



Queensland
Law Reform Commission

**Public Justice, Private Lives:
A Companion to the
Confidentiality Report**

MP No 42
August 2007



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Our recommendations: reporting back to you

The Queensland Law Reform Commission has reviewed the role that confidentiality plays in the guardianship system. As part of our review, we wrote a detailed Discussion Paper called *Confidentiality in the Guardianship System: Public Justice, Private Lives*.

We also wrote a short paper, *Public Justice, Private Lives: A Companion Paper*, as a guide to the longer Discussion Paper, and two pamphlets – one for people who may need help with decision-making and one for their families, friends and advocates. A CD-ROM was produced for people who need or prefer to see and/or hear new information. These documents outlined the purpose of the review, discussed the features of the guardianship system and asked questions about the impact of confidentiality on decision-making processes in the guardianship system and on people's lives.

As part of finding out what people thought, the Commission held ten publicly advertised community forums across the State in Brisbane, the Gold and Sunshine Coasts, Toowoomba, Bundaberg, Rockhampton, Mackay, Townsville, Cairns and Mt Isa. In addition, the Commission held fifteen focus groups with people interested in, or affected by, the guardianship laws. Four of these meetings were with groups of people who may need help with decision-making. As a result of our consultation, we received 260 submissions and heard the views of hundreds of people, which is the largest response we have ever had to our consultations. We have included some of your views in this Companion Paper.

We want to tell you about our recommendations to improve the law because:

- We appreciate your help during this stage of the review. In return, we want to tell you what we did with your views, what other views we heard and what we now recommend to the Queensland Government.
- Our final report on confidentiality in the guardianship system is not the end of the story. The Commission has further issues that do not relate to confidentiality. We want to keep talking with you as we will need your help to consider those issues in the future.

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

[http://www.qlrc.qld.gov.au/guardianship](http://www qlrc.qld.gov.au/guardianship)

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For a more detailed discussion of the issues explored in this Companion Paper, see the above chapters of the Commission’s Report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*.

Part 1

Our report on confidentiality

INTRODUCING THE GUARDIANSHIP LAWS

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

The laws call this having ‘impaired capacity’. Someone has impaired capacity if they cannot go through the process of reaching their own decision (free from inappropriate influence), having understood what that decision will mean for them, and communicating that decision. Impaired capacity can be caused by dementia, intellectual disability, acquired brain injury or damage, mental illness or an inability to communicate in some way, for example, because a person is in a coma.

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

We talk more about how the guardianship system works in Appendix 1, but one matter discussed now is the agencies and officials involved in the system. An understanding of what these agencies and officials do is an important part of thinking about what role confidentiality should play in the guardianship system.

Queensland's five guardianship agencies and officials

Guardianship and Administration Tribunal (‘the Tribunal’)

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

The Tribunal works from the following principles:

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

Adult Guardian

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

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

Public Advocate

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

Community Visitor Program

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

Public Trustee of Queensland

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

OUR REPORT ON CONFIDENTIALITY

In October 2005, the Attorney-General asked us, the Queensland Law Reform Commission, being independent of the Queensland Government, to review the guardianship laws. Our review has two stages. We started by looking at the confidentiality provisions in the guardianship laws. Stage two involves reviewing the rest of the guardianship laws.

In July 2006, we published a series of papers for stage one, including a Discussion Paper called *Confidentiality in the Guardianship System: Public Justice, Private Lives*. These papers asked questions about whether the confidentiality provisions should be changed and, if so, what they should be.

We had an enormous response to these papers – the largest response the Commission has ever received from a round of consultation. People’s views guided us in preparing a detailed final report on confidentiality for the Attorney-General. This is the Companion Paper to that report. It includes:

- the report’s guiding principles and the main issues about confidentiality;
- what the Commission asked about the issues being reviewed;
- what people told the Commission during the review; and
- the Commission’s recommendations to improve the law.

The full report will be tabled in Parliament. The Queensland Government will then consider whether it wants to implement the Commission’s recommendations.

THE PURPOSE OF THIS COMPANION PAPER

The Commission wants to explain its report on the confidentiality provisions and its recommendations to improve them to many people, all of whom have different needs and expectations of the guardianship laws. They include adults who have impaired capacity, their families and friends, carers, advocacy groups, service providers, lawyers and interested members of the community.

To meet the different needs of so many people, the Commission has explained the guardianship laws and our recommendations:

- comprehensively in a detailed report called *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*;
- simply, so that you do not have to be a legal expert to understand them. This companion paper, *Public Justice, Private Lives: A Companion to the Confidentiality Report*, has been written as a guide to the longer report, but can also be read independently of that report; and
- in pamphlets reporting on the major recommendations of the review. Two versions are available: *A new approach to confidentiality: A guide for people who may need help with decision-making* and *A new approach to confidentiality: A guide for families, friends and advocates*.

In each of these papers:

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

A glossary of other terms used in this paper can be found in Appendix 2.

Part 2

A fresh look at confidentiality

WHAT DOES THE CURRENT LAW SAY?

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

1. The laws allow the Tribunal to make **‘confidentiality orders’ in some cases**. These orders are not commonly made but are very important because of their potential impact on the people involved. They can stop certain people from:
 - attending a Tribunal hearing, or part of a hearing;
 - seeing a document being considered by the Tribunal; or
 - knowing the Tribunal’s decision or the reasons it gives for a decision.
2. The laws also stop people **publishing information about what happens before the Tribunal**. This includes information such as who was at a hearing, what they said, what documents were considered by the Tribunal, what decision was made and what reasons were given for that decision.
3. The laws also protect personal **information people receive because of their role under the guardianship laws**. This duty to keep information confidential applies, for example, to members and staff of the Tribunal, the Adult Guardian and Public Advocate and their staff, guardians and administrators. It also applies to people acting as attorneys, including statutory health attorneys. The duty protects information only if it could identify the person it is about.

FINDING OUR GUIDING PRINCIPLES FOR THIS REVIEW

The Commission's views at a glance: a need for greater openness

During the review, we found that people strongly support greater openness in the guardianship system. The Commission agrees that the system currently leans too heavily towards confidentiality. A careful balance must still be held between the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system. However, this balance must be found within a guardianship system that increases the level of openness in its decision-making processes. Two factors guide the Commission's views:

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

Revisiting and rethinking the balance

Making a decision about how and when to impose confidentiality upon information within the guardianship system is complex. We must objectively uphold the legal principles at stake while also being aware of the impact on people of using private or sensitive information when making decisions.

On the one hand, decisions affecting people's lives must be transparent and accountable. **Open justice** and **procedural fairness** are fundamental principles of our legal system. The principle of open justice requires that our courts and bodies like the Tribunal be open to the public. This includes

conducting hearings in public and allowing proceedings to be freely reported. The openness required by this principle is at odds with confidentiality.

Similarly, the rules of procedural fairness are a challenge for confidentiality. They say everyone should have a chance to present their case and to comment on any relevant adverse statements made about them before a decision affecting them is made. It is unfair to decide an issue without giving the people affected a chance to respond. To do that, people need to know what has been said about them.

On the other hand, some features of the guardianship system may suggest that information should sometimes be kept confidential. We need to examine the special features of the guardianship system to decide how to rethink this balance.

Special features of the guardianship system

The Commission's review revealed two features of the guardianship system that distinguish it from other areas of law and influence where the line should be drawn between openness and confidentiality. These two features suggest arguments both for and against openness.

1. *Other people make decisions about a person's fundamental rights*

By their very nature, the guardianship laws give people enormous power in others' lives. For example, they allow people to make decisions about medical treatment for adults with impaired capacity.

When people are not able to defend their rights for themselves, the features of open decision-making processes – accountability, transparency, consistency and predictability – help safeguard their rights.

A tick for openness.



2. *The adult's interests come first*


In Queensland, the guardianship system has moved away from the approach of 'protecting' adults with impaired capacity towards promoting and safeguarding the rights and interests of adults, including their right to the greatest degree of autonomy and their right to be supported in decision-making.

Safeguarding rights and interests may mean taking steps to preserve an adult's privacy. Decisions made in the guardianship system are private in nature. They are only discussed publicly because the adult has impaired capacity and needs the help of the guardianship system.

Further, in some situations, disclosure of private information could actually harm the adult. This could happen, for example, where people use the information they learn to take advantage of an adult. Confidentiality may be important in these cases too.

☑ *A tick for confidentiality.* 

However, an adult's rights and interests as a whole are strengthened if people making decisions can rely on complete and tested information, and make their decisions in a transparent and accountable way.

☑ *A tick for openness.* 

The guardianship system is different from other areas in the legal system because the focus of all parties is the same, that is, they want the best outcome for the adult with impaired capacity. Consequently, it is important that the people who care about the adult's rights and interests are not discouraged from participating in Tribunal proceedings because of fears that their own private information will become public. This would make the guardianship system less effective.

☑ *A tick for confidentiality.* 

However, the focus of parties on the adult's interests also means that disputes may be resolved without the full testing of issues that occurs when two parties are battling for their own rights. When issues are not tested with the same scrutiny as they would be in the wider legal system, openness and transparency can help ensure good decision-making.

☑ *A tick for openness.* 

What did people say?

Most people agreed that we must consider confidentiality in the context of the nature of the guardianship system as well as the principle of open justice and what is required by procedural fairness. However, contrasting opinions were expressed about how to resolve the tension between these issues.

Some organisations and guardianship agencies said that the most important principle to observe is respect for the adult's rights and interests, including privacy. They said that this is particularly important because private information would not be in the public domain at all if the adult did not have a disability. They also thought that the nature of the guardianship system requires that the adult's rights and interests should be the primary consideration.

However, the majority of submissions strongly supported greater openness in the guardianship system. They said that greater openness is needed to:

- ensure good decision-making;
- protect the rights of people involved in the guardianship system;
- promote community confidence in the guardianship system;
- meet concerns about accountability in decision-making;
- make the system fair; and
- improve community education and understanding.

