Queensland
Law Reform Commission

Confidentiality in the Guardianship System: Public Justice, Private Lives

Discussion Paper

WP No 60
July 2006

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COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary views in this Discussion Paper.

Written comments and submissions should be sent to:

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Oral submissions may be made by telephoning: (07) 3247 4544

Closing date: 31 October 2006

It would be helpful if comments and submissions address specific issues or questions in the Discussion Paper.

CONFIDENTIALITY

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

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

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

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

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Chapter 1

Introduction to the review

THE GUARDIANSHIP REVIEW

1.1 The Attorney-General has asked the Queensland Law Reform Commission to review aspects of the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). This legislation regulates decision-making by and for adults with impaired decision-making capacity.

1.2 Under its terms of reference,[1] the Commission is to conduct the review in three stages. The first two stages relate to specific aspects of the legislation and the third stage examines the legislation more generally.

1.3 In stage one of the review, the Commission is to consider the confidentiality provisions of the legislation, and is directed by its terms of reference to have regard to the need to balance the protection of people's privacy and the accountability of decision-making. The Commission is to provide a final report to the Attorney-General on the confidentiality provisions by March 2007.

1.4 In the second stage of the review, the Commission is to consider the legislation's General Principles, and is directed again by its terms of reference to have regard to the need to protect the rights and interests of adults with impaired decision-making capacity. The Commission is to provide an interim report on the General Principles to the Attorney-General by September 2007. Work on this stage of the review will commence before the Commission's work on the confidentiality provisions is completed.

1.5 In the third stage of the review, the Commission is to consider the guardianship legislation more broadly. In undertaking this stage, the Attorney-General has asked the Commission to give specific consideration to:

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

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

- the law relating to advance health directives and enduring powers of attorney; and
- the scope of the decision-making power of statutory health attorneys; and
- the ability of an adult with impaired capacity to object to receiving medical treatment; and
- the law relating to the withholding and withdrawal of life-sustaining measures;

(b) the confidentiality provisions of the *Guardianship and Administration Act 2000*;

(c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity;

(d) whether there are circumstances in which the *Guardianship and Administration Act 2000* should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

1.6 The Commission is to give the Attorney-General its final report on stage three of its review by the end of 2008.

ABOUT THIS DISCUSSION PAPER

Methodology

1.7 This Discussion Paper deals exclusively with stage one of the review on the confidentiality provisions of the guardianship legislation. It has been produced to provide information to interested organisations and individuals on the current law relating to confidentiality and the issues the Commission considers will need to be addressed in this stage of the review. It invites readers to make submissions so that these views can be considered when the Commission formulates its recommendations.

1.8 In order to prepare this Discussion Paper, the Commission has obtained preliminary information and advice from a number of people and organisations with experience in the operation of the legislation.

1.9 At the end of 2005, the Commission established an informal Reference Group to provide expertise and advice on the review. While the Commission acknowledges that it is impossible to adequately represent all of the interests in this area of law, the members of the Reference Group represent a cross-section of people who are affected by, administer, or are otherwise interested in, Queensland's guardianship legislation.[2] To date, the Reference Group has met twice: at the beginning of the review, in December 2005, to identify issues for the Commission to consider, and prior to the

[2] Membership of the Reference Group is set out in Appendix 2.

finalisation of this Discussion Paper, in June 2006. The Reference Group will continue to meet throughout all three stages of the Commission's review.

1.10 The Commission was also pleased to receive 40 submissions from interested individuals and organisations. Before releasing this Discussion Paper, the Commission had not yet formally called for submissions and so was encouraged by the level of interest in the review. The Commission was also invited to participate in two forums and received views from the people attending about the guardianship legislation.[3]

1.11 Finally, as part of informing itself as to how the law is operating in practice, the Commission requested from the Tribunal, and was given, empirical information about how and when confidentiality orders are made. The information provided covered an eleven month period from 1 July 2005 to 26 May 2006 and is referred to where relevant throughout the Discussion Paper.[4]

1.12 The Commission is grateful for the assistance provided by these individuals and organisations and appreciates their valuable contribution to the review.

Content

1.13 The *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) contain provisions which protect certain information as confidential. These provisions deal both with the confidentiality of information generally and with the confidentiality of information generated around proceedings of the Tribunal by:

- imposing a duty on a person who gains confidential information through their involvement in the administration of the legislation prohibiting them from making a record of, or intentionally or recklessly disclosing, that information;
- prohibiting the publication of information about Tribunal proceedings and the disclosure of the identity of a person involved in a Tribunal proceeding; and
- conferring power on the Guardianship and Administration Tribunal to make confidentiality orders in a hearing in relation to the privacy of hearings and in relation to the confidentiality of documents and information before the Tribunal, and of the Tribunal's decision and reasons.

1.14 The confidentiality provisions in the legislation are brief but operate in a variety of contexts, each of which is separately dealt with in the Discussion Paper.

1.15 Chapter 2 of the Discussion Paper provides a general introduction to the guardianship system and the relevant confidentiality provisions that are the subject of this Discussion Paper.

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3 The names of people who have made submissions and the forums that the Commission participated in are listed in Appendix 3.

4 Note that the information available in relation to confidentiality orders made under s 109(2)(c) of the *Guardianship and Administration Act 2000* (Qld) is more limited: see para 2.109 in Chapter 2 (Overview of the law in Queensland).

1.16 Chapter 3 discusses the nature of privacy and confidentiality generally and considers three important concepts that inform choices about reform in this area: the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system.

1.17 Chapters 4 to 7 deal with confidentiality in relation to Tribunal proceedings. Chapter 4 considers the provisions that permit the Tribunal to hold hearings in private or to the exclusion of particular people. Chapter 5 discusses the extent to which the Tribunal can displace a person's statutory right to inspect documents before the Tribunal for a proceeding. Chapter 6 considers the Tribunal's ability to displace a person's statutory right to obtain a copy of the Tribunal's decision and any reasons for that decision. Chapter 7 discusses the general prohibition against reporting of Tribunal proceedings.

1.18 Finally, Chapter 8 of the Discussion Paper examines the general duty of confidentiality imposed on those people who are involved in the administration of the guardianship legislation.

1.19 In examining the scope of Queensland's confidentiality provisions, the Commission has sought to provide information about similar provisions that operate in the guardianship legislation in other Australian States and Territories. The Discussion Paper also refers to comparative provisions in the guardianship legislation of jurisdictions outside Australia where those provisions are innovative, unique or may represent best practice.

1.20 In Chapters 4 to 8, hypothetical case studies have been included. These case studies do not reflect any settled views or opinions of the Commission. Rather, their purpose is to help readers understand how the confidentiality provisions might operate in practice and some of the challenges that the issues raise. The Commission is aware that these case studies do not reflect the majority of cases that arise in the guardianship system. However, hypothetical scenarios involving some level of conflict or potential misconduct most usefully highlight the tensions generated by the issue of confidentiality.

1.21 Chapters 4 to 8 also contain expressions of the Commission's preliminary views on some of the issues which this Discussion Paper has raised. This has not been done to seek to persuade or influence people who are reading this paper. Rather, its purpose, as part of a transparent process, is to inform readers what the Commission is currently thinking. It is also intended to assist readers in formulating their own views. Of course, the Commission's views are only preliminary and may change during our consultation process and further research.

1.22 Finally, unless otherwise specified, the law is stated as at 24 July 2006.

How to read this Discussion Paper

1.23 The Commission realises that for various reasons some people may not wish to read this Discussion Paper in its entirety.[5] However, the Commission recommends that readers have particular regard to Chapters 2 and 3 as they introduce readers to the guardianship system, the confidentiality provisions and the principles that underpin the discussion that follows in subsequent chapters. Regard should also be had to Chapter 4 as it contains some generic issues that are relevant to subsequent chapters.

1.24 The substantive analysis of the confidentiality provisions is contained in Chapters 4 to 8. Those chapters deal with discrete issues and can be read independently according to the reader's interest. Each of those chapters contains questions on which the Commission is interested in receiving submissions.

Terminology

1.25 Throughout this Discussion Paper, the following terminology has been used:

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

  Some jurisdictions have Boards (South Australia and Tasmania) whilst others rely on a Court (Northern Territory). Western Australia and Victoria do not have specialised guardianship tribunals and instead each has a generalist tribunal with jurisdiction for a range of matters including guardianship (the State Administrative Tribunal and the Victorian Civil and Administrative Tribunal respectively).
- The term 'Adult Guardian' is used in this Discussion Paper to refer to Queensland's Adult Guardian and, unless otherwise expressed, the equivalent positions in other Australian jurisdictions.[6] In Victoria, Western Australia, South Australia and the Australian Capital Territory, the equivalent of the Adult Guardian is the Public Advocate. New South Wales, Tasmania and the Northern Territory have a Public Guardian.

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5 If this is the case, readers may prefer to read the Commission's shorter paper, written as a stand-alone guide to this Discussion Paper, *Public Justice, Private Lives: A Companion Paper*.

6 Note that the functions and powers of the Adult Guardian equivalents vary from jurisdiction to jurisdiction.

1.26 Some of the other terms used in this Discussion Paper are explained in the Glossary, which is located in Appendix 4.

THE CONSULTATION PROCESS

1.27 The Commission undertakes wide community consultation before making recommendations to the Attorney-General as to how the law might be improved. The consultation process in this review will help the Commission in:

- identifying all the key issues for the Commission to consider;
- finding out how the law works in practice, including what is causing problems;
- generating suggestions for how the law could be improved; and
- refining, developing and testing proposed recommendations.

1.28 The Commission is aware of the significant community interest in this review and is particularly keen to ensure that it hears from people affected on a daily basis by the guardianship legislation. The Commission has engaged Ms Donna McDonald to assist with this consultation and is grateful for her assistance and advice on the review to date.

Consultation on this Discussion Paper

1.29 The Commission will be consulting on this Discussion Paper until the end of October 2006.

1.30 In order to facilitate wide and inclusive consultation, this Discussion Paper is supplemented by:

- a shorter and independent guide to the Discussion Paper called *Public Justice, Private Lives: A Companion Paper*;
- two pamphlets dealing with the key issues in the review called *Confidentiality: Key questions for people who may need help with decision-making* and *Confidentiality: Key questions for families, friends and advocates*; and
- an interactive CD-ROM for people who prefer or need to see and/or listen to new information called *Public Justice, Private Lives: A CD-ROM Companion*.

1.31 Copies of these publications are available on the Commission's guardianship website.[7] Readers can also request a copy of any of these publications by contacting the Commission.

