of this Report. The only other jurisdiction that seeks to impose some confidentiality on reasons for decisions is Western Australia, although that is only in relation to the content of those reasons: see para 6.14–6.18 of this Report.

1341 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [6.68]–[6.72].

## Openness and confidentiality in the guardianship system

6.27 The Commission also examined why the provision of reasons is regarded as an integral part of judicial and quasi-judicial decision-making. The obligation to give reasons has been described as a normal incident of the judicial process<sup>1342</sup> and as being ‘of the essence of the administration of justice’.<sup>1343</sup>

6.28 The Commission identified four matters, considered below, that impact upon the issue of whether the Tribunal should have power to displace a person’s statutory entitlement to decisions and reasons: the principle of open justice, the requirements of procedural fairness, the nature of the guardianship system and a person’s right of appeal.

### Open justice

6.29 The principle of open justice ‘includes the promulgation of reasoned decisions’.<sup>1344</sup> This promotes one of the core functions of open justice, that is, to ensure a measure of accountability of decision-makers through public scrutiny.<sup>1345</sup> This public scrutiny of reasons operates as a disincentive against partial, arbitrary decision-making and instead encourages decision-making that is careful and rational.<sup>1346</sup> The principle of open justice also recognises that the provision of reasons can have an educative function in that it explains to people how and why particular decisions were made.<sup>1347</sup> In

1342 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); Justice MD Kirby, ‘Ex Tempore Judgments’ (1995) 25 *Western Australian Law Review* 213, 220.

1343 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing H Gibbs, ‘Judgment Writing’ (1993) 67 *Australian Law Journal* 494, 494. There is not, however, an absolute rule that a judge must give reasons for decisions. The statement of Gibbs CJ quoted above included the qualification that the provision of reasons is a normal ‘but not a universal’ incident of the judicial process: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667. The limited exceptions include situations such as the making of procedural decisions where the reasons are clear because of the context or the foregoing exchanges between the parties: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing Justice MD Kirby, ‘On the Writing of Judgments’ (1990) 64 *Australian Law Journal* 691, 694. See also *Perkins v County Court of Victoria* (2000) 2 VR 246, 272 (Buchanan JA); *Brittingham v Williams* [1932] VLR 237, 239.

1344 Committee on Administrative Tribunals and Enquiries, United Kingdom House of Commons, *Report of the Committee on Administrative Tribunals and Enquiries* (1957, Cmnd 218) [76]. Also, see Chief Justice JJ Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (Paper presented at the Media Law Resource Centre Conference, London, 20 September 2005) 7; Chief Justice JJ Spigelman, ‘Seen to be Done: The Principle of Open Justice: Part 1’ (2000) 74 *Australian Law Journal* 290, 294; Chief Justice JJ Spigelman, ‘Open Justice and the Internet’ (Paper presented at the Law via the Internet Conference, Sydney, 28 November 2003) 5; Chief Justice JJ Spigelman, ‘Reasons for Judgment and the Rule of Law’ (Speech delivered at the National Judicial College, Beijing, 10 November 2003); *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, 442 (Meagher JA); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA); and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565–6. See also para 3.25 of this Report.

1345 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60]; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 118–9; J Bannister, ‘The public/private divide: personal information in the public domain’ [2002] 3 *Privacy Law and Policy Reporter*. See para 3.29 of this Report.

1346 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 554; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 118–9; D Foulkes, *Administrative Law* (8th ed, 1995) 324; Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.9].

1347 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15]. Traditionally, judges read reasons in open court ‘so that the parties, the profession and the public could understand the outcome of the case and follow it from beginning to end’: Justice MD Kirby, ‘Ex Tempore Judgments’ (1995) 25 *Western Australian Law Review* 213, 214.

*Soulemezis v Dudley (Holdings) Pty Ltd*,<sup>1348</sup> McHugh JA said:

[W]ithout the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision. In my opinion the giving of reasons is correctly perceived as ‘a necessary incident of the judicial process’ because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law. [note omitted]

6.30 Although these arguments about open justice relate to the public at large, they are also compelling in relation to the active parties to a proceeding. For example, withholding reasons from a party, who is directly interested in the outcome of the matter and who may therefore take issue with an inadequately reasoned decision, would remove the decision from the proper scrutiny of that party. Further, a party’s ability to understand how and why the decision was made will be constrained without reasons. These concerns become even more acute if a party is also deprived of the Tribunal’s decision.

### **Procedural fairness**

6.31 In England<sup>1349</sup> and Canada,<sup>1350</sup> the courts have recognised that a duty to give reasons may arise if required by procedural fairness in the circumstances of the particular case.<sup>1351</sup> In Australia, however, where there is an alternative basis for why reasons must be provided by judicial and quasi-judicial decision-makers, the law has not developed in this direction.<sup>1352</sup>

1348 (1987) 10 NSWLR 247, 278–9.

1349 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 556; *Halsbury’s Laws of England*, Vol 1(1) ‘Administrative Law’ [113]. See *R v Home Department State Secretary; Ex Parte Doody* [1994] 1 AC 531; *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330.

1350 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 558, citing *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193; *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 208 DLR (4th) 1, 54; *R v Sheppard* (2002) 210 DLR (4th) 608.

1351 See *Halsbury’s Laws of England*, Vol 1(1) ‘Administrative Law’ [113], n 3:

[T]he obligation to provide a reasoned decision will exist when general considerations of procedural fairness require it. On this basis it is relevant to consider factors such as the need for reasons to give substance to a right of appeal; to explain an otherwise aberrant outcome; to demonstrate that issues had been properly addressed; the nature of the interest affected by the decision and the extent to which the interest is affected by the decision; the need to promote transparency in the decision making process; whether the duty would impose an undue burden on the decision-maker; and the extent to which the judgments made were capable of being reasoned, or whether they were simply matters of academic or other evaluation. This list is not exhaustive. What is relevant will depend on the particular context concerned.

1352 There has been some limited recognition of such a development (for example, *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462, 476 (Fitzgerald P, dissenting)), but others have suggested otherwise: for example, R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) [18.2.1], [18.2.4], citing *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, and particularly 670 (Gibbs CJ), albeit in the context of an administrative decision:

The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made.

See also *Perkins v County Court of Victoria* (2000) 2 VR 246, 271–2 (Buchanan JA).

6.32 Nevertheless, it is argued that without reasons, the right to a fair hearing is ‘devalued’.<sup>1353</sup> The essential feature of the hearing rule is participation,<sup>1354</sup> and it is suggested that meaningful participation requires the giving of reasons for a decision: without reasons, the parties cannot be confident their cases ‘were duly noted, understood and properly considered’.<sup>1355</sup> It has been said that it is:<sup>1356</sup>

a fundamental requirement of fair play ... that parties should know at the end of the day why a particular decision has been taken.

6.33 Further, providing reasons for a decision can help a party know and understand why he or she did not succeed and avoid the grievance of feeling that an injustice has occurred.<sup>1357</sup>

6.34 Although these arguments are advanced in relation to the provision of reasons, they also apply in the context of provisions that permit the Tribunal to withhold reasons and decisions. Again, any sense of unfairness would be more significant if a party were not only denied the reasons for the decision, but also the decision itself.

### **Nature of the guardianship system**

6.35 The nature of the guardianship system, however, may suggest some degree of confidentiality in relation to decisions and reasons if that is necessary to safeguard the rights and interests of the adult. This might arise, for example, if the Tribunal’s reasons contained an adverse finding about a person based on the adult’s evidence in circumstances where its disclosure is likely to prompt retribution against the adult from that person. It might also be suggested that such a discretion is needed if disclosure of a decision or reasons to an adult will harm him or her.<sup>1358</sup>

6.36 In contrast, the fact that the decisions made in the guardianship system affect fundamental rights suggests that decisions and reasons ought not to be withheld. The significance of the decisions being made gives importance to accountability of decision-making and fairness to the parties. Further, in relation to withholding a decision or reasons from the adult, such a course of action is inconsistent with the shift away from a

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1353 JRS Forbes, *Justice in Tribunals* (2002) [13.2].

1354 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 333. See para 3.40–3.45 of this Report.

1355 JRS Forbes, *Justice in Tribunals* (2002) [13.2]. See also P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 190.

1356 D Foulkes, *Administrative Law* (8th ed, 1995) 324. See also Committee on Administrative Tribunals and Enquiries, United Kingdom House of Commons, *Report of the Committee on Administrative Tribunals and Enquiries* (1957, Cmnd 218) [98]–[99]; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 119.

1357 *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, 442 (Meagher JA); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (McHugh JA).

1358 In the context of the provision of information (other than decisions and reasons) causing harm to an adult, see T Henning and J Blackwood, ‘The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals’ (2003) 10 *Australian Journal of Administrative Law* 84, 101. Foulkes has also recognised that one of the situations where the provision of reasons might not be appropriate is if it may cause distress to a person with a mental illness during mental health proceedings: D Foulkes, *Administrative Law* (8th ed, 1995) 326.

paternalistic approach to decision-making to one that seeks to support the adult's participation in decisions affecting his or her own life.<sup>1359</sup>

### **Reasons and the right of appeal**

6.37 Although the obligation to give reasons for a decision is not limited to those situations where an appeal is available,<sup>1360</sup> a failure to do so can defeat a party's ability to exercise that right.<sup>1361</sup> The provision of reasons enables a person 'to determine whether he has good grounds for an appeal and will inform him of the case he will have to meet if he does decide to appeal'.<sup>1362</sup> This has been used as the basis for recognising a duty to give reasons in some cases<sup>1363</sup> and in other cases, it has been described as '[p]erhaps the primary reason' for the giving of reasons.<sup>1364</sup>

### **Issues for consideration**

6.38 In its Discussion Paper, the Commission also sought views on several issues relating to the confidentiality of Tribunal decisions and reasons, including:<sup>1365</sup>

- Should the Tribunal have power to withhold its decisions and reasons?
- What criteria, if any, should guide the Tribunal's power to withhold its decisions and reasons?
- From whom should the Tribunal be able to withhold its decisions or reasons?

1359 See para 3.63–3.64 of this Report.

1360 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 269 (Mahoney JA). See also *Re Tam Anh Le and Secretary, Department of Education, Science and Training* (2006) 90 ALD 83, [28]–[29].

1361 See P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 189. See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 269–70 (Mahoney JA), citing *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 385–6 (Mahoney JA), affirmed on appeal: *Tatmar Pastoral Co Pty Ltd v Housing Commission of New South Wales* (1984) 54 ALR 155; *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, 444 (Meagher JA).

1362 GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 118. See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 560.

1363 See *Pettitt v Dunkley* [1971] 1 NSWLR 376; *King Ranch Australia Pty Ltd v Cardwell Shire Council* [1985] 2 Qd R 182; and *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498, 508 (Thomas J).

1364 *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, 441 (Meagher JA).

1365 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [6.22]–[6.32].

## SUBMISSIONS

### Should the Tribunal have power to withhold its decisions or reasons?

#### *Decisions*

6.39 Almost all of the submissions that addressed this issue were of the view that there should be no power to withhold Tribunal decisions from active parties to proceedings.

6.40 Queensland Advocacy Incorporated observed:<sup>1366</sup>

there can be no reason or justification for denying a party their right to know the decision in a matter. This notion is patently absurd and clearly unworkable, particularly in the case of the adult concerned who may not take kindly to his new guardian's involvement if he has never been notified of it.

6.41 Only three submissions considered it desirable for there to be power to withhold Tribunal decisions.<sup>1367</sup> However, one of those respondents, the Royal College of Nursing Australia, qualified its view by stating that decisions should never be withheld from the adult or a statutory health attorney.<sup>1368</sup>

#### *Reasons*

6.42 The majority of submissions were of the view that there should not be power to displace a person's statutory entitlement to the Tribunal's reasons.<sup>1369</sup>

6.43 However, a significant number of submissions considered this power should be retained, albeit in limited circumstances.<sup>1370</sup> A small number of these submissions further expressed views about the persons from whom reasons may be withheld. Some considered that the power should never permit withholding reasons from an adult.<sup>1371</sup> Others were of the view that the power should apply only to withholding reasons from the adult and not from other active parties to a proceeding.<sup>1372</sup>

6.44 The submissions identified the following factors as being relevant to determining whether or not the Tribunal should have power to withhold reasons:

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1366 Submission 102.

1367 Submissions 60, 67, 74.

1368 Submission 60.

1369 For example, submissions 16, 18, 19, 26, 28, 31, 37, 44, 48, 49, 50, 54, 59, 62, 63, 64, 65, 68, 70, 73, 80, 81, 82, 84, 96, 98, 99, 100, 117, 120, 123, 134, 135, 136, 142, 145, 149, F5, F7, F12, F19, F22.

1370 For example, submissions 1H, 38, 45, 66, 67, 79, 83A, 85, 87, 88, 97, 101, 102, 106, 121, 122, 125, 126, 127, 134, F6, F21. The issue of what criteria should guide the Tribunal in the exercise of any power to withhold decisions and reasons is discussed at para 6.72–6.84 of this Report.

1371 For example, submissions 60, 102.

1372 For example, submissions 74, F14.

- open justice and accountability;
- procedural fairness;
- the adult-focused nature of the guardianship system;
- the right to appeal;
- promoting understanding and acceptance by parties of Tribunal decisions;
- promoting public awareness of, and confidence in, the Tribunal; and
- national legislative uniformity.

#### *Open justice and accountability*

6.45 Several submissions expressed concern that a power to withhold decisions and reasons would be contrary to the principles of open justice and erodes the accountability of the Tribunal.<sup>1373</sup>

6.46 The Aboriginal and Torres Strait Islander Legal Service (Qld South) considered it:<sup>1374</sup>

essential to the proper exercise of the power that is given to the Tribunal, that there is transparency of Tribunal decisions and to that end, for written decisions to be provided by the Tribunal to parties.

6.47 The President of the New South Wales Guardianship Tribunal considered that ‘providing written orders or decisions and reasons for decisions is vital in ensuring accountability and fair process for parties’.<sup>1375</sup>

6.48 A view expressed at a community forum was that the Tribunal is performing a role on behalf of society and so needs to be open and accountable.<sup>1376</sup>

6.49 A journalist considered the obligation to publish reasons for decisions was both the ‘foundation of judicial accountability’ and an ‘important manifestation of the principle [of open justice]’.<sup>1377</sup>

6.50 Many of the submissions that favoured retaining a power to withhold reasons still acknowledged the importance of the principle of open justice.<sup>1378</sup> For example, the

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<sup>1373</sup> Submissions 16, 31, 50, 69, 73, 74, 81, 96, 98, 100, 123, F7, F13, F15.

<sup>1374</sup> Submission 96.

<sup>1375</sup> Submission 137.

<sup>1376</sup> Submission F13.

<sup>1377</sup> Submission 100, quoting New South Wales Chief Justice JJ Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (Paper presented at the Media Law Resource Centre Conference, London, 20 September 2005) 7.

<sup>1378</sup> For example, submissions 1H, 122, 127, F15.

Public Trustee of Queensland stated that:<sup>1379</sup>

open justice is fundamental and when set in the context of the Guardianship system might, with some slight modification, be well served without substantial compromise.

6.51 A view expressed at a forum of advocacy groups was that reasons are a reflection of a decision-maker's ability and are essential for accountability.<sup>1380</sup>

#### *Procedural fairness*

6.52 A number of submissions considered that the giving of reasons plays a significant role in ensuring procedural fairness has been afforded to the parties.<sup>1381</sup> Caxton Legal Centre commented:<sup>1382</sup>

we also support an open and accountable justice system and believe that evidence – especially when very serious and prejudicial allegations are made about people – needs to be able to be tested and findings noted on the record.

6.53 A number of respondents, all parties to Tribunal proceedings, considered that without access to the Tribunal's reasons for the decisions, they would have been unable to ascertain whether issues had been properly addressed, and which evidence was relied upon or tested by the Tribunal.<sup>1383</sup> Some of these respondents suggested that, in their cases, the reasons for the decision revealed that the Tribunal had relied upon inaccuracies<sup>1384</sup> and 'wishy-washy' evidence.<sup>1385</sup>

#### *Adult-focused nature of the guardianship system*

6.54 Many respondents advanced arguments in favour of retaining power to withhold reasons due to the vulnerability of adults with impaired capacity. Australian Lawyers Alliance considered:<sup>1386</sup>

The guardianship system in Queensland is, of its nature, designed to protect the adult and must have as its primary concern avoiding harm to the adult.

6.55 A significant number of submissions, including one from the Public Advocate, and views expressed at a focus group with the Tribunal, highlighted the potential for reasons for a decision by the Tribunal to cause an adult physical or emotional harm.

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1379 Submission 127.

1380 Submission F15.

1381 For example, submissions 31, 73, 87, 98, 101, 124, 137, F6, F10.

1382 Submission 124.

1383 For example, submissions 31, 37, 141, 142.

1384 Submissions 16, 31, 92, 142.

1385 Submission 37.

1386 Submission 97.

These respondents argued that the nature of the Tribunal's jurisdiction means that power to withhold reasons for decisions should be retained in these circumstances.<sup>1387</sup>

6.56 Disability Services Queensland observed:<sup>1388</sup>

Some adults, the subject of an application may have challenging behaviour that means they are at risk of self-harm or of causing harm to others. Should the reasons for the decision cause them distress, this may give rise to behaviour that results in them harming themselves or becoming violent to others.

6.57 Some submissions argued that safeguarding an adult's rights and interests includes preserving relationships in the adult's life, such as with family, friends or treating medical professionals. Power to withhold reasons is necessary where disclosure of those reasons would damage or place in jeopardy these relationships.<sup>1389</sup> This view was rejected, however, by other submissions as far as it relates to preserving therapeutic relationships.<sup>1390</sup>

6.58 Several of the submissions that favoured the Tribunal having no power to withhold decisions and reasons considered that the adult-focused nature of the guardianship system was insufficient justification for permitting this sort of confidentiality.<sup>1391</sup> One parent of an adult with impaired capacity stated:<sup>1392</sup>

To grant power to the Tribunal to make reasons confidential goes against the very basis of open justice and procedural fairness. While it is acknowledged that the nature of the Guardianship System is designed to protect the rights and privacy of the Adult; those reasons are considered to be insufficient to warrant a Tribunal making such confidential order. ... It is accepted that there may be isolated cases where confidentiality may be appropriate. However, on balance, this would not be the case and to legislate in favour of a small minority even though they might experience some disadvantage cannot be substantiated in the Australian context.

6.59 Other respondents considered that the rights and interests of adults would, in fact, be advanced further by the Tribunal making its reasons available to parties.<sup>1393</sup> For example, Caxton Legal Centre commented:<sup>1394</sup>

given that guardianship law affects the most vulnerable of people, it is critical for the relevant decision-makers in this jurisdiction to be accountable for their decisions...

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1387 For example, submissions 1H, 38, 67, 85, 97, 121, 126, F6, F17. This view was also expressed by the President of the Tribunal: information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

1388 Submission 125.

1389 For example, submissions 66, F6, F11.

1390 For example, submissions 102, 124, 149, F7, F15.

1391 For example, submissions 73A, 102.

1392 Submission 73A.

1393 Submissions 100, 124, 149, F6, F9, F20.

1394 Submission 124.

### *The right to appeal*

6.60 A large number of submissions highlighted the importance of decisions and reasons to the appeals process.<sup>1395</sup> The Department of Justice and Attorney-General considered that the Tribunal's decisions and reasons were:<sup>1396</sup>

critical documents for parties to determine whether they may take action ... in response to the Tribunal's decision in a matter.

6.61 Caxton Legal Centre noted that 'appeal rights would be seriously weakened if parties had no knowledge of the case to answer in an appeal.'<sup>1397</sup> It also observed that the lack of legal representation in many hearings impacted adversely on the evidence people present. In these circumstances, where parties wished to obtain legal advice about the prospects of appealing a decision or resisting an appeal, lawyers need access to Tribunal decisions and reasons to be able to provide adequate advice to their clients.

6.62 Many people who expressed views at community forums also considered that the provision of reasons was crucial to the appeals process.<sup>1398</sup>

6.63 Even those submissions that supported a limited power to withhold reasons were anxious to ensure that this did not occur where a person was considering an appeal.<sup>1399</sup> Queensland Aged and Disability Advocacy commented:<sup>1400</sup>

The standards in the criteria would have to be extremely high, to ensure any aggrieved party's right to appeal is not compromised.

### *Promoting understanding and acceptance by parties*

6.64 Several respondents noted the importance of decisions and reasons in promoting acceptance of the Tribunal's orders by those involved in a proceeding.<sup>1401</sup> One respondent commented:<sup>1402</sup>

People have a right to be able to get on with their lives. A decision with reasons in writing is something they can sit down, read and understand how it is arrived at, and be more likely to accept it.

One of the biggest hurdles for people with an incapacity, any incapacity is the acceptance of same, and the impact it makes on their day to day living. The withholding of a decision or reason for same just exasperates their situation and their likely understanding of its effect on the total situation.

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1395 For example, submissions 19, 53, 63, 65, 74, 82, 101.

1396 Submission 126.

1397 Submission 124.

1398 For example, submissions F5, F6, F7, F9, F13, F22.

1399 For example, submissions 106, 121.

1400 Submission 106.

1401 Submissions 16, 48, 100, 101, 120.

1402 Submission 48.

6.65 The Department of Justice and Attorney-General also recognised that parties participating in a hearing would benefit from receiving reasons for the decision.<sup>1403</sup>

These documents are useful to explain to the adult and other parties, the Tribunal's process at arriving at the decision and the relevant facts that were relied upon when arriving at the decision.

6.66 Several respondents argued that the denial of reasons for a decision might further inflame disgruntled parties with possible adverse consequences for the adult or other parties.<sup>1404</sup>

6.67 An adult with a mental illness considered that adults with impaired capacity do not necessarily need to be protected from information.<sup>1405</sup> This view was also expressed at a focus group of people with dementia.<sup>1406</sup>

#### *Promoting public awareness of, and confidence in, the Tribunal*

6.68 Numerous submissions suggested that the giving of decisions and reasons would promote public awareness of, and confidence in, the operation of the guardianship system.<sup>1407</sup> Endeavour Foundation observed:

If people do not know the reasons behind decisions of the Tribunal there will be continued suspicion about the process and the legislation in general.

6.69 Another respondent commented that 'preventing people from understanding why decisions were made does little to inspire justice, honesty or the best interests of the parties involved.'<sup>1408</sup> It was suggested by one respondent that if the Tribunal 'is open and transparent in its conduct, it is more likely to obtain community trust.'<sup>1409</sup>

6.70 The need for increased community awareness of the Tribunal's processes and the reasoning behind its decision-making also received support at community forums and focus groups.<sup>1410</sup>

#### *National legislative uniformity*

6.71 Endeavour Foundation noted that Queensland was the only Australian jurisdiction where Tribunal decisions and reasons may be withheld. It commented that 'it is difficult to understand why Queensland legislation is currently out of step with

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1403 Submission 126.

1404 For example, submissions F6, F9.

1405 Submission F21.

1406 Submission F22.

1407 Submissions 16, 48, 82, 98, 101, 120.

1408 Submission 16.

1409 Submission 48.

1410 Submissions F12, F22.

every other jurisdiction in Australia on this point.’<sup>1411</sup> This comment was also made by several other respondents.<sup>1412</sup>

### **What criteria should guide the Tribunal’s power to withhold decisions and reasons?**

6.72 The vast majority of submissions that supported retaining power to withhold Tribunal reasons for decisions were also in favour of adopting legislative criteria to guide the exercise of that discretion.

6.73 The submissions revealed two themes. First, the current right to written reasons under section 158 of the *Guardianship and Administration Act 2000* (Qld) should only be displaced rarely.<sup>1413</sup> Although respondents suggested different criteria to guide this power, there was consensus that the making of such an order was a grave step and should occur only in exceptional circumstances. For example, the Department of Justice and Attorney-General recommended that the current legislative criterion be narrowed because:

a party’s right to the Tribunal’s reasons is an important right and should only be interfered with in the least restrictive manner.

6.74 Second, the current legislative criterion that permits reasons to be withheld ‘because of the confidential nature of particular information or matter or for another reason’ is too wide.<sup>1414</sup> For example, the Public Advocate described the current provision as ‘inappropriate’ and ‘lacking in rigour as a test.’<sup>1415</sup>

6.75 The various criteria suggested by respondents are considered below.

#### ***Serious harm to the health of the adult or risk to the safety of a person***

6.76 Many submissions, including those from the Public Advocate and the Adult Guardian, as well as views expressed at a focus group with members of the Tribunal, supported the inclusion of a criterion to withhold reasons where disclosure may cause physical or emotional harm to the adult.<sup>1416</sup>

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1411 Submission 120.

1412 For example, submissions 62, 73, 98, 119, 120.

1413 For example, submissions 83A, 97, 101, 102, 106, 119, 124, 126, 134, F15.

1414 For example, submissions 1H, 106.

1415 Submission 1H.

1416 Submissions 1H, 38, 67, 88, 97, 102, 122, 124, 125, 127, F15, F17, F21. Note that the Public Trustee of Queensland supported the retention of the current reference to ‘confidential nature of the information’, if the new provision also included the additional criteria of harm to the health of the adult or risk to the safety of a person.

6.77 Several submissions also supported the additional criterion, contained in the *Mental Health Act 2000* (Qld), of risk to the safety of another person.<sup>1417</sup> Disability Services Queensland commented:

it would seem appropriate for the Tribunal to have the ability to make an order restricting disclosure should the circumstances satisfy the Tribunal that the disclosure would ‘cause serious harm to the health or wellbeing of the adult or put the safety of someone else at risk’. This is similar to provisions included in the *Mental Health Act 2000*.

6.78 Views expressed at community forums also revealed support for the criteria contained in the *Mental Health Act 2000* (Qld).<sup>1418</sup> Some of the submissions that supported this approach specifically commented that the criteria should include an express reference to the likelihood of *serious* harm occurring.<sup>1419</sup>

### **Harm to the adult only**

6.79 Several submissions considered that the only criterion that should guide the power to withhold reasons should be the likelihood of harm to the adult.<sup>1420</sup> One respondent commented that:<sup>1421</sup>

the only time that the reasons for decisions is not given to someone should be when the person that is involved is going to have a serious mental or physiological problem ...

### **Separate criteria for withholding reasons from an adult**

6.80 The submissions revealed some support for more stringent criteria where it is proposed to withhold reasons from an adult with impaired capacity.<sup>1422</sup> The Public Advocate noted:<sup>1423</sup>

There should rarely be circumstances when an adult will be denied reasons. It is suggested that this could only be justified in cases where there is a real risk to the health or safety of the adult or other person/s. Again, this would recognise that guardianship proceedings are about the adult and it is the adult’s rights and interests under consideration.

6.81 Queensland Advocacy Incorporated observed:<sup>1424</sup>

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1417 Submissions 122, 125, 127, F10, F15.

1418 See F10, F11, F14.

1419 Submission F14.

1420 For example, submissions 38, 67, 88, 97, F21.

1421 Submission 88.

1422 For example, submissions 1H, 85, 102, 106, 122.

1423 Submission 1H.

1424 Submission 102.

at least for the adult in question, the right to know how the decision was reached should be virtually absolute with a presumption that reasons must be presented upon request and very compelling independently verified evidence of some harm that could arise from it the only exception.

6.82 Some submissions considered that the current legislative criterion, enabling reasons to be withheld from an adult where their disclosure might be prejudicial to the physical or mental health or wellbeing of the adult, is appropriate.<sup>1425</sup>

### **Other criteria**

6.83 Some submissions argued that any criteria proposed for inclusion in the legislation should not be overly prescriptive; rather the criteria should be sufficiently flexible to allow the Tribunal to deal with each case individually.<sup>1426</sup> Attendees at a community forum commented that in many cases it might be a fine line between the decision to give reasons and the decision to withhold reasons and that the Tribunal should be trusted to do the right thing.<sup>1427</sup> Another person commented that ‘one size does not fit all’.<sup>1428</sup>

6.84 Other suggestions for possible criteria included:

- the best interests of the adult;<sup>1429</sup>
- the express wishes of the adult;<sup>1430</sup>
- the privacy of the adult;<sup>1431</sup>
- the preservation of therapeutic relationships between the adult and treating medical professionals;<sup>1432</sup> and
- the preservation of relationships between the adult and family members, friends and carers.<sup>1433</sup>

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1425 Submissions 85, 122.

1426 For example, submissions 103, F10, F13, F21.

1427 Submission F10.

1428 Submission F13.

1429 Submissions 45, 67, 79, F13, F22.

1430 Submission 85.

1431 Submission 60.

1432 Submission F16.

1433 Submissions F6, F11, F22.

## THE COMMISSION'S VIEW

### No power to withhold reasons

6.85 In its Discussion Paper, the Commission expressed serious reservations about withholding reasons for a Tribunal decision from the active parties to a proceeding.<sup>1434</sup> Taking into account the nature of the guardianship system, the Commission also initially considered, however, that there may be exceptional circumstances where it might be appropriate for such an order to be made.

6.86 The Commission is now of the view that active parties should always have a right to know the reasons for the Tribunal's decision and that there should not be power to withhold those reasons from them. The Commission was persuaded by the fact that this was the view of the majority of respondents, and that the arguments advanced in favour of this position by a number of these submissions were convincing. This approach is also consistent with one of the guiding principles identified in Chapter 3 of this Report that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>1435</sup>

6.87 The Commission agrees with those submissions that emphasised the critical role that the giving of reasons plays in terms of ensuring accountability in decision-making and promoting community confidence in the Tribunal. It also gives significant weight to the arguments that the provision of reasons enhances the fairness of the decision-making process and ensures that active parties to a proceeding have a clear understanding of why the Tribunal reached its decision.

6.88 The Commission also notes the adverse implications for a person's right of appeal if he or she is not informed why a particular decision has been made. It is also conscious that the giving of reasons is regarded as a normal incident of the judicial process<sup>1436</sup> and as being 'of the essence of the administration of justice'.<sup>1437</sup>

6.89 The Commission acknowledges that a large number of submissions were of the view that the power to withhold reasons should be retained. However, the Commission considers it is significant that many of these submissions were of the view that this power should be exercised only in very limited or exceptional circumstances.

6.90 Further, the rationale behind many of these submissions was that the disclosure of reasons might result in either physical or psychological harm to the adult. The Commission accepts that on occasions there may be adverse consequences for an adult that flow from disclosure of reasons, but, as discussed above, it can be argued that an adult's rights and interests are best advanced through the high quality decision-

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1434 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [6.69].

1435 See para 3.156, 3-2 of this Report.

1436 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); Justice MD Kirby, 'Ex Tempore Judgments' (1995) 25 *Western Australian Law Review* 213, 220.

1437 See para 6.29 and note 1343 of this Report.

making that is promoted by the requirement to disclose reasons for decisions. In addition, ensuring that the reasons for decisions are not withheld from the adult is in accordance with the Commission's guiding principle identified in Chapter 3 of this Report that the adult is entitled to know and have access to information about himself or herself.<sup>1438</sup> This approach is also more consistent with the priority given by the guardianship system to promoting an adult's autonomy and participation in matters that affect him or her.

6.91 The Commission also considers that there are other strategies that can be employed to address possible risks of harm to the adult (or other persons), such as delaying the notification of decisions rather than withholding them permanently, or facilitating disclosure of the decisions or reasons in a sensitive manner. These recommendations are discussed further below.<sup>1439</sup> The Commission notes, too, that there are other areas of law that are designed specifically to deal with those situations where the concern is that a person's safety may be at risk.<sup>1440</sup>

6.92 It could also be argued that concerns about harm to the adult or other persons from disclosure of reasons are overstated given that a confidentiality order permanently depriving an active party of reasons for the decision has been made only once in the Tribunal's history.<sup>1441</sup>

6.93 A final argument in favour of removing the power to withhold reasons for a Tribunal decision is that this would also harmonise Queensland law with all of the other Australian States and Territories. The Commission is not aware of any difficulties experienced in the other jurisdictions where the reasons for decisions cannot be withheld.

6.94 Accordingly, section 109 of the *Guardianship and Administration Act 2000* (Qld) should be amended to remove the Tribunal's power to give directions, by order, prohibiting the disclosure of the Tribunal's reasons to some or all of the active parties to a proceeding. That amendment should also include the omission of section 109(3), which imposes an additional criterion for withholding the Tribunal's reasons from the adult. Further, section 158(3) of the *Guardianship and Administration Act 2000* (Qld), which refers to the displacement of the requirement to give copies of a Tribunal's reasons for decision, should also be amended.

6.95 The Commission also considers that a copy of the written reasons given for a decision should be available to any person upon request, in a form that does not breach the prohibition recommended in Chapter 7 on publication of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published. As noted earlier in this chapter, the public

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1438 See para 3.156, 3-3 of this Report.

1439 See para 6.111–6.114, 6.123–6.127 of this Report.

1440 *Domestic and Family Violence Protection Act 1989* (Qld); *Peace and Good Behaviour Act 1982* (Qld).

1441 See para 6.11 of this Report.

availability of reasons is an important aspect of open justice.<sup>1442</sup> The Commission recommends that section 158(4) of the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

### **No power to withhold decisions**

6.96 The Commission endorses the preliminary view expressed in its Discussion Paper that there should be no power to withhold a Tribunal decision from those people currently entitled to be notified.<sup>1443</sup> The arguments outlined above as to why there should not be power to withhold reasons apply with even greater force in relation to the provision of Tribunal decisions. There was overwhelming support for this position from submissions.

6.97 Sections 109 and 158 of the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.

6.98 In addition, the Commission considers that a copy of the Tribunal's decision should be available to any person upon request, provided the prohibition recommended in Chapter 7 of this Report on publication of information about a Tribunal proceeding is not contravened by doing so.<sup>1444</sup> Section 158(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.

## **SHOULD THE TRIBUNAL HAVE POWER TO PLACE 'RESTRICTIONS' ON DISCLOSURE OF DECISIONS AND REASONS?**

### **The Discussion Paper**

6.99 Having recommended that there be no power to withhold the Tribunal's decisions or reasons, an issue arises as to whether any lesser restrictions on disclosure should be permitted. In its Discussion Paper, the Commission identified that the reference in the current guardianship legislation to 'restricting ... disclosure' could permit the Tribunal to:<sup>1445</sup>

- withhold part of the content of a decision or reasons; or
- impose conditions upon the disclosure of a decision or reasons.

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1442 See para 6.29 of this Report.

1443 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [6.68], [6.71].

1444 See para 7.204 of this Report.

1445 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [6.33]–[6.40].

## Should the Tribunal have power to withhold part of a decision or reasons?

6.100 A power to restrict the disclosure of a decision or reasons might permit a copy of these documents to be given to some or all of the active parties with certain material omitted.

### **Legislation in other jurisdictions**

6.101 Western Australia is the only jurisdiction that makes specific provision for the content of reasons for decisions given by its State Administrative Tribunal to be restricted in this way. Section 80 of the *State Administrative Tribunal Act 2004* (WA) provides that the giving of reasons must be done in a way that:

- is consistent with any order that was made under section 61(2) to hold the proceeding in private and in the absence of a particular person; and
- gives effect to the Tribunal's general obligation not to disclose 'protected matter' under section 160.

6.102 These provisions were considered in detail earlier in this chapter.<sup>1446</sup>

### **Submissions**

6.103 Few submissions addressed this issue.<sup>1447</sup> Some respondents supported the inclusion of a provision enabling the Tribunal to impose conditions to restrict disclosure of decisions and reasons on the basis that restriction was a preferable alternative to a complete prohibition on disclosure.<sup>1448</sup>

### **The Commission's view**

6.104 The Commission has earlier recommended that information received by, or documents before, the Tribunal may be made the subject of a confidentiality order and withheld from some or all of the active parties to a proceeding.<sup>1449</sup> In these circumstances, it may be necessary for the reasons for a decision to be written in such a way that does not reveal the relevant information or document. The Commission accepts that the omission of certain material from the reasons for a decision may be a necessary incident of imposing confidentiality in relation to that material.

6.105 The Commission does not consider, however, that it is desirable for there to be a separate power that permits the further withholding of part of the content of a decision or the reasons for that decision. The arguments that militate strongly against

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<sup>1446</sup> See para 6.14–6.18 of this Report.

<sup>1447</sup> For example, submissions 1H, 85, 122, 127, 134.

<sup>1448</sup> Submissions 1H, 27, 134.

<sup>1449</sup> See para 5.147 of this Report.

withholding a decision or reasons for a decision generally<sup>1450</sup> also apply to the omission of references to material relied upon by the Tribunal from those decisions and reasons.

6.106 Accordingly, section 109 of the *Guardianship and Administration Act 2000* (Qld) should be amended to remove the Tribunal's power to restrict disclosure to some or all active parties in a proceeding of its decision or reasons. Further, section 158(3) of the *Guardianship and Administration Act 2000* (Qld), which refers to the displacement of the requirement to give copies of a Tribunal's decision or reasons, should be amended accordingly.

### **Should the Tribunal have power to impose conditions upon the disclosure of a decision or reasons?**

6.107 The current power of the Tribunal to restrict disclosure of a decision or reasons may permit the imposition of conditions as to how that disclosure occurs. An example is that the reasons for a decision may be disclosed to a person only if he or she is accompanied by appropriate support, such as counselling, to minimise any distress that might be caused by the disclosure of this information.

#### **Legislation in other jurisdictions**

6.108 None of the Australian jurisdictions have provisions in their guardianship legislation that permit the Tribunal to impose conditions on how decisions or reasons are disclosed to active parties. However, section 55 of the *Guardianship and Administration Act 1993* (SA) does require the South Australian Guardianship Board to give parties a written statement, where possible in the person's preferred language, outlining the effect of any decision or order of the Board and any rights of appeal.<sup>1451</sup> Further, if the person is:<sup>1452</sup>

illiterate, or too disturbed to read and comprehend the statement, the Board must cause such steps (if any) as may be practicable in the circumstances to be taken to have the information contained in the statement conveyed to the person.

#### **Submissions**

6.109 There was widespread support at community forums for Tribunal decisions and reasons to be disclosed to adults in such a way that the information is understood and any harm or distress to the adult minimised.<sup>1453</sup> Many respondents were of the view that adults would benefit from knowing the decision made in their case and the reasons for it, provided that the information was conveyed to them in an appropriate manner. Suggested methods of communicating this information included:

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1450 See para 6.87–6.93 of this Report.

1451 *Guardianship and Administration Act 1993* (SA) s 55(1)–(2).

1452 *Guardianship and Administration Act 1993* (SA) s 55(3).

1453 For example, submissions F5, F6, F8, F9, F12, F22.

- decisions and reasons being delivered in the presence of a support worker or treating medical professional;<sup>1454</sup>
- the engagement by the Tribunal of a mental health worker to provide advice and assistance to the Tribunal as to how best to deliver its decisions and reasons without harm to the adult; and<sup>1455</sup>
- reasons being written in language that was not likely to inflame any pre-existing hostilities between those people involved in the adult's life.<sup>1456</sup>

6.110 The Commission understands that in a 'small number of cases' the Tribunal has made directions about the circumstances in which disclosure of the written reasons to the adult should occur, including for example, disclosure in the presence of a particular person.<sup>1457</sup> The Tribunal considered that an express power in the legislation enabling the Tribunal to direct the procedure for disclosure of its reasons would be useful.<sup>1458</sup>

### **The Commission's view**

6.111 The Commission recognises that in a jurisdiction such as the guardianship system, it is desirable for information that may cause distress or harm to be disclosed in a way that minimises unfavourable outcomes. This is particularly so in relation to the adult who should have appropriate support when receiving a decision or reasons if that information is likely to affect him or her adversely.

6.112 The Commission considers, however, that 'restricting' disclosure by way of imposing conditions is not the most desirable way to address these concerns. This is because such an approach implies that access to decisions and reasons may be conditional or limited. The same arguments against withholding decisions and reasons apply in respect of conditional disclosure.<sup>1459</sup> Accordingly, as already recommended,<sup>1460</sup> section 109 of the *Guardianship and Administration Act 2000* (Qld) should be amended to remove the Tribunal's power to restrict disclosure to some or all active parties in a proceeding of its decision or reasons. Section 158(3) of the

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1454 Submission F8

1455 Ibid.

1456 For example, submissions F5, F6, F9.

1457 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007. The President noted that these directions had been given under the Tribunal's general powers to order its own procedures. See ss 104 and 110 of the *Guardianship and Administration Act 2000* (Qld) which provide, respectively, that procedure for a Tribunal proceeding is within the presiding member's discretion (unless otherwise provided) and that the President or presiding member may give directions about the procedure to be followed for a particular proceeding that has started.

1458 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

1459 See para 6.87–6.93, 6.96 of this Report.

1460 See para 6.106 of this Report.

*Guardianship and Administration Act 2000* (Qld) should also be amended as discussed above.<sup>1461</sup>

6.113 The Commission instead prefers the approach identified in submissions of *facilitating* the disclosure of decisions and reasons in an appropriate manner. Such an approach is more consistent with the Commission's earlier recommendations because it does not countenance the limitation of disclosure of this information but rather focuses on how that disclosure can occur in a sensitive and appropriate manner. This is also consistent with the Commission's recommendations in relation to facilitation of disclosure of information and documents before the Tribunal in Chapters 4 and 5.<sup>1462</sup>

6.114 Accordingly, the Commission considers that the Tribunal should give consideration as to the way in which its decisions and reasons are disclosed to the adult and other active parties and whether it is desirable in certain cases for that disclosure to be facilitated in some way. In particular, it may wish to give consideration to how this information is disclosed where it considers it may pose a risk of harm to the adult or another person. The Commission does not consider it necessary or desirable to include a provision to this effect in the legislation. What is required in each case will vary significantly and the steps to be taken are best determined as a matter of practice by the Tribunal.

## SHOULD THE TRIBUNAL HAVE POWER TO DELAY NOTIFICATION OF A DECISION?

6.115 Having decided that there should not be power to withhold a Tribunal's decision, or the reasons for a decision, from those persons entitled to receive this information, an issue arises as to whether there should be a discretion to *delay* notification of its decision. At present, the Tribunal is required to give its decision within a reasonable time after the matter is heard, and to give reasons for that decision, if requested by a person aggrieved by a decision or if directed by the President, within 28 days from that request or direction.<sup>1463</sup>

6.116 The Commission is aware of one matter where the Tribunal has delayed notifying active parties of a decision.<sup>1464</sup> The case involved allegations of rape and sexual assault by the step-father of a young woman with an intellectual disability. An application was made to the Tribunal for the appointment of a guardian and administrator for the woman. Upon notification of the application, the step-father made threats to relocate the woman to a remote area where she would not be found.

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1461 Ibid.

1462 See para 4.276–4.279, 5.221–5.225 of this Report.

1463 See para 6.4 of this Report.

1464 Inspection by the Commission of files of the Guardianship and Administration Tribunal, 7–8 December 2006; and information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

6.117 In an attempt to protect the woman from further abuse, the Adult Guardian obtained a warrant of entry to the family home for the purposes of removing her. The Adult Guardian was close to executing the warrant at the time of the Tribunal hearing.

6.118 At the hearing, the Tribunal appointed the Adult Guardian and the Public Trustee of Queensland as guardian and administrator respectively for the woman. Due to concerns the step-father and mother would abscond with the woman, the Tribunal made a confidentiality order prohibiting notification to them of the decision to appoint substitute decision-makers, until the warrant to remove the woman was executed. That occurred five days later, at which time the confidentiality order was lifted.

6.119 The Commission understands that the Tribunal considers the power to delay notification of the decision in these circumstances is important given the ‘extreme risk’ that may be involved.<sup>1465</sup>

## Submissions

6.120 Although the Commission did not seek submissions on this issue specifically, two respondents considered it was desirable for the Tribunal to have a discretion to delay the notification of its decisions.<sup>1466</sup> The Department of Justice and Attorney-General noted:<sup>1467</sup>

situations could arise where the adult’s health, well-being or safety could be placed at risk with the communication of the decision to a party, such as a party absconding from the jurisdiction with the adult to avoid the effect of the decision.

6.121 This view was supported by Queensland Health who recommended that ‘the Tribunal retain its discretionary power to delay the release of a decision, as a last resort, if it is reasonable to conclude that its release will result in further harm to the adult.’<sup>1468</sup> An example given of when such a discretion may be necessary is where:<sup>1469</sup>

A lack of available accommodation and support options can result in the adult having to remain in an unsafe environment until other options are sourced. If the release of the decision could not be delayed whilst other accommodation options were sourced, vulnerable people could be placed at further risk.

6.122 The Tribunal also considered that, although it would be rarely exercised, the power to delay disclosure of the reasons for its decision should be retained given the possibility that disclosure may cause substantial harm to the adult.<sup>1470</sup> The President of the Tribunal gave, as an example of where such a power might be needed, the situation

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<sup>1465</sup> Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

<sup>1466</sup> Submissions 87A, 87B, 126. Both respondents considered the issue of delay in relation to decisions only as they preferred the retention of a discretion to make the Tribunal’s reasons confidential.

<sup>1467</sup> Submission 126.

<sup>1468</sup> Submission 87B. See also submission 87A.

<sup>1469</sup> Submission 87B. See also submission 87A.

<sup>1470</sup> Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

of an adult suffering an acute mental health episode that was expected to continue beyond the 28 day period in which the Tribunal has to give a copy of its reasons.<sup>1471</sup> The Tribunal was also of the view that there should be some flexibility permitted in the period of time for which notification of the decision or disclosure of the reasons for that decision can be delayed.<sup>1472</sup>

### The Commission's view

6.123 The Commission considers it would be undesirable if the requirement to disclose the Tribunal's decision allowed persons to take steps to defeat the effect of the decision the Tribunal has made. Similarly, it would be undesirable for the disclosure of this information to have serious adverse consequences for an adult's safety. Accordingly, the Commission considers that the Tribunal should have a discretion to delay, by order, notification of its decision to one or more persons who are otherwise entitled to be notified of the decision to enable substitute decision-makers or government officials to put in place arrangements to manage these risks.

6.124 The Commission considers that the discretion to delay notification of a decision should be exercised only in exceptional circumstances. The Commission considers the Tribunal should have power to delay notification if it is necessary to avoid serious harm to a person or the effect of the Tribunal's decision being defeated.

6.125 In terms of what period of delay should be permitted, the Commission is of the view that a decision should be disclosed as soon as practicable, but in any event, within a period of fourteen days from when it is otherwise required to be given.<sup>1473</sup> The imposition of such a delay is a significant step so the Commission does not consider it appropriate for this period of time to be extended. Fourteen days is sufficient time to put in place arrangements to manage the risks that justify delaying the notification of a decision. The Commission notes that this recommendation requires amendment to section 156 of the *Guardianship and Administration Act 2000* (Qld), which deals with time for giving decisions, to permit this short delay.

6.126 The Commission also notes that as a consequence of this recommendation, it will be necessary to amend section 164A of the *Guardianship and Administration Act 2000* (Qld). That section provides that a notice of appeal must be filed within 28 days after the date of the Tribunal decision, or from the date of the written reasons for the decision.<sup>1474</sup> The Commission considers the appeal provisions should provide, as an exception to this general position, that when notification of a decision to a person has been delayed, the time limit for appeal of the decision commences when the last person who is entitled to appeal is notified of the decision or from the date of the written

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1471 Information provided by the President of the Guardianship and Administration Tribunal, 5 and 20 June 2007. The various time limits for the giving of copies of reasons for a decision are discussed above: see para 6.4 of this Report.

1472 Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

1473 See para 6.4, 6.115 of this Report.

1474 The Commission notes that the Tribunal's practice of notifying parties of its decision and reasons by post will impact on active parties' actual time for appeal. The timeframe for appeals is an issue for consideration in stage two of the Commission's review.

reasons for the decision, whichever is later. This will ensure that in the rare circumstance where notification of the decision is delayed by the Tribunal, there will be one period of time applicable to all relevant persons in which to appeal.

6.127 However, the Commission considers it unnecessary to provide for the delay of giving reasons for the Tribunal's decision beyond the 28 days already provided in the legislation.<sup>1475</sup>

## FUTURE ISSUES

6.128 As a result of its consultation process, two significant issues relating to the Tribunal's decisions and reasons have been identified by the Commission. These issues do not raise questions of confidentiality and so will be examined in stage two of the review.

6.129 The first issue is whether the Tribunal should be required to produce written reasons for all of its decisions. Section 157 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal must produce written reasons for its decision if, within 28 days of notification of the decision, a person aggrieved by the decision makes a written request for reasons. Many respondents considered that parties to a hearing should not have to make a request for written reasons.

6.130 The second issue is whether the time for requesting written reasons for a decision of the Tribunal, which is currently 28 days, is sufficient.

## RECOMMENDATIONS

6.131 The Commission makes the following recommendations:

### ***Disclosure of decisions and reasons***

**6-1 The *Guardianship and Administration Act 2000* (Qld) should not include a provision, such as the current provision in section 109(2)(d)(iii), permitting the Tribunal to give directions, by order, prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of the Tribunal's decision or reasons. The provisions in sections 109(3) and 158(3) of the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.<sup>1476</sup>**

<sup>1475</sup> *Guardianship and Administration Act 2000* (Qld) s 157(1), (5).

<sup>1476</sup> See para 6.85–6.95, 6.104–6.106, 6.111–6.112 of this Report.

- 6-2 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) that the Tribunal must give a copy of its decision and any written reasons for its decision to any person, upon request, provided the prohibition recommended in Chapter 7 of this Report on publication of information about proceedings is not contravened. The provision in section 158(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.<sup>1477</sup>
- 6-3 The Tribunal should give consideration to the way in which its decision and reasons are disclosed to the adult and other active parties and whether it is desirable that disclosure be facilitated in some way in particular cases.<sup>1478</sup>

#### ***Delaying notification of decisions***

- 6-4 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order, delay notification of its decision to a person otherwise entitled to notification if it is necessary to avoid serious harm to a person or the effect of the Tribunal's decision being defeated. The period of time for which notification of decisions may be delayed should be as short as practicable but no longer than 14 days after the time the Tribunal is otherwise required by the legislation to give its decision. Section 156 of the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.<sup>1479</sup>
- 6-5 Section 164A of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide, as an exception to the usual position, that where the Tribunal has delayed notification of its decision to a person to a particular day, the time limit for appeal of the decision commences on the date the last person who is entitled to appeal the decision is notified of the Tribunal's decision, or the date of the written reasons for the decision, whichever is the later.<sup>1480</sup>

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1477 See para 6.95, 6.98 of this Report.

1478 See para 6.113–6.114 of this Report.

1479 See para 6.123–6.125 of this Report.

1480 See para 6.126 of this Report.

# Chapter 7

## Publication of Tribunal proceedings

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## THE LAW IN QUEENSLAND

7.1 As part of its review of the confidentiality provisions of the guardianship legislation, the Commission considered those provisions that restrict the publication of Tribunal proceedings.

7.2 There are two provisions that address this issue, namely, sections 109 and 112 of the *Guardianship and Administration Act 2000* (Qld). It is convenient to deal with section 112 first, because it has the wider operation.

### Section 112

7.3 Section 112(3) of the *Guardianship and Administration Act 2000* (Qld) contains two prohibitions that restrict the way in which Tribunal proceedings may be reported. First, it prohibits the publication of information about a Tribunal proceeding.<sup>1481</sup> This includes information given before the Tribunal, matters contained in documents given to the Tribunal, and the Tribunal's decisions and reasons.<sup>1482</sup> Second, it prohibits the disclosure of the identity of a person involved in a Tribunal proceeding.<sup>1483</sup> A person 'involved in a proceeding' includes a person:<sup>1484</sup>

- who makes an application in the proceeding to the Tribunal;
- about whom an application is made in the proceeding;
- who is an active party in the proceeding;<sup>1485</sup>
- who gives information or documents to a person performing a function under the Act relevant to the proceeding; and
- who appears as a witness at the hearing of the proceeding.

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1481 *Guardianship and Administration Act 2000* (Qld) s 112(3).

1482 *Guardianship and Administration Act 2000* (Qld) s 112(4).

1483 *Guardianship and Administration Act 2000* (Qld) s 112(3).

1484 *Guardianship and Administration Act 2000* (Qld) s 112(4).

1485 Section 119 of the *Guardianship and Administration Act 2000* (Qld) provides that the following people are an active party for a proceeding:

- the adult;
- the applicant (if not the adult);
- any proposed guardian, administrator or attorney for the adult if the proceeding is for the appointment or reappointment of such person;
- any current guardian, administrator or attorney for the adult;
- the Adult Guardian;
- the Public Trustee of Queensland; and
- any other person joined as a party to the proceeding.

7.4 The Tribunal may make an order permitting the publication of information about a proceeding or the disclosure of a person's identity if it is satisfied that to do so would be in the public interest.<sup>1486</sup> For example, the Tribunal has used this provision to make orders allowing the publication of de-identified Tribunal decisions on the AustLII website.<sup>1487</sup>

7.5 A person will also be permitted to publish this information, or to disclose a person's identity, if he or she has a reasonable excuse.<sup>1488</sup>

7.6 Section 112 relevantly provides:<sup>1489</sup>

**112 Publication about proceeding or disclosure of identity**

- (1) If the tribunal is satisfied publication of information about a proceeding is in the public interest, the tribunal may, by order, permit publication of the information.
- (2) If the tribunal is satisfied publication of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit disclosure of the person's identity.
- (3) A person must not, without reasonable excuse, publish information about a proceeding, or disclose the identity of a person involved in a proceeding, unless the tribunal has, by order, permitted the publication or disclosure.

Maximum penalty—200 penalty units.

...

- (4) In this section—

...

*information*, about a proceeding, includes—

- (a) information given before the tribunal; and
- (b) matters contained in documents filed with, or received by, the tribunal; and

<sup>1486</sup> *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

<sup>1487</sup> These decisions can be accessed at the AustLII website <<http://www.austlii.edu.au/au/cases/qld/QGAAT>> at 27 June 2007. Prior to 2005, the Tribunal published on AustLII only its leading reasons for decision. However, since that time all reasons for decisions that have been produced are placed on the AustLII website: Information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007.

<sup>1488</sup> *Guardianship and Administration Act 2000* (Qld) s 112(3).

<sup>1489</sup> Section 112 of the *Guardianship and Administration Act 2000* (Qld) also provides a limited exception for disclosure of information about a proceeding, including a person's identity, to a member of this Commission or to its staff or consultants in order to facilitate the Commission's review of the guardianship legislation: *Guardianship and Administration Act 2000* (Qld) s 112(3A)–(6). This exception will expire on 1 January 2009 (or up to 1 January 2010 if extended by regulation) and so, for the purposes of this review, will not be considered further. The Commission prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission's consultation process. The *Protocol* can be viewed at the Commission's website: <<http://www.qirc.qld.gov.au/guardianship/protocol.htm>>.

- (c) the tribunal's decision or reasons.

*involved*, in a proceeding, includes—

- (a) making an application in the proceeding to the tribunal; and
- (b) being a person about whom an application is made in a proceeding; and
- (c) being an active party for the proceeding; and
- (d) giving information or documents to a person who is performing a function under this Act relevant to the proceeding; and
- (e) appearing as a witness at the hearing of the proceeding.

...

7.7 In addition to the restrictions imposed by section 112, it is noted that active parties who obtain information from documents that they have inspected prior to or at a hearing will also be subject to any undertakings they have given to the Tribunal that information obtained from the file will be used only to assist that person to present his or her case before the Tribunal.<sup>1490</sup> The same undertaking is required when an active party is given copies of documents.<sup>1491</sup> This may also limit the extent to which an active party can disclose information about a Tribunal proceeding.

## Section 109

7.8 The second provision of the *Guardianship and Administration Act 2000* (Qld) that may restrict the reporting of Tribunal proceedings is section 109(2)(c). This provision gives the Tribunal power to make directions prohibiting or restricting the publication of information given before the Tribunal or of matters contained in documents filed with or received by the Tribunal.<sup>1492</sup>

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Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007). This Presidential Direction specifies that an active party must, before inspecting documents prior to a hearing, sign a written undertaking (a 'Confidentiality Undertaking') that any information obtained from the file must only be used to assist that party to present his or her case to the Tribunal. If an active party wishes to inspect documents from the file at the hearing, the active party must give a verbal undertaking to the same effect as the Confidentiality Undertaking. This is consistent with the implied undertaking that applies to parties to civil litigation, and to their legal representatives, that documents obtained on discovery will not be used for a collateral or ulterior purpose, breach of which is contempt of court: see para 5.222 of this Report.

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Information provided by the Registrar of the Guardianship and Administration Tribunal, 21 June 2007. See also para 5.96 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 109(2)(c). Note that a similarly worded power granted to the Administrative Appeals Tribunal by s 35(2)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) has been held to include the power to suppress the name of a party contained in such documents and to use, instead, a pseudonym: *Re An Applicant and Australian Prudential Regulation Authority* (2005) 89 ALD 643, 665–6.

7.9 As with other confidentiality orders, the test employed by the Tribunal is whether it ‘is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason’.<sup>1493</sup> The Tribunal would also need to have regard to what is required in its jurisdiction by open justice and procedural fairness, and to apply the General Principles contained in the legislation.<sup>1494</sup> A person must comply with a confidentiality order unless they have a reasonable excuse.<sup>1495</sup>

7.10 Section 109 relevantly provides:

**109 Open**

- (1) Generally, a hearing by the tribunal of a proceeding must be in public.
- (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a *confidentiality order*)—
  - ...
  - (c) give directions prohibiting or restricting the publication of information given before the tribunal, whether in public or in private, or of matters contained in documents filed with, or received by, the tribunal;
  - ....

### The interaction between sections 109 and 112

7.11 As the law currently stands, it appears that section 109(2)(c) is unnecessary. This provision permits the Tribunal to make a confidentiality order in relation to information about a proceeding, but such information is already prohibited from being published by section 112. In other words, the discretion to prohibit information from being published is superfluous if the publication of that information is already prohibited.<sup>1496</sup>

7.12 As such, any recommendations in relation to the operation of section 112 may affect the extent to which section 109(2)(c) is considered necessary or desirable. This chapter will therefore consider both provisions.

7.13 The Commission also notes some inconsistency or tension in the policy that underpins section 109(1) (that proceedings are to be held in public, although there is a power to change that position) and that which underpins section 112 (that information

<sup>1493</sup> *Guardianship and Administration Act 2000* (Qld) s 109(2).

<sup>1494</sup> See para 4.15–4.21 of this Report.

<sup>1495</sup> *Guardianship and Administration Act 2000* (Qld) s 109(6).

<sup>1496</sup> Note, however, that the making of a confidentiality order specifically directed at an active party may be more effective in practice than the generally worded prohibition in s 112 of the *Guardianship and Administration Act 2000* (Qld); compare *Re MAB* [2007] QGAAT 9, [60]–[63] in which the Tribunal denied an application for a confidentiality order to restrain a person from continuing to publish information about the adult, instead relying on the prohibition against publication in s 112.

about proceedings is not to be published, although there is a power to change that position). The primary objectives in permitting people to attend hearings are to improve accountability in decision-making and to enhance community understanding of the law. The tension in policy between the two provisions arises because those objectives are then undermined by the imposition of strict limits on what people can do with the information they receive during those open hearings.

### Some recent Tribunal decisions

7.14 There have been three recent decisions in which the issue of publishing information about Tribunal proceedings has been considered.

7.15 One decision was *Re WEK No 2*.<sup>1497</sup> Although there was no formal application before the Tribunal on that occasion, the parties raised the issue of an order permitting the wider publication of information in the public interest.<sup>1498</sup> The Tribunal considered section 112 of the *Guardianship and Administration Act 2000* (Qld) and the General Principles (particularly General Principle 11), and decided to permit only the publication of de-identified reasons on AustLII. It prohibited any other publication of information about the hearing, for example, by the media:<sup>1499</sup>

there were insufficient reasons advanced to convince it that it was in the public interest to agree to any other means to publish information related to this matter other than via AustLII. It is accepted that publication on AustLII in a de-identified format allows public scrutiny of Tribunal processes, yet respects the confidentiality of the adult.

7.16 The Tribunal did, however, make an order permitting some media coverage in *Re MHE*<sup>1500</sup> concluding that the circumstances of that case meant that some level of public disclosure was in the public interest. It commented:<sup>1501</sup>

there had already been wide publicity about MHE, and his family. Some of the published information, particularly quotes attributed to some politicians were incorrect, misleading and confusing to the public. It is in the public interest for citizens to know how decisions around ‘end of life’ can be made.

7.17 In this case, the Tribunal made a limited order permitting the publication of the declarations it had made and that it had made a recommendation to the attorney who was the adult’s substitute decision-maker.<sup>1502</sup> However, a confidentiality order was also made prohibiting the publication of the identity of the parties and all other information before the Tribunal, including specific prohibitions on the contents of the recommendation made to the attorney and photographs of the parties.<sup>1503</sup> The basis for

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1497 [2005] QGAAT 25.

1498 Ibid [78], [107].

1499 Ibid [106].

1500 [2006] QGAAT 9.

1501 Ibid [75].

1502 Ibid [75], Recommendation 6.

1503 Ibid [76], Recommendation 6.

the making of the confidentiality order was ‘the intensely private nature of the matters before the Tribunal’.<sup>1504</sup>

7.18 The Tribunal also made a limited order permitting publication in *Re MLI*.<sup>1505</sup> In that case, the Tribunal considered that it was in the public interest for those people and bodies with responsibility for reviewing the relevant area of law to be permitted to receive information about the proceeding, including the identity of the parties. It made a limited order permitting publication to them,<sup>1506</sup> and it also made an order permitting the publication of its reasons, provided they were not published in a form that identified either the adult or his family.<sup>1507</sup>

7.19 A confidentiality order was made, however, preventing all other publication of information, including information about the identity of people involved in the proceeding.<sup>1508</sup> This was done so that MLI’s matter could ‘be determined without MLI attracting the media notoriety he attracted in his home town.’<sup>1509</sup>

## LEGISLATION IN OTHER JURISDICTIONS

7.20 The relevant statutes in all of the Australian jurisdictions impose various prohibitions on the publication of information about guardianship proceedings. These prohibitions can be categorised into three broad approaches that are considered in this section:

- A prohibition on publication of information about proceedings with power given to the Tribunal to allow the publication of de-identified information only.
- A prohibition on publication of information about proceedings with power given to the Tribunal to allow the publication of information generally, including that which would identify the people involved.
- A prohibition only on publication of information about proceedings that would identify people, and with power given to the Tribunal to allow this information to be published.

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1504 Ibid [76].

1505 [2006] QGAAT 31.

1506 In *Re MLI* [2006] QGAAT 31, the Tribunal made orders permitting the publication of information about proceedings to the Queensland Law Reform Commission, the Honourable Bill Carter QC, and the Attorney-General and Minister for Justice: [91]–[92]. Such an order was also made in relation to the Public Advocate, given the systemic issues that this case involved: [92].

There has since been a periodic review of the appointment of the guardian in this matter, where the Tribunal also made a specific order permitting the publication of reasons for decision in their identified form to the then Attorney-General: *Re MLI No 2* [2006] QGAAT 70, [30].

1507 *Re MLI* [2006] QGAAT 31, [93].

1508 Ibid [90].

1509 Ibid.

7.21 This section also considers those jurisdictions in which the Tribunal is conferred with discretion to make an order prohibiting publication of information in particular cases, in addition to any general legislative prohibition on the publication of information.

### Prohibition with power to permit publication of de-identified information

7.22 The guardianship legislation in both South Australia and the Northern Territory prohibits the publication of information about proceedings, subject to the Tribunal's discretion to permit the publication of information in a de-identified form. This limited discretion permits publication only if it does not contain 'particulars calculated to lead to the identification' of the adult or others concerned in the proceedings<sup>1510</sup> or if it does not contain material that 'identifies, or could tend to identify' the adult.<sup>1511</sup>

7.23 In the Northern Territory, this discretion may be exercised only if publication is in the public interest.<sup>1512</sup> There are no criteria specified for the exercise of the discretion in South Australia.<sup>1513</sup>

### Prohibition with power to permit publication of all information

7.24 Whilst the guardianship legislation in Queensland imposes a prohibition on the publication of any information about proceedings,<sup>1514</sup> the Tribunal has discretion to permit not only publication of de-identified information but also the publication of information about proceedings generally.<sup>1515</sup> This is similarly the position in New Zealand.<sup>1516</sup> In Queensland, the Tribunal can exercise its discretion where it is satisfied that publication is in the public interest,<sup>1517</sup> whilst in New Zealand a person may publish information with the leave of the court.<sup>1518</sup>

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1510 *Adult Guardianship Act* (NT) s 26(2).

1511 *Guardianship and Administration Act 1993* (SA) s 81(3). The South Australian legislation expressly defines the term 'person to whom proceedings relate' as an individual who has or is alleged to have a mental incapacity, mental illness or who is subject to a guardianship or administration order made under the Act: *Guardianship and Administration Act 1993* (SA) s 3. This definition includes reference to 'protected persons' defined as the person the subject of a guardianship or administration order (or both) under the Act: *Guardianship and Administration Act 1993* (SA) s 3.

1512 *Adult Guardianship Act* (NT) s 26(2).

1513 Section 81(2) of the *Guardianship and Administration Act 1993* (SA) states that the Guardianship Board may authorise publication upon application of a person who has a proper interest in the matter. However, this requirement relates to the issue of standing, and not to the exercise of the discretion.

1514 *Guardianship and Administration Act 2000* (Qld) s 112(3). The legislation also specifically prohibits the identification of people involved in the proceedings: *Guardianship and Administration Act 2000* (Qld) s 112(3).

1515 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

1516 *Protection of Personal and Property Rights Act 1988* (NZ) s 80(1). Note, however, that there is no express reference in this jurisdiction to 'identifying information'.

1517 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

1518 *Protection of Personal and Property Rights Act 1988* (NZ) s 80(1).

## Prohibition only on publication of identity with power to permit publication

7.25 The relevant legislation in the Australian Capital Territory, New South Wales, Tasmania, Victoria and Western Australia has taken the third approach: the only information that is prohibited from publication is information that would identify relevant people, but the Tribunal is granted discretion to override that prohibition in appropriate cases.<sup>1519</sup> The provisions in these jurisdictions generally contain two common elements.

7.26 First, all jurisdictions begin by imposing a prohibition on the publication of information that will identify certain people.<sup>1520</sup> The people whose identity must not be published vary in each jurisdiction and include the adult only,<sup>1521</sup> parties to the proceedings,<sup>1522</sup> or people generally involved or concerned in the proceedings.<sup>1523</sup>

7.27 There are varying approaches taken to the question of what will be sufficient to identify a person. Some legislation, such as that in Victoria, contains a generic test where the prohibition relates to information that ‘identifies, or could reasonably lead to the identification’ of a person.<sup>1524</sup> Other jurisdictions go further and expressly state some of the ways in which a person may be identified. The most comprehensive example of this is in Western Australia where the legislation refers to matters such as a person’s name or alias, his or her voice, address, physical description, occupation, or relationships or associations with others.<sup>1525</sup>

7.28 Second, having prohibited the publication of information that would identify a person, the respective Tribunals are then granted discretion to permit the publication of

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1519 See note 1520 of this Report.

1520 *Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Administration Act 1995* (Tas) s 13(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1). In Western Australia, there is also a separate prohibition on the publication of a list of the names of people involved in guardianship proceedings, with an exception for a notice on display on the Tribunal’s premises: *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(2). The *State Administrative Tribunal Act 2004* (WA) also imposes a prohibition on the publication of ‘protected matter’ in that State. This is a matter the disclosure of which has been certified as contrary to the public interest by the Attorney-General under s 159 of the *State Administrative Tribunal Act 2004* (WA) or an exempt matter or document under the *Freedom of Information Act 1992* (WA): *State Administrative Tribunal Act 2004* (WA) s 3 (definitions of ‘protected matter’, ‘exempt document’ and ‘exempt’). This prohibition on the publication of protected matter is one that applies to all matters before the State Administrative Tribunal (not just those involving issues of guardianship) and so is not considered further.

1521 *Guardianship and Management of Property Act 1991* (ACT) s 49(1). In New South Wales, reference is made to a ‘prescribed person’ which means a person under guardianship, a person whose estate is subject to a financial management order, a child, or a person to whom an application relates: *Guardianship Act 1987* (NSW) s 57(4).

1522 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1). See also s 59(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) which outlines who are the parties to a proceeding.

1523 *Guardianship and Administration Act 1995* (Tas) s 13(1); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1).

1524 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

1525 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3).

such information.<sup>1526</sup> Victoria and Tasmania are the only jurisdictions in which a criterion for the exercise of that discretion, that of the ‘public interest’, is imposed.<sup>1527</sup>

### Further discretion to prohibit the publication of information

7.29 In addition to a legislative prohibition on the publication of certain types of information, some jurisdictions grant the Tribunal a further discretion to prohibit the publication of information in particular cases. This is the position in Queensland where, as discussed above,<sup>1528</sup> the Tribunal may make a confidentiality order in relation to the publication of information in addition to the legislative prohibition on the reporting of proceedings.<sup>1529</sup>

7.30 The Tribunals in Western Australia and Victoria are granted a similar discretion and may order that specific evidence or documents must not be published except in the manner and to the people specified by the Tribunal.<sup>1530</sup> The criteria for the exercise of this discretion include whether such an order is necessary to avoid, for example, endangering national security, prejudicing the administration of justice,

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*Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Administration Act 1995* (Tas) s 13(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8)(d), although note that the provision in this Act is worded as an exception to the prohibition, rather than as a discretion of the Tribunal.

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*Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1995* (Tas) s 13(2). In *Korp (Guardianship)* [2005] VCAT 779, [7] the Victorian Civil and Administrative Tribunal stated that something more than a general claim to ‘open justice’ is required to override the general rule that publication of identifying information is prohibited:

Clause 37 of the *VCAT Act* provides in guardianship cases what the Parliament regards as a proper balance between the competing considerations; that is, without order, it prohibits the publication or broadcasting of a report of such proceedings that identifies, or could reasonably lead to the identification of, a party to the proceeding. Because this is the general rule that the parliament has applied to guardianship matters, no argument based upon a principle of “open justice” is sufficient in itself to override that general rule. Clearly the Parliament knew of that principle when it enacted clause 37. It deliberately chose that matters under the *Guardianship and Administration Act* be regarded as an exception to that principle, unless having regard to the public interest the tribunal makes an order allowing such publication.