Some people believed that open justice and procedural fairness do not have to be in competition with the rights and interests of adults. They thought that an adult's rights and interests are in fact improved by openness as it increases the quality of decision-making in the guardianship system.

'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.' A parent of an adult with impaired capacity

Other people suggested that greater openness would strengthen the community's confidence in the guardianship system.

'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.' Carers Queensland

Some people also favoured more openness because the rights and interests of people other than the adult can be affected.

'An 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.' Caxton Legal Centre

Some people had strong views about who should be given information. The general feeling was that people close to the adult, usually family, have a greater claim to information. However, it was agreed that it can sometimes be difficult to identify who those people are.

'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.' The Public Advocate

The Commission's guiding principles

The Commission decided that the following principles should guide its review of confidentiality in the guardianship system:

- Three matters are relevant to determining the role of confidentiality in the guardianship system: the principle of open justice, the requirements of procedural fairness, and the special nature of the guardianship system.
- The guardianship laws should promote greater openness in the system.
- The adult is entitled to know and obtain information about himself or herself.
- The more involved and interested a person is in the adult's life, then the greater is that person's claim to be given information about the adult.

What information should be considered when making decisions?

A third special feature of the guardianship system that may affect the role of confidentiality, while already part of the guardianship laws, became more apparent during the review. **The Guardianship and Administration Tribunal has inquisitorial powers.** This means it has wide powers as to how its hearings are conducted. It can determine its own procedures and it is not required to follow the rules of evidence. It also has a duty to inform itself of all relevant information needed to make a decision where this is possible. It can do this by calling its own witnesses and asking for particular documents.

Consequently, the parties have little control over the information received by the Tribunal. The Tribunal may, in fact, receive a lot of highly personal, private or sensitive information that is irrelevant. This also happens because most people prepare for a Tribunal hearing without a lawyer, resulting in a lot of information being produced that may not be legally relevant to the issues. This raises the distinction between irrelevant, relevant and confidential information before the Tribunal.

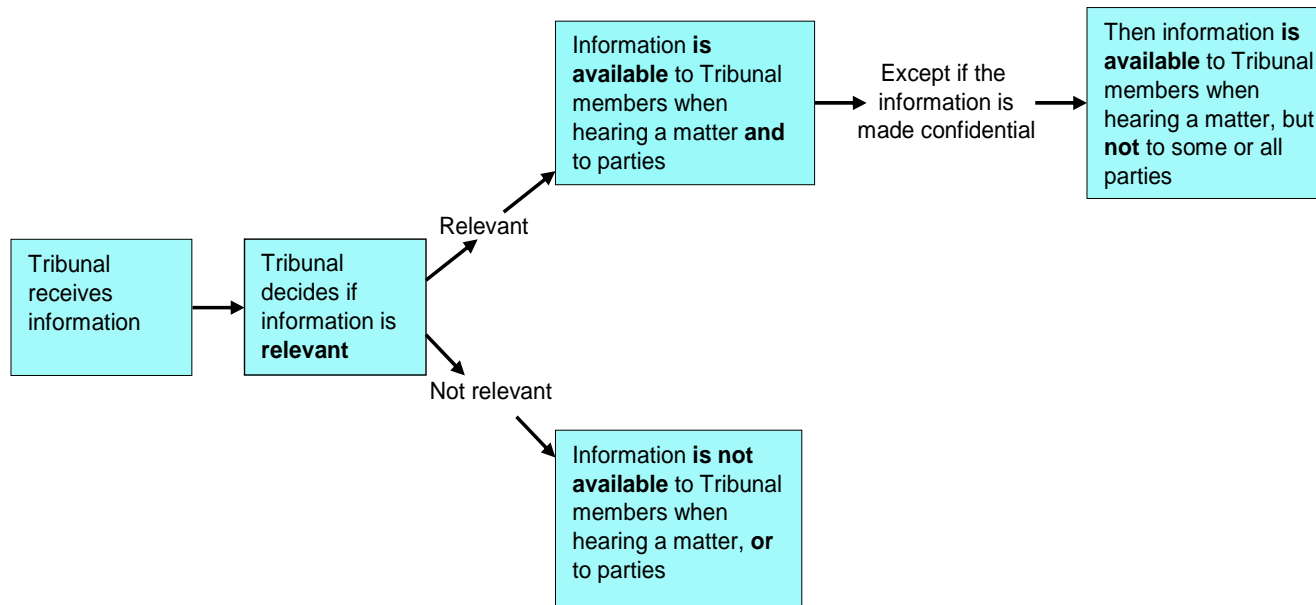
A further guiding principle

The Commission believes that to protect people's privacy, the Tribunal must first work out what information is relevant to the decision it has to make about the adult. Irrelevant information cannot be used by the Tribunal to make a decision so it is only *relevant* information that needs to be disclosed to the parties to a proceeding. Withholding *irrelevant* information is not about confidentiality because not even the Tribunal will be looking at it. The Tribunal may only make orders to withhold information (currently called 'confidentiality orders') once it has determined whether that information is *relevant* and would normally need to be disclosed to the parties.

The Commission decided that another general principle should guide its review of confidentiality in the guardianship system:

- The Tribunal must make a clear distinction between information that is irrelevant to the proceedings and that which is confidential. The question of confidentiality only arises once it is determined that the information is relevant and so must be disclosed to the parties.

This diagram explains the Commission's recommendations for how this process of sorting irrelevant, relevant and confidential information should occur.



Part 3

What changes do we recommend?

We asked questions about confidentiality on five main themes. The first four related to the Guardianship and Administration Tribunal. The last one related to the general duty of confidentiality imposed on people involved in the guardianship system.

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

We received many different ideas, opinions and suggestions from several hundred people throughout Queensland. Sometimes, a majority of people held the same views. At other times, people's opinions differed greatly. In this Companion Paper, we include some of those agreements and differences under the heading 'What did people say?'.

We also give the Commission's recommendations for improving those parts of the guardianship laws that deal with confidentiality. Sometimes these recommendations may differ from what some people think. We give our reasons for why we have made these recommendations.

If you want more information about any of these matters, you might like to read the Commission's full report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System*. That document discusses in more detail the law that is relevant to each of the issues, what people said in their submissions and at the forums we held across Queensland, the Commission's recommendations for reform and a full explanation of those recommendations.

Finally, during our consultation the Commission also identified some new significant issues relating to the guardianship system. Because these issues are not about confidentiality, they will be examined in stage two of the review. However, as part of our continuing conversation with you, we have outlined some of them under a separate heading 'The future of the review' near the end of this Companion Paper.

More open hearings

'I am mindful of the argument that the privacy of vulnerable people with decision-making incapacity is a right warranting protection . . . (but) of equal if not greater value is their right to appearances before a tribunal that is functioning optimally by virtue of its adherence to the open justice principle.' A journalist

| What the law currently says | What we asked |
|---|---|
| <p>Section 109(1) of the <i>Guardianship and Administration Act 2000</i> says that Tribunal hearings are generally to be conducted in public.</p> <p>However, section 109(2)(b) says that if certain information is of a confidential nature (or for any other reason), the Tribunal can make a confidentiality order to keep people out of the hearing or direct that all or part of the hearing take place in private. The Tribunal may also prohibit or limit the disclosure of information given at a Tribunal hearing to some or all of the people involved in a proceeding.</p> | <p>During our consultation, we asked:</p> <ul style="list-style-type: none"> • Under what circumstances, if any, should the Tribunal be able to keep a person out of a hearing and why? • Under what circumstances, if any, should information given at a Tribunal hearing be able to be kept from a person involved in a proceeding and why? <p>We also asked for other suggestions to deal with this issue.</p> |

WHAT DID PEOPLE SAY?

Open to the public

Most people, including the Public Advocate, the Adult Guardian, Queensland Advocacy Incorporated, Caxton Legal Centre, some families and carers of adults, and media organisations, strongly supported Tribunal hearings being generally **open to the public**.

'The highest standards of decision-making . . . are 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.' Caxton Legal Centre

Some people said that open hearings would also provide an opportunity for increased public awareness and education about the Tribunal's role and processes.

On the other hand, some people (including some adults with impaired capacity) said that hearings should generally be **closed to the public** because matters discussed at hearings are essentially private and personal. They felt that attendance by the public would invade people's privacy and could be embarrassing for the adult. Reasons put forward for keeping Tribunal hearings private included that they might be more effective for obtaining information or to avoid adults being intimidated by having to appear in front of a large group of people.

A few people identified the benefits of both open and closed hearings, depending on the circumstances. For example, it was suggested that hearings might be closed when held in a small regional community or where the application was about a highly personal topic such as a sterilisation or termination of pregnancy.

Some people identified practical issues about the openness of Tribunal hearings, such as the lack of public notification of when and where hearings are held. Other concerns were that the need to complete a form before entering a hearing room discouraged attendance and that the doors to some hearing rooms were locked.

Excluding people from hearings

Most people agreed that the Tribunal should have **a power to exclude a person from a hearing in certain circumstances**. Some common reasons given by people included:

- concerns about the safety of the adult with impaired capacity or another person, or about the adult being intimidated or subject to undue influence;
- the confidential, sensitive or private nature of the information discussed in hearings;
- the desire to respect the wishes or interests of the adult who might prefer that a particular person not attend a hearing; and

- the positive or negative influence of the presence of family, friends, support workers and media on the information people give the Tribunal.

Several people said that the Tribunal should not be able to exclude people involved in proceedings because allegations might be made against them in their absence. Some people also described their experiences of being excluded from hearings and then not being told what was said in their absence despite wanting an opportunity to respond.

'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.' A relative of an adult with impaired capacity

Some people said that certain people with an interest in the adult – for example, a guardian, relevant service providers, a spouse or parents of the adult – should *never* be kept out of a hearing. Other people, including parents of adults with impaired capacity, said that the Tribunal should have power to exclude the adult from the hearing. One mother of an adult with impaired capacity stated:

'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.'