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

1.32 The Commission will hold a number of public forums in different parts of the State to promote widespread community participation in its review. The Commission will also be holding several focus group discussions with different groups of people with particular interests and backgrounds. The Commission also invites people to make a written submission or to contact the Commission in person or by telephone to share their views on the issues raised in this Discussion Paper.

1.33 Details of the Commission's public consultation process, including information about dates, venues and times for public forums, will be posted on the Commission's guardianship website, and advertised widely.

CALL FOR SUBMISSIONS

1.34 The Commission invites submissions on stage one of the review. Submissions can relate to issues raised by this Discussion Paper generally or to the specific questions posed at the end of each chapter.

1.35 Details on how to make a submission are set out in the beginning of this Discussion Paper.[8] The closing date for submissions is 31 October 2006.

1.36 These submissions will be taken into consideration when the Commission is formulating its recommendations. At the conclusion of the review, the Commission will publish its recommendations in its final report which will be presented to the Attorney-General for tabling in Parliament.

8 There is also information about how the Commission will treat any submissions it receives.

Chapter 2

Overview of the law in Queensland

INTRODUCTION

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

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

OVERVIEW OF GUARDIANSHIP IN QUEENSLAND

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

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

- When is an adult unable to make their own decisions for a matter?
- What decisions can be made for an adult?
- Who can make substitute decisions for an adult?[9]
- How are substitute decisions for an adult to be made?
- What agencies are involved in the guardianship system?

When is an adult unable to make their own decisions for a matter?

2.5 One of the ordinary incidents of being an adult (a person 18 years or older)[10] is the ability to make your own decisions. An adult may, however, be unable to make their own decisions if they have impaired decision-making capacity. Capacity has been described as 'a gatekeeper concept' in that it is 'a mechanism by which individuals retain or lose authority over and responsibility for decisions that affect their lives'.[11] Impaired capacity may result from an intellectual disability, dementia, acquired brain

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

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

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

injury, mental illness, or an inability to communicate, for example, when a person is in a coma.[12]

2.6 In Queensland, an adult will have 'capacity' for a matter if they are capable of:[13]

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

2.7 An adult who does not satisfy these criteria in relation to a matter is described as having 'impaired capacity'[14] for that matter. Under Queensland's guardianship legislation, the Guardianship and Administration Tribunal has power to make a declaration about an adult's capacity[15] on the basis of medical and other evidence.[16]

2.8 There is a presumption, however, that every adult has capacity unless it is otherwise established.[17] The legislative framework also promotes the right of an adult to make all decisions to the extent that they are capable.[18] This includes the right to make decisions with which others may not agree.[19]

2.9 Impaired capacity is specific to individual decisions about matters. An adult may have capacity to make decisions about some matters but not others.[20] For example, an adult with mild dementia may not have sufficient capacity to execute a will but may

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

13 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'capacity'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'capacity').

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

15 *Guardianship and Administration Act 2000* (Qld) ss 82(a), 146.

16 See, for example, *Re MV* [2005] QGAAT 46.

17 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 (General principles) s 1. Also see *Guardianship and Administration Act 2000* (Qld) s 7(a); *Re Bridges* [2001] 1 Qd R 574.

18 In particular, see *Guardianship and Administration Act 2000* (Qld) ss 5(d), 6(a).

19 *Guardianship and Administration Act 2000* (Qld) s 5(b).

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

be fully capable of making day-to-day decisions about their accommodation or lifestyle.[21]

What decisions can be made for an adult?

2.10 An adult with impaired capacity for a matter may require a substituted decision-maker for decisions about that matter. The guardianship legislation makes provision for a wide range of personal and financial decisions to be made for an adult with impaired capacity. The legislation distinguishes between decisions concerning 'financial matters' which involve *administration*, and those concerning 'personal matters' which involve *guardianship*. It also differentiates between 'health matters', 'special health matters', and 'special personal matters'. Each of these matters is discussed in turn.

Financial matters

2.11 All matters relating to an adult's financial or property matters are referred to in the guardianship legislation as 'financial matters'.[22] These include buying and selling property (including land); paying the adult's expenses, rates, insurance, taxes and debts; conducting a trade or business on the behalf of the adult; making financial investments; performing the adult's contracts; and all legal matters relating to the adult's financial or property matters.

Personal matters

2.12 All matters (other than 'special personal matters' and 'special health matters') relating to an adult's care or welfare are referred to as 'personal matters'.[23] These include where and with whom the adult lives; the adult's health care; day-to-day issues such as diet and dress; the adult's employment, education and training; and legal matters that do not relate to the adult's financial or property matters.

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21 See, for example, *Re FHW* [2005] QGAAT 50, [46] where the Tribunal held: 'he [FHW] has capacity for simple and complex personal matters and simple financial matters but he has impaired capacity for complex financial matters'.

22 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 1 (definition of 'financial matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 1 (definition of 'financial matter').

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

Health matters

2.13 A type of personal matter, 'health matters' concern the 'health care, other than special health care, of the adult'.[24] 'Health care' is defined in the guardianship legislation as:[25]

> … care or treatment of, or a service or a procedure for, the adult—
>
> (a) to diagnose, maintain, or treat the adult's physical or mental condition; and
>
> (b) carried out by, or under the direction or supervision of, a health provider.

Special health matters

2.14 'Special health matters' are those relating to 'special health care'. They involve decisions about very significant health issues. The guardianship legislation defines 'special health care' as:[26]

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

Special personal matters

2.15 'Special personal matters' are regarded as being of such an intimate nature that it would be inappropriate for another to make such a decision on behalf of an adult under the guardianship legislation.[27] These matters include voting; consenting to

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24 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 4 (definition of 'health matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 4 (definition of 'health matter').

25 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 5 (definition of 'health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 5 (definition of 'health care'). 'Health care' can include the withholding or withdrawal of life-sustaining measures in some circumstances, but it excludes first aid treatment, non-intrusive examinations made for diagnostic purposes and the administration of non-prescription medication which would normally be self-administered: *Powers of Attorney Act 1998* (Qld) sch 2 s 5(2)–(3); *Guardianship and Administration Act 2000* (Qld) sch 2 s 5(2)–(3).

26 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 7 (definition of 'special health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 7 (definition of 'special health care').

27 The power to make decisions for an adult about special personal matters cannot be assigned in an enduring document: *Powers of Attorney Act 1998* (Qld) s 32(1)(a). Nor can it be granted to a substitute decision-maker by order of the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 14(2). Further, there are no other provisions in the guardianship legislation empowering other decision-makers in relation to special personal matters.

marriage; and making or revoking a will,[28] a power of attorney, an enduring power of attorney, or an advance health directive.[29]

Who can make substitute decisions for an adult?

2.16 The guardianship legislation provides for substitute decisions for an adult to be made by several types of decision-makers, depending on the matter involved. The legislation recognises:[30]

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

2.17 The adult themselves may also be a decision-maker, by completing an advance health directive before they lose the requisite capacity for a matter. In such a document, the adult may give directions about future health matters, including 'special health matters'.[31] An adult may direct, for example, that in particular circumstances, a life-sustaining measure be withheld or withdrawn.[32]

Informal decision-makers

2.18 The guardianship legislation recognises that substitute decisions for an adult can be made informally by the adult's 'existing support network',[33] that is, the adult's family and close friends, and other people who the Tribunal decides provide support to the adult.[34]

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

29 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 3 (definition of 'special personal matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 3 (definition of 'special personal matter').

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

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

32 *Powers of Attorney Act 1998* (Qld) s 35(2)(b). Also see s 36 of the *Powers of Attorney Act 1998* (Qld) for the conditions that must apply for a direction to withdraw or withhold life-sustaining measures to operate.

33 *Guardianship and Administration Act 2000* (Qld) s 9(2)(a).

34 *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'support network').

2.19 If there is doubt about the appropriateness of a decision, the Tribunal may ratify or approve informal decisions.[35]

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

- the person wishing to make a 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.

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

Attorneys appointed in advance by the adult

2.22 An adult may formalise future substitute decision-making for themselves by appointing a person (an attorney) to make particular decisions on their behalf in the event they subsequently lose capacity. There are two instruments that an adult (the principal) may use to appoint an attorney: an enduring power of attorney and an advance health directive.[36] An adult may only make such a document if they have sufficient capacity.[37]

2.23 In an enduring power of attorney, a principal can assign to their nominated attorney or attorneys decision-making power for some or all financial matters and/or personal matters, including health matters.[38] A principal cannot, however, give power to an attorney for 'special health matters' or 'special personal matters'.[39]

2.24 In an advance health directive, a principal can assign decision-making power to an attorney or attorneys for some or all health matters, other than for 'special health matters'.[40]

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35 *Guardianship and Administration Act 2000* (Qld) s 82(1)(e).

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

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

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

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

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

2.25 An attorney can exercise his or her assigned power with respect to personal matters only during a period when the principal no longer has capacity for the particular matter.[41] The power for financial matters becomes exercisable either at the time or in the circumstance the principal nominates in the document, or otherwise, once the enduring power of attorney is made.[42] Power for financial matters is also exercisable at any time the principal has impaired capacity.[43]

2.26 The legislation imposes a range of obligations on attorneys as to how they exercise their power. For example, an attorney must act honestly and diligently[44] and must comply with the General Principles set out in the legislation and, for decisions about health matters, the Health Care Principle.[45] Attorneys for financial matters are also required, for example, to avoid conflict transactions[46] and to keep their property separate from that of the adult.[47] An attorney is also regarded as an agent of their principal and so would be subject to the general law of agency to the extent that it is not inconsistent with the guardianship legislation.[48]

Statutory health attorneys

2.27 A statutory health attorney is a person in a particular relationship with the adult who is declared by the legislation to be a person with authority to make decisions about health matters for an adult. The legislation lists the relationships in a hierarchical order. The first of the following who is 'readily available and culturally appropriate' to make the decision will be an adult's statutory health attorney:[49]

- the adult's spouse,[50] if the relationship is close and continuing;

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

42 *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

43 *Powers of Attorney Act 1998* (Qld) s 33(3).

44 *Powers of Attorney Act 1998* (Qld) s 66(1).

45 *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are discussed at para 2.38–2.43.

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

47 *Powers of Attorney Act 1998* (Qld) s 86.

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

49 *Powers of Attorney Act 1998* (Qld) s 63(1).

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

- a person 18 years or older who is caring for the adult but who is not a paid carer[51] of the adult; or

- a close friend or relation of the adult 18 years or older and who is not a paid carer[52] of the adult.