In that case, the Victorian Civil and Administrative Tribunal found that there were three ‘special features’ that set it apart and, together, warranted permitting publication in the public interest (although subject to conditions). Those were, first, that the purpose of the proceeding was to seek appointment of a guardian for Mrs Korp, a ‘severely disabled’ person, to facilitate decisions about medical treatment that could include refusal of life-sustaining medical treatment; second, that Mrs Korp’s circumstances had already received ‘saturation publicity’; and third, that two people had been charged with criminal offences in relation to how Mrs Korp acquired her brain injury. See *Korp (Guardianship)* [2005] VCAT 779, [9]–[11].

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See para 7.8–7.10 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 109(2)(c).

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*State Administrative Tribunal Act 2004* (WA) s 62(1), (3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3). These Tribunals are also granted power to make such an order in relation to ‘information that might enable a person who has appeared before [the Tribunal] to be identified’: *State Administrative Tribunal Act 2004* (WA) s 62(1)(c); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3)(c). However, it appears that in the context of the guardianship jurisdiction that such a power is unnecessary because of the prohibitions that already exist in relation to identifying material: see para 7.26–7.27 of this Report.

Note also that the exercise of this discretion is limited to either a legally qualified member of the Tribunal or otherwise the presiding member: *State Administrative Tribunal Act 2004* (WA) s 62(4); or the presiding member: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(5). For an example of when such an order has been made under the Victorian legislation, see *Korp (Guardianship)* [2005] VCAT 779.

endangering a person's safety, offending public decency or morality, the publication of confidential information, or 'for any other reason in the interests of justice'.<sup>1531</sup>

7.31 The effect of these provisions is to grant the Tribunal the power to extend the prohibition to material that could otherwise be published. The publication of information that identifies a person is already prohibited in Western Australia and Victoria. This discretion further allows the Tribunal to order that specific evidence or documents not be published, even if they do not identify a person.

7.32 The discretion in Victoria, so far as it relates to identifying information, may also be wider than the legislative prohibition because it relates to 'information that might enable a person who has appeared before [the Tribunal] to be identified'.<sup>1532</sup> This is wider than the wording of the legislative prohibition, which refers only to a 'party to the proceedings'.<sup>1533</sup> The discretion is wide enough, for example, to allow suppression of identifying information about witnesses as well.

## THE DISCUSSION PAPER

7.33 In its Discussion Paper, the Commission raised a number of issues for consideration, examined three matters to guide reform in this area (namely the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system) and identified possible models for reform. This section outlines those possible legal models and matters first, before turning to the specific issues for consideration which form the remainder of this chapter.

### Possible legal models

7.34 The Discussion Paper outlined four models for how the law might deal with the issue of publishing information about proceedings.<sup>1534</sup>

- Model 1: publishing information about proceedings, including disclosure of identifying information, should be permitted unless the Tribunal orders that particular information must not be published.
- Model 2: prohibiting publication of information about a proceeding but the Tribunal is given discretion to permit such publication provided that it does not identify the people concerned in the proceeding.

1531 *State Administrative Tribunal Act 2004* (WA) ss 62(3), 61(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(4).

1532 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3).

1533 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

1534 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [4.75]–[4.82].

- Model 3: prohibiting publication of any information about a proceeding but the Tribunal is given discretion to permit such publication, including that of information which would identify the people involved.
- Model 4: allowing publication of information about a proceeding except for identifying information, but the Tribunal is given discretion to permit the publication of such information.

7.35 These models were posed as a starting point for a general approach to this issue and as a guide for submissions. In its Discussion Paper, the Commission expressed a preliminary preference for model 4.<sup>1535</sup> The Commission considered that this position appeared to strike a reasonable balance between respecting the privacy of those involved in proceedings and promoting the transparency and accountability favoured by open justice.

### Openness and confidentiality in the guardianship system

7.36 The Commission also identified three matters that would guide consideration of what role confidentiality should play in the context of publication of information about proceedings: open justice, procedural fairness, and the nature of the guardianship system.

#### Open justice

7.37 Open justice is a fundamental principle of the common law aimed at holding decision-makers accountable through public scrutiny. It also promotes consistency and predictability of decision-making. The right of members of the public, and therefore representatives of the media, to attend at judicial proceedings is a core requirement of open justice.<sup>1536</sup> Derivative of that right is a right to report proceedings, as well as a requirement that the names of those involved in proceedings, such as the parties and witnesses, be available to the public.<sup>1537</sup>

7.38 While the principle of open justice favours open reporting of proceedings, it is not an absolute concept.<sup>1538</sup> There are many types of proceedings in which the principle of open justice has been modified, either under the general law or by statutory

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1535 Ibid [7.111].

1536 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2.

1537 *Brennan v State of New South Wales* [2006] NSWSC 167, [31]; J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 3; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.90].

1538 For example, *Korp (Guardianship)* [2005] VCAT 779, [6]:

This principle [open justice] is important as the public has a proper interest in knowing how the system of justice operates. However it is not a principle that requires proceedings to be open in every case, as there are other legitimate matters of public interest that sometimes operate in the other direction. One such other public interest is the interest in privacy. It is only in recent years that privacy has become a matter of greater focus, although I would hazard to say it has always been important. Matters in which a person seeks an administrator or guardian under the *Guardianship and Administration Act* often involve the disclosure of personal and sensitive information. The revelation of that information can significantly infringe legitimate rights to privacy, even when it occurs in the context of a tribunal proceeding.

provisions. One modification that is sometimes adopted is to permit the publication of information about proceedings but only if it does not identify particular people.<sup>1539</sup> An example of this is the prohibition in family law proceedings of an account that identifies a party or witness.<sup>1540</sup>

7.39 It should also be recognised that the nature of open justice as it relates to publication of information about proceedings has changed with the advent of the internet. For example, in relation to the publication of court and tribunal decisions, the internet has resulted in their wide dissemination, accessibility and searchability to the public at large.<sup>1541</sup> This is in stark contrast to the ‘practical obscurity’<sup>1542</sup> previously afforded by paper records which were difficult to search and not widely available.<sup>1543</sup> This has led some to suggest that judges, being aware of the potential dissemination of their judgments, should adopt a cautious approach and avoid ‘unnecessary personal identifiers’<sup>1544</sup> to reduce disclosure of personal information.<sup>1545</sup> The breadth of possible publication may also be relevant when considering any prohibitions on how that information should be treated outside proceedings.

#### Procedural fairness

7.40 Prohibitions on a party’s ability to discuss proceedings could also potentially lead to a failure to accord procedural fairness, depending on the scope of those prohibitions. An inability to discuss a proceeding may, for example, inhibit an active

1539 This has been described as a ‘minimalist interference with open justice’: *Witness v Marsden* (2000) 49 NSWLR 429, [144] (Heydon JA); *R v Kwok* (2005) 64 NSWLR 335, [29] (Hodgson JA), [39] (Howie J). Others have gone further and expressed doubt as to whether there is a public interest in knowing the identities of people involved in court proceedings: C Davis, ‘The Injustice of Open Justice’ (2001) 8 *James Cook University Law Review* 92, 111.

1540 *Family Law Act 1975* (Cth) s 121. Other examples include *Child Protection Act 1999* (Qld) ss 189, 192, 193; *Mental Health Act 2000* (Qld) ss 525–526; *Criminal Law (Sexual Offences) Act 1978* (Qld) ss 6–7; *Adoption of Children Act 1964* (Qld) s 45; *Property Law Act 1974* (Qld) ss 342–344. See also D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.170], [4.230].

1541 See Justice DA Mullins, ‘Judicial Writing in the Electronic Age’ (Paper presented at Supreme and Federal Courts Judges’ Conference, Darwin, 23–27 January 2005); Chief Justice JJ Spigelman, ‘Open Justice and the Internet’ (Paper presented at The Law via the Internet 2003 Conference, Sydney, 28 November 2003); and K Curtis, ‘Access and Privacy: Getting the Balance Right’ (Paper presented at Australian Courts Administrators Group: Courts and Tribunals Annual Conference, Homebush Bay, 25 November 2005).

1542 See Justice DA Mullins, ‘Judicial Writing in the Electronic Age’ (Paper presented at Supreme and Federal Courts Judges’ Conference, Darwin, 23–27 January 2005) 1–2, citing *United States Department of Justice v Reporters Committee for Freedom of the Press* (1989) 489 US 749, 764. See also Chief Justice JJ Spigelman, ‘Open Justice and the Internet’ (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003) and K Curtis, ‘Access and Privacy: Getting the Balance Right’ (Paper presented at the Australian Courts Administrators Group: Courts and Tribunals Annual Conference, Homebush Bay, 25 November 2005).

1543 See Justice DA Mullins, ‘Judicial Writing in the Electronic Age’ (Paper presented at Supreme and Federal Courts Judges’ Conference, Darwin, 23–27 January 2005); Chief Justice JJ Spigelman, ‘Open Justice and the Internet’ (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003); and K Curtis, ‘Access and Privacy: Getting the Balance Right’ (Paper presented at the Australian Courts Administrators Group: Courts and Tribunals Annual Conference, Homebush Bay, 25 November 2005).

1544 Personal identifiers include a date and place of birth, residential address, financial details and family members’ names: Justice DA Mullins, ‘Judicial Writing in the Electronic Age’ (Paper presented at Supreme and Federal Courts Judges’ Conference, Darwin, 23–27 January 2005) 3.

1545 Chief Justice JJ Spigelman, ‘Open Justice and the Internet’ (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003).

party from seeking to join another party who has not previously attended any hearings, or from discussing matters with others as part of preparing for an appeal.

### Nature of the guardianship system

7.41 The nature of the guardianship system may weigh against an absolute right to open reporting. The guardianship system is one in which the primary concern is promoting and safeguarding the rights and interests of adults with impaired capacity, and this includes the adult's privacy interests.<sup>1546</sup> Permitting widespread publication of information about an adult's private life, which is only disclosed for a limited purpose, may infringe those privacy interests. Such publication may also cause other harm to the adult, for example, in relation to employment opportunities if people make assumptions about the adult's abilities based on a finding of impaired capacity for a particular matter.

7.42 It may also be that future participation in the Tribunal's proceedings will be facilitated by an assurance that the information disclosed to the Tribunal will not be the subject of public discussion.<sup>1547</sup>

7.43 On the other hand, the fact that decisions made in the guardianship system often affect the fundamental legal rights of an adult may weigh in favour of adherence to the principle of open justice. Transparency of decision-making processes enhances accountability, and a proceeding may also raise issues of wider importance to the community. For example, it may be in the public interest to allow publication about a proceeding that 'reveals information of systemic abuse of persons with a decision-making disability ... so as to assist in preventing further abuse'.<sup>1548</sup>

### Issues for consideration

7.44 The Discussion Paper also raised several issues for consideration when examining any potential prohibition on the publication of information about proceedings. Each of the following issues is considered below:

- Should there be a prohibition on publishing information about a Tribunal proceeding or publishing the identity of people involved in a proceeding?
- If there should be a prohibition in relation to publishing the identity of the people involved in proceedings, whose identity should be protected?
- If there should be a prohibition on publishing information about a proceeding, who should be prohibited from receiving that information?

<sup>1546</sup> In the context of information generally causing harm to an adult, see T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101.

<sup>1547</sup> It has been suggested, for example, that in the case of sexual offence proceedings, a prohibition on publication of a complainant's identity is justified on the basis that protection of anonymity will encourage complainants to come forward and to testify in court: C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 110.

<sup>1548</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 249.

- If there should be a prohibition in relation to the publication of the identity of the persons involved in proceedings, what should constitute ‘identification’?
- Should the Tribunal have power to permit publication that is otherwise prohibited?
- Should it be an offence to breach the prohibition on publication and should there be any exceptions or defences to the prohibition?
- Should the Tribunal have any additional power to prohibit the publication of information in particular cases?
- Should any prohibition in relation to guardianship matters before the Tribunal also apply to the courts?

## SHOULD THERE BE A PROHIBITION ON PUBLISHING INFORMATION ABOUT A TRIBUNAL PROCEEDING?

### The Discussion Paper

7.45 In its Discussion Paper, the Commission considered whether there should be a prohibition on publishing information about a Tribunal proceeding and, if so, what that prohibition should be.<sup>1549</sup>

7.46 Generally, proceedings in court, including any evidence given and the identity of those people involved, may be reported upon and publicly discussed, unless a specific suppression order has been made.<sup>1550</sup> There may be reasons, however, why the guardianship system might be treated differently from some other legal settings.<sup>1551</sup> At

<sup>1549</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.33]–[7.35].

<sup>1550</sup> D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.05]–[4.230]. In relation to the court’s power to make a suppression order in its inherent jurisdiction, see *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166. In that case, McPherson J examined the authorities in other common law jurisdictions, namely *R v Clement* (1821) 106 ER 918 and *Taylor v Attorney-General* [1975] 2 NZLR 675, stating (at 170):

The result of these authorities seems to me to be that, apart from specific statutory provisions, the power of the court under general law to prohibit publication of proceedings conducted in open court has been recognised and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice; and, apart from securing that purpose in proceedings before it, there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in open court, as in all but exceptional cases they must be.

See also *Brennan v State of New South Wales* [2006] NSWSC 167 (Hall J). Note, however, the different view taken in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 53–8 where Kirby J said that ‘the principles which support and justify the open doors of our courts likewise require that what passes in court should be capable of being reported’: 55. Kirby J also concluded in that case that: ‘[s]tatute apart, it is doubtful on the authorities, that courts have the power to make an order, operating outside the court, which suppresses the publication of anything said in open court’: 55. See also *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477–80.

For examples of statutory provisions which empower the court to make suppression orders in relation to publication, see s 13A(8) of the *Penalties and Sentences Act 1992* (Qld) and s 121(1) of the *Drugs Misuse Act 1986* (Qld).

<sup>1551</sup>

See para 7.41–7.42 of this Report.

present, the guardianship legislation in all Australian jurisdictions imposes at least some restriction on the publication of information about proceedings.<sup>1552</sup>

7.47 As noted above, the Commission's preliminary view in the Discussion Paper was that the law should be changed to permit the publication of all information about Tribunal proceedings except that which would identify particular people involved in a hearing (model 4).<sup>1553</sup>

## Submissions

### *Arguments favouring greater openness*

7.48 There was strong support for the law recognising greater openness in publishing information about Tribunal proceedings. Underpinning this support were concerns about the need to promote accountability and public confidence in the Tribunal. Also of significance was the importance of enhancing community awareness of the guardianship system. A number of submissions specifically considered the ways in which the media can assist in achieving these goals.

#### *Promoting accountability and public confidence*

7.49 A large number of submissions expressed concern about the accountability of the Tribunal and supported reform that increased scrutiny of its processes and decisions.<sup>1554</sup> One respondent stated:<sup>1555</sup>

these provisions are being misused to prevent parties to proceedings complaining about the outcome of proceedings. There is no public accountability of the Tribunal because these provisions can be interpreted to prevent parties discussing proceedings outside the Tribunal.

7.50 Some respondents were of the view that the confidentiality provisions in the *Guardianship and Administration Act 2000* (Qld) are not operating as was originally intended.<sup>1556</sup> One parent of an adult with impaired capacity was of the view that:<sup>1557</sup>

as practised presently, [confidentiality] is overdone and serves to protect those who would subject the impaired to abuse rather than protect the impaired as was, obviously, the intention of the legislature.

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1552 See para 7.20–7.28 of this Report.

1553 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.111].

1554 Submissions 1H, 2, 16, 24, 27C, 31A, 48A, 60, 64, 69, 73A, 78, 81, 83, 84, 86, 88, 95, 100, 101, 102, 106, 116, 119, 120, 124, 125, 134, 149, F1, F5, F7, F10, F16. Submissions 31A and 84 suggested that the Tribunal be accountable to other parts of Government, for example, a Government Minister or another area of Government.

1555 Submission 24. Similar views were expressed by submissions 40C, 65, 134.

1556 Submissions 86, 100.

1557 Submission 31A.

7.51 One respondent argued that greater openness would better protect the rights of adults and other interested parties to a fair and proper hearing as that would permit criticism of the Tribunal to be reported publicly.<sup>1558</sup>

7.52 Some respondents, including the Endeavour Foundation, considered that wider reporting of proceedings would allow for public scrutiny and result in greater confidence in the legislation and the workings of the Tribunal.<sup>1559</sup> Carers Queensland suggested that the current lack of confidence in the guardianship system was also having a detrimental affect on participation in the system:<sup>1560</sup>

many people are currently already dissuaded from engaging with the system because they lack confidence in it to deliver a fair outcome. In this context, a system that applied open justice and procedural fairness might be construed to provide greater transparency and more scrutiny and therefore reach better and fairer decisions. This will ultimately increase people's confidence and willingness to participate in the system.

7.53 There was considerable support for permitting publication of at least some information by the media<sup>1561</sup> and a number of submissions specifically addressed how wider publicity can foster accountability and highlight deficiencies in a system.<sup>1562</sup> Some submissions described situations where people felt 'forced' to take action through the media after all official avenues had been exhausted without success.<sup>1563</sup> Others commented that systemic problems in the guardianship system should be able to be aired in a public forum.<sup>1564</sup> One respondent noted:<sup>1565</sup>

Quite often it is only when media become involved in certain issues involving a person with a disability that justice is achieved. It was media that brought the inadequacy of the guardianship laws to the attention of the general public and something began to be done to rectify the problem.

7.54 Other submissions commented on how the current confidentiality provisions prevent the media from fulfilling this role. These provisions were said to have:<sup>1566</sup>

affected the quantity and quality of stories published. In some cases *The Courier-Mail*, acting on its lawyers' advice, has so censored reports, in an effort to comply with section 112, that the published finished product has barely made sense.

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1558 Submission 100.

1559 Submissions 100, 120.

1560 Submission 101.

1561 Submissions 2, 26D, 27C, 48A, 75, 88, 94, 95, 98, 100, 101, 102, 134, F1, F7, F10.

1562 Submissions 19B, 28E, 88, 100, 149, F7, F12, F22.

1563 Submissions 28A, 100, F1, F5, F14.

1564 Submissions 106, 124, F13.

1565 Submission 19B. Similar views were expressed by submission F12.

1566 Submission 100.

7.55 It was suggested that the current requirement to approach the Tribunal for permission in relation to every publication of information about a proceeding has the result, unless applications are dealt with quickly, that ‘the public is deprived of timely information about Tribunal hearings.’<sup>1567</sup> Some media submissions stated that reporting had been hindered in a particular case<sup>1568</sup> where:<sup>1569</sup>

a journalist who sought the tribunal’s permission to publish information involving tribunal proceedings received no reply for a period of six weeks, and was then given a hearing date for two months later. Such a lengthy delay will, in most instances, defeat the purpose for which access or permission was sought.

### *Enhancing community awareness*

7.56 Another theme present in many submissions favouring greater openness was the need for increased community awareness and education about the guardianship system.<sup>1570</sup> At present, it seems that the prohibition on publishing information is contributing to a lack of awareness about the Tribunal and its role.

7.57 The Public Trustee of Queensland considered that the current prohibition has resulted in a lack of knowledge as to how the Tribunal works as ‘those interested in publishing information may have been misled as to the operations of the Tribunal or its manner and approach and reasons for decisions through that proscription’.<sup>1571</sup> Members of the Tribunal (and another respondent) also recognised that a lack of public awareness of its role contributed to negative perceptions about the Tribunal.<sup>1572</sup> One respondent noted that the confidentiality provisions also currently operated to prevent the public from being aware of the valuable work being done by the Tribunal and its consideration of cases in a fair and just manner.<sup>1573</sup>

7.58 Two submissions did comment favourably on the limited information about Tribunal proceedings that is currently available through the de-identified reasons for decisions posted on the AustLII website.<sup>1574</sup> Disability Services Queensland considered that the information released had:<sup>1575</sup>

assisted officers to acquire a greater understanding of the proceedings and the law. This has in turn assisted in the formulation of departmental policy and procedures that have regard to the principles enunciated in the *Guardian and Administration Act 2000*.

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1567 Submission 1H.

1568 Submissions 95, 100, F1.

1569 Submission 95.

1570 Submissions 37B, 38B, 42, 58, 68, 72, 73A, 81, 82, 83, 101, 106, 116, 120, 124, 125, 127, F6, F7, F9, F10, F12, F22.

1571 Submission 127.

1572 Submissions F6, F17.

1573 Submission F6.

1574 Submissions 124, 125.

1575 Submission 125.

7.59 Some submissions identified benefits in permitting wider publication about proceedings that went beyond just informing the public about the Tribunal. One view was that increasing publication of information about proceedings would also bring the public's attention to the plight of adults with impaired capacity which may potentially aid in decreasing abuse of this group of people.<sup>1576</sup> Another submission, from the Public Advocate, suggested that a relaxation of the current laws would permit her to communicate more effectively to the public about her systemic monitoring role. The Public Advocate considered that she had not been able to clarify inaccurate information that had been published about her role in a Tribunal proceeding and that she had also been prevented from giving a full explanation of the performance of her functions in the Public Advocate's Annual Report.<sup>1577</sup>

### ***Arguments favouring some level of confidentiality***

7.60 Some respondents advanced arguments in favour of preserving some level of confidentiality. Those arguments focused on the privacy interests of the adult (and those close to the adult) and on potential harm that could occur if there was greater openness. These submissions also identified some reservations about media reporting in this area.

#### ***Concerns about privacy***

7.61 Strong views were expressed about the privacy of the adult. Some respondents questioned the public's right to know everything that happens during a Tribunal hearing<sup>1578</sup> and a number of respondents, including some adults with impaired capacity and the Royal College of Nursing Australia, suggested that these matters are essentially private in nature and are not of public interest.<sup>1579</sup> An attendee at a community forum expressed the view that the Tribunal is different from courts as it focuses on the needs of the adult and therefore, the adult should be afforded greater privacy than parties that appear before courts.<sup>1580</sup>

7.62 Some adults with impaired capacity expressed the view that there should be limits on what the media could report. One example given of information that the media should not be able to report was medical problems or issues that involve a person's dignity.<sup>1581</sup> The Royal College of Nursing Australia also agreed that there should be a prohibition on publication of information about the health of an adult.<sup>1582</sup> One respondent considered that unless the proceedings gave rise to matters of 'public

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1576 Submission F10.

1577 Submission 1H.

1578 Submissions F4, F6, F9, F10, F11, F12. Submission 137 identified that the privacy of the adult should be a relevant consideration.

1579 Submissions 60, 99, F5, F9, F11, F13, F20, F21.

1580 Submission F8.

1581 Submission F20.

1582 Submission 60.

interest’, ‘the Tribunal should have power to decide what should be disclosed and by whom’.<sup>1583</sup>

7.63 Concern for the privacy of people, other than the adult, involved in Tribunal proceedings was also expressed.<sup>1584</sup> It was recognised that these people are often only involved because they have an interest in an adult with impaired capacity and so their privacy should also be respected.<sup>1585</sup>

7.64 Some respondents in favour of supporting the privacy of those involved in Tribunal proceedings did so by specifically favouring a prohibition on the publication of those people’s *identity*. Australian Lawyers Alliance was of the view that publishing information that would lead to the identification of people involved in proceedings was ‘inconsistent with the dignity of the adult’.<sup>1586</sup> The Public Advocate noted that no real interest was served by naming the adult or parties to a proceeding.<sup>1587</sup>

7.65 The President of the Tasmanian Guardianship and Administration Board suggested that privacy may qualify the public interest in openness in guardianship proceedings.<sup>1588</sup>

A person becomes the subject of a guardianship or administration order in very extreme circumstances, for example when dementia, a psychiatric disability or a brain injury compromises their ability to make reasonable decisions in their own best interests. These are often traumatic times for the person who is the subject of the order and their family. It mostly involves a great deal of grief and upset, for these reasons, it may be that a person’s need for privacy outweighs the public’s interest in a matter.

7.66 The Aboriginal and Torres Strait Islander Legal Service (Qld South) noted that while it was conscious of the transparency promoted by openness, Aboriginal and Torres Strait Islander people are sensitive to intrusion by public scrutiny of private matters such as an individual’s personal health and finance matters.<sup>1589</sup>

### *Concerns about other harm*

7.67 Submissions from the Presidents of the Guardianship Tribunals in New South Wales and Tasmania specifically addressed the harm other than to privacy interests which could result if full publication, involving identifying information, was allowed.<sup>1590</sup> One concern was that public availability of information could lead to

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1583 Submission 70.

1584 Submissions 137, F14.

1585 Submission F9. Submission F8 also distinguished the Tribunal from other judicial proceedings on this basis.

1586 Submission 97.

1587 Submission 1H.

1588 Submission 75.

1589 Submission 96.

1590 Submissions 75, 137.

financial exploitation and other abuse of adults with impaired capacity.<sup>1591</sup> They also favoured some limitation on the identification of people involved in proceedings to avoid ‘possible stigmatisation and discrimination as well as personal distress.’<sup>1592</sup>

7.68 The President of the Tasmanian Guardianship and Administration Board gave particular weight to the fact that an adult’s incapacity may only be temporary. She gave the following examples of where harm may have resulted to an adult if his or her identity had been published (which is prohibited by that State’s guardianship legislation):<sup>1593</sup>

A middle-aged man with an extensive and successful business suffered a stroke and had been unconscious for a period of weeks during which time some sensitive business contracts required signing by him. His wife (who was also his business partner) was appointed as his administrator to see those contracts to conclusion. He recovered some 5-6 weeks later, the administration order was revoked and he resumed operation of the business. Public knowledge of the proceedings would have jeopardised the contracts and undermined the standing of the business.

A talented and intelligent woman had a psychotic episode of 6–8 months duration. She initially resisted diagnosis and treatment. Following the making of an administration order and the intensive support of her family and medical team, she accepted the diagnosis and treatment. She recovered, the administration order was revoked and she resumed her career. Publication of her illness would have jeopardised her public standing and diminished her ability to resume employment.

*Practical concerns about publication by the media*

7.69 A number of the submissions that favoured some level of confidentiality expressed concerns about responsible journalism, and the accuracy and appropriateness of some reporting by the media.<sup>1594</sup>

7.70 Some doubts were also expressed as to the benefit to the adult in allowing media reporting.<sup>1595</sup> The Department of Justice and Attorney-General had concerns about the potential harm that could result from de-identified reporting.<sup>1596</sup>

A concern arising from this would be where a member of the adult’s support network permits the adult to be interviewed and filmed about the family dispute, or grievance with the guardianship system, with only some of the features of the adult ‘blackened out’. Although, the adult or other party’s name may be changed or face unrecognisable, so it is not possible to identify the adult or proceedings, it may not be beneficial for the adult to participate in such an interview and in fact cause distress to the adult.

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1591 Ibid.

1592 Ibid.

1593 Submission 75.

1594 Submissions F6, F9, F10, F14, F15, F21, F22.

1595 Submissions F6, F7.

1596 Submission 126.

Although members of the adult's family or support network believe that 'justice' will be obtained by having their matter broadcast by the media to the public, it is often difficult to justify the benefit to the adult by this medium.

7.71 One respondent suggested that most people who seek media involvement are disgruntled parties, and not those necessarily acting in the best interests of the adult.<sup>1597</sup>

7.72 Submissions raising practical concerns about the media did, however, recognise the benefits of increasing public education and awareness of the Tribunal and its role. Some suggested alternatives to publication of information by the media were the use of de-identified case studies, open lectures or the Tribunal generally publicising its role.<sup>1598</sup>

7.73 Similarly, respondents acknowledged concerns about accountability<sup>1599</sup> and suggested that this could be achieved without media reporting by providing an internal review of Tribunal decisions other than to the Supreme Court,<sup>1600</sup> providing an independent observer at hearings or having an independent body tasked with reviewing the Tribunal.<sup>1601</sup>

### **Possible legal models**

7.74 Of the submissions that addressed this issue, a substantial majority supported greater openness in relation to the information about Tribunal proceedings that can be published.<sup>1602</sup>

7.75 In particular, there was strong support for model 4<sup>1603</sup> or for permitting generally some kind of de-identified reporting. This was the preferred approach of the majority of submissions that considered this issue.<sup>1604</sup> Such an approach, which involves prohibiting only the publication of identifying information, was generally regarded as striking an appropriate balance between open justice and ensuring the privacy of relevant individuals. It was endorsed by respondents including the Public Advocate,<sup>1605</sup> the President of the Tasmanian Guardianship and Administration

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1597 Submission F7.

1598 Submissions F9, F11, F20, F21, F22.

1599 Submissions F10, F11, F13.

1600 Submission F21.

1601 Submissions F5, F13, F21.

1602 While not endorsing a specific model, a number of submissions considered that people should generally be able to talk openly about Tribunal proceedings: submissions 18B, 19B, 26D, 28D, 50B, 54B, 62, 65, 68, 80, 81, 82, 83, 117, F5. However, it was recognised that there is often a conflict as people may wish to discuss Tribunal proceedings but not want to have their own details revealed publicly: submissions 36A, 88.

1603 See para 7.34 of this Report.

1604 Submissions 1H, 16B, 28E, 37B, 38B, 44, 56, 63, 67, 73B, 75, 85, 87, 94, 97, 101, 102, 106, 119, 121, 122, 124, 125, 127, 134, 135, 137, F7, F8, F9, F12, F15, F16, F17, F22, F23.

1605 Submission 1H.

Board,<sup>1606</sup> Queensland Aged and Disability Advocacy Inc<sup>1607</sup> and an adult with impaired capacity.<sup>1608</sup>

7.76 The Adult Guardian also considered that de-identified reporting was important both to ensure public confidence and to promote greater understanding in the community of this area.<sup>1609</sup>

If public confidence in the regime is to be maintained, the media should be allowed to discuss de-identified matters and public officials should be allowed to respond fully to issues, criticisms and concerns raised in that dialogue in a way which does not disclose the identity of the person concerned but which does allow the community to fully comprehend the decision-making which has been applied in a particular matter.

7.77 Carers Queensland supported the use of safeguards to ensure appropriate levels of privacy were maintained. They considered that this would, to some extent, minimise the impact that disclosure of information might otherwise have on people's willingness to participate in the guardianship system.<sup>1610</sup> Queensland Advocacy Incorporated considered that the potential benefit in allowing de-identified reporting outweighed the potential for harm.<sup>1611</sup>

Media stories vilifying adults appearing before the tribunal, albeit without identifying them, are a possible side effect of this approach but on balance accepting the potential of media to benefit means accepting the potential for harm.

7.78 Caxton Legal Centre also considered that such a model would enable 'the development of critical academic discourse' in relation to guardianship issues.<sup>1612</sup>

7.79 Some submissions specifically addressed the concerns, discussed above, about how the media should report within such a model and not reveal people's identities. Specific constraints on reporting were suggested by Endeavour Foundation who considered that media reporting should be governed by the Act or by regulations which establishes a set of 'clear criteria detailing how the proceedings can be reported'.<sup>1613</sup> In addition, there was some support for establishing a particular format for reporting of Tribunal hearings<sup>1614</sup> and for making clear to the media appropriate reporting standards in this area.<sup>1615</sup> Queensland Advocacy Incorporated also suggested that the Tribunal

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1606 Submission 75.

1607 Submission 106.

1608 Submission F22.

1609 Submission 122.

1610 Submission 101.

1611 Submission 102.

1612 Submission 124.

1613 Submission 120.

1614 Submission F6.

1615 Submission F12.

could employ a media officer to write and distribute press releases to facilitate accurate media reporting.<sup>1616</sup>

7.80 Support for the Commission's other suggested models was limited. Some submissions, including three from media organisations, favoured model 1 which provides that, generally, there will be no prohibition on publication of information about a Tribunal proceeding, including identifying information, unless the Tribunal orders otherwise.<sup>1617</sup> Some of these submissions qualified this general position by stating that there should be no prohibition on identifying specified persons:

- unless it was necessary for someone's protection or where disclosure would result in harm to someone;<sup>1618</sup>
- except in relation to staff of the Office of the Adult Guardian and the Tribunal disclosing information about a proceeding to those not involved in the proceeding;<sup>1619</sup>
- unless disclosing the identity of a person posed a risk to the public in general;<sup>1620</sup> or
- but the Tribunal should have discretion to prohibit the disclosure of a person's identity, that discretion being exercised in the same way as it would be in the Supreme Court<sup>1621</sup> or in accordance with criteria specified in the legislation.<sup>1622</sup>

7.81 One view favouring generally open discussion of Tribunal proceedings considered that defamation laws provide an adequate check on reporting by the media.<sup>1623</sup>

7.82 Some respondents, including the Department of Justice and Attorney-General, supported retaining the current prohibition (described as model 3) on publishing information about Tribunal proceedings even if it would not identify the people involved.<sup>1624</sup>

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<sup>1616</sup> Submission F15.

<sup>1617</sup> Submissions 26D, 31B, 59B, 80, 81, 83A, 95, 98, 100, 118, F8.

<sup>1618</sup> Submissions 26D, 95, 97.

<sup>1619</sup> Submission 31B.

<sup>1620</sup> Submission 81.

<sup>1621</sup> Submissions 48A, F7.

<sup>1622</sup> Submission 83A.

<sup>1623</sup> Submission F8. Submission 106 also considered that, at least with respect to individual parties, defamation laws could be used as a remedy.

<sup>1624</sup> Submissions 126, F7. Note that in endorsing model 3, the Department of Justice and Attorney-General also considers that the Tribunal should have power to make orders permitting information to be published, including the identity of the adult or other parties, and how that publication should occur: see para 7.208 of this Report.

7.83 A number of attendees at community forums also expressed views consistent with the approach of model 2 or 3.<sup>1625</sup> At one regional forum, there was general agreement that even de-identified reporting should not be permitted, particularly in small regional areas, as people knew the other members of their community and so could identify the adult.<sup>1626</sup>

7.84 One submission was of the view that all four models suggested by the Commission could be deployed on a case by case basis.<sup>1627</sup>

### The Commission's view

7.85 The Commission recognises the strong concerns expressed by respondents about promoting accountability and enhancing community confidence in the Tribunal. The effective functioning of the Tribunal depends on both accountable decision-making and the community having confidence in the system. This is particularly so, given the significance of the decisions that the Tribunal is called upon to make. The Commission also gives weight to the need for increased public awareness of the Tribunal and its role. The current law makes wider community understanding of these matters very difficult to achieve. For these reasons, which largely correspond with the rationales for open justice, the Commission considers that information about Tribunal proceedings should generally be able to be published and recommends the inclusion of a provision in the guardianship legislation to this effect. This approach is consistent with one of the guiding principles identified in Chapter 3 that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>1628</sup> The Commission recognises that it is of particular importance that the outcome of any proceedings can be published.<sup>1629</sup>

7.86 However, the Commission recognises that the Tribunal's jurisdiction is one that deals with a vulnerable group of people and that the publicity associated with proceedings may adversely impact upon an adult. A wide range of sensitive and personal information about an adult may be disclosed in a Tribunal hearing and this, if disclosed publicly, may harm the adult. The Commission is also conscious that this information would not be disclosed in this way if the adult had capacity.<sup>1630</sup>

7.87 For these reasons, the Commission considers that there should be a general prohibition on publishing information about a Tribunal proceeding that will identify particular people. The issue of whose identity should be protected is considered in the

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1625 Submissions F5, F9, F11. See para 7.34 of this Report.

1626 Submission F9.

1627 Submission 89.

1628 See para 3.156, 3-2 of this Report.

1629 For example, *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 307 (Hutley AP) cited in *Re W: Publication Application* (1997) 21 Fam LR 788, 800 (Fogarty and Baker JJ):

The interest which the public has in knowing the result of a court's work is even greater than the interest it has in observing the actual operation of courts.

1630 See para 3.70 of this Report.

next section.<sup>1631</sup> This view, which corresponds with model 4 discussed above, was strongly supported by respondents. Such an approach is also consistent with accommodations the law has made to safeguard the interests of other vulnerable groups of people, such as children in family law proceedings and sexual offence victims in criminal proceedings.<sup>1632</sup>

7.88 The Commission considers that this approach strikes a reasonable balance between safeguarding the privacy of the adult and promoting the accountability and public understanding that is valued by open justice. It is for this reason that such an approach has been described as only a ‘minimalist interference with open justice’.<sup>1633</sup>

7.89 The Commission recognises that some tension remains between the adoption of such an approach in relation to publication and the requirement for all Tribunal hearings to be completely open, albeit that the tension will be reduced from that which currently exists.<sup>1634</sup> This means that members of the public by attending a hearing will be permitted to receive information that would enable them to identify the adult, which they would generally otherwise not be permitted to receive due to the prohibition on publication. The Commission notes, however, that such a position arises in the Family Court<sup>1635</sup> and can be reconciled on the basis that the requirement of open hearings remains a valuable safeguard.<sup>1636</sup>

1631 See para 7.90–7.110 of this Report.

1632 See para 7.38 of this Report.

1633 *Witness v Marsden* (2000) 49 NSWLR 429, [144] (Heydon JA); *R v Kwok* (2005) 64 NSWLR 335, [29] (Hodgson JA), [39] (Howie J).

1634 See para 7.13 of this Report.

1635 Section 97(1) of the *Family Law Act 1975* (Cth) states that all proceedings will be held in open court, unless expressly dealt with under the Act. Section 121 prohibits publication of the identities of persons concerned in the proceedings, including parties and witnesses. The rationale for implementing these provisions, in their current form, was outlined in Joint Select Committee on the Family Law Act, Parliament of the Commonwealth of Australia, *Family Law in Australia* (1980) [9.16]:

The majority of members of this Committee believe that the rules restricting publication of proceedings in the Family Court should be relaxed. It is believed that this is necessary if the public are to be properly informed concerning the operation of a court in free society and the conduct of the Family Court should be open to scrutiny and media comment as much as any other court ... There is a need, however, to protect parties who may be vulnerable to irresponsible exploitation of their private affairs by certain sections of the media ... The legislation should specifically restrict the reporting of names of parties or any information that might lead to identification of the parties...

As long as reporting of matrimonial proceedings by the press or other media is sufficiently restricted in this manner, the Committee considers that the privacy of the parties and those involved in the proceedings is adequately protected.

1636 See *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 18 (Hunt J). This case involved the media challenging a coroner’s decision to make an order restricting media publication of an inquest in circumstances where the hearing room was required to be open to the public at all times:

The effect of an order pursuant to s 44(1) prohibiting the publication of reports by the news media is to reduce the extent of the publicity afforded to the proceedings before the coroner, but it is not to exclude all publicity. The fact that at all times the proceedings before the coroner are open to the public does reduce the possibility that arbitrary power will be exercised whilst the prohibition order is in force, but it obviously does not wholly exclude that possibility. The prospect that the public will attend the hearing carries with it the prospect also that members of the public (including representatives of the news media, if they wish) can complain of such misbehaviour to persons in authority; a report of the proceedings made in support of such a complaint is not prohibited by an order pursuant to s 44(1) — although, strangely, a copy of the depositions of the

## WHOSE IDENTITY SHOULD BE PROTECTED?

### The Discussion Paper

7.90 Having recommended that the prohibition on publication of information about Tribunal proceedings should be limited to that which will identify a relevant person, a further issue considered was whose identity should be protected. The Discussion Paper identified three categories of people whose identity might be protected, each of which builds cumulatively to include the previous categories.<sup>1637</sup>

7.91 The first is the adult. This is the position in the Australian Capital Territory,<sup>1638</sup> South Australia<sup>1639</sup> and New South Wales.<sup>1640</sup>

7.92 The second category is the parties to the proceeding, as is the case in Victoria.<sup>1641</sup>

7.93 The third category is the widest as it captures all people who are involved in the proceedings. In addition to the adult and the parties to the proceeding, this includes any person who gives information or documents to the Tribunal and any witnesses. This is the current law in Queensland,<sup>1642</sup> the Northern Territory,<sup>1643</sup> Tasmania<sup>1644</sup> and

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proceedings is not available except to persons who show sufficient cause why they should be supplied with such a copy (s 34(4)). It would, of course, be foolish to suggest that the prospect of such a complaint being made is of the same cathartic effect as the prospect of publicity in the news media. But its existence is sufficient basis for the assertion that the need for publicity in the news media is not to be judged upon the same considerations as the need for permitting the public into the courtroom.

In *Re W: Publication Application* (1997) 21 Fam LR 788, 800 Fogarty and Baker JJ, in referring to the above quote stated:

courts have generally been more willing to impose limitations on reporting of the proceedings up to judgment than to make orders closing the courts to the public. The latter is a more stringent restriction and it is far more likely to raise doubts in the public's perception of the judicial system.

<sup>1637</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.36]–[7.40].

<sup>1638</sup> *Guardianship and Management of Property Act 1991* (ACT) s 49(1).

<sup>1639</sup> Section 81(3) of the *Guardianship and Administration Act 1993* (SA) refers to 'the person to whom the proceedings relate'. This is an individual who has or is alleged to have a mental incapacity, mental illness or who is subject to a guardianship or administration order made under the Act: *Guardianship and Administration Act 1993* (SA) s 3 (definitions of 'persons to whom proceedings relate' and 'protected person'). It is noted that this definition appears in the context of a general prohibition on publication of information about proceedings, where publication of information may be authorised by the body or court as long as it does not identify, or could tend to identify, the adult: see para 7.22 of this Report.

<sup>1640</sup> In New South Wales, this includes any adult with impaired capacity who participates in the proceeding, not just the adult to whom the proceeding relates. Section 57 of the *Guardianship Act 1987* (NSW) refers to a 'prescribed person', which means a person under guardianship, a person whose estate is subject to a financial management order, a child, or a person to whom an application relates: *Guardianship Act 1987* (NSW) s 57(4). All prescribed persons who appear as witnesses before the Tribunal, who are the subject of the proceedings, or who are mentioned or otherwise involved in the proceedings fall within the prohibition on publication: *Guardianship Act 1987* (NSW) s 57(1).

<sup>1641</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1). See also s 59(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) which outlines who are the parties to a proceeding.

<sup>1642</sup> *Guardianship and Administration Act 2000* (Qld) s 112(3)–(4).

<sup>1643</sup> *Adult Guardianship Act* (NT) s 26(2).

<sup>1644</sup> *Guardianship and Administration Act 1995* (Tas) s 13(1).

Western Australia.<sup>1645</sup>

7.94 In practice, the difference between these categories may be less distinct than first appears because, for example, a restriction on the disclosure of an adult's identity may have the practical consequence of restricting disclosure of other people's identities, particularly family members, given that such information may be likely to identify the adult indirectly.

## Submissions

7.95 A modest number of submissions specifically addressed the issue of whose identity should be protected. Four respondents were of the view that any prohibition should extend only to the adult as his or her welfare is the relevant interest that warrants safeguarding.<sup>1646</sup> However, most respondents who addressed this issue considered that the prohibition should be expanded further to apply also to the identity of others involved in a proceeding. Some were of this view because it is not only the privacy of the adult that matters but also the privacy of others involved in Tribunal proceedings.<sup>1647</sup>

7.96 The Adult Guardian and the Public Trustee of Queensland considered that any person involved in the proceedings, including any witnesses and any person who has given information or documents to the Tribunal for the proceeding should have his or her identity protected.<sup>1648</sup> Queensland Advocacy Incorporated also supported a general prohibition on publication of information that would 'identify people involved in the proceedings'.<sup>1649</sup> The Department of Justice and Attorney-General also considered that the relevant identities to protect included all people involved in a proceeding, including the categories of persons currently included in section 112(4) of the *Guardianship and Administration Act 2000* (Qld).<sup>1650</sup>

7.97 A variety of submissions all agreed that the adult's identity should be protected and then suggested further specific people who should also fall within the prohibition:

- the applicant and family;<sup>1651</sup>

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1645 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1).

1646 Submissions 37B, 94, 98, 118.

1647 Submission F14.

1648 Submissions 122, 127.

1649 Submission 101.

1650 Submission 126. This comment was made in relation to the scope of the prohibition on publishing a person's identity but was in the context of the Department's view that the publication of information generally about Tribunal proceedings should be prohibited.

1651 Submission 38B.

- the parents of the adult,<sup>1652</sup>
- active parties,<sup>1653</sup>
- active parties and anyone likely to be subject to harm or harassment as a result of being identified;<sup>1654</sup> or
- whistleblowers.<sup>1655</sup>

7.98 Another submission proposed that the prohibition should be available to any person who wished for their identity to be protected.<sup>1656</sup>

7.99 Some respondents, including the Public Advocate, distinguished between the adult, those active parties whose identity may lead to the indirect identification of the adult, and statutory or public bodies.<sup>1657</sup> Some respondents considered that the prohibition against identification should not extend to the latter category.<sup>1658</sup> Concern was raised in one submission about the lack of oversight and scrutiny of the activities of statutory bodies such as the Public Trustee of Queensland and the Adult Guardian.<sup>1659</sup> Another respondent, a parent of an adult with impaired capacity, stated:<sup>1660</sup>

The Adult Guardian and the Public Trustee should be identified even if they are the guardian or administrator. These are Government entities which need to be held accountable for their actions as they do not bring personal knowledge of the adult and his/her needs to the matter.

7.100 However, the Public Advocate, while agreeing that these bodies should be named, noted the potential undesirability of junior staff being identified in the media.<sup>1661</sup>

Exclusion of the requirement of de-identification of statutory officers, government department representatives and health professionals enables public scrutiny of their actions and is accordingly in the public interest.

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1652 Submission 73.

1653 Submission 47.

1654 Submission 85.

1655 Submission 88. This respondent proposed that the name of a whistleblower should always be prohibited from publication unless it has been proved that the whistleblower has provided false or misleading information to the Tribunal.

1656 Submission 119.

1657 Submissions 1H, 73A, F15.

1658 Submissions 1H, F15.

1659 Submission 33B.

1660 Submission 73A.

1661 Submission 1H.

However, it would probably be undesirable for junior departmental staff to be regularly identified and quoted in the media: it may lead to departments seeking to be legally represented on all occasions and this would introduce an increased degree of formality to Tribunal proceedings which is likely not warranted or desirable. Consideration could be given to allowing for publication of the person's position and department, but not their name.

## The Commission's view

7.101 The Commission considers that, as the nature of the guardianship jurisdiction focuses on promoting and safeguarding the rights and interests of adults, only the identity of the adult should be protected.

7.102 The Commission acknowledges that the majority of submissions supported specifically protecting the identity of a wider group of people than just the adult. The Commission is conscious, however, of the overall thrust of the submissions as a whole towards generally fostering greater openness to promote accountability in the guardianship system and public awareness of its functions. In addition, one of the principles identified in Chapter 3 that is guiding this stage of the Commission's review is that the guardianship legislation should provide for a greater level of openness than that which currently exists.<sup>1662</sup> For this reason, the Commission has decided to qualify the principle of open justice only to the extent necessary to promote the adult-focused nature of the jurisdiction and to limit that protection of privacy to the adult.

7.103 Broader public interest considerations also favour this approach. The Commission does not consider it to be in the public interest for those who constitute a vulnerable group of people in our society to be identified and the subject of public discussion. Similar rationales also apply in other jurisdictions that protect the identity of vulnerable individuals, such as sexual offence victims and children,<sup>1663</sup> and in relation to adults involved in litigation about otherwise private matters, such as the parties to family law and de facto property settlement proceedings.<sup>1664</sup>

7.104 The Commission notes, however, that this prohibition against publishing information that identifies an adult will, in most cases, also result in individuals who are closely associated with the adult not being able to be identified. This is because the publication of those individuals' identities could breach the prohibition by leading to the identification of the adult.<sup>1665</sup> In this way, incidental privacy protection is also offered to those closest to the adult.

7.105 The Commission agrees with the submissions<sup>1666</sup> that suggest that it is not appropriate or necessary for statutory bodies (such as the Public Trustee of Queensland or the Adult Guardian) or organisations (such as service providers or advocacy groups)

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1662 See para 3.156, 3-2 of this Report.

1663 See note 1540 of this Report.

1664 *Family Law Act 1975* (Cth) s 121(1); *Property Law Act 1974* (Qld) ss 343(1), 344(1).

1665 See para 7.198–7.199 of this Report.

1666 See para 7.99 of this Report.

to be given the same protection from identification as the adult. These entities appear in a public or professional capacity and the naming of these entities is unlikely to have a negative impact on the interests of the adult. In addition, permitting the identification of these parties may allow for further scrutiny of the operation of those statutory bodies by the public.

7.106 The Commission further considers that the prohibition against information that can identify a person should not extend to all those ‘involved in a proceeding’, including witnesses or persons who have given information or documents to the Tribunal. To do so would involve prohibiting the identification of persons whose connection to a hearing may be quite peripheral. For example, the Commission considers it is unnecessary for the identity of witnesses such as medical professionals or forensic accountants who provide reports to be covered by the prohibition and have their identities suppressed.

7.107 If the publication of the identity of a person involved in a proceeding other than the adult (for example a whistleblower) could result in harm to the person or to others, the Tribunal has power to make a non-publication order to prevent the person’s public identification.<sup>1667</sup>

### **Who is the adult?**

7.108 An issue considered by the Commission is whether the prohibition should apply in respect of the adult to whom proceedings relate or only an adult where a finding of incapacity is specifically made by the Tribunal. In the Australian Capital Territory, New South Wales and South Australia, the legislation prohibits the identification of the adult to whom any guardianship proceedings relate, regardless of whether a determination of incapacity is made or not.<sup>1668</sup>

7.109 The Commission considers that the approach in those jurisdictions should be followed. Confining the privacy protection offered by the prohibition only to when an adult has been the subject of a finding of impaired capacity would lead to undesirable outcomes. For example, because an adult is presumed to have capacity for all matters,<sup>1669</sup> a Tribunal hearing that is part heard and has not yet resolved the issue of capacity could be the subject of open reporting, despite a later finding of an adult’s impaired capacity. The Commission considers that such an approach is warranted to avoid undermining the policy of providing such protection: to promote and safeguard the rights and interests of a vulnerable group of people.

7.110 The Commission also considers that the protection granted to the adult should include all people to whom proceedings relate to avoid possible negative consequences where a person is subsequently found to have capacity. In these circumstances, where an application is made mistakenly (or maliciously), the fact that guardianship

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<sup>1667</sup> See para 7.285–7.296 of this Report.

<sup>1668</sup> See notes 1638–1640 of this Report.

<sup>1669</sup> *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 1. Also see *Guardianship and Administration Act 2000* (Qld) s 7(a); *Re Bridges* [2001] 1 Qd R 574.

proceedings have been held in relation to a person can impact upon his or her interests. For example, public awareness of guardianship proceedings could unfairly prejudice a person's business or other interests if it leads to doubts about that person's capacity or abilities.

7.111 There is a related issue as to whether there should be an exception to this prohibition for an adult who does have capacity for the matter of authorising the disclosure of this information and he or she chooses to do so. This issue is considered later in the context of exceptions to the recommended prohibition.<sup>1670</sup>

## WHO SHOULD BE PROHIBITED FROM RECEIVING INFORMATION?

7.112 Having decided that there should be a prohibition on publishing the identity of an adult, an issue arises as to who should be prevented from receiving this information. For example, the prohibition could prevent the disclosure of information to even a single person or, alternatively, the prohibition could be framed so that it only prevents disclosure to a wider group of people such as the public at large.

### The Discussion Paper

#### *The law in Queensland*

7.113 At present, the Queensland legislation does not specify who must receive information about the adult's identity before a breach of the prohibition occurs. It simply imposes a penalty on people if they 'publish' information about a proceeding or 'disclose' the identity of particular people.<sup>1671</sup>

7.114 In defamation law, 'publication' occurs even if information is disclosed only to one person.<sup>1672</sup> In the Discussion Paper, it was identified that such an interpretation in relation to the guardianship legislation may be problematic because of its breadth. If the prohibition covers all communications to a single individual, it could potentially forbid a wide range of publications that might otherwise be regarded as appropriate. For example, it could prohibit a person from informing his or her spouse about guardianship proceedings in relation to their child (if the spouse was unable to attend the hearing and so did not know what occurred). It could also prohibit a person from seeking legal advice about appealing a Tribunal decision, as this would involve publication of information about proceedings to a lawyer.

<sup>1670</sup> See para 7.248–7.251 of this Report.

<sup>1671</sup> *Guardianship and Administration Act 2000* (Qld) s 112(3).

<sup>1672</sup> See *Encyclopaedic Australian Legal Dictionary*, 'publish'; *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524. Note that while communication to one person, other than the plaintiff, is sufficient to constitute publication, the size of the group of people to whom the defamatory material is published may be relevant in the determination of any award of damages to the plaintiff: D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.230]. See also note 1774 of this Report.

7.115 It may be that publication in these situations would be excused under section 112(3) of the *Guardianship and Administration Act 2000* (Qld) which contains the defence of a reasonable excuse. However, as is discussed below,<sup>1673</sup> it was suggested that uncertainty as to what will be a reasonable excuse means that it may be preferable to clarify the scope of the intended prohibition.

7.116 Given these difficulties, it could be argued that a more limited interpretation of ‘publish’ should be adopted. There is some authority for such an approach in relation to legislative prohibitions on publication in other legal contexts. When considering a prohibition on the publication of information about victims of sexual offences which was silent as to whom disclosure was prohibited, the Victorian Court of Appeal concluded that to ‘publish’ meant ‘to make public, to make generally known, to disseminate to the public at large’.<sup>1674</sup> The Court’s reasoning was informed by similar considerations to those outlined above, namely, to avoid a number of absurd outcomes, one of which was that a person could not tell his or her spouse of a sexual assault on their child.<sup>1675</sup>

7.117 A similar interpretation had also been suggested in respect of wardship proceedings in the United Kingdom so that the relevant prohibition was limited to communications ‘addressed to the public at large or any section of the public’, which would exclude communications within the family and to experts.<sup>1676</sup> This uncertainty was clarified to some extent in 2005 with amendments to the *Family Proceedings Rules 1991* (UK)<sup>1677</sup> which introduced a comprehensive and exhaustive list of circumstances of when disclosures of information can be made for specific purposes without permission or directions from the court.<sup>1678</sup> Some difficulties remain, however, as to what information can be shared in the absence of court directions or permission, as there have been disputes as to the scope of disclosures permitted by these rules and the purpose for which disclosed information can be used.<sup>1679</sup>

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1673 See para 7.261–7.264 of this Report.

1674 *Hinch v Director of Public Prosecutions* [1996] 1 VR 683, 692.

1675 Ibid.

1676 NV Lowe and RAH White, *Wards of Court* (2nd ed, 1986) 169–70. The authors argue, in the context of contempt proceedings in wardship cases, that if the term ‘publication’ in s 12(1) of the *Administration of Justice Act 1960* (UK) meant communication in *any* form then it would ‘cast the contempt net too widely’ and capture communication within families and disclosure of information to experts. They prefer instead to adopt an approach consistent with the *Contempt of Court Act 1981* (UK), which refers to publication as being to ‘the public at large or any section of the public’. See also *Re M (a child) (children and family reporter: disclosure)* [2002] 4 All ER 401, which takes a similar approach to Lowe and White in relation to the meaning of ‘publication’ in s 12(1) of the *Administration of Justice Act 1960* (UK).

1677 *Family Proceedings (Amendment No 4) Rules 2005* (UK).

1678 *Family Proceedings Rules 1991* (UK) r 10.20A provides exceptions to the prohibition on publication contained in s 12 of the *Administration of Justice Act 1960* (UK) for communications made, for example, to a party’s legal representative, adviser, or expert, to the party’s spouse, or to a health care or counselling service for the child or the family. See also *Clayton v Clayton* [2007] 1 All ER 1197, [31]–[33] (Potter P).

1679 See *A Local Authority v D (Chief Constable of Thames Valley Police Intervening)*; *Re D* [2006] 2 FLR 1053.

### The family law approach

7.118 The Discussion Paper also considered how this issue was dealt with in another jurisdiction that deals with personal matters that are usually kept private: family law. Section 121 of the *Family Law Act 1975* (Cth) states that a ‘person who publishes ... or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings ... that identifies [the relevant person]’<sup>1680</sup> will be guilty of an offence. That prohibition is aimed at preventing ‘ridicule or curiosity or some kind of notoriety’ attaching to the parties and their children.<sup>1681</sup>

7.119 There is only limited case law on the meaning of section 121, particularly in relation to the phrase ‘public or ... section of the public’. However, the Family Court has drawn on the High Court’s examination of the *Companies (South Australia) Code*, which prohibits in certain circumstances offering ‘the public’ or a ‘section of the public’ an opportunity to subscribe for, or purchase, particular interests. When considering the meaning of these words, the High Court outlined the following principles:

For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or the group in a private capacity and places him or them in a position of contrast with a member or section of the public.<sup>1682</sup>

...

If, however, there is some subsisting special relationship between offeror and members of a group or some rational connexion between the common characteristic of members of a group and the offer made to them, the question whether the group constitutes a section of the public for the purposes of the offer will fall to be determined by reference to a variety of factors of which the most important will ordinarily be: the number of persons comprising the group, the subsisting relationship between the offeror and the members of the group, the nature and content of the offer, the significance of any

1680 *Family Law Act 1975* (Cth) s 121(1).

1681 *Re South Australian Telecasters Ltd* (1998) 23 Fam LR 692, [35] (Nicholson CJ). See also *Re W: Publication Application* (1997) 21 Fam LR 788, 801–8 (Fogarty and Baker JJ) as to the history and policy behind s 121 of the *Family Law Act 1975* (Cth). Also note the similar prohibition that applies to de facto proceedings: *Property Law Act 1974* (Qld) ss 343(1), 344(1).

1682 *Corporate Affairs Commission South Australia v Australian Central Credit Union* (1985) 157 CLR 201, 208 (Mason ACJ, Wilson, Deane and Dawson JJ) cited in *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 324 (Kenny J). See also the example given by Angel J in *R v Campbell* (1990) 99 FLR 107 cited in *Attorney-General v Wurrabadlumba* (1990) 74 NTR 5, 8 (Asche CJ):

Of course a person may be a member of the public for one purpose and at the same time not a member of the public for another. For example, if two friends went to the football and one assaulted the other in the course of a private argument...the assault by one on the other could not, in my view, be said to be an act directed against a member of the public. If on the other hand one of the friends threw a missile indiscriminately into the crowd and it hit a stranger that would, in my view, clearly be an act in respect of a member of the public. If the missile were to hit the friend rather than a stranger I can see no reason why that also would not constitute an act in relation to a member of the public.

particular characteristic which identifies the members of the group and any connexion between that characteristic and the offer.<sup>1683</sup>

...

[N]o particular number of persons can be designated as being, of itself, necessarily sufficient or inadequate to constitute the public or a section of the public for every purpose.<sup>1684</sup>

7.120 The essence of the test is whether a person or body has a ‘special characteristic’ that sufficiently distinguishes them from the public or a section of the public. In drawing on these principles when interpreting section 121 of the *Family Law Act 1975* (Cth),<sup>1685</sup> the family law cases reveal three main categories of disclosures as falling outside the prohibition:

- disclosures made by a person in a ‘private’ or ‘personal’ context;
- disclosures of information to a person or body with a sufficient interest in receiving that information that distinguishes them from other members of the public; and
- disclosures for the purpose of obtaining advice or assistance in relation to a court proceeding.

#### *Personal disclosures*

7.121 The courts have distinguished between disclosures of information to the public or a section of the public, and parties to family law proceedings communicating that information in a private or personal context. In *Re Edelsten*,<sup>1686</sup> the Federal Court considered that:<sup>1687</sup>

It cannot have been intended by the legislature that the restriction on dissemination should apply, for example, to conversations between a party to Family Court proceedings and a close personal friend.

<sup>1683</sup> *Corporate Affairs Commission South Australia v Australian Central Credit Union* (1985) 157 CLR 201, 208 (Mason ACJ, Wilson, Deane and Dawson JJ) cited in *Re W: Publication Application* (1997) 21 Fam LR 788, 809 (Fogarty and Baker JJ).

<sup>1684</sup> *Corporate Affairs Commission South Australia v Australian Central Credit Union* (1985) 157 CLR 201, 209 (Mason ACJ, Wilson, Deane and Dawson JJ). Their Honours went on to quote: ‘Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole’: *Nash v Lynde* [1929] AC 158.

<sup>1685</sup> For example, *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308; *Re W: Publication Application* (1997) 21 Fam LR 788.

<sup>1686</sup> (1988) 18 FCR 434.

<sup>1687</sup> *Ibid* 436 (Morling J). This statement was endorsed in *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 324 (Kenny J).

See also generally, comments by Pennycuik J in *Morrison Holdings Ltd v Inland Revenue Commissioners* [1966] 1 All ER 789, 798 cited by Asche CJ in *Attorney-General v Wurrabadlumba* (1990) 74 NTR 5, 9 when discussing who is ‘the public’:

One would not, on any ordinary use of the word, describe a man’s child or partner, and above all his wife, as being a member of the public in relation to himself.

7.122 Disclosures to associates of a person by that person's former spouse have also been described as 'essentially personal, that is, as being made... in a private way' and so falling outside the prohibition.<sup>1688</sup>

*Disclosures when a sufficient interest exists*

7.123 The courts have also found that a person or group of people do not constitute the public or a section of the public if they have a sufficient interest in receiving the relevant information that distinguishes them from other members of the public.

7.124 The family law cases in this context have considered only disclosures to an official or statutory body, although the High Court's decision in *Corporate Affairs Commission South Australia v Australian Central Credit Union*<sup>1689</sup> does not appear to limit the required interest in this way. For example, the Family Court has held that the disclosure of information to State and Territory child welfare authorities that a person could potentially be at risk of committing sexual offences against children did not constitute dissemination to a section of the public because:<sup>1690</sup>

it is the connection which exists between the information which is sought to be provided to the child welfare authorities and the functions that they perform, which distinguishes them from other persons or organisations in the public.

7.125 The Court was clear though that there remains a need to demonstrate a sufficient interest in or connection to the subject matter of the information, otherwise the relevant authority would not have a 'legitimate interest, above and beyond any other sections of the public, in acquiring that information.'<sup>1691</sup>

7.126 Similarly, the receipt of documents from a family law proceeding by the Commissioner of Taxation did not amount to dissemination to the public or a section of the public under section 121 because the documents were received 'by reason of his office and his statutory functions, powers and obligations'.<sup>1692</sup>

7.127 There have also been other cases that seem to have been decided on this basis although the courts have not stated expressly that it was a sufficient interest in receiving the information that distinguished the relevant body from the public or a section of the public. The circumstances that were considered not to involve publishing information about family law proceedings to the public or a section of the public were:

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1688 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 325 (Kenny J).

1689 (1985) 157 CLR 201.

1690 *Re W: Publication Application* (1997) 21 Fam LR 788, 810 (Fogarty and Baker JJ).

1691 *Ibid.*

1692 *Atkinson v Commissioner of Taxation* (2000) ATC 4332, 4335 (Lindgren J).

- the transmission by the Family Court to the Attorney-General or his or her Department of documents revealing persistent tax evasion;<sup>1693</sup>
- the giving of evidence by a witness in a bankruptcy examination. The Federal Court considered that any publication was to the court and not to the public; and<sup>1694</sup>
- the transmission by a party to family law proceedings to the Director of Public Prosecutions of documents so that he or she could consider whether the publication of information by another person contravened section 121 of the *Family Law Act 1975* (Cth).<sup>1695</sup>

#### *Disclosures to assist with proceedings*

7.128 The disclosure of information by a party to get advice or assistance in a family law proceeding has also been found to fall outside the scope of the prohibition against dissemination to the public or a section of the public.

7.129 The Full Court of the Family Court considered that disclosure by a party of court documents and reports from a proceeding to health professionals for the purpose of obtaining professional advice on issues raised in the proceedings fell outside the scope of the section 121 prohibition.<sup>1696</sup> Despite there being a specific exception that applies in such cases, the Family Court held that such a disclosure is not one to the public or a section of the public.<sup>1697</sup>

### **Submissions**

7.130 The submissions that considered this issue addressed three broad themes. Firstly, there was a call for clarity in the law in relation to who should be prohibited from receiving information. Secondly, many submissions distinguished between disclosures of information to family and friends and those made to the wider public. Thirdly, a number of submissions identified other purposes or situations when the publication of information about Tribunal proceedings should be permitted.

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1693 *In the Marriage of T and T* (1984) FLC 91–588. The Full Court of the Family Court did say, however, that not doing so may be regarded as a ‘failure of public duty’: [79–747] (Simpson and Barblett SJJ) and [79–749] (Strauss J agreeing). See *Re W: Publication Application* (1997) 21 Fam LR 788, 810 where Fogarty and Baker JJ suggested that the Court’s approach in *In the Marriage of T and T* was consistent with theirs, which was based on the connection between the relevant department’s function and the information.

1694 *Re Edelsten* (1988) 18 FCR 434, 436 (Morling J). The Court also considered that, in any event, there were other reasons why the giving of such evidence was permitted such as the existence of a specific exception in s 121(9)(a) of the *Family Law Act 1975* (Cth).

1695 *AH v SS* (2005) 34 Fam LR 24. Although note that Bryant CJ did not specifically say that the Director of Public Prosecutions was not a member of the public or a member of a section of the public, but simply that an order permitting such disclosure was unnecessary: 33.

1696 *Separate Representative v JHE* (1993) 16 Fam LR 485, 497–8 (Nicholson CJ and Fogarty J).

1697 *Ibid* 498.

### **Lack of clarity**

7.131 Concerns were expressed about uncertainty in the current law in terms of who is prohibited from receiving information.<sup>1698</sup> In calling for greater clarity, the Public Advocate commented that:<sup>1699</sup>

it is not clear that publication under the guardianship regime is limited to publication in the media or to a section of the public as suggested. Although the better view may be that publication is not intended to cover disclosures of the information to a neighbour or close friend, as it currently stands, s112(3) is open to that interpretation.

7.132 Some submissions identified some of the problems that have resulted from this uncertainty.<sup>1700</sup> Queensland Advocacy Incorporated commented:<sup>1701</sup>

The lack of clarity at present makes it very difficult to talk to anyone about problems in the regime. In a sense even informing politicians of issues, discussing matters with legal representatives and colleagues in advocacy groups, even in a de-identified form, seems problematic under the present law.

7.133 Caxton Legal Centre noted that people are afraid to seek support, including professional support, for fear of breaching the confidentiality provisions:<sup>1702</sup>

Other clients have been in desperate need of seeking out support, advocacy and legal advice and have been afraid to do so because of the confidentiality rule. Some of our more pragmatic clients have simply proceeded to discuss issues hoping that they could justify their actions, if required, as being reasonable and therefore excused under the legislation.

7.134 Staff from the Office of the Adult Guardian also expressed some uncertainty as to whether the current law allowed information from a hearing to be disclosed to other staff and whether information learned at a hearing could be used in an investigation in relation to another adult.<sup>1703</sup>

### **Personal disclosures and those to the public**

7.135 Many submissions distinguished between personal disclosures made to family and friends, and wider dissemination of information to the public. Of the submissions that considered this issue, there was strong support (including from some adults with impaired capacity)<sup>1704</sup> for permitting disclosures about Tribunal proceedings to an

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1698 Submissions 1H, 102, 124.

1699 Submission 1H.

1700 Submissions 102, 124, F23.

1701 Submission 102.

1702 Submission 124.

1703 Submission F23.

1704 Submissions 136, F19, F20.

adult's support network, but not to the general public.<sup>1705</sup>

7.136 For example, Caxton Legal Centre considered that a prohibition that prevented family members, who constitute an adult's support and care network, telling each other about proceedings would be impractical. It also suggested that such a law would appear to breach General Principle 8,<sup>1706</sup> which requires the importance of maintaining an adult's existing supportive relationships to be taken into account.<sup>1707</sup>

7.137 Some other submissions did not specifically address the issue of public disclosures but were of the view that the law should not stop people being able to discuss Tribunal hearings with family members or close friends.<sup>1708</sup>

7.138 It was also recognised that public dissemination of information need not occur only through the media. One adult with impaired capacity identified the power of the internet and noted that many people talk in chat rooms and internet forums about issues relating to decision-making disabilities.<sup>1709</sup>

7.139 Some of the reasons expressed in favour of allowing personal disclosures focused on advancing the interests of adults. Examples given were that these types of disclosures are necessary to care for the adult properly<sup>1710</sup> and to facilitate decision-making in his or her best interests.<sup>1711</sup> A view expressed at a forum was that it is desirable to think of whom the adult would be likely to tell about his or her circumstances and the information that would be shared, although it was recognised that it is difficult to know in practice what the adult would want.<sup>1712</sup>

7.140 However, the majority of submissions that favoured permitting personal disclosures did so because of the benefits that would flow to those close to the adult. Some submissions favoured permitting such discussions for educative reasons because sometimes people need to share and discuss information to know what steps they should take.<sup>1713</sup> Endeavour Foundation expressed concerns that the current law would prevent one family who had been before the Tribunal from sharing information about how it operates with another family.<sup>1714</sup> One submission thought this type of information was

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1705 Submissions 53, 67, 74, 94, 102, 145, F4, F5, F6, F8, F9, F13, F19.

1706 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 8; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 8.

1707 Submission 124.

1708 Submissions 37B, 73A, 101, 124, F4, F6, F12, F14, F22.

1709 Submission F22.

1710 Submissions 120, 124.

1711 Submission 74. Submission F4 also considered that if people are not allowed to discuss Tribunal proceedings, where issues of importance are raised during a proceeding, that issue may never be satisfactorily resolved as people are not able to discuss it outside of the hearing.