In contrast, other people thought that the adult should be present throughout all, or at least the majority, of a hearing. 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'.

A few people commented on the current practice of the Tribunal in speaking with the adult in the absence of other people. Queensland Advocacy Incorporated noted the difficulties of assessing the effectiveness of this practice (given that people are excluded from the hearing room), but generally supported it:

'In a more inquisitorial environment like the Tribunal other methods like the panel simply speaking to the adult alone can be effective . . . 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.'

A few people suggested that this practice not only encourages the adult to give full and frank information that he or she might not otherwise disclose in the presence of other people, but also lets Tribunal members test the adult's capacity. On the other hand, two parents of an adult with impaired capacity considered this practice unfair. They accepted 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.

Withholding information from parties

Some people, including the Adult Guardian, the Public Advocate, the Public Trustee of Queensland and the Department of Justice and Attorney-General, thought that the Tribunal should be able to **withhold information from parties** in limited circumstances. Examples given were when:

- information could be used unfairly;
- it may be necessary to maintain the effectiveness of professional and family relationships; and
- the disclosure of information may result in harm or have a detrimental effect on the adult's mental health.

While some people were particularly concerned about the consequences of providing distressing information to the adult, one person also noted that information should be withheld only 'after a lot of consideration', suggesting that the Tribunal would need to:

'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?' A daughter of an adult with impaired capacity

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 it in confidence and in the absence of others. Instead, it was suggested that the Tribunal should use its powers to investigate any allegations made by the adult. The Tribunal said that one way it can assess the credibility of the information given by the adult while others are absent is by testing it against the other information it receives during a hearing.

However, many other people were concerned that adverse information about a party was being given to the Tribunal without that party knowing or having a chance to respond. Some people considered that this goes ‘against the laws of natural justice’ and affects the quality of information received by the Tribunal and the decision it makes. Australian Lawyers Alliance noted:

‘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 interests of the incapacitated person.’

A lot of people were in favour of adopting the special procedures that courts normally use when hearing from vulnerable people. Suggestions included using technology such as video-recorded statements or a live closed circuit television link to provide information away from the hearing room, or having an independent support person available before and during the hearing to make the adult feel more comfortable. It was thought that these procedures could reduce or avoid the need to close a hearing or make information confidential.

Criteria for Tribunal powers

Many people suggested **criteria for when the Tribunal should be able to close hearings to the public, exclude people from hearings or withhold information**. Queensland Corrective Services and the Department of Justice and Attorney-General considered that the current test is appropriate and flexible. However, other people, including the Public Advocate, media organisations and Carers Queensland, thought the current test is too broad. Endeavour Foundation described it as ‘too open ended’.

Several people preferred a more specific test than the current law provides. Some favoured including a reference to open justice and procedural fairness, and others preferred a test based on the best interests of the adult. Potential

for harm or disadvantage to the adult or others, the confidential or sensitive nature of the information, and the wishes of the adult were also suggested as possible criteria.

Some people suggested **different criteria for the three types of decisions** that the Tribunal can make about hearings – closing a hearing to the public, excluding people from a hearing, and withholding information from a party.

There was some general support for the Tribunal to have specific criteria to govern when it can close a hearing or exclude a person. Suggested criteria included where the Tribunal considers that there is a real risk of injustice or serious disadvantage to anyone as a result of giving information in a public hearing. People suggested that other circumstances might be where the information dealt with in the hearing is ‘privileged’, where conflicts of interest or personalities could cause friction, or where ‘criminal motives are intended’.

The Public Advocate considered that the appropriate test for when parties can be excluded or denied information is if ‘serious harm’ or ‘substantial injustice’ would result.

Carers Queensland and Caxton Legal Centre generally considered that there would have to be ‘exceptional circumstances’ to exclude parties. Two media organisations thought that the Tribunal should exclude 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. Caxton Legal Centre endorsed a similar test and also proposed an alternative test based on whether the information is of such importance that receiving it in confidence is more likely to do justice than not receiving it. Some people also thought the Tribunal should be required to take as its starting point the desirability of hearings being held in public.

Some people considered when the Tribunal might decide to close a hearing to the public. The Public Advocate noted that this is different from excluding 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’. Others suggested, similar to the test proposed by some for excluding a party, that closure to the public is warranted if the Tribunal 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 are in public.

The Department of Justice and Attorney-General supported the current test for withholding information from a party. The Public Trustee of Queensland considered that only in the ‘clearest and most compelling circumstances’ should information not be available to a party, for example, if disclosure would ‘otherwise cause serious harm to the adult or to another person, or put the safety of someone at risk’.

Caxton Legal Centre suggested that simply not attending a hearing should not mean that a person cannot know what is said there, provided the party has an ongoing interest in the case consistent with the adult’s. An adult with impaired capacity said that an adult who chooses not to attend a hearing should have a right to a transcript of the proceedings. This is particularly important for people with an acquired brain injury where memory problems can be an issue.

THE COMMISSION’S RECOMMENDATIONS TO IMPROVE THE LAW

The Commission agrees with the strongly expressed view of most people that **Tribunal hearings should remain open to the public**. The Commission notes concerns about the private, personal and sensitive nature of the information discussed at Tribunal hearings, and about the vulnerability of adults with impaired capacity. However, it considers that open hearings strengthen the accountability of the Tribunal and so are an important safeguard for the people who appear before it.

The Commission also considers that the **policy of openness underpinning the law should be better supported by the Tribunal’s procedures**. Members of the public should be able to readily find out when and where Tribunal hearings occur and be able to attend. For example, the Commission considers that:

- The Tribunal should have a publicly available law list, similar to other courts and tribunals, to tell members of the public when and where hearings are to be held. It should be published on a website or in a newspaper (or preferably both). This can be done without identifying the adult.
- Physical impediments that might discourage public attendance should be removed. For example, the doors of a hearing room should not be locked while a hearing is in progress.

- Any procedures prior to a hearing, such as asking people to complete an attendance form, should not discourage people from attending a hearing. It should be clear that hearings are open to the public.

However, the Commission considers that the **Tribunal should keep its power** to: close a hearing to the public, exclude particular people (including parties) from a hearing, and withhold information from a party. But to reflect the Commission's view that greater openness is needed, we make four further recommendations to improve the law:

1. The guardianship laws should state that **parties are entitled to access all information before the Tribunal** that is credible, relevant and significant to the case. This right can be removed only by a specific order.
2. At present, section 109 of the *Guardianship and Administration Act 2000* uses the same term – ‘confidentiality orders’ – to describe several different actions such as closing a hearing to the public, excluding a person from a hearing, and withholding information from a party. The Commission considers that clearer distinctions need to be made between these types of orders. The Commission therefore considers that the Tribunal's general power to make ‘confidentiality orders’ should be replaced with specific powers for the Tribunal to make the following four types of **‘limitation orders’**:
 - **‘adult evidence orders’**: The Commission understands that the practice of speaking with the adult in the absence of others is generally not done for reasons of confidentiality but instead to make sure that the Tribunal can obtain information it could not otherwise receive. The Commission considers that the Tribunal should be able to speak to the adult in the absence of others for that reason, or if necessary to avoid serious harm or injustice, as long as it makes an order to do so.
 - **‘closure orders’**: The Commission considers that if it is necessary to avoid serious harm or injustice to a person, the Tribunal should have power to close a hearing to the public or exclude particular people, including parties. The making of a ‘closure order’ or ‘adult evidence order’ will not make the information disclosed during that part of the hearing confidential and will not affect a party's right to receive that

information. For that information to be kept confidential, the Tribunal will need to make a separate ‘confidentiality order’.

- **‘confidentiality orders’:** The Commission considers that the only ‘true’ confidentiality order is one that withholds information from a party. We consider that the Tribunal should only be able to make a confidentiality order in the rare circumstances where it is necessary to avoid serious harm or injustice to a person. The Commission also recommends that the Tribunal have this power in relation to documents.
 - **‘non-publication orders’:** This is an order to stop people reporting Tribunal proceedings. This is discussed later in this paper.
3. The **test applied for making limitation orders should be stricter.** Because orders can be made only if it is ‘necessary to avoid serious harm or injustice to a person’, they will be made in very limited circumstances. (There is a wider test for making adult evidence orders because of the nature of the guardianship system.) Further, the Commission recommends that the guardianship laws should require the Tribunal, when considering whether to make a limitation order, to start with a presumption in favour of openness and of parties having access to information.
 4. To make limitation orders transparent and accountable, the Commission considers that the following **safeguards** should generally apply:
 - The guardianship laws should be amended to clarify that parties and anyone else affected by the order have the right to make submissions to the Tribunal before a limitation order is made. They should also have a right to appeal such an order.
 - The Tribunal should tell the Public Advocate when it is considering making a limitation order (except for an adult evidence order) and invite the Public Advocate to comment on whether the order should be made. The Public Advocate, as an independent statutory official with systemic advocacy functions under the guardianship laws, is in an ideal position to test whether a limitation order should be made.

- The Tribunal should produce written reasons for making a limitation order (except for an adult evidence order). These reasons should be provided to the parties. Members of the public should also be able to request a copy in a de-identified form.

The Commission recommends that, before making a limitation order, the **Tribunal should consider using alternative mechanisms** during hearings such as video link-ups. This will help make the adult more comfortable but still allow a party to participate as much as possible in the hearing.

Finally, while not specifically about confidentiality, the Commission also considers that the Tribunal should have **power to exclude a disruptive person** from a hearing.