2.28 If no-one from that list is readily available and culturally appropriate, the Adult Guardian becomes the adult's statutory health attorney.[53]

2.29 A statutory health attorney is authorised by the legislation to make any decision about an adult's health matter that the adult could have made if he or she had capacity for the matter,[54] but only during a period when the adult has impaired capacity for the matter.[55] A statutory health attorney must comply with the General Principles and the Health Care Principle set out in the legislation when exercising their power.[56]

Guardians and administrators appointed by the Tribunal

2.30 In some circumstances, the Tribunal has power to appoint formal substitute decision-makers for particular matters for an adult.[57] A guardian can be appointed for a personal matter, including a health matter (but not 'special health matters'[58]). An administrator can be appointed for a financial matter. The Tribunal may make such an appointment, on terms it considers appropriate, if:[59]

> (a) the adult has impaired capacity for the matter; and
>
> (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and

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

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

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

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

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

56 *Powers of Attorney Act 1998* (Qld) s 76. The General Principles and the Health Care Principle are discussed at para 2.38–2.43.

57 *Guardianship and Administration Act 2000* (Qld) ss12(1), 82(1)(c).

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

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

(c) without an appointment—

(i) the adult's needs will not be adequately met; or

(ii) the adult's interests will not be adequately protected.

2.31 A person may only be appointed as a guardian or administrator for an adult if they are 18 years or older, they are not a paid carer or health provider for the adult, and the Tribunal considers them appropriate for appointment.[60]

2.32 The Tribunal is required by the guardianship legislation to take into account several considerations in deciding whether a person is appropriate for appointment.[61] These include:[62]

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

2.33 A guardian or administrator is conferred with the authority to do anything in relation to a personal or financial matter for which they are appointed that the adult could have done if they had capacity for that matter (in accordance with the terms of appointment).[63]

2.34 Given the breadth of this power, the guardianship legislation imposes strict requirements on the exercise of authority by a guardian or administrator. Such a person must exercise his or her power honestly and diligently,[64] must apply the General Principles contained in the legislation (and the Health Care Principle if appropriate),[65] is subject to regular review,[66] and, if they are an administrator, must submit a management

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

61 *Guardianship and Administration Act 2000* (Qld) s 15.

62 *Guardianship and Administration Act 2000* (Qld) s 15(1).

63 *Guardianship and Administration Act 2000* (Qld) s 33. Also see *Guardianship and Administration Act 2000* (Qld) s 36.

64 *Guardianship and Administration Act 2000* (Qld) s 35.

65 *Guardianship and Administration Act 2000* (Qld) s 34(1)–(2). The General Principles and the Health Care Principle are discussed at para 2.38–2.43.

66 *Guardianship and Administration Act 2000* (Qld) ss 28, 29.

plan[67] and avoid conflict transactions.[68] These requirements are reflective of those imposed in respect of the common law of agency.[69]

The Tribunal

2.35 The guardianship legislation also empowers the Tribunal to make substitute decisions for an adult in relation to some types of 'special health care'.[70] If a special health matter for an adult is not dealt with by a direction given by the adult in an advance health directive, the Tribunal has power to consent to special health care for an adult, other than electroconvulsive therapy or psychosurgery.[71]

2.36 The Tribunal's authority to give consent is limited by several specific requirements imposed by the legislation. The Tribunal must be satisfied, for example, that the special health care involves minimal risk to the adult and is the only reasonably available option.[72] In deciding whether to give consent, the Tribunal must also apply the General Principles and the Health Care Principle contained in the legislation.[73]

2.37 The Tribunal may also consent to the withholding or withdrawal of a life-sustaining measure for an adult with impaired capacity (if the matter is not dealt with by a direction given in an advance health directive)[74] and to the sterilisation of a child with an impairment.[75]

How are substitute decisions for an adult to be made?

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

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67 *Guardianship and Administration Act 2000* (Qld) s 20.

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

69 See S Fisher, *Agency Law* (2000) [7.2.1]–[7.5.6].

70 *Guardianship and Administration Act 2000* (Qld) ss 65(4), 68(1), 82(1)(g).

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

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

73 *Guardianship and Administration Act 2000* (Qld) s 11. The General Principles and the Health Care Principle are discussed at para 2.38–2.43.

74 *Guardianship and Administration Act 2000* (Qld) ss 66(3), 82(1)(f). See also s 66A of the *Guardianship and Administration Act 2000* (Qld), which provides that this consent cannot operate unless the adult's health provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.

75 *Guardianship and Administration Act 2000* (Qld) ch 5A, s 82(1)(h).

2.39 The General Principles and the Health Care Principle must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult.[76] This includes the making of a decision for an adult by the potential decision-makers already discussed. The guardianship legislation also makes specific provision for the application of these principles to the Tribunal,[77] the Adult Guardian,[78] and an adult's guardian or administrator.[79]

2.40 The legislation also states that the 'community is encouraged to apply and promote the general principles'.[80]

2.41 The General Principles include:[81]

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

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

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

78 *Guardianship and Administration Act 2000* (Qld) s 174(3).

79 *Guardianship and Administration Act 2000* (Qld) ss 34, 74(4).

80 *Guardianship and Administration Act 2000* (Qld) s 11(3).

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

- the importance of maintaining the adult's cultural, linguistic and religious environment; and

- an adult's right to confidentiality of information about them.

2.42 The Health Care Principle provides that power for a health or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power:[82]

- is necessary and appropriate to maintain or promote the adult's health or wellbeing; or

- is, in all the circumstances, in the adult's best interests.

2.43 In deciding whether the exercise of a power is appropriate, the adult's views and wishes and information given by the adult's health provider are to be taken into account.[83] In addition, in deciding whether to consent to special health care, the Tribunal, which is the only potential decision-maker for such matters, must take into account the views of the adult's guardian, attorney or statutory health attorney.[84]

What agencies are involved in the guardianship system?

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

- the Tribunal;

- the Adult Guardian;

- the Public Advocate;

- community visitors; and

- the Public Trustee.

The Tribunal

2.45 The Guardianship and Administration Tribunal is a quasi-judicial body established by the *Guardianship and Administration Act 2000* (Qld).[85] The Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for

82 *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(1); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 s 12(1).

83 *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(2); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 s 12(2).

84 *Powers of Attorney Act 1998* (Qld) sch 1 pt 2 s 12(5); *Guardianship and Administration Act 2000* (Qld) sch 1 pt 2 s 12(5).

85 *Guardianship and Administration Act 2000* (Qld) s 81.

adults,[86] subject to the exercise of the Tribunal's powers by the Supreme or District Court to make, change, or revoke the appointment of a guardian or administrator in particular civil proceedings.[87] The Tribunal also has concurrent jurisdiction with the Supreme Court for matters relating to enduring documents and attorneys appointed under enduring documents.[88]

2.46 The Tribunal's functions include:[89]

- making declarations about an adult's capacity for a matter;
- hearing applications for the appointment of guardians and administrators and appointing, where necessary, guardians and administrators for an adult;
- making declarations, orders or recommendations, or giving directions or advice in relation to guardians, administrators, attorneys, and enduring documents;
- ratifying or approving an exercise of power by an informal decision-maker for an adult; and
- giving consent to some types of special health care for an adult, to the withholding or withdrawal of life-sustaining measures, and to the sterilisation of a child with an impairment.[90]

2.47 At a hearing, the Tribunal is generally constituted by three members, unless the President considers it appropriate that a matter be heard by one or two members.[91] To the extent that it is practicable,[92] the Tribunal that is hearing a matter is also to be constituted by either the President, a Deputy President or a legal member;[93] a professional member;[94] and a personal experience member,[95] although the composition

86 *Guardianship and Administration Act 2000* (Qld) s 84(1).

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

88 *Guardianship and Administration Act 2000* (Qld) s 84(2).

89 *Guardianship and Administration Act 2000* (Qld) s 82(1).

90 *Guardianship and Administration Act 2000* (Qld) ss 82(1)(f)–(h).

91 *Guardianship and Administration Act 2000* (Qld) s 101(1).

92 *Guardianship and Administration Act 2000* (Qld) s 101(2).

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

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

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

of the Tribunal will also depend on the nature of the matter.[96]

2.48 Proceedings before the Tribunal are to be conducted as simply and quickly as practicable.[97] The Tribunal may inform itself on a matter in any way it considers appropriate,[98] but it must observe the rules of procedural fairness.[99]

2.49 Tribunal orders are enforceable as if they were orders of a court.[100] A person may appeal against a Tribunal decision to the Supreme Court.[101]

The Adult Guardian

2.50 The Adult Guardian is an independent statutory official whose position is established under the *Guardianship and Administration Act 2000* (Qld) to protect the rights and interests of adults with impaired capacity.[102]

2.51 The Adult Guardian's functions include:[103]

- protecting adults from neglect, exploitation, or abuse;[104]
- conducting investigations of complaints of such allegations, and investigations into the actions of an adult's substitute decision-maker;[105]
- mediating and conciliating disputes between an adult's substitute decision-maker and others, such as health providers;
- acting as an attorney for an adult under an enduring document or as an adult's statutory health attorney;
- acting as an adult's guardian if appointed by the Tribunal;
- consenting to the forensic examination of an adult;[106]

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

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

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

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

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

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

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

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

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

105 *Guardianship and Administration Act 2000* (Qld) ss 174(2)(b), 180.

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

- seeking government or organisational assistance for an adult; and
- undertaking educative, advisory, and research activities on the operation of the guardianship legislation.

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

- temporarily suspend an attorney's powers if there are reasonable grounds to suspect that the attorney is not competent;[107]
- apply to the courts to claim and recover possession of property that the Adult Guardian considers has wrongfully been held or detained;[108] and
- apply to the Tribunal for a warrant to remove an adult from a place if there are reasonable grounds to suspect the adult is at immediate risk of harm due to neglect, exploitation, or abuse.[109]

The Public Advocate

2.53 The Public Advocate is an independent statutory official whose position is established under the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights of adults.[110]

2.54 The Public Advocate's other functions include:[111]

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

2.55 Unlike the Adult Guardian, the Public Advocate's functions are aimed at systemic advocacy rather than advocacy on behalf of individual adults. The Public Advocate seeks to identify issues in the systems that impact on adults, and works towards influencing appropriate change. Those systems include policy, service and legislative systems, across the government and non-government sectors. Systemic advocacy may be conducted through a variety of advocacy strategies including

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107 *Guardianship and Administration Act 2000* (Qld) s 195(1).

108 *Guardianship and Administration Act 2000* (Qld) s 194.

109 *Guardianship and Administration Act 2000* (Qld) s 197.

110 *Guardianship and Administration Act 2000* (Qld) ss 208, 209(a), 211.