1712 Submission F4

1713 Submissions 18B, F20.

1714 Submission 120.

particularly valuable for preparing people with poor literacy or limited education to appear before the Tribunal.<sup>1715</sup>

7.141 Other submissions considered these disclosures should be permitted because discussing these issues often helps people cope with the difficulties they have experienced in dealing with the guardianship system.<sup>1716</sup> Carers Queensland commented:<sup>1717</sup>

It needs to be remembered that contact with the system is generally a significant event and one which does not belong to the adult alone. It is likely to impact considerably on families and carers and their associated rights and interests. Therefore, their experience and the associated need or desire to communicate with family and friends or relevant experts should not be denied to them under the guise of protecting the confidential information of the adult.

7.142 Some submissions recognised that personal disclosures could simply be gossip and were of the view that this was undesirable.<sup>1718</sup> One attendee at a community forum was of the view that disclosure of information to a ‘nosy neighbour’ could be worse than disclosure to the media as it could result in inaccurate information being spread throughout a community.<sup>1719</sup> However, Queensland Advocacy Incorporated was of the view that:<sup>1720</sup>

While gossip is to be discouraged it is hardly in the same league as putting it on the front page of *The Courier-Mail* or even in an association newsletter.

7.143 Also of significance to respondents was the difficulty in legislating to prevent people from talking to family or others close to them. Attempting to do so was generally seen as impractical, unlikely to be effective and difficult to enforce.<sup>1721</sup> One adult with impaired capacity thought it was not possible to stop people talking to their neighbours.<sup>1722</sup>

### ***Disclosures for other purposes***

7.144 A number of submissions also identified specific circumstances where other disclosures to people about Tribunal proceedings should not be prohibited.

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1715 Submission 19B.

1716 Submissions 28D, F5, F9, F13, F14.

1717 Submission 101.

1718 Submissions 102, 105, F9, F19, F21. Submission 105 also identified that gossip about an adult was generally undesirable.

1719 Submission F9.

1720 Submission 102.

1721 Submissions 60, 69, 70, 74, 121, F8, F9, F12, F13, F15, F22, F23.

1722 Submission F22.

### *Legal or advocacy advice*

7.145 Caxton Legal Centre was of the view that people need to be able to disclose information relating to Tribunal proceedings to obtain legal advice.<sup>1723</sup> Some respondents also considered that the prohibition should not prevent people disclosing information when seeking advice from advocacy groups.<sup>1724</sup>

### *Medical or health reasons, or other support*

7.146 A number of submissions considered that any prohibition should not apply to circumstances where an adult or a person associated with the adult seeks medical or health support. For example, Queensland Corrective Services stated that any restriction on information relating to proceedings:<sup>1725</sup>

should not prevent the disclosure of information to other parties, including health professionals or other service providers where the information is necessary to protect the interest of the person, the subject of the guardianship proceedings.

7.147 In addition, one respondent considered that health service providers should be informed of any relevant order made by the Tribunal (or the existence of power of attorneys) in relation to those adults admitted to their service.<sup>1726</sup> However, concerns were expressed at a focus group for advocacy groups about service providers disclosing information about a hearing that could potentially compromise an adult's service provision.<sup>1727</sup>

7.148 Some submissions recognised that involvement in the guardianship system can be significant or traumatic<sup>1728</sup> and therefore considered that people should be able to talk about the proceedings to medical professionals and support persons,<sup>1729</sup> including advocacy groups.<sup>1730</sup>

### *Informing Government or Members of Parliament*

7.149 A number of submissions also considered that any prohibition should not prevent people disclosing information about Tribunal proceedings to a relevant official, Government body or Member of Parliament.

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1723 Submission 124. Submission 102 also referred to the undesirability of the current position where there is uncertainty as to whether a person is able to discuss matters with legal representatives.

1724 Submissions 124, F16.

1725 Submission 121.

1726 Submission 66.

1727 Submission F15.

1728 Submission F8 and see notes 1716–1717 of this Report.

1729 Submission F8.

1730 Submission 124.

7.150 Two respondents stated that they had been prevented from, or warned against, communicating with Members of Parliament about Tribunal proceedings due to the prohibition on publication.<sup>1731</sup> Other respondents, however, have reported approaching their local Member without such difficulties.<sup>1732</sup> Another respondent who attempted to complain about the Tribunal to a variety of Government Departments reported difficulties establishing ‘credibility’ because the confidentiality provisions prevented the giving of examples to substantiate his or her concerns.<sup>1733</sup>

7.151 The Public Advocate and the Adult Guardian also identified circumstances where they needed to be able to disclose or receive information about Tribunal proceedings to fulfil their statutory functions. Staff of the Office of the Adult Guardian were concerned that the confidentiality provisions hindered the proper flow of information between the various guardianship agencies.<sup>1734</sup> Another respondent shared these concerns and gave an example of where a lack of communication between the statutory authorities involved in an adult’s life had led to negative outcomes for that adult.<sup>1735</sup> The Public Advocate also considered that the legislation should make clear the entitlement of the Public Advocate to receive information about Tribunal proceedings regardless of whether he or she is a party to those proceedings.<sup>1736</sup>

#### *Other reasons*

7.152 One concern expressed by respondents arose in the context of where an appointment as an adult’s guardian or administrator was sought but not made because the existing informal decision-making arrangements supporting the adult were adequate. In these circumstances, some people felt unable to explain to others the reasons why their application to be guardian or administrator had been refused.<sup>1737</sup>

On the face of it, to the outside world, it seemed that we must have done something wrong, but we weren’t allowed to talk about it, or show the notice to anyone.

7.153 Another situation identified by one submission where it was suggested that disclosures about Tribunal proceedings should be permitted was to ‘researchers who have already been through a well-recognised ethical clearance process’. One

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1731 Submissions 116, F5.

1732 For example, submissions 114, 138.

1733 Submission F5.

1734 Submission F23. Similar views were expressed by submission 109 who commented that it would be desirable for government agencies to be able to exchange information relevant to the guardianship system. A centralised database was suggested for information from, and accessible by, Disability Services Queensland, the Adult Guardian, the Commission for Children and Young People and other entities. This would enable knowledge of any relevant order to be readily available.

1735 Submission 16B.

1736 Submission F16.

1737 Submission 16B. Similar views were expressed by submissions 51 (in relation to where only an appointment of guardian or administrator was made in circumstances where an application was made in relation to both) and F5.

respondent considered that research on the guardianship system would assist in improving the quality of decision-making through transparency.<sup>1738</sup>

### **Suggested approaches**

7.154 A small number of submissions, including those from the Public Advocate and Adult Guardian, proposed limiting the prohibition to publications made to the public or a section of the public.<sup>1739</sup> Caxton Legal Centre considered that such an approach would take into account ‘real life’ needs and practicalities by allowing private discussions with friends, families, support workers and legal representatives.<sup>1740</sup>

### **The Commission’s view**

7.155 The Commission notes the widespread concern and confusion about the scope of the current prohibition. Submissions from a wide range of individuals and groups expressed uncertainty about the extent to which they may lawfully share information with other people. This lack of clarity in the law is undesirable and the Commission considers that the prohibition should state expressly who should be prohibited from receiving identifying information about Tribunal proceedings.

7.156 The Commission agrees with the strong view expressed in submissions that the prohibition on publishing information about Tribunal proceedings should not apply to all disclosures. The Commission considers that a blanket prohibition would prevent disclosures of information to people who have an appropriate need or interest in receiving that information. It also agrees with those submissions that considered that legislating for such a prohibition would be impractical and unlikely to be adhered to by the community. The Commission considers it generally undesirable to attempt to prohibit conduct that will nevertheless occur as it undermines the legitimacy of the law.<sup>1741</sup> The Commission considers, however, that disclosures of information about Tribunal proceedings to a wider and more public group of people should be prohibited.

7.157 When formulating the scope of the prohibition, the Commission considered the approach taken in the United Kingdom under the *Family Proceedings Rules 1991* (UK).<sup>1742</sup> However, the establishment of an exhaustive list received no support from respondents and the Commission considers such an approach to be too inflexible. An exhaustive list would mean that disclosures that might seem appropriate, but fall outside one of the circumstances listed, would be unlawful and so would require the making of

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1738 Submission 86.

1739 Submissions 1H, 73A, 94, 122, 124.

1740 Submission 124.

1741 For example, the legitimacy of the law was identified as a relevant policy consideration when the *Family Proceedings Rules 1991* (UK) were amended: see Explanatory Memoranda, Family Proceedings (Amendment No 4) Rules 2005 (UK) [7.2].

1742 *Family Proceedings (Amendment No 4) Rules 2005* (UK). *Family Proceedings Rules 1991* (UK) r 10.20A provides exceptions to the prohibition on publication contained in s 12 of the *Administration of Justice Act 1960* (UK) for communications made, for example, to a party’s legal representative, adviser, or expert, to the party’s spouse, or to a health care or counselling service for the child or the family. See also *Clayton v Clayton* [2007] 1 All ER 1197, [31]–[33] (Potter P).

an application to the Tribunal or the Supreme Court for permission to publish.<sup>1743</sup> Reliance on an exhaustive list has also caused some difficulties in determining which disclosures fall within the listed circumstances.<sup>1744</sup>

7.158 Instead, the Commission prefers a test based on section 121 of the *Family Law Act 1975* (Cth), which prohibits disclosure of information to the public or to a section of the public, and considers it establishes an appropriate limit as to the persons to whom information may be published. As discussed above, such a test does not prevent what are essentially private or personal disclosures or those to people with a sufficient interest in receiving the information, but does prevent wider publication.

7.159 An advantage of adopting the ‘public or section of the public’ model is that the test has been judicially considered and so has some established meaning which is important given the concerns expressed about the uncertainty of the current law. The Commission does note, however, that a test based on notions of who is or is not ‘the public or a section of the public’ is a flexible one. There remains scope for some degree of residual uncertainty as to whether a particular disclosure falls within the prohibition. However, some degree of flexibility is desirable given the multitude of circumstances in which the test may have to be applied.

7.160 To deal with concerns about the inevitable uncertainty that accompanies a flexible test, the Commission proposes to consider how it might be applied in the guardianship context, drawing on the developing case law in the family law context. The essence of the test, as discussed above, is whether the relevant person or group possesses a special characteristic that distinguishes them from the public or a section of the public. The cases that have considered this test in the family law context have recognised three categories of disclosures that fall outside the prohibition. These categories may overlap and there may also be other disclosures that fall outside the categories and do not breach the prohibition. Nevertheless, these categories present a useful starting point for the Commission to articulate the application of this test in the guardianship context.

### **Personal disclosures**

7.161 The Commission notes that personal disclosures are not made to the public or a section of the public and so would fall outside the prohibition on publication of information.<sup>1745</sup> Distinguishing between the public and the adult’s support network (particularly family and close friends) was a strong theme revealed by consultation. The greater claim to receive information of those with a greater involvement and interest in an adult’s life is also one of the Commission’s guiding principles of this stage of the review identified in Chapter 3 of this Report.<sup>1746</sup> Indeed, it is also recognised that it

1743 The Commission later recommends that the Tribunal and the Supreme Court should have power to permit the publication of information about a proceeding that is otherwise prohibited if it is in the public interest or in the interests of the adult: see para 7.215–7.218 of this Report.

1744 See *A Local Authority v D (Chief Constable of Thames Valley Police Intervening)*; *Re D* [2006] 2 FLR 1053.

1745 *Re Edelsten* (1988) 18 FCR 434, 436 (Morling J); *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 324 (Kenny J).

1746 See para 3.156, 3–4 of this Report.

may be necessary for this group of people to have this information if they are to provide support or care for the adult. Accordingly, the Commission considers that such disclosures would, and should, fall outside the prohibition.

7.162 The Commission is aware that personal disclosures will not always be due to a person's interest in the adult's life. Gossip was an example mentioned by respondents. The Commission accepts that such disclosures may be undesirable but considers that they are, to some extent, inevitable and unable to be regulated adequately by the law. Attempts to do so would be unsuccessful and may inhibit the sorts of personal disclosures identified earlier that should be permitted. The Commission considers that if such gossip or discussions escalated and involved larger groups of people, then this may involve a breach of the prohibition and, as such, disclosures would be to the public or a section of the public and not be of a personal nature.

### **Disclosures when a sufficient interest exists**

7.163 The Commission considers that disclosures of information about proceedings that identify an adult would, and should, be permitted to a person who has a sufficient interest in receiving that information. There is family law authority that such an interest can arise where a body receives information that is relevant to fulfilling its statutory function,<sup>1747</sup> although, consistent with the approach of the High Court in *Corporate Affairs Commission South Australia v Australian Central Credit Union*,<sup>1748</sup> the Commission considers that such an interest is not limited to official or Government bodies.

7.164 The circumstances when a person may have a sufficient interest in receiving information about a guardianship proceeding is likely to be wider than in the family law context. One reason for this difference is that orders made in a guardianship proceeding can impact upon people who have ongoing dealings with an adult, and who would otherwise presume that an adult has capacity. In contrast, the scope for people to have a sufficient interest in knowing identifying information about people involved in a divorce or in child-related proceedings is more limited.

7.165 The type of orders made during guardianship proceedings may influence the range of people who have a sufficient interest in receiving information about those proceedings. Orders appointing a guardian or administrator may be limited in scope and in those cases it is likely that the variety of circumstances which may give rise to a person having a sufficient interest in receiving information that identifies the adult will be more restricted. For example, an administration order may be made only in relation to complex financial decisions and so not impinge on an adult's ability to control his or her day-to-day finances. In addition, if only an administrator or only a guardian is appointed, this is likely to result in different types of people having a sufficient interest in receiving information about the relevant order that is made.

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1747 *Re W: Publication Application* (1997) 21 Fam LR 788, 810 (Fogarty and Baker JJ); *Atkinson v Commissioner of Taxation* (2000) ATC 4332, 4335 (Lindgren J).

1748 (1985) 157 CLR 201.

**Disclosures to assist with proceedings**

7.166 The Commission considers that the prohibition would not,<sup>1749</sup> and should not, apply to disclosures made to seek assistance or advice in relation to guardianship proceedings. It would undermine the effective functioning of the system if disclosures that were needed to bring, or consider bringing, proceedings were prohibited.

7.167 The Commission also considers that the ability to make such disclosures should not be limited only to active parties but should also include any person seeking assistance in relation to the proceedings. This is because it is not uncommon for the active parties to a guardianship proceeding to be finalised either shortly before a hearing or even at the hearing itself.

**When will disclosures not be to the public or a section of the public?**

7.168 In the course of its consultation, the Commission encountered concerns about the scope of the prohibition and whether particular disclosures were permitted. To address those concerns and to provide greater certainty for the law in this area, the Commission will examine those disclosures that consultation revealed as causing confusion or doubt. Accordingly, the Commission considers that a person disclosing information about Tribunal proceedings in the following situations would not be doing so to the public or a section of the public.

- Family members and close friends are able to discuss Tribunal proceedings with each other. This would include a person explaining to another the reasons why he or she was not appointed as guardian for an adult. Such disclosures are of a personal nature and so are not made to the public or a section of the public.<sup>1750</sup>
- A person involved in Tribunal proceedings who is suffering from stress or depression may discuss the proceedings with a medical professional or counsellor as part of his or her treatment. Such a disclosure is of a personal nature because of its limited scope, and so is not to the public or a section of the public. There are limits though as to how far this disclosure may be permitted. That same person may also benefit from disclosing that information about proceedings to a wider support group meeting. At some point, depending on factors such as the size of the group and their interest in the information, that disclosure may then be considered as one to the public or a section of the public.
- As part of the category of disclosures relating to seeking assistance with guardianship proceedings, a person is able to obtain legal and other advice (for example, from an advocacy group) as part of preparing for a guardianship hearing. Similarly, disclosure of this information is also permitted when considering an appeal against a Tribunal decision. The Family Court has made

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See *Separate Representative v JHE* (1993) 16 Fam LR 485, 497–8 (Nicholson CJ and Fogarty J).

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See *Re Edelsten* (1988) 18 FCR 434, 436 (Morling J); *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, 324 (Kenny J).

clear these types of disclosures are not made to the public or a section of the public.<sup>1751</sup>

- The disclosure to nursing staff and administrators of an aged care facility as to the appointment of a guardian for an adult in their care is permitted. The High Court has stated that a ‘special characteristic’ can place a person in a position of contrast to a member or section of the public.<sup>1752</sup> The Commission considers that people who need to act upon that guardian’s directions, such as nursing staff and administrators of an aged care facility, have a sufficient interest in knowing of that appointment which distinguishes them from the public or a section of the public.
- A person who has some responsibility for an adult, such as a guardian, administrator, attorney or carer, should be able to disclose identifying information about a proceeding to Centrelink in relation to the adult’s financial situation. Centrelink has a sufficient interest in receiving such information in fulfilling its statutory duties that distinguishes it from members of the public. This reasoning could also apply to other Government Departments or agencies such as the police, the Office of the Director of Public Prosecutions, Queensland Health’s Mental Health Services and the Legal Services Commission if they have a sufficient interest in receiving relevant information. This is consistent with the family law cases that decided that statutory bodies with a sufficient interest in particular information fall outside the scope of the public or a section of the public.<sup>1753</sup>
- Similarly, a person is able to provide information to a statutory or other body that has as its purpose the promotion or safeguarding of the rights and interests of adults. This means, for example, the Public Advocate and the Adult Guardian could disclose information about proceedings to each other if their interest in the information is sufficient to distinguish them from the public or a section of the public. Their sufficient interest would also entitle them to receive information from other people about Tribunal proceedings, for example, through receipt of a copy of a transcript or by talking to parties to a proceeding.
- For the same reason, disclosure of information about a proceeding to a local Member of Parliament is also permitted. The Commission considers that Members of Parliament as elected representatives of the people have a sufficient interest in being told about issues relevant to their constituency and that this interest distinguishes them from the public or a section of the public. The Attorney-General may also be regarded as having a sufficient interest in receiving information about a proceeding if it is necessary to discharge of the responsibilities of that office.

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1751 *Separate Representative v JHE* (1993) 16 Fam LR 485, 497–8 (Nicholson CJ and Fogarty J).

1752 *Corporate Affairs Commission South Australia v Australian Central Credit Union* (1985) 157 CLR 201, 208 (Mason ACJ, Wilson, Deane and Dawson JJ).

1753 *Re W: Publication Application* (1997) 21 Fam LR 788, 810 (Fogarty and Baker JJ); *Atkinson v Commissioner of Taxation* (2000) ATC 4332, 4335 (Lindgren J).

## WHAT CONSTITUTES ‘IDENTIFICATION’?

7.169 The Commission has recommended that there should be a prohibition on publication of information to the public or a section of the public that would identify an adult.<sup>1754</sup> There are two issues to consider when determining whether publication of information will be sufficient to identify the adult. First, it is necessary to determine *who* must be able to identify the adult from the information. Second, consideration must be given to whether the information published must result in the actual identification of the adult, or whether some lower threshold is sufficient such as a reasonable likelihood that the information will identify the adult.

### Who must be able to identify the adult?

#### *The Discussion Paper*

7.170 There are broadly two categories of people, at either end of a spectrum, who may be able to identify an adult. The first is private individuals, such as family members and close friends, who may be able to identify the adult from minimal and non-specific information. The second category is members of the public or a section of the public who could identify the adult only from reasonably specific information. In between these two ends of the spectrum are a range of other people, such as service providers, work colleagues, neighbours, and members of the adult’s local community, who would require varying levels of detail in order to identify the adult.

7.171 Two cases mention this issue, albeit only briefly. One of them is *Re South Australian Telecasters Ltd*,<sup>1755</sup> which considered section 121 of the *Family Law Act 1975* (Cth). That provision states that identification will be taken to occur when the information is such that it is ‘sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated’.<sup>1756</sup> The Family Court held that section 121 would be breached if the parties to Family Court proceedings could be identified by the residents of a small semi-rural township where they resided.<sup>1757</sup> Nicholson CJ, who examined this issue in the context of an application for an injunction to prohibit airing of a television program, stated:<sup>1758</sup>

for the program to proceed would involve the dissemination to both a member of the public and a member of a section of the public, namely those in the [township] environs and, in particular, such dissemination would identify them to anyone who knew any of the parties.

<sup>1754</sup> See para 7.101–7.110, 7.155–7.168 of this Report.

<sup>1755</sup> (1998) 23 Fam LR 692.

<sup>1756</sup> *Family Law Act 1975* (Cth) s 121(3).

<sup>1757</sup> *Re South Australian Telecasters Ltd* (1998) 23 Fam LR 692, 697 (Nicholson CJ).

<sup>1758</sup> *Ibid.*

7.172 A second case is *Western Australia v West Australian Newspapers Ltd; Ex parte Attorney-General (WA)*,<sup>1759</sup> which considered the prohibition on publication imposed by the *Children's Court of Western Australia Act 1998* (WA).<sup>1760</sup> Unlike the family law prohibition, the relevant provisions do not specify the audience whose identification is relevant and simply refer to publications or disclosures 'likely to lead to the identification of a child' concerned in Children's Court proceedings.<sup>1761</sup>

7.173 The Western Australian Court of Appeal considered that the relevant capacity for identification is by the public, including those members of the public in the child's community, such as neighbours, 'whose identification would be most likely to have practical consequences for the child'.<sup>1762</sup> The Court of Appeal distinguished between people 'closely and intimately connected with the child or the child's family' whose capacity for identification would *not* be relevant, and the 'ordinary general reader' who 'may be a person who lives in the same small town as the child, or who attends or teaches at, or is the parent of a child who attends, the child's school' whose capacity for identification *would* be relevant.<sup>1763</sup> This test appears to be very similar to that which applies to the prohibition under the *Family Law Act 1975* (Cth). The Court of Appeal referred only once to the words 'section of the public', but its treatment of identification could comfortably sit with the definition of that phrase in the family law context.

### Submissions

7.174 Only a small number of submissions addressed this issue, but of those that did, the majority considered the prohibition should be breached only if a member of the public or a member of a section of the public was able to identify the adult.<sup>1764</sup> Respondents that were of this view included the Department of Justice and Attorney-General, Disability Services Queensland, the Public Trustee of Queensland, the Public Advocate, the Adult Guardian and some media organisations. The Australian Broadcasting Corporation considered that:<sup>1765</sup>

It is preferable that private individuals, such as family members and close friends, who may be able to identify the person from minimal or non-specific information, should not be caught up in the prohibition.

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1759 (2005) 30 WAR 434.

1760 See *Children's Court of Western Australia Act 1988* (WA) ss 35–36.

1761 The purpose of those provisions was described as preventing 'the victimisation, humiliation and harassment' of children involved in Children's Court proceedings: *Western Australia v West Australian Newspapers Ltd; Ex parte Attorney-General (WA)* (2005) 30 WAR 434, 440 (Wheeler and Roberts-Smith JJA and Miller AJA).

1762 *Western Australia v West Australian Newspapers Ltd; Ex parte Attorney-General (WA)* (2005) 30 WAR 434, 440–1 (Wheeler and Roberts-Smith JJA and Miller AJA).

1763 Ibid.

1764 Submissions 1, 94, 98, 118, 126 stated that identification by a member of the public was necessary for the prohibition to be breached, while submissions 122, 125, 127 considered that identification by the public or a section of the public was the appropriate test.

1765 Submission 94.

7.175 One person with a mental illness commented that a person in that situation is not likely to want his or her neighbour to know about their dealings with the Tribunal. That respondent considered that even if a media report is ‘de-identified’ so the general public could not identify the adult, a neighbour may still be able to do so.<sup>1766</sup> The Department of Justice and Attorney-General considered that:<sup>1767</sup>

publications made to a neighbour who has no interest in the matter would be prohibited as a ‘neighbour’ is generally considered to be a member of a section of the public.

7.176 Some respondents gave examples of where a person’s involvement with an adult meant that identification occurred even when publications were in a de-identified form. One respondent, who has appeared before the Tribunal, reported being recognised by another person in a publication that had been de-identified.<sup>1768</sup> Disability Services Queensland also provided an example where identification of the adult was possible by its staff:<sup>1769</sup>

By reason of their involvement in providing services to an adult, some departmental officers may be able to identify clients even where information is de-identified. However, as this information is obtained in the course of their employment these employees have an obligation to treat such information as confidential. It may be impossible for information to be omitted to the extent necessary to prevent any person being able to identify the adult, without rendering the information meaningless. It would seem to be very rare circumstances that would require de-identification to a level that would prevent any person from identifying the adult.

7.177 One respondent considered that the identity of an adult should be protected from staff who may work with him or her. There were concerns that if an adult’s privacy is not maintained, his or her reputation may compromise the level of service or care that he or she receives.<sup>1770</sup>

7.178 Caxton Legal Centre, however, accepted that people close to the ‘fact situations may well be able to identify parties from the reported facts, despite the omission of names’, but considered that in the interests of open justice this was an appropriate compromise.<sup>1771</sup>

### **The Commission’s view**

7.179 The Commission agrees with the majority of submissions that identification in breach of the prohibition should occur only if a member of the public or a member of the section of the public to whom the information is published is able to identify the adult from the published information. As discussed earlier, a person will fall outside

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1766 Submission F21.

1767 Submission 126.

1768 Submission 8.

1769 Submission 125. Submission 60 also noted that people involved with the adult might be able to ‘decode’ a de-identified report, especially where there are some factual ‘idiosyncrasies’.

1770 Submission F16.

1771 Submission 124.

this definition if he or she has a ‘special characteristic’ that distinguishes him or her from the public or a section of the public.<sup>1772</sup>

7.180 This will not prevent the publication of information that would identify an adult to a person who knows him or her through a family, professional or other relationship. The Commission acknowledges the concern of some respondents that even this level of identification could have an adverse impact upon the adult.

7.181 However, the Commission considers that prohibiting publication of information from which *anyone* could identify the adult is not practicable. Such an approach would mean that even the remotest of identifying features would have to be removed from all publications and that only very generic discussion of Tribunal proceedings would be permitted. This would seriously impair meaningful reporting of Tribunal proceedings. Such an approach is also inconsistent with the Commission’s previous recommendations that publication of information about Tribunal proceedings should generally be permitted unless it would disclose the identity of the adult.

7.182 The Commission therefore considers that the legislation should specify, consistent with section 121 of the *Family Law Act 1975* (Cth), that breach of the prohibition will occur only if a member of the public or a member of the section of the public to whom the information is published is able to identify the adult from a publication. This approach is consistent with the Commission’s previous recommendation that publication of information about Tribunal proceedings that would identify an adult should be prohibited to the public or to a section of the public.<sup>1773</sup>

## Actual or likely identification of an adult?

### *The Discussion Paper*

7.183 In its Discussion Paper, the Commission examined the three tests adopted in the various Australian jurisdictions as to when information will be sufficient to identify a person.<sup>1774</sup> The first refers to information that would actually lead to identification. In the Australian Capital Territory, the legislation refers to information that would ‘enable a person to be identified’,<sup>1775</sup> the Western Australian legislation applies to information

<sup>1772</sup> See para 7.155–7.168 of this Report.

<sup>1773</sup> See para 7.158 of this Report.

<sup>1774</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.44]–[7.48]. The Discussion Paper also considered the law of defamation, as one of the elements of such an action is that the defamatory material ‘must reasonably be taken to refer to the plaintiff’: Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.42]; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.190], citing *Bjelke-Petersen v Warburton* [1987] 2 Qd R 465, 467. It has been held in this context that a reference to the plaintiff’s name or inclusion of the plaintiff’s picture will be sufficient, but is not necessary, to satisfy that test: D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.195], citing *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239; *Knupffer v London Express Newspaper Limited* [1944] AC 116, 119; *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331; *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 373–4.

<sup>1775</sup> *Guardianship and Management of Property Act 1991* (ACT) s 49(1). See also the similar wording of s 101(3)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), although this provision relates to that Tribunal’s power to impose a further prohibition on publishing information about proceedings rather than the general prohibition on publication: see para 7.32 of this Report.

‘being particulars that are sufficient to identify that person’<sup>1776</sup> and in Queensland, the legislation currently forbids a person to ‘disclose the identity’ of another.<sup>1777</sup>

7.184 The second test is a little broader as it refers, in addition to information that *would* result in identification, to a *likelihood* or *probability* of the information being sufficient to identify a person. The South Australian and Victorian legislation respectively prohibit the disclosure of ‘any information ... that identifies, or could tend to identify, the person’<sup>1778</sup> and information that ‘identifies, or could reasonably lead to the identification of, a party to proceedings’.<sup>1779</sup> The legislation in New South Wales prohibits the publication of a person’s name,<sup>1780</sup> and goes on to state that this includes a reference to any information that ‘identifies the person or is likely to lead to the identification of the person’.<sup>1781</sup>

7.185 Although there has been no judicial consideration of this second test, the Full Court of Western Australia has examined similarly worded provisions in the *Children’s Court of Western Australia Act 1998* (WA).<sup>1782</sup> Those provisions prohibit the publication of matters ‘likely to lead to the identification of a child’ concerned in proceedings. When considering these provisions, the Full Court adopted the view that ‘it must be established that there was a real or substantial prospect that the report would lead the general reader, viewer or listener to identify the child’.<sup>1783</sup> It held that the ‘general reader’ extends to those in the community of the child<sup>1784</sup> and that a single publication or series of publications read together can satisfy this test.<sup>1785</sup>

7.186 The third type of test is found in Tasmania and the Northern Territory, where identification occurs with the publication of any ‘particulars calculated to lead to the identification’ of any person.<sup>1786</sup> This shares with the second type of test the notion of probability of identification, although it is possibly ambiguous as the inclusion of the

1776 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3)(a).

1777 *Guardianship and Administration Act 2000* (Qld) s 112(3).

1778 *Guardianship and Administration Act 1993* (SA) s 81(3).

1779 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

1780 *Guardianship Act 1987* (NSW) s 57(1).

1781 *Guardianship Act 1987* (NSW) s 57(3).

1782 *Children’s Court of Western Australia Act 1988* (WA) ss 35–36. See *R v West Australian Newspapers Ltd; Ex parte Keating* (Unreported, Full Court of Supreme Court of Western Australia, Kennedy, Murray and White JJ, 19 June 1997), cited in *Western Australia v West Australian Newspapers Ltd; Ex parte Attorney-General (WA)* (2005) 30 WAR 434.

1783 *R v West Australian Newspapers Ltd; Ex parte Keating* (Unreported, Full Court of Supreme Court of Western Australia, Kennedy, Murray and White JJ, 19 June 1997), cited in *Western Australia v West Australian Newspapers Ltd; Ex parte Attorney-General (WA)* (2005) 30 WAR 434, 440 (Wheeler and Roberts-Smith JJA and Miller AJA).

1784 *Ibid* 440–1.

1785 *Western Australia v West Australian Newspapers Ltd; Ex parte Attorney-General (WA)* (2005) 30 WAR 434, 439 (Wheeler and Roberts-Smith JJA and Miller AJA).

1786 *Guardianship and Administration Act 1995* (Tas) s 13(1); *Adult Guardianship Act* (NT) s 26(2).

word ‘calculated’ could also lead to an interpretation requiring some element of intent.<sup>1787</sup>

7.187 In addition to these general tests for identification, some of the statutes list specific ways in which a person may be identified. Most of these centre on the publication of a person’s picture on television or in the print media. This is specified to amount to identification in Western Australia<sup>1788</sup> and New South Wales,<sup>1789</sup> and is the subject of specific prohibitions in the Australian Capital Territory<sup>1790</sup> and Tasmania.<sup>1791</sup> In Victoria, the Tribunal is required to specify, if exercising its discretion to permit publication about proceedings, that pictures of the relevant people must not be taken.<sup>1792</sup>

7.188 The Western Australian legislation goes further and sets out a detailed list of examples of the ways in which a person may be identified. In determining whether the information is sufficient to identify a person, reference may be had to matters such as the person’s name or alias, his or her voice,<sup>1793</sup> home or work address, a physical description of the person or his or her dress, his or her occupation or relationships or associations with others.<sup>1794</sup>

7.189 The Commission sought views on whether any or some of the following criteria would be appropriate for determining when information is sufficient to identify a person:<sup>1795</sup>

- (a) information that will identify the person;
- (b) information that could reasonably, or is likely to, lead to the identification of the person;
- (c) particulars calculated to lead to the identification of the person;

1787 Australian courts have recognised that the term ‘calculated’ has two distinct meanings: an objective meaning of ‘likely’ and a subjective meaning of ‘intended or designed’. The meaning attributed to the term in a particular statute is determined by reference to the context in which it is used: *O’Sullivan v Lunnon* (1986) 163 CLR 545, 549 (Gibbs CJ) and *R v Lansbury* [1988] 2 Qd R 180, 182, 184 (Macrossan J). For cases where ‘calculated’ has been interpreted objectively as meaning ‘likely’ see: *Thurley v Hayes* (1920) 27 CLR 548; *Howard v Gallagher* (1988) 85 ALR 496 and *R v Lansbury* [1988] 2 Qd R 180 (Macrossan and McPherson JJ). For examples of when courts have construed the term subjectively as meaning ‘intended or designed’ see *Crafter v Webster (No 2)* (1980) 23 SASR 321; *O’Sullivan v Lunnon* (1986) 163 CLR 545; *R v Lansbury* [1988] 2 Qd R 180, 184–8 (Derrington J) and *Adlam v Noack* [1999] FCA 1230.

1788 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3)(b).

1789 *Guardianship Act 1987* (NSW) s 57(1), (3). Section 57(1) prohibits publishing or broadcasting the name of a prescribed person. Section 57(3) specifies that a reference to the name of a prescribed person ‘includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.’

1790 *Guardianship and Management of Property Act 1991* (ACT) s 49(2). See also the definition of ‘photograph’ in s 49(3) of the *Guardianship and Management of Property Act 1991* (ACT).

1791 *Guardianship and Administration Act 1995* (Tas) s 13(1)(b).

1792 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(3).

1793 Section 49(1)(b) of the *Guardianship and Management of Property Act 1991* (ACT) also refers to a sound recording of an inquiry that would enable a person to be identified.

1794 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3)(a), (c). This provision is drafted in similar terms to s 121 of the *Family Law Act 1975* (Cth).

1795 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.112] Q7-5.

- (d) the person's name, address, or physical description;
- (e) a picture or photograph of the person;
- (f) a voice recording of the person;
- (g) other criteria or information.

### **Submissions**

7.190 Two submissions favoured the adoption of criteria (b), (c), (d), (e) and (f).<sup>1796</sup> Another respondent considered that all of these criteria except for (c) should be adopted.<sup>1797</sup>

7.191 Submissions from the Australian Broadcasting Corporation, the Adult Guardian, the Public Trustee of Queensland and the Department of Justice and Attorney-General favoured a prohibition that refers to information that could reasonably, or is likely to, lead to the identification of a person.<sup>1798</sup> The Public Trustee of Queensland also favoured the inclusion in the legislation of 'criteria as to what is likely to lead to identification',<sup>1799</sup> although the Australian Broadcasting Corporation considered this unnecessary.<sup>1800</sup>

7.192 One respondent, who is a parent and administrator of an adult with impaired capacity, suggested that the criteria should only include the name, address, picture or photograph, or voice recording of the relevant person:<sup>1801</sup>

These criteria are reasonable and practical. To extend it beyond this will be open to interpretation and could result in facts which should be openly available being confidential.

7.193 Endeavour Foundation considered that publication of identifying names and addresses of the adult should never be permitted.<sup>1802</sup> Caxton Legal Centre recognised the difficulty in attempting to list all identifying factors.<sup>1803</sup>

Given the typically unique facts in guardianship cases, it would be practically impossible to delete every single 'potential' identifying factor to stop recognition of cases by people with some link to certain matters. De-identification of names, dates of birth, addresses, photographs and key particulars seem to be the most obvious factors to consider.

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1796 Submissions 1H, 47.

1797 Submission 85.

1798 Submissions 94, 122, 126, 127.

1799 Submission 127.

1800 Submission 94.

1801 Submission 73A.

1802 Submission 120.

1803 Submission 124.

7.194 Other submissions commented on two practical matters relating to issues of identification. One of these matters was raised by the President of the Tasmanian Guardianship and Administration Board who provided an example of where a newspaper had been prosecuted for publishing an adult's name and photograph in breach of a prohibition on identifying those involved in guardianship proceedings.<sup>1804</sup> This respondent considered that this prosecution improved media understanding of identification issues when reporting guardianship proceedings:<sup>1805</sup>

The prosecution has had an informative effect across Tasmanian media outlets and has enhanced the manner in which people with disabilities are portrayed in the media. While there have been misunderstandings about the effect of section 13,<sup>1806</sup> (at times such misunderstandings being promoted by Parliamentarians for political purposes) the effect of the prosecution has been that journalists now regularly seek advice from officers of the Board about what is and is not appropriate material for publication. [note added]

7.195 The second practical matter relating to identification was raised by the Privacy Commissioner who commented on the Tribunal's practice of de-identifying judgments.<sup>1807</sup> This respondent noted that identification can occur other than by disclosing a person's name and was of the view that some of the information included in the judgments could reveal a person's identity:

A random sampling by my Office of the Tribunal decisions published on AustLII shows that although they do not contain individual names, they contain a broad range of other personal information about individuals. This information includes age; gender; dates of incidents causing the impairment; how the incident may have occurred, e.g. motor vehicle accident; health information about the individual, e.g. whether they are suffering from dementia, stroke or other neurological impairment; how their impairment has affected them, testimony from others as to the form this impairment might take, either physically or behaviourally; information about their financial status; and (in one instance) a reference to racial origin. The published proceedings often include references to relatives of the impaired individual, including their relationship to the individual and their actions toward or on behalf of the individual concerned.

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1804 Submission 75. See *Guardianship & Administration Board v The Advocate Newspaper Pty Ltd* (Unreported, Magistrates Court of Tasmania, Court of Petty Sessions, Magistrate PH Wilson, 26 July 2004).

1805 Submission 75.

1806 The relevant parts of s 13 of the *Guardianship and Administration Act 1995* (Tas) state:

- (1) Except as provided by subsection (2), a person must not publish –
  - (a) any particulars calculated to lead to the identification of any person in respect of whom any proceedings of the Board have been brought or any other person concerned in the proceedings; and
  - (b) pictures of any person in respect of whom proceedings have been brought or any other person concerned in the proceedings.

...

- (3) A person who fails to comply with this section is guilty of an offence and is liable on summary conviction to a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 6 months or both.

1807 Submission 104.

In the context of the guardianship proceedings, it is possible that the identity of many of the individuals involved may be determined or at least reasonably ascertained through the personal information provided in the published determinations, even where a name is not used to identify the individual. It is even more likely that identification will be able to be made if the individual concerned comes from a small town or from a particular ethnic or racial group or section of the community.

7.196 Other respondents also identified problems with the current de-identification process for judgments, especially in regional areas. A number of submissions, including one from the Public Advocate, acknowledged that the amount of information needed to identify an adult may be different for regional areas than for metropolitan areas.<sup>1808</sup> People in smaller towns know who in their community has a disability and so adults often are more readily identifiable from facts other than names.<sup>1809</sup> A comment was made at one regional community forum that this meant the de-identification of Tribunal decisions on the AustLII website was not effective.<sup>1810</sup>

7.197 The Privacy Commissioner suggested consideration be given to limiting the period of time that judgments remain on the AustLII website and also identified ways in which potential identifying factors could be removed from the Tribunal's reasons for a decision to make them more 'privacy-aware':<sup>1811</sup>

For example, by simply noting that various oral or written evidence related to the health, capacity and treatment of the individual has been presented to the Tribunal and considered in their decision but not actually including details in the published proceeding. Such a method would avoid disclosing potentially privacy-invasive personal information.

### **The Commission's view**

7.198 The Commission agrees with the majority of submissions that proof of actual identification of the adult should not be necessary in order for the prohibition to be breached. The Commission recommends that the approach taken in New South Wales, South Australia and Victoria should be followed and that information that is likely to lead to the identification of the adult should be prohibited from publication.<sup>1812</sup>

7.199 The Commission further considers it is neither necessary nor desirable to include specific examples in the legislation as to when information is likely to lead to an adult's identification. The general test proposed is sufficiently flexible to include all of the suggestions made in submissions and the examples listed in the Western Australian provision. Further, there is already wide community awareness, and particularly by

1808 Submissions 1H, F9, F16. Similar views were expressed by submission F17.

1809 Submission F16.

1810 Submission F9. Similar views were expressed by submission F14.

1811 Submission 104.

1812 The Commission notes that s 249 of the *Guardianship and Administration Act 2000* (Qld) and s 74 of the *Powers of Attorney Act 1998* (Qld) exclude a duty of confidentiality in relation to statistical or other information 'that could not reasonably be expected to result in the identification of the person to whom the information relates.' It considers, however, the proposed formulation is more appropriate because it is based on other provisions regulating the publication of information about Tribunal proceedings rather than those that impose a more general duty of information privacy. This issue is discussed further in para 8.160–8.166 of this Report.

media organisations,<sup>1813</sup> that a person can be identified by disclosing information other than his or her name.

7.200 The Commission notes the practice that occurs in Tasmania where journalists seek advice from officers of the Guardianship and Administration Board as to whether it is appropriate to publish particular information about a Board proceeding. The Commission considers it may be useful for media organisations to consult with Tribunal staff prior to publishing a report on Tribunal proceedings. This dialogue would increase awareness of the prohibition on publication and also would generally promote an informed and sensitive approach to reporting on disability. The Commission notes, however, that such discussions are not a substitute for legal advice as to the lawfulness of a proposed publication as this remains the responsibility of the media organisation.

7.201 The Commission also notes the comments of the Privacy Commissioner about the extent to which the judgments that the Tribunal de-identifies and then makes publicly available refer to the private information of people. The issue of privacy arises particularly because these judgments are being made available on the internet,<sup>1814</sup> a practice that the Commission commends.

7.202 The Commission has earlier expressed the view that public availability of reasons for a decision enhances community understanding of why a particular decision was made.<sup>1815</sup> The Commission acknowledges the importance of a person's privacy, but considers that this should not impede the Tribunal from explaining publicly its reasoning in a clear and transparent manner, including the identification of the facts on which it has relied. Nevertheless, the Commission recommends the Tribunal give consideration to whether there are ways in which it could de-identify its judgments, so that they still contain a sufficient account of its reasoning, but are more 'privacy-aware'. The Commission also noted earlier<sup>1816</sup> suggestions that judges should avoid 'unnecessary personal identifiers'<sup>1817</sup> to reduce disclosure of personal information in judgments.<sup>1818</sup>

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1813 The Commission also notes that in Australia the press and media self-regulate publication and have guidelines, which are voluntarily adhered to, regarding appropriate reporting practices: see Australian Press Council *General Press Release 91-Disability Identification; General Press Release 18 – Mentally Handicapped* <<http://www.presscouncil.org.au/pcsite/activities/gprguide.html>> at 27 June 2007. See also Alliance Online Media Entertainment and Arts Alliance *Code of Ethics* <<http://www.alliance.org.au/documents/codeofethics.pdf>> at 27 June 2007.

1814 See *Re W: Publication Application* (1997) 21 Fam LR 788, 811–2 (Fogarty and Baker JJ); Justice DA Mullins, 'Judicial Writing in the Electronic Age' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 23–27 January 2005).

1815 See para 6.29, 7.37, 7.85 of this Report.

1816 See para 7.39 of this Report.

1817 Personal identifiers include a date and place of birth, residential address, financial details and family members' names: Justice DA Mullins, 'Judicial Writing in the Electronic Age' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 23–27 January 2005) 3.

1818 Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003).

7.203 Given the concerns expressed in submissions, this issue is particularly important for hearings in regional areas, where de-identification of judgments is more difficult.<sup>1819</sup> To achieve effective de-identification, it may be necessary for the Tribunal to remove the town or place names, or provide less specific information about the adult involved in the proceeding.

7.204 The Commission's preceding recommendations in this chapter have defined the scope of the proposed prohibition on the publication of information about Tribunal proceedings. In summary, the Commission considers that a provision should be included in the guardianship legislation that prohibits the publication of information about a Tribunal proceeding to the public or a section of the public<sup>1820</sup> that is likely to lead to the identification<sup>1821</sup> of the adult<sup>1822</sup> by a member of the public or a member of the section of the public to whom the information is published.<sup>1823</sup> These recommendations involve substantial changes to the current law as contained in section 112 of the *Guardianship and Administration Act 2000* (Qld). Accordingly, the Commission considers it desirable for this provision to be repealed and for the recommended prohibition to be included in a new provision.

## SHOULD THE TRIBUNAL HAVE POWER TO PERMIT PUBLICATION THAT IS OTHERWISE PROHIBITED?

### The Discussion Paper

7.205 In its Discussion Paper, the Commission sought views on whether the Tribunal should have power to permit publication that is otherwise prohibited by section 112 of the *Guardianship and Administration Act 2000* (Qld).<sup>1824</sup> All Australian jurisdictions have provisions that address this issue and permit further publication to some extent.<sup>1825</sup>

7.206 A further issue raised, if such a power is to continue, is the criteria, if any, upon which such discretion must be exercised. In some jurisdictions, the legislation is

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1819 See para 7.196 of this Report.

1820 See para 7.155–7.168 of this Report.

1821 See para 7.198–7.199 of this Report.

1822 See para 7.101–7.110 of this Report.

1823 See para 7.179–7.182 of this Report.

1824 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.74]–[7.76], [7.112] Q7-7.

1825 *Guardianship and Administration Act 1993* (SA) s 81(2)–(3); *Adult Guardianship Act* (NT) s 26(2); *Guardianship and Administration Act 2000* (Qld) s 112(2)–(3); *Guardianship and Administration Act 1995* (Tas) s 13(2); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1)–(2); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8)(d) (although note that the provision in this Act is worded as an exception to the prohibition, rather than as a discretion). For more detail of the various provisions, see Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.74]–[7.76].

silent as to when the Tribunal may exercise its discretion.<sup>1826</sup> In others, including Queensland and Victoria, the test applied is whether disclosure is in the ‘public interest’.<sup>1827</sup>

7.207 In *Korp (Guardianship)*,<sup>1828</sup> the Victorian Civil and Administrative Tribunal permitted the publication of identifying information because three ‘special features’ of the case meant that publication (subject to conditions) was in the public interest:<sup>1829</sup>

- the purpose of the proceeding was to appoint a guardian for a ‘severely disabled’ adult to enable someone to make medical decisions on that adult’s behalf. Such medical decisions could include the refusal of medical treatment with the consequence that the adult would die;
- the circumstances of the adult had already been subject to ‘saturation publicity’; and
- two people had been charged with serious criminal offences in relation to how the adult acquired a brain injury.

## Submissions

7.208 A small number of submissions addressed this issue, the majority of which supported the Tribunal having the discretion to allow publication of identifying information about a proceeding.<sup>1830</sup> The President of the New South Wales Guardianship Tribunal considered that the existence of the discretion in that jurisdiction:<sup>1831</sup>

recognises that in some circumstances, the release of information is warranted. The Tribunal is recognised as the appropriate body to decide when this should occur.

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*Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8)(d). Section 81(2) of the *Guardianship and Administration Act 1993* (SA) states that the Guardianship Board may exercise a discretion to enable publication upon application of a person who has a proper interest in the matter. This requirement relates to the issue of standing rather than establishing a criterion to be taken into account when deciding whether to exercise the discretion.

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*Adult Guardianship Act* (NT) s 26(2); *Guardianship and Administration Act 2000* (Qld) s 112(2)–(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1995* (Tas) s 13(2). What is in the public interest is difficult to determine, although some organisations have attempted to define the ‘public interest’. For example, the Australian Press Council defines public interest for the purposes of its Statement of Principles as ‘involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others’: Australian Press Council *Statement of Principles* (2006) <<http://www.presscouncil.org.au/pcsite/complaints/sop.html>> at 27 June 2007.

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[2005] VCAT 779.

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*Ibid* [9]–[11]. See also *GMcG (Guardianship)* [2007] VCAT 646 where the Tribunal seemed to be satisfied more readily as to the relevant public interest in publication in the circumstances of that case. See also the discussion of the right of freedom of public discussion of matters of legitimate public concern in *Hinch v The Attorney-General for the State of Victoria* (1987) 164 CLR 15, 57 (Deane J) which was examined by Nicholson CJ in the context of the family law prohibition on publication in *In the Marriage of Lowe* (1995) 19 Fam LR 65, 68.

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Submissions 75, 85, 94, 97, 119, 121, 124, 126, 134, 137, F14.

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Submission 137.

7.209 The President of the Tasmanian Guardianship and Administration Board, commenting on the relevant Tasmanian provision,<sup>1832</sup> was of the view that:<sup>1833</sup>

Should the public interest value of a story be diminished by the exclusion of names and identifying materials, this would be a persuasive and cogent reason to seek the approval of the Board [to publish that information] ...

7.210 The Public Advocate and the Australian Broadcasting Corporation considered that a discretion to permit publication of identifying information could be useful to seek assistance from the public in locating a person the subject of Tribunal proceedings.<sup>1834</sup>

7.211 In terms of the criteria that should govern any discretion to permit publication of information that is otherwise prohibited, some submissions favoured retaining the current test that publication must be in the 'public interest'.<sup>1835</sup> Caxton Legal Centre stated that such an approach would allow 'public debate in matters where systems abuse may need to be aired in a very public way'.<sup>1836</sup> However, it was recognised by the Privacy Commissioner that assessing when matters arising from Tribunal proceedings are in the public interest presents challenges.<sup>1837</sup>

This is particularly so where the matter concerns the disclosure of personal information, including sensitive health information, about an individual with impaired capacity. In striking a balance between what is in the public interest and the protection of that individual's personal information, privacy considerations should be a key concern.

7.212 Australian Lawyers Alliance proposed that the Tribunal should only be able to permit the publication of identifying information in accordance with strict guidelines developed to ensure that information is not made available unnecessarily and inappropriately.<sup>1838</sup> Another respondent considered that the Tribunal should be concerned with what the advantage would be to the adult in having the matters published.<sup>1839</sup>

7.213 The Public Advocate considered that the appropriate criteria for the exercise of such a discretion was whether publication was in the adult's interests or in the public interest.<sup>1840</sup> The Department of Justice and Attorney-General was of a similar view

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1832 Section 13(2) of the *Guardianship and Administration Act 1995* (Tas) states:

Where the Board considers that it is in the public interest to do so, the Board may determine that a person may publish, or cause to be published in accordance with its determination, a report of any proceedings of the Board.

1833 Submission 75.

1834 Submissions 1H, 94.

1835 Submissions 85, 123, 124, F14. One respondent referred to the need for a court of law to establish an 'essential public interest' such as matters of fraud or official malpractice.

1836 Submission 124.

1837 Submission 104.

1838 Submission 97.

1839 Submission F14.

1840 Submission 1H.

although it considered that it was not only the adult's interests that were relevant but also the 'health, well-being or safety' of other persons.<sup>1841</sup> One respondent suggested that the Tribunal have the option of seeking guidance from a court where there are matters of concern 'for the client or public'.<sup>1842</sup>

7.214 In contrast, the Australian Broadcasting Corporation considered that legislative criteria were not necessary as the 'Tribunal should be trusted to use the power sparingly and wisely'.<sup>1843</sup>

### **The Commission's view**

7.215 The Commission has earlier recommended that there should be a prohibition on publication of identifying information about an adult to the public or a section of the public.<sup>1844</sup> The Commission considers, however, that the Tribunal should have the discretion to displace this prohibition. Without this discretion, the Tribunal would be unable to permit publication of information identifying an adult even if there were strong public interest reasons supporting publication. Although ensuring an adult's privacy is important, there may be occasions when other legitimate public interests should prevail. Such an approach is consistent with the Commission's guiding principle identified in Chapter 3 of providing for greater openness in the guardianship system.<sup>1845</sup>

7.216 Without such discretion, the Tribunal would also not be able to permit such a publication even if it would advance the interests of the adult for whose benefit the prohibition exists. Again, an adult's privacy is important but he or she has other rights and interests that may be better served by permitting a publication that identifies him or her.

7.217 The Commission considers that these two circumstances are those where the exercise of such discretion would be appropriate. Accordingly, the Commission considers that, consistent with the submissions, the Tribunal should have the discretion to permit the publication of identifying information about an adult if it is in the public interest or in the interests of the adult. The Commission considers this should apply in relation to information about proceedings of the Tribunal.

7.218 Later in this chapter, the Commission has made recommendations about extending the prohibition on publication of information about a Tribunal proceeding that is likely to lead to the identification of the adult to particular proceedings of the Supreme Court that involve guardianship matters.<sup>1846</sup> The Commission also considers that the Supreme Court should have power to permit the publication of identifying

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1841 Submission 126.

1842 Submission 123.

1843 Submission 94.

1844 See para 7.204 of this Report.

1845 See para 3.156, 3-2 of this Report.

1846 See para 7.307-7.313 of this Report.

information about the adult if it is in the public interest or in the interests of the adult, in relation to proceedings of the Supreme Court or of the Tribunal.

## SHOULD THERE BE ANY EXCEPTIONS TO THE PROHIBITION?

### The Discussion Paper

7.219 In its Discussion Paper, the Commission sought views on whether the legislation should contain express exceptions to any recommended prohibition.<sup>1847</sup> It noted the position in Western Australia where its guardianship legislation, in equivalent terms to section 121 of the *Family Law Act 1975* (Cth),<sup>1848</sup> includes the following exceptions:<sup>1849</sup>

- the communication of a transcript of evidence or other document to people concerned in court proceedings for use in connection with those proceedings;
- the communication of a transcript of evidence or other document to a body responsible for disciplining members of the legal or medical professions or to people concerned in proceedings before such disciplinary bodies;
- the communication of a transcript of evidence or other document to a body that grants legal aid assistance in order to facilitate a decision whether such assistance should be provided;
- the bona fide publication of any material intended primarily for use by any profession being a law report or any other publication of a technical nature; and
- the publication or other dissemination of an account of proceedings to a member of a profession in connection with the person's practice of that profession or in the course of professional training, or to a person who is a student in connection with the person's studies.

7.220 The guardianship legislation in New South Wales also provides a specific exception for the publication or broadcast of identifying material contained in an official report of the proceedings of the Tribunal.<sup>1850</sup> Similarly, in New Zealand, the prohibition on publication of information about proceedings does not apply in respect of a publication of a bona fide professional or technical nature intended for circulation amongst members of the legal or medical profession.<sup>1851</sup>

<sup>1847</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.80]–[7.82], [7.112] Q7-13.

<sup>1848</sup> *Family Law Act 1975* (Cth) s 121(9).

<sup>1849</sup> *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8).

<sup>1850</sup> *Guardianship Act 1987* (NSW) s 57(2).

<sup>1851</sup> *Protection of Personal and Property Rights Act 1988* (NZ) s 80(4).

7.221 A further possible exception considered was whether a person should be able to authorise publication of information about proceedings that involve them.<sup>1852</sup>

7.222 When seeking views in its Discussion Paper, the Commission outlined the following examples as representing the major exceptions present in legislation of the various jurisdictions:<sup>1853</sup>

- (a) the bona fide publication of any material intended primarily for use by any profession being a law report or any other publication of a technical nature
- (b) the communication of a transcript of evidence or other document to:
  - (i) people concerned in court proceedings for use in connection with those proceedings;
  - (ii) a body responsible for disciplining members of the legal or medical professions or to people concerned in proceedings before such disciplinary bodies;
  - (iii) a body that grants legal aid assistance in order to facilitate a decision whether such assistance should be provided
- (c) the publication of information that is authorised by the person to whom the information about a proceeding relates.

## Submissions

### *Bona fide reports*

7.223 A number of submissions, including those from the Public Advocate, the Adult Guardian and the Australian Broadcasting Corporation, supported the inclusion of an exception, such as that identified in (a) above,<sup>1854</sup> that permits the bona fide publication of material intended primarily for use by any profession such as a law report.<sup>1855</sup> It was also suggested at a community forum that people should be permitted to access information about Tribunal proceedings for education and professional training purposes.<sup>1856</sup>

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1852 The Discussion Paper noted that s 249 of the *Guardianship and Administration Act 2000* (Qld), which deals with the general duty of confidentiality imposed upon those who receive information through their involvement in the legislation's administration, contains such an exception: Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.82]. See para 8.351–8.359 of this Report.

1853 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.112] Q7-13.

1854 See para 7.222 of this Report.

1855 Submissions 1H, 85, 94, 122.

1856 Submission F13.

### *Disclosure of transcripts or other documents to specified persons*

7.224 Some respondents, including the Public Advocate, the Adult Guardian, the Public Trustee of Queensland and the Australian Broadcasting Corporation supported the inclusion of exceptions for disclosure of transcripts or other documents to specified persons as identified in (b) above.<sup>1857</sup>

7.225 The Royal College of Nursing Australia considered that the prohibition should not prevent any person aggrieved by a decision to appeal and also that an exception like (b)(ii) above, was justified:<sup>1858</sup>

If the Tribunal finds that a health professional has acted in a way that could be unethical/unprofessional, they must be able to report this to the appropriate disciplinary body.

### *Authorised publication*

7.226 There was a strong response from some media organisations and other respondents in favour of the exception mentioned in paragraph (c) above:<sup>1859</sup> where a person authorises publication of information about him or her.

7.227 The Adult Guardian, the Public Advocate, the Public Trustee of Queensland and the Australian Broadcasting Corporation expressed support for the inclusion of such an exception,<sup>1860</sup> although the Public Advocate expressed some reservations about its application in relation to adults (discussed below).<sup>1861</sup> A number of other respondents, including a number of media organisations, also appeared to agree with such an exception.<sup>1862</sup> *The Courier-Mail* argued that:<sup>1863</sup>

Guardianship legislation should not disenfranchise individuals who choose to speak publicly of their experience in a Tribunal hearing.

7.228 One family member of an adult thought that if it was agreed between parties, then publication may be beneficial:<sup>1864</sup>

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1857 Submissions 1H, 85, 94, 122, 127. See para 7.222 of this Report.

1858 Submission 60.

1859 See para 7.222 of this Report.

1860 Submissions 1H, 94, 122, 127.

1861 See para 7.230 of this Report.

1862 Submissions 49, 67, 95, 98, 100, 101, 118, 119, 134, F22 considered the issue of allowing authorisation of publication, although, some of these respondents did not specifically discuss this issue as an exception to the prohibition. Submission F9 also supported allowing authorisation of publication, although this respondent also supported prohibition of publication of a wider range of information, not simply de-identified information.

1863 Submission 98.

1864 Submission 82.

I think that, if the parties agree, then it could be in the best interests of the community to make them aware of some of the wrongdoings of those associated with the Adult in question. I explain this by the obvious fact that, without community awareness, vulnerable people can be taken advantage of unknowingly.

7.229 Some respondents, including an adult with impaired capacity, were of the view that adults in particular should be able to authorise publication of their own story.<sup>1865</sup> They submitted that it is important that when an adult is incorrectly found to have impaired capacity, he or she can dispute that decision publicly<sup>1866</sup> and that an adult who has been found to have capacity should also be able to discuss the case publicly.<sup>1867</sup>

7.230 However, the Public Advocate, while agreeing with the inclusion of such an exception, considered that in fact many adults the subject of proceedings will not have the capacity to authorise publication of this information.<sup>1868</sup> Another respondent recognised that there may be problems in determining whether an adult had sufficient capacity to make a decision for that matter.<sup>1869</sup>

7.231 Carers Queensland considered that in the case of an adult, his or her substitute decision-maker for the matter should be able to provide consent on his or her behalf. It was of the view that where there was agreement from all those involved, it is unnecessary for the Tribunal to approve the disclosure.<sup>1870</sup> However, the Australian Press Council recognised that there may be potential conflict between an adult's interests and those of a substitute decision-maker.<sup>1871</sup>

It should be recognised that in some instances there may be a conflict between the incapacitated adult's interests and those of the guardian, attorney, administrator or 'substitute decision-maker'. Even where this is not the case the guardian may not always act in the best interests of the incapacitated adult.

### *Other exceptions*

7.232 Some submissions raised other possible circumstances in which an exception to a prohibition on publishing information about Tribunal proceedings may be warranted. The Public Advocate suggested that, if the current law was to be retained, an exception to allow re-publication of information already available to the public in judgments should be considered:<sup>1872</sup>

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1865 Submissions 98, 100, 118, F22. Submissions 102, F15 were also of the opinion that an adult with impaired capacity should be able to tell any person about proceedings.

1866 Submissions 98, 100, 118.

1867 Submission 102.

1868 Submission 1H.

1869 Submission 60. Similar views were expressed by submission 88.

1870 Submission 101.

1871 Submission 95.

1872 Submission 1H.

it is suggested that another exception ought to relate to publication by any person of de-identified material which is contained in information already publicly available. At present, notwithstanding that a decision appears on AustLII, the Tribunal has not authorised publication of information by any other person: under s 112(3), it must therefore not be published ‘without reasonable excuse.’ Accordingly, a newspaper article referring to information in the de-identified reasons can only be published if there is reasonable excuse. It would be argued, and likely a reasonable view to take, that if the information is already in the public domain, that there is reasonable excuse to publish again in an article. However, there should be clarity around this issue.

7.233 The Adult Guardian suggested that her office should be able to respond to public criticism to increase confidence in the Office of the Adult Guardian and reduce resistance to its involvement from people close to the adult.<sup>1873</sup> This could be done in a way which does not disclose the identity of the adult but which ‘does allow the community to fully comprehend the decision-making which has been applied in a particular matter’.<sup>1874</sup> A view expressed at a community forum supported this and suggested that the Public Advocate and the Adult Guardian should have an exception entitling them to speak publicly about hearings.<sup>1875</sup>

7.234 Concerns were raised about how long any prohibition on publication of information about Tribunal proceedings should last, especially in circumstances where the adult who was the subject of those proceedings has died.<sup>1876</sup> One respondent considered that the prohibition should not apply where the person whose privacy is being protected has died:<sup>1877</sup>

if the argument is that we must protect the best interests of the adult, if they have passed away, why is there a need for confidentiality? This is particularly so if the family of the adult agrees to the wider publication and wants their story known.

7.235 Some respondents suggested other circumstances where it would be appropriate for their preferred view, that Tribunal proceedings should not be discussed openly, to be displaced and for publication of that information to occur:<sup>1878</sup>

- when it is in the best interest of the adult;<sup>1879</sup>
- when a third party may be required to assist in decisions regarding the adult;<sup>1880</sup>

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1873 Submissions 122, F3, F23.

1874 Submission 122.

1875 Submission F5.

1876 Submissions 27D, 95.

1877 Submission 27D.

1878 Submissions 45, 59B, 90.

1879 Submission 45. Submissions 95, F4, F6 also appeared to support this approach, although those views were not expressed as exceptions to a general prohibition against allowing discussions of Tribunal proceedings by people outside of those proceedings.

1880 Submission 45.

- by those who have an ongoing relationship with the adult;<sup>1881</sup>
- when there has been ‘an abuse of power or criminal act’;<sup>1882</sup> and
- by those who are parties to proceedings, but only in the ‘confines of the hearing room’.<sup>1883</sup>

### **The Commission’s view**

7.236 There are two categories of potential exceptions identified by the Discussion Paper and in submissions. The first is exceptions that permit disclosures that are not prevented by the Commission’s recommendations to prohibit publication of information that would identify the adult. The Commission considers these exceptions are unnecessary as they would simply permit publication of information that is already allowed. The second category of potential exceptions considered is those that apply to publications that would not otherwise be permitted by the Commission’s recommendations and so do require a specific exemption if they are to be lawful.

#### ***Disclosures not prohibited by the Commission’s recommendations***

7.237 The Commission has earlier recommended that there should only be a prohibition on publication to the public or a section of the public of information about Tribunal proceedings that is likely to identify an adult.<sup>1884</sup> This means that the current prohibition would be significantly narrowed in that the only information protected would be the adult’s identity. The recommendations also clarify that the prohibition applies only to dissemination of this information to the public or a section of the public. One result of this narrowing and clarification of the prohibition is that the majority of exceptions identified in the Discussion Paper or raised in submissions are no longer required. This is because the disclosures that these exceptions permit would already be lawful.

7.238 In these circumstances, the Commission considers that the inclusion of a list of exceptions in the legislation to address publications that are already permitted is undesirable. Specifically exempting categories of publications from a prohibition that does not apply may cause confusion and doubt as to the intended scope of that prohibition. This issue has arisen in relation to section 121 of the *Family Law Act 1975* (Cth) where the existence of a list of exceptions has led to some confusion in two cases

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1881 Submission F4.  
1882 Submission 59B.  
1883 Submission 90.  
1884 See para 7.204 of this Report.

as to the proper scope of that prohibition.<sup>1885</sup>

7.239 The Commission acknowledges that a list of exceptions could make the law clearer in relation to those situations addressed. However, such a list of exceptions would always be incomplete because it is not possible to specify each type of publication that should be permitted. Further, the Commission considers that the need to clarify the law through a list of exceptions is reduced given that its recommendations have addressed the previous uncertainty about whether the prohibition applies to all publications or only those to the public or a section of the public. Accordingly, the Commission considers that publications that would be permitted because they do not fall within the prohibition should not be the subject of specific exceptions.

7.240 The Commission therefore considers that there need not be a specific exception permitting publication of bona fide reports intended for professional use, such as law reports. Nor should there be a specific exception that permits the publication of information for educational or training purposes generally. These exceptions are unnecessary because the Commission's recommended prohibition does not prevent this information from being published provided it does not contain information that would identify the adult. In relation to information that would identify the adult, the Commission considers that such identification will nearly always be unnecessary. The purposes of these publications, such as increased awareness and understanding of decisions within the community and specific professions, can be achieved without revealing the adult's identity. The Commission notes, however, that should identification be justified in the public interest or in the interests of the adult, it has elsewhere recommended that the Tribunal have the discretion to permit the publication of information that would identify the adult.<sup>1886</sup>

7.241 The Commission also considers that there need not be an exception for the communication of information, including transcripts and other documents, to people concerned in proceedings or to bodies that grant legal aid. These disclosures are clearly for the purpose of gaining assistance in proceedings and so fall outside the prohibition as they are not to the public or a section of the public.<sup>1887</sup>

7.242 Similarly, the Commission considers that there need not be an exception permitting disclosure to a body responsible for disciplining members of the legal or medical professions or to people concerned in those disciplinary proceedings. Such an exception is unnecessary because these disclosures are to a body or person with a

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1885 *Separate Representative v JHE* (1993) 16 Fam LR 485, 497–8 where Nicholson CJ and Fogarty J considered that a disclosure did not fall within the prohibition contained in s 121(1) *Family Law Act 1975* (Cth) but, in any event would also have been covered by the exception in s 121(9)(f)(i); *Re Edelsten* (1988) 18 FCR 434, 435–8 where Morling J considered that evidence given before a Registrar pursuant to the *Bankruptcy Act 1966* (Cth) did not fall within the prohibition contained in s 121(1) *Family Law Act 1975* (Cth) but, in any event would also have been covered by the exception in s 121(9)(a).

1886 See para 7.215–7.217 of this Report.

1887 See para 7.166–7.167 of this Report.

sufficient interest in receiving that information that distinguishes them from the public or a section of the public.<sup>1888</sup>

7.243 Finally, the Commission considers that an exception need not be included to address perceived problems with re-publishing information contained in publicly available judgments.<sup>1889</sup> This information falls outside the prohibition, provided it does not identify the adult.

### ***Publications that require a specific exception***

7.244 The second category of potential exceptions relates to those publications that would not be permitted by the Commission's recommended prohibition and so require specific exemption if they are to be lawful. The three potential exceptions considered are where:

- the Adult Guardian or Public Advocate wishes to respond to the publication of identifying information by a person;
- a person wishes to authorise publication of information about himself or herself; and
- the adult whose identity is protected has died.

#### ***Publication by the Adult Guardian or Public Advocate***

7.245 The Commission notes that it may be appropriate in some circumstances for the Adult Guardian or Public Advocate to comment publicly on particular guardianship cases.<sup>1890</sup> In most circumstances, it will be possible to do this without identifying the adult. However, this may not always be the case. For example, where identifying information about an adult has already been published in circumstances that would constitute a breach of the recommended prohibition, it would be difficult for the Adult Guardian or Public Advocate to respond publicly without that response referring to the adult who has been identified. The Commission considers it appropriate in the public interest for the Adult Guardian or Public Advocate to respond in this way and publish information even if it does identify the relevant adult.

7.246 The Commission notes that it has earlier recommended that the Tribunal be given the discretion to permit the publication of information that would identify an adult.<sup>1891</sup> The Commission considers, however, that requiring the Adult Guardian or

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1888 See para 7.163–7.165 of this Report.

1889 See para 7.232 of this Report.

1890 Such a response may be an appropriate part of the Adult Guardian or Public Advocate fulfilling their functions. For example, the Adult Guardian has as one of its functions educating and advising persons about the operation of the guardianship legislation: *Guardianship and Administration Act 2000* (Qld) s 174(2)(h). The Public Advocate's systemic advocacy function includes promoting and protecting the rights of adults, promoting the protection of adults from neglect, exploitation and abuse, and monitoring and reviewing the delivery of services and facilities to adults: *Guardianship and Administration Act 2000* (Qld) s 209(a), (b), (e).

1891 See para 7.215–7.217 of this Report.

Public Advocate to seek Tribunal authorisation in these circumstances would be impractical given that it may be necessary to respond quickly.

7.247 The Commission therefore recommends that an exception be included in the guardianship legislation permitting the Adult Guardian and Public Advocate, if it is necessary in the public interest, to publish information in response to the publication by another of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published.

#### *Authorised publication*

7.248 The Commission notes some support in the submissions for an exception that allows a person to authorise publication of information about himself or herself.<sup>1892</sup> The Commission has, however, recommended that the only information that should be prohibited from publication is that which identifies the adult. Some of the arguments advanced in submissions that favoured having such a general exception are of less weight when applied specifically to an exception permitting only an adult to authorise publication.

7.249 The Commission notes that some respondents did specifically consider that the adult should be able to authorise publication of identifying information about himself or herself. However, given that the rationale for recommending such a prohibition is to protect the interests of a vulnerable group of people, the Commission considers that the recommended prohibition should apply to all persons, including the adult. The Commission considers that this position should be altered only where the Tribunal expressly permits publication of such information.