Ensuring access to relevant documents

‘Limiting the disclosure of the documents to an active party is a serious matter . . . 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.’ The Public Advocate

| What the law currently says | What we asked |
|---|--|
| <p>Section 108 of the <i>Guardianship and Administration Act 2000</i> says that people involved in a Tribunal proceeding must be given a reasonable chance to present their case. This includes being able to look at relevant documents held by the Tribunal.</p> <p>However, section 109 of the <i>Guardianship and Administration Act 2000</i> lets the Tribunal make a confidentiality order to prevent people involved in a proceeding from seeing Tribunal documents.</p> | <p>During our consultation, we asked:</p> <ul style="list-style-type: none"> • Under what circumstances, if any, should the Tribunal be able to stop a person involved in a proceeding from seeing documents that the Tribunal is considering, and why? <p>We also asked for other suggestions to deal with this issue.</p> |

WHAT DID PEOPLE SAY?

Inspection of documents

People raised concerns about the difficulties parties experienced when **inspecting documents** that the Tribunal has access to when making decisions.

In particular, the Tribunal’s practice of placing certain documents, without making a confidentiality order, on an ‘inaccessible spike’ so people could not see them was criticised. (Since February 2007, the Tribunal has reorganised its filing system to meet some of these concerns.) The Public Advocate observed that this led to the perception that decisions about which documents were

relevant to the case and so were made available for inspection were being made ‘on an arbitrary basis’. Part of this perception was due to the fact that it was a registry officer and not the Tribunal who was deciding what documents were to be put on the inaccessible spike. A few people were also concerned about the Tribunal relying on documents that people had not seen nor had the opportunity to comment on or correct.

Several people considered that the **period of time** between receiving notice of a hearing and the hearing was too short for adequate document inspection to occur.

‘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 . . . In disability circles it is widely accepted that where rights are diminished, confidentiality is often the means of camouflaging it.’ Queensland Advocacy Incorporated

Some people indicated that lack of time to inspect documents was worse in regional areas where documents could only be viewed in the few hours before a hearing started.

Some comments to the Commission revealed the risks of a **poor awareness of the document inspection process**.

‘Without assistance to effectively navigate the system, the operational processes and procedures effectively deny people access to important information.’ Carers Queensland

Withholding documents from parties

People were divided in their views on the question **‘should the Tribunal be able to make a confidentiality order in relation to documents?’**. Strong support was expressed by a range of people – including the Adult Guardian, the Public Trustee of Queensland, the Public Advocate and the Tribunal – for the Tribunal to keep a power to make confidentiality orders about documents. At the same time, many people said that the requirements of procedural fairness and open justice mean that this power should only be used in exceptional circumstances.

‘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 . . . We have become aware of (many examples) 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.’ Carers Queensland

Reasons put forward for keeping documents confidential included the need to:

- make sure that the Tribunal receives the best available information because some people may be reluctant to provide information if they know it will be disclosed to all the parties;
- maintain good relationships, for example, within families or between service providers and clients; and
- prevent the possibility of physical or emotional harm to the adult or another person, or to deter elder abuse. This view received strong support at the community forums conducted by the Commission.

Some people said the Tribunal’s power to make documents confidential should be limited to very specific circumstances. For example, one person said that no restrictions should ever be placed on an adult’s or statutory health attorney’s right to access documents relating to the health of the adult. Others argued that only certain types of documents – such as wills and documents filed by whistleblowers – should be kept confidential.

Many people believed that **documents should never be withheld from parties** to a proceeding. Their reasons included:

- Access to documents is consistent with the requirements of procedural fairness and the right to test the truthfulness or accuracy of information. People thought this was the most important reason – it received widespread support at community forums and from numerous individuals with personal experience in attending Tribunal hearings.

‘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.' A parent of an adult with impaired capacity

- It ensures the receipt of quality information and the promotion of quality decision-making. That is, if access to documents is denied the 'full picture' will not be revealed and the Tribunal will not have all the relevant information it needs.
- It assists adequate preparation for a hearing. Several people considered that parties require access to all documents to allow them to prepare adequately for the Tribunal hearing.
- The principle of open justice is undermined by not letting people see documents.

Criteria for power to withhold documents

The vast majority of people who supported keeping the Tribunal's power to make documents confidential were also in favour of having legislative criteria for when the power can be used. In response to the question '**when should the Tribunal be able to make a confidentiality order?**', most people thought the current legislative criteria were 'too broad'. On the other hand, the Department of Justice and Attorney-General considered that the current criteria provide the flexibility to deal with the 'complex and varied circumstances of families'.

A significant number of people said that the criteria in the guardianship laws needed to be 'strict', 'stringent' and 'clear', or to indicate a presumption in favour of openness and procedural fairness.

'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.'
Queensland Advocacy Incorporated

'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.' Submission 67

Suggested criteria for making an order to keep a document confidential included if:

- the Tribunal considered it was in the best interests of the adult to do so;
- its release would result in physical or emotional harm to the adult or another person, or vilification of an adult; or
- there is a real possibility of doing injustice or inflicting a serious disadvantage upon a party, a witness or a person giving information.

Some people also identified circumstances which they considered would not justify the making of a confidentiality order in relation to a document. For example, Carers Queensland said that conflict within a family is not, on its own, a sufficient reason for the Tribunal to keep documents confidential. Another view expressed at a focus group was that it is unacceptable to make documents confidential just because the information may cause a person discomfort or embarrassment.

Some people thought there should be different criteria for withholding documents from an adult than for withholding documents from other people. For example, Queensland Aged and Disability Advocacy said that the Tribunal should be able to prevent the adult from seeing a document if it would 'foreseeably affect the person's ongoing medical treatment or well-being'. However, others, including the Adult Guardian, considered the same criteria should apply to everyone.

People who commented on the issue of placing 'restrictions' on the disclosure of documents said that it is desirable to permit the Tribunal to restrict access to documents either by allowing access to only parts of a document or by imposing conditions on the document inspection process.

'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.' The President of the New South Wales Guardianship Tribunal

Both the Public Advocate and the Adult Guardian said that, in their experience, most applications for confidentiality orders are only for partial non-disclosure, for example, withholding the name of a doctor or part of a medical report. The ability to restrict access to documents rather than withhold them altogether was also supported for the flexibility it provided.

Most people considered it appropriate to allow a party's legal representative **access to documents** that have been withheld from that party. Some thought this was particularly important where a document has been kept from the adult.

THE COMMISSION'S RECOMMENDATIONS TO IMPROVE THE LAW

The Commission notes the importance of distinguishing between 'relevance' and 'confidentiality'. **All documents that are credible, relevant and significant** to a case must be available for **inspection by parties**. Documents that do not meet this test cannot help the Tribunal make its decision and so need not be available to the parties. The Tribunal's filing system and the inspection policy should reflect this.

In addition, apart from the Tribunal's own notes of a hearing and documents that are the subject of confidentiality orders, we consider that for the purposes of the hearing the Tribunal and the parties should have access to the same information. This means that the Tribunal will make its decision based only on the information that the parties know. The Commission notes that this may be the effect of the revised file structure adopted in February 2007. However, in the past, Tribunal members had access for the purposes of the hearing to information that the parties did not see. Given the concerns expressed during our consultation, we consider that people will have greater confidence in the Tribunal if its procedures ensure this does not happen (at least without the Tribunal having to make a specific order and invite the parties to have their say on that issue).

As well as these changes in practice, we also consider the guardianship laws should make clearer that a **party has a right to access any documents** that are credible, relevant and significant to the case, including before a hearing starts. This right can be removed only by a specific order.

In response to people's concerns about the **time provided for inspection of documents**, the Commission appreciates that 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'. However, we note that some matters are complex and so more time may be needed for inspection to be meaningful. We also note the problems for inspections in regional areas, where parties may only have the morning before a hearing to read all the relevant material and consider their response to it. In certain circumstances, the Tribunal may wish to consider giving parties copies of documents rather than relying on inspection alone. The issue of copies will be examined more fully in stage two of this review.

In relation to people's responses to the question '**should the Tribunal be able to make a confidentiality order in relation to documents?**', the Commission considers that the requirement of procedural fairness to disclose all credible, relevant and significant information is essential for high quality decision-making. This allows both the information and the credibility of persons supplying information to be tested.

But sometimes disclosing a document or part of a document to a party could cause the adult or another person serious harm or injustice. Consequently, we consider that the Tribunal should keep the power to make a document confidential from a party. Because such an order imposes confidentiality, the Commission considers it should continue to be called a '**confidentiality order**'.

To achieve our guiding principle of greater openness in the guardianship system, we make three further recommendations:

1. The **test applied for making confidentiality orders should be stricter**. The guardianship laws should impose a presumption in favour of parties having access to documents and permit this right to be displaced only if it is 'necessary to avoid serious harm or injustice to a person'. This means these orders will be made only in very limited circumstances.
2. The Commission recommended earlier on pages 24-25 that certain **safeguards** should apply to the making of 'limitation orders'. Confidentiality orders in relation to documents are one type of limitation order and so these safeguards should also apply to them.

3. The Tribunal should take **the least restrictive approach** available when making a confidentiality order in relation to a document. This means that only the information in the document that is the cause for concern – such as references to a person’s identity – should be withheld.

Another recommendation of the Commission is that the Tribunal should consider whether **disclosure to the adult or other parties of certain documents or information should be facilitated** in some way. It is desirable in the guardianship system that any distress or harm that might occur when disclosing information to the adult or others be minimised. One way this might be done is to have a support person present when the party inspects documents.

The Commission considers that it is appropriate for a **party’s representative to have access to documents or information** that have been withheld from a party. However, we note that parties are infrequently represented at Tribunal hearings, and so it would be unfair to require information to be disclosed to a representative of one party, but not to a party who is not represented.

A right to know decisions and reasons

‘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.’

Endeavour Foundation

| What the law currently says | What we asked |
|--|---|
| <p>Section 158 of the <i>Guardianship and Administration Act 2000</i> says that, generally, the Tribunal must give a copy of its decision and any written reasons for that decision to the adult concerned in a proceeding and to certain other people.</p> <p>However, section 109 of the <i>Guardianship and Administration Act 2000</i> lets the Tribunal keep its decision and reasons confidential from some or all of the people involved in a proceeding.</p> | <p>During our consultation, we asked:</p> <ul style="list-style-type: none"> • Under what circumstances, if any, should the Tribunal be able to refuse to give its decision or reasons for that decision to a person involved in a proceeding? <p>We also asked for other suggestions to deal with this issue.</p> |

WHAT DID PEOPLE SAY?