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

discussions, correspondence, committee representation, submissions, discussion and issues papers, forums and conferences.[112]

2.56 The Public Advocate may do all things necessary and convenient for the performance of its functions[113] and may, with leave, intervene in a proceeding involving the protection of the rights or interests of adults in a court, tribunal, or official inquiry.[114]

Community visitors

2.57 Community visitors are appointed by the Queensland Government under the *Guardianship and Administration Act 2000* (Qld) to safeguard the interests of 'consumers' by regularly visiting 'visitable sites'.[115]

2.58 A 'consumer' means any person who lives or receives services at an authorised mental health service; or an adult with impaired capacity for a matter or with a mental or intellectual impairment and who lives or receives services at a visitable site.[116]

2.59 A 'visitable site' means a place where a consumer lives and receives services and is prescribed to be such a site under a regulation.[117] This includes residences and services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.[118]

2.60 Community visitors' functions include:[119]

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

- inquiring into and seeking to resolve complaints, and referring complaints to other entities for further investigation or resolution.

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

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

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

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

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

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

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

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

2.61 Community visitors have power to do all things necessary or convenient in the performance of these functions.[120]

The Public Trustee

2.62 The Public Trustee of Queensland is a Queensland Government corporation established under the *Public Trustee Act 1978* (Qld).[121] It may be appointed by the Tribunal as an adult's administrator.[122] If appointed as an administrator, the Public Trustee has the same obligations as any other administrator appointed under the guardianship legislation.[123]

OVERVIEW OF THE CONFIDENTIALITY PROVISIONS

Introduction

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

- section 249 of the *Guardianship and Administration Act 2000* (Qld) and its mirror provision in section 74 of the *Powers of Attorney Act 1998* (Qld);
- section 112 of the *Guardianship and Administration Act 2000* (Qld); and
- section 109 of the *Guardianship and Administration Act 2000* (Qld).

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

2.65 Section 249 of the *Guardianship and Administration Act 2000* (Qld) (and section 74 of the *Powers of Attorney Act 1998* (Qld)) impose a *blanket* duty on people who receive confidential information through their involvement in the guardianship system. There are exceptions to this duty, but it is the widest of the confidentiality provisions in terms of to whom and to which information it applies.

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

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

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

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

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

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

2.68 As part of facilitating the flow of information to the Commission for its consultation process, some minor amendments were made to sections 112 and 249 of the *Guardianship and Administration Act 2000* (Qld) and to section 74 of *Powers of Attorney Act 1998* (Qld).[124] These amendments will not be treated as part of the confidentiality provisions for the purposes of this Discussion Paper and so will not be considered further.

Section 249: the general duty of confidentiality

2.69 The duty imposed by section 249 is the widest and most general of the confidentiality provisions: it prohibits any person who gains 'confidential information' through their involvement in the administration of the legislation from recording or disclosing that information.[125] Section 74 of the *Powers of Attorney Act 1998* (Qld) mirrors that duty in relation to attorneys.[126]

2.70 Together, these provisions apply to such people as:[127]

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

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

125 *Guardianship and Administration Act 2000* (Qld) s 249(1).

126 *Powers of Attorney Act 1998* (Qld) s 74(1), (3). An attorney means an attorney under a power of attorney, enduring power of attorney or advance health directive, or a statutory health attorney: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'attorney').

127 *Powers of Attorney Act 1998* (Qld) s 74(1), (3); *Guardianship and Administration Act 2000* (Qld) s 249(2).

2.71 The duty relates to confidential information, including 'information about a person's affairs'.[128] It does not apply to information that has already been publicly disclosed (unless further disclosure is prohibited by law) or to information that identifies the person to whom the information relates.[129]

2.72 The provisions also contain a number of exceptions to the duty including, for example:[130]

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

2.73 Section 250 of the *Guardianship and Administration Act 2000* (Qld) also contains an exception to the duty. It relates to the disclosure by the Adult Guardian of information related to ongoing investigations. It confers a wide discretion on the Adult Guardian to disclose information, despite the duty, if it considers it is 'necessary and reasonable in the public interest' and if the disclosure is not likely to prejudice the investigation.[131]

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

> **249 Preservation of confidentiality**
>
> (1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (3).
>
> Maximum penalty—100 penalty units.
>
> (2) A person gains information through involvement in this Act's administration if the person gains the information because of being, or an opportunity given by being—
>
> (a) the president, a deputy president or another tribunal member; or
>
> (b) the registrar, a member of the tribunal staff or a tribunal expert; or

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128 *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of 'confidential information'); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of 'confidential information').

129 *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of 'confidential information'); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of 'confidential information').

130 *Powers of Attorney Act 1998* (Qld) s 74(2); *Guardianship and Administration Act 2000* (Qld) s 249(3).

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

(c) the adult guardian or a member of the adult guardian's staff; or

(d) a professional consulted or employed by the adult guardian or an adult guardian's delegate for an investigation; or

(e) the public advocate or a member of the public advocate's staff; or

(f) a guardian or administrator; or

(g) a community visitor

…

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

(a) for this Act; or

(b) to discharge a function under another law; or

(c) for a proceeding in a court or relevant tribunal; or

(d) if authorised under a regulation or another law; or

(e) if authorised by the person to whom the information relates; or

(f) if authorised by the tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

…

(4) In this section—

…

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

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

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

…

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

74 Preservation of confidentiality

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

Maximum penalty—200 penalty units.

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

(a) to discharge a function under this Act or another law; or

(b) for a proceeding in a court or relevant tribunal; or

(c) if authorised under a regulation or another law; or

(d) if authorised by the person to whom the information relates; or

(e) if authorised by the court in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

…

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

(4) In this section—

…

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

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

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

…

2.76 These provisions raise a number of issues for consideration including what type of information should be protected, what type of conduct should be prohibited, to whom the duty should apply, and whether there should be any exceptions to that duty. Sections 249 and 74 are examined in detail in Chapter 8.

Section 112: a prohibition specific to Tribunal proceedings

2.77 The prohibition in section 112 of the *Guardianship and Administration Act 2000* (Qld) is more specific than that contained in section 249 because it applies only to Tribunal proceedings. Section 112 prohibits any person from publishing information about a Tribunal proceeding or disclosing the identity of a person involved in a proceeding.[132] However, while this prohibition relates only to Tribunal proceedings, it is wider in some respects as it applies to everyone and not just those people involved in the administration of the guardianship legislation.[133]

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

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

2.78 The prohibition relates to 'information about a proceeding' which includes:[134]

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

2.79 It also applies to information that identifies a person 'involved in a proceeding'. Such people include:[135]

- a person who makes an application to the Tribunal;
- a person about whom an application is made;
- the active parties to a proceeding;[136]
- a person who gives information or documents to a person performing a function under the legislation for the proceeding; and
- a person who is a witness at a Tribunal hearing of the proceeding.

2.80 The section 112 prohibition does not apply, however, if the person has a reasonable excuse for making the publication or disclosure.[137] The Tribunal may also permit the publication of information about a proceeding or the disclosure of the identity of a person involved in a proceeding if it is satisfied that doing so is in the public interest.[138]

2.81 Section 112 provides:

> **112 Publication about proceeding or disclosure of identity**
>
> (1) If the tribunal is satisfied publication of information about a proceeding is in the public interest, the tribunal may, by order, permit publication of the information.

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

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

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

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

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

138 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

(2) If the tribunal is satisfied publication of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit disclosure of the person's identity.

(3) A person must not, without reasonable excuse, publish information about a proceeding, or disclose the identity of a person involved in a proceeding, unless the tribunal has, by order, permitted the publication or disclosure.

Maximum penalty—200 penalty units.

...

(4) In this section—

…

information, about a proceeding, includes—

(a) information given before the tribunal; and

(b) matters contained in documents filed with, or received by, the tribunal; and

(c) the tribunal's decision or reasons.

involved, in a proceeding, includes—

(a) making an application in the proceeding to the tribunal; and

(b) being a person about whom an application is made in a proceeding; and

(c) being an active party for the proceeding; and

(d) giving information or documents to a person who is performing a function under this Act relevant to the proceeding; and

(e) appearing as a witness at the hearing of the proceeding.

…

2.82 This provision raises a number of issues for consideration including whether publication of Tribunal proceedings should be prohibited, whether people's identities should be protected, whether the Tribunal should be able to permit publication in some circumstances, and whether there should be any exceptions to the prohibition. Section 112 is examined in detail in Chapter 7.

Section 109: case-by-case confidentiality orders

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

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

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

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

What rights might a confidentiality order displace?

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

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

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

2.88 However, those sections also provide that a party's right to receive that information can be displaced by a section 109(2) confidentiality order.[139]

2.89 Section 108 provides:

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

108 Procedural fairness

(1) The tribunal must observe the rules of procedural fairness.

(2) Each active party in a proceeding must be given a reasonable opportunity to present the active party's case and, in particular, to inspect a document before the tribunal directly relevant to an issue in the proceeding and to make submissions about the document.

(3) However—

(a) the tribunal may displace the right to inspect the document in a confidentiality order; and

(b) the tribunal rules may prescribe conditions in relation to inspection of the document. [note omitted]

2.90 Section 134 provides:

134 Report by tribunal staff

(1) The tribunal may—

(a) receive in evidence in a proceeding a written report by tribunal staff on a matter in the proceeding; and

(b) have regard to the report.

(2) Generally, if the tribunal receives the report in evidence in a proceeding, the adult concerned in the proceeding and each other active party in the proceeding must be—

(a) advised of the contents of the report; and

(b) upon request, given a copy of the report.

(3) However, the right to be given a copy may be displaced in a confidentiality order. [note omitted]

2.91 Section 158 provides:

158 Decision and reasons to the adult and each active party

(1) Generally, the tribunal must give a copy of its decision, and any written reasons for its decision, on an application about a matter to—

(a) the adult concerned in the matter; and

(b) each other active party in the proceeding.

(2) Generally, the tribunal must also give a copy of its decision to each person given notice of the hearing of the application.

(3) However, a confidentiality order may displace the requirement to give copies of its decision or reasons.

> (4) The tribunal may also give a copy of its decision or reasons to anyone else as required by a tribunal order. [note omitted]

When may a confidentiality order be made?