7.250 The Commission acknowledges that such an approach will also affect an adult found to have capacity. A person may appear before the Tribunal, be found to have capacity for the relevant matter and wish to tell people of this fact. However, under the prohibition recommended by the Commission in this chapter, a person could still make personal disclosures to individuals such as family and friends as to that finding of capacity. He or she could also tell those people or bodies who have an interest in receiving this information, for example, if the adult wished to make complaints about the process. He or she could also make those disclosures publicly or have the media report upon them, provided his or her identity is not revealed.

7.251 Further, the Tribunal also has the power to permit publication of information about proceedings that would identify an adult if it is in the adult's interests or the public interest. An adult who has capacity (or a media organisation on his or her behalf) could approach the Tribunal for such an order. Given that one of the purposes of the prohibition is to ensure the privacy of adults with impaired capacity, it would be difficult to see how the Tribunal could not consider a desire to authorise publication by an adult with capacity as not satisfying the test of being in that adult's interests.

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For a discussion of authorising disclosures in the context of the general duty of confidentiality see para 8.351–8.359 of this Report.

### *Death of an adult*

7.252 The Commission considers that the prohibition that prevents the publication to the public or a section of the public of information that is likely to identify an adult should not apply if the adult has died.<sup>1893</sup> The Commission agrees with the submissions that addressed this issue and considers that the policy justification for the prohibition no longer remains if the adult whose privacy it seeks to protect is deceased.<sup>1894</sup>

It is normally accepted that in law, deceased persons have no privacy interests. This is presumably on the basis that the *raison d'être* for privacy protection no longer exists, since dead people can feel no shame or humiliation. The underlying common law principle here is much the same as in the law of defamation, which in most jurisdictions does not countenance civil actions that seek to vindicate the reputation of the dead.

7.253 The purpose of the recommended prohibition is to prevent publicity associated with proceedings from impacting adversely upon the adult. The Commission considers that the justification for the imposition of confidentiality in relation to Tribunal proceedings does not continue after the adult has died. In reaching this conclusion, the Commission gives particular weight to the openness required in judicial and quasi-judicial proceedings by the principle of open justice. In the absence of harm to the adult and his or her interests, there is insufficient reason to warrant curtailing this principle. This approach is consistent with the Commission's guiding principle for this stage of the review identified in Chapter 3 that the legislation should provide for greater openness in the guardianship system.<sup>1895</sup>

7.254 Accordingly, the Commission recommends the inclusion of a provision in the *Guardianship and Administration Act 2000* (Qld) that the recommended prohibition not apply where the adult to whom the proceedings relate has died.<sup>1896</sup>

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For a discussion of whether disclosures should be permitted, following the death of a person to which information relates, in the context of the general duty of confidentiality see para 8.351–8.359 of this Report.

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P Roth, 'Privacy proceedings and the dead' (2004) 11 *Privacy Law and Policy Reporter* 50 cited in Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [3.42]. A consequence of this is that any personal action for breach of privacy where damages are sought to compensate hurt feelings, dies with the claimant, see M Tugendhat et al, 'Publication of Personal Information' in M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) 195, [4.55].

The Commission notes, however, that a deceased person's information, in particular medical information, is the subject of various statutory schemes in Australia. For example, in Queensland, information acquired because of a person's contact with a public sector health service facility must not be disclosed to another person if it identifies him or her, even if the person who could be identified is deceased: *Health Services Act 1991* (Qld) s 62A(1), (3). In New South Wales, personal information about individuals who have been dead for not more than 30 years are covered by the *Privacy and Personal Information Protection Act 1998* (NSW) s 4(3)(a) and the *Health Records and Information Privacy Act 2002* (NSW) s 5(3)(a). See also in Victoria, personal information about individuals who have been dead for not more than 30 years are covered by the *Health Records Act 2001* (Vic) ss 3(1), 95(1). The legislation also provides that a legal representative may exercise a right or power on behalf of a deceased person, but a consent by a legal representative will be void if 'when giving it, the legal representative knows or believes that the consent does not accord with the wishes expressed, and not changed or withdrawn, by the individual in his or her lifetime': *Health Records Act 2001* (Vic) s 95(2), (3).

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See para 3.156, 3-2 of this Report.

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The Commission considers the impact of a person's death on information relating to them protected by the general duty of confidentiality in para 8.491–8.495 of this Report.

## SHOULD IT BE AN OFFENCE TO BREACH THE PROHIBITION?

7.255 The Commission considered whether it is appropriate for the guardianship legislation to provide that it is an offence to breach the prohibition on publication of information about proceedings.

7.256 At present, it is an offence under section 112 of the *Guardianship and Administration Act 2000* (Qld) to publish information about a Tribunal proceeding or disclose the identity of a person involved in a proceeding, unless the Tribunal has permitted the publication or disclosure by order.<sup>1897</sup> The Act stipulates a maximum penalty of 200 penalty units (currently \$15,000) for breach of that provision.<sup>1898</sup>

### Submissions

7.257 The Commission did not expressly seek views about whether it should be an offence to breach the prohibition, however, some submissions addressed the issue of penalty.

7.258 One respondent considered that breaches of the confidentiality provisions generally should result in enforceable penalties against those in breach.<sup>1899</sup> Caxton Legal Centre noted that under the existing legislation a breach of the current prohibition could result in a maximum penalty of \$15,000, which is:<sup>1900</sup>

a very heavy fine if applied to low income earners, such as aged pensioner parents of impaired adults.

7.259 However, other respondents considered that if the legislation is to contain such a prohibition, it should be supported by an adequate penalty to ensure compliance.<sup>1901</sup>

### The Commission's view

7.260 The Commission considers it appropriate that the *Guardianship and Administration Act 2000* (Qld) continue to provide that it is an offence to contravene the prohibition on publication of information about a Tribunal proceeding. The possibility of incurring a penalty is an appropriate deterrent against breaches of the prohibition. The Commission considers the current maximum penalty of 200 penalty units is appropriate.

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<sup>1897</sup> *Guardianship and Administration Act 2000* (Qld) s 112(3). See s 41 of the *Acts Interpretation Act 1954* (Qld) which provides, inter alia, that a penalty specified at the end of a subsection indicates that a contravention of the subsection constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) by a penalty not more than the specified penalty.

<sup>1898</sup> *Guardianship and Administration Act 2000* (Qld) s 112(3); *Penalties and Sentences Act 1992* (Qld) s 5.

<sup>1899</sup> Submission 38B.

<sup>1900</sup> Submission 124.

<sup>1901</sup> Submission F11. Similar views were expressed by submission 38B.

## SHOULD THERE BE ANY DEFENCES?

### The Discussion Paper

7.261 In its Discussion Paper, the Commission sought views on whether the defence of ‘reasonable excuse’ that is currently available in relation to a breach of the prohibition in section 112(3) of the *Guardianship and Administration Act 2000* (Qld) should be retained, and whether any additional defences were necessary.<sup>1902</sup>

7.262 The Commission has already recommended in Chapter 4 of this Report that a defence of reasonable excuse should be available in relation to a breach of limitation orders, including a non-publication order prohibiting publication of information about a Tribunal proceeding that falls outside the general prohibition recommended in this chapter.<sup>1903</sup> The meaning of ‘reasonable excuse’ is discussed in detail in that chapter.<sup>1904</sup>

7.263 The Discussion Paper noted some advantages of excluding conduct that involves a ‘reasonable excuse’ from the prohibition. The inherent flexibility of the defence means that liability is not rigidly imposed when it would be unjust to do so. This may be an advantage in the guardianship context given the wide variety of circumstances in which people disclose information to each other.

7.264 However, this flexibility also gives rise to uncertainty. A person may breach the prohibition believing he or she has a reasonable excuse, only to find out subsequently that their conduct was not judged to be reasonable.

### Submissions

7.265 All of the submissions that considered this issue agreed that a defence of ‘reasonable excuse’ should be retained in the legislation.<sup>1905</sup>

7.266 Some respondents, including the Department of Justice and Attorney-General, noted the utility of having a flexible defence<sup>1906</sup> that could excuse liability in circumstances where its imposition may be unjust.<sup>1907</sup> Similar views were expressed by the Public Advocate, who suggested that such a defence was appropriate as it is impossible to predict every possible situation that may arise.<sup>1908</sup>

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<sup>1902</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.78]–[7.79], [7.112] Q7-12.

<sup>1903</sup> See para 4.368–4.372 of this Report.

<sup>1904</sup> See para 4.360 of this Report.

<sup>1905</sup> Submissions 1H, 60, 85, 94, 95, 98, 118, 122, 124, 126, 127.

<sup>1906</sup> Submission 126.

<sup>1907</sup> Submissions 94, 126.

<sup>1908</sup> Submission 1H.

7.267 Caxton Legal Centre, however, noted that such a defence has not been fully tested and needs clarification. It suggested providing guidelines in the legislation to indicate the kinds of circumstances that the excuse would cover, without limiting when it might apply.<sup>1909</sup> A number of respondents, including media organisations and the Public Advocate, agreed and considered examples or categories of what constitutes a reasonable excuse would be useful.<sup>1910</sup>

7.268 The Australian Broadcasting Corporation, however, suggested that any uncertainty about the scope of a defence of reasonable excuse could be managed through prosecutorial discretion or, in the event of a prosecution occurring, through the judgment of the courts.<sup>1911</sup>

7.269 Only one respondent, the Australian Press Council, addressed the issue of whether any other defences should be included in the legislation.<sup>1912</sup> That respondent suggested a defence of ‘public interest’ and also one for whistleblowers. The latter defence would permit disclosures for the purpose of ‘exposing corruption, dishonesty, or incompetence’.<sup>1913</sup> That respondent also suggested that it may be useful to have a defence of ‘unintentional disclosure’, which would excuse a disclosure where the defendant was not aware or could not have reasonably been aware that the information was subject to confidentiality.<sup>1914</sup>

### The Commission’s view

7.270 The Commission agrees with the view of all respondents who addressed this issue that a defence of reasonable excuse for a breach of the recommended prohibition should be retained. The Commission considers the flexibility provided by the defence is useful given the multiplicity of potential publications that could occur in the guardianship context. Again, the Commission considers that descriptions or examples of what would be a reasonable excuse should not be included in the legislation.<sup>1915</sup> This is also consistent with the recommendation the Commission has made in Chapter 4 that there should be a defence of reasonable excuse for a breach of a limitation order, including a non-publication order.<sup>1916</sup>

7.271 The Commission further considers that it is not necessary to include other defences for breach of the prohibition.<sup>1917</sup> The Commission notes that consultation did

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1909 Submission 124.

1910 Submissions 1H, 95, 98, 118.

1911 Submission 94.

1912 Submission 95.

1913 Ibid.

1914 Ibid.

1915 See para 4.371 of this Report.

1916 See para 4.368–4.372 of this Report.

1917 It is noted that the defences available under the *Criminal Code* (Qld) would also apply: see note 949 of this Report.

not reveal specific circumstances that warrant the creation of a further defence, particularly given the narrower scope of the prohibition recommended by the Commission above.<sup>1918</sup>

## SHOULD THE TRIBUNAL HAVE POWER TO PROHIBIT THE PUBLICATION OF OTHER INFORMATION?

### The Discussion Paper

7.272 In its Discussion Paper, the Commission sought views on whether, in addition to any prohibition on publishing information about guardianship proceedings, the Tribunal should have discretion to prohibit the publication of other information.<sup>1919</sup> Such discretion exists in Queensland, Victoria and Western Australia.

7.273 In Queensland, the Tribunal has power under section 109 of the *Guardianship and Administration Act 2000* (Qld) to give directions, in a confidentiality order, prohibiting or restricting the publication of information given before it.<sup>1920</sup> That provision also permits the making of an order to prohibit or restrict publication of matters contained in documents that have been filed with, or received by, the Tribunal.<sup>1921</sup> The legislative criterion for exercising this discretion is quite broad as the Tribunal may make a confidentiality order where ‘it is desirable to do so because of the confidential nature of particular information or matter or for any other reason’.<sup>1922</sup> The Tribunal would also need to consider what is required in its jurisdiction by open justice and procedural fairness, and apply the General Principles.<sup>1923</sup>

7.274 The criteria guiding the discretion in Western Australia and Victoria are even broader, partly because the Tribunals in those States have jurisdiction for a range of matters other than guardianship. Those criteria include having regard to matters such as national security, the administration of justice, a person’s safety, public decency or morality, the protection of confidential information, and ‘any other reason in the interests of justice’.<sup>1924</sup> In its Discussion Paper, the Commission considered that the most relevant of these criteria for the guardianship context were the interests of justice,

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1918 See para 7.204 of this Report.

1919 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.83]–[7.85], [7.112] Q7-9.

1920 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c). That provision is set out at para 7.10 of this Report.

1921 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c).

1922 *Guardianship and Administration Act 2000* (Qld) s 109(2).

1923 See para 4.15–4.21 of this Report.

1924 *State Administrative Tribunal Act 2004* (WA) ss 62(3), 61(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(4).

avoiding endangering the safety of a person and the protection of confidential information.<sup>1925</sup>

## Submissions

7.275 A number of submissions, the majority of which supported allowing publication of information about a Tribunal proceeding except identifying information, considered that the Tribunal should have the additional power to make an order to prohibit publication of information about a particular proceeding.<sup>1926</sup>

7.276 Australian Lawyers Alliance supported the Tribunal having such discretion in circumstances where the omission of an adult's name would be insufficient to prevent his or her identification.<sup>1927</sup>

It should be possible for a person involved in a proceeding to apply to the Tribunal for an order that no information be available in the public arena where there is a reasonably held fear that such information will be used in a manner that is incompatible with maintaining the dignity, reputation and privacy of the individual eg where the person was a public figure before their incapacity.

7.277 An attendee at a community forum suggested that a total ban on publication might be justified in circumstances where a famous person has lost capacity and is before the Tribunal.<sup>1928</sup>

7.278 One respondent was of the view that there should be no discretion for the Tribunal to order the non-publication of any account of any proceeding.<sup>1929</sup>

7.279 Some of the submissions addressed the issue of what criteria, if any, should guide the exercise of such discretion by the Tribunal. The Adult Guardian and Public Trustee of Queensland favoured the three criteria set out above from Victoria and Western Australia: that prohibiting publication of the information is necessary to avoid endangering the safety of a person or the publication of confidential information, or that it is in the interests of justice.<sup>1930</sup>

7.280 The Public Advocate also favoured these criteria although she considered that in respect of the 'interests of justice' criterion, there must be a likelihood that a serious injustice would result if the information was disclosed.<sup>1931</sup> In relation to the 'protection

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1925 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.85], [7.112] Q7-10.

1926 Submissions 94, 97, 101, 120, 122, 125, 127, F8. Submissions 98 and 118 favoured model 1 but considered that the Tribunal should have the power to prohibit publication of the adult's identity if it would harm or endanger the adult.

1927 Submission 97.

1928 Submission F8.

1929 Submission 100.

1930 Submissions 122, 127.

1931 Submission 1H.

of confidential information' criterion, she considered that there must be some special degree of sensitivity which attached to the information.<sup>1932</sup>

7.281 The Public Trustee of Queensland additionally considered that 'the issue of the risk of harm to the adult or the adult's property' should be part of the Tribunal's deliberations when considering such an order.<sup>1933</sup> Caxton Legal Centre also considered this criterion to have merit, if the Tribunal were to retain this power.<sup>1934</sup>

7.282 The Australian Broadcasting Corporation considered the appropriate criteria were that it is necessary to avoid endangering the safety of a person or that it is in the interests of justice. This respondent considered this discretion should be exercised only rarely and stated that the 'emphasis on "necessity" should be clear in the legislation'.<sup>1935</sup>

7.283 The Australian Press Council proposed that restrictions on the publication of information about Tribunal proceedings should 'only be imposed to the extent necessary to protect the safety and welfare of parties and witnesses'. This respondent considered that in most circumstances this could be achieved by protecting the identities of those concerned. Further, it considered it important to establish criteria for the exercise of this discretion to ensure that it is 'not abused or used capriciously'.<sup>1936</sup>

7.284 Carers Queensland and Disability Services Queensland also supported the inclusion of criteria to govern the Tribunal's discretion.<sup>1937</sup> Carers Queensland considered that this discretion should be governed by tightly constrained criteria rather than the broad test currently in the legislation.<sup>1938</sup> Endeavour Foundation also favoured such a discretion but considered its exercise should be accompanied by reasons for that decision.<sup>1939</sup>

If the Tribunal for any reason saw it as not being appropriate to publish any details from a specific proceeding, then they should be able to exercise that discretion. However, in the interests of public accountability Endeavour stresses the Tribunal needs to give the reasons for such a decision as part of the record of proceedings.

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1932 Ibid.

1933 Submission 127.

1934 Submission 124. Note that submissions 98 and 118 applied such a criterion in relation to prohibiting the publication of the identity of the adult.

1935 Submission 94.

1936 Submission 95.

1937 Submissions 101, 125.

1938 Submission 101.

1939 Submission 120.

## The Commission's view

7.285 The Commission agrees with the majority of submissions that, in addition to the recommended prohibition on publishing identifying information about the adult involved in guardianship proceedings, the Tribunal should retain its discretion to prohibit, by order, the publication of other information.

7.286 There are circumstances where it would be appropriate to exercise such discretion to prohibit publication of the identity of a person other than the adult (whose identity is already protected). This may arise where a whistleblower wishes to have his or her identity concealed from the public or a section of the public where the public release of that information could affect his or her personal safety. In some circumstances, persons other than the adult may gain incidental identity protection because to name them would reveal the identity of the adult, but this will not always be the case.

7.287 Another situation where it may be appropriate for such discretion to be exercised is where the Tribunal wishes to prohibit the publication of information not only to the public or a section of the public but to all persons or particular persons. The Commission has earlier recommended that the prohibition should only prevent information being published to the public or a section of the public that would enable a member of either of those groups to identify the adult. Accordingly, there is no prohibition on disclosing information about the adult to other people in the course of private discussions. There is also no prohibition on publishing information from which a member of the public could not identify the adult, but those close to him or her could.

7.288 There may be circumstances where such disclosures are not appropriate, for example where the adult is being stalked or subject to repeated abuse by another. The Tribunal may wish in these circumstances to prohibit the publication of any information about Tribunal proceedings which would enable that person to identify the adult from the published information and then continue that harmful behaviour.

7.289 Similarly, where another person gains identity protection through the exercise of the Tribunal's discretion, as in the whistleblower example discussed above, the Tribunal may consider that other information that would lead to the whistleblower being identified by those close to him or her should also be prohibited from being published.

7.290 Such an order is presently described by section 109 of the *Guardianship and Administration Act 2000* (Qld) as a 'confidentiality order'. The Commission considered earlier that only those orders that involve withholding information or documents from an active party to which he or she would otherwise be entitled should be described as 'confidentiality orders'.<sup>1940</sup> Accordingly, the Commission considers the order being presently examined is more appropriately described as a 'non-publication order'.<sup>1941</sup>

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1940 See para 4.187 of this Report.

1941 See para 4.188 of this Report.

7.291 As noted in Chapter 4 of this Report, a non-publication order is a type of limitation order.<sup>1942</sup> The Commission therefore considers that the criteria for the making of a non-publication order should be consistent with that generally applicable to limitation orders. The Commission therefore recommends that the legislation provide that, prior to making a non-publication order, the Tribunal is to take as the basis of its consideration that it is desirable that hearings are held in public and may be publicly reported.<sup>1943</sup> This approach, similar to that required of the Administrative Appeals Tribunal, expressly tips the balance in favour of open justice and is consistent with one of the Commission's guiding principles identified in Chapter 3 that there should be greater openness in the guardianship system.<sup>1944</sup> The Commission recommends that a non-publication order prohibiting further publication must be made only in circumstances where the Tribunal is satisfied it is necessary to avoid serious harm or injustice to any person.<sup>1945</sup> The Commission considers that those circumstances will rarely arise.

7.292 The Commission notes that, at present, an additional criterion is imposed when a non-publication order is made under section 109 of the *Guardianship and Administration Act 2000* (Qld) in proceedings in relation to special health matters.<sup>1946</sup> An order must not be made if it is likely to affect the ability of the adult's guardian, attorney, or statutory health attorney to form and express a view about the proposed special health care. The Commission does not consider it necessary that such criterion continue to apply to non-publication orders. The Commission considers it unlikely that a non-publication order would impact on an adult's substitute decision-makers in this way. The Commission also notes that the criteria it has proposed for the making of non-publication orders are sufficiently strict to provide a safeguard against such outcomes.<sup>1947</sup>

7.293 The Commission also considers the reference to 'restricting' publication that presently exists in section 109(2)(c) should be removed. In Chapters 4 and 5 of this Report, the Commission explained that 'restricting' in those contexts could refer either to making a limited order limiting the amount of information that is disclosed to an active party or to imposing conditions upon the manner of disclosure of that information to an active party.<sup>1948</sup> In relation to the issue of limited orders, the Commission

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1942 See para 4.188 of this Report.

1943 In Chapter 4 of this Report, the Commission has recommended that the Tribunal be required to take as the basis of its consideration that it is desirable that hearings before the Tribunal should be held in public and may be publicly reported, and that active parties have an entitlement to information that is credible, relevant and significant to an issue in the proceeding: see para 4.254–4.256 of this Report. In relation to the Tribunal having power to further prohibit publication of information through the making of a non-publication order, an active party's entitlement to information that is credible, relevant and significant to an issue in the proceeding is not relevant.

1944 See para 3.156, 3-2 of this Report.

1945 These criteria are consistent with those recommended for confidentiality orders and closure orders: see para 4.258–4.259 of this Report.

1946 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c), (4).

1947 This is consistent with the approach taken in relation to confidentiality orders in Chapters 4 and 5 of this Report. See para 4.264–4.265, 5.203 of this Report.

1948 See para 4.270, 5.207 of this Report

considered in those chapters that a reference to ‘restricting’ was unnecessary.<sup>1949</sup> A confidentiality order should be as narrow as possible so information that does not meet the criteria for withholding it from an active party should not be the subject of an order. For example, this may mean that a confidentiality order is made in relation to part of a document only. The Commission considers this reasoning also applies in relation to non-publication orders and so a specific additional power to ‘restrict’ the content of what may be published is unnecessary.

7.294 In relation to ‘restricting’ through the imposition of conditions on the manner of publication, the Commission notes the primary concern identified in Chapters 4 and 5 was that an active party may react badly to information unless the party is given adequate support.<sup>1950</sup> In those chapters, the Commission acknowledged that such an outcome was undesirable but did not consider it appropriate for conditions to be placed upon the disclosure of information except where a confidentiality order is made. Instead, the Commission considered that where such concerns do not meet the test for a confidentiality order, they should be addressed by facilitating disclosure of the information in a supportive environment. The Commission recommended in those chapters that a power to ‘restrict’ disclosure should be removed<sup>1951</sup> and considers a similar approach is appropriate in relation to non-publication orders. Further, in the context of a non-publication order, the Commission notes that it deals with the wider publication of information and not its disclosure to active parties. In these circumstances, the Commission considers a specific recommendation about facilitated disclosure similar to the one made in Chapters 4 and 5 is unnecessary.

7.295 The Commission also considers that, given the seriousness of a non-publication order and its impact on the extent to which the Tribunal operates in accordance with the open justice principle, the procedural safeguards proposed in Chapter 4 of this Report for the making of ‘limitation orders’ should apply to a non-publication order.<sup>1952</sup> Of particular relevance in this context is that active parties, the Public Advocate and others who would be adversely affected by a non-publication order (including media organisations and journalists) would have standing to make submissions on the making of the order.<sup>1953</sup> Also, where the Tribunal makes a non-publication order it must provide written reasons for its decision and that decision is able to be appealed.<sup>1954</sup>

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1949 See para 4.272, 4.275, 5.218–5.220 of this Report.

1950 See para 4.276, 5.224 of this Report.

1951 See para 4.274, 5.220 of this Report.

1952 See para 4.310–4.352 of this Report.

1953 See para 4.319–4.339 of this Report.

1954 See para 4.315–4.353 of this Report.

7.296 The Commission has also made recommendations in Chapter 4 of this Report that breach of a limitation order, including a non-publication order, should be an offence, unless there is a reasonable excuse.<sup>1955</sup>

7.297 As noted elsewhere in this chapter, the Supreme Court also hears proceedings involving guardianship matters.<sup>1956</sup> The Commission has recommended that the prohibition on the publication of information about a Tribunal proceeding should also apply in respect of certain proceedings of the Supreme Court. Given the Court's inherent jurisdiction to regulate its own proceedings,<sup>1957</sup> however, the Commission does not consider it necessary for the *Guardianship and Administration Act 2000* (Qld) to confer power explicitly on the Supreme Court to make a non-publication order in relation to guardianship proceedings before it.

## SHOULD THE PROHIBITION APPLY TO COURT PROCEEDINGS?

### The Discussion Paper

7.298 In its Discussion Paper, the Commission sought views on whether any prohibition on publication that applies to Tribunal hearings should also govern guardianship matters before other courts.<sup>1958</sup>

7.299 The Supreme Court has sometimes made orders in guardianship matters prohibiting the publication of parties' names<sup>1959</sup> and also reported them in a de-identified format.<sup>1960</sup>

### Submissions

7.300 Some respondents regarded the difference in how confidentiality is treated by the Tribunal and Supreme Court as anomalous.<sup>1961</sup> There was some support, including from the Adult Guardian, the Public Advocate and the Public Trustee of Queensland, for the prohibition on publication of information about proceedings to be consistent in the Tribunal and Supreme Court.<sup>1962</sup>

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1955 See para 4.358, 4.368–4.372 of this Report.

1956 See para 7.307–7.313 of this Report.

1957 See D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.95].

1958 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [7.35], [7.112] Q7-14.

1959 For example, *EJR v RFHR* [2003] QCA 276.

1960 *Ibid*; *VJC v NSC* [2005] QSC 068. Compare with *Adult Guardian v Langham* [2006] 1 Qd R 1; *Adult Guardian v Hunt* [2003] QSC 297; *Rickleman v Public Trustee of Queensland* [2005] QSC 336.

1961 Submission F10.

1962 Submissions 1H, 85, 98, 118, 122, 127.

7.301 One respondent, who had been the subject of an appointment by the Tribunal, reported feeling distressed on discovering that his or her name, which had not been disclosed by the Tribunal's judgment, was later publicly reported in the appeal before the Supreme Court. That respondent did not want particular people to know of his or her involvement with the guardianship system and considered that this public reporting affected 'the ability to obtain legal representation and a fair hearing in other matters'.<sup>1963</sup>

7.302 Some respondents commented on the existing position where publication restrictions are different in the Supreme Court from the Tribunal.

7.303 One respondent considered that the 'normal publicity' of proceedings should be allowed for appeals to the Supreme Court from a Tribunal decision.<sup>1964</sup>

7.304 The Department of Justice and Attorney-General, while supporting a prohibition which generally prevents publication of all information about a Tribunal proceeding, noted that different considerations may apply in the Supreme Court:<sup>1965</sup>

Given the importance and relevance of Supreme Court decisions about matters and their potential use as legal precedents for future decisions by the Tribunal or other entities, it may be more appropriate for the publication of proceedings to be permitted but the identification of the parties or any other information that could lead to the identification of a party to be prohibited.

7.305 One media organisation stated:<sup>1966</sup>

Supreme Court judges are cognisant of the prohibitions applying to reporting Tribunal proceedings, and will be amenable to a suppression order application seeking to impose a similar restriction on reporting, where there are reasonable grounds for the application to be made.

7.306 Caxton Legal Centre noted that, 'in appropriate circumstances, superior court cases are also reported in this de-identified fashion'.<sup>1967</sup>

### **The Commission's view**

7.307 The Commission identified four situations where issues arising under the guardianship legislation may come before the courts:

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1963 Submission 25.

1964 Submission 38B.

1965 Submission 126.

1966 Submission 94.

1967 Submission 124.

- where there is an appeal from the Tribunal<sup>1968</sup> or where a question of law has been referred to the Supreme Court,<sup>1969</sup>
- where a Tribunal order is filed in a court for the purposes of enforcement;<sup>1970</sup>
- where the Supreme Court has concurrent jurisdiction with the Tribunal;<sup>1971</sup> and
- where, in a civil proceeding, a court sanctions a settlement between another party and an adult or orders an amount be paid by another person to the adult.<sup>1972</sup>

7.308 Where guardianship proceedings are before the Supreme Court by way of an appeal from the Tribunal or where a question of law relevant to a proceeding has been referred to the Supreme Court, the Commission considers that the prohibition on publishing information about Tribunal proceedings should apply to proceedings before the Supreme Court. The Supreme Court is exercising the same jurisdiction as the Tribunal and so the rationales for imposing a prohibition in that context apply also to the Court. Further, the Commission notes that it is undesirable if an adult or other person is deterred from instituting an appeal because that could result in the privacy protection accorded for Tribunal proceedings being removed. The Commission also considers that proceedings before a court for the purpose of enforcing a Tribunal order should be treated in the same way. Again, it would be undesirable if a person is deterred from pursuing enforcement due to privacy concerns.

7.309 In relation to the Supreme Court's concurrent jurisdiction, the Court is exercising power under the guardianship legislation. Accordingly, as is the case with appeals, the arguments that warrant the imposition of the recommended prohibition in relation to Tribunal proceedings also apply in relation to matters before the Supreme Court in its concurrent jurisdiction. Further, the fact that the jurisdiction is exercised concurrently with the Tribunal also favours a consistent approach. The Commission considers it undesirable that whether information identifying an adult can be published should depend on whether proceedings were instituted in the Supreme Court or the Tribunal. Indeed, there has already been one instance in which a matter involving a

<sup>1968</sup> Section 80O of the *Guardianship and Administration Act 2000* (Qld) allows an active party to appeal a Tribunal decision relating to sterilisation of a child with impairment to the Supreme Court; and s 164 of the *Guardianship and Administration Act 2000* (Qld) allows appeals against other Tribunal decisions to be made to the Supreme Court.

<sup>1969</sup> Section 105A of the *Guardianship and Administration Act 2000* (Qld) allows the Tribunal, at any stage of a proceeding, to refer a question of law relevant to the proceeding to the Supreme Court for opinion. The Tribunal must give effect to the Court's opinion: s 105A(3).

<sup>1970</sup> Section 172(3) of the *Guardianship and Administration Act 2000* (Qld) permits proceedings to be taken to enforce a Tribunal order as though it is an order of that court. The court in which the Tribunal order is filed will be either 'a court having jurisdiction to make the order' or 'a court having jurisdiction for the recovery of debts up to the amount remaining unpaid': *Guardianship and Administration Act 2000* (Qld) s 172(1)–(2).

<sup>1971</sup> The Tribunal and the Supreme Court have concurrent jurisdiction for enduring documents and attorneys under enduring documents: *Guardianship and Administration Act 2000* (Qld) s 84(2). For example, *Powers of Attorney Act 1998* (Qld) s 111, which allows the Supreme Court to make declarations about a person's capacity. Section 241 of the *Guardianship and Administration Act 2000* (Qld) allows proceedings to be transferred between the Tribunal and the Supreme Court where both have jurisdiction.

<sup>1972</sup> *Guardianship and Administration Act 2000* (Qld) s 245. 'Court' in this section means the Supreme Court or the District Court.

particular adult experienced different levels of media reporting depending on whether the matter was before the Tribunal or the Supreme Court.<sup>1973</sup>

7.310 The Commission notes that the Supreme Court's *parens patriae* jurisdiction,<sup>1974</sup> which also includes the making of decisions by the Court on behalf of adults with impaired capacity, is not subject to any statutory reporting restrictions. On balance, however, the Commission considers the exercise of the Court's concurrent jurisdiction is more analogous with that exercised by the Tribunal under the guardianship legislation than with the Court's wider *parens patriae* jurisdiction. Accordingly, the Commission considers that the recommended prohibition should also apply to the Supreme Court when exercising its concurrent jurisdiction under the guardianship legislation.

7.311 The Commission acknowledges those submissions that favour proceedings before the Supreme Court being open but notes that there already exist categories of proceedings where disclosure of the identities of certain parties is not permitted.<sup>1975</sup>

7.312 The focus of the courts in the fourth category of proceeding is, however, different. Pursuant to section 245 of the *Guardianship and Administration Act 2000* (Qld) the Supreme and District Courts can exercise all the powers of the Tribunal in relation to the appointment of guardians and administrators where, in a civil proceeding, the court sanctions a settlement or orders money to be paid to the adult and the court considers the adult to be a person with impaired capacity. In these circumstances, the finding of incapacity and appointment of a substitute decision-maker by a court under the *Guardianship and Administration Act 2000* (Qld) is incidental to the primary purpose of the civil action, which is to pursue compensation for another's negligence.

7.313 In addition, the information disclosed during a proceeding of this type does not depend on the adult having impaired capacity. Adults with capacity and those with impaired capacity are both required to sacrifice their privacy to pursue their right to be compensated. This can be distinguished from guardianship proceedings where an adult's privacy is compromised in a way that does not occur for adults with capacity who are able to make such decisions in private. Accordingly, the Commission considers that this fourth category of proceeding is not analogous to proceedings before the Tribunal and so should not be subject to a prohibition on the publication of information.

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1973 For example, *Re MHE* [2006] QGAAT 9.

1974 The *parens patriae* jurisdiction is part of the Supreme Court's inherent jurisdiction and does not arise under the guardianship legislation: see *VJC v NSC* [2005] QSC 068. The guardianship legislation expressly preserves the Court's *parens patriae* jurisdiction: *Powers of Attorney Act 1998* (Qld) s 109; *Guardianship and Administration Act 2000* (Qld) s 240.

1975 For example, *Criminal law (Sexual Offences) Act 1978* (Qld) s 6; *Child Protection Act 1999* (Qld) s 193(1); *Property Law Act 1974* (Qld) s 343.

## MISCELLANEOUS ISSUES

### Education and awareness

#### *Submissions*

7.314 Some submissions raised concerns about a lack of understanding and awareness of the confidentiality obligations imposed under the guardianship system and, in particular, in relation to information about Tribunal proceedings.

7.315 Some respondents submitted that guardians and administrators need to know what their obligations and responsibilities are,<sup>1976</sup> ‘so they can get on with things’.<sup>1977</sup>

7.316 Caxton Legal Centre stated that it had ‘advised clients who have had no idea that they were not meant to discuss the proceedings’.<sup>1978</sup> Carers Queensland also noted that a lack of knowledge of the confidentiality requirements could lead to breach of the prohibition:<sup>1979</sup>

The lack of support offered to people to understand the current system generally, and of specific relevance to this discussion, the confidentiality requirements, means that people may also unwittingly contravene the current system’s strict confidentiality requirements governing the disclosure of information. However, the first that the party generally hears of these confidentiality provisions is when they are warned of a penalty for having breached them.

7.317 Some submissions commented that explanations of the confidentiality requirements are not given at Tribunal hearings.<sup>1980</sup> One respondent considered that the Tribunal should be taking more steps to make people aware of the confidentiality provisions.<sup>1981</sup> The Royal College of Nursing Australia stated that there ‘needs to be some process for enabling educative outcomes’.<sup>1982</sup>

7.318 One respondent stated that greater public involvement and discussion was needed to expose common problems and to come up with possible solutions. That respondent suggested one way this could be achieved:<sup>1983</sup>

An example is the SBS Television programme, *Insight*. The Tribunal staff would be able to publicly state how the system works and debate with interested parties and affected families and relatives. This could be educational for people with the prospect of a Tribunal hearing.

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1976 Submissions 116, F14.

1977 Submission F14.

1978 Submission 124.

1979 Submission 101.

1980 For example, submissions 51, 110, F10.

1981 Submission F14. Similar views were expressed by submission F5.

1982 Submission 60.

1983 Submission 38B.

7.319 An attendee at a community forum suggested that the requirements of confidentiality and disclosure be made more explicit through the Tribunal's forms.<sup>1984</sup> This respondent also commented on the need to accommodate people from different ethnic backgrounds.

### ***The Commission's view***

7.320 The Commission considers it important that those involved in Tribunal proceedings and those intending to publish information about a Tribunal proceeding have an understanding of the scope of the prohibition and its operation.

7.321 The Commission, therefore, considers steps should be taken by the Tribunal to provide accessible information about the confidentiality provisions that apply in relation to Tribunal proceedings. This information should be made available to those involved in proceedings, such as active parties, but also to those who may attend or wish to report on proceedings, such as media organisations, journalists or members of the public.

7.322 The Commission notes, for example, that the Tribunal's fact sheets and brochures could usefully include an explanation of the scope of the prohibition. The Commission also considers the Tribunal should alert people in attendance at Tribunal hearings as to any confidentiality requirements that apply.

7.323 The Commission also considers that when a limitation order is made, the Tribunal should take steps to inform the relevant people of the consequences of such an order.

## **RECOMMENDATIONS**

7.324 The Commission makes the following recommendations:

### ***Limited prohibition on publication***

**7-1 Section 112 of the *Guardianship and Administration Act 2000 (Qld)* should be repealed.<sup>1985</sup>**

**7-2 A provision should be included in the *Guardianship and Administration Act 2000 (Qld)* to provide that a person may generally publish information about a Tribunal proceeding.<sup>1986</sup>**

**7-3 A provision should be included in the *Guardianship and Administration Act 2000 (Qld)* to provide that:**

1984 Submission F13.

1985 See para 7.204 of this Report.

1986 See para 7.85 of this Report.

- (a) it is an offence to publish information about a Tribunal proceeding to the public or a section of the public that identifies the adult;<sup>1987</sup>
- (b) information about a Tribunal proceeding shall be taken to identify the adult if it is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published;<sup>1988</sup>
- (c) an ‘adult’ for the purposes of this provision is a person to whom a proceeding relates;<sup>1989</sup>
- (d) the maximum penalty stipulated for breach of this provision is 200 penalty units.<sup>1990</sup>

**7-4** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the prohibition recommended in 7-3 applies to proceedings before a court where:<sup>1991</sup>

- (a) there is an appeal from the Tribunal to the Supreme Court or where a question of law has been referred to the Court;
- (b) a Tribunal order is filed in a court for the purposes of enforcement;
- (c) the Supreme Court exercises concurrent jurisdiction under the guardianship legislation with the Tribunal;

but not where a court is acting under section 245 of the *Guardianship and Administration Act 2000* (Qld).

**7-5** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide a defence of reasonable excuse for breach of the prohibition recommended in 7-3.<sup>1992</sup>

<sup>1987</sup> See para 7.85–7.89, 7.101–7.106, 7.155–7.168, 7.260 of this Report.

<sup>1988</sup> See para 7.179–7.182, 7.198–7.199 of this Report.

<sup>1989</sup> See para 7.108–7.110 of this Report.

<sup>1990</sup> See para 7.260 of this Report.

<sup>1991</sup> See para 7.307–7.313 of this Report.

<sup>1992</sup> See para 7.270–7.271 of this Report.

### ***Exceptions to the prohibition***

- 7-6** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide, as an exception to the prohibition recommended in 7-3, that the Adult Guardian and the Public Advocate, if it is necessary in the public interest, may publish information in response to a publication by another of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published.<sup>1993</sup>
- 7-7** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the prohibition recommended in 7-3 does not apply where the adult to whom the proceedings relate has died.<sup>1994</sup>
- 7-8** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order and in relation to a Tribunal proceeding, permit publication of information that is otherwise prohibited from being published by the prohibition recommended in 7-3 where it is satisfied that publication is in the public interest or the adult's interest.<sup>1995</sup> A provision should also be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Supreme Court may, by order, and in relation to a Tribunal proceeding or a proceeding of the Supreme Court to which the prohibition applies, permit publication of information otherwise prohibited from being published by the prohibition recommended in 7-3 where it is satisfied that publication is in the public interest or the adult's interest.<sup>1996</sup>

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1993 See para 7.245–7.247 of this Report.

1994 See para 7.252–7.254 of this Report.

1995 See para 7.215–7.217 of this Report.

1996 See para 7.217–7.218 of this Report.

**Non-publication orders**

- 7-9 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that the Tribunal may, by order, prohibit the publication of information that is not covered by the prohibition recommended in 7-3<sup>1997</sup> where it is satisfied it is necessary to avoid serious harm or injustice to any person.<sup>1998</sup> The *Guardianship and Administration Act 2000* (Qld) should refer to this order as a ‘non-publication order’.<sup>1999</sup> This provision should not refer to ‘restricting’ publication.<sup>2000</sup>
- 7-10 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that, prior to making a non-publication order, the Tribunal must take as the basis of its consideration that it is desirable that hearings before the Tribunal should be held in public and may be publicly reported.<sup>2001</sup>
- 7-11 The *Guardianship and Administration Act 2000* (Qld) should not include a provision, such as the current provision in section 109(4) of the Act, imposing additional criteria on the making of a non-publication order in proceedings involving special health matters.<sup>2002</sup>
- 7-12 A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that a non-publication order may be made only in accordance with the procedural safeguards recommended in Chapter 4 of this Report for the making of ‘limitation orders’.<sup>2003</sup>

**De-identification of reasons**

- 7-13 The Tribunal should review its process for the de-identification of reasons for decisions to ensure that those reasons, while still containing a sufficient account of the Tribunal’s reasoning, do not reveal personal information unnecessary for the decision. The Tribunal should also give specific consideration to the process for de-identifying the reasons for decisions for proceedings held in regional areas.<sup>2004</sup>

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1997 See para 7.285–7.289 of this Report.

1998 See para 7.291 of this Report.

1999 See para 7.290 of this Report.

2000 See para 7.293 of this Report.

2001 See para 7.291 of this Report.

2002 See para 7.292 of this Report.

2003 See para 7.295 of this Report.

2004 See para 7.202–7.203 of this Report.

***Education***

**7-14 The Tribunal should provide accessible information about the recommended prohibition in 7-3 and ‘limitation orders’ to persons involved in Tribunal proceedings, such as active parties, and to persons who may attend or wish to report on proceedings, such as media organisations, journalists or members of the public.<sup>2005</sup>**

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2005

See para 7.320–7.323 of this Report.

# Chapter 8

## General duty of confidentiality

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## INTRODUCTION

8.1 The Commission's terms of reference require it to consider the provisions of the guardianship legislation that regulate the confidentiality of information gained in connection with the legislation.<sup>2006</sup> Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) currently prohibit certain uses of 'confidential' information.

8.2 This chapter considers whether the guardianship legislation should include a general duty of confidentiality and, if so, to whom, and in respect of what information and conduct, the duty should apply. It also considers whether the legislation should include any exceptions to such a duty and, if so, what those exceptions should be. The chapter also discusses the desirability for community education about the scope of the duty, and raises some other issues about access to information, that fall outside the scope of this review, for appropriate consideration elsewhere.

### The law in Queensland

8.3 The guardianship legislation confers responsibilities and powers on numerous people, the exercise of which may involve the communication of personal information, either directly or incidentally. Disclosure of that information outside the exercise of those functions or powers is governed by several mechanisms. The provisions of the guardianship legislation are but one means; others include the Queensland Government's administrative scheme (which has been implemented in part by Information Standard 42), and the *Freedom of Information Act 1992* (Qld). Information privacy is also the subject of the *Privacy Act 1988* (Cth), which may impact on the disclosure of information by service providers involved in the life of an adult with impaired capacity. This multiplicity of mechanisms for the protection and use of personal information can cause considerable confusion. An overview of these mechanisms is set out in this section of the chapter.

8.4 In this review, the Commission is limited by its terms of reference to an examination of the confidentiality provisions of the guardianship legislation. Other information privacy mechanisms that operate in Queensland, and that may have some application to information within the guardianship system, are therefore outside the scope of this review. Later in this chapter, however, concerns that were raised in submissions about these other information privacy and disclosure mechanisms have been noted for future consideration.<sup>2007</sup>

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2006

The Commission's terms of reference are set out in Appendix 1 of this Report.

2007

See para 8.530–8.535 of this Report.

### **Information privacy and disclosure mechanisms in Queensland**

8.5 As discussed in Chapter 3 of the Discussion Paper, privacy protection in Australia is limited.<sup>2008</sup> Australia has no actionable right of privacy.<sup>2009</sup> Aspects of personal privacy are protected to some extent through federal and state legislation<sup>2010</sup> and peripherally by some common law causes of action.<sup>2011</sup> Privacy has also become increasingly important to the community<sup>2012</sup> and has been the focus of many recent inquiries and reviews.<sup>2013</sup>

#### **The Privacy Act 1998 (Cth)**

8.6 The *Privacy Act 1998* (Cth) is Australia's principal piece of privacy legislation. It regulates dealings with 'personal information' by the Commonwealth Government, the Australian Capital Territory Government, and some private sector entities.<sup>2014</sup>

8.7 Within the context of adult guardianship in Queensland, this would include all private health service providers,<sup>2015</sup> any private service providers with an annual

2008 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [3.7].

2009 *Kalaba v Commonwealth of Australia* [2004] FCA 763, [6] (Heerey J); *Giller v Procopets* [2004] VSC 113, [187]–[189] (Gillard J); compare *Grosse v Purvis* (2003) Aust Torts Reports ¶81–706, [442]–[445], [483] (Senior Judge Skoien).

2010 For example, *Privacy Act 1988* (Cth); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (Vic); *Personal Information and Protection Act 2004* (Tas); *Information Act* (NT). For an overview of the legislative, administrative and policy mechanisms regulating the privacy and use of personal information that have been adopted in the federal, state and territory jurisdictions in Australia, see Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [2.18]–[2.83].

2011 For example, the torts of nuisance, trespass and defamation, and the equitable action for breach of confidence.

2012 For example, Roy Morgan Research, *Community Attitudes Towards Privacy 2004* (2004) Australian Government, Office of the Privacy Commissioner <[http://www.privacy.gov.au/publications/rcommunity/index\\_print.html#exe](http://www.privacy.gov.au/publications/rcommunity/index_print.html#exe)> at 27 June 2007. For a summary of this survey see Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) appendix 6.

2013 The federal *Privacy Act 1988* (Cth) is currently under review by the Australian Law Reform Commission with a final report expected by the end of March 2008: See the Commission's terms of reference (30 January 2006) <<http://www.alrc.gov.au/inquiries/current/privacy/terms.htm>> at 27 June 2007. The Victorian and New South Wales Law Reform Commissions are also conducting privacy reviews: see Victorian Law Reform Commission, 'Surveillance in the public eye' (Press Release, 18 August 2006), and the New South Wales Law Reform Commission's terms of reference (11 April 2006) <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_cref113](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref113)> at 27 June 2007. The federal *Privacy Act 1998* (Cth) was also recently reviewed by the Australian Government Office of the Privacy Commissioner and the Senate Legal and Constitutional References Committee: see Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: the review of the private sector provisions of the Privacy Act 1998* (March 2005); Senate Legal and Constitutional References Committee, Parliament of Australia, *The real Big Brother: Inquiry into the Privacy Act 1988* (June 2005). The New Zealand Law Commission is also currently conducting a review of privacy: See the Commission's terms of reference (October 2006) <<http://www.lawcom.govt.nz/ProjectGeneral.aspx?ProjectID=129>> at 27 June 2007.

2014 *Privacy Act 1988* (Cth) ss 16, 16A(2), 6C. 'Personal information' means 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion': *Privacy Act 1988* (Cth) s 6(1). For a more detailed overview of the *Privacy Act 1988* (Cth) scheme, see Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) ch 3.

2015 *Privacy Act 1988* (Cth) ss 16A(2), 6C(1), 6D(4)(b). Small businesses that trade in personal information are also covered by the *Privacy Act 1988* (Cth): *Privacy Act 1988* (Cth) ss 16A(2), 6C(1), 6D(4)(c)–(e).

turnover of more than \$3 million,<sup>2016</sup> and any small business service providers that have ‘opted-in’ to the federal privacy scheme.<sup>2017</sup>

8.8 The *Privacy Act 1998* (Cth) does not apply, however, to the Tribunal, the Adult Guardian, the Public Advocate, the Public Trustee of Queensland, or the Community Visitor Program. Neither does it apply to Queensland Health or to Disability Services Queensland. Information privacy within these agencies is regulated by other means.<sup>2018</sup>

8.9 The *Privacy Act 1988* (Cth) requires the Commonwealth and Australian Capital Territory Governments to comply with the 11 Information Privacy Principles (called ‘IPPs’) set out in the Act.<sup>2019</sup> Private sector entities that are regulated by the *Privacy Act 1988* (Cth) must comply with the 10 National Privacy Principles (called ‘NPPs’).<sup>2020</sup> The IPPs and NPPs regulate the collection, use, updating, and disclosure of personal information. The IPPs and NPPs generally provide that personal information cannot be used except for the purpose for which it was collected and cannot be disclosed, other than to the individual concerned, except in certain circumstances.<sup>2021</sup>

8.10 Under the *Privacy Act 1988* (Cth), breach of the IPPs or the NPPs is a ground for complaint to the Privacy Commissioner.<sup>2022</sup> The Privacy Commissioner may investigate, and make determinations on, complaints.<sup>2023</sup>

#### *Information Standard 42*

8.11 Queensland does not have a privacy statute akin to the *Privacy Act 1988* (Cth). The handling of personal information by Queensland Government agencies is primarily regulated by an administrative standard (Information Standard 42) and by the *Freedom of Information Act 1992* (Qld).

2016 *Privacy Act 1988* (Cth) ss 16A(2), 6C(1), 6D(1).

2017 Private sector entities that are not covered by the Act may ‘opt-in’ to the federal privacy scheme: *Privacy Act 1988* (Cth) s 6EA. The Office of the Privacy Commissioner maintains a public register of businesses that have opted-in to the federal privacy scheme: See Australian Government, Office of the Privacy Commissioner <<http://www.privacy.gov.au/business/register/index.html#3>> at 27 June 2007.

2018 See para 8.11–8.16 of this Report.

2019 *Privacy Act 1988* (Cth) s 16.

2020 *Privacy Act 1988* (Cth) s 16A(2). The federal privacy scheme also allows private sector entities to develop their own privacy codes. If an organisation’s code is approved by the Privacy Commissioner, the organisation must abide by that code, rather than by the NPPs: *Privacy Act 1988* (Cth) ss 16A(1), 18BB.

2021 *Privacy Act 1988* (Cth) ss 14, 6, sch 3 cl 2.

2022 *Privacy Act 1988* (Cth) ss 13(a), 13A(1), 36(1).

2023 *Privacy Act 1988* (Cth) ss 40(1), 52(1). Proceedings for an order to enforce a determination of the Privacy Commissioner can be brought in the Federal Court or the Federal Magistrates Court: *Privacy Act 1988* (Cth) s 55A(1).

8.12 Information Standard 42 (called ‘IS42’) is part of an administrative information privacy scheme that applies to Queensland Government agencies.<sup>2024</sup>

8.13 Within the context of adult guardianship, IS42 applies to the Adult Guardian, the Public Advocate, the Community Visitor Program, the Public Trustee of Queensland and Queensland Government service providers such as Disability Services Queensland.<sup>2025</sup> It also has limited application to the Tribunal. It does not, however, apply to the judicial or quasi-judicial functions of the Tribunal.<sup>2026</sup> Neither does it apply to private sector service providers.

8.14 Information Standard 42 requires Queensland Government agencies, other than Queensland Health, to comply with 11 Information Privacy Principles, based on the IPPs of the *Privacy Act 1988* (Cth), dealing with the collection, use, and disclosure of ‘personal information’.<sup>2027</sup> Every agency must implement a publicly available privacy plan to give effect to the principles.<sup>2028</sup> The principles generally provide that personal information cannot be used except for the purpose for which it was collected and cannot be disclosed, other than to the individual concerned, except in certain circumstances.

8.15 A separate administrative standard, Information Standard 42A (called ‘IS42A’), applies to Queensland Health for the collection, use, and disclosure of personal information.<sup>2029</sup> Information Standard 42A requires Queensland Health to comply with 10 National Privacy Principles adapted from the NPPs of the *Privacy Act 1988* (Cth).<sup>2030</sup>

8.16 Because IS42 and IS42A are administratively based, compliance is subject to any conflicting legislative requirements.<sup>2031</sup>

<sup>2024</sup> *Information Standard 42 – Information Privacy* is issued under *Financial Management Standard 1997* (Qld) ss 22(2), 56(1). Measures for the protection of personal information held by Queensland Government departments and agencies, including the implementation of a set of information privacy principles, were recommended in the late 1990s: Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Privacy in Queensland*, Report No 9 (1998) 22 (Recommendation 1), 45 (Recommendation 2).

<sup>2025</sup> Queensland Government, *Information Standard 42 – Information Privacy*, 1.1. See also Queensland Government, Department of Justice and Attorney-General, *Privacy Plan 2006* (2006), Public Trust Office, *Privacy Plan 2005–06*, Queensland Government, Disability Services Queensland, *Privacy Plan 2005*.

<sup>2026</sup> Queensland Government, *Information Standard 42 – Information Privacy*, 1.2.1. ‘Judicial’ functions are typified by the exercise of power to determine liability or otherwise affect a person’s legal rights by the application of law to particular facts and circumstances: Jowitt (ed), *The Dictionary of English Law* (1959) (definition of ‘judicial’).

<sup>2027</sup> ‘Personal information’ generally has the same meaning as under the *Privacy Act 1988* (Cth): Queensland Government, *Information Standard 42 – Information Privacy*, 7. See note 2014 of this Report.

<sup>2028</sup> Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.

<sup>2029</sup> Queensland Government, *Information Standard 42A – Information Privacy for the Queensland Department of Health* is issued under *Financial Management Standard 1997* (Qld) ss 22(2), 56(1). See also Queensland Health, *Privacy Plan 2005* (2005).

<sup>2030</sup> Queensland Government, *Information Standard 42A – Information Privacy for the Queensland Department of Health*, 3.1.

<sup>2031</sup> Queensland Government, *Information Standard 42 – Information Privacy*, 1.1; Queensland Government, *Information Standard 42A – Information Privacy for the Queensland Department of Health*, 1.1.

### *The Freedom of Information Act 1992 (Qld)*

8.17 The *Freedom of Information Act 1992* (Qld) provides a legally enforceable right of access to documents held by Queensland Government departments, Ministers, local governments, and other public authorities, except in certain circumstances.<sup>2032</sup>

8.18 Within the context of adult guardianship, the *Freedom of Information Act 1992* (Qld) applies to documents held by the Public Advocate, the Community Visitor Program, the Public Trustee of Queensland, and Queensland Government service providers such as Queensland Health and Disability Services Queensland.<sup>2033</sup>

8.19 The *Freedom of Information Act 1992* (Qld) also has a limited application to documents held by the Tribunal registry and the Adult Guardian.<sup>2034</sup> The Act does not apply, however, to documents received or brought into existence in the performance of judicial or quasi-judicial functions by the Tribunal, its members, its registry or the staff of its registry acting in their official capacity.<sup>2035</sup> Neither does the Act apply to documents received or brought into existence in carrying out an investigation or audit by the Adult Guardian.<sup>2036</sup>

8.20 Under the *Freedom of Information Act 1992* (Qld), a person may apply for access to a document held by the agency or Minister.<sup>2037</sup> Access to a document or part of a document may be refused, however, if the document contains ‘exempt matter’.<sup>2038</sup> One type of exempt matter is matter about another person’s ‘personal affairs’.<sup>2039</sup>

8.21 ‘Personal affairs’ are the private aspects of a person’s life, such as family or personal relationships, health, domestic financial obligations, or education. Information

2032 *Freedom of Information Act 1992* (Qld) ss 21, 22, 28, 28A.

2033 *Freedom of Information Act 1992* (Qld) ss 21, 7, 8 (Meaning of agency), 9 (Meaning of public authority). See also Queensland Government, Department of Justice and Attorney-General, *Statement of Affairs 2006* (June 2006) 20, 34–5; The Public Trustee of Queensland, *Statement of Affairs* (June 2006); Queensland Health, *Privacy Plan 2005* (2005) [7.3]; Queensland Government, Disability Services Queensland, *Annual Report 2005–06* (2006) 127.

2034 *Freedom of Information Act 1992* (Qld) ss 21, 7, 8 (Meaning of agency), 9 (Meaning of public authority). See also Queensland Government, Department of Justice and Attorney-General, *Statement of Affairs 2006* (June 2006) 18–19, 26.

2035 *Freedom of Information Act 1992* (Qld) s 11(1)(fa)–(fb), (2).

2036 *Freedom of Information Act 1992* (Qld) s 11(1)(o), (2).

2037 *Freedom of Information Act 1992* (Qld) s 25(1).

2038 *Freedom of Information Act 1992* (Qld) s 28.

2039 *Freedom of Information Act 1992* (Qld) s 44. Information about a person’s personal affairs will not be exempt matter if its disclosure would, on balance, be in the public interest: *Freedom of Information Act 1992* (Qld) s 44(1). Also, information about a person’s personal affairs is not exempt merely because it relates to information concerning the personal affairs of the applicant, or of the person on whose behalf the application for access is being made: *Freedom of Information Act 1992* (Qld) s 44(2).

about personal affairs does not usually include information relating to the person's work or business.<sup>2040</sup>

8.22 A person may also apply under the *Freedom of Information Act 1992* (Qld) for amendment of information about the person's personal affairs that is inaccurate, incomplete, out-of-date, or misleading.<sup>2041</sup>

8.23 Importantly, the *Freedom of Information Act 1992* (Qld) does not prevent release of information by other means.<sup>2042</sup> In particular, many agencies may have administrative release policies in place to streamline access by the public to particular types of information. For example, Queensland Health has an administrative policy for access by members of the community to their own health records.<sup>2043</sup> The Queensland Information Commissioner has encouraged the use of such policies in the case of information that is frequently requested, that would be released under the *Freedom of Information Act 1992* (Qld), and that would not involve substantial harm in being released.<sup>2044</sup>

#### *Ad hoc statutory provisions*

8.24 Disclosure and use of particular information is also regulated by ad hoc statutory provisions. For example, some statutes impose an obligation on people acting under the statute to maintain the confidentiality of personal information that they gain in the performance of their functions.<sup>2045</sup> In particular, members and officers of tribunals are often obliged or permitted to keep information acquired through their office confidential.<sup>2046</sup>

8.25 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) are examples of such provisions.

2040 The term 'personal affairs' is not defined in the *Freedom of Information Act 1992* (Qld) nor in the *Acts Interpretation Act 1954* (Qld) but has been considered judicially and by the Information Commissioner Queensland. See *Stewart and Department of Transport* (1993) 1 QAR 227; *State of Queensland v Albietz* [1996] 1 Qd R 215, 221 (de Jersey J); *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 435 (Lockhart J). Also see Office of the Information Commissioner Queensland, *FOI Concepts: 'Personal affairs'* (6 February 2007) <<http://www.oic.qld.gov.au/default.asp?p=13>> at 27 June 2007.

2041 *Freedom of Information Act 1992* (Qld) s 53(1). The agency or Minister retains discretion to refuse to make an amendment: *Freedom of Information Act 1992* (Qld) s 54E.

2042 *Freedom of Information Act 1992* (Qld) s 14.

2043 Queensland Health, *Privacy Plan 2005* (2005) [7.1].

2044 Information Commissioner Queensland, 'Administrative release of documents', *voICE: News from the Office of the Information Commissioner*, Issue 3 (September 2003) 1, 3–5 <[http://www.oic.qld.gov.au/indexed/voice/vOICe\\_3.pdf](http://www.oic.qld.gov.au/indexed/voice/vOICe_3.pdf)> at 27 June 2007.

2045 For example, *Disability Services Act 2006* (Qld) s 222 (Confidentiality of other information); *Industrial Relations Act 1999* (Qld) s 706 (Confidentiality of information); *Juvenile Justice Act 1992* (Qld) s 288 (Preservation of confidentiality).

2046 For example, *Anti-Discrimination Act 1991* (Qld) s 264 (No communication of official information to court); *Children Services Tribunal Act 2000* (Qld) s 142 (Confidentiality); *Mental Health Act 2000* (Qld) s 528 (Confidentiality of information—officials).

8.26 In addition, the *Public Trustee Act 1978* (Qld) imposes an obligation of secrecy on staff of the Public Trust Office.<sup>2047</sup>

8.27 Some statutes also contain a set of principles, containing references to privacy or confidentiality, to guide the administration of the legislation.<sup>2048</sup> For example, one of the ‘general principles’ for the administration of the *Mental Health Act 2000* (Qld) provides that ‘a person’s right to confidentiality of information about the person must be recognised and taken into account’.<sup>2049</sup>

8.28 Statements about access to information are also often included in these sets of principles. For example, one of the ‘service delivery principles’ of the *Disability Services Act 2006* (Qld) provides that ‘information that allows the quality of ... services to be judged’ should be made available, including to people using the service, their families, carers and advocates.<sup>2050</sup>

8.29 Similar statements about confidentiality and the provision of information are contained in the General Principles of the guardianship legislation.<sup>2051</sup>

### **The guardianship legislation**

8.30 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) require particular people, such as attorneys, guardians and administrators, Tribunal members and staff, and the Adult Guardian and his or her staff, to preserve the confidentiality of certain personal information obtained through an involvement in the administration of the legislation. These provisions also specify some exceptions to the operation of this duty. In addition, section 250 of the *Guardianship and Administration Act 2000* (Qld) qualifies the Adult Guardian’s obligation in relation to information about its investigations.<sup>2052</sup>

8.31 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) have also been amended to include a limited exception for disclosure of confidential information to a member of this Commission or to its staff or consultants in order to facilitate the Commission’s review

2047 *Public Trustee Act 1978* (Qld) s 15 provides that staff of the Public Trust Office are ‘bound to secrecy by declaration in the form approved by the public trustee’.

2048 For example, *Child Protection Act 1999* (Qld) s 74, sch 1 (Charter of rights for a child in care) cl (f); *Disability Services Act 2006* (Qld) pt 2 div 1 (Human rights principle) s 19(3)(c); *Mental Health Act 2000* (Qld) pt 3 (Principles for administration of Act) s 8(i).

2049 *Mental Health Act 2000* (Qld) s 8(i).

2050 *Disability Services Act 2006* (Qld) s 31. Also, for example, *Child Protection Act 1999* (Qld) s 5(2)(g); *Mental Health Act 2000* (Qld) s 8(c).

2051 *Powers of Attorney Act 1998* (Qld) sch 1 ss 7(3)(a), 11; *Guardianship and Administration Act 2000* (Qld) sch 1 ss 7(3)(a), 11. See para 8.35–8.36 of this Report.

2052 Section 250 is set out at para 8.417 of this Report.

of the guardianship legislation.<sup>2053</sup> This exception has not been examined as part of this stage of the Commission's review. The Commission anticipates that it will recommend it be repealed at the conclusion of the final stage of the Commission's review of the legislation.

8.32 Section 74 of the *Powers of Attorney Act 1998* (Qld) provides:

**74 Preservation of confidentiality**

- (1) If a person gains confidential information because of being, or an opportunity given by being, an attorney ..., the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (2).

Maximum penalty—200 penalty units.

- (2) A person may make a record of confidential information, or disclose it to someone else—
- (a) to discharge a function under this Act or another law; or
  - (b) for a proceeding in a court or relevant tribunal; or
  - (c) if authorised under a regulation or another law; or
  - (d) if authorised by the person to whom the information relates; or
  - (e) if authorised by the court in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

...

- (3) This section also applies to a statutory health attorney.

- (4) In this section—

...

**confidential information** includes information about a person's affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

<sup>2053</sup>

*Powers of Attorney Act 1998* (Qld) s 74(2)(f); *Guardianship and Administration Act 2000* (Qld) s 249(3)(g). Those provisions were inserted by ss 107C and 126B of the *Justice and Other Legislation Amendment Act 2005* (Qld) which commenced on 8 December 2005. The Commission has prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission's consultation processes. The Protocol can be viewed at the Commission's website: <<http://www.qjrc.qld.gov.au/guardianship/protocol.htm>>.

8.33 Section 249 of the *Guardianship and Administration Act 2000* (Qld) provides:

**249 Preservation of confidentiality**

- (1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (3).

Maximum penalty—100 penalty units.

- (2) A person gains information through involvement in this Act's administration if the person gains the information because of being, or an opportunity given by being—

- (a) the president, a deputy president or another tribunal member; or
- (b) the registrar, a member of the tribunal staff or a tribunal expert; or
- (c) the adult guardian or a member of the adult guardian's staff; or
- (d) a professional consulted or employed by the adult guardian or an adult guardian's delegate for an investigation; or
- (e) the public advocate or a member of the public advocate's staff; or
- (f) a guardian or administrator; or
- (g) a community visitor;

...

- (3) A person may make a record of confidential information, or disclose it to someone else—

- (a) for this Act; or
- (b) to discharge a function under another law; or
- (c) for a proceeding in a court or relevant tribunal; or
- (d) if authorised under a regulation or another law; or
- (e) if authorised by the person to whom the information relates; or
- (f) if authorised by the tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

...

- (4) In this section—

...

**confidential information** includes information about a person's affairs but does not include—

- (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
- (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

8.34 To the extent that disclosure is not prohibited by the operation of section 249 of the *Guardianship and Administration Act 2000* (Qld), information may be released by the Adult Guardian, the Public Advocate, community visitors and the Public Trustee of Queensland in accordance with IS42.<sup>2054</sup> Where it applies, information is also subject to disclosure in accordance with the *Freedom of Information Act 1992* (Qld).<sup>2055</sup>

8.35 The guardianship legislation also contains a set of 'General Principles' governing the process of decision-making for an adult under the legislation.<sup>2056</sup> The General Principles contain express statements about confidentiality and access to information.<sup>2057</sup> General Principle 11 provides:

#### **11 Confidentiality**

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

8.36 General Principle 7, in part, provides:

#### **7 Maximum participation, minimal limitations and substituted judgment**

...

(2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.

(3) So, for example—

- (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life;

...

2054 Also note the obligation of secrecy imposed on staff of the Public Trust Office: *Public Trustee Act 1978* (Qld) s 15.

2055 The *Freedom of Information Act 1992* (Qld) does not apply to documents relating to an investigation or audit conducted by the Adult Guardian but applies in respect of other documents of the Adult Guardian: *Freedom of Information Act 1992* (Qld) s 11(1)(o), (2). See para 8.19 of this Report.

2056 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. The General Principles must be applied in the performance of a function or the exercise of a power under the guardianship legislation: *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1).

2057 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 ss 11, 7(3)(b); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 ss 11, 7(3)(b).

8.37 The guardianship legislation also contains provisions about the circumstances in which the openness of the Tribunal's judicial proceedings may be limited.<sup>2058</sup> These provisions, which raise distinct issues about open justice and procedural fairness, have been examined in Chapters 4–7 of this Report.

### The guardianship legislation in other jurisdictions

8.38 Provisions similar to section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) are included in the guardianship statutes of each of the other Australian jurisdictions, apart from the Northern Territory.<sup>2059</sup> Those provisions require particular people to keep certain information gained under the legislation confidential, except in particular circumstances. The legislation in the Australian Capital Territory and Tasmania additionally provide specific exceptions to the duty of confidentiality for the Adult Guardian equivalents in those jurisdictions.<sup>2060</sup>

## THE DISCUSSION PAPER AND ISSUES FOR CONSIDERATION

8.39 In its Discussion Paper, the Commission identified four possible models for an approach in the guardianship legislation to the issue of confidentiality of personal information gained through an involvement in the administration of the legislation.<sup>2061</sup> These models were posed as a starting point for a general approach to this issue and as a guide for submissions. The four models identified in the Discussion Paper were:

- Model 1 (no duty) – This would remove the current provisions so that there would be no general duty of confidentiality in the guardianship legislation, and protection of personal information obtained under the legislation would fall to other existing statutory, general law, and administrative obligations.
- Model 2 (absolute duty) – This would modify the current provisions to remove the existing exceptions to the duty.
- Model 3 (duty with some exceptions) – This would modify the current provisions, retaining a general duty of confidentiality with certain exceptions, but removing any specific exception for the Adult Guardian.

2058 *Guardianship and Administration Act 2000* (Qld) ss 108 (Procedural fairness), 109 (Open), 112 (Publication about proceeding or disclosure of identity), 134 (Report by Tribunal staff), 158 (Decision and reasons to the adult and each active party).

2059 *Guardianship and Management of Property Act 1991* (ACT) s 66D; *Public Advocate Act 2005* (ACT) s 16; *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80; *Guardianship and Administration Act 1995* (Tas) s 86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 34–36; *Guardianship and Administration Act 1986* (Vic) s 14(2), sch 3 cl 3(b); *Guardianship and Administration Act 1990* (WA) s 113; *State Administrative Tribunal Act 2004* (WA) ss 157–158. Also see *Dependent Adults Act*, RSA 2000, c D–11, s 68; *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58; and *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, ss 32, 62(3), (4).

2060 *Public Advocate Act 2005* (ACT) s 17; *Guardianship and Administration Act 1995* (Tas) s 86(1)(b).

2061 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.133]–[8.137].

- Model 4 (duty with exception specific to the Adult Guardian) – This would retain the tenor of the current provisions so that there would be a general duty of confidentiality with an exception specific to the Adult Guardian, with or without other general exceptions.

8.40 The Discussion Paper also identified some important considerations in responding to the issue of a general duty of confidentiality:<sup>2062</sup>

- the desire for accountability and transparency in the operations of guardianship authorities;
- the significance of information disclosure in meeting the requirements of procedural fairness in decision-making by guardianship authorities;
- the need to accord the same respect for privacy to adults with impaired capacity as others; and
- the benefit of information disclosure in securing the best decisions for an adult.

8.41 In its Discussion Paper, the Commission expressed a preliminary preference for model 4: a statutory duty of confidentiality with general exceptions and an exception specific to the Adult Guardian.<sup>2063</sup>

8.42 In Chapter 3 of this Report, the Commission has also set out several guiding principles for its review. Of some relevance to the issues under consideration in this chapter, are the following of those guiding principles.<sup>2064</sup>

- The role of confidentiality in the guardianship system is to be determined by the values of accountability, transparency, consistency and predictability in administrative decision-making, the requirements of procedural fairness, and the nature of the guardianship system;
- The guardianship legislation should provide for a greater level of openness than that which currently exists;
- The adult is entitled to know and have access to information about himself or herself; and
- The greater the involvement and interest by a person in the life of the adult, the greater claim that person has to receive information about the adult.