Almost all the submissions said that the Tribunal should have **no power to withhold its decisions** from parties to proceedings.

‘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.’ Queensland Advocacy Incorporated

Only three submissions said that the Tribunal should have power to withhold its decisions. However, one of these submissions also said that the Tribunal’s decisions should never be withheld from the adult or a statutory health attorney.

Similarly, the majority of submissions said that the Tribunal should have **no power to withhold the reasons for its decisions**. Some submissions did favour the Tribunal retaining this power, but thought that it should be used only very rarely. They considered that the legislative criteria that currently govern this power are too wide. Possible situations identified where it might be appropriate to withhold reasons included where disclosure may result in physical or emotional harm to the adult or another person.

In considering whether there should be a power to withhold decisions and reasons, a number of arguments were discussed. Several people said that such a power is contrary to the principle of **open justice** and would undermine the Tribunal's accountability.

'(It is) 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.' The Aboriginal and Torres Strait Islander Legal Service (Qld South)

Some people said that the giving of reasons is important in making sure that **procedural fairness** has been observed.

'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.' Caxton Legal Centre

This was supported by the comments of people who said that, in their cases, the reasons for decisions revealed that the Tribunal had relied upon inaccuracies and 'wishy-washy' information.

In contrast, **the guardianship system's focus on promoting and safeguarding the adult's interests** led many people to argue that the Tribunal should have power to withhold its reasons because of the vulnerability of adults with impaired capacity.

'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.' Australian Lawyers Alliance

A significant number of people, including the Public Advocate and some members of the Tribunal, said that giving reasons for a Tribunal decision has the potential to cause an adult physical or emotional harm. They 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 practitioners. The power to withhold reasons is necessary where their disclosure would damage or jeopardise those relationships, the adult or other people.

'Some adults (who are) 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.'
Disability Services Queensland

However, several other people said that the focus on the adult's interests in the guardianship system does not justify this sort of confidentiality.

'To grant power to the Tribunal to make reasons confidential goes against the very basis of open justice and procedural fairness. (Although) 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 (a) confidential order.' A parent of an adult with impaired capacity

A large number of submissions and many views expressed at community forums highlighted the importance of decisions and reasons to the **appeal process**.

'The Tribunal's decision and reasons are critical documents for parties to determine whether they may take action . . . in response to the Tribunal's decision in a matter.' Department of Justice and Attorney-General

'The standards in the criteria (for withholding reasons) would have to be extremely high, to ensure any aggrieved party's right to appeal is not compromised.'
Queensland Aged and Disability Advocacy

Several people noted the importance of decisions and reasons in **promoting acceptance of the Tribunal's orders** by those involved in a proceeding. One parent of an adult with impaired capacity thought:

'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.'

Some adults with impaired capacity said that they do not need to be protected from information.

Several people – including some at community forums – said that giving decisions and reasons would **promote public awareness of, and confidence in, the operation of the guardianship system.**

Several people also made a comment about **national legislative uniformity.**

‘It is difficult to understand why Queensland legislation is currently out of step with every other jurisdiction in Australia on this point.’ Endeavour Foundation

Provided it is **explained sensitively**, many people said that adults would benefit from knowing the decision made in their case and the reasons for it – even if that information is potentially distressing. Suggestions for facilitating this disclosure of information in an appropriate way included doing so in the presence of a health professional, or having such a person advise the Tribunal as to how its decisions and reasons should be delivered in particular cases. The Tribunal also considered that an express power in the guardianship laws enabling the Tribunal to direct the procedure for disclosure of its reasons would be useful.

The Department of Justice and Attorney-General and Queensland Health identified circumstances where it would be desirable for the Tribunal to **delay telling some people of a decision** to protect the adult’s health, well-being or safety. For example, Queensland Health noted:

‘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.’

The Tribunal also favoured a power to delay notification of a decision or reasons to deal with potential harm to an adult. It considered the law should be flexible as to the length of delay permitted.

THE COMMISSION'S RECOMMENDATIONS TO IMPROVE THE LAW

The Commission considers that people should **always have a right to know the Tribunal's decision and the reasons for that decision**. There should not be any power to withhold this information. This is consistent with the Commission's guiding principle that there should be greater openness in the guardianship system. As part of this, the Commission also considers that any person should be able to ask for a copy of a Tribunal decision and reasons as long as those documents do not identify the adult.

At the same time, the Commission recognises that it is desirable for **potentially distressing information to be disclosed sensitively**. This should not be done by imposing conditions on disclosure as this could have the effect of denying people information if the conditions cannot be met. The Commission instead prefers that in certain cases, the Tribunal consider whether the disclosure of a decision and reasons should occur in a supportive environment. The Tribunal is to determine when and how this needs to happen according to the individual circumstances of the case.

The Commission also considers that it might be appropriate for the Tribunal to **delay the disclosure of its decision to certain people for up to 14 days**. This is allowed only if it is necessary to avoid serious harm to a person or someone defeating the effect of a Tribunal decision. This period of time will allow substitute decision-makers or government officers to make the necessary arrangements to address these concerns.

Greater public discussion of proceedings

‘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 . . .’ The Public Advocate

| What the law currently says | What we asked |
|--|--|
| <p>Section 112 of the <i>Guardianship and Administration Act 2000</i> generally prohibits:</p> <ul style="list-style-type: none"> • publishing information about a Tribunal proceeding; and • revealing the identity of a person involved in a Tribunal proceeding. <p>There is some uncertainty in the law about whether ‘publishing’ information about proceedings means discussing it with <i>anyone</i> or only publicising it to a large group of people such as the general public.</p> <p>Section 109 of the <i>Guardianship and Administration Act 2000</i> also lets the Tribunal make a confidentiality order to keep certain information and documents it has received confidential from members of the public.</p> | <p>During our consultation, we asked:</p> <ul style="list-style-type: none"> • To what extent, if at all, should Tribunal proceedings be able to be openly discussed by people outside those proceedings, and why? • What limits, if any, should there be on disclosing the identity of a person involved in Tribunal proceedings, and why? • Should any ban on publishing information relate to telling that information to a single person or only to telling it to a large group of people such as the general public (for example, by the media)? <p>We also asked for other suggestions to deal with this issue.</p> |

WHAT DID PEOPLE SAY?

There was strong support for the guardianship laws to allow **greater openness in publishing information about Tribunal proceedings**. People felt this would improve accountability, public confidence and community awareness.

Some people said that wider publicity would allow for better public scrutiny and would highlight shortcomings in the system.

'Quite often it is only when media become involved in certain issues involving a person with a disability that justice is achieved.' A parent of an adult with impaired capacity

Having to ask permission to publish information about a proceeding can sometimes delay the public's access to timely information.

'A journalist who sought the Tribunal's permission to publish information . . . 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.' Australian Press Council

It is also seen to contribute to the public's limited – and sometimes negative – understanding of the Tribunal's role. One person noted that the current provisions 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.

Some people did, however, favour keeping **some level of confidentiality to preserve people's privacy and avoid harm**. Some adults with impaired capacity felt that limits should be imposed on what the media could report, including matters about health and matters that have an impact on a person's dignity. The Aboriginal and Torres Strait Islander Legal Service (Qld South) noted that Indigenous people are sensitive to intrusive public scrutiny of private matters.

Some people felt that the public availability of information could lead to financial exploitation and other abuse of adults. Others noted that it can lead to stigmatisation, discrimination and personal distress. This has particular implications when the impaired capacity is only temporary.

'A middle-aged man with an extensive and successful business suffered a stroke and had been unconscious for a period of weeks . . . His wife . . . was appointed as his administrator to see . . . (some) 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.’ President of the Tasmanian Guardianship and Administration Board

People also expressed concerns about the accuracy and appropriateness of media reporting. It was suggested that if the law is to allow the media to report on Tribunal proceedings, clear standards must be established as to what is appropriate along with a standard format for reporting stories.

Overall though, people felt that **prohibiting only the publication of identifying information** would strike an appropriate balance between open justice and preserving privacy.

What identifying information should be prohibited from being published depends on **whose privacy should be protected**. Most people felt that not only the privacy of the adult matters, but also the privacy of others involved in Tribunal proceedings. Some named specific people whose identity should not be disclosed – the applicant and family, parents, parties, whistleblowers or any person who wishes for his or her identity to be protected. People generally thought, however, that it is not appropriate for statutory bodies or organisations to be given protection from identification, as this would limit public scrutiny.

Another issue discussed was **who should be prohibited from receiving identifying information** – any person, or only large groups of people such as the general public? Several people noted that the current law is not clear about this.

‘The lack of clarity at present makes it very difficult to talk to anyone about problems in the regime . . . Even informing politicians of issues, discussing matters with legal representatives and colleagues in advocacy groups, even in a de-identified form, seems problematic.’ Queensland Advocacy Incorporated

Strong support was expressed (including from some adults with impaired capacity) for permitting disclosures about Tribunal proceedings to the adult’s family and friends, but not to the general public. People felt that these personal discussions were necessary to care for the adult properly and to make decisions in his or her best interests. This was also seen as necessary for the well-being of people close to the adult. Families and carers often feel the need to share and discuss information to know what steps they can take and to cope with any difficulties they have experienced.

A few people were concerned about personal discussions ending up as gossip. However, people also recognised that it was impractical for the law to stop that from happening.

Some people identified specific circumstances where disclosures should be allowed, for example, to obtain legal advice, for medical or health reasons or to inform government about issues.

People also discussed **what level of de-identification is required**. Some were worried that, even if a media report is de-identified so that the general public cannot identify an adult, a neighbour or those who know the adult may be able to do so. However, most people felt that publication of that sort of information should still be allowed.