2.92 The Tribunal may make a confidentiality order under section 109(2) on its own initiative or on the application of a party to the proceeding.[140]

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

2.94 Section 109(2) provides that the Tribunal may make a confidentiality order if it 'is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason'. While this power is worded in very broad terms, it is not an unfettered discretion. The Tribunal must exercise its discretion having regard to what is required in its jurisdiction by open justice and procedural fairness.[141]

2.95 The Tribunal must also apply the General Principles contained in the guardianship legislation in exercising its power to make a confidentiality order,[142] including General Principle 11 which provides that the adult's right to confidentiality of information be recognised and taken into account.[143]

2.96 Section 109(4) additionally provides that in a proceeding on an application to obtain the Tribunal's consent to special health care,[144] a confidentiality order must not impede the adult's relevant substitute decision-maker for health matters from forming and expressing a view about the special health care.

Who may make a confidentiality order?

2.97 Section 109(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Tribunal power to make confidentiality orders. Such an order may also, at present, be capable of being made by the Registrar.[145]

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140 *Guardianship and Administration Act 2000* (Qld) s 109(5).

141 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 270–3. See para 4.15–4.18 in Chapter 4 (Tribunal hearings).

142 *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2). See, for example, *Re RJE* [2005] QGAAT 4, [10].

143 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 s 11.

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

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

145 See para 4.23–4.26 in Chapter 4 (Tribunal hearings).

2.98 The Registrar has power under the legislation to perform the functions and exercise the powers of the Tribunal for 'prescribed non-contentious matters'.[146] The Tribunal rules specify matters relating to section 109(2) as being such matters.[147]

When will a person contravene a confidentiality order?

2.99 Section 109(6) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must not contravene a confidentiality order unless the person has a 'reasonable excuse'. The question of whether a person has a reasonable excuse in a particular case is likely to be assessed in light of the purpose of the legislation[148] and having regard to what a reasonable person would accept as appropriate.[149]

2.100 Section 109 provides:

> **109 Open**
>
> (1) Generally, a hearing by the tribunal of a proceeding must be in public.
>
> (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a ***confidentiality order***)—
>
> (a) give directions about the persons who may or may not be present; and
>
> (b) direct a hearing or part of a hearing take place in private; and
>
> (c) give directions prohibiting or restricting the publication of information given before the tribunal, whether in public or in private, or of matters contained in documents filed with, or received by, the tribunal; and
>
> (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
>
> (i) information given before the tribunal; or
>
> (ii) matters contained in documents filed with, or received by, the tribunal; or
>
> (iii) subject to subsection (3), the tribunal's decision or reasons.
>
> (3) The tribunal may make a confidentiality order prohibiting or restricting disclosure of the tribunal's decision or reasons to the adult concerned only if the tribunal considers disclosure to the adult might be prejudicial to the physical or mental health or wellbeing of the adult.

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

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

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

149 *Bank of Valletta v National Crime Authority* (1999) 164 ALR 45, 55 (Hely J). This case was cited with approval in *Callanan v Bush* [2004] QSC 88. See para 4.27 in Chapter 4 (Tribunal hearings).

> (4) In a proceeding to obtain the tribunal's consent to special health care for an adult, the tribunal may not make a confidentiality order that is likely to affect the ability of any of the following persons to form and express a considered view about the special health care—
>
> (a) a guardian for the adult;
>
> (b) an attorney for a health matter for the adult under an enduring document;
>
> (c) the statutory health attorney for the adult.
>
> (5) The tribunal may make a confidentiality order on its own initiative or on the application of an active party.
>
> (6) A person must not contravene a confidentiality order, unless the person has a reasonable excuse.
>
> Maximum penalty—200 penalty units.

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

Confidentiality orders in proceedings relating to children

2.102 One of the Tribunal's functions under the *Guardianship and Administration Act 2000* (Qld) is consenting to the sterilisation of a child with an impairment.[150] Those matters are dealt with under chapter 5A of the *Guardianship and Administration Act 2000* (Qld). The Act contains two provisions dealing with the confidentiality of proceedings in relation to those matters: sections 80G and 80N. Those sections mirror the provisions of sections 109 and 158 of the Act.

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

2.104 The Tribunal's power to make a confidentiality order under section 80G is guided by the same criteria as for an order under section 109.[151]

2.105 Section 80G provides:

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150 *Guardianship and Administration Act 2000* (Qld) s 82(1)(h).

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

80G Open

(1) Generally, a hearing by the tribunal of a proceeding in relation to a chapter 5A application must be in public.

(2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a ***confidentiality order***)—

(a) give directions about the persons who may or may not be present; and

(b) direct a hearing or part of a hearing take place in private; and

(c) give directions prohibiting or restricting the publication of information given before the tribunal, whether in public or in private, or of matters contained in documents filed with, or received by, the tribunal; and

(d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—

(i) information given before the tribunal; or

(ii) matters contained in documents filed with, or received by, the tribunal; or

(iii) subject to subsection (3), the tribunal's decision or reasons.

(3) The tribunal may make a confidentiality order prohibiting or restricting disclosure of the tribunal's decision or reasons to the child only if the tribunal considers disclosure to the child might be prejudicial to the physical or mental health or wellbeing of the child.

(4) The tribunal may not make a confidentiality order that is likely to affect the ability of an active party to form and express a considered view about the proposed sterilisation.

(5) The tribunal may make a confidentiality order on its own initiative or on the application of an active party.

(6) A person must not contravene a confidentiality order, unless the person has a reasonable excuse.

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

2.106 Section 80N is substantially identical to section 158. It provides that generally, the active parties to a proceeding must be given a copy of the Tribunal's decision and any written reasons for the decision. However, it also provides that a confidentiality order may displace this requirement.[152]

2.107 Section 80N provides:

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

> **80N Decision and reasons to each active party**
>
> (1) Generally, the tribunal must give a copy of its decision, and any written reasons for its decision, on a chapter 5A application to each active party in the proceeding.
>
> (2) Generally, the tribunal must also give a copy of its decision to each person given notice of the hearing of the application.
>
> (3) However, a confidentiality order may displace the requirement to give copies of its decision or reasons.
>
> (4) The tribunal may also give a copy of its decision or reasons to anyone else as required by a tribunal order. [note omitted]

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

Confidentiality orders in practice

2.109 The Commission was given empirical information by the Tribunal about how and when confidentiality orders are made. The information provided generally covers an eleven month period from 1 July 2005 to 26 May 2006. The information on confidentiality orders made in relation to the publication outside Tribunal proceedings of information before the Tribunal or of matters contained in documents before the Tribunal[153] is more limited, however, as collection of this information only began in February 2006.[154]

2.110 The Commission has been advised that during the relevant periods, confidentiality orders have been made in relation to 48 of the 5083 applications made to the Tribunal.[155] The total number of orders made in that period was 51, which is due to the fact that two confidentiality orders were made in three of the matters. All but two of the confidentiality orders made during the relevant period related to the inspection of documents. This empirical information will be discussed further in each of the relevant chapters dealing with particular aspects of confidentiality orders.

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153 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c).

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

155 Information provided by the President of the Guardianship and Administration Tribunal, 26 May 2006.

Chapter 3

Guardianship and confidentiality

INTRODUCTION

3.1 The fundamental question posed by this review is: *what role should confidentiality play in Queensland's guardianship system?*

3.2 Answering this question will involve the Commission examining not only whether the extent of confidentiality imposed by the current legislative provisions is appropriate, but also tackling the more general question of whether confidentiality should continue to play a greater role in the guardianship system than in the wider legal system. As part of answering this question, the Commission will consider the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system.

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

3.4 On the other hand, the primary focus of the guardianship system is to safeguard the rights and interests of the adult, which includes the adult's right to privacy. This area of law also often involves decisions about highly personal issues, such as the adult's medical treatment, the adult's financial position, and where and with whom the adult is to live. For these reasons, it may be argued that the nature of the guardianship system itself permits the recognition of a higher degree of confidentiality than is otherwise allowed in the wider legal system. Conversely, it may also be argued that the very significance of the decisions made in the guardianship system is itself a good reason for the existence of open and transparent decision-making.

3.5 Open justice and procedural fairness are fundamental principles of legal systems generally and so represent the Commission's starting point. However, the law concerning the application of both principles does recognise that a measure of confidentiality can be appropriate in particular circumstances. The fundamental question about what role confidentiality should play is largely answered by determining whether the particular circumstances of the guardianship system sufficiently distinguish it from other areas of law to require a greater level of confidentiality, and if so, to what extent.

3.6 This chapter begins by considering the nature of confidentiality, as well as the related concept of privacy. Then, and with a view to providing a platform for the examination of the specific legislative provisions dealing with confidentiality which appear in later chapters, it examines the principle of open justice, the requirements of procedural fairness, and the nature of the guardianship system. A final matter

considered is whether different levels of confidentiality might be appropriate depending on the relationship that a person or group of people has with the adult.

CONCEPTS OF CONFIDENTIALITY AND PRIVACY

A 'right' to privacy

3.7 The Commission's terms of reference require it to have regard to the need to protect the privacy of people involved in the guardianship system.[156] The privacy interest that is relevant here is a person's claim to privacy of *information* about them. 'Information privacy' relates to 'control of the availability and flow of personal information' about an individual and has been described as 'perhaps the most significant privacy interest'.[157] Australia's common law does not recognise a general right to privacy,[158] although the human right to be free from arbitrary interferences with privacy forms part of international law.[159] A number of commentators have also promoted the importance of privacy, arguing that it is a key aspect of human dignity, autonomy and identity.[160]

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

157 C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 115. Three other categories of privacy are also generally recognised: physical and bodily privacy; privacy of space and territory; and privacy of communications: see C Doyle and M Bagaric, *Privacy Law in Australia* (2005) ch 4; Australian Privacy Charter Council, *Australian Privacy Charter* (1994) <http://www.privacy.org.au/About/PrivacyCharter.html> at 24 July 2006; Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Privacy in Queensland*, Report No 9 (1998) [2.1]. See also R Wacks, *Personal Information Privacy and the Law* (1989) 15–6 in which the base components of privacy are described as secrecy (information known about an individual), anonymity (attention paid to an individual) and solitude (physical access to an individual).

158 *Kalaba v Commonwealth of Australia* [2004] FCA 763, [6] (Heerey J):

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

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

159 *Universal Declaration of Human Rights* (1948) Art 12; *International Covenant on Civil and Political Rights* (1966) Art 17; *Convention on the Rights of the Child* (1989) Art 16. See also Australian Privacy Charter Council, *Australian Privacy Charter* (1994) <http://www.privacy.org.au/About/PrivacyCharter.html> at 24 July 2006, which states, in part, that '[p]rivacy is a basic human right and the reasonable expectation of every person'.