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2062 Ibid [8.125]–[8.132].

2063 Ibid [8.144]–[8.145].

2064 The guiding principles are set out at para 3.156 of this Report.

8.43 The Discussion Paper and the Commission's preliminary view raise two primary sets of concerns. The first is whether there should be a general obligation of confidentiality in the guardianship system and, if so, what the extent of that obligation should be. The second is whether there should be any exceptions to that obligation and, if so, what the extent of those exceptions should be. Each set of concerns raises further issues for consideration.

## A GENERAL DUTY OF CONFIDENTIALITY

8.44 The Discussion Paper asked whether the guardianship legislation should include a general duty on those people involved in the administration of the legislation to keep personal information received under the legislation confidential.<sup>2065</sup> This section of the chapter examines that question. It also considers to whom, to what information, and to what conduct such a duty should apply. As part of this examination, this section also considers the extent to which the guardianship legislation should permit or encourage particular disclosures or communications despite any such duty.

### Should there be a general duty of confidentiality?

8.45 As discussed above, personal information gained in connection with the guardianship legislation may be required, or allowed, to be kept confidential by a variety of mechanisms.<sup>2066</sup>

#### *The guardianship legislation*

8.46 At present, the guardianship legislation provides that, generally, 'confidential information' obtained as a consequence of a person's involvement in the administration of the legislation must not be recorded or disclosed.<sup>2067</sup> On its face, this obligation limits disclosure that might otherwise occur in accordance with IS42 or under the *Freedom of Information Act 1992* (Qld).<sup>2068</sup> The duty is framed as a prohibition, breach of which may incur a penalty.<sup>2069</sup>

8.47 The duty is qualified by several exceptions, one being for disclosures made in discharging a function under the guardianship legislation or under another law.<sup>2070</sup>

2065 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.67].

2066 See para 8.14, 8.20, 8.25–8.26, 8.29 of this Report.

2067 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1). See para 8.32–8.33 of this Report.

2068 Note, however, the impact of the existing exceptions to the obligation for disclosures authorised under a regulation or another law or authorised by the person to whom the information relates: *Powers of Attorney Act 1998* (Qld) s 74(2)(a), (c); *Guardianship and Administration Act 2000* (Qld) s 249(3)(d), (e). See para 8.326 of this Report.

2069 The maximum penalty stipulated for contravention of *Powers of Attorney Act 1998* (Qld) s 74(1) is 200 penalty units (\$15,000). The maximum penalty stipulated for contravention of *Guardianship and Administration Act 2000* (Qld) s 249(1) is 100 penalty units (\$7,500). See *Penalties and Sentences Act 1992* (Qld) s 5(1)(b), (2).

2070 *Powers of Attorney Act 1998* (Qld) s 74(2)(a), (c); *Guardianship and Administration Act 2000* (Qld) s 249(3)(a), (b).

Exceptions are considered elsewhere in this chapter,<sup>2071</sup> but the provision for disclosures to be made in accordance with legislative functions is relevant to a consideration in this section of the chapter of the extent to which certain communications should be permitted.

### **The legislation in other jurisdictions**

8.48 Except for the Northern Territory, the guardianship legislation of all the Australian jurisdictions imposes some form of confidentiality requirement on information acquired under the legislation. In the Australian Capital Territory, New South Wales, South Australia, Tasmania, Victoria and Western Australia, disclosure of particular information may incur a penalty.<sup>2072</sup> In addition, the legislation in Victoria requires the Public Advocate to take an oath of office that ‘she or he will not except in accordance with this Act divulge information received or obtained under this Act’.<sup>2073</sup>

8.49 In each of those jurisdictions, an exception is provided for disclosures made in accordance with the person’s other legislative functions or powers.<sup>2074</sup>

8.50 Some Canadian guardianship statutes also impose duties of confidentiality in relation to information gained under the legislation.<sup>2075</sup>

### **Submissions**

8.51 Some submissions expressed a general commitment to the importance of the privacy of adults with impaired capacity. At a focus group attended by families and carers of adults with intellectual disability, it was noted that, although individuals with impaired capacity require assistance with decision-making, the privacy of those individuals should still be respected.<sup>2076</sup>

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2071 See para 8.228 of this Report.

2072 *Guardianship and Management of Property Act 1991* (ACT) s 66D; *Public Advocate Act 2005* (ACT) s 16; *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80; *Guardianship and Administration Act 1995* (Tas) s 86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 34–35; *Guardianship and Administration Act 1990* (WA) s 113; and *State Administrative Tribunal Act 2004* (WA) ss 157–158.

2073 *Guardianship and Administration Act 1986* (Vic) s 14, sch 3 cl 3(b).

2074 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2): ‘in relation to the exercise of a function, as a person to whom this section applies, under this Act or another Act’; *Public Advocate Act 2005* (ACT) s 16(3)(b): the prohibition does not apply if the record is made or the information is divulged ‘in relation to the exercise of a function ... under this Act or another territory law’; *Guardianship Act 1987* (NSW) s 101(b): ‘in connection with the administration or execution of this Act’; *Guardianship and Administration Act 1993* (SA) s 80(2)(a): ‘if authorised or required to do so by law or by his or her employer’; *Guardianship and Administration Act 1995* (Tas) s 86(1)(c): ‘by a person authorized in writing either generally or in a particular case by the President’; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)(b): ‘in connection with the performance of functions under this Act or an enabling enactment’; *Guardianship and Administration Act 1990* (WA) s 113(1)(a): ‘in the course of duty’; *State Administrative Tribunal Act 2004* (WA) s 157(3)(b): ‘in connection with the performance of functions under this Act or an enabling Act’.

2075 See *Dependent Adults Act*, RSA 2000, c D–11, s 68; *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58; and *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32.

2076 Submission F4. Note also the comment from the Privacy Commissioner that ‘we may need to be more vigilant about the way the personal information (of those whose capacity is impaired) is handled in order to avert any invasive impact on their privacy’: submission 104.

8.52 Australian Lawyers Alliance also expressed the view that ‘the paramount consideration in all instances must be what is best for and in the interests of the adult’ and that ‘where possible all efforts should be made to retain the privacy and human dignity of the adult’.<sup>2077</sup>

8.53 Submissions that addressed the question whether there should be a general duty of confidentiality in the guardianship legislation were divided, although most submissions generally considered there should be some form of confidentiality.

8.54 Some submissions favoured no duty of confidentiality at all (model 1).<sup>2078</sup> One submission expressed the view, for example, that ‘in the majority of cases the telling of information to another person or body should be allowed as privacy rules are often used to protect government bodies rather than individuals’.<sup>2079</sup> Another submission commented:<sup>2080</sup>

I believe that decency and good sense inherent in everyone, should be sufficient to prevent the irresponsible dissemination of any of this information to persons not entitled thereto and that to enforce a blanket prohibition thereon would be to adopt a totalitarian approach detrimental to personal liberty...

8.55 Other submissions indicated that confidentiality should be imposed, but in limited circumstances only, such as:<sup>2081</sup>

- to protect the adult’s identity;
- where disclosure would cause harm to a person or to a person’s reputation, or would not be in the adult’s best interest; or
- in ‘exceptional circumstances’.

8.56 Carers Queensland considered, for example, that the ‘least restrictive option’ in relation to confidentiality should be employed as each case demands.<sup>2082</sup>

8.57 Other submissions favoured a general duty of confidentiality with exceptions (model 3)<sup>2083</sup> or a general duty with an exception specific to the Adult Guardian, with or without other general exceptions (model 4).<sup>2084</sup>

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<sup>2077</sup> Submission 97.

<sup>2078</sup> For example, submissions 16, 18, 54, 63, 66, 68, 84, 149, F13.

<sup>2079</sup> Submission 81. Also, for example, submission F5.

<sup>2080</sup> Submission 31B. Also note submission 149 which commented that confidentiality is more appropriately handled by individual confidentiality agreements between people than by strict legislation.

<sup>2081</sup> For example, submissions 38, 59, 64, 79, 81, 88, 117.

<sup>2082</sup> Submission 101.

<sup>2083</sup> For example, submissions 49, 97, 99, 100, 121, 124, F14, F15, F19.

<sup>2084</sup> For example, submissions 1H, 28E, 44, 47, 60, 67, 74, 85, 120, 122, 126, 127, 135, 137, F22.

8.58 Royal College of Nursing Australia, for example, was of the view that, '[g]iven the nature of the business of the Guardianship System' and except in limited circumstances, information obtained within, and for the purposes of, the guardianship system should invariably be kept confidential.<sup>2085</sup>

8.59 A submission from a journalist commented.<sup>2086</sup>

[I]nformation pertaining to the affairs of an adult with diminished capacity should in the normal course ... be treated as confidential. However, the Act should also allow persons, who are concerned that an adult's best interests and well-being are not being protected or advanced, to disclose that information to another person or body who may assist the adult.

8.60 Both the Queensland Law Society and Queensland Health considered the current position should be retained.<sup>2087</sup>

8.61 Some submissions also indicated there is some confusion about the scope of the current confidentiality obligation<sup>2088</sup> and others expressed concern that people may be reluctant to make otherwise reasonable disclosures because of the current prohibition.<sup>2089</sup> These submissions are considered elsewhere in the chapter but are relevant here in considering the extent to which particular disclosures should be permitted.

### **The Commission's view**

8.62 The Commission agrees with the views expressed in submissions that the privacy of adults with impaired capacity should be respected. Privacy is important for all people, regardless of capacity.<sup>2090</sup> This is recognised in international human rights instruments.<sup>2091</sup> An important aspect of privacy is the protection of personal information,<sup>2092</sup> particularly when its disclosure has been compelled.<sup>2093</sup>

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2085 Submission 60.

2086 Submission 100.

2087 Submissions 22B, 87.

2088 For example, submissions F16, F17, F24.

2089 For example, submissions 24, 86, F13.

2090 See, for example, Privacy Commissioner and Office of the Public Advocate, *Private Lives? An Initial Investigation of Privacy and Disability Issues* (1993) 5, 12; and Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [9.102].

2091 *Universal Declaration of Human Rights* (1948) art 12; *International Covenant on Civil and Political Rights* (1966) art 17; art 22 of the *Convention on the Rights of Persons with Disabilities*, adopted by the United Nations General Assembly on 13 December 2006 and opened for signature on 30 March 2007: *Resolution on the Convention on the Rights of Persons with Disabilities*, GA Res 61/106 of 13 December 2006, UN GA, 61st sess, 76th plen mtg, UN Doc A/Res/60/106 (2006), Annex 1. Australia signed the Convention (but not its Optional Protocol) on 30 March 2007. The Convention is not yet in force. See <<http://www.un.org/esa/socdev/enable/conventioninfo.htm>> at 27 June 2007.

2092 See, for example, Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol II [1193], [1301]; Office of the New South Wales Privacy Commissioner, *Privacy New South Wales, Best Practice Guide: Privacy and people with decision-making disabilities* (2004) [1.3].

8.63 The guardianship legislation is the source of responsibilities and powers conferred on people with particular roles in the guardianship system.<sup>2094</sup> The Commission agrees with the view expressed in submissions that personal information gained by a person performing a role under the legislation should be accorded some form of protection.

8.64 To an extent, personal information obtained through a person's involvement in the guardianship legislation is protected by the operation of IS42. But, this administrative standard has a limited application.<sup>2095</sup> It does not apply, for example, to many guardians, administrators, or attorneys because they are private individuals and not Queensland Government agencies.<sup>2096</sup> Neither does the *Privacy Act 1988* (Cth) apply to persons acting under the guardianship legislation.<sup>2097</sup>

8.65 The Commission considers it appropriate that a provision should be included in the guardianship legislation for the protection of personal information gained through a person's involvement with that legislation. This has the advantage of providing a single, consistent framework for the use and disclosure of such personal information by all persons who are involved in the administration of the legislation. It also carries the advantage of accessibility in that use and disclosure of information obtained through particular legislation is dealt with under that same legislation. It would also allow the provision to be tailored, where appropriate, to the requirements of the guardianship system.

8.66 The Commission notes, however, that the privacy of personal information must be balanced with the objectives of the legislation. While it is desirable to curb the misuse of personal information, it is equally important to ensure that any confidentiality provision does not undermine the proper performance of a person's obligations or exercise of a person's powers under the legislation. As one submission put it, for example:<sup>2098</sup>

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2093 For example, M Crompton, Federal Privacy Commissioner, 'What is Privacy?' (Paper presented at Privacy and Security in the Information Age Conference, Melbourne, 16–17 August 2001) at <<http://www.privacy.gov.au/news/speeches/sp51note1.html>> at 27 June 2007:

In return for taking control over their information away from individuals, there should be additional safeguards protecting that information from unrelated uses or disclosures. Safeguards could include prohibitions on using the information for other purposes without the individual's consent and strict accountability measures.

2094 For example, the Tribunal, the Adult Guardian, the Public Advocate, the Community Visitor Program, guardians, administrators, and attorneys. See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [2.16]–[2.37], [2.44]–[2.62].

2095 See para 8.12–8.13 of this Report.

2096 Note, however, that IS42 will apply to the Adult Guardian or to the Public Trustee of Queensland when acting as an adult's attorney or as an appointed guardian or administrator, respectively, for an adult. See para 8.13 of this Report.

2097 See para 8.8 of this Report.

2098 Submission 137.

A person's guardian or administrator should have the ability to access information about the person which they need to properly carry out their duties and make decisions on the person's behalf. It would be contrary to the intent of guardianship legislation if confidentiality provisions apply in such a way as to prevent or hinder this necessary flow of information.

8.67 The Commission notes that, at present, it appears the obligation of confidentiality imposed under the legislation may sometimes act as a general stopper on otherwise permissible disclosures, despite the exceptions listed in the legislation.<sup>2099</sup> People may be fearful of contravening the obligation and err on the side of caution.

8.68 At present, the confidentiality provision is framed negatively, as a prohibition on the disclosure of information.<sup>2100</sup> The exceptions to this, including the exceptions for disclosures authorised by the guardianship legislation, appear in a later subsection.<sup>2101</sup> Given this formulation, it is perhaps unsurprising that the duty is applied conservatively and that the prohibition on disclosure is given greater emphasis than the exceptions that permit disclosure.<sup>2102</sup>

8.69 The Commission is of the view that section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be reformulated, in a more positive way, to clarify that the obligation to maintain confidentiality of personal information is not intended to interfere with the appropriate use of information under the legislation.

8.70 The Commission therefore considers section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person who gains confidential information because of the person's involvement in the administration of the guardianship legislation, may use that information for the purposes of the legislation, or in accordance with any of the exceptions provided in the legislation, but not for any other purpose.

8.71 The Commission also considers the legislation should clearly articulate that the duty of confidentiality does not operate to prevent disclosure of information to the person to whom the information relates.<sup>2103</sup>

8.72 In the context of information about an adult, for example, the Commission notes that one of the guiding principles for its review set out in Chapter 3 of this Report

2099 For example, submissions 122, F16, F23, F24.

2100 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1). These provisions are set out at para 8.32–8.33 of this Report.

2101 *Powers of Attorney Act 1998* (Qld) s 74(2); *Guardianship and Administration Act 2000* (Qld) s 249(3).

2102 Negatively framed information tends to carry more psychological weight than does positive information: see generally RF Baumeister, E Bratslavsky, and C Finkenauer, 'Bad is stronger than good' (2001) 5(4) *Review of General Psychology* 323, 355.

2103 At present, this is achieved only by the operation of an exception for disclosures authorised by the person to whom the information relates. See para 8.326 of this Report.

is that the adult is entitled to know and have access to information about himself or herself.<sup>2104</sup>

8.73 The Commission also notes that both the *Privacy Act 1988* (Cth) and IS42 provide that a person must not disclose personal information to a person ‘other than the individual concerned’.<sup>2105</sup>

8.74 The Commission therefore proposes that a provision be included in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) to the effect that the duty of confidentiality imposed by those provisions does not prevent the disclosure of information to the person to whom the information relates.

8.75 The Commission notes that the extent to which such information can be disclosed will depend on the extent to which it can be separated from information about the affairs of another person.<sup>2106</sup>

8.76 A related issue is the question whether a person should be able to authorise disclosure of information about them to another person. This is considered elsewhere in this chapter.<sup>2107</sup>

### Who should be subject to the duty?

8.77 In its Discussion Paper, the Commission sought submissions on who should be required to comply with the duty of confidentiality if the guardianship legislation includes such a duty.<sup>2108</sup>

8.78 At present, the duty imposed by the guardianship legislation applies only to certain people who gain confidential information through an involvement in the administration of the legislation. It does not apply to people who may gain personal information because of some other involvement with an adult with impaired capacity.

8.79 An issue for consideration is whether the confidentiality provision should apply more widely or more narrowly than is presently provided. Another issue for consideration is whether the confidentiality provision should apply to a list of specified persons or more generally to persons of a particular class. In particular, the Discussion

<sup>2104</sup> See para 3.156, 3-3 of this Report.

<sup>2105</sup> *Privacy Act 1988* (Cth) s 14, Information Privacy Principle 11(1); Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.11 Information Privacy Principle 11(1). See generally Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol II [1230]–[1236].

<sup>2106</sup> See para 8.358–8.359 of this Report.

<sup>2107</sup> See para 8.351–8.357 of this Report. Also note that some submissions specifically endorsed an exception for disclosures made with the person’s consent: see para 8.337 of this Report. Note, however, that in Chapter 7 of this Report, the Commission has recommended that an adult should not be able to authorise disclosure of information about Tribunal proceedings that is likely to lead to his or her identification as an exception to the proposed prohibition on publication of such information. The Commission considers that such a prohibition should bind all persons, including the adult, and that it should be capable of being displaced only by an order of the Tribunal. See para 7.248–7.251 of this Report.

<sup>2108</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.68], [8.146] Q8-3.

Paper asked whether the duty should be extended to apply to service providers and informal substitute decision-makers.

### **The guardianship legislation**

8.80 Section 74 of the *Powers of Attorney Act 1998* (Qld) applies ‘[i]f a person gains confidential information because of being, or an opportunity given by being, an attorney’.<sup>2109</sup> This applies also to a person who is a statutory health attorney.<sup>2110</sup>

8.81 Section 249(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the duty imposed by that section applies to ‘a person [who] gains confidential information because of the person’s involvement in [the] Act’s administration’.<sup>2111</sup> Section 249(2) appears to set out an exhaustive list of those persons. It provides that a person gains confidential information through involvement in the Act’s administration if the person gains the information because of being, or an opportunity given by being:

- a Tribunal member, a member of the Tribunal’s staff, or an expert engaged by the Tribunal;
- the Adult Guardian or his or her staff, including consultants and those delegated by him or her to conduct investigations;
- the Public Advocate or his or her staff;
- a guardian or administrator; or
- a community visitor.

### **The legislation in other jurisdictions**

8.82 In some jurisdictions, the duty of confidentiality is limited in application to particular statutory officers and their staff. In the Australian Capital Territory and Victoria, confidentiality obligations are imposed on Tribunal members and staff<sup>2112</sup> and the Public Advocate.<sup>2113</sup> In Tasmania, the obligation applies to any person in relation to information obtained by the Board or the Public Guardian.<sup>2114</sup>

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2109 *Powers of Attorney Act 1998* (Qld) s 74(1). This section is set out at para 8.32 of this Report.

2110 *Powers of Attorney Act 1998* (Qld) s 74(3).

2111 Section 249 of the *Guardianship and Administration Act 2000* (Qld) is set out at para 8.33 of this Report.

2112 *Guardianship and Management of Property Act 1991* (ACT) s 66D(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(1). The relevant Tribunal in Western Australia is also under a statutory duty of confidentiality: *State Administrative Tribunal Act 2004* (WA) s 157(1).

2113 *Public Advocate Act 2005* (ACT) s 16(1); *Guardianship and Administration Act 1986* (Vic) s 14(1), sch 3 cl 3(b).

2114 *Guardianship and Administration Act 1995* (Tas) s 86(1).

8.83 A wider approach is adopted in New South Wales, South Australia, and Western Australia. In New South Wales, any person who obtains information ‘in connection with the administration or execution’ of the legislation is bound by the confidentiality provision.<sup>2115</sup> The South Australian provision applies to ‘[a] person engaged in the administration of [the] Act’.<sup>2116</sup> In Western Australia, the duty of confidentiality is imposed on persons ‘performing any function’ under the legislation.<sup>2117</sup>

8.84 Some Canadian guardianship statutes impose confidentiality requirements on substitute decision-makers. For example, in Ontario, attorneys and guardians are to keep required accounts and records pertaining to the adult confidential.<sup>2118</sup> In British Columbia, a general duty of confidentiality is imposed on decision-makers, guardians and monitors.<sup>2119</sup> In the North West Territories, a confidentiality obligation is imposed in relation to information obtained under the Act by a guardian or trustee.<sup>2120</sup>

### Submissions

8.85 Few submissions specifically addressed this issue. Of the submissions that did, most considered the duty of confidentiality should apply to those people with a statutory role under the legislation and who are currently listed in the provision.<sup>2121</sup> However, some submissions were of the view that the duty should apply generally to all persons who gain information through their involvement in the administration of the legislation.<sup>2122</sup>

8.86 In addition, some submissions, including submissions from the Community Visitor Program, considered the existing list of people should be extended to cover not only community visitors, but also other staff of the Community Visitor Program.<sup>2123</sup>

8.87 Only two submissions commented directly on whether the duty should apply to formally appointed guardians and administrators.<sup>2124</sup> The Public Advocate distinguished between lay and professional guardians and administrators, expressing the view that the duty of confidentiality should apply only to professionals, such as the Adult Guardian and the Public Trustee of Queensland. In her view, lay guardians and administrators should more generally be required to respect an adult’s privacy, perhaps

2115 *Guardianship Act 1987* (NSW) s 101.

2116 *Guardianship and Administration Act 1993* (SA) s 80(1). Note, however, that a guardian or administrator is not to be taken as being engaged in the administration of that Act: *Guardianship and Administration Act 1993* (SA) s 80(3).

2117 *Guardianship and Administration Act 1990* (WA) s 113(1).

2118 *Accounts and Records of Attorneys and Guardians*, O Reg 100/96, s 4.

2119 *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32(1).

2120 *Guardianship and Trusteeship Act*, SNWT 1996, c 29, s 58(1).

2121 For example, submissions 1H, 122, 127, F16.

2122 For example, submissions 45, 85.

2123 For example, submissions 1H, 126, 146.

2124 Submissions 1H, 73A.

through the existing requirement in the General Principles. The Public Advocate commented:<sup>2125</sup>

A person who has been an informal decision-maker, for example, a daughter, son or parent, in most circumstances, will have freely shared information with other relevant members of the adult's informal support network. The types of information commonly shared may in the future become confidential if gained while guardian or administrator. This seems artificial and confusing for those involved. This can be contrasted with the position of Tribunal Members and staff, Adult Guardian and staff, the Public Advocate and staff and others who only gain knowledge of the information through their roles in the administration of the regime.

...it is desirable for there to be a requirement for appointed guardians and administrators to actively consult with and keep informed members of the adult's support network. If this is done, unless limits are also placed on what and with whom the support network can discuss, it seems pointless to formally require confidentiality of a lay guardian or administrator.

8.88 Similarly, another submission commented that lay guardians and administrators have 'a reasonable and genuine need' for discussion and support:<sup>2126</sup>

For example, it would be useful for administrators all doing the same job for their family to get together and compare notes and share ideas.

8.89 Some submissions also specifically commented on the desirability of extending the duty of confidentiality to apply to service providers. Only one of these submissions supported such an extension, suggesting that it may prompt service providers to be more discreet, particularly in regional areas where a false reputation may spread 'through the grapevine' about an adult who is in need of services.<sup>2127</sup>

8.90 Other submissions commented that many service providers' employees would already be bound by confidentiality agreements.<sup>2128</sup>

8.91 A submission from Disability Services Queensland, which provides accommodation and specialist support services to some adults with impaired capacity, acknowledged the importance of confidentiality, but referred to its existing obligations under IS42.<sup>2129</sup>

8.92 Some submissions also commented on the application of the duty of confidentiality to informal substitute decision-makers, considering that the duty should not apply because it would hinder appropriate discussion within an adult's support network.<sup>2130</sup>

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2125 Submission 1H.

2126 Submission 73A.

2127 Submission F23.

2128 For example, submissions 120, 126.

2129 Submission 125.

2130 For example, submissions 119, 126, F4, F8.

8.93 As one submission noted:<sup>2131</sup>

Not only would ‘enforcement be very difficult’ – such prohibition would be likely [to] prevent a range of actions occurring which might be beneficial for an adult (or for others – without disadvantage to the adult), and inhibit normal interaction between the adult and the adult’s family or the adult’s friends; between family members and others, in such a way as would have the potential to have serious consequences for the mental health of the adult and of the other members of that family so affected. It is felt very strongly that such prohibition *should never be made* and that, instead, the system will continue to rely on the ‘encouragement to members of the community to apply and promote the general principles’. [original emphasis]

8.94 Another submission, from the Department of Justice and Attorney-General, commented that informal decision-makers would be unaware of obligations contained in the legislation and that a duty of confidentiality would be ‘difficult to monitor or enforce and would be impractical in application’.<sup>2132</sup>

### **The Commission’s view**

8.95 It is by virtue of a person’s role under the guardianship legislation that a limitation on the use of information gained because of that role becomes relevant. As such, the Commission agrees with the view in submissions that the duty of confidentiality should apply to people who are involved in the administration of the legislation. In particular, the Commission considers the duty should continue to apply to attorneys under section 74 of the *Powers of Attorney Act 1998* (Qld) and, exhaustively, to the list of persons set out in section 249(2) of the *Guardianship and Administration Act 2000* (Qld), with some modification. The Commission considers that for clarity and certainty, the application of section 249 to an exhaustive list of people is preferable to the application of the provision more generally to persons involved in the administration of the legislation.

#### *The Community Visitor Program*

8.96 The Commission agrees with the suggestion made in submissions that in addition to community visitors, the duty should apply to other staff of the Community Visitor Program, including the Program’s manager.

#### *The Tribunal*

8.97 The Commission considers that the duty of confidentiality should have a limited application to the Tribunal. The judicial nature of the Tribunal’s functions distinguishes it from the other persons listed in section 249(3) of the *Guardianship and Administration Act 2000* (Qld). As a judicial body, the Tribunal has a responsibility to operate transparently and in a way that accords procedural fairness to the parties appearing before it. Indeed, the principle of open justice applies uniquely to the

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2131 Submission 119.

2132 Submission 126.

Tribunal as a judicial, rather than an administrative, decision-making body.<sup>2133</sup> The importance of these obligations to the question of confidentiality in the guardianship system is reflected in the Commission's guiding principles adopted in Chapter 3 of this Report.<sup>2134</sup>

8.98 There are two kinds of information disclosure that fall to be governed by the principle of open justice and the requirements of procedural fairness and so, as a consequence, should not be governed by the operation of the duty of confidentiality in section 249 of the *Guardianship and Administration Act 2000* (Qld).

8.99 The first is information disclosed to active parties to a Tribunal proceeding. Disclosure of information by the Tribunal to an active party that is relevant to an issue in the proceeding is properly governed by the parties' general rights to such information and any provisions that specifically limit those rights.<sup>2135</sup> A general duty to keep personal information confidential should have no operation in this context. Indeed, the Commission is of the view that active parties, who have a right to inspect documents that are directly relevant to an issue in the proceeding,<sup>2136</sup> should not be prevented from inspecting such documents after the hearing. The Commission has made recommendations later in this chapter about the Tribunal's facilitation of such post-hearing access.<sup>2137</sup>

8.100 The second kind of disclosure is the disclosure of information about a Tribunal proceeding more generally. The dissemination of information about a Tribunal proceeding is properly to be governed by those provisions that direct the publication of Tribunal proceedings generally.<sup>2138</sup> This applies to the publication of such information by any person, including by members and staff of the Tribunal. Again, a general duty of confidentiality should not operate in this context.

8.101 This is generally consistent with the approach under the *Privacy Act 1988* (Cth) which exempts federal courts from the requirements of that Act except to the extent of acts and practices of an 'administrative nature'.<sup>2139</sup> The Australian Law

2133 It has been suggested, for example, that 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure': *McPherson v McPherson* [1936] AC 177, 200. See generally para 3.23–3.35 of this Report.

2134 See para 3.156 of this Report.

2135 For example, *Guardianship and Administration Act 2000* (Qld) ss 108 (Procedural fairness), 109 (Open), and 158 (Decision and reasons to the adult and each active party). These provisions are discussed in Chapter 5 (Documents before the Tribunal) and Chapter 6 (Tribunal decisions and reasons) of this Report.

2136 *Guardianship and Administration Act 2000* (Qld) s 108(2).

2137 See generally para 8.496–8.519 of this Report.

2138 For example, *Guardianship and Administration Act 2000* (Qld) s 112 (Publication about proceeding or disclosure of identity). This is the subject of Chapter 7 of this Report.

2139 *Privacy Act 1988* (Cth) ss 7(1)(a)(ii), (b), 13(a). See also *I v Commonwealth Agency* [2005] PrivCmR 6:

Records which contain information about the judicial function of the court, including records containing litigants and court judgments are considered 'judicial records'. The records of the respondent agency which are of an administrative nature and over which the Commissioner has jurisdiction include personnel records; operations and financial records; freedom of information records; complaint files; and mailing lists used to send judgments and other published material about the court.

Reform Commission has commented on this exemption:<sup>2140</sup>

The partial exemption of federal courts from the *Privacy Act* reflects a balance between the protection of individual privacy and the principle of open justice. Public access to court proceedings is vital to maintaining public confidence in the administration of justice. [note omitted]

8.102 Similarly, IS42 exempts courts and tribunals to the extent of their judicial and quasi-judicial functions.<sup>2141</sup>

8.103 The Commission is therefore of the view that section 249 of the *Guardianship and Administration Act 2000* (Qld) should continue to apply to the Tribunal. However, the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the duty of confidentiality imposed by section 249 does not apply to the disclosure or publication of information about a Tribunal proceeding.<sup>2142</sup> Section 74 of the *Powers of Attorney Act 1998* (Qld) should also be similarly amended. Disclosure and publication of information about Tribunal proceedings is to be governed by the provisions currently contained in sections 112 and 109(2) of that Act. This includes disclosure of information by the Tribunal to active parties to a Tribunal proceeding or persons who were active parties to a proceeding that has been finalised.<sup>2143</sup> Such disclosure should not be governed by the general duty of confidentiality.

#### *Guardians, administrators, and attorneys*

8.104 The Commission acknowledges the concern expressed in submissions about the application of the duty of confidentiality to lay guardians and administrators. It may be difficult for a lay appointee to discern the boundaries between information that can and cannot be disclosed. This may be particularly difficult where the appointee gains information by virtue of a personal relationship with the adult or where the appointee has previously acted in an informal capacity.

8.105 Formal appointment as an adult's decision-maker, however, places the appointee in a role that is characterised by significant responsibilities and powers.<sup>2144</sup> For example, guardians, administrators, and attorneys must 'act honestly and with

<sup>2140</sup> Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [5.50]. Note also that one of the questions posed in the Australian Law Reform Commission's review is whether federal courts should remain exempt from the *Privacy Act 1988* (Cth) either completely or partially and, if so, what the policy justifications for the exemption are: Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) 230–31 Q5-3.

<sup>2141</sup> Queensland Government, *Information Standard 42 – Information Privacy*, 1.2.1.

<sup>2142</sup> See also para 8.185 of this Report.

<sup>2143</sup> Note that the Commission has also recommended, in Chapter 7 of this Report, that the prohibition on publication contained in s 112 of the *Guardianship and Administration Act 2000* (Qld) be amended to apply only to the publication of information to the public or a section of the public that is likely to lead to the identification of the adult. This would prevent public disclosures but would not impact on the Tribunal's ability to disclose information to a person with a sufficient interest in the information, such as a person who was an active party to the proceeding. See para 7.163–7.165 of this Report.

<sup>2144</sup> See generally Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Privacy Lives*, Discussion Paper, WP 60 (2006) [2.25]–[2.26], [2.33]–[2.34].

reasonable diligence to protect the adult's interests<sup>2145</sup> and must apply the General Principles of the legislation.<sup>2146</sup> Guardians, administrators and attorneys are empowered, within the limitations of their appointment, to do anything in relation to a matter that the adult could have done if the adult had capacity for the matter.<sup>2147</sup> Appointees are also entitled to all information the adult would have been entitled to that is necessary to make an informed decision for the adult.<sup>2148</sup>

8.106 The role of a formal substitute decision-maker can be equated with that of an agent or fiduciary.<sup>2149</sup> As such, it is appropriate that guardians, administrators, and attorneys be required to use information gained because of their unique position for limited purposes only.<sup>2150</sup>

8.107 The Commission considers the concerns expressed in submissions can be addressed without the need to exempt lay guardians, administrators, and attorneys from the application of the duty of confidentiality.

8.108 The Commission has recommended elsewhere in this chapter that the duty of confidentiality be reformulated to clarify that information may be used for the purposes of the legislation.<sup>2151</sup> This would include use of information in accordance with the General Principles. It may be appropriate, in applying the General Principles, for example, to discuss particular matters with an adult's support network.<sup>2152</sup>

8.109 The Commission has also recommended elsewhere in this chapter that steps be taken to educate substitute decision-makers about their confidentiality obligations under the legislation.<sup>2153</sup>

8.110 The Commission is therefore of the view that section 74 of the *Powers of Attorney Act 1998* (Qld), which applies to attorneys, should remain, and that section 249 of the *Guardianship and Administration Act 2000* (Qld) should continue to apply to all guardians and administrators.

2145 *Powers of Attorney Act 1998* (Qld) s 66(1) (although note the difference in terminology of 'principal' rather than 'adult'); *Guardianship and Administration Act 2000* (Qld) s 35.

2146 *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 34(1).

2147 *Powers of Attorney Act 1998* (Qld) s 32(1); *Guardianship and Administration Act 2000* (Qld) s 33.

2148 *Powers of Attorney Act 1998* (Qld) s 81; *Guardianship and Administration Act 2000* (Qld) s 44.

2149 See generally S Fisher, *Agency Law* (2000) [2.1.1]–[2.2.2], [7.1.3], [12.2.1].

2150 See, for example, PD Finn, *Fiduciary Obligations* (1977) [163], [321] in relation to the obligation of a fiduciary not to misuse confidential information acquired by virtue of his or her position.

2151 See para 8.69–8.70 of this Report.

2152 Note, for example, General Principle 8 which requires the importance of maintaining an adults' existing 'supportive relationships' to be taken into account: *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 8.

2153 See para 8.526–8.529 of this Report.

### *Statutory health attorneys*

8.111 At present, in addition to attorneys appointed under an enduring document, the duty of confidentiality in section 74 of the *Powers of Attorney Act 1998* (Qld) applies to statutory health attorneys.<sup>2154</sup> A statutory health attorney is a person such as a spouse, a carer or a friend, who is declared by the *Powers of Attorney Act 1998* (Qld) to be a person with authority to make decisions about an adult's health matters during a period when the adult has impaired capacity.<sup>2155</sup>

8.112 Apart from the obligation to comply with the General Principles and the Health Care Principle in the exercise of their authority,<sup>2156</sup> statutory health attorneys are not subject to the requirements imposed on guardians or administrators, or attorneys appointed under an enduring document. In this way, a statutory health attorney may act in much the same way as an informal substitute decision-maker.

8.113 On the other hand, a statutory health attorney derives authority from the guardianship legislation. A statutory health attorney is, in this sense, a formal substitute decision-maker.<sup>2157</sup>

8.114 The Commission considers it appropriate that personal information gained by a person because of his or her capacity as a statutory health attorney should be subject to the duty of confidentiality imposed on other persons performing a role under the guardianship legislation. The Commission acknowledges that this may sometimes seem like an artificial distinction for a person who might otherwise make decisions for the adult informally. However, as with lay guardians, administrators, and appointed attorneys, the Commission considers the reformulation of the duty, and education in relation to statutory health attorneys' confidentiality obligations should go some way to addressing those concerns.<sup>2158</sup>

8.115 The Commission is therefore of the view that section 74(3) of the *Powers of Attorney Act 1998* (Qld) should remain, so that the duty of confidentiality continues to apply to statutory health attorneys.

### *Informal substitute decision-makers*

8.116 The Commission agrees with the view expressed in submissions that the duty of confidentiality should not be extended to apply to informal substitute decision-makers. The object of the duty is to limit the use of personal information gained by a person because of his or her role in the administration of the legislation.

<sup>2154</sup> *Powers of Attorney Act 1998* (Qld) s 74(3). Section 74 is set out at para 8.32 of this Report.

<sup>2155</sup> *Powers of Attorney Act 1998* (Qld) ss 62–63. See generally Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Privacy Lives*, Discussion Paper, WP 60 (2006) [2.27]–[2.29].

<sup>2156</sup> *Powers of Attorney Act 1998* (Qld) s 76.

<sup>2157</sup> See *Guardianship and Administration Act 2000* (Qld) s 9(2)(b)(iii) which provides that the exercise of power for a matter for an adult with impaired capacity may be done on a formal basis by, inter alia, a statutory health attorney under the *Powers of Attorney Act 1998* (Qld).

<sup>2158</sup> See para 8.108–8.109 of this Report.

Such a duty is justified because information is acquired by virtue of the person's unique position under the legislation.

8.117 An informal decision-maker is not involved in the administration of the legislation. The guardianship legislation does not regulate informal decision-making<sup>2159</sup> and does not confer informal decision-makers with powers or obligations. There is little justification for imposing an obligation of confidentiality in situations the legislation otherwise leaves untouched.

8.118 A certain amount of idle conversation and curiosity about others' personal affairs is an ordinary incident of social interaction and beyond the reach of reasonable regulation.<sup>2160</sup> Informal decision-makers, like others in the community, should nevertheless exercise their good judgment in respecting the privacy of others, including the adult on whose behalf they are acting. The Commission notes that 'the community is encouraged to apply and promote' the General Principles, including General Principle 11 under which the adult's right to confidentiality of information should be recognised and taken into account.<sup>2161</sup>

8.119 In relation to an informal decision-maker's involvement in a Tribunal proceeding, the Commission considers the provisions of section 112 of the *Guardianship and Administration Act 2000* (Qld) which deal with the publication of information about a proceeding are appropriate and adequate mechanisms for the protection of such information.<sup>2162</sup>

8.120 The Commission is therefore of the view that the duty of confidentiality in section 249 of the *Guardianship and Administration Act 2000* (Qld) should not be extended to apply to informal substitute decision-makers.

### *Service providers*

8.121 The Commission also agrees with the view in submissions that the duty of confidentiality should not be extended to apply to service providers who may gain information about an adult with impaired capacity. For the reasons expressed above in relation to informal substitute decision-makers,<sup>2163</sup> the Commission considers an extension of the duty in this way would be inappropriate.

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<sup>2159</sup> Note, however, that the *Guardianship and Administration Act 2000* (Qld) empowers the Tribunal to ratify or approve the exercise of powers by informal decision-makers: ss 82(1)(e), 154. See also s 9(2)(a) of the *Guardianship and Administration Act 2000* (Qld) which specifically recognises that decisions may be made informally by an adult's existing support network.

<sup>2160</sup> See JG Fleming, *The Law of Torts* (9th ed, 1998) 665; C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 184; and Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1 [53].

<sup>2161</sup> *Guardianship and Administration Act 2000* (Qld) s 11(3), sch 1 pt 1 s 11. General Principle 11 is set out at para 8.35 of this Report.

<sup>2162</sup> Section 112 is discussed in Chapter 7 of this Report.

<sup>2163</sup> See para 8.117–8.119 of this Report.

8.122 In addition, the Commission notes that obligations of confidentiality will in many cases already operate to protect personal information gained by service providers and their staff.

8.123 Queensland Government service providers, such as Disability Services Queensland, are required to comply with IS42. Queensland Health is also subject to an administrative standard, IS42A.<sup>2164</sup>

8.124 Some private sector service providers must comply with the National Privacy Principles set out in the *Privacy Act 1988* (Cth). This includes all private health service providers and those private sector businesses with an annual turnover of more than \$3 million.<sup>2165</sup> The Commission also notes that one of the questions to be considered in the Australian Law Reform Commission's current review of the *Privacy Act 1988* (Cth) is whether the Act should be extended to apply to all private sector entities.<sup>2166</sup>

8.125 Other private sector service providers may have confidentiality agreements with their employees that would protect personal information acquired in the course of employment.

8.126 The Commission is therefore of the view that the duty of confidentiality in section 249 of the *Guardianship and Administration Act 2000* (Qld) does not need to be extended to apply to service providers.

### **What information should the duty apply to?**

8.127 In its Discussion Paper, the Commission sought submissions on what information the duty of confidentiality should apply to, if the guardianship legislation includes such a duty.<sup>2167</sup> That is, what information should be protected by the duty?

8.128 In particular, the Commission sought submissions on whether the duty should protect all information that is gained through a person's involvement in the administration of the legislation, or only information about a person's, or about an adult's, affairs. The Commission also sought submissions on whether the duty should be limited to information that identifies the person and whether the duty should cover information that has already been publicly disclosed.

### ***The guardianship legislation***

8.129 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) apply to 'confidential information' gained by a person 'because of being, or an opportunity given by being', for example,

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<sup>2164</sup> See para 8.15 of this Report.

<sup>2165</sup> See para 8.7 of this Report.

<sup>2166</sup> Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [5.132]–[5.138].

<sup>2167</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Privacy Lives*, Discussion Paper, WP 60 (2006) [8.82], [8.146] Q8-4.

an attorney, a Tribunal member, or a guardian.<sup>2168</sup> The legislation does not define ‘confidential information’ exhaustively. The definition provides that confidential information ‘includes information about a person’s affairs’ but does not include:<sup>2169</sup>

- information that has already been publicly disclosed (unless further disclosure is prohibited by law); or
- statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

8.130 This definition has not been judicially considered.

### **The legislation in other jurisdictions**

8.131 In some jurisdictions, the duty of confidentiality is limited to information about the adult to whom guardianship proceedings relate. In South Australia, the legislation prohibits a person from divulging ‘any personal information relating to a person in respect of whom any proceedings under [the] Act have been taken’ that is obtained in the course of administration of the Act.<sup>2170</sup> In Tasmania, the duty applies in relation to ‘any information’ obtained under the Act ‘that deals with the personal history or records of a represented person, proposed represented person or a person to whom Part 6 applies’.<sup>2171</sup> Similarly, in Western Australia, the general duty applies to ‘any personal information obtained in the course of duty relating to a represented person or person in respect of whom an application is made’.<sup>2172</sup> A similar approach is used in the legislation of Alberta, the North West Territories, and Ontario.<sup>2173</sup>

8.132 In other jurisdictions, the duty is broader in that it applies to information about any person, rather than the adult only. In the Australian Capital Territory, the duty applies to ‘information about a person that is disclosed to, or obtained by, a person ... because of the exercise of a function under [the] Act’.<sup>2174</sup> Similarly, in Victoria, the

<sup>2168</sup> *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1)–(2). These provisions are set out at para 8.32–8.33 of this Report.

<sup>2169</sup> *Powers of Attorney Act 1998* (Qld) s 74(4); *Guardianship and Administration Act 2000* (Qld) s 249(4). These provisions are set out at para 8.32–8.33 of this Report. Note that the same definition is used in relation to a similar duty of confidentiality imposed under the *Disability Services Act 2006* (Qld): *Disability Services Act 2006* (Qld) ss 187, 9 sch 7 (definition of ‘confidential information’).

<sup>2170</sup> *Guardianship and Administration Act 1993* (SA) s 80(1).

<sup>2171</sup> *Guardianship and Administration Act 1995* (Tas) s 86(1). Part 6 of that Act deals with consent to medical and dental treatment.

<sup>2172</sup> *Guardianship and Administration Act 1990* (WA) s 113(1). The duty imposed on Tribunal members and staff in Western Australia similarly applies to ‘information about the affairs of a person acquired in the performance of functions under or in connection with [the] Act’: *State Administrative Tribunal Act 2004* (WA) s 157(2).

<sup>2173</sup> *Dependent Adults Act*, RSA 2000, c d–11, s 68(1); *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58(1); *Accounts and Records of Attorneys and Guardians*, O Reg 100/96, s 4.

<sup>2174</sup> *Guardianship and Management of Property Act 1991* (ACT) s 66D(1). Similar wording is adopted in respect of the duty of confidentiality imposed on the Public Advocate in the Australian Capital Territory: *Public Advocate Act 2005* (ACT) s 16.

duty applies to ‘any information about the affairs of a person acquired in the performance of functions under or in connection with [the] Act’.<sup>2175</sup>

8.133 Finally, in New South Wales, the duty applies most widely to ‘any information obtained in connection with the administration or execution of [the] Act’.<sup>2176</sup> A similar formulation is used in the legislation of British Columbia.<sup>2177</sup>

8.134 Through the operation of an exception to the duty, some jurisdictions also provide that the duty does not apply to statistical or other information that does not identify the person to whom it relates.<sup>2178</sup>

8.135 None of the other Australian jurisdictions expressly excludes from the duty information that has already been publicly disclosed. However, section 34(6) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) excludes particular information in relation to Tribunal proceedings from the duty of confidentiality imposed on Tribunal members and staff.<sup>2179</sup> That section provides:

**34 Secrecy**

...

(6) Nothing in this section applies to the recording or disclosure of—

- (a) anything said or done at a hearing of the Tribunal (other than at a hearing that the Tribunal has directed to be held in private); or
- (b) any decision or order of the Tribunal or the reasons for any such decision or order.

### **Submissions**

8.136 Few submissions responded to this issue.

8.137 The Department of Justice and Attorney-General, the Adult Guardian, and the Public Advocate considered the duty should cover ‘any information gained through the person’s involvement in the administration of the legislation’.<sup>2180</sup> The Public Advocate expressed the view that.<sup>2181</sup>

<sup>2175</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(2).

<sup>2176</sup> *Guardianship Act 1987* (NSW) s 101. Note also that the Victorian Public Advocate’s duty of confidentiality applies widely to ‘information received or obtained under [the] Act’: *Guardianship and Administration Act 1986* (Vic) s 14(1) sch 3 cl 3(b).

<sup>2177</sup> *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32(1).

<sup>2178</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(5); *Guardianship and Administration Act 1990* (WA) s 113(2); *State Administrative Tribunal Act 2004* (WA) s 157(5).

<sup>2179</sup> The Victorian Civil and Administrative Tribunal exercises jurisdiction under the *Guardianship and Administration Act 1986* (Vic).

<sup>2180</sup> Submissions 1H, 122, 126.

<sup>2181</sup> Submission 1H.

Information wider than an adult's should be protected since intimate details about other person's affairs may be disclosed from time to time in the course of activities related to the administration of the legislation.

8.138 Some submissions considered the duty should apply more narrowly to information about an adult's affairs.<sup>2182</sup> One submission indicated the duty should apply only to the extent necessary to protect the adult's identity.<sup>2183</sup> Another submission also commented that the adult's identity should be protected.<sup>2184</sup>

8.139 Some submissions suggested more generally that the duty should cover information that identifies the person to whom it relates.<sup>2185</sup>

8.140 A few submissions also considered that the duty should apply in respect of information that has not already been publicly disclosed.<sup>2186</sup> The Public Advocate commented that:<sup>2187</sup>

when information is already in the public domain, for example, through media report, then arguably there should be no prohibition against responding to it. Inability to respond may bring the regime into disrepute where unfounded allegations are made. It is highly desirable that public confidence in the guardianship system be maintained to serve the interests of the adults. (Otherwise people who should make applications for the benefit of adults may be reluctant to use the system).

8.141 The Adult Guardian also suggested more generally that her office should be able to respond to public criticism to encourage confidence in the Office of the Adult Guardian and in the guardianship system.<sup>2188</sup>

8.142 Another submission, from the Public Trustee of Queensland, suggested the application of the duty to information that has been publicly disclosed should be clarified.<sup>2189</sup>

The existing definition of confidential information might be retained but with some further legislative discussion advanced in relation to material that is publicly disclosed – the concerns of the Commission are real, for example, in respect of an apparent breach of the statutory confidentiality provision in respect of information which is otherwise publicly available – although the reason it became public was through a breach of the duty...

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2182 For example, submission 85.

2183 Submission 59.

2184 Submission 56.

2185 For example, submissions 83A, 85, 117.

2186 For example, submissions 1H, 47, 85.

2187 Submission 1H.

2188 Submissions F3, F23.

2189 Submission 127.

8.143 Other submissions nominated particular types of information that should be covered by the duty. One submission thought the duty could apply to financial information.<sup>2190</sup> Another submission considered an adult's personal health information should be covered.<sup>2191</sup> One submission suggested that information revealed at a Tribunal hearing that is not directly relevant to the issues under discussion should be protected.<sup>2192</sup>

ie person's background, livelihood, financial state that does not pertain to the client's case.

8.144 A submission from Caxton Legal Centre expressed the view that:<sup>2193</sup>

Information about a person's financial affairs, state of health, personal relationships, personal attributes or related matters appear to be the obvious matters that require protection.

### **The Commission's view**

#### *Information gained in connection with the administration of the legislation*

8.145 The Commission has recommended that the guardianship legislation continue to impose a duty of confidentiality on certain persons who are involved in the administration of that legislation.<sup>2194</sup> It is by virtue of a person's role under the legislation that the need for such a duty arises. As such, the duty must only apply in relation to information that is gained in connection with the administration of the legislation.

8.146 At present, this is achieved in section 74 of the *Powers of Attorney Act 1998* (Qld) by providing that the duty arises in relation to confidential information that is gained 'because of being, or an opportunity given by being, an attorney'.<sup>2195</sup> The same formulation is adopted in section 249 of the *Guardianship and Administration Act 2000* (Qld) in relation to those persons to whom the duty under that Act applies.<sup>2196</sup> The Commission considers that formulation is appropriate and does not propose any amendment to it.

8.147 The Commission acknowledges this may sometimes require a difficult distinction to be made between information that is covered by the duty and information that is not. For example, it may be difficult for an attorney, a guardian or an administrator to differentiate between information that is gained in the person's capacity

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2190 Submission 69.

2191 Submission 62.

2192 Submission 45.

2193 Submission 124.

2194 See para 8.65 of this Report.

2195 *Powers of Attorney Act 1998* (Qld) s 74(1). This section is set out at para 8.32 of this Report.

2196 *Guardianship and Administration Act 2000* (Qld) s 249(2). This section is set out at para 8.33 of this Report.

as a substitute decision-maker, and information that is acquired because of a pre-existing and ongoing personal relationship with the adult.

8.148 This distinction, however, will not always be problematic. For example, attorneys, guardians and administrators are entitled under the guardianship legislation to all information the adult would have been entitled to that is necessary to make an informed decision for the adult.<sup>2197</sup> Upon request, a person with custody or control of such information must give the information to the attorney, the guardian, or the administrator.<sup>2198</sup> In those circumstances, it will be clear that the information has been gained because of the person's authority as an appointed substitute decision-maker.

8.149 The Commission considers this concern may also be appropriately addressed through education. The Commission has made recommendations elsewhere in this chapter that steps be taken to educate substitute decision-makers about their confidentiality obligations under the legislation.<sup>2199</sup>

#### *Information about a person's affairs*

8.150 Information privacy is concerned with information about the person. It rests on the assumption that 'all information about a person is in a fundamental way his own' so that 'he has a basic and continuing interest in what happens to this information, and in controlling access to it'.<sup>2200</sup>

8.151 Legislative information privacy protection in Australia therefore extends to all information about an individual (who is identified or identifiable from that information).<sup>2201</sup> This is also the approach under IS42, which is based on the information privacy principles contained in the *Privacy Act 1988* (Cth).<sup>2202</sup> Those mechanisms regulate not only use and disclosure of such information but the collection,

<sup>2197</sup> *Powers of Attorney Act 1998* (Qld) s 81(1); *Guardianship and Administration Act 2000* (Qld) s 44(1).

<sup>2198</sup> *Powers of Attorney Act 1998* (Qld) s 81(2)–(3); *Guardianship and Administration Act 2000* (Qld) s 44(2)–(6).

<sup>2199</sup> See para 8.526–8.529 of this Report.

<sup>2200</sup> Department of Communications and Department of Justice, Canada, *Privacy and Computers* (1972) 13–14 quoted with approval in Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol I [47]. Also see Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Privacy in Queensland*, Report No 9 (1998) 9.

<sup>2201</sup> Section 6(1) of the *Privacy Act 1988* (Cth) defines 'personal information' as 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'. Similar definitions are adopted in the privacy legislation of other Australian States and Territories: *Privacy and Personal Information Protection Act 1998* (NSW) s 4 (definition of 'personal information'); *Information Act* (NT) s 4 (definition of 'personal information'); *Personal Information Protection Act 2004* (Tas) s 3 (definition of 'personal information'); *Information Privacy Act 2000* (Vic) s 3 (definition of 'personal information'). Note also the administrative instrument that applies to South Australian Government agencies: *PC012 Information Privacy Principles Instruction* (SA Government, 1992) pt 1 s 3 (definition of 'personal information').

<sup>2202</sup> For all of the Information Privacy Principles of IS42, except Information Privacy Principles 6 and 7, 'personal information' has the same meaning as provided under the *Privacy Act 1988* (Cth) s 6(1): Queensland Government, *Information Standard 42 – Information Privacy*, 7. For Information Privacy Principles 6 and 7 of IS42, 'personal information' is instead limited to information about a person's 'personal affairs' as that phrase has been interpreted in the *Freedom of Information Act 1992* (Qld). Information Privacy Principles 6 and 7 relate to a person's ability to access information about himself or herself and request amendments to it to keep it up-to-date and accurate.

recording, access and correction of information.<sup>2203</sup> The focus of the *Privacy Act 1988* (Cth), and of IS42, is therefore much wider than the duty of confidentiality imposed under the guardianship legislation. The Commission also notes that one of the matters for examination in the Australian Law Reform Commission's current review of the *Privacy Act 1988* (Cth) is the definition of 'personal information' used in that Act.<sup>2204</sup>

8.152 At present, the duty imposed by section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) applies to 'information about a person's affairs'. Similar obligations of confidentiality imposed in some other Queensland statutes also apply to information about a 'person's affairs'.<sup>2205</sup> That phrase has not been judicially considered.

8.153 A similar formulation, used in the *Freedom of Information Act 1992* (Qld), however, has been considered. One of the exemptions for disclosure under that Act relates to 'personal affairs' information.<sup>2206</sup> That phrase is given its ordinary dictionary meaning<sup>2207</sup> and is distinguished from a person's 'business affairs', for which there is a different exemption.<sup>2208</sup> 'Personal affairs' are matters of private concern to an individual, including family or personal relationships, health, domestic responsibilities and financial obligations, and education.<sup>2209</sup>

8.154 The Commission considers the duty of confidentiality should continue to apply to 'information about a person's affairs'. The Commission agrees with the view expressed in the submission from Caxton Legal Centre that the duty should apply to information about a person's financial affairs, health, personal relationships, personal attributes and other related matters. The character of confidentiality arises first, because the information is gained for a limited purpose because of a person's role under the legislation and second, because the information relates to matters personal, or of private concern, to the individual.<sup>2210</sup>

2203 For example, *Privacy Act 1988* (Cth) ss 14 (Information Privacy Principles), 6 sch 3 (National Privacy Principles).

2204 Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [3.23]–[3.30], 111 Q3–4.

2205 *Anti-Discrimination Act 1991* (Qld) s 264(1)(b); *Children Services Tribunal Act 2000* (Qld) s 142(2); *Disability Services Act 2006* (Qld) ss 187, 9 sch 7 (definition of 'confidential information'); *Mental Health Act 2000* (Qld) s 528(1)(b).

2206 See para 8.20 of this Report.

2207 *Re Williams and Registrar of the Federal Court of Australia* (1985) 8 ALD 219, 221; *Director of Public Prosecutions v Smith* [1991] 1 VR 63, 69; *State of Queensland v Albietz* [1996] 1 Qd R 215, 221.

2208 *Freedom of Information Act 1992* (Qld) s 45 (Matter relating to trade secrets, business affairs and research).

2209 *Stewart and Department of Transport* (1993) 1 QAR 227. See para 8.21 of this Report. Whether particular information is information about a person's personal affairs is essentially a question of fact: *Pope and Queensland Health* (1994) 1 QAR 616, [109].

2210 Note, for example, C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 184:

In defining matters that ought to be regarded as private, it is important to take a pragmatic view. Human perceptions and social conventions mean that it is not always possible or easy to conceal some types of information. Thus, it is nonsense to talk about a right to keep our height, weight and hair colour private.

Note also that the Commission's concern when recommending the inclusion of a confidentiality obligation in the guardianship legislation in its Report in the 1990s was with 'material containing sensitive information' about people involved in Tribunal proceedings. See Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 274.

8.155 The Commission considers the phrase ‘information about a person’s affairs’ is sufficiently wide to capture such information, including financial and business information.<sup>2211</sup> The Commission also notes that the same formulation is used in other statutes in relation to similar duties of confidentiality.<sup>2212</sup> The Commission does not therefore propose any amendment to that part of the definition of ‘confidential information’ in section 74(4) of the *Powers of Attorney Act 1998* (Qld) and section 249(4) of the *Guardianship and Administration Act 2000* (Qld).

#### *Information about an adult*

8.156 The Commission agrees with the view expressed in the Public Advocate’s submission that the protection afforded by the duty of confidentiality should not be limited to information about the adult.

8.157 The Commission acknowledges the concern that, because adults with impaired capacity are the focus of the guardianship system, the duty should protect information about the adult from inappropriate use and disclosure. However, the Commission considers the duty of confidentiality has a wider purpose: to protect from inappropriate use or disclosure personal information that has come into a person’s hands solely because of the person’s role under the guardianship legislation. This applies equally to information about the adult with impaired capacity and to information about others.

8.158 Information about a range of people may be gained in connection with the guardianship legislation. This might include information about an adult’s family member, carer, substitute decision-maker, or service provider. The Commission considers that, to the extent such information, gained in connection with the administration of the legislation, is information ‘about a person’s affairs’, it should be protected by the duty.

8.159 The Commission does not therefore propose any amendment to section 74 of the *Powers of Attorney Act 1998* (Qld) or section 249 of the *Guardianship and Administration Act 2000* (Qld) limiting the application of the duty to information about the adult with impaired capacity or about whom proceedings under the guardianship legislation have been taken.

#### *Information that identifies the person*

8.160 The Commission agrees with the view expressed in some submissions that the duty of confidentiality should apply in respect of information that identifies the person to whom it relates. Identification is what links the information to the individual and thereby to the individual’s privacy. The affront, embarrassment or other harm caused by unwarranted disclosure or use of personal information seems to depend on this

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2211 Note that although ‘personal affairs’ information has been held to exclude information about a person’s business affairs in the context of the *Freedom of Information Act 1992* (Qld), that construction was informed by the existence of a separate provision specifically addressing business affairs. See para 8.21 of this Report.

2212 See note 2205 of this Report. Also note *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34 which applies to ‘information about the affairs of a person’.

linkage between the information and the individual to whom it relates.<sup>2213</sup> The significance of identification is also discussed in Chapter 7 of this Report in relation to the publication of information disclosed at a Tribunal hearing.<sup>2214</sup>

8.161 In the context of the personal affairs exemption under the *Freedom of Information Act 1992* (Qld), the Queensland Information Commissioner has made the following comment about the significance of identifying information:<sup>2215</sup>

if a name links an identifiable person to information about a private aspect of their life, such as information about their health, the name in the context of that information would be personal affairs information. In many cases, deletion of a person's name and other identifying information will allow the rest of the document to be disclosed without affecting the person's privacy. The FOI Act permits deletion of parts of documents in such cases.

8.162 Identification is also a central element of the definition of 'personal information' to which the *Privacy Act 1988* (Cth) applies.<sup>2216</sup> That definition provides, in part, that personal information is information 'about an individual whose identity is apparent, or can reasonably be ascertained from the information'. This is also reflected in other information privacy statutes in Australia, and in IS42.<sup>2217</sup>

8.163 Adequate de-identification of information may involve more than the removal of a person's name or other obvious identifying details.<sup>2218</sup> A submission from the Privacy Commissioner included the following commentary:<sup>2219</sup>

De-identification of personal information is not defined in the *Privacy Act*. However, the *Privacy Act* (as noted above), defines personal information as 'information or an opinion about an individual whose identity is apparent or *can reasonably be ascertained*.' (Italics mine.)

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Note, for example, that one of the elements of an action for defamation is that the defamatory material 'must reasonably be taken to refer to the plaintiff': *Bjelke-Petersen v Warburton* [1987] 2 Qd R 465, 467. See generally JG Fleming, *The Law of Torts* (9th ed, 1998) 590–91. Note the contrast with the duty of confidence in relation to trade secrets, for example, which imposes confidentiality on the basis of the nature of the information itself and the circumstances of its initial disclosure, rather than, necessarily, the identity of the person who imparted the information: see generally RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (4th ed, 2002) [41-050].

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For example, see para 7.86 of this Report.

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Office of the Information Commissioner Queensland, *FOI Concepts: 'Personal affairs'* (6 February 2007) <<http://www.oic.qld.gov.au/default.asp?p=13>> at 27 June 2007.

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*Privacy Act 1988* (Cth) s 6(1). That definition is set out at note 2014 of this Report.

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See note 2201 of this Report.

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See, for example, Office of the Information Commissioner Queensland, *FOI Concepts: Identities of Complainants and Information Providers* (5 October 2006) <<http://www.oic.qld.gov.au/default.asp?p=13>> at 27 June 2007:

Identifying information includes not only obvious identifiers like a name, address or telephone number, but also any other information that could reasonably be expected to enable identification of the information provider...

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Submission 104. For a discussion of when a person's identity will be 'apparent' or 'reasonably ascertainable' in the context of the *Information Privacy Act 2000* (Vic) see *WL v La Trobe University (General)* [2005] VCAT 2592.

What constitutes personal information need not include such obvious identifiers as an individual's name or date of birth. It may include other information about the individual that can be linked to them through other information sources or by association or inference and the context in which the information is provided.

8.164 The Commission considers the duty of confidentiality should similarly apply to information about a person's affairs only if the information could reveal the identity of the person to whom it relates. If the person's identity is not reasonably apparent or ascertainable, there would seem to be little difficulty in allowing the information to be disclosed. That is, if the information is sufficiently de-identified, the duty of confidentiality should not prevent its disclosure.

8.165 At present, this is achieved in relation to the duty of confidentiality imposed in the guardianship legislation by excluding 'statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates' from the operation of the duty.<sup>2220</sup> An almost identical provision is made in relation to the general duty of confidentiality imposed in Western Australia.<sup>2221</sup>

8.166 The Commission considers this formulation is sufficient and does not propose any amendment to that part of the definition of 'confidential information' in section 74(4) of the *Powers of Attorney Act 1998* (Qld) and section 249(4) of the *Guardianship and Administration Act 2000* (Qld).

#### *Publicly disclosed information*

8.167 At present, the duty of confidentiality imposed by section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) only applies to information that has not already been 'publicly disclosed', unless further disclosure is prohibited by law.<sup>2222</sup>

8.168 This appears consistent with the equitable doctrine of confidence. Information loses the relative degree of confidentiality or secrecy necessary to found an action for breach of confidence once the information has entered the public domain.<sup>2223</sup> As Kellam J of the Victorian Supreme Court explained recently in *Australian Football League v The Age Co Ltd*.<sup>2224</sup>

<sup>2220</sup> *Powers of Attorney Act 1998* (Qld) s 74(4); *Guardianship and Administration Act 2000* (Qld) s 249(4). Those provisions are set out at para 8.32–8.33 of this Report.

<sup>2221</sup> *Guardianship and Administration Act 1990* (WA) s 113(2). That section provides that the duty 'does not apply to statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates'. Note that, in contrast, the duty of confidentiality imposed in Victoria and the duty imposed in Western Australia on Tribunal members and staff does not apply in relation to a disclosure 'for statistical purposes' to approved persons 'provided that the information does not identify any person to whom it relates': *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(5); *State Administrative Tribunal Act 2004* (WA) s 157(5).

<sup>2222</sup> *Powers of Attorney Act 1998* (Qld) s 74(4); *Guardianship and Administration Act 2000* (Qld) s 249(4). See para 8.32–8.33 of this Report.

<sup>2223</sup> *O Mustad v S Allcock & Co Ltd* [1963] 3 All ER 416, 418 (Lord Buckmaster); *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413, 415 (Lord Greene MR). See generally F Gurry, *Breach of Confidence* (1984) 65–6; RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (4th ed, 2002) [41-060]; and The Law Commission, *Breach of Confidence*, Report No 110 (1981) 27–9.

<sup>2224</sup> [2006] VSC 308, [38].

It would be entirely pointless and indeed, would bring the administration of justice into disrepute, for the Court to endeavour to restrain the publication of matters which are well-known by a large number of members of the public.

8.169 The question of whether or not the information has passed into the ‘public domain’ is a question of degree<sup>2225</sup> on the facts of each case.<sup>2226</sup> A key consideration is the degree of accessibility of the information.<sup>2227</sup> While disclosure to the public at large will destroy the confidential nature of the information, more limited disclosures will not necessarily mean that the information has passed into the public domain.<sup>2228</sup>

information can clearly be available in public sources and yet not so notorious or freely available that further protection is pointless ... In short, publicity is a matter of degree; only the greater degree of publicity amounting to notoriety will entirely preclude protection by the law of confidence, while less widespread publication is correspondingly less drastic in its effects.

8.170 For example, a transitory and impermanent disclosure, such as a brief disclosure on a television broadcast, has been held insufficient to destroy the confidentiality of the information.<sup>2229</sup>

8.171 In contrast, publication in widely circulated print media, or on a credible or authoritative internet site, may place the information in the public domain.<sup>2230</sup> It is also noted, for example, that a television broadcast may be placed on a web page, giving the publication more permanence.

8.172 This seems generally consistent with the meaning attributed to ‘publication’ in some other contexts.<sup>2231</sup>

8.173 The Commission agrees generally with the view expressed in some submissions that the duty imposed under the guardianship legislation should apply to information only if it has not already been publicly disclosed. If information is

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2225 *Franchi v Franchi* [1967] RPC 149, 153 (Cross J).

2226 *Australian Football League v The Age Co Ltd* [2006] VSC 308, [38] (Kellam J); *Johns v Australian Securities Commission* (1993) 178 CLR 408, 461–62 (Gaudron J).

2227 *Australian Football League v The Age Co Ltd* [2006] VSC 308, [40] (Kellam J). See also F Gurry, *Breach of Confidence* (1984) 70–73.

2228 AM Tettenborn, ‘Breach of confidence, secrecy and the public domain’ (1982) 11 *Anglo-American Law Review* 273, 277. Also see *Franchi v Franchi* [1967] RPC 149, 152 (Cross J); and F Gurry, *Breach of Confidence* (1984) 73–4.

2229 *G v Day* [1982] 1 NSWLR 24, 40–41 (Yeldham J).

2230 *Australian Football League v The Age Co Ltd* [2006] VSC 308, [46], [55]–[56] (Kellam J); *EPP National Buying Group Pty Ltd v Levy* [2001] NSWSC 482, [20] (Barrett J).

2231 For example, publication in the context of a prohibition on publication of information about judicial proceedings has been held to involve disclosure to a wide audience: see, for example, *Hinch v Director of Public Prosecutions* [1996] 1 VR 683, 692; *Re Edelsten* (1988) 18 FCR 434, 436–7. Also see para 7.121–7.122 of this Report. In contrast, for the law of defamation, a ‘publication’ is any communication or conveyance to a third party: *Pullman v Walter Hill & Co* [1891] 1 QB 524. Also see TK Tobin and MG Sexton, *Australian Defamation Law and Practice* (2006) [5001], [5015]. Note, however, that the size of the group of people to whom the defamatory material is published may be relevant in the determination of any award of damages to the plaintiff: D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.230].

otherwise readily available, it would seem impractical to insist on a duty of non-disclosure.<sup>2232</sup>

If information is so well-known that no-one can benefit from its further protection, it is quixotic to suggest it should be protectable if published by one person but not by another.

8.174 However, because the duty arises out of the person's privileged position under the guardianship legislation, it should not matter that the information is also known to some other people or has a limited public exposure. Limited disclosure should not preclude the operation of the duty. Accordingly, the Commission prefers an approach similar to that adopted for breach of confidence, as outlined above.<sup>2233</sup> That is, the duty should not apply to widely disclosed information.

8.175 At present, the words used in the guardianship legislation are 'publicly disclosed'. The scope of those words for the purposes of the legislation has not been considered judicially but the Commission considers they may capture *any* public disclosure of the information, be it to a wide or small audience. For clarity, the Commission considers the wording should be amended to information 'within the public domain'.

8.176 The Commission also considers this exclusion should operate so that no duty will arise in relation to information that is already in the public domain at the time it is acquired, and so that the duty, once in effect, will lapse if the information subsequently enters the public domain.

8.177 The Commission considers the 'public domain' approach will also address concerns raised about disclosures in the media. In its Discussion Paper, the Commission commented:<sup>2234</sup>

It may seem unreasonable ... for a fleeting or inconspicuous publication of such information, particularly one that is made in breach of the duty, to remove any subsequent protection and allow future, and possibly more enduring forms of, disclosure.

8.178 This concern was also expressed in the submission from the Public Trustee of Queensland.<sup>2235</sup>

8.179 The Commission considers that the amendment of the provision to exclude information within the public domain will clarify that transient or inconspicuous disclosures will not release a person from the duty of confidentiality but that, if

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2232 AM Tettenborn, 'Breach of confidence, secrecy and the public domain' (1982) 11 *Anglo-American Law Review* 273, 279.

2233 See para 8.168–8.171 of this Report.

2234 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.89].