People had various ideas about **what information, other than names and addresses, should never be published** because it might identify the person. One parent of an adult with impaired capacity suggested that the only information that should not be published should be name, address, picture or photograph, or voice recording of the person:

‘To extend it beyond this will be open to interpretation and could result in facts which should be openly available being confidential.’

Some pointed out that the amount of information needed to identify an adult may be different in regional areas than in metropolitan areas. People in small towns know who in their community has a disability, and adults are therefore more readily identifiable from facts other than their names.

People generally agreed with the **Tribunal having power to allow the publication of identifying information about a proceeding**. This was considered necessary in some cases, either in the interests of the adult or when legitimate public interests should prevail.

For example, publication of identifying information could be useful to seek assistance from the public in locating an adult. It may also be considered important where systemic abuse is taking place and should be aired in a public way.

Some people argued for special cases where **identifying information can be published without the permission of the Tribunal**. Some people, including media organisations, strongly believed that an exception should apply when a

person, including an adult, authorises publication of information about himself or herself.

'Guardianship legislation should not disenfranchise individuals who choose to speak publicly of their experience in a Tribunal hearing.' The Courier-Mail

On the other hand, some people acknowledged that problems can arise in determining whether an adult has sufficient capacity to make this decision.

The Public Advocate proposed an exception be made for the re-publication of identifying information that is already in the public domain. The Adult Guardian also felt that it was important to allow her office to respond to public criticism. People also debated how long any prohibition on the publication of information should last, particularly after the adult has died.

'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?' A parent of an adult with impaired capacity

Most people felt the Tribunal should have an **additional power to prohibit publication of any information about a particular proceeding**. It was suggested that this power might be used when publishing even limited information would reveal the identity of the adult, for example, when a public figure has lost capacity and is before the Tribunal. People generally thought that this power should be used only rarely and be governed by tightly constrained criteria, for example, where it is necessary to avoid endangering the safety of a person or in the interests of justice.

Some people argued that the **prohibition on publication of information should be consistent in the Tribunal and Supreme Court**. One respondent was distressed to discover 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. This person did not want people to know of his or her involvement with the guardianship system and thought this public reporting affected 'the ability to get legal representation and a fair hearing in other matters'.

THE COMMISSION'S RECOMMENDATIONS TO IMPROVE THE LAW

The Commission considers that **information about Tribunal proceedings should generally be able to be published**. This is consistent with the Commission's guiding principle that there should be greater openness in the guardianship system. However, due to the personal, private and sensitive information disclosed at hearings, there should be a **prohibition on publishing information that identifies the adult**.

The Commission thinks it is generally unnecessary to protect the identity of others involved in Tribunal proceedings. In most cases, protecting the adult's identity will, incidentally, mean not identifying those people who are close to him or her. In situations where wider identity protection is needed, for example where a whistleblower should remain anonymous, the Commission recommends later that the Tribunal be able to make non-publication orders in specific cases.

Identifying information should **not be disclosed 'to the public or a section of the public'**, but disclosures to a person who has sufficient interest in receiving that information should be permitted, as should personal discussions. While allowing personal discussions may have undesirable consequences, such as permitting gossip, the law cannot stop people from doing this. This test of 'to the public or a section of the public' will also let people tell others information if they need to as part of preparing their case before the Tribunal. It would, however, stop the media publicly reporting on a proceeding if the story would reveal the adult's identity.

The Commission notes the confusion about **whether certain disclosures are currently permitted**. Under our recommendations the following examples would not be considered disclosures 'to the public or a section of the public' and so would be allowed:

- family members or close friends discussing Tribunal proceedings and decisions with each other;
- a person involved in Tribunal proceedings discussing them with a medical professional or counsellor;
- a person obtaining legal advice (for example, from an advocacy group) as part of preparing for Tribunal proceedings;

- disclosing the appointment of a guardian or administrator for an adult to nursing staff of an aged care facility where the adult lives; and
- a guardian, administrator, attorney or carer disclosing identifying information to Centrelink or other Government Departments, to officials such as the Public Advocate and the Adult Guardian, or to a Member of Parliament.

In deciding **what level of de-identification is required**, the Commission believes that prohibiting publication of information from which *anyone* could identify the adult would not work. This would allow only very generic discussion of Tribunal proceedings because an adult's family could identify him or her from a very small amount of information. This would prevent meaningful reporting of proceedings. The Commission instead recommends that only information 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 who receives the information should be prohibited from publication.

The Commission suggests the Tribunal consider ways to de-identify its judgments so that they still contain a sufficient account of its reasoning but are more 'privacy-aware'. This is particularly important for hearings in regional areas.

The Commission considers that the **Tribunal should have power to permit publication of identifying information** if doing so is in the public interest or in the interests of the adult.

The Commission also recommends that **identifying information should be able to be published, without Tribunal authorisation**, in the following circumstances:

- if the Adult Guardian or the Public Advocate believe it is necessary in the public interest to publish identifying information in order to respond to identifying information that has already been published; and
- if the adult has died.

Further, a person should be able to publish identifying information if there is a 'reasonable excuse' for doing so.

The Commission does not believe that an exception should be made if a person authorises publication of information about themselves. In this

situation, an adult with capacity (or a media organisation) can approach the Tribunal to permit publication, if it is in the adult's interests or the public interest.

The Commission agrees with the majority of people's views that in some circumstances **the Tribunal should have power to prohibit the publication of any information about a particular Tribunal proceeding**. This might be appropriate, for example, where whistleblowers wish to have their identity concealed from the public for safety reasons, or where the adult is being abused and published information may allow the abuser to identify the adult and continue that behaviour.

The Commission considers that such an order (a **'non-publication order'**) should be made only where the Tribunal is satisfied it is necessary to avoid serious harm or injustice to a person. In considering whether to make such an order, the Tribunal must also take as its starting point that it is desirable that hearings be held in public and may be publicly reported. A non-publication order is a type of limitation order and so the safeguards recommended earlier on pages 24-25 for making those orders should also apply here.

The Commission also considers that the **prohibition on publication should apply to some Supreme Court guardianship proceedings**, for example, where there is an appeal from the Tribunal to the Supreme Court.

Finally, the Commission believes that the Tribunal should provide accessible information about the confidentiality provisions that apply to Tribunal proceedings to anyone involved in a proceeding, or anyone who may wish to attend, or report on, a proceeding.

Reframing the general duty of confidentiality: permitting appropriate use

‘Decency and good sense inherent in everyone should be sufficient to prevent the irresponsible dissemination of any of this information . . .’ A parent of an adult with impaired capacity

| What the law currently says | What we asked |
|--|--|
| <p>Section 74 of the <i>Powers of Attorney Act 1998</i> and section 249 of the <i>Guardianship and Administration Act 2000</i> aim to keep certain information confidential when it is gained by people who are acting under the guardianship laws.</p> <p>This includes people such as attorneys, guardians, administrators, Tribunal members and staff, the Adult Guardian and staff, the Public Advocate and staff, and community visitors.</p> <p>Both sections also have exceptions that allow disclosure of confidential information. They include if disclosure is permitted by the guardianship or other laws, or by the person that the information is about.</p> <p>An important exception is also provided for the Adult Guardian in section 250 of the <i>Guardianship and Administration Act 2000</i> to disclose information in the course of its investigations if it is ‘necessary and reasonable in the public interest’.</p> | <p>During our consultation, we asked:</p> <ul style="list-style-type: none"> • Apart from the situations referred to in the earlier questions (which relate to Tribunal proceedings), when should personal information that is gained by someone who is acting under the guardianship laws be kept confidential, and why? • Should there be any exceptions that allow a person to tell this information to another person or body? <p>We also asked for other suggestions to deal with this issue.</p> |

WHAT DID PEOPLE SAY?

A general duty of confidentiality

Some people expressed a general commitment to the **importance of the privacy** of adults with impaired capacity.

‘The paramount consideration in all instances must be what is best for and in the interests of the adult . . . Where possible all efforts should be made to retain the privacy and human dignity of the adult.’ Australian Lawyers Alliance

People were divided over whether there should be a **general duty of confidentiality** under the guardianship laws, although most people agreed that some form of confidentiality is needed. Views ranged from favouring no confidentiality provisions at all through to imposing confidentiality with exceptions.

‘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 . . .’ A parent of an adult with impaired capacity

‘Given the nature of the business of the guardianship system, information obtained within that system, for the limited purposes of that system, should almost without exception be confidential.’ Royal College of Nursing Australia

‘Information 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.’ A journalist

Most people who commented on the issue of **who should be subject to the duty of confidentiality** said that it should continue to apply to the list of people who are currently set out in the guardianship laws (guardians, administrators, attorneys and the statutory guardianship agencies and officials). The Community Visitor Program and others also suggested that the list should be extended to include, in addition to the community visitors, the staff administering that program.

The Public Advocate said that the duty of confidentiality should apply only to professionals, such as the Adult Guardian and the Public Trustee of Queensland. She said that lay guardians and administrators should be required to respect an adult's privacy under more general provisions, like the General Principles:

'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.'

Some people also said that the duty should not apply to informal substitute decision-makers because it would hinder appropriate discussion within an adult's support network.

'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.' Submission 119

Some people commented on **what kind of information the duty of confidentiality should apply to**. 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.'

Some people suggested that the duty of confidentiality should cover information that identifies a person. A few people also considered that the duty should apply only if the information has not already been publicly disclosed. Other people nominated particular types of information that should be covered by the duty, for example:

'Information about a person's financial affairs, state of health, personal relationships, personal attributes or related matters appears to be the obvious matters that require protection.' Caxton Legal Centre

Some people also commented on **what kind of conduct the duty of confidentiality should prevent**. Most said the duty should prevent the information from being disclosed, but not from being recorded. The Public Advocate commented, for example, that it is necessary for guardians and others performing functions under the guardianship laws to keep proper

records of information. She considered that the real issue was disclosure of the information to others.