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

3.8 The concept of privacy has proved difficult to articulate,[161] but a commonly cited definition is that:[162]

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

3.9 This is a concept that is distinct from confidentiality.[163] Central to the distinction are the circumstances in which the information is communicated. Information is confidential if it is received in circumstances that impose a duty of confidentiality. In contrast, information that is private (and hence might be protected by a right to privacy) does not depend on how it came to be known or disclosed; information is private because of its nature.[164]

3.10 For example, a person may learn of very personal and sensitive information relating to another's lifestyle, but not in circumstances that impose a duty of confidentiality.[165] This information is clearly private, in that it deals with personal matters that the individual may not want disclosed, but it is not confidential. Accordingly, while private information is *sometimes* protected by a duty of confidentiality, this is not always the case.[166] Information considered private by a person is only confidential and therefore protected from disclosure if a legal duty is imposed in relation to it.[167]

Duties of confidentiality

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

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161 R Wacks, *Personal Information Privacy and the Law* (1989) 13–4; GB Melton, 'Privacy Issues in Child Mental Health Services' in JJ Gates and BS Arons (eds), *Privacy and Confidentiality in Mental Health Care* (2000) 48. See also C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 15–9.

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

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

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

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

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

167 See Chapter 2 (Overview of the law in Queensland) as to when legal duties of confidentiality arise in the guardianship system.

Equity

3.12 An equitable duty of confidence will arise in situations where confidential information is imparted to another person who promises, or is obliged, not to disclose it to a third party because of the special circumstances in which the communication occurred.[168] Predominantly utilised in the commercial context to protect trade secrets and business information,[169] the duty of confidence derives from the principle of equity that:[170]

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

3.13 For such a duty to arise, the relevant information must have the necessary quality of being confidential. Some types of information are generally regarded as confidential, such as information about health and medical treatment.[171]

Contract

3.14 A duty of confidentiality may also arise as an incident of contract. For example, the duty may be imposed as an express term of a contract, such as an employment contract or commercial agreement.[172] Alternatively, the nature of a contractual relationship, such as one between doctor and patient or solicitor and client, may be such that the duty is imposed by an implied contractual term.[173]

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

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

See RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4110]; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [6.30], [6.55]–[6.60], citing *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47.

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

170 *Seager v Copydex Ltd* [1967] 1 WLR 923, 931 (Lord Denning MR), cited in M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.09].

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

172 RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4.103]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.08], [6.105]; M Thompson, 'Breach of Confidentiality and Privacy' in L Clarke (ed), *Confidentiality and the Law* (1990) 65, 66.

173 RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4.103]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 195, [6.08], [6.115]; M Thompson, 'Breach of Confidentiality and Privacy' in L Clarke (ed), *Confidentiality and the Law* (1990) 65, 66.

Statute

3.15 A duty of confidentiality may also be imposed by statute. Examples include the duties imposed on people who serve on juries[174] and on people who receive or deal with complaints from whistleblowers.[175] As discussed earlier, particular people who gain information through their involvement in the guardianship system are prohibited by statute from disclosing confidential information.[176]

CONFIDENTIALITY IN THE GUARDIANSHIP SYSTEM

3.16 This section of the chapter examines three concepts that need to be balanced in determining the appropriate role for confidentiality in the guardianship system, namely the principle of open justice, the requirements of procedural fairness and the nature of the guardianship system.

3.17 As has already been discussed,[177] the current confidentiality provisions of the guardianship legislation apply to a wide range of decision-makers, including the Tribunal, the Adult Guardian and other people involved in the administration of the legislation. Accordingly, the relevance and application of the concepts discussed in this section will vary depending on the decision-maker and the context in which the decision is being made. These variations will be explored in the subsequent chapters that examine specific aspects of the law governing confidentiality under the guardianship legislation.

Open justice

3.18 One of the two concepts that tends to weigh against confidentiality, at least in a judicial context, is the principle of open justice. It is a basic tenet of the common law that bodies discharging judicial functions[178] conduct their proceedings in public.[179] The principle that judicial proceedings be held in open court has been described as 'the right of the public to be informed and the corresponding right of the media to inform them'.[180]

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

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

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

177 See Chapter 2 (Overview of the law in Queensland).

178 'Judicial' functions are typified by the exercise of power to determine liability or otherwise affect a person's legal rights by the application of law to particular facts and circumstances: Jowitt (ed), *The Dictionary of English Law* (1959) (definition of 'judicial').

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

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

What are the elements of open justice?

3.19 The principle of open justice has been described as comprising the following four elements:[181]

- Access to proceedings – a right of attendance at proceedings by members of the public and by media representatives;[182]
- Reporting of proceedings – a derivative right of those in attendance to report proceedings to others;
- Identification – a requirement that the names of those involved in a proceeding, such as the parties to the proceedings and witnesses, be available to the public; and
- Access to documents – a right of the public to inspect documents that have come into existence for proceedings.

3.20 Others have also recognised a fifth element: that the principle of open justice requires reasons for a decision to be produced and made available to the public.[183]

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

3.22 Although open justice is a central feature of our legal system, it is clear that it remains a principle and not a right:[184]

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

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

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

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

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

184 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 521 (Spigelman CJ). Also see *Seven Network Ltd v News Ltd (No 9)* [2005] FCA 1394, [26] (Sackville J).

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

What are the reasons for open justice?

3.23 The rationales for the principle of open justice may be grouped into three categories: the disciplinary rationale, the educative rationale and the investigatory rationale.[185]

3.24 Central to the *disciplinary rationale* of open justice is that it acts as a safeguard against judicial 'partiality, arbitrariness, or idiosyncrasy'[186] and is thus a means of accountability.[187] The disciplinary rationale also views open justice acting as a check on legal counsel[188] and against dishonest testimony.[189]

3.25 An open court has also been said to fulfil an *educative function* by, first, informing the public about the law and legal process,[190] and second, by prompting judicial arbiters to educate themselves in 'prevailing public morality and thereby avoid public criticism'.[191] Open justice also promotes predictability and consistency in decision-making in that both decision-makers and those advising people about the law are aware of previous decisions and can act accordingly.[192]

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

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

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

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

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

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

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

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

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

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

3.26 Finally, under the *investigatory rationale*, it has been argued that an open court facilitates the production of additional witnesses[193] and therefore plays an important part in securing completeness of testimony.[194]

Are there any exceptions to the principle of open justice?

3.27 At common law, exceptions to the principle of open justice are limited to those circumstances where the administration of justice would be affected.[195] For example, closure of the court is justified only if a public hearing 'is likely to lead, directly or indirectly, to a denial of justice'.[196] It is insufficient justification for an infringement of open justice if public proceedings would cause embarrassment, distress, ridicule or reputational harm to a witness or party.[197] Similarly, the protection of privacy and confidentiality 'traditionally take second place to the principle of open justice'.[198] One reason for this is that by choosing to pursue 'their dispute in the forum of a court, the parties inevitably place themselves in a situation in which their privacy is compromised'.[199]

3.28 Examples of where the common law has recognised that open justice poses a risk to the administration of justice include proceedings involving police informers, blackmail or matters of national security.[200]

3.29 A more relevant example to guardianship is matters heard under the *parens patriae* jurisdiction, which is the inherent jurisdiction of superior courts in relation to people who are unable to make their own decisions.[201] Such proceedings have been

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

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

195 W Holdsworth, *A History of English Law*, Vol XIV (1964) 182; C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 104; P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], [15.150], citing *Johnston v Cameron* (2002) 195 ALR 300.

196 C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 104, citing *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building* [1984] 1 QB 227, 235.

197 C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 104, citing *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 45; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 58, 61, 63; *John Fairfax Group Pty Ltd (Receivers and Managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131, 143. Also see P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.195].

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

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

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

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

201 See para 3.52.

recognised as an exception to the principle of open justice and may be held in private.[202] One rationale for this exception recognised by the House of Lords in *Scott v Scott* is that the court's paramount duty in such cases is the care of the adult who is unable to make decisions.[203] In the interests of justice, that duty can override other principles such as the requirement to hear cases publicly.[204] The House of Lords also considered that the exception was warranted because such matters are essentially domestic and private in nature, and so therefore need not be open to the public:[205]

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

3.30 In addition to the common law exceptions, the principle of open justice is frequently curtailed by statute.[206] These statutory exceptions customarily relate to proceedings involving juvenile defendants, adoption proceedings, family law proceedings, committal hearings, sexual offence proceedings and coronial inquests.[207] While there is little consistency between such provisions,[208] some underlying policies have been identified, such as privacy protection and informality of proceedings.[209] It has also been recognised that informal tribunals are commonly granted specific powers to depart from the principle of open justice in appropriate circumstances.[210]

Procedural fairness

3.31 The second concept that tends to weigh against secrecy in decision-making is that of procedural fairness. Historically captured by the term 'natural justice',[211] the common law requirement of procedural fairness imposes a set of procedural standards

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

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

204 Ibid.

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

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

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

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

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

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

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

on decision-makers to ensure a fair hearing and determination for the persons affected by the decision.[212]

3.32 Unless displaced by statute, the requirement of procedural fairness will apply, at common law, to the exercise of judicial and quasi-judicial functions.[213] It also applies to administrative decisions that affect a person's rights, interests or legitimate expectations.[214] This is one way in which procedural fairness differs from open justice; open justice is based on the interests of the public generally whereas procedural fairness is concerned with the rights and interests of a particular person.[215]

3.33 Traditionally, the requirements of procedural fairness are based on two maxims:[216]

- *Audi alteram partem* – that both parties must be given an adequate opportunity to present their case (the hearing rule); and
- *Nemo debet esse judex in propria sua causa* – that the decision-maker must be impartial or free from bias (the bias rule).[217]

What is the hearing rule?

3.34 While the particular procedural requirements flowing from the 'hearing rule' will vary in each case, the 'vital element' is participation.[218] There are generally two aspects to the 'right to be heard', as it is often referred to: adequate prior notice and adequate disclosure with an opportunity to respond.

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

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

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

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

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

217 There is conflicting authority as to whether procedural fairness imposes other obligations upon decision-makers. For example, Creyke and McMillan note suggestions that procedural fairness should also include a 'probative evidence rule' and a 'duty of inquiry', but concludes that neither have been authoritatively endorsed by the High Court: R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) [10.1.4]. In relation to the existence of a probative evidence rule, see also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 372–5 and WB Lane and S Young, *Administrative Law in Queensland* (2001) 59 (the latter considers the issue of probative evidence as part of the hearing rule). See also the recent High Court case of *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77 which held that a breach of procedural fairness can occur through delay in the decision-making process.