2235 Submission 127.

publication by a third party is so extensive that the information enters the public domain, the duty of confidentiality will lapse.<sup>2236</sup>

8.180 The Commission therefore considers that paragraph (a) of the definition in section 74(4) of the *Powers of Attorney Act 1998* (Qld) and section 249(4) of the *Guardianship and Administration Act 2000* (Qld) should be amended to replace the reference to ‘information already publicly disclosed’ with the words ‘information within the public domain’.

*Publicly disclosed information: Tribunal hearings*

8.181 An issue raised by the exclusion of publicly disclosed information from the operation of the duty, is the extent to which information disclosed during Tribunal hearings should be excluded.

8.182 In the context of the equitable doctrine of confidence, the publication of information in open court places the information within the public domain, provided there is no restriction on the reporting of the proceedings.<sup>2237</sup>

When the proceedings of a court, tribunal or commission created by statute or in exercise of the prerogative are open to the public and a fair report of the proceedings can lawfully be published generally, it is not possible to regard information published in those proceedings as outside the public domain. Information published in those circumstances enters the public domain by a lawful gate. Once in the public domain, it can be freely used or disseminated. [note omitted]

8.183 This appears consistent with the operation of the implied undertaking imposed on parties and legal representatives not to use documents obtained by discovery for a collateral or ulterior purpose.<sup>2238</sup> The undertaking ceases to apply if the court releases the obligation or if the contents of the document pass into the public domain.<sup>2239</sup> For

2236 Note that this is broadly consistent with the operation of the equitable duty of confidence from which the confidant may be released if the information passes into the public domain because of disclosures made by a third party or, where the publication is extensive enough and no further loss remains to be suffered by the plaintiff, by the confidant himself or herself. See A Stewart and M Chesterman, ‘Confidential material: the position of the media’ (1992) 14 *Adelaide Law Review* 1, 7–8, 11.

2237 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 432 (Brennan J). See also *Bunn v British Broadcasting Corporation* [1998] 3 All ER 552, 557 (Lightman J); and *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225, 237 (Browne-Wilkinson VC).

2238 *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 QB 613; *Riddick v Thames Board Mills Ltd* [1977] QB 881; *Nicol v Brisbane City Council* [1969] Qd R 371, 377; *Central Queensland Cement Pty Ltd v Hardy* [1989] 2 Qd R 509, 510–11. Note also the undertaking required for document inspection pursuant to Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, ‘General Information in relation to the Inspection of Files and Confidentiality Orders’ (amended 9 January 2007). The undertaking as to discovered documents is discussed at para 5.222 of this Report.

2239 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280. While the court agreed in that case that the implied undertaking will cease to operate when documents are received into evidence, the court was divided on the question whether the undertaking would also cease to operate if the documents were read in open court. The minority thought it would: *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, 313–14 (Lords Scarman and Simon). The question was resolved in England by a rule of court adopting the minority view: *Civil Procedure Rules 1998* (UK) r 31.22. See generally M Groves, ‘The implied undertaking restricting the use of material obtained during legal proceedings’ (2003) 23 *Australian Bar Review* 1.

example, disclosure of the contents of the document in open court,<sup>2240</sup> or in a transcript of proceedings or the reasons for judgment<sup>2241</sup> are likely to place the contents in the public domain.<sup>2242</sup>

The central theme of these rules is the importance of the principle that justice is to be done in public, and within that principle the importance of those attending a public court understanding the case. They cannot do that if the contents of documents used in that process are concealed from them: hence the release of confidence once the document has been read or used in court.

8.184 The Commission considers a similar approach should be taken in relation to the duty of confidentiality imposed under the guardianship legislation. That is, information that has been disclosed at a Tribunal hearing should not be covered by the duty of confidentiality.

8.185 The Commission is of the view that the openness of Tribunal hearings should generally be maintained, subject to the limited restrictions on open justice it has recommended be imposed or allowed in relation to Tribunal hearings and information about Tribunal proceedings.<sup>2243</sup> In the context of an open hearing, it is neither desirable nor practical to further restrain the use that may be made by some people, but not by others, of information that has entered the public domain. The Commission has recommended elsewhere in this chapter that the general duty of confidentiality should not apply to the disclosure or publication of information about Tribunal proceedings.<sup>2244</sup> Such conduct is the subject of other specific provisions.<sup>2245</sup>

8.186 The Commission also notes the Victorian position which excludes from the operation of the duty information disclosed at an open Tribunal hearing or contained in Tribunal decisions, orders and reasons.<sup>2246</sup> The Commission considers the exclusion of ‘information within the public domain’ from the operation of the duty is consistent with this.<sup>2247</sup>

2240 *Esso Australia Resources Limited v Plowman* (1995) 183 CLR 10, 32–3 (Mason CJ). Note also *Federal Court Rules* O 15, r 18; *Federal Magistrates Court Rules 2001* r 14.11; *Civil Procedure Rules 1998* (UK) r 31.22. Note that the passing of a document into evidence may be insufficient on its own to release the document from the application of the undertaking: *British American Tobacco Australia Services Ltd v Cowell (No 2)* (2003) 8 VR 571, [35].

2241 *British American Tobacco Australia Services Ltd v Cowell (No 2)* (2003) 8 VR 571, [38].

2242 *Lilly Icos Ltd v Pfizer Ltd* [2002] 1 All ER 842, 847 (Buxton LJ) explaining r 31.22 of the *Civil Procedure Rules 1998* (UK). See note 2239 of this Report.

2243 See para 8.97 of this Report. The Commission has made recommendations about the conduct of hearings in public and private, the disclosure of documents relevant to proceedings, the disclosure of decisions and reasons, and the publication of information about proceedings in Chapters 4, 5, 6, and 7 of this Report respectively.

2244 See para 8.103 of this Report.

2245 For example, a restriction may be imposed under s 112 of the *Guardianship and Administration Act 2000* (Qld) or by a confidentiality order made by the Tribunal under s 109(2)(c), (d) of the *Guardianship and Administration Act 2000* (Qld). Those provisions are discussed in Chapters 7 and 4 of this Report, respectively.

2246 See para 8.135 of this Report.

2247 The Commission has made a recommendation about the exclusion of information within the public domain earlier in this chapter: see para 8.180 of this Report.

## What conduct should the duty apply to?

8.187 In its Discussion Paper, the Commission sought submissions on what types of conduct the duty of confidentiality should apply to, if such a duty is included in the guardianship legislation.<sup>2248</sup>

8.188 An issue for consideration is whether the duty should apply to specific types of conduct, such as recording or disclosing information, or more generally to the use of information. In particular, the Discussion Paper sought submissions on whether the duty should apply to intentional, reckless and/or negligent disclosure of information, and whether the duty should prohibit a person from making a record of information.

8.189 Another issue for consideration is whether, if the duty prohibits disclosure of information, it should also apply to secondary disclosure of information. The Discussion Paper also sought submissions on this issue.

### **The guardianship legislation**

8.190 Section 74(1) of the *Powers of Attorney Act 1998* (Qld) and section 249(1) of the *Guardianship and Administration Act 2000* (Qld) provide that, other than in accordance with one of the specified exceptions to the duty, ‘the person must not make a record of the information or intentionally or recklessly disclose the information to anyone’.<sup>2249</sup>

8.191 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) are silent on the issue of secondary disclosure.

### **The legislation in other jurisdictions**

8.192 The general duties of confidentiality imposed by the guardianship legislation of New South Wales, South Australia, Tasmania, Victoria, and Western Australia prohibit the disclosure or divulgence of particular information.<sup>2250</sup> For example, section 101 of the *Guardianship Act 1987* (NSW) provides that a person ‘shall not disclose’ the information.

8.193 Similarly, the general duty of confidentiality imposed on formal substitute decision-makers in Alberta, British Columbia, the North West Territories, and Ontario apply to the disclosure of the relevant information.<sup>2251</sup>

2248 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.91], [8.146] Q8-5.

2249 Those provisions are set out at para 8.32–8.33 of this Report.

2250 *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80(1); *Guardianship and Administration Act 1986* (Vic) s 14(2), sch 3 cl 3(b); *Guardianship and Administration Act 1990* (WA) s 113(1).

2251 *Dependent Adults Act*, RSA 2000, c D-11, s 68(1); *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32(1); *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58(1); *Accounts and Records of Attorneys and Guardians*, O Reg 100/96, s 4.

8.194 In contrast, the duties of confidentiality imposed on Tribunal members and staff by the legislation in the Australian Capital Territory, Victoria, and Western Australia prohibit both the disclosure and recording of the requisite information.<sup>2252</sup> For example, section 157(2) of the *State Administrative Tribunal Act 2004* (WA) provides:

**157     Secrecy**

...

- (2) Except as permitted by this section, a person to whom this section applies commits an offence if the person directly or indirectly makes a record of, or discloses to any person, any information about the affairs of a person acquired in the performance of functions under or in connection with this Act or an enabling Act. [emphasis added]

8.195 A similar approach applies in relation to the duty imposed on the Public Advocate of the Australian Capital Territory, with an additional element of recklessness.<sup>2253</sup> Section 16(2) of the *Public Advocate Act 2005* (ACT) provides:

**16       Secrecy**

...

- (2) A person to whom this section applies commits an offence if—
- (a) the person—
- (i) makes a record of protected information about someone else; and
- (ii) is reckless about whether the information is protected information about someone else; or
- (b) the person—
- (i) does something that divulges protected information about someone else; and
- (ii) is reckless about whether—
- (A) the information is protected information about someone else; and
- (B) doing the thing would result in the information being divulged to someone else.

8.196 In addition, the legislation that governs the relevant Tribunals in Victoria and Western Australia prohibits ‘secondary disclosures’.<sup>2254</sup> The primary duty of

2252 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(2); *State Administrative Tribunal Act 2004* (WA) s 157(2).

2253 *Public Advocate Act 2005* (ACT) s 16(2).

2254 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 35; *State Administrative Tribunal Act 2004* (WA) s 158.

confidentiality under those statutes applies to Tribunal members and staff.<sup>2255</sup> The secondary disclosure provisions extend the application of the duty to persons who receive protected information from members or staff of the Tribunal. For example, section 35 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides:

**35 Prohibition on secondary disclosures**

- (1) A person to whom information referred to in section 34(2)<sup>2256</sup> is disclosed, and any employee of that person, is subject to the same obligations and liabilities with respect to the recording or disclosure of the information as they would be if they were a person referred to in section 34(1) who had acquired the information in the performance of functions under this Act or an enabling enactment.
- (2) Sub-section (1) does not apply to a member of the police force to whom information is disclosed under section 34(4). [note added]

8.197 The equivalent provision in Western Australia is in almost identical terms.

**Submissions**

8.198 Few submissions responded to this issue. Of those that did, most considered the duty should apply to the disclosure of information. Some respondents, including the Public Advocate, the Adult Guardian, and the Public Trustee of Queensland considered this should be limited to intentional or reckless disclosure.<sup>2257</sup> Some other respondents, including the Department of Justice and Attorney-General, thought negligent disclosure should also be covered.<sup>2258</sup>

8.199 Some submissions also considered whether the duty should prohibit a person from making a record of the information. Most of these respondents considered that making a record of the information should not be prohibited.<sup>2259</sup> The Public Advocate commented, for example, that it is necessary for guardians and others performing functions under the legislation to keep proper records of information; the real issue is disclosure of the information to others.<sup>2260</sup>

8.200 A submission from staff of the Community Visitor Program explained that a prohibition on making a record may present particular difficulties for community visitors:<sup>2261</sup>

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2255 See para 8.82 of this Report.

2256 Section 34 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) contains the primary duty of confidentiality imposed on Tribunal members and staff.

2257 Submissions 1H, 73A, 122, 127.

2258 Submissions 47, 85, 126.

2259 Submissions 1H, 119, 127, F16, F24A.

2260 Submissions 1H, F16.

2261 Submission F24A.

At present, community visitors have the power to photocopy information at the sites they visit. We would be concerned about their ability to gather information.

8.201 The Department of Justice and Attorney-General, however, considered that the making of a record should be prohibited by the duty.<sup>2262</sup>

8.202 Some respondents also considered whether the duty should be extended to cover secondary disclosures.<sup>2263</sup> The Public Advocate expressed the view that secondary disclosures should not be covered.<sup>2264</sup>

Secondary disclosure seems unworkable and unenforceable: additionally, those on whom such a duty is imposed may be completely unaware of it. It is suggested that the law should only impose reasonably realistic and achievable duties, which it should be prepared to enforce, otherwise it falls into disrepute.

8.203 Queensland Advocacy Incorporated also expressed concern about restricting appropriate discussion among an adult's family and support network.<sup>2265</sup>

A process where a guardian shares information with individuals within such groups but the recipients of the information cannot share it within the 'family' or support circle is unworkable and could isolate the adult from all the people in the world who genuinely care for them.

8.204 The Public Trustee of Queensland, however, thought secondary disclosure should be covered by the duty.<sup>2266</sup>

8.205 The Department of Justice and Attorney-General expressed the view that secondary disclosure should be prohibited in relation to investigation reports of the Adult Guardian.<sup>2267</sup>

The written reports of an investigation by the Adult Guardian contain sensitive and private information about the adult and the adult's family members and support network. This includes personal information and financial information about the adult and other parties. There is no prohibition against parties who receive written reports to release these reports to the media or other parties. The secondary disclosure of the written report or information contained in the written report by all persons who have been provided with a copy of the written report should be prohibited.

8.206 Another submission to the Commission indicated that, in practice, such secondary disclosure of investigation reports may already be restricted.<sup>2268</sup> This respondent explained that he had requested an investigation by the Adult Guardian and

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2262 Submission 126.

2263 Submissions 1H, 102, 126, 127.

2264 Submission 1H.

2265 Submission 102.

2266 Submission 127.

2267 Submission 126.

2268 Submission 40.

had accordingly received a copy of the Adult Guardian's investigation report.<sup>2269</sup> The Commission understands from the documentation provided in this submission that the investigation report included a statement to the effect that the report was not to be released other than with the permission of the Adult Guardian.

8.207 The submission explained that the respondent had sought, but was refused, permission to disclose the report for the purpose of a complaint lodged with the Human Rights and Equal Opportunity Commission and for an application for legal assistance to the Queensland Public Interest Law Clearing House.

8.208 From documentation included in the submission, the Commission understands that permission for these secondary disclosures was denied for two reasons: one was that, in having requested the investigation, the respondent was arguably acting in the administration of the legislation and therefore subject to the duty of confidentiality; the other was that none of the exceptions in sections 249(3) or 250(1) of the *Guardianship and Administration Act 2000* (Qld) applied in this case to allow the disclosure. The Commission understands from the submission that the Adult Guardian subsequently gave permission for some sections of the report to be disclosed.

8.209 A submission from Guardianship and Administration Reform Drivers also expressed the view that investigation reports by the Adult Guardian should be made publicly available.<sup>2270</sup>

In relation to investigations into service providers, it is a matter of public interest that existing and potential consumers of any service provider have access to information, good or bad, about the service so they can make an informed decision. ... Reservations about publication of reports should only arise where the vulnerability of the person with the incapacity may be heightened.

### **The Commission's view**

#### *Disclosure and making records*

8.210 The Commission agrees generally with the views expressed in submissions that the duty of confidentiality should limit only the disclosure of information and that a person bound by the duty should not be prevented from making or keeping appropriate records of information.<sup>2271</sup>

<sup>2269</sup> Section 193(1) of the *Guardianship and Administration Act 2000* (Qld) provides that '[a]fter the adult guardian has carried out an investigation or audit in relation to an adult, the adult guardian must make a written report and give a copy of the report to any person at whose request the investigation or audit was carried out and to every attorney, guardian, or administrator, for the adult'.

<sup>2270</sup> Submission 24.

<sup>2271</sup> Note that the *Privacy Act 1998* (Cth) additionally regulates the collection and storage of personal information, recognising that, for example, the maintenance of computerised records involves a risk of unauthorised disclosure or use of the stored information: Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1 [572]–[579], [1031], Vol 2 [1222]. Note, however, that the regulation of information storage does not prevent records from being kept but is aimed at ensuring collected information is kept up-to-date, accurate and secure. See *Privacy Act 1998* (Cth) s 14, Information Privacy Principles 6, 7, 8. Also see Queensland Government, *Information Standard 42 – Information Privacy* which substantially mirrors the *Privacy Act 1998* (Cth) scheme.

8.211 The harm addressed by the duty is the misuse of personal information obtained, by virtue of a person's unique position under the legislation, for a limited set of purposes. In particular, communication, discussion or sharing of that information outside the limited context for which it was received and is to be used is an infringement of a person's privacy.<sup>2272</sup>

8.212 The Commission notes that just as a blanket prohibition on disclosure of information would inhibit the proper performance of a person's functions and exercise of powers under the legislation, a prohibition against making a record of information would undermine a person's ability to undertake the tasks for which the information was received. Indeed, the legislation imposes express obligations to make and keep records of information,<sup>2273</sup> just as it requires and allows information sharing.<sup>2274</sup>

8.213 Earlier in this chapter, the Commission recommended that the duty be reformulated to emphasise that it is appropriate for personal information to be used for a purpose under the legislation.<sup>2275</sup> The Commission has proposed that the duty be reworded to provide that a person may use the information for the purposes of the legislation, but not for any other purpose.

8.214 Given its ordinary meaning, the word 'use' in this context would be wide enough to include disclosure.<sup>2276</sup> As such, a person would be free to disclose information for a purpose under the legislation, but not for any other purpose. The Commission considers it would be useful, however, to provide a definition of 'use' for the purposes of those sections to clarify that 'use' includes disclosure.

8.215 The Commission considers the question whether the behaviour prohibited by the duty should encompass intentional, reckless and/or negligent behaviour is adequately dealt with by the criminal law. Under the *Criminal Code* (Qld), a person is criminally responsible for the consequences of his or her actions if the outcome was intended, or was foreseen as a possibility, or if an ordinary person in his or her position

2272 Note that in submissions to the Commission in relation to this chapter, respondents referred, inter alia, to information being 'disclosed', 'released', 'shared' and 'discussed', and of being 'notified', 'informed', 'told' of or given 'access' to information: for example, submissions 38B, 48, 60, 120, 123, 126, F5, F7, F15. Also note that the Commission's concern when recommending the inclusion of a confidentiality obligation in the guardianship legislation in its Report in the 1990s was with 'disclosure' of information: see Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Discussion Paper, WP 38 (1992) 49; and Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 274.

2273 For example, see s 49 of the *Guardianship and Administration Act 2000* (Qld) and s 85 of the *Powers of Attorney Act 1998* (Qld) which require administrators and attorneys for financial matters to keep financial records.

2274 For example, see s 40 of the *Guardianship and Administration Act 2000* (Qld) and s 79 of the *Powers of Attorney Act 1998* (Qld) which require an adult's attorneys, administrators, and guardians to consult with one another; and General Principles 7 and 8 which require an adult to be kept informed and the maintenance of an adult's supportive relationships to be taken into account: *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 ss 7(3)(a), 8; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 ss 7(3)(a), 8.

2275 See para 8.69–8.70 of this Report.

2276 *The Macquarie Dictionary* (revised 3rd ed, 2001) defines 'use' as 'to employ for some purpose; put into service; turn to account'. The word 'use' is a 'word of wide import': *Shell-Mex & BP Ltd v Clayton* [1955] 3 All ER 102, 117. Also see *R v Brown* [1996] AC 543, 548–9 (Lord Goff of Chieveley) in the context of the *Data Protection Act 1984* (UK).

would have reasonably foreseen the event as a possible outcome.<sup>2277</sup> As such, the duty would capture the intentional, reckless or criminally negligent use of information for an unauthorised purpose resulting, for example, from a disclosure of the information.

8.216 The Commission does not consider there is any compelling reason why liability in relation to this duty of confidentiality should differ from the usual rules of criminal responsibility. The Commission therefore considers the reference to the words ‘intentionally or recklessly’ in section 249(1) of the *Guardianship and Administration Act 2000* (Qld) and section 74(1) of the *Powers of Attorney Act 1998* (Qld) should be removed.

### *Secondary disclosure*

8.217 The Commission agrees generally with the views expressed in the submissions from the Public Advocate and Queensland Advocacy Incorporated that the duty should not be extended to prohibit secondary disclosures.

8.218 The intention of the duty is to limit the inappropriate use of information that has been gained in connection with the administration of the legislation. Many secondary disclosures will appropriately be captured by the scope of this primary duty. For example, a guardian to whom information is disclosed by the Tribunal, in compliance with the duty and because of the person’s position as the adult’s guardian, will in turn be required to comply with the duty in respect of that information.

8.219 Extension of the duty beyond this, to require any person who receives information under the operation of the duty to also comply with the duty, would create considerable uncertainty as to the scope of the duty and its enforcement. It is not the intention of the duty to impose requirements of confidentiality on persons and situations that are not otherwise connected with the legislation.

8.220 The Commission does not therefore propose any amendment to section 74 of the *Powers of Attorney Act 1998* (Qld) or section 249 of the *Guardianship and Administration Act 2000* (Qld) to prohibit the secondary disclosure of information disclosed to a person in accordance with those provisions.<sup>2278</sup>

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*R v Taiters; Ex parte Attorney-General* [1997] 1 Qd R 333, in relation to the words ‘an event which occurs by accident’ used in s 23(1) of the *Criminal Code* (Qld). Also see MJ Shanahan et al, *Carter’s Criminal Law of Queensland* (2007) [23.20]. Section 23(1) of the *Criminal Code* (Qld) provides that a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person’s will or an event that occurs by accident. That section applies to all criminal offences against the statute law of Queensland, other than regulatory offences: *Criminal Code* (Qld) s 36.

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The Commission notes that IS42, which applies to Queensland Government agencies such as the Adult Guardian, the Public Advocate and the Community Visitor Program, provides that secondary disclosure of personal information is not permitted. Information Privacy Principle 11(3) provides:

A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

See Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.11 and Queensland Government, *Information Standard 42 – Information Privacy Guidelines* (2001) 42. The Commission notes that such a requirement will generally not be binding on a person to whom information is disclosed given the administrative, rather than legislative, status of IS42.

8.221 The Commission also notes the concern expressed in submissions about the secondary disclosure, and possible publication, of investigation reports released by the Adult Guardian. The Commission notes that the *Guardianship and Administration Act 2000* (Qld) does not, at present, prevent secondary disclosure of such reports.<sup>2279</sup>

8.222 Just as a wide range of sensitive and personal information about an adult may be disclosed at a Tribunal hearing, such information will often form part of an investigation report by the Adult Guardian. In Chapter 7 of this Report, the Commission recommended that while disclosure of information about a Tribunal hearing should generally be permitted, for example, in a personal or private context or to persons with a sufficient interest in receiving the information, wider publication of information identifying an adult with impaired capacity should be prohibited.<sup>2280</sup> The Commission considered this an appropriate balance between the openness of Tribunal hearings and the privacy of adults involved in those hearings. As such, the Commission recommended that the legislation prohibit the publication of information identifying an adult to the public or a section of the public.<sup>2281</sup>

8.223 The Commission considers that similar concerns arise in relation to the secondary disclosure of investigation reports of the Adult Guardian. There will be circumstances in which it is appropriate for information contained in an investigation report to be provided to another person or body. This would include secondary disclosure to a person with a sufficient interest in receiving the information, for example, a body responsible for handling complaints where the information is relevant to that function. The Commission is of the view, however, that widespread publication of information in an investigation report is undesirable, unless information about the adult is de-identified.

8.224 The Commission also notes that it may sometimes be appropriate to protect the identity of a complainant or another person, acting in good faith, who may be at risk of retribution.<sup>2282</sup>

8.225 However, such protection will not always be justified. For example, it may be inappropriate to protect the identity of a malicious or vexatious complainant. Rather than prohibit the secondary publication of an investigation report, the Commission considers it desirable for the Adult Guardian to maintain a discretion in determining whether a person should be identified in a report. The legislation should then prohibit a person from publishing information about another that is contained in a report, and that has been de-identified, to the public or a section of the public if the information is likely

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2279 Neither ss 193, 249 nor 250 of the *Guardianship and Administration Act 2000* (Qld) limits the secondary disclosure of an investigation report released by the Adult Guardian. Note, though, that if the report is received by a person because of the person's involvement in the administration of the legislation, for example, as an adult's guardian, administrator or attorney, the provisions of s 249 of the *Guardianship and Administration Act 2000* (Qld) or of s 74 of the *Powers of Attorney Act 1998* (Qld), respectively, would apply.

2280 See generally para 7.101–7.106, 7.161–7.167 of this Report.

2281 A publication 'to the public or a section of the public' would capture publications to the public at large but would not include disclosures made in private or to a person with a sufficient interest in the information. See para 7.161–7.165 of this Report.

2282 See para 8.455–8.456 of this Report.

to lead to the identification of that person by a member of the public or a member of the section of the public to whom the information is published. This would prevent widespread dissemination of identifying information where the Adult Guardian has thought fit to protect a person's identity. Appropriate identifying disclosures would, however, be allowed to persons with a sufficient interest in receiving the information, such as members of the Tribunal in a hearing in which the Adult Guardian's report is relevant.

8.226 The Commission notes that the general duty of confidentiality would apply to an attorney, guardian or administrator to whom an investigation report is given.<sup>2283</sup> The Commission considers it appropriate for that duty to continue to govern the disclosure of information in a report by those persons.

8.227 The Commission therefore considers that while secondary disclosure of information contained in an investigation report should not generally be prohibited, the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person, other than a person to whom section 249 of the *Guardianship and Administration Act 2000* (Qld) or section 74 of the *Powers of Attorney Act 1998* (Qld) applies, must not publish information about a person contained in the report, and that has been de-identified, to the public or a section of the public if the information is likely to lead to the identification of that person by a member of the public or a member of the section of the public to whom the information is published. The Commission considers this approach strikes the appropriate balance between the accountability and transparency of the Adult Guardian's investigations, and the privacy of those involved in an investigation.

## EXCEPTIONS TO THE DUTY

8.228 In its Discussion Paper, the Commission sought submissions on whether there should be any exceptions to the duty of confidentiality and, if so, what those exceptions should be.<sup>2284</sup> This section of the chapter examines those questions and considers whether the existing exceptions should be retained or modified, and whether any additional exceptions should be included in the legislation.

### Should there be exceptions to the duty?

8.229 As discussed above, the guardianship legislation imposes a duty on persons acting under the legislation to maintain the confidentiality of information gained in that capacity about a person's affairs.<sup>2285</sup> The Commission has recommended that such a

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2283 See note 2279 of this Report.

2284 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.98], [8.146] Q8-6.

2285 See para 8.46 of this Report.

duty continue to apply, in modified form, such that a person may use confidential information for the purposes of the legislation, but not for any other purpose.<sup>2286</sup>

8.230 An issue to consider is whether the legislation should set out other circumstances in which a person may use such information, displacing the obligation to otherwise keep information confidential.

### **The guardianship legislation**

8.231 The duty of confidentiality imposed under the guardianship legislation is qualified by several exceptions set out in section 74(2) of the *Powers of Attorney Act 1998* (Qld) and section 249(3) of the *Guardianship and Administration Act 2000* (Qld).

8.232 Those provisions displace the duty of confidentiality in the following circumstances:<sup>2287</sup>

- if acting under the *Guardianship and Administration Act 2000* (Qld);<sup>2288</sup>
- if discharging a function under another law (including the *Powers of Attorney Act 1998* (Qld));<sup>2289</sup>
- during a proceeding in a court or relevant tribunal;
- if authorised under a regulation or another law;
- if authorised by the person to whom the information relates; or
- if authorised by the court or Tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered.

8.233 Section 250 of the *Guardianship and Administration Act 2000* (Qld) also qualifies the operation of the duty in relation to information about investigations conducted by the Adult Guardian. This is considered elsewhere in this chapter.<sup>2290</sup>

<sup>2286</sup> See para 8.70 of this Report.

<sup>2287</sup> *Powers of Attorney Act 1998* (Qld) s 74(2); *Guardianship and Administration Act 2000* (Qld) s 249(3). Those provisions are set out at para 8.32–8.33 of this Report. Note also the limited exception for disclosure of confidential information to a member of this Commission or to its staff or consultants in order to facilitate the Commission's review of the guardianship legislation: *Powers of Attorney Act 1998* (Qld) s 74(2)(f); *Guardianship and Administration Act 2000* (Qld) s 249(3)(g). The Commission has prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission's consultation processes. The Protocol can be viewed at the Commission's website: <<http://www.qirc.qld.gov.au/guardianship/protocol.htm>>.

<sup>2288</sup> This provision does not specifically appear in s 74 of the *Powers of Attorney Act 1998* (Qld). However, acting under the *Guardianship and Administration Act 2000* (Qld) would fall within the exception provided in s 74(2)(c) of the *Powers of Attorney Act 1998* (Qld): 'if authorised under a regulation or another law'.

<sup>2289</sup> Section 74(2)(a) of the *Powers of Attorney Act 1998* (Qld) makes specific reference to that Act, whereas the *Guardianship and Administration Act 2000* (Qld) refers generally to 'another law', which would include the *Powers of Attorney Act 1998* (Qld); *Guardianship and Administration Act 2000* (Qld) s 249(3)(b).

<sup>2290</sup> See para 8.412–8.462 of this Report.

### **The legislation in other jurisdictions**

8.234 In each of the other Australian jurisdictions in which a duty of confidentiality is imposed, the guardianship legislation also sets out exceptions to the duty.<sup>2291</sup> Many of the exceptions are similar across these jurisdictions, though there are some differences. For example, all of these jurisdictions include an exception for disclosures made in connection with the performance of functions under the legislation.<sup>2292</sup>

8.235 Exceptions are also provided to the duties of confidentiality imposed on substitute decision-makers by the guardianship statutes in some Canadian provinces and territories.<sup>2293</sup>

8.236 The exceptions set out in the legislation of other jurisdictions will be considered in more detail as each issue arises.

### **Submissions**

8.237 Several submissions that commented on the general duty of confidentiality addressed the question of when it is appropriate for otherwise confidential information to be disclosed.

8.238 Of those submissions that addressed the question whether there should be a general duty of confidentiality, the majority favoured a general duty with exceptions of some kind (model 3 or 4).<sup>2294</sup> Of those respondents who supported the inclusion of a duty of confidentiality, none considered the duty should be absolute (model 2).<sup>2295</sup>

8.239 A submission from Caxton Legal Centre expressed the view, for example, that:<sup>2296</sup>

because of the way in which decisions can impact so dramatically on other people associated with an adult, some flexibility as to the confidentiality rules is required. A model where a duty of confidentiality is applied with reasonable exceptions is the most appropriate model for those working in the administration of guardianship.

8.240 The President of the New South Wales Guardianship Tribunal also commented that ‘there should be some flexibility to allow such information to be

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2291 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2), (3); *Public Advocate Act 2005* (ACT) s 16(3), (4); *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80(2); *Guardianship and Administration Act 1995* (Tas) s 86(1)–(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)–(5); *Guardianship and Administration Act 1986* (Vic) s 14(2), sch 3 cl 3(b); *Guardianship and Administration Act 1990* (WA) s 113(1); *State Administrative Tribunal Act 2004* (WA) s 157(3)–(5).

2292 See note 2074 of this Report.

2293 *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32(1), (2); *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58(1), (3); and *Accounts and Records of Attorneys and Guardians*, O Reg 100/96, s 4.

2294 See para 8.57 of this Report. Models 3 and 4 are set out at para 8.39 of this Report.

2295 Model 2 is set out at para 8.39 of this Report.

2296 Submission 124.

disclosed in appropriate circumstances'.<sup>2297</sup>

8.241 Some submissions expressed the view that an adult's right to privacy is just one of many interests that are safeguarded in the guardianship system.<sup>2298</sup> Carers Queensland commented:<sup>2299</sup>

Confidentiality should not always be the paramount issue. It is very possible, depending on the situation, for the best interests of the adult to be served through a stay of their right to confidentiality.

8.242 Some submissions specifically considered that the existing exceptions should be retained.<sup>2300</sup>

8.243 Many other submissions expressed views in relation to the particular circumstances in which confidentiality should be displaced.<sup>2301</sup> For example, some submissions expressed the view that the closer a person's relationship is to the adult, the more reasonable the person's access to information about the adult will usually be.<sup>2302</sup>

8.244 Royal College of Nursing Australia considered, however, that exceptions should be used infrequently and only when there are 'reasonable grounds for the disclosure'.<sup>2303</sup>

8.245 Some submissions raised concerns about over-reliance on the duty of confidentiality at the expense of accountability and transparency.<sup>2304</sup> A submission from the Adult Guardian acknowledged, for example:<sup>2305</sup>

Although the confidentiality provisions within the regime are designed to protect the privacy of the clients for whom decisions are being undertaken, the community view is that that ideal is simply invoked to provide blanket protection for the conduct of public officials.

8.246 A submission from the Cerebral Palsy League of Queensland commented that this apparent 'blanket of secrecy' has 'led to anger, uncertainty, ambivalence and ambiguity'.<sup>2306</sup>

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2297 Submission 137.

2298 For example, submissions 101, 102.

2299 Submission 101.

2300 Submissions 85, 122, 127.

2301 See para 8.368–8.385 of this Report.

2302 For example, submissions 101, F10, F14, F21.

2303 Submission 60.

2304 For example, submissions 19B, 24, 48, 86, 122, F1, F5, F6, F7, F10.

2305 Submission 122.

2306 Submission 86.

8.247 A submission from Endeavour Foundation raised the concern that, while the current exceptions would appear to allow particular communications, clearer criteria would help in identifying these opportunities.<sup>2307</sup>

8.248 Staff of the Community Visitor Program also commented that '[s]ection 249 does not make sufficiently clear what information can and cannot be disclosed'.<sup>2308</sup>

8.249 The views expressed in submissions in relation to specific exceptions will be considered in more detail as each issue arises.

### **The Commission's view**

8.250 The Commission agrees with the view expressed in submissions that the legislation should make provision for the duty of confidentiality to be displaced in particular circumstances. This is consistent with the position in other jurisdictions<sup>2309</sup> and in relation to similar duties imposed in other Queensland statutes.<sup>2310</sup>

8.251 Flexibility is necessary to enable information to be used appropriately and responsively, particularly given the role of persons subject to the duty in making decisions which affect the lives of adults and members of their support network in significant and intimate ways.<sup>2311</sup>

8.252 The Commission also considers such flexibility is important in order that decision-making is accountable and transparent. This is particularly significant where the decision-maker has a duty to accord procedural fairness. These concerns are reflected in the Commission's guiding principles adopted in Chapter 3 of this Report.<sup>2312</sup>

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2307 Submission 120.

2308 Submission F24A.

2309 See para 8.235 of this Report.

2310 For example, *Anti-Discrimination Act 1991* (Qld) s 264(2); *Children Services Tribunal Act 2000* (Qld) s 142(3); *Disability Services Act 2006* (Qld) s 222(4)–(5); *Health Services Act 1991* (Qld) ss 62B–62Q; *Industrial Relations Act 1999* (Qld) s 706(a)–(c); *Juvenile Justice Act 1992* (Qld) ss 289–297; *Mental Health Act 2000* (Qld) s 528(3). Also see, for example, *Income Tax Assessment Act 1936* (Cth) s 16(2A), (4).

2311 Note also that the Commission expressed a similar view in its Report in the 1990s. See Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Draft Report, WP 43 (1995) [6.2.40]:

[T]he Commission recognises that there will be situations which override the duty of confidentiality. A number of submissions pointed out, for example, that it will often be necessary for tribunal members or staff to disclose information to relatives, service providers and health care professionals during the course of investigating and making a determination about the decision-making needs of the person concerned.

Also see Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 274.

2312 See para 3.156 of this Report.

8.253 The Commission also notes the concerns raised in submissions about the confidentiality provisions sometimes being inflexibly applied.<sup>2313</sup> In light of those concerns, the Commission considers the legislation should clearly articulate the circumstances in which disclosure of information is permitted. The Commission has also made recommendations, elsewhere in this Report, about education in relation to the interpretation of a person's confidentiality and disclosure obligations under the legislation.<sup>2314</sup> The Commission has endeavoured, in the following parts of this chapter, to explain the scope of each of the exceptions it has recommended be retained or included in the legislation.

### Disclosures made under the Act

8.254 In its Discussion Paper, the Commission sought submissions on whether there should be an exception to the duty allowing disclosures to be made for the Act.<sup>2315</sup>

#### *The guardianship legislation*

8.255 At present, the guardianship legislation includes an exception to the duty of confidentiality for disclosures made under the legislation.

8.256 Section 74(2) of the *Powers of Attorney Act 1998* (Qld) provides that a person may disclose confidential information 'to discharge a function under this Act' or 'if authorised under a regulation'.<sup>2316</sup> This would include disclosures made under the *Powers of Attorney Act 1998* (Qld) or in accordance with a regulation made under that Act.

8.257 Section 249(3) of the *Guardianship and Administration Act 2000* (Qld) provides that a person may disclose confidential information 'for this Act' or 'if authorised under a regulation'.<sup>2317</sup> This would include disclosures made under the *Guardianship and Administration Act 2000* (Qld) and any regulation made under that Act.

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Note, for example, that the Adult Guardian reported that in the year 2003–04, most requests for release of confidential information obtained during an investigation were denied 'as they do not meet the strict disclosure requirements of the Act': Adult Guardian, *Annual Report 2003–04* (2004) 9–10. The Commission notes that similar difficulties have been encountered in the context of the *Privacy Act 1998* (Cth): see, for example, Legal and Constitutional References Committee, Parliament of Australia, *The real Big Brother: Inquiry into the Privacy Act 1998* (2005) [5.108]–[5.111]; and Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) 215–16.

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See para 8.526–8.529 of this Report.

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Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.103].

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*Powers of Attorney Act 1998* (Qld) s 74(2)(a), (c). These provisions are set out at para 8.32 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 249(3)(a), (d). These provisions are set out at para 8.33 of this Report.

### **The legislation in other jurisdictions**

8.258 Apart from the Northern Territory, which does not impose a duty of confidentiality in its guardianship legislation, each of the other Australian jurisdictions provides an exception of some kind for disclosures made under the legislation.

8.259 The Australian Capital Territory guardianship legislation provides, for example, that the duty of confidentiality does not apply if the information is divulged ‘in relation to the exercise of a function, as a person to whom this section applies, under this Act or another Act’.<sup>2318</sup>

8.260 In New South Wales, an exception is provided for disclosures made ‘in connection with the administration or execution of [the] Act’.<sup>2319</sup> Similarly, in Victoria, disclosure is permitted ‘in connection with the performance of functions under [the] Act or an enabling enactment’.<sup>2320</sup> The guardianship legislation in Western Australia also allows the disclosure of information that a person is ‘authorised or required to divulge in the course of duty’ or ‘by this Act or another law’.<sup>2321</sup>

8.261 The legislation in South Australia provides that the duty ‘does not prevent a person from ... divulging information if authorised or required to do so by law or by his or her employer’.<sup>2322</sup>

8.262 In Tasmania, the legislation allows disclosures that have been authorised in writing ‘either generally or in a particular case by the President [of the Guardianship and Administration Board]’ or, provided the person to whom the information relates has consented, that are ‘required or permitted by any law’.<sup>2323</sup>

8.263 The guardianship legislation of British Columbia and Ontario also includes exceptions for disclosures made under the legislation.<sup>2324</sup>

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2318 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2). Note also the exception provided to the duty imposed on the Public Advocate of the Australian Capital Territory and his or her staff under the *Public Advocate Act 2005* (ACT). Section 16(3) of that Act provides that the duty does not apply if the information is divulged ‘under this Act’ or ‘in relation to the exercise of a function, as a person to whom this section applies, under this Act or another territory law’.

2319 *Guardianship Act 1987* (NSW) s 101(b).

2320 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)(b). Also note the exception provided in respect of the oath of secrecy required to be taken by the Victorian Public Advocate: *Guardianship and Administration Act 1986* (Vic) s 14(1), sch 3 cl 3(b).

2321 *Guardianship and Administration Act 1990* (WA) s 113(1)(a)–(b). Note also the exception for disclosures made ‘in connection with the performance of functions under [the] Act or an enabling Act’ provided in s 157(3)(b) of the *State Administrative Tribunal Act 2004* (WA). That Act imposes a duty of confidentiality on members and staff of the Tribunal.

2322 *Guardianship and Administration Act 1993* (SA) s 80(2)(a).

2323 *Guardianship and Administration Act 1995* (Tas) s 86(1)(c), (2).

2324 *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32(1)(a); *Accounts and Records of Attorneys and Guardians*, O Reg 100/96, s 4(a), (c), (d).

## Submissions

8.264 Few submissions explicitly considered this question. Some submissions thought the existing exceptions, including the exception for disclosures made under the legislation, should be retained.<sup>2325</sup>

8.265 A large number of submissions expressed views about disclosures they thought should be permitted. Many of these disclosures would seem to be captured, at least in part, by an exception for disclosures made under the legislation. These submissions are discussed below.

### *Consultation between substitute decision-makers*

8.266 Some submissions raised the importance of the obligation imposed on formal substitute decision-makers to consult with one another.<sup>2326</sup> The Public Advocate commented that it is unclear how the duty of confidentiality sits with this obligation.<sup>2327</sup> A submission from Guardianship and Administration Reform Drivers explained, for example, that:<sup>2328</sup>

Where the Public Trustee and the Adult Guardian are appointed, such consultation is not always occurring, even though under section 40 of the Queensland Act it is a requirement that this consultation occur.

It is problematic that clear communication between the decision-making bodies is not occurring as this is necessary to guarantee that decisions made are in the impaired person's best interests.

### *Gathering information and views*

8.267 Several submissions spoke of the need for consultation by a guardian or administrator with members of the adult's support network in gathering information and views to inform decision-making for the adult.<sup>2329</sup>

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2325 Submissions 85, 122, 127.

2326 For example, submissions 24, 137, F16.

2327 Submission F16.

2328 Submission 24. This submission included the following case study:

A is profoundly disabled. A's mother was appointed administrator for A at the same time that the Adult Guardian was appointed guardian for accommodation and lifestyle decisions. Without consulting A's mother the Adult Guardian placed A in accommodation the cost of which greatly exceeded the funds available to A via her pension and/or from Disability Services Queensland ('DSQ').

The service provider who contracted directly with the Adult Guardian for A's accommodation pursued A's mother for the expenses. The service provider, who has a commercial interest in the accommodation decisions of A, eventually made an application to the Tribunal for the Public Trustee to be appointed as administrator.

2329 For example, submissions 11A, 21A, 26A, 28D, 43, 58, 67, 74, 78A, 102, 114, 115A, 142A, F1, F9, F13, F15, F23.

8.268 A submission from Carers Queensland expressed concern about an apparent lack of involvement or consultation with families by the Adult Guardian and the Public Trustee of Queensland.<sup>2330</sup>

Families and carers believed that they have a lot of knowledge and expertise that they could contribute to assist the Adult Guardian or Public Trustee in the making of decisions but that this knowledge was currently underutilised and, in some cases, actively rejected.

8.269 As one submission commented, ‘it is still insulting that a guardian would presume to know what my mother’s needs are more than I who actually sees her every week’.<sup>2331</sup>

8.270 A submission from Queensland Advocacy Incorporated also commented that.<sup>2332</sup>

It is correct to assume that the Adult Guardian will often not have sufficient understanding of an adult’s needs and wishes and may need to reveal information to those close to the adult to seek their views. ... it is suggested that a test of whether it was consistent with good decision making, with the principles of the Act and the best interests of the adult might be useful.

8.271 At a forum attended by several advocacy groups, a view was expressed that an adult’s family and friends can contextualise an issue by bringing knowledge to the guardian, for example, about an adult’s medication history, and should be involved in the substitute decision-making process.<sup>2333</sup> It was suggested that claims of confidentiality should not interfere with good decision-making.

8.272 Another respondent explained that, in his experience as an administrator for an adult, discussion with close family members was often the best way to assess different options and decide what is best for the adult.<sup>2334</sup> As a submission from Guardianship and Administration Reform Drivers commented.<sup>2335</sup>

Decision-making in isolation is at best not informed decision-making and has the potential to cause harm to the person with impaired capacity and lead to the breakdown of supportive relationships and networks.

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2330 Submission F1. This sentiment was also expressed in submissions from people with experience of the Adult Guardian and/or the Public Trustee of Queensland: submissions 11A, 21A, 26A, 28D, 43, 58, 115A, 142A.

2331 Submission 21A.

2332 Submission 102.

2333 Submission F15.

2334 Submission 74.

2335 Submission 24.

8.273 Some attendees at a focus group with staff of the Office of the Adult Guardian also commented on the need for disclosure in gathering information and the need to balance this with the obligation of confidentiality.<sup>2336</sup>

Part of the process of substitute decision-making for an adult is to seek the views of the adult's family members. In order to elicit a person's view, it is often necessary to disclose information to the person. It is a 'constant juggling act' to judge how much and what information needs to be disclosed in order to elicit an informed view and holistic picture. These judgments often need to be made on the spot as much of the work is conducted by telephone.

...

It might also be necessary to withhold the name of a source of particular information when eliciting a response to that information in order to protect the source.

### *Informing carers and families of decisions*

8.274 A considerable number of submissions discussed the need for formal substitute decision-makers to inform members of an adult's support network of decisions that have been made for an adult.<sup>2337</sup>

8.275 For example, a submission from Carers Queensland expressed the view that:<sup>2338</sup>

While confidentiality concerning private and personal information is important, this should not unnecessarily obstruct the flow of information to those close to the adult. The appropriate sharing of information with the adult's family and carers is essential.

8.276 As one respondent explained, such information assists in the day-to-day care of the adult and should be made available.<sup>2339</sup> This view was shared by Queensland Advocacy Incorporated and Endeavour Foundation.<sup>2340</sup> Attendees at a number of community forums also considered sharing information with an adult's carers to be crucial.<sup>2341</sup> Some attendees suggested this is especially important when decisions involve health matters.<sup>2342</sup> In their view, it is essential for carers to be informed about matters such as doctors' appointments, medical test results, and prescribed medications.<sup>2343</sup>

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2336 Submission F23.

2337 For example, submissions 6, 8, 11A, 21C, 24, 26A, 27C, 31B, 58, 68, 73A, 78A, 80, 101, 110, 114, 120, 124, 135, 142A, 145, 149, F1, F4, F5, F6, F7, F8, F9, F10, F11, F12, F14, F15, F20, F22, F23.

2338 Submission 101.

2339 Submission 135.

2340 Submissions F15, 120.

2341 For example, submissions F5, F6, F8, F9, F10, F12, F14, F22.

2342 Submissions F5, F9, F12.

2343 Submission F9.

8.277 The Cerebral Palsy League of Queensland suggested that the Adult Guardian form partnerships for information-sharing with government and non-government support services involved in the adult's support.<sup>2344</sup>

8.278 At a focus group of adults with impaired capacity, it was considered that family members generally have a right to be kept informed.<sup>2345</sup>

8.279 Submissions also raised concerns that information sharing with an adult's support network was sometimes not occurring in practice by the Adult Guardian and the Public Trustee of Queensland.<sup>2346</sup> A number of attendees at a community forum commented that this issue was one of the most unsatisfactory aspects of the current guardianship system.<sup>2347</sup> Another respondent commented, though, that she had been 'very fortunate' to be involved by the Adult Guardian in the decision-making process.<sup>2348</sup>

8.280 Some attendees at a focus group with staff of the Office of the Adult Guardian discussed the impact of confidentiality obligations on decisions to update an adult's family members:<sup>2349</sup>

Often, the Adult Guardian officer will rely on the adult's service provider, such as an aged care facility, to update family members of the adult's status. At other times, the response may depend on the relationship between the adult and the particular family member. ... Sometimes, an officer will refer to the Act's requirement that information be kept confidential as a reason for not being able to give more detailed information.

8.281 The practice of relying on service providers to keep family members informed was criticised as 'inappropriate' in a submission from Guardianship and Administration Reform Drivers.<sup>2350</sup> In its view, informing an adult's family of substitute decisions made by the Adult Guardian is the responsibility of the Adult Guardian.

8.282 Some submissions also commented on the consequences of withholding information about decisions from an adult's support network. A community forum attendee commented, for example, that:<sup>2351</sup>

When the Adult Guardian does not pass on information, people ask what the secrecy is about. People then don't trust the Adult Guardian.

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2344 Submission 86.

2345 Submission F20.

2346 For example, submissions 142A, F1, F22.

2347 Submission F9.

2348 Submission 114.

2349 Submission F23.

2350 Submission 24.

2351 Submission F22.

8.283 A staff member of the Office of the Public Advocate also explained, for example, that family members sometimes apply to the Tribunal for the removal of a substitute decision-maker because they have not been consulted or kept informed, despite the guardian or administrator otherwise having acted properly.<sup>2352</sup> It was also suggested by staff of the Office of the Public Advocate that when an order is made appointing a guardian or administrator for an adult, the Tribunal should stipulate particular persons within the adult's support network who are to be consulted and kept informed by the appointee.<sup>2353</sup>

### *The General Principles*

8.284 Some submissions also commented on disclosures made by decision-makers in accordance with the General Principles, or with the goal generally of advancing the adult's interests.

8.285 The Public Advocate commented that it is unclear how the duty of confidentiality sits with a substitute decision-maker's obligations under the General Principles.<sup>2354</sup>

8.286 One respondent considered that decisions about disclosure should be guided by what is best and fairest for the adult concerned.<sup>2355</sup>

8.287 A number of attendees at a community forum expressed the view that consideration of the adult's wishes and the application of the General Principles were imperative in deciding who should receive information.<sup>2356</sup> Some other submissions also thought the adult's views should be taken into account.<sup>2357</sup>

8.288 Other submissions suggested that a guardian should be able to disclose information that the adult, if he or she had capacity, would have communicated to the person.<sup>2358</sup> Another respondent acknowledged that this could be difficult in practice.<sup>2359</sup> At a community forum, one attendee suggested that interpretation is a key issue:<sup>2360</sup>

The General Principles already provide for the release of information that the adult would have released himself or herself. The problem comes down to day-to-day practices and interpretation by bodies like the Adult Guardian.

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2352 Submission F16.

2353 Ibid.

2354 Ibid.

2355 Submission 67.

2356 Submission F7.

2357 Submissions F8, F10, F7.

2358 Submissions 135, F4.

2359 Submission F4.

2360 Submission F13.

8.289 Some submissions also considered that the adult should be given all information about himself or herself.<sup>2361</sup> The concern was raised by one respondent that the Public Trustee of Queensland has not kept him informed about where and how his money is used.<sup>2362</sup>

8.290 Some submissions also commented more generally on the potential adverse impact on an adult for information to be withheld from the adult's support network. Carers Queensland considered that guardianship agencies, like the Adult Guardian, should communicate with families and friends in keeping with the General Principles' requirement to encourage the continuance of existing supportive relationships.<sup>2363</sup>

the result of excessive confidentiality may be that the adult becomes ostracised from family and friends. This is obviously not in the adult's interest.

8.291 Caxton Legal Centre also cautioned that:<sup>2364</sup>

An inappropriate application of the confidentiality provisions could be misused to exclude otherwise caring involved family members and associates from the adult's life.

### *Procedural fairness*

8.292 Many submissions expressed the view that adverse information should be disclosed by decision-making bodies such as the Adult Guardian in order to accord procedural fairness.<sup>2365</sup> Caxton Legal Centre commented, for example, that:<sup>2366</sup>

people must be given the chance in this area of law to put a full case before decision-makers and they will not be able to do so unless they are aware of allegations made against them or which they know to be untrue.

8.293 A submission from Carers Queensland also explained that procedural fairness would, 'importantly, mean a better outcome for the adult'.<sup>2367</sup>

8.294 Concerns were raised that disclosure of adverse information is not always occurring in practice.<sup>2368</sup> One respondent commented, in relation to an investigation conducted by the Adult Guardian, that:<sup>2369</sup>

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2361 Submissions 103, 65.

2362 Submission 8.

2363 Submission 101.

2364 Submission 124. Also note submission F16.

2365 For example, submissions 4A, 60, 14, 19A, 101, F1.

2366 Submission 124.

2367 Submission 101.

2368 For example, submissions 4A, 14, 19A, 101, F1.

2369 Submission 14.

These complaints were made against me but at no stage was I informed who had made them nor was I informed what the substance of the complaints was. The secrecy provisions meant that these complaints and who had made them need not be disclosed by the Adult Guardian to me.

8.295 In relation to a similar experience, another respondent commented that:<sup>2370</sup>

the person lodging the complaint can bear a grudge against the family and can come out of the situation unscathed while the family carer/s can be made to suffer unbearable mental torture in trying to stand up for their rights and the rights of their adult child with a disability.

8.296 The view was expressed at a forum held by Carers Queensland that the protection of privacy should not override the need to accord procedural fairness:<sup>2371</sup>

the effect of these privacy conditions, in practice, severely disadvantages families and carers and has, effectively, denied them their rights to natural justice and procedural fairness.

8.297 A submission from Queensland Corrective Services expressed the view that while procedural fairness must be accorded, the adult's right to privacy is paramount.<sup>2372</sup>

The approach that should be taken is one that balances the right to privacy with the general duty to be informed of information adverse to interests. Where there is a doubt about the balance, the right to protect the interests of those unable to protect their own interests is paramount.

8.298 Some attendees at a focus group with staff of the Office of the Adult Guardian explained that the usual practice in conducting investigations is to inform people of any allegations and allow them to respond.<sup>2373</sup> A view was also expressed at the focus group that the obligation to comply with the principles of natural justice is unclear given the requirement to act in the adult's best interests.<sup>2374</sup>

8.299 The Commission also understands from information provided in submissions that the process of consultation, including compliance with procedural fairness, forms part of the Adult Guardian's policy on decision-making.<sup>2375</sup>

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2370 For example, submission 19A.

2371 Submission F1.

2372 Submission 121.

2373 Submission F23.

2374 Submission F3.

2375 Submission 26C.

### **The Commission's view**

8.300 The Commission agrees with the view that an exception for disclosures made under the Act should be retained. Earlier in this chapter, the Commission recommended that the duty be reformulated to emphasise that personal information may be disclosed for the purposes of the legislation.<sup>2376</sup>

8.301 This reformulation relocates the exceptions provided in section 74(2)(a) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(a) of the *Guardianship and Administration Act 2000* (Qld) for disclosures made in the discharge of functions under the legislation or for the legislation. Those exceptions will therefore no longer be necessary because they will be incorporated into the scope of the obligation itself. The Commission proposes that section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

8.302 The Commission considers that the provision allowing the use of personal information for the purposes of the legislation would permit disclosure in a number of circumstances. Given the concerns raised in submissions, the Commission has outlined below some of the disclosures it considers would be permissible as disclosures made for the purposes of the legislation. These are, disclosures made:

- in complying with an obligation under the legislation;
- in making a substitute decision for a matter;
- in performing functions or exercising powers under the legislation; and
- in complying with procedural fairness.

8.303 The Commission does not consider it necessary or desirable to specify in the legislation that such disclosures are permitted. The Commission encourages the Adult Guardian and the Public Trustee of Queensland to give consideration to these matters in their confidentiality and disclosure policies. The Commission has also made recommendations elsewhere in this chapter about the need for education and training for decision-makers in relation to their confidentiality and disclosure obligations under the guardianship legislation.<sup>2377</sup>

8.304 In light of the concerns raised in submissions, the Commission is also of the view that consideration should be given to the question whether the guardianship legislation should be amended to impose obligations on guardians and administrators to consult with and provide particular information to the adult and members of the adult's support network. The Commission notes that this matter may be considered in stage two of its review.

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<sup>2376</sup> See para 8.69–8.70 of this Report.

<sup>2377</sup> See para 8.526–8.529 of this Report.

8.305 The Commission also agrees with the view expressed by the Public Advocate that when an order is made appointing a guardian or administrator for an adult, the Tribunal might usefully stipulate particular persons within the adult's support network who are to be consulted and kept informed by the appointee.

### *Compliance with obligations*

8.306 Any disclosure that is required or compelled under the legislation will be a disclosure made for the purposes of the legislation and will clearly be permitted. For example, this would include:

- disclosures compelled by the Tribunal under section 130 of the *Guardianship and Administration Act 2000* (Qld);<sup>2378</sup>
- provision of information to the Adult Guardian as required under section 183 of the *Guardianship and Administration Act 2000* (Qld);<sup>2379</sup>
- provision of information to an attorney, guardian or administrator as required under section 81 of the *Powers of Attorney Act 1998* (Qld) or section 44 of the *Guardianship and Administration Act 2000* (Qld);<sup>2380</sup>
- inclusion of information as part of an investigation or audit report of the Adult Guardian required under section 193 of the *Guardianship and Administration Act 2000* (Qld);<sup>2381</sup>
- inclusion of information as part of a Community Visitor's report under section 230 of the *Guardianship and Administration Act 2000* (Qld),<sup>2382</sup> and

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2378 Section 130 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may order a person to give information to the Tribunal and that a person must comply with such an order unless the person has a reasonable excuse. That section overrides any legislative or common law restriction on disclosure of the information: *Guardianship and Administration Act 2000* (Qld) s 130(6).

2379 Section 183 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may require a person to give information to the Adult Guardian and that a person must comply with such a requirement unless the person has a reasonable excuse. That section overrides any legislative or common law restriction on disclosure of the information: *Guardianship and Administration Act 2000* (Qld) s 183(5).

2380 Section 81 of the *Powers of Attorney Act 1998* (Qld) provides that, upon request, a person who has custody or control of information to which the adult would have been entitled if he or she had capacity, must disclose the information to the attorney. Section 44 of the *Guardianship and Administration Act 2000* (Qld) provides that a person who has custody or control of information to which the adult would have been entitled if he or she had capacity, must give the information to the guardian or administrator, unless the person has a reasonable excuse. Those sections override any legislative or common law restriction on disclosure of the information: *Powers of Attorney Act 1998* (Qld) s 81(3)(a); *Guardianship and Administration Act 2000* (Qld) s 44(6).

2381 Section 193 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian must make a written report after an investigation or audit and give a copy to every attorney, guardian, or administrator for the adult and, upon request and at the person's expense, to any interested person.

2382 Section 230 of the *Guardianship and Administration Act 2000* (Qld) provides that a community visitor must prepare a report on each site visit and give a copy of the report to the chief executive. The chief executive must give a copy of the report to the person in charge of the site and may also give a copy to the consumer (if the report relates to a complaint), the Adult Guardian, the Public Advocate, and the director of mental health.

- information provided by a substitute decision-maker in complying with the obligation to consult with the adult's other substitute decision-makers under section 79 of the *Powers of Attorney Act 1998 (Qld)* and section 40 of the *Guardianship and Administration Act 2000 (Qld)*.<sup>2383</sup>

8.307 In particular, the Commission notes the importance of the obligation of consultation between substitute decision-makers. The Commission reiterates the view expressed in its report in the 1990s that an adult's substitute decision-makers and, in particular, the Public Trustee of Queensland and the Adult Guardian should 'adopt a co-operative and constructive approach toward finding appropriate solutions for the person concerned'.<sup>2384</sup> The Commission does not consider the duty of confidentiality an impediment to such consultation.

8.308 The Commission also notes, in relation to the obligation to consult, that guardians, administrators and attorneys must also comply with the General Principles.<sup>2385</sup> General Principle 11 requires the adult's right to confidentiality to be taken into account.<sup>2386</sup> As such, the need to respect the confidentiality of information about the adult is one of several factors to be considered. This means a judgment is required in each case about the level of detail appropriate for disclosure. The General Principles are also discussed below.<sup>2387</sup>

### *Substitute decision-making and the General Principles*

8.309 Disclosure is also permitted when it is made in accordance with the General Principles as part of substitute decision-making for the adult. This would include disclosure of information:

- in informing the adult and members of the adult's support network of a substitute decision that has been made; and
- in seeking information and views to inform the making of a substitute decision.

8.310 In having power for a matter, an attorney, guardian or administrator also has the attendant power to decide what information about the adult, relevant to that matter, should be disclosed.<sup>2388</sup> That is, a decision whether or not to disclose confidential

2383 Section 79 of the *Powers of Attorney Act 1998 (Qld)* and s 40 of the *Guardianship and Administration Act 2000 (Qld)* provide that where there are 2 or more persons who are guardian, administrator or attorney for an adult, the persons must consult with one another on a regular basis to ensure the adult's interests are not prejudiced by a breakdown in communication between them.

2384 Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 185. The Commission recommended in that Report that decision-makers be required to regularly consult with one another 'to ensure that the person's interests are not jeopardised in any way by lack of communication between the decision-makers': Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 284-5.

2385 *Guardianship and Administration Act 2000 (Qld)* s 34(1); *Powers of Attorney Act 1998 (Qld)* s 76.

2386 General Principle 11 is set out at para 8.35 of this Report.

2387 See para 8.309-8.315 of this Report.

2388 This issue was discussed in the Discussion Paper. See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.107]-[8.112].

information about an adult is itself a decision for a matter. For example, a guardian appointed for personal matters has power for matters ‘relating to’ the adult’s care or welfare. In the Commission’s view, power for a personal matter therefore includes the power to make decisions about whether or not information about the adult’s care or welfare should be disclosed.<sup>2389</sup> In deciding whether information should be disclosed, the decision-maker must apply the General Principles.<sup>2390</sup>

8.311 This would include a decision, in compliance with the General Principles, to inform members of the adult’s support network or others involved in the adult’s life of a substitute decision that has been made. For example, a guardian may make an accommodation decision for the adult. The guardian may then decide, after applying the General Principles, to inform members of the adult’s family or close friends of the adult about the accommodation decision. This may be the result, particularly, of compliance with General Principles 8 and 9.<sup>2391</sup> Similarly, it is likely to be necessary to inform an adult’s primary carer of decisions made about the adult’s health care. Such disclosures are clearly permitted. Again, the level of detail disclosed will be influenced by a consideration of the adult’s right to confidentiality under General Principle 11.<sup>2392</sup>

8.312 A substitute decision-maker’s power to make decisions about the disclosure of the adult’s information would also include a decision to disclose information in order to obtain views and information as required by the General Principles. In making a decision for a matter, an attorney, guardian or administrator is directed by the General Principles to seek the adult’s views and wishes.<sup>2393</sup> This includes determining what the adult’s views and wishes would be on the basis of the adult’s previous actions.<sup>2394</sup> The General Principles also require the decision-maker to consider the adult’s characteristics

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The words ‘relating to’ appear wide enough to mean that decisions for a matter include decisions about whether information relevant to that matter should be disclosed. While the words ‘relating to’ must be read in context, they are of wide import and ‘do not ordinarily require a direct or immediate connection’: *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 363 (Gaudron J); *O’Grady v North Queensland Co Ltd* (1990) 169 CLR 356, 373–4 (Toohey and Gaudron JJ). See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [12.7].

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Attorneys, guardians and administrators must apply the General Principles: *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 34(1). The Commission notes that this is necessarily a balancing exercise and would include taking the adult’s wishes into account. Note, for example, the following comment from the Adult Guardian:

At times, guardians are challenged in balancing their client’s wish that information (that forms part of the reasoning in the decision) not be passed on to family members to prevent a negative impact on their relationship, and the need for guardians to be transparent in the decision making process.

See Adult Guardian, *Annual Report 2004–05* (2005) 22.

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See note 2395 of this Report.

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General Principle 11 requires the confidentiality of information about the adult to be taken into account: *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 11; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 11. General Principle 11 is set out at para 8.35 of this Report.

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In particular, General Principle 7(3)(b) provides that the adult’s views and wishes are to be sought and taken into account to the greatest extent practicable for exercising a power for a matter for the adult: *Powers of Attorney Act 1998* (Qld) sch 1 pt 1, s 7(3)(b); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1, s 7(3)(b).

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General Principle 7(4) provides that in performing a function or exercising a power under the legislation, the person must take into account what the person considers would be the adult’s views and wishes if it is reasonably practicable to work out what the adult’s views and wishes would be from the adult’s previous actions, using the principle of substituted judgment: *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 7(4); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 7(4).

and needs, cultural and linguistic environment, and his or her existing supportive relationships.<sup>2395</sup>

8.313 In complying with the General Principles, a decision-maker will need to discuss relevant issues with the adult and members of the adult's support network, including close family, friends and carers, in order to gather information and views. This would necessarily involve some level of disclosure of personal information about the adult, and perhaps about others as well. Such disclosure is clearly permitted. The level of detail disclosed, however, will vary in each case and will be limited to whatever the decision-maker considers appropriate, having regard to the adult's right to confidentiality of information as is also required by the General Principles.<sup>2396</sup> This is necessarily a balancing exercise.

8.314 The Commission reiterates its comments from the Discussion Paper that excessive weight given to confidentiality of information under General Principle 11 may inappropriately or unreasonably exclude family members or close friends from participating in the adult's life.<sup>2397</sup> The Commission also notes the concern raised in submissions about information being withheld from members of an adult's support network. The Commission encourages substitute decision-makers to be mindful of the need to balance the confidentiality required by General Principle 11 with the other General Principles. In so doing, the Commission considers it appropriate to have regard to the closeness of a person's relationship with the adult and the level of involvement of a person in the adult's life. The importance of these factors is reflected in the Commission's guiding principles adopted in Chapter 3 of this Report.<sup>2398</sup> The Commission endorses the following comment from the Public Advocate:<sup>2399</sup>

Clearly, the interests of family members should not prevail over those of the vulnerable person. ...

What is incontrovertible, however, is that in seeking to protect citizens, we have necessarily created legislation that is as intrusive into the private domain of the family as any legislation in the country. It is incumbent on those who administer the guardianship regime to remember that the protection of the vulnerable person is to be

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General Principle 10 provides that power for a matter should be exercised for an adult in a way that is appropriate to the adult's characteristics and needs. General Principle 9(1) requires that the importance of maintaining an adult's cultural and linguistic environment and set of values, including any religious beliefs, be taken into account. General Principle 8 requires the importance of maintaining an adult's existing supportive relationships to be taken into account. In so doing, it would be necessary to find out about the adult's characteristics and needs, linguistic and cultural values, and his or her supportive relationships. See *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 ss 8–10; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 ss 8–10.

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See note 2392 of this Report.

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See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.111].

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See para 3.156 of this Report.

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Public Advocate, *Annual Report 2004–05* (2005) 56. The Commission also notes the Adult Guardian's recognition of the importance of:

explaining why decisions are made and on what basis, so that those impacted by the decisions, whether the adult, family or service providers, can understand the decisions, even if they do not agree with it.

See Adult Guardian, *Annual Report 2004–05* (2005) 5.

balanced against the person's right to maintain links with their existing support network, which often includes family members.

8.315 Disclosure of information to the adult himself or herself in the course of making a substitute decision or to inform the adult of a decision that has been made is also clearly permitted. This is recognised, in particular, by General Principle 7.<sup>2400</sup> The Commission considers such disclosure is essential in respecting the rights of adults with impaired capacity and in ensuring transparency and accountability of decision-making, particularly in relation to decision-making by public officials such as the Adult Guardian and the Public Trustee of Queensland. These issues are reflected in the guiding principles adopted by the Commission in Chapter 3 of this Report.<sup>2401</sup>

#### *Performance of functions and exercise of powers*

8.316 Disclosure of information that is necessary or incidental to the performance of a power or exercise of a function under the legislation, and in compliance with the General Principles, will also be permitted as disclosure for the purposes of the legislation.<sup>2402</sup>

8.317 For example, one of the functions of the Adult Guardian is to seek help for an adult with impaired capacity from an institution, welfare organisation, service provider, or government department.<sup>2403</sup> In so doing, the Adult Guardian will need to discuss relevant details of the adult's situation and needs. Another of the Adult Guardian's functions is to protect adults with impaired capacity.<sup>2404</sup> As part of that function, the Adult Guardian might consider it appropriate to refer an issue, for example of suspected wrongdoing, to another official or agency. Such disclosures are clearly permitted.<sup>2405</sup> Again, the level of detail disclosed will depend on the application of the General Principles, including the adult's right to confidentiality.

8.318 The Commission also notes that the performance of a particular power under the legislation may justify withholding information from a person. For example, where the Adult Guardian applies for a warrant to remove the adult from a place where there is an immediate risk of harm to the adult, the application may be made, and the warrant

2400 General Principle 7 provides for the maximum participation of an adult in decision-making about himself or herself. General Principle 7(3)(a), for example, provides that the adult must be given access to information necessary to enable the adult to participate in decisions about his or her life. See *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 7; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 7. General Principle 7(3)(a) is set out at para 8.36 of this Report.

2401 See para 3.156 of this Report.

2402 A person or entity performing a function or exercising a power for a matter in relation to an adult must apply the General Principles: *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1).

2403 *Guardianship and Administration Act 2000* (Qld) s 174(2)(g).

2404 *Guardianship and Administration Act 2000* (Qld) s 174(1), (2)(a).

2405 Note that s 175(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Adult Guardian power to do 'all things necessary or convenient' to perform his or her functions.

may be issued and executed, without notice.<sup>2406</sup> This may be necessary to prevent interference from a member of the adult's family.

### *Compliance with procedural fairness*

8.319 Any disclosure that is required in order to accord procedural fairness will also be permitted as a disclosure made for the purpose of the legislation.

8.320 Administrative decision-makers, such as the Adult Guardian, must comply with the requirements of procedural fairness when making decisions that affect a person's rights, interests or legitimate expectations.<sup>2407</sup> Before making an adverse finding about an administrator's conduct, for example, the Adult Guardian would be required to disclose the adverse information to the administrator and allow an opportunity to respond.<sup>2408</sup>

8.321 This may involve the disclosure of otherwise confidential information. Such disclosure is clearly permitted. Administrative decisions made under the legislation cannot be made without compliance with procedural fairness.

8.322 Apart from satisfying the legal requirements of procedural fairness, the Commission notes that such disclosure is important for other reasons.<sup>2409</sup> It accords respect for the person affected by the decision. It enhances the person's sense that the decision has been reached fairly and is therefore a fair decision. In eliciting a response to the information provided, disclosure also promotes informed, and better, decision-making. The Commission notes, for example, the following comment from the Adult Guardian:<sup>2410</sup>

Outcomes cannot be achieved without due attention to process, ensuring fairness and the perception of fairness to all parties, while also ensuring that all parties understand the guardian's duties to the adult with impaired capacity.