Some people suggested that all disclosures of confidential information, even those by people who are not fulfilling a role under the guardianship laws and so receive information informally, should be prevented. Others disagreed, including Queensland Advocacy Incorporated who expressed concern about restricting ‘secondary disclosures’ which may be appropriate within an adult’s family and support network:

‘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.’

Guardianship and Administration Reform Drivers suggested that investigation reports by the Adult Guardian should be made publicly available:

‘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.’

Exceptions to the duty of confidentiality

Most people said the guardianship laws **should provide exceptions** to the general duty of confidentiality. For example, Caxton Legal Centre said:

‘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.’

Some people said that an adult’s right to privacy is just one of many interests that are safeguarded in the guardianship system.

‘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.’ Carers Queensland

Concerns were also raised about the duty of confidentiality being followed at the expense of accountability and transparency.

'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.' The Adult Guardian

This 'blanket of secrecy' has:

'led to anger, uncertainty, ambivalence and ambiguity.' Cerebral Palsy League of Queensland

People suggested that **information might need to be disclosed** in the following circumstances:

- For consultation between formally appointed substitute decision-makers.
- To gather information and views. Some people said that confidentiality should not interfere with good decision-making. There is a need for consultation by a guardian, administrator or attorney with members of the adult's support network when gathering information and views to inform decision-making for the adult. But concerns were expressed that this is not happening.

'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.' A daughter of an adult with impaired capacity

- When informing carers and families of decisions. Many people said it is crucial that information is shared with an adult's carers and family members, especially when decisions involve health matters. In their view, it is essential for carers to be informed about matters such as doctors' appointments, medical test results, and prescribed medications – this information assists in the day-to-day care of the adult. This view was shared by Queensland Advocacy Incorporated, Endeavour Foundation and Carers Queensland.

'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.' Carers Queensland

- To disclose adverse information held by decision-making bodies, like the Adult Guardian, in the interest of procedural fairness.

‘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.’
A son of an adult with impaired capacity

Some people also said the **current exceptions provided by the guardianship laws should continue** to apply, for example, to allow disclosure when: the person gives his or her consent; the Tribunal or the Supreme Court gives its permission; it is for a Tribunal or court proceeding; or it is permitted or required under another law.

Some **new exceptions for disclosures were also suggested**. Examples given were if disclosure of information would:

- advance the adult’s interests or prevent harm to the adult;
- assist the police or another law enforcement agency;
- protect the public interest by opening up the guardianship system for greater discussion;
- assist in obtaining legal advice or preparing an application for Tribunal proceedings; and
- let people tell the guardianship agencies and officials the information they need to do their job.

The Adult Guardian

Most people thought the guardianship laws should include a specific exception to the general duty of confidentiality for the Adult Guardian. People said the existing exception for disclosures made by the Adult Guardian about investigations should generally be retained.

That exception permits a disclosure if it is ‘necessary and reasonable in the public interest’, but only if it is not ‘likely to prejudice the investigation’. The Adult Guardian may identify the complainant ‘only if it is necessary and reasonable’. The exception also provides that the Adult Guardian may express a criticism of a person only if the person has been given ‘an opportunity to answer the criticism’.

THE COMMISSION'S RECOMMENDATIONS TO IMPROVE THE LAW

A general duty of confidentiality

The Commission considers that a **general duty of confidentiality** should be applied to information that a person receives when performing a role under the guardianship laws. The privacy of adults and others who have contact with the guardianship system should be respected.

However, the Commission considers that the **duty of confidentiality should not interfere with the appropriate use of that information** under the guardianship laws. Under the current law, this is one of the exceptions to the duty of confidentiality, but the Commission thinks that it should be part of the duty itself. It is important that confidentiality does not stop people in the guardianship system from carrying out their responsibilities properly.

The Commission therefore recommends that the duty of confidentiality should be a **duty to use information only for the purposes of the guardianship laws**. This reframing of the duty is likely to encourage greater openness and permit appropriate disclosures. Circumstances where disclosures could appropriately be made for the purposes of the guardianship laws include when:

- complying with an obligation under the guardianship laws;
- making a substitute decision for a matter;
- performing functions or exercising powers under the guardianship laws; or
- complying with procedural fairness.

A duty to use information for the purposes of the guardianship legislation will also not stop people from making or keeping appropriate records of information.

The duty of confidentiality should continue to apply to **people who are acting under the guardianship laws**. In particular, the Commission considers the duty should apply to:

- attorneys, including statutory health attorneys;

-
- guardians and administrators;
 - community visitors and other staff of the Community Visitor Program;
 - the Adult Guardian and his or her staff;
 - the Public Advocate and his or her staff; and
 - members and staff of the Tribunal.

Sometimes it will be difficult for family members or friends who are acting as guardians, administrators or attorneys to decide whether they received information because of their guardianship role or because of their personal relationship with the adult. Information received in a guardianship role is generally confidential but other information is not. This is a problem but can be managed by making the scope of the duty of confidentiality clear and by educating people about how it works.

The Commission considers that the duty of confidentiality should *not* be extended to apply to informal decision-makers. They are not acting under the guardianship laws. This means that people can share information about the adult and others. Nevertheless, informal decision-makers, like others in the community, should exercise their good judgment in respecting the privacy of others.

The Commission also thinks that the duty of confidentiality should *not* be extended to apply to service providers who may gain information about an adult. Other obligations of confidentiality already operate in this situation.

The Commission considers that the **duty of confidentiality should apply to information** that:

- is gained in connection with acting under the guardianship laws;
- is about a person's affairs (which would include financial and business information); and
- enables someone to identify the person.

Information that is already **within the public domain** should *not* be covered by the duty of confidentiality. This includes information about Tribunal

proceedings (although other parts of the guardianship laws discussed earlier restrict the reporting of those proceedings).

The Commission also considers that the duty of confidentiality should not prevent a person from **disclosing information about another person** to him or her.

Exceptions to the duty of confidentiality

The Commission considers that the guardianship laws **should provide exceptions** to the duty of confidentiality. Flexibility is necessary if information is to be used appropriately and responsively, and to ensure that decision-making is accountable and transparent. The Commission also notes that the duty of confidentiality appears to have been applied inflexibly sometimes. The Commission therefore considers the guardianship laws should clearly state when disclosure is permitted.

The Commission recommends that the current exceptions in the guardianship laws should be kept (or changed only slightly) to allow disclosure when it is:

- authorised or required **under another law**;
- **for a legal proceeding** arising out of or in connection with the guardianship laws;
- **authorised by the person** to whom the information relates; and
- authorised by the Tribunal or the Supreme Court **in the interests of justice**.

The Commission does *not* think a new exception is needed for disclosures made in the adult's best interests. The Commission considers that such an exception is too broad and too open to subjective interpretation.

However, the Commission recommends the following new exceptions to permit disclosures:

- when necessary to **prevent a serious risk to a person's life, health or safety**, especially in emergency situations;

- if made for the purpose of obtaining **legal or financial advice**, or giving information to **police** for the investigation of an offence; and
- to **statutory officials or government officers** as part of them carrying out their functions under the guardianship laws.

The Commission also recommends that people should be able to discuss otherwise confidential information if it is reasonable in the course of obtaining **counselling, advice or other treatment**. Further, a person should not be held in breach of the duty if he or she has a ‘reasonable excuse’.

The Adult Guardian

The Commission recommends that an exception allowing the Adult Guardian to disclose **information about investigations** should be kept. The Adult Guardian should be able to publicly disclose confidential information about an ongoing investigation if it is necessary and reasonable in the public interest. But he or she should be required first to consider: the likely prejudice to the investigation; whether the identity of a complainant or other person should be protected; and the urgency involved.

The Adult Guardian should also be required to consider whether the disclosure would reveal adverse information about a person that the person would normally have a chance to comment on before it is released. Provided it is necessary and reasonable in the public interest, the Adult Guardian should be allowed to disclose the information even if the person has not commented on it.

OTHER ISSUES

Other issues about the general duty of confidentiality raised during the review include:

- **Administrative policies to facilitate post-hearing disclosure by the Tribunal:** Some people said they had concerns about accessing information after a hearing held by the Tribunal. For example, Guardianship and Administration Reform Drivers said that access to Tribunal transcripts is important if a person wants to appeal. The Public Advocate also said that her office should be able to receive a

copy of Tribunal transcripts and files upon request to allow her to perform her statutory functions.

To deal with these and other concerns, the Freedom of Information and Privacy Unit of the Department of Justice and Attorney-General suggested that the Tribunal develop an administrative policy to deal with requests for such information.

The Commission agrees that the Tribunal should develop a detailed information access policy, which takes into account all of the confidentiality provisions of the guardianship laws. In particular, that policy should allow parties to access a Tribunal file after a hearing has finished. This access policy should be publicly available and would improve public confidence in the Tribunal.

- **Education and awareness:** Some people said that the confidentiality obligations under the guardianship laws are generally not well understood or even known about. A member of the Tribunal commented that professionals, including lawyers, have had difficulty understanding the confidentiality provisions so it would be ‘safe to assume that lay people are having problems’. Another person said people need to know what their responsibilities are ‘so they can get on with things’.

‘The lack of support offered to people to understand the current system generally, and . . . 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.’ Carers Queensland

The Commission agrees that people who are bound by confidentiality obligations must be made aware of them. The Commission considers that the Department of Justice and Attorney-General should provide accessible information about the general duty of confidentiality to substitute decision-makers and others to whom the duty applies. The Department should also provide resources for further training on the operation of the duty for the guardianship agencies and officials, designed in collaboration with those agencies and officials. This training should also be made available to other substitute decision-makers.

Part 4

The future of the review

The Commission's Guardianship Review has two stages. The first, which dealt with the confidentiality provisions, is now complete. The Commission has started work on the second stage, which involves reviewing the rest of the guardianship laws.