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

3.35 A person must be given adequate prior notice of the date, time and location at which the matter will be heard and also of the nature of the issues that are to be decided.[219] Notice must be sufficiently detailed and given sufficiently early to allow the person 'to make inquiries, to consider his position, and to prepare his response'.[220]

3.36 The person must also be given adequate disclosure of the evidence upon which the decision-maker proposes to base its decision.[221] That is, the person should be given an opportunity to 'deal with adverse information that is credible, relevant or significant to the decision to be made.'[222] This means that, for example, the person should be apprised of the substance of any documentary evidence[223] and of any oral evidence that is received,[224] and given an opportunity to respond to it.

What is the bias rule?

3.37 The second element of procedural fairness is the requirement that the decision-maker approach the task with an open mind, free from prejudice and without any interest, pecuniary or otherwise in the outcome.[225] The question of bias is resolved by asking 'whether, in the circumstances, the public, including the parties, might entertain a reasonable apprehension of bias in the sense that the decision-maker is incapable of bringing an impartial and unprejudiced mind to the resolution of the issue'.[226] The bias rule is of lesser relevance to the issues of confidentiality considered in this paper and so is not discussed further.

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

220 JRS Forbes, *Justice in Tribunals* (2002) [10.1], citing *Johnson v Miller* (1937) 59 CLR 467, 487; *Etherton v Public Service Board of NSW* (1983) 3 NSWLR 297, 301.

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

222 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J). See also *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

223 However, procedural fairness may not necessarily require that the person be given a copy of the document itself as it may be sufficient that the substance of the information is brought to the person's attention. See J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122, 123, 128–9, citing *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417, 413; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 197, 205, 223; *Gilson v Minister for Immigration and Multicultural Affairs* (Unreported, Federal Court of Australia, Lehane J, 21 July 1997) 8–9; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539, 557; and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, 748–9 (which was subsequently appealed to the High Court: *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72). See also JRS Forbes, *Justice in Tribunals* (2002) [12.31]. Compare, however, in the guardianship context, *Moore v Guardianship and Administration Board* [1990] VR 902, 912 (Gobbo J) where it was held that the nature of the document required that it actually be produced, preferably before the hearing.

224 JRS Forbes, *Justice in Tribunals* (2002) [12.30]. Note that provided that other parties are not preferentially treated, the oral evidence need not be received in the person's presence if its substance is subsequently communicated: see for example, in the guardianship context, *Re SU* (Unreported, Supreme Court of NSW Equity Division, Windeyer J, 17 September 2001).

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

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

What are the reasons for procedural fairness?

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

3.39 Some are arguments based in principle. Fairness, whether in legal processes or otherwise, is valued as a quality in its own right.[227] Respect and dignity for others also suggests people should be included in the decision-making processes that affect them.[228] Participation is also an important political value in a democratic society.[229]

3.40 Other rationales for procedural fairness relate to the quality of decision-making. Minimum guarantees of participation for all parties are important in contributing to the completeness of evidence and, therefore, in going some way to securing accuracy, and fairness, in decision-making.[230] Failing to hear opposing views carries 'notorious risks':[231]

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

3.41 Another rationale for procedural fairness relates to the legitimacy of the decision and the decision-maker. Legal authorities, including judicial decision-makers, rely to some extent on having fair processes for their legitimacy.[232] Research in social psychology concludes that people tend to assess their satisfaction with decisions made by third parties in terms of the fairness of the procedure used to reach the decision, rather than the favourability of the decision itself.[233] Critical to that assessment of the process was whether people were given an opportunity to participate.[234]

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

228 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 333–4; LB Solum, 'Procedural Justice' (2004) 78 *Southern California Law Review* 181, 262–4.

229 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 334: '[Participation in decision-making] is one of the universally acclaimed values against which it is hard to find a voice of dissent'. Also see EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (1988) 64.

230 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 328; LB Solum, 'Procedural Justice' (2004) 78 *Southern California Law Review* 181, 244–52; TR Tyler et al, *Social Justice in a Diverse Society* (1997) 82.

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

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

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

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

What are the requirements of procedural fairness?

3.42 Procedural fairness does not dictate adherence to a precise set of rules.[235] What it requires will depend on the circumstances of each case, including:[236]

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

3.43 Given the importance of the circumstances in which a decision is made, the requirements of procedural fairness will be less demanding for an administrative decision-maker than for a court. However, because of the origins of procedural fairness (in evaluating judicial and quasi-judicial decision-making),[237] the starting point for making judgments about what is appropriate in a particular case is generally what is required in the judicial arena.[238]

3.44 One of the circumstances that will be particularly relevant when determining the content of procedural fairness in the guardianship context is the nature and purpose of the jurisdiction:[239]

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

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

237 W Holdsworth, *A History of English Law* (1964) Vol XIV, 199.

238 EI Sykes et al, *General Principles of Administrative Law* (4th ed, 1997) [1513]; DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 326.

239 *J v Lieschke* (1986) 162 CLR 477, 456–7 (Brennan J, Mason, Wilson, Deane and Dawson JJ concurring), cited in J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 123. See also, T Henning and J Blackwood, 'Tribunals' Power to Control Their Own Procedures and the Requirements of Procedural Fairness: Some Issues' (Paper presented at the *Sixth Annual AIJA Tribunals Conference*, Sydney, 5–6 June 2003) 22:

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

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

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

3.45 For example, although generally the requirements of procedural fairness will override considerations of individual privacy,[240] the protective nature of the guardianship system may warrant varying levels of confidentiality in some circumstances. A tension arises between safeguarding an adult's privacy and other rights and interests, and still providing sufficient information to parties so that they receive a fair hearing.[241] Conflict between the protective nature of the system and procedural fairness may also arise in cases where disclosure of information to the adult might cause harm to the adult.

3.46 The personal and sensitive nature of the information in the guardianship system may also affect what is required by way of procedural fairness.[242] The courts have recognised that procedural fairness may permit withholding or limiting disclosure of adverse material where there is a compelling need for confidentiality or secrecy.[243] Such an issue might arise where a person has provided information to a guardianship tribunal but has requested that it remain confidential. In such cases, there is a need to balance the requirements of procedural fairness against the policy goal of encouraging continued disclosure of information.[244]

3.47 Conversely, however, it may also be argued that the disclosure of information through the application of the rules of procedural fairness may promote the protective nature of the guardianship system. High quality decision-making is a critical part of safeguarding an adult's rights and interests and this is more likely when decisions are based upon the full disclosure and discussion of all of the relevant evidence.[245]

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

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

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

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

244 J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 130; *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72, [24]–[29].

245 See, for example, *TC v Public Guardian* [2006] NSWADTAP 15, [37] and *KA v Public Guardian* [2004] NSWADTAP 25, [13].

Nature of the guardianship system

3.48 The third concept relevant to the role of confidentiality is the nature of the guardianship system. This system has some features that distinguish it from other areas of law[246] and which may affect the extent to which it is appropriate for decision-makers within the guardianship system to adhere strictly to the principle of open justice and the requirements of procedural fairness. The nature of Queensland's guardianship system is discussed generally in Chapter 1, but there are two features that are important in the context of confidentiality.

3.49 The first relevant feature of the guardianship system is that it empowers the Tribunal and others to make decisions about fundamental rights of vulnerable adults. The significance of these decisions may favour openness and transparency in decision-making rather than confidentiality. The second relevant feature is the protective nature of the guardianship system. The emphasis on safeguarding the rights and interests of the adult may warrant a greater recognition of confidentiality.

Decisions about fundamental rights of vulnerable adults

3.50 Guardianship decisions made by the Tribunal and others affect the fundamental rights of the adult, and sometimes also of people close to the adult.[247] For example, the guardianship legislation permits the making of decisions that remove an adult's ability to reproduce.[248] It also enables decisions to be made about refusal of medical treatment that is needed to stay alive.[249] The rights of people close to the adult can also be affected by decisions made under the legislation, such as decisions about where and with whom the adult is to live.[250] The more significant a decision that is being made, the more scrutiny that is warranted.[251] Interestingly, this view is in stark contrast to a view expressed above in *Scott v Scott*[252] that these matters involve only questions of a domestic nature.[253]

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

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

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

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

250 Such decisions are 'personal matters' and so fall within the decisions regulated by the guardianship legislation: *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 2(a)–(b) (definition of 'personal matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 2(a)–(b) (definition of 'personal matter').

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

252 [1913] AC 417.

253 See para 3.29.

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

Protective nature of the guardianship system

3.52 The protective nature[254] of guardianship has an ancient history in the English common law where it was originally recognised as the duty of the monarch as *parens patriae*, or 'parent of the country', to protect vulnerable citizens.[255] A protective jurisdiction is one in which the rights of individuals who cannot care for themselves, such as infants and the mentally ill, are paramount.[256] A statutory example is the Family Court's welfare jurisdiction in relation to children.[257]

3.53 There are three elements of the protective nature of the guardianship system that might favour a greater role for confidentiality than in other contexts: the primary focus on the adult's rights and interests; the consideration of matters personal to the adult; and the scrutiny given to the otherwise personal circumstances of others involved in the adult's life.

The adult's rights and interests

3.54 The primary focus in the guardianship system is on the adult and safeguarding his or her rights and interests.[258] It is the fundamental purpose for which the system exists. This focus on the adult may mean that the rights and interests of others may need to be modified or adapted in some circumstances if necessary.[259]

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254 Carney and Tait classify judicial bodies into four general categories: constitutional, criminal, civil and protective: T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 5. See also J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 123.

255 T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) 10. For a history of the development of the guardianship jurisdiction in Australia, see T Carney and D Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (1997) ch 2. In Queensland, the *parens patriae* jurisdiction is exercised by the Supreme Court and this jurisdiction was specifically preserved by s 109 of the *Powers of Attorney Act 1998* (Qld) and s 240 of the *Guardianship and Administration Act 2000* (Qld): *VJC v NSC* [2005] QSC 68.

256 See *Secretary, Department of Health and Community Services v JWB (Marion's Case*) (1992) 175 CLR 218, 258–9 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Re S (a child)* [2003] EWCA Civ 963, [20] (Lady Justice Hale).

257 See *Family Law Act 1975* (Cth) Pt VIII. See HA Finlay, RJ Bailey-Harris and MRA Otlowski, *Family Law in Australia* (5th ed, 1997) [7.267].

258 The long title of the *Guardianship and Administration Act 2000* (Qld) provides in part: 'An Act to consolidate, amend and reform the law relating to the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity …'. Section 6 of the Act states the purpose of the Act is to 'strike an appropriate balance between— (a) the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision making; and (b) the adult's right to adequate and appropriate support for decision making'. See also *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane); and *TC v Public Guardian* [2006] NSWADTAP 15, [23] and *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [40] in relation to the New South Wales Guardianship Tribunal.