8.323 In making an administrative decision, in the exercise of a function under the legislation, the decision-maker is also required to comply with the General Principles, including General Principle 11.<sup>2411</sup> These principles inform what is required to accord procedural fairness<sup>2412</sup> and, in relation to information about the adult, may influence the level of detail disclosed. For example, if the adult has asked that a particular document

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2406 *Guardianship and Administration Act 2000* (Qld) ss 197, 148, 149. Note that s 151 of the *Guardianship and Administration Act 2000* (Qld) provides that as soon as practicable after the adult has been removed under the warrant, the Adult Guardian must apply to the Tribunal for the orders the Adult Guardian considers appropriate about the adult's personal welfare, a power of attorney or advance health directive of the adult, or a guardian, administrator or attorney of the adult.

2407 See para 3.37 of this Report.

2408 The hearing rule of procedural fairness is discussed at para 3.40–3.45 of this Report.

2409 See para 3.47–3.50 of this Report.

2410 Adult Guardian, *Annual Report 2004–05* (2005) 7.

2411 *Guardianship and Administration Act 2000* (Qld) ss 11, 34(1). General Principle 11 is set out at para 8.35 of this Report.

2412 See para 3.51–3.57 of this Report.

received by the Adult Guardian during an investigation not be shared with others, it may be appropriate to provide a summary of the substance of the relevant information without providing a copy of the document.

8.324 The Commission acknowledges the concern expressed in submissions that procedural fairness is not always being met. While respect for the adult's confidentiality of information under General Principle 11 may impact on the amount of detail given to a person, the Commission is of the view that it does not override the obligation of procedural fairness.

### Other existing exceptions

8.325 In addition to the exception for disclosures made under the legislation, the Commission sought submissions in its Discussion Paper on whether the other existing exceptions to the duty of confidentiality should be retained.<sup>2413</sup>

### The guardianship legislation

8.326 At present, section 74(2) of the *Powers of Attorney Act 1998* (Qld) and section 249(3) of the *Guardianship and Administration Act 2000* (Qld) set out the following exceptions to the duty of confidentiality:<sup>2414</sup>

- to discharge a function under another law<sup>2415</sup> or if authorised under a regulation or another law;<sup>2416</sup>
- for a proceeding in a court or relevant tribunal;<sup>2417</sup>
- if authorised by the person to whom the information relates;<sup>2418</sup> or
- if authorised by the court or the Tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered.<sup>2419</sup>

<sup>2413</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.98].

<sup>2414</sup> Those provisions are set out at para 8.32–8.33 of this Report. Note also the limited exception for disclosure of confidential information to a member of this Commission or to its staff or consultants in order to facilitate the Commission's review of the guardianship legislation: *Powers of Attorney Act 1998* (Qld) s 74(2)(f); *Guardianship and Administration Act 2000* (Qld) s 249(3)(g). The Commission has prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission's consultation processes. The Protocol can be viewed at the Commission's website: <<http://www.qlrc.qld.gov.au/guardianship/protocol.htm>>.

<sup>2415</sup> *Powers of Attorney Act 1998* (Qld) s 74(2)(a); *Guardianship and Administration Act 2000* (Qld) s 249(3)(b).

<sup>2416</sup> *Powers of Attorney Act 1998* (Qld) s 74(2)(c); *Guardianship and Administration Act 2000* (Qld) s 249(3)(d).

<sup>2417</sup> *Powers of Attorney Act 1998* (Qld) s 74(2)(b); *Guardianship and Administration Act 2000* (Qld) s 249(3)(c).

<sup>2418</sup> *Powers of Attorney Act 1998* (Qld) s 74(2)(d); *Guardianship and Administration Act 2000* (Qld) s 249(3)(e).

<sup>2419</sup> *Powers of Attorney Act 1998* (Qld) s 74(2)(e); *Guardianship and Administration Act 2000* (Qld) s 249(3)(f).

## **The legislation in other jurisdictions**

### *Disclosures under another law*

8.327 The Australian Capital Territory legislation includes an exception for disclosures made to discharge a function under another Act.<sup>2420</sup> The legislation in New South Wales exempts disclosures made with ‘lawful excuse’.<sup>2421</sup>

8.328 In South Australia and Western Australia, the legislation provides an exception for disclosures that are authorised or required to be made by law.<sup>2422</sup> The Tasmanian legislation also permits disclosures ‘as required or permitted by any law’, provided the person to whom the information relates consents.<sup>2423</sup>

8.329 The legislation in Ontario also includes an exception to the duty imposed on attorneys and guardians for disclosures required under another Act.<sup>2424</sup> Similar exceptions are also provided in other Queensland statutes.<sup>2425</sup>

### *Disclosures for a court or tribunal proceeding*

8.330 The legislation in New South Wales includes an exception for disclosures made ‘for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings’.<sup>2426</sup> Similarly, the Tasmanian legislation includes an exception for disclosures made ‘at a hearing under this Act’.<sup>2427</sup>

8.331 The legislation in British Columbia and the North West Territories also permits disclosure for proceedings under the guardianship legislation.<sup>2428</sup> Some other Queensland statutes that impose a duty of confidentiality provide exceptions for disclosures to a court or tribunal.<sup>2429</sup>

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2420 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2); *Public Advocate Act 2005* (ACT) s 16(3). Section 34(3)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) also provides that disclosures made under ‘an enabling enactment’ are permitted despite the duty of confidentiality.

2421 *Guardianship Act 1987* (NSW) s 101(e).

2422 *Guardianship and Administration Act 1993* (SA) s 80(2)(a); *Guardianship and Administration Act 1990* (WA) s 113(1)(b). Note also that s 157(3)(b) of the *State Administrative Tribunal Act 2004* (WA) provides that information may be disclosed under ‘an enabling Act’ despite the duty of confidentiality imposed on members and staff of the Tribunal.

2423 *Guardianship and Administration Act 1995* (Tas) s 86(2).

2424 *Accounts and Records of Attorneys and Guardians*, O Reg 100/96, s 4(c).

2425 For example, *Anti-Discrimination Act 1991* (Qld) s 264(2)(b); *Children Services Tribunal Act 2000* (Qld) s 142(3)(b); *Disability Services Act 2006* (Qld) s 222(4)(b), (d); *Health Services Act 1991* (Qld) s 62B; *Industrial Relations Act 1999* (Qld) s 706(c); *Juvenile Justice Act 1992* (Qld) s 289(g); *Mental Health Act 2000* (Qld) s 528(3)(c).

2426 *Guardianship Act 1987* (NSW) s 101(c).

2427 *Guardianship and Administration Act 1995* (Tas) s 86(1)(a).

2428 *Adult Guardianship Act*, RSBC 1996 (Supp), c 6, s 32(1)(b); *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58(1)(a).

2429 For example, *Disability Services Act 2006* (Qld) s 222(4)(c); *Whistleblowers Protection Act 1994* (Qld) s 55(3)(c).

*Disclosures authorised by the person*

8.332 The legislation in the Australian Capital Territory, New South Wales, Victoria and Western Australia each provides an exception for disclosures made with the consent of the person to whom the information relates.<sup>2430</sup> In Tasmania, an exception is provided for disclosures that are required or permitted under law and to which the person gives written consent.<sup>2431</sup>

8.333 Other statutes in Queensland also provide for disclosures to be made with the consent of the person to whom the information relates.<sup>2432</sup>

*Disclosures authorised by the court or Tribunal*

8.334 The legislation in Tasmania provides an exception for disclosures that are authorised in writing either generally or in a particular case by the President of the Guardianship and Administration Board.<sup>2433</sup> None of the other Australian jurisdictions provides an exception for disclosures authorised by the court or Tribunal.

8.335 Some other statutes in Queensland provide exceptions for disclosures authorised by the court.<sup>2434</sup>

**Submissions**

8.336 Few submissions addressed this issue. Of those that did, most considered that each of the existing exceptions should be retained.<sup>2435</sup>

8.337 Some submissions specifically endorsed an exception for disclosures made with the person's permission or consent.<sup>2436</sup> One of these respondents considered that the right of a person to whom the information relates to authorise its disclosure, subject to safeguards for any other person's privacy, 'would seem inalienable'.<sup>2437</sup> At a focus group of adults with impaired capacity, it was thought that an adult should be able to give written permission for his or her information to be given to other people.<sup>2438</sup> The

2430 *Guardianship and Management of Property Act 1991* (ACT) s 66D(3); *Public Advocate Act 2005* (ACT) s 16(4); *Guardianship Act 1987* (NSW) s 101(a); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)(a); *Guardianship and Administration Act 1990* (WA) s 113(1)(c); *State Administrative Tribunal Act 2004* (WA) s 157(3)(a).

2431 *Guardianship and Administration Act 1995* (Tas) s 86(2).

2432 For example, *Children Services Tribunal Act 2000* (Qld) s 142(3)(a)(ii); *Disability Services Act 2006* (Qld) s 222(4)(e); *Health Services Act 1991* (Qld) s 62C; *Juvenile Justice Act 1992* (Qld) s 290(2); *Mental Health Act 2000* (Qld) s 528(3)(d).

2433 *Guardianship and Administration Act 1995* (Tas) s 86(1)(c).

2434 For example, s 298(2) of the *Juvenile Justice Act 1992* (Qld) provides that information may be disclosed if it is authorised by the court because the disclosure is necessary for a purpose of the Act or it would be in the interests of justice. Also note ss 62F, 62I of the *Health Services Act 1991* (Qld) which allow disclosures to be authorised by the chief executive in the public interest or to avert a serious risk to a person's life, health or safety or to the public safety.

2435 Submission 1H, 85, 122, 127.

2436 Submissions 38B, 47, 119, F20.

2437 Submission 119.

2438 Submission F20.

Public Advocate also thought there should be an exception for disclosures authorised by the person, but cautioned that.<sup>2439</sup>

there are risks that ‘authorisation’ will be sought from adults with impaired decision-making capacity. It is acknowledged of course, that some of the adults will have capacity to authorise, but others will not. Also, it is acknowledged that this exception will also be relevant in respect of information relating to persons other than the adults whose personal information is disclosed in the course of guardianship related matters.

8.338 Some other submissions thought it should be possible to obtain a court order or other determination to allow access to information.<sup>2440</sup> Australian Lawyers Alliance thought there should be an exception for disclosures considered appropriate by the Tribunal.<sup>2441</sup> Another submission expressed the view that anyone seeking information should be required to demonstrate why the information is needed and that its disclosure would be in the adult’s best interests.<sup>2442</sup> Another respondent commented more generally that there should be ‘some sort of public interest test’.<sup>2443</sup>

8.339 At a forum held with members and staff of the Tribunal, none of the attendees recalled any applications having been made for Tribunal authorisation under the current exception.<sup>2444</sup>

8.340 Another submission thought the exception for disclosures made to discharge a function under another law should be retained.<sup>2445</sup>

### **The Commission’s view**

8.341 The Commission is of the view that the existing exceptions to the duty of confidentiality should be retained, subject to some modification. This is largely consistent with the guardianship legislation in other jurisdictions<sup>2446</sup> and with other Queensland statutes.<sup>2447</sup>

#### *Disclosures under another law*

8.342 At present, section 74(2)(c) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(d) of the *Guardianship and Administration Act 2000* (Qld) provide an exception for disclosures that are authorised under a regulation or another law.

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2439 Submission 1H.

2440 Submissions 38B, 97, F6, F16, F21.

2441 Submission 97.

2442 Submission F6.

2443 Submission F15.

2444 Submission F17.

2445 Submission 47.

2446 See para 8.327–8.328, 8.330, 8.332, 8.334 of this Report.

2447 See notes 2425, 2429, 2432, 2434 of this Report.

8.343 Consistent with the guardianship legislation in South Australia, Western Australia and Tasmania,<sup>2448</sup> and with other statutes in Queensland,<sup>2449</sup> the Commission considers this exception should provide for disclosures that are authorised *or required* under a regulation or another law. Although probably already covered by the word ‘authorised’, the addition of ‘required’ clarifies that the duty of confidentiality is not intended to override a requirement in another law that information be provided or disclosed to someone.

8.344 This is also consistent with the exceptions provided under the *Privacy Act 1988* (Cth) and IS42 for use or disclosure of information for a purpose that is ‘required or authorised by or under law’.<sup>2450</sup>

8.345 In addition, section 249(3)(b) of the *Guardianship and Administration Act 2000* (Qld) provides an exception for disclosures made to discharge a function under another law. The Commission considers this exception would be captured by an exception for disclosures that are authorised or required by another law and is therefore unnecessary and, for clarity, should be omitted.

8.346 The Commission therefore proposes that section 74(2)(c) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(d) of the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

#### *Disclosures for court or tribunal proceedings*

8.347 At present, section 74(2)(b) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(c) of the *Guardianship and Administration Act 2000* (Qld) provide an exception for disclosures made for a proceeding in a court or relevant tribunal.<sup>2451</sup>

8.348 This exception is wide enough to allow disclosure of otherwise confidential information for a court proceeding unrelated to the guardianship legislation or the person’s role under it. The Commission does not consider such a wide exception is appropriate given the general policy of protecting confidential information from uses unrelated to the purpose/s for which the information is acquired.

8.349 The Commission acknowledges that disclosure for unrelated legal proceedings may sometimes be appropriate. In those circumstances, the person may seek authorisation under the guardianship legislation from the Supreme Court or the Tribunal

2448 See para 8.328 of this Report.

2449 For example, *Anti-Discrimination Act 1991* (Qld) s 264(2)(b); *Children Services Tribunal Act 2000* (Qld) s 142(3)(b); *Health Services Act 1991* (Qld) s 62B; *Industrial Relations Act 1999* (Qld) s 706(c); *Juvenile Justice Act 1992* (Qld) s 289(g); *Mental Health Act 2000* (Qld) s 528(3)(c).

2450 *Privacy Act 1988* (Cth) s 14, Information Privacy Principle 10(1)(c), Information Privacy Principle 11(1)(d); Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.10 Information Privacy Principle 10(1)(c); 3.1.11 Information Privacy Principle 11(1)(d). Note that this also appears consistent with the law in an action for breach of confidence to which it is a defence that the disclosure was required or authorised by statute: The Law Commission, *Breach of Confidence*, Report No 110 (1981) [4.55]. Also note *Data Protection Act 1998* (UK) s 35(1).

2451 This is generally consistent with the formulation used in s 222(4)(c) of the *Disability Services Act 2006* (Qld) and s 55(3)(c) of the *Whistleblowers Protection Act 1994* (Qld) which provide an exception for disclosures made ‘for a proceeding in a court or tribunal’. Also note *Data Protection Act 1998* (UK) s 35(2)(a).

to use the information. The Commission has made a recommendation about the exception for disclosures authorised by the Court or Tribunal below.<sup>2452</sup> Disclosure will also be permitted if it is compelled by a subpoena, for example, for the purpose of a legal proceeding.<sup>2453</sup> The Commission considers the availability of those exceptions sufficient to address this issue.

8.350 The Commission is therefore of the view that section 74(2)(b) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(c) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide an exception for disclosures made ‘for a legal proceeding arising out of or in connection with this Act’. This is largely consistent with the provisions in other jurisdictions.<sup>2454</sup>

#### *Disclosures authorised by the person*

8.351 At present, section 74(2)(d) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(e) of the *Guardianship and Administration Act 2000* (Qld) provide an exception for disclosures that are ‘authorised by the person to whom the information relates’. The Commission considers this exception is appropriate and should be retained.<sup>2455</sup>

8.352 This is consistent with the guardianship legislation in other jurisdictions,<sup>2456</sup> other Queensland statutes,<sup>2457</sup> and the position under the *Privacy Act 1988* (Cth) and IS42.<sup>2458</sup> It is also consistent with the law in relation to breach of confidence under which the confider may, by consent, relieve a confidant from the duty of confidentiality in whole or in part.<sup>2459</sup>

8.353 The retention of this exception raises some further issues for consideration. One issue is whether, in relation to information about an adult with impaired capacity, authorisation can be given on the adult’s behalf by a substitute decision-maker.

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2452 See para 8.360–8.364 of this Report.

2453 This would be covered by the exception for disclosures authorised or required under another law, discussed at para 8.342–8.345 of this Report. Note also that under the law on breach of confidence, it is a defence if the disclosure is made in compliance with a court order: The Law Commission, *Breach of Confidence*, Report No 110 (1981) [4.57].

2454 See para 8.330–8.331 of this Report.

2455 The Commission notes that in Chapter 7 of this Report, it has recommended against the inclusion of an exception permitting an adult or others to authorise the publication of information about a Tribunal proceeding that is otherwise prohibited by the prohibition recommended in that chapter: see para 7.248–7.251 of this Report. Different considerations apply in this context because the recommended prohibition has a much narrower application, applying only to disclosures to the public or a section of the public that identify the adult who is the subject of Tribunal proceedings. Further, in this chapter, the duty imposed is based on information privacy which traditionally recognises that a person can authorise the disclosure of information about him or her.

2456 See para 8.332 of this Report.

2457 See note 2432 of this Report.

2458 *Privacy Act 1988* (Cth) s 14, Information Privacy Principle 10(1)(a), Information Privacy Principle 11(1)(b); Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.10 Information Privacy Principle 10(1)(a); 3.1.11 Information Privacy Principle 11(1)(b).

2459 RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (4th ed, 2002) [41-050]; PD Finn, *Fiduciary Obligations* (1977) [363].

8.354 In the context of the *Privacy Act 1988* (Cth), it is recognised that a formally appointed substitute decision-maker for an adult may exercise the adult's right to access information held about the adult.<sup>2460</sup> This will depend on the terms of the substitute decision-maker's appointment.<sup>2461</sup>

For example, a financial manager appointed under a court or tribunal order should be able to represent the person in relation to decisions about their financial information to the extent authorised by their appointment. However in relation to other types of personal information such as information about lifestyle decisions, a different representative may be more appropriate.

8.355 The Commission is of the view that this would apply equally to the exception for authorised disclosure under the guardianship legislation. Subject to the terms of appointment, a guardian or administrator appointed for a matter has the power to do anything the adult could have done in relation to the matter.<sup>2462</sup> An attorney may also be authorised to do anything in relation to a financial or personal matter that the adult could have lawfully done by an attorney if the adult had capacity for the matter when the power is exercised.<sup>2463</sup>

8.356 Accordingly, a guardian, administrator or attorney for an adult has power to authorise disclosure of relevant information about the adult on the adult's behalf. In doing so, the guardian, administrator or attorney must apply the General Principles, including General Principle 11 which requires the adult's right to confidentiality of information to be recognised and taken into account, but also including the other principles which may, on balance, merit the disclosure of information.<sup>2464</sup>

8.357 The Commission considers this appropriate in ensuring that an adult's inability to provide consent does not hinder the disclosure of information, on authorisation by an appropriate agent, which might be required to advance the adult's interests.

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Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [9.109]–[9.110]; Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) 214–15. Also see, in relation to the *Privacy and Personal Information Protection Act 1998* (NSW), New South Wales Government, Office of the New South Wales Privacy Commissioner, *Best Practice Guide: Privacy and People with Decision-Making Disabilities* (2004) 15; and, in relation to the *Data Protection Act 1998* (UK), United Kingdom Government, Information Commissioner's Office, *Data Protection Act 1998 Legal Guidance* [4.1.7]. This issue is currently being considered in the Australian Law Reform Commission's review of the *Privacy Act 1988* (Cth). In particular, concerns have been raised about the reluctance of some agencies to respect the authority of guardians and administrators in accessing information on behalf of an adult and about the particular difficulties faced by informal decision-makers in accessing information for an adult. See generally Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [9.106]–[9.114].

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New South Wales Government, Office of the New South Wales Privacy Commissioner, *Best Practice Guide: Privacy and People with Decision-Making Disabilities* (2004) 15. Also see Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) 215.

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*Guardianship and Administration Act 2000* (Qld) s 33. Note also, that a guardian or administrator has a right to all the information to which the adult would have been entitled in relation to the matter: *Guardianship and Administration Act 2000* (Qld) s 44.

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*Powers of Attorney Act 1998* (Qld) s 32. Note also, that an attorney has a right to all the information to which the adult would have been entitled in relation to the matter: *Powers of Attorney Act 1998* (Qld) s 81.

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See para 8.310 and note 2390 of this Report.

8.358 Another issue is whether a person can authorise disclosure of information about the person's affairs if the information also relates to the affairs of a third party.<sup>2465</sup> This issue has been dealt with in the context of the personal affairs exemption under the *Freedom of Information Act 1992* (Qld). In that context, it is accepted that information can be disclosed to the extent it can be separated from identifiable information about the affairs of the third party.<sup>2466</sup>

8.359 The Commission is of the view that this approach would appropriately apply in relation to the guardianship legislation. To the extent information about one person is separable from information about a third party, the person may authorise its disclosure. If the information cannot be separated, authorisation from both people would be needed.

#### *Disclosures authorised by the court or Tribunal*

8.360 At present, section 74(2)(e) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(f) of the *Guardianship and Administration Act 2000* (Qld) provide an exception to the duty of confidentiality for disclosures that are authorised by the Supreme Court or Tribunal 'in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered'.<sup>2467</sup>

8.361 The Commission is of the view that this provision is unduly restrictive. A risk of endangerment to a person's life or physical safety is one of many possible justifications for the use or disclosure of otherwise confidential information.<sup>2468</sup> For example, it may be appropriate to allow information that reveals serious misconduct or wrongdoing to be disclosed.<sup>2469</sup> The Commission does not consider it desirable to limit the discretion of the court or Tribunal in this regard. The Commission considers a more appropriate and flexible test would be whether the disclosure is in the interests of justice.<sup>2470</sup>

<sup>2465</sup> This issue was discussed in the Discussion Paper. See Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.100]–[8.101].

<sup>2466</sup> *B' and Brisbane North Regional Health Authority* (1994) 1 QAR 279. Also see *Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556, 565 and *Richardson and Commissioner of Taxation* (2004) 81 ALD 486, 503 in the context of the *Freedom of Information Act 1982* (Cth). This is also broadly consistent with the position under the *Data Protection Act 1998* (UK): see United Kingdom Government, Information Commissioner's Office, *Data Protection Technical Guidance Note: Dealing with subject access requests involving other people's information* (2006).

<sup>2467</sup> Section 74(2)(e) of the *Powers of Attorney Act 1998* (Qld) refers to an authorisation by the Supreme Court, which has jurisdiction under that Act, although s 109A then confers the court's jurisdiction and powers for enduring documents on the Tribunal. Section 249(3)(f) of the *Guardianship and Administration Act 2000* (Qld) refers to an authorisation by the Tribunal, which has jurisdiction under that Act. While s 240 of the *Guardianship and Administration Act 2000* (Qld) expressly preserves the Supreme Court's inherent jurisdiction, the express conferral of jurisdiction on the Tribunal under s 249(3)(f) of that Act may operate to exclude the Court's jurisdiction in that regard.

<sup>2468</sup> Note that the Commission has recommended elsewhere in this chapter that an exception be included in the legislation for disclosures necessary to prevent a serious risk to a person's life, health or safety: see para 8.390–8.394 of this Report.

<sup>2469</sup> Note, for example, that in relation to the equitable duty of confidence, the courts will not enforce the duty in relation to the disclosure of iniquity, 'in the sense of a crime, civil wrong or serious misdeed of public importance': *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 455–6 (Gummow J). See also *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, [173]–[191].

<sup>2470</sup> Note, for example, s 298(2) of the *Juvenile Justice Act 1992* (Qld) which allows the court to authorise disclosure of otherwise confidential information if it would be in the interests of justice.

8.362 This is consistent with the operation of the implied undertaking as to discovered documents in civil litigation.<sup>2471</sup> The court will give leave to use discovered documents in another action in ‘special circumstances’ and where it would ‘not occasion injustice to the party giving discovery’.<sup>2472</sup> Whether there are special circumstances to justify release or modification of the undertaking is a question on the facts of each case.<sup>2473</sup> It is then a matter for the discretion of the court.<sup>2474</sup>

the court’s duty, in an application of this kind, is to consider whether the applicant has shown some circumstance which takes the matter out of the ordinary course, according to which production of documents pursuant to an obligation to make discovery involves the implied undertaking to the court; and, if so, whether an exercise of the court’s discretion in favour of the application would be in the interests of justice.

8.363 The Commission also considers the legislation should clarify that both the Supreme Court and the Tribunal have power to authorise a disclosure in the interests of justice under both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). At present, this is unclear.<sup>2475</sup> The Commission considers it appropriate that a person may approach either the Tribunal or the Supreme Court for authorisation under either statute.

8.364 The Commission proposes that section 74(2)(e) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(f) of the *Guardianship and Administration Act 2000* (Qld) be amended accordingly.

### Possible new exceptions

8.365 In its Discussion Paper, the Commission sought submissions on whether any additional exceptions to the duty of confidentiality should be included in the legislation.<sup>2476</sup>

2471 The implied undertaking is discussed at para 8.183 of this Report.

2472 *Crest Homes PLC v Marks* [1987] AC 829, 860.

2473 Ibid. Note in *Carrington v Sea World Australia Limited* [1992] 2 Qd R 470, Master White held that ‘cogent and persuasive reasons’ must be advanced.

2474 *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576, 687. Also see *Springfield Nominees Pty Limited v Bridgelands Securities Limited* (1992) 38 FCR 217, 225; *Eso Australia Resources Limited v Plowman* (1995) 183 CLR 10, 37 (Brennan J). Note also *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476, 486–7 (Lee J): ‘the duty of the Court is to weigh up the competing considerations of public interest and determine how the interests of justice are best met’.

2475 See note 2467 of this Report.

2476 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.113]–[8.117], [8.146] Q8-6.

### **The legislation in other jurisdictions**

8.366 The guardianship legislation in Tasmania provides an exception to the duty where ‘it is in the best interests of the represented person to disclose the information’.<sup>2477</sup>

8.367 In Victoria and Western Australia, the legislation provides an exception for disclosures to a member of the police force ‘for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence’.<sup>2478</sup>

### **Submissions**

8.368 Some submissions suggested additional circumstances in which disclosure of otherwise confidential information should be permitted.

#### **Adult’s interests**

8.369 Some submissions thought there should be an additional exception for disclosures made in the adult’s interests.<sup>2479</sup>

8.370 In particular, some submissions, including submissions from Caxton Legal Centre and Carers Queensland, considered disclosure should be permitted if it is in the adult’s best interests.<sup>2480</sup> The President of the New South Wales Guardianship Tribunal, for example, expressed the view that any additional exceptions to the duty ‘should be framed in terms of whether the disclosure is necessary to promote the best interests and welfare of the person’.<sup>2481</sup>

8.371 A journalist also submitted that it may be in the public interest to allow disclosure of information, including to a media organisation, where the adult’s best interests are not being met.<sup>2482</sup>

the Act should also allow persons, who are concerned that an adult’s best interests and well-being are not being protected or advanced, to disclose that information to another person or body who may assist the adult.

8.372 The Public Advocate of the Australian Capital Territory was of the view that personal information should generally be kept confidential ‘unless used for the benefit and/or protection of the represented person’.<sup>2483</sup>

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2477 *Guardianship and Administration Act 1995* (Tas) s 86(1)(b). See also *Dependent Adults Act*, RSA 2000, c D–11, s 68(1)(c); *Guardianship and Trusteeship Act*, SNWT 1994, c 29, s 58(1)(b).

2478 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(4); *State Administrative Tribunal Act 2004* (WA) s 157(4).

2479 Submissions 47, 85, 101.

2480 Submissions 100, 101, 107, 124, 137, F5, F6, F15.

2481 Submission 137.

2482 Submission 100.

2483 Submission 99.

8.373 The Queensland Public Advocate considered, however, that an exception for disclosures ‘in the adult’s interest’ would be ‘too broad’ and lacking in precise meaning.<sup>2484</sup>

A person could seek to justify almost any disclosure on the basis that it is somehow in the interests of an adult. It is difficult to envisage that the decision to disclose could be considered incorrect on the basis of this test. Significantly, the degree of seriousness required before disclosure might be appropriate is not indicated.

#### *Health or safety*

8.374 Some submissions thought disclosure would be appropriate in order to prevent harm to the adult.<sup>2485</sup> Attendees at a focus group of adults with impaired capacity, for example, thought disclosure should be permitted if there is a potential for serious medical harm to the adult, such as a threatened suicide, or if abuse may be occurring.<sup>2486</sup>

8.375 Australian Lawyers Alliance considered that disclosure may be appropriate where it is necessary for the adult’s health and safety, for example, in obtaining necessary medical treatment.<sup>2487</sup>

8.376 A submission from Queensland Corrective Services expressed the view that disclosure should be permitted.<sup>2488</sup>

where it is in the best interests of the party and in particular where the non-disclosure might impede the proper health treatment of the party. There may also be occasions where the disclosure of information would be required to prevent injury to another person ...

#### *Police investigation*

8.377 A submission from the Department of Justice and Attorney-General considered there should be an exception to allow disclosure to the police or another law enforcement agency:<sup>2489</sup>

In some instances, a person who gains confidential information because of their involvement in the administration of the Acts, may become aware of circumstances that give rise to a criminal offence or other type of offence, which should be properly investigated by the appropriate law enforcement agency. ... This section should be expanded to include a provision for when information is provided to a member of the police force or other law enforcement agency, for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence.

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2484 Submission 1H. Similar views were expressed by submission F16.

2485 Submissions 28D, F14, F19.

2486 Submission F19.

2487 Submission 97.

2488 Submission 121.

2489 Submission 126.

8.378 Queensland Corrective Services also commented more generally that disclosure may be required as part of the justice process.<sup>2490</sup>

### *Scrutiny of the system*

8.379 A journalist submitted that it is in the public interest to allow disclosure, including to a media organisation, of problems within the guardianship system.<sup>2491</sup>

It should be enshrined in the Act that it is in the interest of the adult and in the public interest generally that abuses of guardianship and administration statutes and perceived problems with Tribunal hearings or procedures be exposed.

8.380 It was also suggested at a focus group of adults with impaired capacity that it should be possible to inform the public if an administrator has acted improperly.<sup>2492</sup>

### *Legal advice and other support*

8.381 Some submissions suggested that disclosure of information should be permitted for the purpose of seeking legal advice or for preparing an application to the Tribunal.<sup>2493</sup>

8.382 Other submissions considered disclosure should be allowed in seeking other advice or support.<sup>2494</sup> Caxton Legal Centre expressed the view, for example, that disclosure should be allowed in seeking counselling, treatment or advice in relation to a person's work with an adult.<sup>2495</sup> Attendees at a focus group of adults with impaired capacity also thought disclosure should be permitted to help an adult obtain advice.<sup>2496</sup>

8.383 One submission expressed the view that carers, guardians and administrators should be able to discuss issues at support and advocacy groups.<sup>2497</sup> This respondent explained that such discussion is important and can be a valuable source of information. Another submission thought guardians and administrators should be able to 'unburden' themselves by speaking with their doctor or priest.<sup>2498</sup> That respondent noted that such disclosures would take place in circumstances of confidence.

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2490 Submission 121.

2491 Submission 100.

2492 Submission F20.

2493 Submissions 26D, F10.

2494 Submissions 74, 124, F7, F20.

2495 Submission 124.

2496 Submission F20.

2497 Submission 74.

2498 Submission F7.

*Inter-agency disclosure*

8.384 A view expressed by the Adult Guardian at a focus group of her staff raised the importance of disclosures between guardianship agencies.<sup>2499</sup> In her view, the confidentiality provisions hinder information-sharing between the Adult Guardian, the Public Advocate and the Community Visitor Program. The Adult Guardian considered these agencies should be able to share information freely. This view was also expressed in some other submissions.<sup>2500</sup> A submission from Guardianship and Administration Reform Drivers, for example, considered that where there is an overlap in investigations conducted by the Adult Guardian and matters of concern to the Public Advocate, the Adult Guardian should collaborate and share relevant information with the Public Advocate.<sup>2501</sup>

8.385 One submission, however, expressed concern about ‘defamatory’ material being ‘spread’ between different agencies.<sup>2502</sup>

**The Commission’s view***Disclosure in the adult’s interests*

8.386 The Commission agrees with the view expressed by the Public Advocate that an exception framed in terms of the ‘adult’s interests’ would be open to subjective interpretation making it unduly broad and imprecise.

8.387 The Commission notes that in many instances, disclosure of information to advance the adult’s interests would be covered by the provision that information may be used for the purposes of the legislation.<sup>2503</sup> As a guardian or administrator for an adult, for example, the obligation to protect the adult’s interests<sup>2504</sup> and to comply with the General Principles would provide wide scope for such disclosures.<sup>2505</sup> This may also apply to other persons performing a function or exercising a power under the legislation. For example, the Adult Guardian’s role under the legislation is to protect the rights and interests of adults with impaired capacity.<sup>2506</sup> Disclosures made by the Adult Guardian in fulfilling that role would be permitted.

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Submission F23.

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Submissions 16B, 24, 86, 108.

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Submission 24.

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Submission 27C.

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See generally para 8.300–8.302 of this Report.

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Section 35 of the *Guardianship and Administration Act 2000* (Qld) provides that a guardian or administrator must exercise power for a matter ‘honestly and with reasonable diligence to protect the adult’s interests’.

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While General Principle 11 requires the adult’s right to confidentiality of information to be recognised and taken into account, the application of the General Principles is a balancing exercise and other principles may take on more weight in the particular circumstances. See generally para 8.309–8.315 of this Report.

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*Guardianship and Administration Act 2000* (Qld) s 174(1).

8.388 The Commission also notes that the issue of whether the legislation, and the General Principles in particular, should include specific references to the adult's best interests will be examined in stage two of the Commission's review.

8.389 The Commission does not therefore consider that an exception for disclosures made in the adult's interests or in the adult's best interests should be included in the legislation.

*Disclosure for health or safety*

8.390 For the reasons expressed above in relation to an exception based on the adult's interests, the Commission considers it undesirable to include an exception based generally on harm to the adult.<sup>2507</sup> However, the Commission recognises there may be situations in which disclosure of information is necessary to avoid serious danger or harm to a person's health or safety. The Commission anticipates a specific exception for such disclosures may be especially appropriate in circumstances of emergency.

8.391 The Commission notes that such disclosures might be covered by other exceptions. For example, if the matter involved is particularly serious, a person may apply to the court or the Tribunal for authorisation of the disclosure in the public interest.<sup>2508</sup> A person might also avoid liability for a disclosure made with 'reasonable excuse'.<sup>2509</sup>

8.392 The Commission notes that IS42 includes a specific exception to allow disclosures where a person's life or health is in immediate danger. Information Privacy Principle 11(1)(c) provides that disclosure is permitted if the person:<sup>2510</sup>

believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person.

8.393 The *Health Services Act 1991* (Qld) also includes an exception to the general obligation of confidentiality imposed by that Act for disclosure authorised by the chief executive because it is 'necessary to assist in averting a serious risk to...the life, health or safety of a person'.<sup>2511</sup>

8.394 The Commission considers the inclusion of a similar exception in the guardianship legislation is appropriate. The Commission does not consider it necessary

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2507 See para 8.387 of this Report.

2508 See para 8.360–8.363 of this Report.

2509 See para 8.472–8.484 of this Report.

2510 Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.11. Also see *Privacy Act 1988* (Cth) s 14, Information Privacy Principle 11(1)(c).

2511 *Health Services Act 1991* (Qld) s 62L.

to require that such disclosures be authorised by the court or Tribunal.<sup>2512</sup> Such a requirement would be particularly impractical in the context of an emergency. The Commission is therefore of the view that section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an exception for disclosures that are necessary to prevent a serious risk to a person's life, health or safety.

#### *Disclosure to seek legal or financial advice*

8.395 The Commission agrees with the view expressed in submissions that disclosures made for the purpose of seeking legal advice should be permitted. The Commission considers this an appropriate adjunct to the existing exception allowing disclosures to be made for a relevant proceeding in a court or tribunal.<sup>2513</sup>

8.396 The *Data Protection Act 1998* (UK), for example, provides that personal data are exempt from the requirement of non-disclosure where disclosure is necessary for the purposes of, or in connection with, legal proceedings or for the purpose of obtaining legal advice.<sup>2514</sup>

8.397 The Commission also considers it appropriate to permit disclosures made for the purpose of obtaining financial advice. In both circumstances, of disclosure for obtaining legal or financial advice, the Commission notes that the disclosure would be protected under the common law by the confidential nature of the communication.<sup>2515</sup> (The Commission has not recommended that secondary disclosure should be covered by the general duty of confidentiality under the guardianship legislation.<sup>2516</sup>)

8.398 The Commission therefore considers section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an exception for disclosures made for the purpose of obtaining legal or financial advice.

#### *Disclosure to police*

8.399 The Commission also agrees with the view of the Department of Justice and Attorney-General that disclosure of information to police for the investigation of an offence should be permitted. The Commission notes that such an exception is included

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At present, s 74(2)(e) of the *Powers of Attorney Act 1998* (Qld) and s 249(3)(f) of the *Guardianship and Administration Act 2000* (Qld) provide that disclosure is permitted if authorised by the court or Tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered. The Commission has recommended that this be amended: see para 8.360–8.363 of this Report.

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See para 8.347–8.350 of this Report.

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*Data Protection Act 1998* (UK) s 35(2).

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A duty of confidence commonly arises either as an express or implied term of the contract between the professional, such as a solicitor, banker or accountant, and his or her client: see *Parry-Jones v Law Society* [1969] 1 Ch 1, 7 (Diplock LJ); *RP Meagher, WMC Gummow and JRF Lehane, Equity Doctrines and Remedies* (4th ed, 2002) [41-015]; and *PD Finn, Fiduciary Obligations* (1977) [303], [309].

2516

See para 8.217–8.220 of this Report.

in the legislation in Victoria and Western Australia and considers a similar exception should be included in the guardianship legislation.<sup>2517</sup>

8.400 The Commission therefore considers section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an exception for disclosures to a member of the police force for the purpose of reporting a suspected offence or assisting in the investigation of a suspected offence.

#### *Disclosure to guardianship agencies and officials*

8.401 The Commission acknowledges the concern expressed in the Adult Guardian's submission that the application of the duty of confidentiality may hinder appropriate information-sharing between guardianship agencies and officials. The Commission also notes that the duty may prevent disclosure of information to such agencies and officials by other persons who are covered by the duty, such as guardians and administrators.

8.402 The Commission considers such disclosure is necessary for the proper functioning of the legislation and, ultimately, for the rights and interests of adults to be promoted and safeguarded. The importance of inter-agency disclosure is expressly recognised in relation to reports by community visitors which may be provided to the Public Advocate and the Adult Guardian.<sup>2518</sup> However, there are no reciprocal provisions in the legislation allowing the Public Advocate or the Adult Guardian to furnish information to each other or to the Community Visitor Program.

8.403 The Commission notes that an exception for inter-agency disclosure is included in the *Mental Health Act 2000* (Qld).<sup>2519</sup> Section 528(3)(b) of that Act provides that a person may disclose information to someone else 'to the extent necessary for the other person to perform that person's functions under or in relation to this Act'.

8.404 A similar exception, for disclosures to 'an official' where the information is 'relevant to the functions being performed by the official' is included in the *Health Services Act 1991* (Qld).<sup>2520</sup>

8.405 The Commission considers a similar exception should be included in the guardianship legislation to clarify that disclosure to and between agencies and statutory officials, relevant to the purposes of the legislation, is permissible. The Commission notes that such disclosures would in many instances be covered by the general provision allowing disclosures to be made for the purposes of the legislation. However, to avoid

<sup>2517</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(4); *State Administrative Tribunal Act 2004* (WA) s 157(4). An exception for disclosures necessary for law enforcement is also included in IS42: Queensland Government, *Information Standard 42 – Information Privacy*, 3.1.11 Information Privacy Principle 11(1)(e). Also see *Privacy Act 1988* (Cth) s 14, Information Privacy Principle 11(1)(e).

<sup>2518</sup> *Guardianship and Administration Act 2000* (Qld) s 230(4).

<sup>2519</sup> That Act imposes a duty of confidentiality on particular persons involved with the Mental Health Review Tribunal: *Mental Health Act 2000* (Qld) s 528.

<sup>2520</sup> *Health Services Act 1991* (Qld) s 62K. Section 62A of that Act imposes a general duty of confidentiality.

any doubt, the Commission considers it appropriate to include a specific exception to this effect.

8.406 The Commission is therefore of the view that section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an exception for disclosure to a statutory official of information relevant to the performance of that statutory official's functions under the guardianship legislation.

#### *Disclosure for counselling or treatment*

8.407 The Commission agrees with the view raised in submissions that it is important for people to be able to discuss otherwise confidential information in the course of seeking counselling, treatment or other support or advice. It is appropriate that people acting as guardians, administrators or attorneys, for example, are able to seek advice and support to assist them in undertaking their role which, at times, may involve significant stress or difficulty. For example, the Commission considers it appropriate for information to be divulged in the course of discussions with a doctor, counsellor or similar professional. The Commission notes that a professional to whom information is disclosed in such circumstances is also likely to be under a common law duty of confidentiality in relation to that information.<sup>2521</sup> (The Commission has not recommended that secondary disclosure should be covered by the general duty of confidentiality under the guardianship legislation.<sup>2522</sup>)

8.408 The Commission is therefore of the view that section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include an exception for disclosures reasonably made for the purpose of obtaining counselling, advice or other treatment.

#### *Media disclosure*

8.409 The Commission notes the view raised in submissions that disclosure of information to the media, for later publication, should be permitted in some circumstances.

8.410 The Commission agrees that media publication is an important accountability mechanism and notes that, at present, a person may disclose de-identified information to a media organisation without infringing the duty of confidentiality imposed by the guardianship legislation.<sup>2523</sup>

8.411 In the absence of a person's authorisation to use confidential information about that person, however, a compelling reason is required to justify a publication identifying that person. As such, the Commission considers it appropriate for authorisation from the court or Tribunal to be sought for such publication. The

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2521 See note 2515 of this Report.

2522 See para 8.217–8.220 of this Report.

2523 The issue of 'de-identification' is discussed at para 8.163 of this Report.

Commission has recommended earlier in this chapter that the court or Tribunal may authorise disclosure of confidential information in the interests of justice.<sup>2524</sup>

## PROVISION SPECIFIC TO THE ADULT GUARDIAN

8.412 As discussed above, the guardianship legislation imposes a duty on persons acting under the legislation to maintain the confidentiality of information gained in that capacity about a person's affairs.<sup>2525</sup> The Commission has recommended that such a duty continue to apply, in modified form, such that a person may use confidential information for the purposes of the legislation, but not for any other purpose.<sup>2526</sup> It has also recommended that the legislation set out other circumstances in which a person may use such information, displacing the obligation to otherwise keep information confidential.<sup>2527</sup>

8.413 A further issue to consider is whether the legislation should include any provisions specific to the Adult Guardian qualifying the operation of the duty. In its Discussion Paper, the Commission sought submissions on whether there should be an exception to the duty specific to the Adult Guardian and, in particular, whether and how such an exception should deal with disclosure of information about an Adult Guardian investigation.<sup>2528</sup>

8.414 At present, section 250 of the *Guardianship and Administration Act 2000* (Qld) provides an additional exception to section 249 in relation to the release of information about investigations conducted by the Adult Guardian. An issue for consideration, examined in this section of the chapter, is whether section 250 should be retained or modified.

### The guardianship legislation

8.415 Section 250 of the *Guardianship and Administration Act 2000* (Qld) permits the Adult Guardian to disclose otherwise confidential information about an investigation if he or she 'is satisfied the disclosure is necessary and reasonable in the public interest'.<sup>2529</sup>

8.416 Such disclosure is subject to certain conditions. First, a disclosure must not be made 'if it is likely to prejudice the investigation'.<sup>2530</sup> Second, a disclosure may express a criticism of an entity only if the entity has been given 'an opportunity to answer the

<sup>2524</sup> See para 8.360–8.364 of this Report.

<sup>2525</sup> See para 8.46 of this Report.

<sup>2526</sup> See para 8.70 of this Report.

<sup>2527</sup> See para 8.250, 8.253 of this Report.

<sup>2528</sup> Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.120]–[8.124], [8.146] Q8-7, Q8-8, Q8-9.

<sup>2529</sup> *Guardianship and Administration Act 2000* (Qld) s 250(1).

<sup>2530</sup> *Guardianship and Administration Act 2000* (Qld) s 250(2).

criticism’.<sup>2531</sup> Third, a disclosure may identify the complainant ‘only if it is necessary and reasonable’ to do so.<sup>2532</sup>

8.417 Section 250 of the *Guardianship and Administration Act 2000* (Qld) provides:

**250 Disclosure of information about investigations**

- (1) Section 249 does not prevent the adult guardian from disclosing information to a person or to members of the public about an issue the subject of an investigation by the adult guardian if the adult guardian is satisfied the disclosure is necessary and reasonable in the public interest.
- (2) However, the adult guardian must not make the disclosure if it is likely to prejudice the investigation.
- (3) In a disclosure under subsection (1), the adult guardian—
  - (a) may express an opinion expressly or impliedly critical of an entity<sup>2533</sup> only if the adult guardian has given the entity an opportunity to answer the criticism; and
  - (b) may identify the complainant, directly or indirectly, only if it is necessary and reasonable. [note added]

## The legislation in other jurisdictions

8.418 The Australian Capital Territory and Tasmania both have Adult Guardian equivalents conferred with similar investigatory functions to the Queensland Adult Guardian.<sup>2534</sup> The Australian Capital Territory official is called the Public Advocate. The Tasmanian official is called the Public Guardian.

8.419 In both of those jurisdictions, the legislation provides an exception to the duty of confidentiality specific to those officials.

8.420 In the Australian Capital Territory, the Public Advocate is prohibited from recklessly recording or divulging certain information other than in specified circumstances.<sup>2535</sup> Section 17 of the *Public Advocate Act 2005* (ACT) provides an additional exemption from the duty of confidentiality in relation to information about the Public Advocate’s investigations. That provision is in substantially the same terms as section 250 of the *Guardianship and Administration Act 2000* (Qld). It provides:

<sup>2531</sup> *Guardianship and Administration Act 2000* (Qld) s 250(3)(a).

<sup>2532</sup> *Guardianship and Administration Act 2000* (Qld) s 250(3)(b).

<sup>2533</sup> Section 36 of the *Acts Interpretation Act 1954* (Qld) provides that in an Act, ‘entity’ includes a person and an unincorporated body.

<sup>2534</sup> *Public Advocate Act 2005* (ACT) s 11(1)(c); *Guardianship and Administration Act 1995* (Tas) s 17.

<sup>2535</sup> *Public Advocate Act 2005* (ACT) s 16.

## 17 Disclosure of information about investigations

- (1) Section 16 does not prevent the public advocate from disclosing information to a person (including members of the public) about an investigation by the public advocate if the public advocate is satisfied that the disclosure is necessary and reasonable in the public interest.
- (2) The public advocate must not make a disclosure mentioned in subsection (1) that is likely to prejudice the investigation.
- (3) In a disclosure mentioned in subsection (1), the public advocate must not—
  - (a) express an opinion that is (expressly or impliedly) critical of a person or body unless the public advocate has given the person, or the principal officer of the body, an opportunity to answer the criticism; or
  - (b) identify the complainant (directly or indirectly) unless it is necessary and reasonable to do so.

8.421 In Tasmania, the Public Guardian is under a duty not to disclose the personal history or records of a represented person.<sup>2536</sup> The guardianship legislation, however, confers discretion on the Public Guardian to disclose such information ‘where in the opinion of the ... Public Guardian it is in the best interests of the represented person to disclose the information’.<sup>2537</sup>

8.422 The other Australian jurisdictions do not include exceptions to the duty of confidentiality specific to their Adult Guardian equivalents.

## Submissions

8.423 Most of the submissions that considered there should be a duty of confidentiality, favoured the inclusion of an exception specific to the Adult Guardian (model 4).<sup>2538</sup>

8.424 In addition, some submissions specifically considered section 250 of the *Guardianship and Administration Act 2000* (Qld). All of those submissions thought the existing exception for disclosures made about an issue the subject of an investigation by the Adult Guardian should generally be retained.<sup>2539</sup> Those respondents included the Adult Guardian, the Public Advocate, the Public Trustee of Queensland and the Department of Justice and Attorney-General.

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<sup>2536</sup> *Guardianship and Administration Act 1995* (Tas) s 86(1).

<sup>2537</sup> *Guardianship and Administration Act 1995* (Tas) s 86(1)(b). See also *Dependent Adults Act*, RSA 2000, c D-11, s 68(1)(c) which includes a similar exception for the Public Guardian in that province.

<sup>2538</sup> For example, submissions 1H, 28E, 44, 47, 60, 67, 74, 85, 120, 122, 126, 127, 135, 137, F22. See para 8.57 of this Report.

<sup>2539</sup> Submissions 1H, 47, 85, 122, 126, 127.

8.425 The Public Advocate expressed the view that such disclosures by the Adult Guardian would seem to be covered by the general exceptions, but that the inclusion of a specific provision, while it seems unnecessary, would provide some certainty for the Adult Guardian about the circumstances in which disclosure is warranted.<sup>2540</sup>

8.426 The Adult Guardian submitted that section 250 is useful in providing explicit authority for the release of information about ongoing investigations, for example, for the purposes of public awareness or education.<sup>2541</sup> In her view, the provision clarifies that this forms part of the Adult Guardian's function to inform the public about the operation of the legislation.<sup>2542</sup>

8.427 In relation to the content of section 250, submissions that addressed the issue thought the Adult Guardian should have discretion to disclose information about an investigation if satisfied the disclosure is necessary and reasonable in the public interest.<sup>2543</sup> Each of those submissions also considered the current requirements that information must not be disclosed if it is likely to prejudice the investigation, and that the identity of the complainant must not be revealed unless it is necessary and reasonable to do so, are appropriate and should be retained.<sup>2544</sup>

8.428 The Department of Justice and Attorney-General also thought the current provision should clarify that the Adult Guardian may de-identify information about an investigation that is disclosed as it relates to persons other than the complainant:<sup>2545</sup>

For example, a current employee of a service provider (who is not the complainant) who provides information to the Adult Guardian about abuse at the service and who fears retribution from other employees may not want to be identified. The Adult Guardian should also be permitted to de-identify any person, agency or other entity referred to in the investigation report and not be limited to just being able to de-identify the complainant.

8.429 Some other submissions thought there may be circumstances in which the identity of the complainant should be revealed.<sup>2546</sup> One submission suggested, for example, that revealing a complainant's identity may help uncover inappropriately motivated complaints, particularly in the context of family disputes.<sup>2547</sup>

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Submission 1H.

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Submissions 122B, 122C.

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Note s 174(2)(h) of the *Guardianship and Administration Act 2000* (Qld) which provides that one of the Adult Guardian's functions is to educate and advise persons about the operation of that Act and of the *Powers of Attorney Act 1998* (Qld).

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Submissions 1H, 47, 85, 122, 126. Note that the Public Trustee of Queensland 'defers to the Adult Guardian' as to the precise content of the criteria upon which such disclosure can be made: submission 127.

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Submissions 1H, 47, 85, 122, 126.

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Submission 126.

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For example, submissions 14, 19A.

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Submission 14.

8.430 Some submissions also considered the current requirement to give a person the opportunity to answer a critical opinion expressed about them by the Adult Guardian before the opinion is disclosed, is appropriate and should be retained.<sup>2548</sup>

8.431 In addition, some submissions thought section 250 of the *Guardianship and Administration Act 2000* (Qld) should clarify that the Adult Guardian may disclose adverse information in relation to an investigation to the person to whom it relates.<sup>2549</sup> The Public Advocate thought, for example, that a provision to this effect would put the question ‘beyond doubt’.<sup>2550</sup> Another submission thought such disclosure should be permitted unless it ‘could reasonably be expected to cause or lead to harm to that person or another’.<sup>2551</sup> One submission was of the view that such a provision should not be included.<sup>2552</sup>

### The Commission’s view

8.432 Section 250 of the *Guardianship and Administration Act 2000* (Qld) applies to the release of information during an investigation but may also be wide enough to apply to disclosures made once an investigation has been completed. These two situations involve different considerations.

8.433 Where the information relates to a concluded investigation, there are three principal scenarios in which the Adult Guardian may wish to make a public disclosure.

8.434 The first involves disclosures made in order to speak generally about issues that have arisen during or out of an investigation, for example, to raise community awareness in relation to the abuse of adults.<sup>2553</sup> This could ordinarily be done without revealing a person’s identity. Such disclosures would not be prevented by the operation of the duty of confidentiality imposed in section 249 as it does not apply if the information could not reasonably be expected to lead to the person’s identification.<sup>2554</sup>

8.435 The second scenario is where information is disclosed in order to speak about a particular investigation in a way that would reveal a person’s identity, for example, in response to public criticism or a media story. To the extent the information is within the

2548 Submissions 1H, 85, 122, 126, 127.

2549 Submissions 1H, 85, 122. Other submissions also commented more generally on the importance of the disclosure of adverse information in according procedural fairness: for example, submissions 4, 14, 19A, 60, 101, F1.

2550 Submission 1H.

2551 Submission 85.

2552 Submission 47.

2553 The Adult Guardian is also able, even in the absence of s 250 of the *Guardianship and Administration Act 2000* (Qld), to engage in general discussion related to a concluded investigation to the extent it relates to his or her function, under s 174(2)(h) of that Act, to educate and advise persons about the operation of the guardianship legislation. Section 249 of the *Guardianship and Administration Act 2000* (Qld) permits disclosure of confidential information for the Act. The Commission has recommended that the general effect of this provision remain but that s 249 be amended to provide that a person may use information for the purposes of the legislation: see para 8.300–8.301, 8.316–8.317 of this Report. Section 249 is set out at para 8.33 of this Report.

2554 *Guardianship and Administration Act 2000* (Qld) s 249(4)(b). See para 8.164–8.166 of this Report. Section 249 is set out at para 8.33 of this Report.

public domain, such disclosure would not be prevented by the duty in section 249. That duty does not apply to information that has already been publicly disclosed.<sup>2555</sup>

8.436 The third scenario is where the disclosure is made in order to speak about a particular investigation in a way that would reveal a person's identity, for the purpose of issuing a warning about a facility or person as an issue of public safety. This would fall within the Adult Guardian's statutory function of protecting adults from neglect, exploitation or abuse. As such, the disclosure would be expressly permitted under section 249. That section allows disclosure of confidential information if it is done for the Act.<sup>2556</sup>

8.437 These disclosures of information connected with a concluded investigation are therefore permitted within the legislative framework even without an express power such as may be currently provided in section 250.

8.438 Even so, the Commission acknowledges that there may be some merit in the Adult Guardian's having such an express power to release information after an investigation is completed. However, the Commission considers this should be considered in the wider context of the Adult Guardian's role and his or her reporting obligations. Specific provisions dealing with the Adult Guardian's power to release information after having carried out an investigation should not be dealt with as part of section 250 but perhaps as part of section 193 of the *Guardianship and Administration Act 2000* (Qld). That section deals with the Adult Guardian's reporting obligations after an investigation is carried out.<sup>2557</sup> The Commission considers section 250 is more appropriately aimed at addressing the specific considerations that arise in relation to the release of information during the course of an investigation.

8.439 In this discussion, the Commission will therefore address section 250 in the context of disclosures made during the course of an investigation. The Adult Guardian's role and his or her reporting obligations and powers once an investigation has been carried out will then be considered in stage two of the Commission's review.

### **The purpose of section 250**

8.440 Section 249 of the *Guardianship and Administration Act 2000* (Qld) imposes a duty of confidentiality on the Adult Guardian which impacts upon the Adult Guardian's ability to disclose information during the course of an investigation. In some circumstances, section 249 would allow disclosure. In particular, the Commission's proposed reformulation of the duty would allow information to be disclosed for the

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2555 *Guardianship and Administration Act 2000* (Qld) s 249(4)(a). The Commission has recommended that the general effect of this provision remain but that it be clarified and reworded to refer to information within the public domain: see para 8.175–8.180 of this Report. Section 249 is set out at para 8.33 of this Report.

2556 *Guardianship and Administration Act 2000* (Qld) s 249(3)(a). The Commission has recommended that the general effect of this provision remain but that s 249 be amended to provide that a person may use information for the purposes of the legislation: see para 8.300–8.301, 8.316–8.317 of this Report. Section 249 is set out at para 8.33 of this Report.

2557 See note 2381 of this Report.

purposes of the Act.<sup>2558</sup> This would permit the disclosure of information where it is necessary for the performance of the Adult Guardian's investigatory functions.<sup>2559</sup>

8.441 However, release of information in the public interest during the course of an investigation is not specifically contemplated by section 249. The Commission considers the inclusion of a provision specifically dealing with such disclosure is appropriate. First, it provides explicit authority for the Adult Guardian to reveal information to the public during the course of an investigation where it is necessary and reasonable in the public interest to do so. While public disclosure would not usually occur, there will be times when it is appropriate.<sup>2560</sup> Such disclosure may be especially important given the Adult Guardian's statutory role of protecting the rights and interests of adults with impaired capacity and in protecting adults from neglect, abuse and exploitation.<sup>2561</sup> This is considered in more detail below.<sup>2562</sup>

8.442 Second, such a provision provides for appropriate limitations on the circumstances in which information of this kind may be publicly released. This is warranted given the investigative context and sensitive nature of the information involved. The Commission reiterates the view expressed in its report in the 1990s that the disclosure of information about investigations should incorporate safeguards 'to ensure fairness to both those who make complaints and those against whom complaints are made'.<sup>2563</sup> This may require consideration of the need to avoid prejudice to the conduct of the investigation, the need to protect the identity of complainants, and the desirability of providing a person with an opportunity to comment on adverse information about them. This is discussed in more detail below.<sup>2564</sup>

8.443 The Commission is therefore of the view that section 250 of the *Guardianship and Administration Act 2000* (Qld) should be retained, subject to modification.

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2558 See para 8.70, 8.301 of this Report.

2559 See para 8.316 of this Report.

2560 It has been said in the context of police investigation, for example, that:

It is important to remember that it is never justifiable in conducting a criminal investigation to take an unnecessary risk. The risks attaching to publicity must be carefully considered in light of the facts of the particular case. If the balance of risk appears to be on the side of a harmful rather than a useful result, then the Investigating Officer will be doing right in keeping his information confidential.

See N Kendal (ed), *Criminal Investigation: A Practical Textbook for Magistrates, Police Officers and Lawyers* (3rd ed, 1934) 202.

2561 *Guardianship and Administration Act 2000* (Qld) s 174(1), (2)(a).

2562 See para 8.444–8.450 of this Report.

2563 Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 414; and Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Discussion Paper, WP 38 (1992) 171.

2564 See para 8.451–8.462 of this Report.

### **Release of information in the public interest**

8.444 Section 250(1) of the *Guardianship and Administration Act 2000* (Qld) currently provides that the Adult Guardian is not prevented by section 249 of the Act from disclosing information about an issue the subject of an investigation to a person or to members of the public if satisfied the disclosure is necessary and reasonable in the public interest.<sup>2565</sup>

8.445 Release of otherwise confidential information during an investigation is not a step that should be taken lightly. However, there will be occasions when it is in the public interest to do so. For example, it may be in the public interest, for the protection of the community, to issue a statement about a facility under investigation.<sup>2566</sup>

if an investigation into a residential care facility reveals conditions of neglect or abuse, the Adult Guardian may wish to issue a warning about the facility.

8.446 It may equally be in the public interest to release information to allay unfounded criticisms about a person or facility. The Commission therefore considers it appropriate that the Adult Guardian have power to release information about an investigation if it is necessary and reasonable in the public interest.

8.447 The Commission considers, however, that this power should specifically enable the disclosure of information ‘to the public or a section of the public’.<sup>2567</sup> This would obviously not preclude the disclosure of information to a person.<sup>2568</sup> The release of information to the public during an investigation has a different complexion to disclosures made in other contexts due to the nature of the investigative function. As noted above, public disclosure of information during an investigation is not a step that should be taken lightly.<sup>2569</sup>

8.448 Disclosure to persons other than the public during an investigation, however, is not neatly distinguishable from disclosures made in other contexts. For example, the question whether the Adult Guardian should be able to share information with another official or agency arises generally and not only in the specific context of investigations. Such disclosure can be adequately dealt with under section 249 of the Act<sup>2570</sup> and without the need for a specific provision in section 250.

8.449 The Commission also considers section 250 should be amended to clarify that it applies in relation to ongoing investigations. As noted above, disclosure of information when an investigation has concluded is a matter for other provisions.<sup>2571</sup>

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2565 Section 250 of the *Guardianship and Administration Act 2000* (Qld) is set out at para 8.417 of this Report.

2566 Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Discussion Paper, WP 38 (1992) 171.

2567 The scope of this phrase is discussed in detail at para 7.119–7.129 of this Report.

2568 See para 8.440, 8.448 of this Report.

2569 See para 8.441 and note 2560 of this Report.

2570 See para 8.317 of this Report.

2571 See para 8.437–8.438 of this Report.

The Commission notes, in particular, section 193 of the *Guardianship and Administration Act 2000* (Qld) which deals with the Adult Guardian's reporting obligations when an investigation has been carried out. The scope of section 193 of the Act will be a matter for examination in stage two of the Commission's review.<sup>2572</sup>

8.450 The Commission is therefore of the view that section 250(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that section 249 does not prevent the Adult Guardian from disclosing information to the public or a section of the public about an issue the subject of an ongoing investigation if the Adult Guardian is satisfied the disclosure is necessary and reasonable in the public interest.

**Factors in deciding whether disclosure is necessary and reasonable in the public interest**

8.451 While section 250 of the *Guardianship and Administration Act 2000* (Qld) allows the Adult Guardian to make disclosures he or she considers necessary and reasonable in the public interest, it confines the circumstances in which such disclosures can be made.

8.452 Section 250(2) provides that the Adult Guardian must not make such a disclosure if it is likely to prejudice the investigation.<sup>2573</sup> Section 250(3) provides that, in a disclosure under section 250(1), the Adult Guardian:

- may identify the complainant only if it is necessary and reasonable; and
- may express an opinion expressly or impliedly critical of an entity only if the entity has been given an opportunity to answer the criticism.

8.453 These provisions identify legitimate concerns.

8.454 It would clearly undermine the Adult Guardian's investigative role if disclosure of information to the public under section 250 prejudiced the conduct of the investigation. This may include considerations, for example, of the need to protect sources of information or prevent the destruction of evidence.

8.455 It might also be appropriate to protect the identity of a complainant. In its report in the 1990s, the Commission alluded to a complainant's possible fear of repercussions in making a complaint.<sup>2574</sup> The Public Advocate has also reported the following examples of retribution against complainants in the context of complaints about service providers:<sup>2575</sup>

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<sup>2572</sup> See para 8.530 of this Report.

<sup>2573</sup> Section 250 of the *Guardianship and Administration Act 2000* (Qld) is set out at para 8.417 of this Report.

<sup>2574</sup> See Queensland Law Reform Commission, *Assisted and Substituted Decisions*, WP43 (1995) 188; and Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report 49 Vol 1 (1996) 414.

<sup>2575</sup> Public Advocate, *Annual Report 2003–04* (2004) 27.

For service users, they include being openly chided, ignored, having personal possessions removed, deliberate provocation, and threats of withdrawing services. Staff who complain may suffer gossip, ostracism, be allocated unpleasant tasks, lose casual rostering opportunities, and be overlooked for promotion and higher duties.

8.456 The Adult Guardian has also commented that complainant anonymity is important in encouraging revelations of abuse to be made.<sup>2576</sup>

8.457 The Commission also notes the concern expressed in submissions that other persons who provide information to investigators may also be at risk of reprisals. It may also be appropriate to protect the identity of such people when information is publicly released during an investigation.

8.458 In the interests of fairness, it may also be appropriate to provide an opportunity for a person to comment on any adverse information about them before it is publicly disclosed. This recognises that the public nature of the disclosure may give rise to a risk of reputational or financial harm.<sup>2577</sup> The Adult Guardian's obligation to accord procedural fairness would not normally arise until the stage of the investigation at which a finding adverse to a person is being contemplated.<sup>2578</sup> To require otherwise would be to stifle the investigator's functions.<sup>2579</sup>

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See, for example, Adult Guardian, *Annual Report 2005–06* (2006) 19.

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See *Annetts v McCann* (1990) 170 CLR 596, 608 (Brennan J):

Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made.

'The same is true of business or commercial reputation': see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577 (Mason CJ, Dawson, Toohey and Gaudron JJ). Also note the following comment from GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 46:

Even if a proceeding is of a preliminary nature the rules of natural justice may thus be invoked in appropriate circumstances. ... The closer ... the proceedings get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially and the greater the importance of observing the maxim *audi alteram partem*.

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*Annetts v McCann* (1990) 170 CLR 596, 610 (Mason CJ, Deane and McHugh JJ):

the coroner's duty to allow a person to make such a submission arises only when the coroner has reached the stage of contemplating the making of an unfavourable finding against that person. It is only at that stage that the coroner is bound to give that person notice of the possible finding and to allow that person an opportunity to submit why the finding should not be made.

Also see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578 (Mason CJ, Dawson, Toohey and Gaudron JJ), citing *The State of South Australia v O'Shea* (1987) 163 CLR 378, 389 (Mason CJ):

It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness'.

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See *Cornall v AB (A solicitor)* [1995] 1 VR 372, 396. Also see GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 44:

If there were a plurality of hearings and the opportunity to make representations and counter-representations, nothing could be done simply, quickly and cheaply. ... That which has to be avoided is a series of minor trials which hold up the final hearing indefinitely.

8.459 Such a finding would usually be reported at the conclusion of the investigation.<sup>2580</sup> However, there may be occasions where disclosure during the course of an investigation is warranted.

8.460 The Commission considers the Adult Guardian should retain discretion in deciding whether a disclosure during the course of an investigation is necessary and reasonable in the public interest. It is important that the investigative task is not unduly frustrated. The release of information to the public during the course of an investigation is one aspect of that investigative task. It is therefore appropriate to preserve the investigator's ability to strike a balance between the concerns of privacy and fairness, the objectives of the investigation and the safety of the public.

8.461 The Commission considers this is best achieved by requiring the Adult Guardian to have regard to the concerns discussed above in deciding, under section 250(1), whether the disclosure is necessary and reasonable in the public interest.

8.462 The Commission is therefore of the view that section 250(2) and section 250(3) of the *Guardianship and Administration Act 2000* (Qld) should be omitted and a new provision inserted in section 250 to the effect that, in deciding if the disclosure is necessary and reasonable in the public interest under section 250(1), the Adult Guardian must have regard to:

- the likely prejudice to the investigation of making the disclosure;
- whether there is a need to protect the identity of a complainant or another entity; and
- any circumstances of urgency.

8.463 Provision should also be made in section 250 to the effect that if the disclosure would include disclosure of information that is adverse to an entity and procedural fairness would ordinarily require the Adult Guardian to give the entity notice of the information and an opportunity to comment on it, the Adult Guardian:

- must have regard to that fact in deciding if the disclosure is necessary and reasonable in the public interest; but
- may decide the disclosure is necessary and reasonable in the public interest even if the entity is not given notice of the information and an opportunity to comment on it.

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Note s 193 of the *Guardianship and Administration Act 2000* (Qld) which requires the Adult Guardian to make a written report after he or she has carried out an investigation and give a copy of the report to certain persons.

## LIABILITY FOR BREACH

8.464 Other issues raised by section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) are those of liability for, and defences to, breaches of the duty of confidentiality. This section of the chapter considers those issues.

### Offence and penalty

8.465 One issue to consider is whether it is appropriate for the legislation to provide that it is an offence to breach the duty of confidentiality imposed by the guardianship legislation. Another issue for consideration is whether the maximum penalty stipulated for breach of the duty should be consistent between the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).

### The guardianship legislation

8.466 At present, it is an offence to breach the duty of confidentiality imposed by the guardianship legislation.<sup>2581</sup> The legislation stipulates a maximum penalty of 200 penalty units (currently \$15,000) under section 74 of the *Powers of Attorney Act 1998* (Qld) and 100 penalty units (currently \$7,500) under section 249 of the *Guardianship and Administration Act 2000* (Qld).<sup>2582</sup>

### The legislation in other jurisdictions

8.467 The legislation in other Australian jurisdictions under which a duty of confidentiality is imposed, also provide that it is an offence to breach the duty.<sup>2583</sup>

### Submissions

8.468 The Commission did not expressly seek views about whether it should be an offence to breach the prohibition, however, some submissions addressed the issue of penalty.

8.469 One respondent considered that generally any breach of the confidentiality provisions in the guardianship legislation should result in enforceable penalties against

<sup>2581</sup> *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1). Those provisions are set out at para 8.32–8.33 of this Report. See s 41 of the *Acts Interpretation Act 1954* (Qld) which provides, inter alia, that a penalty specified at the end of a subsection indicates that a contravention of the subsection constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) by a penalty not more than the specified penalty.

<sup>2582</sup> *Penalties and Sentences Act 1992* (Qld) s 5.

<sup>2583</sup> Some provisions expressly make it an offence to breach the duty of confidentiality: *Public Advocate Act 2005* (ACT) s 16(2); *Guardianship and Administration Act 1993* (SA) s 80(1); *Guardianship and Administration Act 1995* (Tas) s 86(4); and *State Administrative Tribunal Act 2004* (WA) s 157(2). Other provisions stipulate a penalty for non-compliance with the duty of confidentiality: *Guardianship and Management of Property Act 1991* (ACT) s 66D(2); *Guardianship Act 1987* (NSW) s 101; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(2); and *Guardianship and Administration Act 1990* (WA) s 113(1).

those in breach.<sup>2584</sup> Another respondent, who had been informed of the maximum penalty under section 249 of the *Guardianship and Administration Act 2000* (Qld), noted that large organisations are better able to afford to pay such a penalty than individuals.<sup>2585</sup>

### **The Commission's view**

8.470 The Commission considers it appropriate that the guardianship legislation continue to provide that it is an offence to breach the duty of confidentiality imposed by section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld).