We have already learnt a great deal from our consultation process about what issues need to be considered in stage two. One issue mentioned in this paper is whether parties to proceedings should be entitled to copies of documents rather than just being able to look at them. People have also raised other broader issues such as:

- appeals from Tribunal decisions, and whether there should be a more accessible avenue of appeal than the current right to go to the Supreme Court;
- the General Principles, and whether they are a comprehensive statement of the factors that people should take into account when making decisions for adults with impaired capacity; and
- informal decision-making, and whether the guardianship laws should provide greater recognition of an adult's support network.

The Commission is also required by its terms of reference to look at other issues such as: the powers and functions of the guardianship agencies and officials; the law relating to enduring powers of attorneys, advance health directives and life-sustaining medical treatment; and whistleblower protection.

Once we have written a consultation paper explaining these and other issues, we will ask you again for your views. To ensure you know when we are consulting, you can contact the Commission to register an interest in the review on (07) 3247 4544 or complete the online form at:

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

Appendix 1

Guardianship: an overview

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

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

- the person wishing to make 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 decision or decisions being made are considered inappropriate; or
- a conflict occurs over the decision-making process.

The guardianship laws distinguish between decisions about:

1. **Personal matters**, such as where we live, who we live with, where we work, and what sort of lifestyle we have. Decisions for an adult about personal matters can be made by a guardian – a person appointed by the Tribunal for this purpose. This is called 'guardianship'. A guardian cannot make a decision for the adult about financial matters. Decisions about personal matters can also be made by an attorney appointed by the adult under an enduring power of attorney before he or she had impaired capacity.
2. **Health matters**. Decisions about health matters relate to our health care, such as what medical treatment we will receive. They are a type of personal matter. Decisions about health matters can be made by an adult by completing an advance health directive while he or she has

capacity. If no such directive exists, these decisions can be made by an attorney appointed under an enduring power of attorney or advance health directive, by a guardian, or by a statutory health attorney (who might be the adult's spouse, unpaid carer, or close friend or relation). The Tribunal can also make decisions about some types of health matters.

3. **Financial matters**, such as day-to-day financial decisions (like paying bills), buying and selling property, insuring property, making investments and entering into contracts. Decisions for an adult about financial matters can be made by an administrator – a person appointed by the Tribunal for this purpose. This is called 'administration'. An administrator cannot make a decision for the adult about personal or health matters. Financial decisions can also be made by an attorney appointed by the adult under an enduring power of attorney before he or she had impaired capacity.

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

Appendix 2

Glossary

Active parties in a Tribunal proceeding may include: 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 a 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.

Administration means making decisions for an adult about financial matters.

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

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

Adult evidence order is a type of order the Commission recommends should be included in the guardianship laws to permit the Tribunal to obtain information from the adult at a hearing in the absence of others (such as in the absence of members of the public, particular persons or parties).

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

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

Attorney is someone who is appointed by an adult (when he or she has capacity) in an enduring power of attorney to make decisions about personal, health or financial matters for the adult. An attorney for health matters can also be appointed in an advance health directive.

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

Closure order is a type of order the Commission recommends should be included in the guardianship laws to permit the Tribunal to close a hearing to members of the public, or to exclude a particular person (including a party) from a hearing.

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

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

Confidentiality orders are, under the current law, orders made by the Tribunal to stop a person from:

- attending a Tribunal hearing, or part of a hearing;
- seeing a document being considered by the Tribunal; or
- knowing the Tribunal's decision or the reasons it gives for a decision.

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 laws would permit the Tribunal to stop a party from hearing information or seeing documents considered by the Tribunal.

Confidentiality provisions are the provisions in the guardianship laws that:

- allow the Tribunal to make confidentiality orders;
- stop information about what happens at Tribunal hearings being published; and
- stop people telling others about personal information that they gain when acting under the laws.

De-identified information is information that has been modified to prevent disclosure of a person's identity.

Enduring power of attorney is a formal document made by an adult appointing an attorney or attorneys to make decisions about his or her personal, health or financial matters. The document is made when the adult has capacity, and remains effective if later the adult's capacity becomes impaired.

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

General Principles are a list of 11 guidelines in the guardianship laws that must be applied when a person makes decisions for an adult.

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

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

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

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

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

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

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

Impaired capacity means when a person cannot go through the process of reaching their own decision (free from inappropriate influence), having understood what that decision will mean for them, and communicating that decision. An adult may have impaired capacity for some decisions but not others.

Informal decision-maker is a person who is a member of the adult's support network but who is not appointed as an attorney, guardian or administrator.

Limitation orders are the four new types of orders the Commission recommends should be included in the guardianship laws: adult evidence orders, closure orders, non-publication orders and confidentiality orders.

Non-publication order is a type of order the Commission recommends should be included in the guardianship laws to permit the Tribunal to prohibit the publication of information about proceedings where the publication of that information is not already prohibited.

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

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

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

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

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

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

Appendix 3

List of submissions

| | |
|---|--|
| Aboriginal and Torres Strait Islander Legal Service (Qld South) | Curtis, Ms Karen (Federal Privacy Commissioner) |
| Acfield, Ms Laraine | Cutler, Ms Gwenyth |
| Alt, Ms Christine | Davis, Mr Ross |
| Appleyard, Mr Laurence | Daymon, Ms Lynne |
| Aspergers Syndrome Support Network | de Voss, Mr Vincent |
| Australian Broadcasting Corporation | Dennison, Mr Cyril |
| Australian Lawyers Alliance | Department of Justice and Attorney-General |
| Australian Press Council | Devine, Ms Kathleen A |
| Bartlett, Mr Alan | Dillon, Ms Alison |
| Bates, Mr Garry | Disability Services Queensland, Department of Communities |
| Berryman, Mrs Jessie | Doherty, Ms Jacqueline |
| Betts, Ms Tammy | Douglas, Mr Graham & Mrs Elspeth |
| Bischof, Mr Harold & Mrs Irene | Douglas, Mr James |
| Bond, Mr Laurence & Mrs Grace | Dover, Liga |
| Booth, Mrs Barbara | Dunne, Mr Brien |
| Briais, Ms Della | Dunne, Mr Michael |
| Brown, Mr Stephen Graham | Ebenezer, Mr Terry & Mrs Kay |
| Buchanan, Mr James M | Eichmann, Ms Libby |
| Burow, Ms Jess | Endeavour Foundation |
| Butler, Mr Bill | Festival of Light Australia |
| Cahill, Ms Maureen | Free TV Australia |
| Carers Queensland | Freeman, Ms Anita |
| Caxton Legal Centre | Geldard, Mr Paul |
| Cerebral Palsy League of Queensland | Gerrard, Ms Annette |
| Community Visitor Program | Gevers, Ms Marianne |
| Conaghan, Mr Mark | Goessling, Mr John & Mrs Janet |
| Connolly, Mr Peter | Gould, Mr Lewis |
| Courier-Mail, The | Greentree, Mr Kevin |
| Cowper, Ms Elizabeth | Guardianship and Administration Reform Drivers (GARD) |
| Croll, Mr Trevor | Guest, Ms Henriette |
| Cullen, Mrs Enid | Handyside, Ms Ann |

| | |
|--|--|
| Hardy, Ms Connie | Parker, Ms Penny |
| Hart, Mr John | Pendergast, Ms Dianne (Adult Guardian, Queensland) |
| Henderson, Mr Alastair | Peterson, Mr Doug |
| Henderson, Ms Alison | Phillips, Ms Anita (Public Advocate, ACT) |
| Hobbs, Ms Jo | Queensland Advocacy Incorporated |
| Hollingsworth, Mr Neil | Queensland Aged and Disability Advocacy Inc |
| Horne, Mr Brendan | Queensland Corrective Services |
| Howard, Ms Michelle (Public Advocate, Queensland) | Queensland Health |
| Hunt, Mr Farne | Queensland Law Society |
| Irving, Ms Lynn | Rafter, Ms Carmen |
| Jazazievska, Ms Bogica | Reid, Ms Marion |
| Jefferis, Ms Elaine | Rex, Ms Rosalene |
| Johnson, Evan & Debra | Reynolds, Mr Neil |
| Kawak, Ms Norma | Right to Life Australia |
| Keim SC, Mr Stephen | Robinson, Ms Diane (President, NSW Guardianship Tribunal) |
| Kennett, Ms Fay | Roper, Ms Angelina |
| Killin, Ms Gabriel | Royal College of Nursing Australia |
| Klein, Mr Greg (Public Trustee of Queensland) | Sargeant, Ms Bianca |
| Krome, Mr H | Scully, Ms Paula |
| Kynaston, Dr Bruce | Shemlowski, Ms Trish |
| Lang, Ms Jude | Sims, Mr Harley |
| Loveday, Mr & Mrs | Slinko, Ms Eugenia |
| McBryde, Ms Jennifer | Smith, Ms Anita (President, Tasmanian Guardianship and Administration Board) |
| McDowall, Ms Claudia | Sunshine Coast Citizen Advocacy |
| McFarlane, Ms Elizabeth | Tincknell, Mrs Jean |
| McMahon, Ms Olivia | Torrens, Ms Gail |
| McMullen, Ms Sheryl | Toten, Mrs Catherine |
| Maddison, Ms Felicity | Trappett, Dr Laurence |
| Moller, Mrs Edith | Treble, Mr John |
| Moore, Ms Dianne | Turnbull, Ms Katrina |
| Morris, Mr Fred | Turner, Ms Rose |
| Morrison, Mr Paul | Tyrrell, Mr Darcy |
| Mudaliar, Ms Janine | Uni Research |
| Nationwide News | von Schrader, Mr Matthaues |
| Nimmo, Ms Wendy | Walker, Ms Judy |
| Nitz, Ms Dianne | |
| O'Brien, Mr Pat | |
| O'Brien, Ms Val | |
| O'Connor, Mr Tony | |

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 |

| Forum No | Forum | Location | Date |
|-----------------|---|-----------------|------------------|
| 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 |