8.471 The Commission also considers the maximum penalty stipulated in those provisions should be consistent between each statute and so, in accordance with its recommendations in Chapters 4<sup>2586</sup> and 7,<sup>2587</sup> considers the maximum penalty for a breach of the duty of confidentiality should be 200 penalty units.

### **Defences**

8.472 Another issue to consider is whether the guardianship legislation should include, in addition to the exceptions provided in the legislation and any defences or excuses that may be available under the *Criminal Code* (Qld), any further protection against liability for breach of the duty of confidentiality.

8.473 As described elsewhere in this chapter, section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) contain several exceptions to the duty of confidentiality, allowing information to be disclosed in particular circumstances.<sup>2588</sup> The Commission has also recommended that a number of additional exceptions be included<sup>2589</sup> and that the duty be reformulated to provide that a person may use confidential information for the purposes of the legislation, but not for any other purpose.<sup>2590</sup>

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2584 Submission 38B. Although not specifically raised in the context of a breach of the duty of confidentiality, submission F11 expressed similar views.

2585 Submission 40C. Similar views were expressed in relation to the maximum penalty for a breach of other confidentiality provisions in the *Guardianship and Administration Act 2000* (Qld) by submission 124.

2586 See para 4.358 of this Report.

2587 See para 7.260 of this Report.

2588 See para 8.255, 8.326 of this Report.

2589 See generally para 8.386–8.408 of this Report.

2590 See para 8.70 of this Report.

8.474 In its Discussion Paper, the Commission sought submissions on whether the legislation should be amended to include a defence for disclosures made with ‘reasonable excuse’.<sup>2591</sup> This section of the chapter considers this issue.

### **The guardianship legislation**

8.475 The guardianship legislation does not currently include a defence for disclosures made with a reasonable excuse. Neither does the legislation include any specific defences or excuses for breach of the duty of confidentiality.<sup>2592</sup>

8.476 In relation to obligations of confidentiality imposed or required with respect to the Tribunal, however, the *Guardianship and Administration Act 2000* (Qld) currently includes ‘reasonable excuse’ provisions which the Commission has recommended be retained.<sup>2593</sup>

### **The legislation in other jurisdictions**

8.477 None of the other Australian jurisdictions provides any additional protection from liability for disclosures made with a reasonable excuse.

### **Submissions**

8.478 Few submissions responded to this issue.

8.479 The Public Advocate, the Public Trustee of Queensland and Caxton Legal Centre submitted that a ‘reasonable excuse’ provision should be included in the legislation.<sup>2594</sup>

8.480 Caxton Legal Centre expressed the view that such a provision should be introduced ‘for the sake of consistency, and given the fact that this guardianship arena is subject to such complex and unpredictable factual situations’.<sup>2595</sup>

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2591 Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives*, Discussion Paper, WP 60 (2006) [8.117], [8.146] Q8-6.

2592 Note, however, s 105 of the *Powers of Attorney Act 1998* (Qld) which allows the court to relieve attorneys from ‘personal liability’ for breaches of that Act if the court considers the attorney ‘has acted honestly and reasonably and ought fairly to be excused for the breach’. Similar provision is made in s 58 of the *Guardianship and Administration Act 2000* (Qld) in relation to prosecution of a guardian or administrator for failure to comply with Chapter 4 (Functions and powers of guardians and administrators) of that Act. Provision for protection from civil liability is included in s 248 of the *Guardianship and Administration Act 2000* (Qld).

2593 Section 109(6) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must not contravene a confidentiality order made by the Tribunal ‘unless the person has a reasonable excuse’. Section 112(3) of that Act provides that a person must not, ‘without reasonable excuse’, publish information about a proceeding or disclose the identity of a person involved in a proceeding. The Commission has recommended that these ‘reasonable excuse’ provisions be retained. See para 4.368–4.372, 7.270–7.271 of this Report.

2594 Submissions 1H, 124, 127.

2595 Submission 24. Also note submission 149 which commented that it is difficult to see where to draw the line with exceptions to the duty.

8.481 The Public Advocate submitted that illustrative examples of a reasonable excuse should also be included.<sup>2596</sup>

### **The Commission's view**

8.482 As discussed above, the guardianship legislation includes a number of exceptions to the duty of confidentiality imposed in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld).<sup>2597</sup> The Commission has also recommended in this chapter that several additional exceptions be included in the legislation<sup>2598</sup> and that the duty itself be reformulated to clarify that information may be used for the purposes of the legislation.<sup>2599</sup>

8.483 These exceptions provide a guide to what might constitute a reasonable excuse but are not exhaustive. The Commission agrees with the view expressed by Caxton Legal Centre that a defence for disclosures made with a reasonable excuse should be introduced to accommodate the complexity and unpredictability of the situations that may be involved. The Commission also notes that this would be consistent with its recommendations elsewhere in this Report that a 'reasonable excuse' defence should be retained for breaches of section 109 orders and the recommended prohibition on publication of information about Tribunal proceedings.<sup>2600</sup>

8.484 The Commission therefore proposes that section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) be amended to include a defence of disclosures made with a reasonable excuse.

## **MISCELLANEOUS ISSUES**

8.485 Some of the submissions received by the Commission raised particular issues about the operation of the duty of confidentiality that were not specifically addressed in the Discussion Paper. These issues related to:

- the application of the duty to information about deceased persons;
- the development of administrative policies by the Tribunal to facilitate the consistent and efficient disclosure of documents after a proceeding has concluded; and
- education and awareness about the operation of the duty.

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2596 Submission 1H.

2597 See para 8.231, 8.250 of this Report.

2598 See generally para 8.386–8.408 of this Report.

2599 See para 8.70 of this Report.

2600 Section 109 of the *Guardianship and Administration Act 2000* (Qld) is considered in Chapters 4, 5, and 6 of this Report. Section 112 of the *Guardianship and Administration Act 2000* (Qld) is considered in Chapter 7 of this Report. In relation to 'reasonable excuse' see para 4.368–4.372, 7.270–7.271 of this Report.

8.486 This section of the chapter considers those issues.

## Information about deceased persons

### Submissions

8.487 One submission raised the question of how long the duty of confidentiality should last and whether it should continue to apply if the adult whose information is protected has died.<sup>2601</sup> This respondent suggested that if the reason for imposing the duty of confidentiality is the protection of the adult's best interests, there would be no need for confidentiality if the adult has died.

### The guardianship legislation

8.488 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) apply to information about a 'person's affairs'.<sup>2602</sup>

8.489 Under the *Acts Interpretation Act 1954* (Qld), a reference in an Act to a 'person' includes a reference to a 'natural person'.<sup>2603</sup> The Federal Privacy Commissioner has expressed the view that, in the context of the *Privacy Act 1988* (Cth), a 'natural person' means a living person.<sup>2604</sup> This does not appear to have been tested judicially.

### The legislation in other jurisdictions

8.490 The guardianship statutes in other Australian jurisdictions are silent as to whether the duty of confidentiality ceases to apply if the person whose information is protected dies.

### The Commission's view

8.491 It has been said that 'deceased persons have no privacy interests'.<sup>2605</sup>

This is presumably on the basis that the *raison d'être* for privacy protection no longer exists, since dead people can feel no shame or humiliation.

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2601 Submission 27D.

2602 *Powers of Attorney Act 1998* (Qld) s 74(4); *Guardianship and Administration Act 2000* (Qld) s 249(4). See para 8.150–8.155 of this Report.

2603 *Acts Interpretation Act 1954* (Qld) s 36 (definitions of 'person' and 'individual').

2604 Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) 281. Also see Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [3.41]. Note that *The Macquarie Dictionary* (revised 3rd ed, 2001) defines 'natural person' as 'an individual human being (opposed to *artificial person*)'. Note also Queensland Government, *Information Standard 42 – Information Privacy Guidelines* (2001) 21:

'Individual' means a natural person; that is, a living person. Although personal information about dead people is not technically considered to be personal information, agencies are encouraged to respect the sensitivities of family members when using or disclosing it.

2605 P Roth, 'Privacy proceedings and the dead' (2004) 11 *Privacy Law and Policy Reporter* 31.

8.492 This is reflected in the law of defamation under which causes of action for the publication of defamatory matter about a deceased person are currently barred.<sup>2606</sup>

8.493 In contrast, the *Freedom of Information Act 1992* (Qld) protects information concerning the personal affairs of a person ‘whether living or dead’.<sup>2607</sup> The Australian Privacy Foundation has also suggested that protection for the information of deceased persons should be provided in the *Privacy Act 1988* (Cth), noting ‘the potential for distress to relatives from disclosures about individuals’.<sup>2608</sup>

8.494 This issue raises conflicting views. On one view, for example, a person who has died no longer has an interest in the protection of information about himself or herself. On another view, the ethical responsibility not to misuse personal information gained in the course of performing a particular role should not necessarily be lifted merely because the person to whom the information relates has died.

8.495 The Commission notes that the Australian Law Reform Commission is currently examining this question in relation to the *Privacy Act 1988* (Cth).<sup>2609</sup> The Commission considers it prudent to revisit this issue after the Australian Law Reform Commission has reported on its review. In this way, the Commission can ensure consistency with the policy approach recommended by that Commission in relation to Australia’s principal piece of privacy legislation. The Commission will therefore consider this issue in stage two of its review. The Commission notes, however, that it has made recommendations about this issue in a different context in Chapter 7.<sup>2610</sup>

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*Defamation Act 2005* (Qld) s 10. Also see *Krahe v TCN Channel Nine Pty Ltd* (1986) 4 NSWLR 536, 541 (Hunt J). Also note M Tugendhat et al, ‘Publication of Personal Information’ in M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) 119 [4.55]: ‘If the breach of privacy alleged is of the invasive type and the damages sought are to compensate hurt feelings, then the cause of action is personal and should die with the claimant’.

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*Freedom of Information Act 1992* (Qld) s 44(1). See also *Freedom of Information Act 1982* (Cth) s 41(1). Also note the existence of some legislative mechanisms to protect the medical information of deceased persons from disclosure: see note 1894 of this Report.

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Australian Privacy Foundation, *Submission to the Office of the Privacy Commissioner Review of the Private Sector Provisions of the Privacy Act 1998* (2004) <<http://www.privacy.gov.au/act/review/revsub90.pdf>> at 27 June 2007. Also see generally Australian Government, Office of the Privacy Commissioner, *Getting in on the Act: The review of the private sector provisions of the Privacy Act 1998* (March 2005) 282–3; and Senate Legal and Constitutional References Committee, Parliament of Australia, *The real Big Brother: Inquiry into the Privacy Act 1988* (June 2005) [5.75].

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Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [3.41]–[3.47], 5 Q3-5.

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In Chapter 7 of this Report, the Commission recommends that an exception to the prohibition on publication of information about a Tribunal proceeding to the public or a section of the public that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published be provided where the adult has died: see para 7.252–7.254 of this Report. However, the recommended prohibition has as its main purpose preventing harm to the adult through publication of information about the adult that identifies him or her to the public, and this prohibition only relates to information disclosed during a quasi-judicial proceeding that is held in public. Given the significance of the principle of open justice, the Commission considers that such an exception is justified in that context. Different considerations apply in relation to the general duty of confidentiality where the information gained could relate to any person, not just the adult, and has been received by virtue of a person’s role under the guardianship legislation.

## Administrative policies to facilitate post-hearing disclosure

### Submissions

8.496 Some submissions that commented on the duty of confidentiality expressed concerns about post-hearing access to information held by the Tribunal.

8.497 Some submissions expressed the view that the person involved in Tribunal proceedings should be able to access transcripts of Tribunal proceedings and information contained in Tribunal files after the conclusion of a Tribunal proceeding.<sup>2611</sup>

8.498 For example, a submission from Guardianship and Administration Reform Drivers made the following comment:<sup>2612</sup>

The File Inspection Presidential Direction does not allow access to a Tribunal file in a matter for which a decision has been made. This is problematic as it means that a party seeking advice on a potential appeal of a decision is unable to obtain copies of documents that may be referred to in the reasons.

8.499 Guardianship and Administration Reform Drivers also submitted that access to Tribunal transcripts is similarly important in the context of appeals.<sup>2613</sup>

8.500 The Public Advocate also submitted that the Public Advocate should be entitled to receive a copy of Tribunal transcripts and files upon request to the Tribunal.<sup>2614</sup> In her view, access to such material ‘would facilitate the performance of [her] statutory functions’.

8.501 It was indicated by some submissions that the Tribunal has applied section 249 of the *Guardianship and Administration Act 2000* (Qld) to requests for copies of transcripts.<sup>2615</sup> (The Commission also understands that the Tribunal applies section 249 of the Act to the post-hearing disclosure of information contained in Tribunal files.<sup>2616</sup>)

8.502 A submission from the Freedom of Information and Privacy Unit of the Department of Justice and Attorney-General (the ‘Unit’), which is the lead agency for IS42,<sup>2617</sup> suggested that the Tribunal should consider developing an administrative

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2611 For example, submissions 1F, 24, 25, 38A and B, 48B, F7.

2612 Submission 24.

2613 Ibid.

2614 Submission 1F.

2615 For example, submissions 1F, 25I.

2616 See Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, ‘General Information in relation to the Inspection of Files and Confidentiality Orders’ (amended 9 January 2007). The Commission also understands the Tribunal generally considers post-hearing access to information contained on Tribunal files should be confined to persons who were active parties for the proceeding: information provided by the President of the Guardianship and Administration Tribunal, 5 June 2007. This is reflected in the Presidential Direction.

2617 ‘IS42’ is the Queensland Government’s administrative standard on privacy, Information Standard 42. See para 8.11–8.16 of this Report.

policy to deal with requests for access to such information.<sup>2618</sup>

There is a need for access to information from the Tribunal, though this needs to be balanced with privacy. The Unit considers the best way to achieve this is through an administrative policy developed by the Tribunal that can be implemented by the Registry staff. Such a policy would need to be carefully scrutinised and designed. The Unit considers it is well-placed to offer its expertise in advising the Tribunal in the development of such a policy.

8.503 The Unit commented that an administrative access policy would need to take into account the Tribunal's legislative confidentiality obligations and could also adopt the privacy principles of IS42. The submission considered that:<sup>2619</sup>

An administrative access policy would give members of the community some certainty, promote transparency and public confidence in the Tribunal, and put people at ease about providing information to the Tribunal by feeling confident their information would be treated respectfully.

8.504 The Unit also outlined some of the principles that should be considered in developing such a policy:

- Where possible, people should be able to access information about themselves.
- An access scheme should not prohibit disclosure of information just because the information is 'shared personal information'.
- Generally, if a person's connection to the adult or the proceeding allows them to attend a hearing and see documents, there should be confidence in giving the person access to documents after the hearing.
- Similarly, if a person is permitted to inspect a document, then it would follow that the person also be entitled to have a copy of that document.
- Internal review of decisions about access should be available and those options should be communicated to the person seeking access.

### ***The Commission's view***

8.505 Prior to and during the course of a Tribunal hearing, disclosure of information in connection with Tribunal proceedings is dealt with by particular provisions.<sup>2620</sup> These are discussed elsewhere in the Commission's Report.<sup>2621</sup> This section of the chapter is concerned with post-hearing disclosure to active parties and others in circumstances where there is no legislative impediment to such disclosure.

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<sup>2618</sup> Submission F25.

<sup>2619</sup> Ibid.

<sup>2620</sup> For example, *Guardianship and Administration Act 2000* (Qld) ss 108, 109, 112.

<sup>2621</sup> See Chapters 4–6 of this Report dealing with Tribunal hearings, documents and Tribunal decisions and reasons respectively and Chapter 7 in relation to the publication of information about Tribunal proceedings.

### *Active parties*

8.506 Earlier in this chapter, the Commission recommended that section 249 of the *Guardianship and Administration Act 2000* (Qld) and section 74 of the *Powers of Attorney Act 1998* (Qld) be amended to provide that the duty of confidentiality does not apply to the disclosure of information about Tribunal proceedings, including the disclosure of information by the Tribunal to active parties or to persons who were active parties in a proceeding that has been finalised.<sup>2622</sup>

8.507 The Commission has also recommended, in Chapter 7 of this Report, that the prohibition contained in section 112 of the *Guardianship and Administration Act 2000* (Qld) be amended to apply only to the publication of information about proceedings, to the public or a section of the public, that is likely to lead to the identification of the adult by a member of the public or a member of the section of the public to whom the information is published.<sup>2623</sup> This would prevent public disclosures but would not impact on the Tribunal's ability to disclose information to a person with a sufficient interest in the information, such as a person who was an active party to the proceeding.<sup>2624</sup>

8.508 The consequence of this is that, unless a relevant confidentiality order has been made under section 109 of that Act,<sup>2625</sup> there will be no legislative impediment to the post-hearing disclosure of information connected with a Tribunal proceeding to persons who were active parties for that proceeding.

8.509 The Commission is of the view that after the conclusion of a Tribunal hearing, active parties should be given access to the documents that were before the Tribunal, other than where a confidentiality order would prevent it. This is essential, in particular, for an active party's right of appeal to be exercised.<sup>2626</sup>

8.510 The Commission considers the removal of the current legislative impediments to such access as it has recommended in this Report, as outlined above,<sup>2627</sup> should be sufficient to ensure active parties are given appropriate post-hearing access to information contained on the Tribunal file.

8.511 In stage two of the review, the Commission will revisit this issue and, in particular, the question whether the legislation should provide an express right of post-hearing document inspection to active parties.<sup>2628</sup>

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2622 See para 8.99–8.103 of this Report.

2623 See para 7.204 of this Report.

2624 See para 7.163–7.165 of this Report.

2625 Section 109 of the *Guardianship and Administration Act 2000* (Qld) is examined in Chapters 4–6 of this Report in relation to the confidentiality of Tribunal hearings, documents, and decisions and reasons respectively.

2626 The right of appeal against a Tribunal decision in a proceeding is dealt with in s 164 of the *Guardianship and Administration Act 2000* (Qld).

2627 See para 8.506–8.508 of this Report.

2628 This issue is also discussed in Chapter 5 of this Report. See para 5.7, 5.238 of this Report.

### *Non-parties*

8.512 As noted above, the Commission has recommended, earlier in this chapter, that the duty of confidentiality in section 249 of the *Guardianship and Administration Act 2000* (Qld) and section 74 of the *Powers of Attorney Act 1998* (Qld) should not apply to the disclosure of information about Tribunal proceedings.<sup>2629</sup> The Commission considered that the disclosure of such information should be regulated by the prohibition on publishing information about Tribunal proceedings contained in section 112 of the *Guardianship and Administration Act 2000* (Qld) and by any restrictions imposed under section 109(2) of that Act. As noted above, one aspect of the prohibition the Commission has recommended in section 112 is that it would prevent only disclosures to the public or a section of the public that are likely to lead to the identification of the adult by a member of the public or member of the section of the public to whom the information is published.<sup>2630</sup> The provision would permit, for example, disclosures to persons who have a sufficient interest in the receiving that information.<sup>2631</sup>

8.513 Accordingly, other than where a relevant confidentiality order has been made under section 109 or where disclosure is prohibited by section 112, there will be no legislative impediment to the post-hearing disclosure to non-parties of information disclosed in a Tribunal hearing.

### *Facilitation of access*

8.514 To facilitate the post-hearing access of information connected with Tribunal proceedings to active parties and others in these circumstances, the Commission considers it desirable for the Tribunal to develop an information access policy. Such a policy could streamline the process of obtaining commonly sought after documents. Such policies are often used in the context of the *Freedom of Information Act 1992* (Qld).<sup>2632</sup> The Commission considers it desirable that decisions in relation to post-hearing access to information be made consistently and in accordance with a policy that is available to the public.

8.515 The Commission notes that post-hearing access to documents contained on a Tribunal file is briefly discussed in the Tribunal's Presidential Direction on file

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2629 See para 8.100–8.103, 8.185 of this Report.

2630 See para 8.507 of this Report.

2631 See para 7.163–7.165 of this Report.

2632 In the context of the *Freedom of Information Act 1992* (Qld), administrative release of documents is used as a 'streamlining' method for 'more commonly-requested categories of information'. The Queensland Information Commissioner has encouraged the development of such policies where there is a recurring demand for access to the particular type of information and provided no substantial harm would be occasioned by its disclosure. See Information Commissioner Queensland, 'Administrative release of documents', *vOICe: News from the Office of the Information Commissioner*, Issue 3 (September 2003) 1, 3–4 <[http://www.oic.qld.gov.au/indexed/voice/vOICe\\_3.pdf](http://www.oic.qld.gov.au/indexed/voice/vOICe_3.pdf)> at 27 June 2007. Note that the *Freedom of Information Act 1992* (Qld) does not apply to the judicial or quasi-judicial functions of the Tribunal: See para 8.19 of this Report.

inspection.<sup>2633</sup> The Commission considers a more comprehensive policy on post-hearing access should be developed and that such a policy should, in particular, note that active parties are able to access documents on the Tribunal file after the hearing.

8.516 The Commission therefore agrees with the view of the Freedom of Information and Privacy Unit of the Department of Justice and Attorney-General (the 'Unit') that the Tribunal should give consideration to the development of an information access policy. The Commission recommends that the Tribunal liaise with the Unit in this regard. In particular, the Commission is of the view that an access policy would improve public confidence in the Tribunal.

8.517 The Commission also considers that in developing an access policy, the Tribunal should give consideration to the principles outlined in the Unit's submission and to the following principles, identified by the Commission as being of particular importance to the issue of confidentiality in the guardianship system:<sup>2634</sup>

- The guardianship legislation should provide for a greater level of openness than that which currently exists.
- The adult is entitled to know and have access to information about himself or herself.
- The greater the involvement and interest by a person in the life of the adult, the greater claim that person has to receive information about the adult.

8.518 If developed, the Commission recommends that any administrative access policy be publicised by the Tribunal, including on its website or the website of the Department of Justice and Attorney-General.

8.519 The Commission is also of the view that it would be appropriate for an internal review mechanism to apply to decisions made, in accordance with such a policy, about the disclosure of information to a particular person. Where such decisions are made by the Registrar, the Commission considers the decision should be subject to review by the Tribunal as is currently provided for in relation to decisions made by the Registrar about a 'matter'.<sup>2635</sup> The Commission considers that the *Guardianship and Administration Act 2000* (Qld) should be amended accordingly.

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2633 Guardianship and Administration Tribunal, *Presidential Direction No 1 of 2005*, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (amended 9 January 2007). This document is available on the Tribunal's internet homepage <<http://www.justice.qld.gov.au/guardian/gaat.htm#6>> at 27 June 2007.

2634 See para 3.156 of this Report.

2635 See *Guardianship and Administration Act 2000* (Qld) ss 160–162.

## Education and awareness

### Submissions

8.520 Some submissions raised concerns about a general lack of understanding and awareness of the confidentiality obligations under the guardianship legislation.

8.521 At a focus group held with members of the Tribunal, one member commented that professionals, including attorneys and lawyers, have had difficulty understanding the confidentiality provisions of the legislation.<sup>2636</sup> In his view, it would be ‘safe to assume that lay people are having problems’. Attendees at a focus group held with staff of the Community Visitor Program also expressed concern about understanding of the scope of the general duty of confidentiality.<sup>2637</sup>

8.522 An attendee at a community forum submitted that people need to know what their responsibilities are ‘so they can get on with things’.<sup>2638</sup>

8.523 Carers Queensland submitted:<sup>2639</sup>

The lack of support offered to people to understand the current system generally, and of specific relevance to this discussion, the confidentiality requirements, means that people may also unwittingly contravene the current system’s strict confidentiality requirements governing the disclosure of information. However, the first that the party generally hears of these confidentiality provisions is when they are warned of a penalty for having breached them.

8.524 Some submissions commented, for example, that explanations of the confidentiality requirements are not given at Tribunal hearings.<sup>2640</sup> An attendee at a community forum considered that the Tribunal should be taking more steps to make people aware of the confidentiality provisions.<sup>2641</sup>

8.525 A submission from Queensland Corrective Services suggested that guidelines or other written publications on the confidentiality provisions be made available.<sup>2642</sup> An attendee at a community forum suggested that the requirements of confidentiality and disclosure be made more explicit through the Tribunal’s forms.<sup>2643</sup> This respondent also commented on the need to accommodate people from different ethnic backgrounds.

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2636 Submission F17.

2637 Submission F24A.

2638 Submission F14.

2639 Submission 101.

2640 For example, submissions 51, 110.

2641 Submission F14.

2642 Submission 121.

2643 Submission F13.

### **The Commission's view**

8.526 The persons to whom the general duty of confidentiality applies must be aware of the duty and have an understanding of its scope and operation. The Commission understands that internal training on the general duty of confidentiality is already conducted by the various guardianship agencies and officials. It also understands that efforts are made, where possible, by these agencies and officials to educate the wider community, including substitute decision-makers, about this duty.

8.527 The Commission considers, however, that further education is desirable. Accordingly, the Commission considers steps should be taken by the Department of Justice and Attorney-General to provide accessible information about the general duty of confidentiality to substitute decision-makers and others to whom the duty applies.

8.528 In particular, the Commission considers that resources will need to be provided by the Department so that members and staff of the Tribunal, the Adult Guardian and his or her staff, the Public Advocate and his or her staff, community visitors and other staff of the Community Visitor Program can receive further training on the scope and operation of the duty imposed under section 249 of the *Guardianship and Administration Act 2000* (Qld). Such training should also be available to attorneys, guardians and administrators to whom the duty also applies, including staff of the Public Trustee of Queensland. The Commission does not make any recommendation about the form such training should take but considers it should be designed in collaboration with the guardianship agencies and officials.

8.529 The Commission acknowledges that these steps will have resource implications but considers they are necessary to ensure the confidentiality obligations are properly understood and followed. This is especially important given the possible criminal consequences for breach of a confidentiality provision.

### **FUTURE ISSUES**

8.530 A number of submissions that addressed the general duty of confidentiality raised other matters of concern that fall outside the scope of this stage of the Commission's review. In particular, the following matters were raised:

- Substitute decision-makers' rights to information – concerns were expressed about the enforceability of the right of guardians and administrators to information about the adult, from service providers for example, under section 44 of the *Guardianship and Administration Act 2000* (Qld) and about the difficulties faced by informal substitute decision-makers in gaining access to information to assist them in performing their role.<sup>2644</sup>

<sup>2644</sup>

For example, submissions 10A, 24, 40A, 41, 52, 60, 107, 120, F2. Section 44 of the *Guardianship and Administration Act 2000* (Qld) provides that a person who has custody or control of information to which the adult would have been entitled if he or she had capacity, must give the information to the guardian or administrator, unless the person has a reasonable excuse. That section overrides any legislative or common law restriction on disclosure of the information: *Guardianship and Administration Act 2000* (Qld) s 44(6). Similar provision is made in s 81 of the *Powers of Attorney Act 1998* (Qld).

- The application of the *Freedom of Information Act 1992* (Qld) – concerns were expressed about the *Freedom of Information Act 1992* (Qld) being unavailable to seek access to information held by the Tribunal and the Adult Guardian.<sup>2645</sup>
- Investigation reports by the Adult Guardian – views were expressed about the level of detail required to be included in an investigation report under section 193 of the *Guardianship and Administration Act 2000* (Qld) and the persons to whom such reports should be given.<sup>2646</sup>
- Site reports by community visitors – the view was expressed that the legislation should clarify the Community Visitor Program’s obligations and powers to provide site reports to particular people, such as the Adult Guardian, and whether reports can be made orally.<sup>2647</sup>
- Whistleblower protection for complaints made to community visitors – concern was expressed about the current lack of protection from possible reprisals afforded to people who raise concerns about a site with community visitors.<sup>2648</sup>
- Community visitors’ right to information – concern was expressed about the enforceability of the right of community visitors to information from service providers under section 227 of the *Guardianship and Administration Act 2000* (Qld).<sup>2649</sup>
- Investigations by the Adult Guardian – concerns were raised about the Adult Guardian’s investigative function and, in particular, whether the Adult Guardian should make and follow up on findings in relation to past instances of abuse or neglect in addition to focusing on future risks.<sup>2650</sup>

8.531 These issues will be considered, and further submissions sought, in stage two of the Commission’s review. The Commission wishes to thank the respondents for highlighting these matters. As mentioned elsewhere in this chapter, other issues to be

<sup>2645</sup> For example, submissions 38B, 48A, 57, 65, 117, F7. The *Freedom of Information Act 1992* (Qld) has a limited application to information held by the Tribunal and the Adult Guardian: see para 8.18–8.19 of this Report. Also note the Commission’s recommendation that the Tribunal consider developing an administrative policy dealing with access to some types of information: see para 8.516 of this Report.

<sup>2646</sup> Submissions 24, 126, F23. Section 193 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian must make a written report after an investigation or audit and give a copy to every attorney, guardian, or administrator for the adult and, upon request and at the person’s expense, to any interested person.

<sup>2647</sup> Submission F24A. Section 230 of the *Guardianship and Administration Act 2000* (Qld) provides that a community visitor must prepare a report on each site visit and give a copy of the report to the chief executive. The chief executive must give a copy of the report to the person in charge of the site and may also give a copy to the consumer (if the report relates to a complaint), the Adult Guardian, the Public Advocate, and the director of mental health. Also note the Commission’s recommendation that an exception be included in s 249 of that Act for disclosure to a statutory official of information relevant to the performance of that statutory official’s functions under the legislation: see para 8.401–8.406 of this Report.

<sup>2648</sup> Submission F24A.

<sup>2649</sup> *Ibid.* Section 227 of the *Guardianship and Administration Act 2000* (Qld) provides that a community visitor may require a person in charge of, employed at, or providing services at a visitable site to answer questions and produce documents. Unless the person has a reasonable excuse, they must comply with such a requirement.

<sup>2650</sup> Submission 40B.

considered in stage two include the questions whether the General Principles should include an express reference to the adult's best interests,<sup>2651</sup> whether guardians and administrators should be explicitly required to consult with the adult and members of the adult's support network,<sup>2652</sup> and whether the duty of confidentiality should apply to a person's information after the person has died.<sup>2653</sup> The Commission will also consider the Adult Guardian's reporting obligations and powers after he or she has carried out an investigation.<sup>2654</sup>

8.532 A number of submissions also raised concerns about the operation of the *Privacy Act 1988* (Cth). In particular, submissions expressed concern about the difficulty faced by substitute decision-makers, particularly those acting informally, in accessing information from service providers, financial institutions and others to whom the *Privacy Act 1988* (Cth) applies.<sup>2655</sup> One submission made the following comment:<sup>2656</sup>

The law rightly recognises that, in most cases, informal support for decision making is appropriate. However, the experience of those families and carers present at the Forum suggests that public, non-government and commercial organisations involved with the person with a decision-making disability are failing to acknowledge and respect the authority of informal decision-makers. In their transactions with the individual these entities increasingly eschew informal decision-making mechanisms involving support from the person's family and friends and prefer to instead pursue statutory based options.

...

As a result, families are wrongly forced to resort to the formal substitute decision-making framework in order to gain access to rights that should be available to them as informal substitute decision-makers.

8.533 While the second stage of the Commission's review will include consideration of informal decision-making under the guardianship legislation, the operation of the *Privacy Act 1988* (Cth) is outside the scope of the Commission's review.

8.534 The Commission notes that these concerns have been recognised by the Australian Law Reform Commission in the context of its current review of the *Privacy Act 1988* (Cth)<sup>2657</sup> and considers that review the appropriate forum for dealing with this matter. The Commission therefore encourages the Australian Law Reform Commission to give particular consideration to substitute decision-makers' access to information in its review.

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2651 See para 8.388 of this Report.

2652 See para 8.304 of this Report.

2653 See para 8.495 of this Report.

2654 See para 8.439 of this Report.

2655 For example, submissions 27B, 104, 130, F1, F2.

2656 Submission F1.

2657 Australian Law Reform Commission, *Review of Privacy*, Issues Paper No 31 (2006) [9.106]–[9.114] Q9-3.

8.535 The Commission also notes that similar issues are likely to arise in the context of the application of IS42 and considers that the Queensland Government should give consideration to substitute decision-makers' access to information under IS42, having regard to any recommendations the Australian Law Reform Commission may make in its review of the *Privacy Act 1988* (Cth).

## RECOMMENDATIONS

8.536 The Commission makes the following recommendations:

### ***The general duty of confidentiality***

**8-1 Provisions to the effect of section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should generally be retained, subject to some modification.<sup>2658</sup>**

**8-2 The provision in section 74(1) of the *Powers of Attorney Act 1998* (Qld) and section 249(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person to whom the section applies may use confidential information for the purposes of the Act but not for any other purpose, removing the references to disclosure and making a record.<sup>2659</sup> A definition of 'use' should be added to those Acts for the purpose of those provisions to clarify that 'use' includes disclosure.<sup>2660</sup>**

<sup>2658</sup>

See para 8.65 of this Report. Also note, in particular, that the Commission has recommended the following:

- Section 249 of the *Guardianship and Administration Act 2000* (Qld) should continue to apply to members and staff of the Tribunal, the Adult Guardian and his or her staff and consultants, the Public Advocate and his or her staff, guardians, administrators, and community visitors (see para 8.95, 8.97, 8.110 of this Report);
- Section 74 of the *Powers of Attorney Act 1998* (Qld) and s 249 of the *Guardianship and Administration Act 2000* (Qld) should continue to apply to information about a person's affairs other than statistical or other information that could not reasonably be expected to result in the identification of the person to whom it relates (see para 8.155, 8.165–8.166 of this Report); and
- The exception provided in s 74(2)(d) of the *Powers of Attorney Act 1998* (Qld) and s 249(3)(e) of the *Guardianship and Administration Act 2000* (Qld) for disclosures authorised by the person to whom the information relates should be retained (see para 8.351 of this Report).

Also note that the Commission has not made any recommendations about the exception provided in s 74(2)(f) of the *Powers of Attorney Act 1998* (Qld) and s 249(3)(g) of the *Guardianship and Administration Act 2000* (Qld). The Commission anticipates this exception, for disclosure of confidential information to the Commission for the purposes of its review, will be repealed after the completion of the final stage of the Commission's review of the guardianship legislation. See para 8.31 of this Report.

<sup>2659</sup>

See para 8.70–8.214 of this Report.

<sup>2660</sup>

See para 8.214 of this Report.

**8-3** The provision in section 74 of the *Powers of Attorney Act 1998* (Qld) should continue to apply to attorneys, including statutory health attorneys.<sup>2661</sup> The provision in section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to apply exhaustively to the persons currently listed in section 249(2) and to staff of the Community Visitor Program.<sup>2662</sup>

**8-4** The provision in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the duty of confidentiality does not prevent the disclosure of confidential information to the person to whom the information relates.<sup>2663</sup>

#### ***Information to which the duty applies***

**8-5** The provision in section 74 of the *Powers of Attorney Act 1998* (Qld) should continue to apply to confidential information gained because of being or an opportunity given by being an attorney. The provision in section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to clarify that it applies to confidential information gained because of being or an opportunity given by being a person to whom that section applies.<sup>2664</sup>

**8-6** The definition of ‘confidential information’ for the provision in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to replace the words ‘information already publicly disclosed’ with the words ‘within the public domain’.<sup>2665</sup>

**8-7** The provision in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the duty of confidentiality imposed by those sections does not apply to the disclosure or publication of information about a Tribunal proceeding. This includes disclosure of information by the Tribunal to the active parties to a Tribunal proceeding or to persons who were active parties to a proceeding that has been finalised. Disclosure and publication of information about Tribunal proceedings is to be governed by the provisions currently contained in sections 112 and 109(2) of the *Guardianship and Administration Act 2000* (Qld).<sup>2666</sup>

<sup>2661</sup> See para 8.70, 8.110, 8.115 of this Report.

<sup>2662</sup> See para 8.95–8.96, 8.110 of this Report.

<sup>2663</sup> See para 8.71–8.74 of this Report.

<sup>2664</sup> See para 8.146 of this Report.

<sup>2665</sup> See para 8.180 and 8.155, 8.159, 8.166 of this Report.

<sup>2666</sup> See para 8.103, 8.185 of this Report.

### ***The conduct to which the duty applies***

- 8-8 The provision in section 74(1) of the *Powers of Attorney Act 1998* (Qld) and section 249(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to omit the words ‘recklessly or intentionally’.<sup>2667</sup>
- 8-9 Section 193 of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that a person, other than a person to whom the duty of confidentiality in section 249 of that Act or section 74 of the *Powers of Attorney Act 1998* (Qld) applies, must not publish information about a person contained in a report made under section 193, and that has been de-identified, to the public or a section of the public if the information is likely to lead to the identification of that person by a member of the public or a member of the section of the public to whom the information is published.<sup>2668</sup>

### ***Exceptions to the duty***

- 8-10 In light of recommendation 8-2, the provision in section 74(2)(a) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(a) of the *Guardianship and Administration Act 2000* (Qld) will be unnecessary and should be omitted.<sup>2669</sup>
- 8-11 The provision in section 74(2)(c) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(d) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide for disclosures that are authorised or ‘required’ under a regulation or another law. The provision in section 249(3)(b) of the *Guardianship and Administration Act 2000* (Qld) should be omitted.<sup>2670</sup>
- 8-12 The provision in section 74(2)(b) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(c) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide for disclosures made for a legal proceeding arising out of or in connection with the Act.<sup>2671</sup>

2667 See para 8.216 of this Report.

2668 See para 8.227 of this Report.

2669 See para 8.301 of this Report.

2670 See para 8.345 of this Report.

2671 See para 8.350 of this Report.

**8-13** The provision in section 74(2)(e) of the *Powers of Attorney Act 1998* (Qld) and section 249(3)(f) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide for disclosures authorised by the Supreme Court or the Tribunal in the interests of justice. Those provisions should be amended to clarify that both the Supreme Court and the Tribunal can authorise a disclosure under each of those Acts.<sup>2672</sup>

**8-14** The provision in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include the following exceptions to the duty of confidentiality for disclosures:

- (a) necessary to prevent a serious risk to a person's life, health or safety;<sup>2673</sup>
- (b) made for the purpose of obtaining legal or financial advice;<sup>2674</sup>
- (c) to a member of the police force for the purpose of reporting a suspected offence or assisting in the investigation of a suspected offence;<sup>2675</sup>
- (d) to a statutory official of information relevant to the performance of that statutory official's functions under the *Powers of Attorney Act 1998* (Qld) or the *Guardianship and Administration Act 2000* (Qld);<sup>2676</sup> and
- (e) reasonably made for the purpose of obtaining counselling, advice or other treatment.<sup>2677</sup>

***Provision specific to the Adult Guardian***

**8-15** Section 250 of the *Guardianship and Administration Act 2000* (Qld) should be retained, subject to modification.<sup>2678</sup>

<sup>2672</sup> See para 8.361–8.364 of this Report.

<sup>2673</sup> See para 8.394 of this Report.

<sup>2674</sup> See para 8.397 of this Report.

<sup>2675</sup> See para 8.400 of this Report.

<sup>2676</sup> See para 8.406 of this Report.

<sup>2677</sup> See para 8.408 of this Report.

<sup>2678</sup> See para 8.443 of this Report.

- 8-16** Section 250(1) of the *Guardianship and Administration Act 2000* (Qld) should be amended to provide that the duty of confidentiality imposed by the provision in section 249 of the Act does not prevent the Adult Guardian from disclosing information to the public or a section of the public about an issue the subject of an ongoing investigation if the Adult Guardian is satisfied the disclosure is necessary and reasonable in the public interest.<sup>2679</sup>
- 8-17** Sections 250(2) and 250(3) of the *Guardianship and Administration Act 2000* (Qld) should be omitted and a new provision inserted in section 250 to the effect that, in deciding if the disclosure is necessary and reasonable in the public interest under section 250(1), the Adult Guardian must have regard to:<sup>2680</sup>
- (a) the likely prejudice to the investigation;
  - (b) whether there is a need to protect the identity of a complainant or another entity; and
  - (c) any circumstances of urgency.
- 8-18** Provision should also be made in section 250 of the *Guardianship and Administration Act 2000* (Qld) to the effect that, if the disclosure of information under section 250(1) would include disclosure of information that is adverse to an entity and procedural fairness would ordinarily require the Adult Guardian to give the entity notice of the information and an opportunity to comment on it, the Adult Guardian:
- (a) must have regard to that fact in deciding whether the disclosure is necessary and reasonable in the public interest; but
  - (b) may decide the disclosure is necessary and reasonable in the public interest despite the entity not being given notice of the information and an opportunity to comment on it.<sup>2681</sup>

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2679 See para 8.447–8.450 of this Report.

2680 See para 8.461–8.462 of this Report.

2681 See para 8.463 of this Report.

***Liability for breach***

- 8-19** It should continue to be an offence to breach the duty of confidentiality imposed by the provision in section 74 of the *Powers of Attorney Act 1998* (Qld) or section 249 of the *Guardianship and Administration Act 2000* (Qld) and the maximum penalty stipulated for breach of those sections should be 200 penalty units.<sup>2682</sup>
- 8-20** The provision in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) should be amended to include disclosures made with a reasonable excuse as a defence to breach of the duty of confidentiality.<sup>2683</sup>

***Miscellaneous issues***

- 8-21** The Tribunal should liaise with the Freedom of Information and Privacy Unit of the Department of Justice and Attorney-General to consider developing a policy for the post-hearing access of information by active parties and others.<sup>2684</sup>
- 8-22** If developed, the Tribunal should publicise any information access policy it develops, including on its website or the website of the Department of Justice and Attorney-General.<sup>2685</sup>
- 8-23** A provision should be included in the *Guardianship and Administration Act 2000* (Qld) to provide that a decision made by the Registrar in accordance with an administrative post-hearing information access policy can be reviewed by the Tribunal in accordance with the provisions in sections 160 to 162 of the Act.

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2682 See para 8.470–8.471 of this Report.

2683 See para 8.482–8.484 of this Report.

2684 See para 8.514–8.516 of this Report.

2685 See para 8.518 of this Report.

**8-24** The Department of Justice and Attorney-General should provide accessible information about the duty of confidentiality imposed by the provision in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) to substitute decision-makers and others to whom the duty applies. In particular, the Department should provide resourcing for further training, designed in collaboration with the guardianship agencies and officials, on the scope and operation of the duty to:<sup>2686</sup>

- (a) members and staff of the Tribunal;
- (b) the Adult Guardian and his or her staff; and
- (c) community visitors and other staff of the Community Visitor Program.

**8-25** The Department of Justice and Attorney-General should also make such training available to attorneys, guardians and administrators, including staff of the Public Trustee of Queensland.<sup>2687</sup>

#### ***Future issues***

**8-26** The Australian Law Reform Commission should give particular consideration to substitute decision-makers' access to information in its current review of the *Privacy Act 1988* (Cth).<sup>2688</sup>

**8-27** Queensland Government should give consideration to substitute decision-makers' access to information under Information Standard 42, having regard to any recommendations the Australian Law Reform Commission may make in its current review of the *Privacy Act 1988* (Cth).<sup>2689</sup>

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<sup>2686</sup> See para 8.526–8.528 of this Report.

<sup>2687</sup> See para 8.528 of this Report.

<sup>2688</sup> See para 8.532–8.534 of this Report.

<sup>2689</sup> See para 8.535 of this Report.

# Appendix 1

## Terms of reference

**A review of the law in relation to the General Principles, the scope of substituted decision-making, the role of the support network, adequacy of investigative powers, health and special health matters, and other miscellaneous matters, under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998***

1. I, LINDA LAVARCH, Attorney-General and Minister for Justice, having regard to—

- the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity;
- the need to ensure that the powers of guardians, administrators and other officers or bodies established by the legislation are sufficiently extensive to protect the interests of an adult with impaired capacity;
- the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts;
- the need to ensure that adults are not deprived of necessary health care because they have impaired capacity;
- the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or wellbeing, or that is in their best interests;
- the need to ensure that the confidentiality provisions that apply to the proceedings and decisions of the Guardianship and Administration Tribunal and other decisions under the *Guardianship and Administration Act* strike the appropriate balance between protecting the privacy of persons affected by the Tribunal's proceedings and decisions and promoting accountability of the Tribunal;
- the fact that some parents of a person with impaired capacity (whether or not an adult), may wish to make a binding direction, appointing a guardian or administrator for a matter for the adult, that applies if the parents are no longer alive or are no longer capable of exercising a power for a relevant matter for the adult;

refer to the Queensland Law Reform Commission (the Commission), for review pursuant to section 10 of the *Law Reform Commission Act 1968*—

- (a) the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* including but not limited to:
    - the General Principles;
    - the scope of personal matters and financial matters and of the powers of guardians and administrators;
    - the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
    - the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
    - the processes for review of decisions;
    - consent to special medical research or experimental health care; and
    - the law relating to advance health directives and enduring powers of attorney; and
    - the scope of the decision-making power of statutory health attorneys; and
    - the ability of an adult with impaired capacity to object to receiving medical treatment; and
    - the law relating to the withholding and withdrawal of life-sustaining measures;
  - (b) the confidentiality provisions of the *Guardianship and Administration Act 2000*;
  - (c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity;
  - (d) whether there are circumstances in which the *Guardianship and Administration Act 2000* should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.
2. In performing its functions under this reference, the Commission is asked to prepare, if relevant, draft legislation based on the Commission's recommendations.

3. The Commission is to provide a report to the Attorney-General and Minister for Justice on the confidentiality provisions by June 2007, and a report on all other matters by the end of 2008.

**The Hon Linda Lavarch MP**  
**Attorney-General and Minister for Justice**

## Appendix 2

### Membership of the Reference Group

The Reference Group is chaired by the Honourable Justice Roslyn Atkinson, Chairperson of the Queensland Law Reform Commission. The membership of the Reference Group as at June 2007 is:

Ms Paige Armstrong, Manager, Community Advocacy and Support Unit, Endeavour Foundation (nominee of ACROD)

Ms Pam Bridges, Residential Care Manager, Aged Care Queensland

Mrs Pat Cartwright, Manager, Community Visitor Program

Mr Mark Crofton, Official Solicitor to the Public Trustee

Ms Madonna Cuthbert, Director, Policy and Legislation, Queensland Health

Dr Chris Davis, Director, Geriatric Medicine and Rehabilitation, The Prince Charles Hospital (nominee of Australian Medical Association (Queensland))

Ms Margaret Deane, Chief Executive Officer, Queensland Aged and Disability Advocacy Inc

Mr John Dickinson, Chief Executive Officer, Brain Injury Association of Queensland

Ms Susan Gardiner, President, Guardianship and Administration Tribunal

Ms Marianne Gevers, Vice-President, Alzheimer's Australia (Qld) Inc

Ms Michelle Howard, Public Advocate

Mrs Bronwyn Jerrard, Principal Legal Consultant, Strategic Policy, Department of Justice and Attorney-General

Mr Stephen Lin, Legal Advocacy Worker, Queensland Advocacy Inc

Ms Karinya Louttit, Communications Officer, Queensland Alliance

Ms Catherine O'Malley, Acting Director, Legal Policy Branch, Disability Services Queensland

Mr Michael O'Neill, Chief Executive, National Seniors

Ms Dianne Pendergast, Adult Guardian

Mr Graham Schlecht, Executive Director, Carers Queensland

Professor Lindy Willmott, Faculty of Law, QUT

Note: The recommendations contained in this Report are those of the Commission and do not necessarily reflect the views of the members of the Reference Group.

## Appendix 3

### List of submissions

The Commission received 260 submissions from 150 individuals and organisations prior to the release of this Report.

Aboriginal and Torres Strait Islander Legal Service (Qld South)	Department of Justice and Attorney- General
Acfield, Ms Laraine	Devine, Ms Kathleen A
Alt, Ms Christine	Dillon, Ms Alison
Appleyard, Mr Laurence	Disability Services Queensland, Department of Communities
Aspergers Syndrome Support Network	Doherty, Ms Jacqueline
Australian Broadcasting Corporation	Douglas, Mr Graham & Mrs Elspeth
Australian Lawyers Alliance	Douglas, Mr James
Australian Press Council	Dover, Liga
Bartlett, Mr Alan	Dunne, Mr Brien
Bates, Mr Garry	Dunne, Mr Michael
Berryman, Mrs Jessie	Ebenezer, Mr Terry & Mrs Kay
Betts, Ms Tammy	Eichmann, Ms Libby
Bischof, Mr Harold & Mrs Irene	Endeavour Foundation
Bond, Mr Laurence & Mrs Grace	Festival of Light Australia
Booth, Mrs Barbara	Free TV Australia
Briais, Ms Della	Freeman, Ms Anita
Brown, Mr Stephen Graham	Geldard, Mr Paul
Buchanan, Mr James M	Gerrard, Ms Annette
Burow, Ms Jess	Gevers, Ms Marianne
Butler, Mr Bill	Goessling, Mr John & Mrs Janet
Cahill, Ms Maureen	Gould, Mr Lewis
Carers Queensland	Greentree, Mr Kevin
Caxton Legal Centre	Guardianship and Administration Reform Drivers (GARD)
Cerebral Palsy League of Queensland	Guest, Ms Henriette
Community Visitor Program	Handyside, Ms Ann
Conaghan, Mr Mark	Hardy, Ms Connie
Connolly, Mr Peter	Hart, Mr John
Courier-Mail, The	Henderson, Mr Alastair
Cowper, Ms Elizabeth	Henderson, Ms Alison
Croll, Mr Trevor	Hobbs, Ms Jo
Cullen, Mrs Enid	Hollingsworth, Mr Neil
Curtis, Ms Karen (Federal Privacy Commissioner)	Horne, Mr Brendan
Cutler, Ms Gwentyth	Howard, Ms Michelle (Public Advocate, Queensland)
Davis, Mr Ross	Hunt, Mr Farne
Daymon, Ms Lynne	Irving, Ms Lynn
de Voss, Mr Vincent	
Dennison, Mr Cyril	

Jazazievska, Ms Bogica  
 Jefferis, Ms Elaine  
 Johnson, Evan & Debra  
 Kawak, Ms Norma  
 Keim SC, Mr Stephen  
 Kennett, Ms Fay  
 Killin, Ms Gabriel  
 Klein, Mr Greg (Public Trustee of  
 Queensland)  
 Krome, Mr H  
 Kynaston, Dr Bruce  
 Lang, Ms Jude  
 Loveday, Mr & Mrs  
 McBryde, Ms Jennifer  
 McDowall, Ms Claudia  
 McFarlane, Ms Elizabeth  
 McMahan, Ms Olivia  
 McMullen, Ms Sheryl  
 Maddison, Ms Felicity  
 Moller, Mrs Edith  
 Moore, Ms Dianne  
 Morris, Mr Fred  
 Morrison, Mr Paul  
 Mudaliar, Ms Janine  
 Nationwide News  
 Nimmo, Ms Wendy  
 Nitz, Ms Dianne  
 O'Brien, Mr Pat  
 O'Brien, Ms Val  
 O'Connor, Mr Tony  
 Parker, Ms Penny  
 Pendergast, Ms Dianne (Adult  
 Guardian, Queensland)  
 Peterson, Mr Doug  
 Phillips, Ms Anita (Public Advocate,  
 ACT)  
 Queensland Advocacy Incorporated  
 Queensland Aged and Disability  
 Advocacy Inc  
 Queensland Corrective Services  
 Queensland Health  
 Queensland Law Society  
 Rafter, Ms Carmen  
 Reid, Ms Marion  
 Rex, Ms Rosalene  
 Reynolds, Mr Neil  
 Right to Life Australia  
 Robinson, Ms Diane (President, NSW  
 Guardianship Tribunal)  
 Roper, Ms Angelina  
 Royal College of Nursing Australia  
 Sargeant, Ms Bianca  
 Scully, Ms Paula  
 Shemlowski, Ms Trish  
 Sims, Mr Harley  
 Slinko, Ms Eugenia  
 Smith, Ms Anita (President, Tasmanian  
 Guardianship and Administration  
 Board)  
 Sunshine Coast Citizen Advocacy  
 Tincknell, Mrs Jean  
 Torrens, Ms Gail  
 Toten, Mrs Catherine  
 Trappett, Dr Laurence  
 Treble, Mr John  
 Turnbull, Ms Katrina  
 Turner, Ms Rose  
 Tyrrell, Mr Darcy  
 Uni Research  
 von Schrader, Mr Matthaues  
 Walker, Ms Judy  
 Walsh, Cr Mary  
 Watchtower Bible and Tract Society of  
 Australia  
 Watkins, Mr Col  
 Wenck, Dr Drew  
 Wenham, Ms Margaret  
 Widdicombe, Dr Neil  
 Willis, Mr Andrew  
 Williams, Mr J J  
 Williams, Ms Karen  
 Williamson, Mr Allan  
 Williamson, Mrs Beverley  
 Williamson, Mr Edward  
 Woodgate, Mr Jonathon  
 Wurth, Mr Mark  
 The Commission also received  
 submissions from five individuals who  
 asked not to be identified.

## Appendix 4

### List of community forums and focus groups

Forum No	Forum	Location	Date
F1	Carers Queensland Forum	Brisbane	7 March 2006
F2	Endeavour Foundation Forum	Brisbane	23 May 2006
F3	Office of the Adult Guardian Focus Group	Brisbane	12 July 2006
F4	Endeavour Foundation Focus Group	Brisbane	13 September 2006
F5	QLRC Community Forum	Sunshine Coast	15 September 2006
F6	QLRC Community Forum	Gold Coast	19 September 2006
F7	QLRC Community Forum	Brisbane	26 September 2006
F8	QLRC Community Forum	Toowoomba	29 September 2006
F9	QLRC Community Forum	Rockhampton	3 October 2006
F10	QLRC Community Forum	Mackay	4 October 2006
F11	QLRC Community Forum	Mt Isa	6 October 2006
F12	QLRC Community Forum	Bundaberg	10 October 2006
F13	QLRC Community Forum	Townsville	11 October 2006
F14	QLRC Community Forum	Cairns	12 October 2006
F15	Focus Group with advocacy groups	Brisbane	18 October 2006
F16	Office of Public Advocate Focus Group	Brisbane	31 October 2006
F17	Guardianship and Administration Tribunal Focus Group	Brisbane	16 October 2006
F18	Guardianship and Administration Tribunal Focus Group	Brisbane	12 December 2006
F19	Focus Group with adults with brain injury	Brisbane	6 December 2006
F20	Focus Group with adults with intellectual disability	Brisbane	7 December 2006

F21	Focus Group with adults with mental illness and mental health advocacy groups	Brisbane	16 January 2007
F22	Focus Group with adults with dementia and carers	Brisbane	1 February 2007
F23	Office of the Adult Guardian Focus Group	Brisbane	29 January 2007
F24	Community Visitor Program Focus Group	Brisbane	6 February 2007
F25	Freedom of Information and Privacy Unit, Department of Justice and Attorney-General Focus Group	Brisbane	29 November 2006

# Appendix 5

## Glossary

### Active party

An active party for a Tribunal proceeding may appear at a hearing before the Tribunal<sup>2690</sup> and receive a copy of the Tribunal's decision and any written reasons for the decision.<sup>2691</sup> The active parties for a proceeding are:<sup>2692</sup>

- the adult;
- the applicant (if this is not the adult);
- the proposed guardian, administrator, or attorney for the adult if the proceeding is for the appointment or reappointment of such person;
- any current guardian, administrator, or attorney for the adult;
- the Adult Guardian;
- the Public Trustee of Queensland; and
- any person joined as a party to the proceeding.

### Administrator

A person appointed by the Tribunal as a substitute decision-maker for an adult for a financial matter(s).<sup>2693</sup> A person may be appointed as an administrator only if they are 18 years or older, they are not a paid carer or health provider for the adult, they are not bankrupt and the Tribunal considers them appropriate for appointment.<sup>2694</sup>

### Adult

A person 18 years or older who has impaired capacity for a matter.

### Adult evidence order

A type of order the Commission recommends should be included in the guardianship legislation to permit the Tribunal to obtain information from the adult at a hearing in the

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2690 *Guardianship and Administration Act 2000* (Qld) s 123.

2691 *Guardianship and Administration Act 2000* (Qld) s 158(1).

2692 *Guardianship and Administration Act 2000* (Qld) s 119.

2693 *Guardianship and Administration Act 2000* (Qld) s 12.

2694 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)–(c).

absence of others (including in the absence of members of the public, particular persons or active parties).

### Adult Guardian

An independent statutory official whose role is to protect the rights and interests of adults with impaired capacity.<sup>2695</sup> The Adult Guardian's functions are wide-ranging and include:<sup>2696</sup>

- investigating complaints or allegations of neglect, exploitation, or abuse of an adult;
- acting as an attorney for an adult under an enduring document or as an adult's statutory health attorney; and
- acting as an adult's guardian if appointed by the Tribunal.

The Adult Guardian also has a number of protective powers in relation to adults.<sup>2697</sup>

### Advance health directive

A document made under the *Powers of Attorney Act 1998* (Qld) by a principal (18 years or older) to:<sup>2698</sup>

- give directions about a health matter(s) or a special health matter(s) for the principal's future health care; and/or
- appoint an attorney(s) to make decisions about a health matter(s), but not about a special health matter(s), in the event those directions prove inadequate.

An advance health directive may only be made while the principal has sufficient capacity to do so<sup>2699</sup> and operates only during a period when the principal no longer has capacity for the matter(s).<sup>2700</sup>

### Attorney

A person appointed by a principal to exercise decision-making power under a power of attorney, an enduring power of attorney, or an advance health directive for an adult for a matter(s).<sup>2701</sup> An attorney may also be a 'statutory health attorney'.<sup>2702</sup>

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2695 *Guardianship and Administration Act 2000* (Qld) ss 173, 174(1), 176.

2696 *Guardianship and Administration Act 2000* (Qld) s 174(2).

2697 *Guardianship and Administration Act 2000* (Qld) ch 8 pt 3.

2698 *Powers of Attorney Act 1998* (Qld) s 35.

2699 *Powers of Attorney Act 1998* (Qld) s 42.

2700 *Powers of Attorney Act 1998* (Qld) s 36(1).

2701 *Powers of Attorney Act 1998* (Qld) ss 8, 32, 35.

2702 *Powers of Attorney Act 1998* (Qld) s 62.

## AustLII

The Australasian Legal Information Institute is a searchable database that provides free access via the internet to a wide range of primary and secondary legal materials. Reasons for decisions made by the Tribunal are available to the public on this website.<sup>2703</sup>

## Capacity

Every adult is presumed to have capacity unless it is otherwise established.<sup>2704</sup> An adult will have ‘capacity’ for a matter if they are capable of:<sup>2705</sup>

- understanding the nature and effect of decisions about the matter;
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way.

An adult who does not satisfy this criteria in relation to a matter is described as having ‘impaired capacity’<sup>2706</sup> for that matter.

## Closure order

A type of order the Commission recommends should be included in the guardianship legislation to permit the Tribunal to close a hearing to members of the public, or to exclude a particular person (including an active party) from a hearing.

## Community visitors

Community visitors are appointed to safeguard the interests of persons who live or receive services at particular visitable sites.<sup>2707</sup> Those sites include residences and services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.<sup>2708</sup> Community visitors regularly visit those sites and have inquiry and complaint functions.<sup>2709</sup>

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2703 <<http://www.austlii.edu.au/>> at 28 June 2007.

2704 *Guardianship and Administration Act 2000* (Qld) sch 1 s 1.

2705 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘capacity’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘capacity’).

2706 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of ‘impaired capacity’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of ‘impaired capacity’).

2707 *Guardianship and Administration Act 2000* (Qld) s 223(1).

2708 *Guardianship and Administration Act 2000* (Qld) s 222 (definition of ‘visitable site’); *Guardianship and Administration Regulation 2000* (Qld) s 8 sch 2.

2709 *Guardianship and Administration Act 2000* (Qld) s 224.

## Confidentiality order

At present, a confidentiality order refers to any order made under section 109 of the *Guardianship and Administration Act 2000* (Qld) to:

- direct who may or may not be present at a Tribunal hearing;
- direct that a Tribunal hearing, or part of a hearing, be held in private;
- prohibit or restrict publication of information or documents before the Tribunal; or
- prohibit or restrict the disclosure to some or all of the active parties for a proceeding of information or documents before the Tribunal, or its decision or reasons.

However, the Commission has recommended that these powers should now be exercised through four new types of orders (adult evidence orders, closure orders, non-publication orders and confidentiality orders) and that they be collectively called ‘limitation orders’. The new confidentiality order that is recommended for inclusion in the guardianship legislation would permit the Tribunal to withhold from an active party information or documents before the Tribunal.

## De-identified information

Information that has been modified to prevent disclosure of a person’s identity.

## Enduring power of attorney

A document made under the *Powers of Attorney Act 1998* (Qld) by a principal (18 years or older) to appoint an attorney(s) to make decisions about a financial or personal matter(s), including a health matter(s).<sup>2710</sup> An enduring power of attorney may only be made while the principal has sufficient capacity to do so.<sup>2711</sup>

For personal matters, an enduring power of attorney will operate only during a period when the principal no longer has capacity for the particular matter.<sup>2712</sup> For financial matters, an enduring power of attorney will operate from the time it is made, unless a different time is specified,<sup>2713</sup> and will operate at any time the principal has impaired capacity.<sup>2714</sup>

This is different from a *general* power of attorney by which a principal can appoint an attorney(s) to make decisions about a financial or legal matter(s), but not about a personal matter(s).<sup>2715</sup> A general power of attorney will operate from the time it is

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2710 *Powers of Attorney Act 1998* (Qld) s 32(1).

2711 *Powers of Attorney Act 1998* (Qld) s 41.

2712 *Powers of Attorney Act 1998* (Qld) ss 33(4), 36(3).

2713 *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

2714 *Powers of Attorney Act 1998* (Qld) s 33(3).

2715 *Powers of Attorney Act 1998* (Qld) s 8.

made, unless another time is specified,<sup>2716</sup> and will be automatically revoked if the principal no longer has capacity.<sup>2717</sup>

## Financial matter

A matter relating to an adult's finances or property.<sup>2718</sup>

## General Principles

Eleven principles contained in the guardianship legislation,<sup>2719</sup> which must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult.<sup>2720</sup> The community is also encouraged to apply and promote the principles.<sup>2721</sup> The General Principles include:<sup>2722</sup>

- the presumption that an adult has capacity to make decisions;
- recognition of an adult's basic human rights and the importance of empowering an adult to exercise those rights;
- an adult's right to respect for his or her human worth and dignity;
- an adult's right to be a valued member of society and the importance of encouraging an adult to perform valued social roles;
- the importance of encouraging an adult to participate in community life;
- the importance of encouraging an adult to become as self-reliant as possible;
- an adult's right to participate in decision-making as far as possible and the importance of preserving the adult's right to make his or her own decisions wherever possible;
- the use of substituted judgement, so that where it is possible to ascertain from previous actions what an adult's views or wishes would be, those views and wishes are taken into account;
- the exercise of power under the legislation in the way least restrictive of the adult's rights;

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2716 *Powers of Attorney Act 1998* (Qld) s 9.

2717 *Powers of Attorney Act 1998* (Qld) s 18(1).

2718 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 1 (definition of 'financial matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 1 (definition of 'financial matter').

2719 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1.

2720 *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2).

2721 *Guardianship and Administration Act 2000* (Qld) s 11(3).

2722 *Powers of Attorney Act 1998* (Qld) sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. More than eleven issues are included in this list because some of the General Principles include a number of elements.

- the importance of maintaining an adult's existing supportive relationships;
- the importance of maintaining the adult's cultural, linguistic and religious environment; and
- an adult's right to confidentiality of information about them.

## Guardian

A person appointed by the Tribunal as a substitute decision-maker for an adult for a personal matter(s), including a health matter(s) but not a special health matter(s).<sup>2723</sup> A person may only be appointed as a guardian if they are 18 years or older, they are not a paid carer or health provider for the adult, and the Tribunal considers them appropriate for appointment.<sup>2724</sup>

## Guardianship and Administration Tribunal (the Tribunal)

The Guardianship and Administration Tribunal is a quasi-judicial body whose functions include:<sup>2725</sup>

- making declarations about an adult's capacity for a matter;
- hearing applications for the appointment of guardians and administrators and appointing, where necessary, guardians and administrators for an adult;
- making declarations, orders or recommendations, or giving directions or advice in relation to guardians, administrators, attorneys, and enduring documents;
- ratifying or approving an exercise of power by an informal decision-maker for an adult; and
- giving consent to some types of special health care for an adult and to the withholding or withdrawal of life-sustaining measures.

## Health Care Principle

A principle contained in the guardianship legislation that must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a health matter(s) or a special health matter(s) for an adult.<sup>2726</sup> The Health Care Principle provides that power for a health or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power:<sup>2727</sup>

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<sup>2723</sup> *Guardianship and Administration Act 2000* (Qld) ss 12, 14(2).

<sup>2724</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1)(a), (c).

<sup>2725</sup> *Guardianship and Administration Act 2000* (Qld) s 82(1).

<sup>2726</sup> *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2).

<sup>2727</sup> *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)–(2); *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)–(2).

- is necessary and appropriate to maintain or promote the adult's health or wellbeing, having regard to the adult's views and wishes, and information provided by the adult's health provider; or
- is, in all the circumstances, in the adult's best interests.

### Health matters

A type of personal matter concerning the adult's health care, other than special health care,<sup>2728</sup> including care, treatment, services or procedures for the adult's physical or mental condition carried out or supervised by a health provider.<sup>2729</sup>

### Impaired capacity

When an adult does not have capacity for a matter.<sup>2730</sup>

### Information Standard 42 – Information Privacy ('IS42')

*Information Standard 42 – Information Privacy* ('IS42') is part of an administrative privacy scheme designed to protect personal information held by Queensland Government departments and agencies.<sup>2731</sup> In the guardianship context, IS42 regulates the handling of personal information by the Adult Guardian, the Public Advocate, the Community Visitor Program, the Public Trustee of Queensland and some service providers such as Disability Services Queensland. It also has limited application to the Tribunal.

### Limitation order

A term to describe the four new types of orders the Commission recommends should be included in the guardianship legislation: adult evidence orders, closure orders, non-publication orders and confidentiality orders.

### Non-publication order

A type of order the Commission recommends should be included in the guardianship legislation to permit the Tribunal to prohibit the publication of information about proceedings where the publication of that information is not already prohibited.

### Parens patriae jurisdiction

The jurisdiction of superior courts, of ancient origin, deriving from the monarch's obligation to act as *parens patriae* (parent of the people) to protect vulnerable citizens.

<sup>2728</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 4 (definition of 'health matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 4 (definition of 'health matter').

<sup>2729</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 5 (definition of 'health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 5 (definition of 'health care').

<sup>2730</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'impaired capacity'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'impaired capacity').

<sup>2731</sup> <[http://www.governmentict.qld.gov.au/02\\_infostand/standards/is42.pdf](http://www.governmentict.qld.gov.au/02_infostand/standards/is42.pdf)> at 28 June 2007.

The jurisdiction allows the court to make a decision on behalf of a person who is incapable of making the decision themselves.

### Personal matter

A matter (other than a ‘special personal matter’ or a ‘special health matter’) relating to an adult’s care or welfare. This includes matters about where and with whom an adult lives, health care, diet and education.<sup>2732</sup>

### Public Advocate

An independent statutory official whose role is to promote and protect the rights of adults.<sup>2733</sup> The Public Advocate’s other functions include:<sup>2734</sup>

- promoting the protection of adults from neglect, exploitation, or abuse;
- encouraging the development of programs that foster and maximise adults’ autonomy;
- promoting service and facility provision for adults; and
- monitoring and reviewing the delivery of services and facilities to adults.

The Public Advocate’s functions are aimed at systemic advocacy rather than advocacy on behalf of individual adults.

### Public Trustee

The Public Trustee of Queensland is a Queensland Government corporation established under the *Public Trustee Act 1978* (Qld),<sup>2735</sup> and may be appointed by the Tribunal as an adult’s administrator.<sup>2736</sup>

### Special health matter

A matter relating to an adult’s ‘special health care’ which involves very significant health issues such as:<sup>2737</sup>

- removal of tissue from the adult while alive for donation to someone else;
- sterilisation;

<sup>2732</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 2 (definition of ‘personal matter’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 2 (definition of ‘personal matter’).

<sup>2733</sup> *Guardianship and Administration Act 2000* (Qld) ss 208, 209(a), 211.

<sup>2734</sup> *Guardianship and Administration Act 2000* (Qld) s 209.

<sup>2735</sup> *Public Trustee Act 1978* (Qld) ss 7–8.

<sup>2736</sup> *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)(ii).

<sup>2737</sup> *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 7 (definition of ‘special health care’); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 7 (definition of ‘special health care’).

- termination of a pregnancy;
- participation in special medical research or experimental health care; and
- electroconvulsive therapy or psychosurgery.

### **Special personal matter**

A matter regarded as being of such an intimate nature that it would generally be inappropriate for another person to make decisions about them on behalf of an adult. These include voting; consenting to marriage; and making or revoking a will, a power of attorney, an enduring power of attorney, or an advance health directive.<sup>2738</sup>

### **Statutory health attorney**

A person who is declared by the guardianship legislation to be a person with authority to make decisions about health matters for an adult during a period when the adult has impaired capacity for the matter.<sup>2739</sup> The first of the following who is ‘readily available and culturally appropriate’ to make the decision will be an adult’s statutory health attorney:<sup>2740</sup>

- the adult’s spouse, if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer of the adult; or
- a close friend or relation of the adult 18 years or older and who is not a paid carer for the adult.

If no-one from that list is readily available and culturally appropriate, the Adult Guardian becomes the adult’s statutory health attorney.<sup>2741</sup>

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2738 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 3 (definition of ‘special personal matter’); *Guardianship and Administration Act 2000* (Qld) s sch 4, sch 2 s 3 (definition of ‘special personal matter’).

2739 *Powers of Attorney Act 1998* (Qld) s 62.

2740 *Powers of Attorney Act 1998* (Qld) s 63(1).

2741 *Powers of Attorney Act 1998* (Qld) s 63(2).