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

3.55 Part of this responsibility to safeguard an adult's rights and interests may require the taking of steps in appropriate cases to protect an adult's privacy.[260] During guardianship proceedings, very private information about an adult is disclosed in a public forum. Safeguarding an adult's privacy may justify requiring that this information, which is only disclosed for a limited purpose, be treated confidentially.[261] It may also mean, for example, imposing an obligation of confidentiality where disclosure of certain information would harm the adult. This safeguarding function may even involve, in exceptional cases, keeping information from the adult.[262]

Matters personal to the adult

3.56 The second element of the protective system of guardianship is that it necessarily involves delving into the personal life of an adult and disclosing information which would otherwise be kept private.[263] Adults *with capacity* are capable of making these personal decisions in private without exposing intimate details of their lives. It is only because an adult has impaired capacity that a wide range of sensitive and personal information needs to be disclosed in a public forum.[264] If adults with impaired capacity are to be accorded the same level of respect for privacy as other members of the community,[265] this may justify imposing some level of confidentiality on this information.

3.57 Such an approach may be particularly appropriate because only very rarely will guardianship proceedings be instigated by the adult. Instead, the application is generally brought by others concerned about the adult. Hence guardianship matters can be distinguished from other types of litigation as the adult is not making a decision to

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

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

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

263 See, for example, *Korp (Guardianship)* [2005] VCAT 779, [6] (Morris J):

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

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

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

265 Privacy Commissioner and Office of the Public Advocate, *Private Lives? An Initial Investigation of Privacy and Disability Issues* (1993) 5, 12. This is the combined effect of General Principles 2 and 11 of the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld).

pursue their rights through the courts, which has traditionally been regarded as one of the justifications for permitting open disclosure of that person's private information.[266]

3.58 Some judicial support for this view is found in a second rationale advanced by members of the House of Lords in *Scott v Scott* for recognising the exception to open justice in cases invoking the *parens patriae* jurisdiction. It was considered that such matters are essentially domestic and private in nature, and so therefore need not be open to the public:[267]

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

Matters personal to others

3.59 This leads to the third element which applies not to the private information of the adult, but to the information of those parties involved in the guardianship system generally. This element is based on the fact that the guardianship system's protective nature does not, like other types of litigation, involve parties who are pursuing rights for their own benefit.[268]

3.60 Instead, proceedings are generally brought by a person who cares about an adult with a view to safeguarding that adult's rights and interests.[269] If the parties to a proceeding participate on this basis, and are not pursuing personal interest, it may be inappropriate to suggest that such action would result in their private information being made public. One of the concerns may be that if one or more of the consequences of seeking the assistance of the guardianship system is seen as undesirable, then this may impair its effective functioning because people will be discouraged from using it.

3.61 Similar arguments can be made in relation to the information which is before the Tribunal during proceedings. It is desirable that decision-makers have access to all relevant information needed to decide a matter. However, because these proceedings raise such private matters, there are concerns that people may be reluctant to participate

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

267 *Scott v Scott* [1913] AC 417, 483 (Lord Shaw of Dumferline). Lord Atkinson also referred to the jurisdiction as 'quasi-domestic': 462. However, such an analysis has been the subject of some criticism: J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 159.

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

269 The Commission is aware, however, that this is not always the case as some guardianship hearings involve people seeking to advance personal interests rather than those of the adult. See, for example, n 263.

in a frank and genuine way without some assurance of confidentiality.[270] These concerns might arise in relation to private assessments of an adult made by a health professional or in relation to disclosures by family members of an adult about relevant conduct or behaviour within that family.

RELATIONSHIPS AND CONFIDENTIALITY

3.62 In establishing a conceptual framework to guide the review of the confidentiality provisions, another relevant consideration is the relationship that a person or group of people has with the adult. Although not always the case, it may be that the closer the relationship between the adult and the relevant person, the more likely that it is appropriate to disclose information to that relevant person.

3.63 For example, these six categories of people in the guardianship system are likely to have different rights and interests in relation to information about the adult:

- the adult him- or herself;
- any person who is empowered to make the relevant decision in question for the adult;[271]
- those who are actively involved and participating in decision-making generally for an adult. In the context of a decision being made by the Tribunal, this category might be captured by the definition of those who are an 'active party'[272] and so have a right to appear before the Tribunal as a party.[273] This might include members of an adult's family;
- other people not already mentioned but who are close to the adult or involved in their life. Again, the definition of an 'interested person' might be one way in which this category could be defined, that is a person who has a 'sufficient and

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

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

271 Guardians and administrators are entitled to all of the information that an adult would have been entitled to if he or she had capacity and which is necessary to be able to make an informed exercise of a power: *Guardianship and Administration Act 2000* (Qld) s 44. Section 81 of the *Powers of Attorney Act 1998* (Qld) creates a similar right for attorneys.

272 In addition to the adult, an 'active party' may be: the applicant; a person proposed for appointment or reappointment as guardian, administrator or attorney (if that is what the proceeding is for); any current guardian, administrator or attorney; the Adult Guardian; the Public Trustee; or any person joined to the proceeding by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 119.

273 *Guardianship and Administration Act 2000* (Qld) s 123.

continuing interesting' in the adult.[274] This category might include service providers;

- members of the press; and
- everyone else, that is, members of the general public.

3.64 It is not necessarily suggested that any legislative regime needs to make specific provision for each of these six categories of people. Indeed, there is often good reason for legislation to be cast in general terms with the discretion of a decision-maker being relied upon to tailor decisions to the specific circumstances.

3.65 Nevertheless, when establishing a conceptual framework for reviewing the role of confidentiality in the guardianship system, it is clear that there are different interests and responsibilities involved that may vary between the different categories. For example, as noted above, it is suggested that it may be generally more appropriate that those close to an adult receive information about the adult than members of the general public. Where relevant, these categories and the impact of having a relationship with the adult are examined in subsequent chapters.

CALL FOR SUBMISSIONS

3.66 This chapter has identified three concepts that will inform choices about what role confidentiality should play in the guardianship system. The tension between these competing factors is played out the chapters that follow, each of which examines a specific aspect of the confidentiality provisions.

3.67 It is clear that whatever reform options are recommended, all involve compromise. It is not possible to simultaneously accord full recognition to the openness required by open justice and procedural fairness and to the confidentiality that might be favoured by the nature of the guardianship system.

3.68 For example, the principle of open justice cannot be applied in full if some level of the adult's privacy is to be maintained. Similarly, if some information is to be kept confidential, the requirements of procedural fairness in the guardianship system may have to be modified. The Commission invites you to consider this inevitable compromise when reading the subsequent chapters of this Discussion Paper.

3.69 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to establishing a conceptual framework for confidentiality in the guardianship system.

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274 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'interested person'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'interested person').

3-1 What concepts are relevant to determining the role of confidentiality in the guardianship system:

(a) open justice;

(b) procedural fairness;

(c) the nature of the guardianship system;

(d) other?

3-2 If there is conflict between these concepts, how should the balance between them be struck? Why do you prefer that approach? (In other words, are there concepts that are more important than the others and if so, why?)

3-3 Is the relationship that a person or a category of people has with the adult a relevant consideration for determining confidentiality in the guardianship system?

3-4 If so, are there other people who have relationships with the adult who have been omitted from the list set out at paragraph 3.63?

Chapter 4

Tribunal hearings

THE LAW IN QUEENSLAND

4.1 As part of its review of the guardianship legislation's confidentiality provisions, the Commission is required to consider the provisions that deal with confidentiality in hearings before the Tribunal. Although hearings are generally required to be open,[275] section 109(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Tribunal a broad discretion to impose confidentiality. The Tribunal may, on application by an active party or on its own initiative:[276]

- hold proceedings in private;[277]
- direct who may or may not be present at a hearing;[278] or
- prohibit or restrict disclosure of information given at a Tribunal hearing to some or all of the active parties to a proceeding.[279]

4.2 These provisions are outlined in turn.

Public and private hearings

4.3 Section 109(1) of the *Guardianship and Administration Act 2000* (Qld) provides that Tribunal hearings are generally to be held in public. Section 109(2)(b), however, provides that the Tribunal may make a confidentiality order directing that a hearing, or part of a hearing, be conducted in private.

4.4 Sections 109(1) and 109(2)(b) provide:

> **109 Open**
>
> (1) Generally, a hearing by the tribunal of a proceeding must be in public.
>
> (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a ***confidentiality order***)—
>
> …
>
> (b) direct a hearing or part of a hearing take place in private;
>
> …

275 *Guardianship and Administration Act 2000* (Qld) s 109(1).

276 *Guardianship and Administration Act 2000* (Qld) s 109(5).

277 *Guardianship and Administration Act 2000* (Qld) s 109(2)(b).

278 *Guardianship and Administration Act 2000* (Qld) s 109(2)(a).

279 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(i).

Excluding a person from a hearing

4.5 Section 109(2)(a) also gives the Tribunal power to direct, in a confidentiality order, that a particular person may or may not be present at a hearing. The Tribunal may direct, for example, that despite the hearing being held in public, a particular person must not attend. Alternatively, a confidentiality order might direct that pursuant to section 109(2)(b) (outlined above) the hearing is to be held in private, but that under section 109(2)(a), a particular person may nonetheless attend the hearing.

4.6 The legislation does not limit the power to exclude only to particular categories of people such as members of the public without an interest in the proceeding. Neither does the legislation specify particular people who cannot be excluded from a hearing, such as active parties to the proceeding.[280]

4.7 While hearings must generally be in public, section 109(2)(a) provides that the Tribunal may 'give directions about the persons who may or may not be present'.

Limiting disclosure to an active party of information given at a hearing

4.8 Section 109(2)(d)(i) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may make a confidentiality order directing that disclosure of 'information given before the Tribunal' to an active party[281] be prohibited or restricted. Although broadly worded, this appears to refer only to oral information received by the Tribunal at a hearing. Other information given before the Tribunal could be documentary, but the Tribunal's power to limit an active party's access to documents is dealt with under a different provision.[282]

4.9 The Tribunal's power to make an order under section 109(2)(d)(i) compliments the Tribunal's power to make directions about who may and may not be present at a hearing. For example, in order to prevent a party from hearing particular evidence, the Tribunal may need to give a direction excluding the party from the relevant part of the hearing, as well as prohibiting the information being disclosed to that party.

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280 Note, however, that the Tribunal may be prevented in a particular case from excluding certain persons in proceedings related to special health care. This is discussed at para 4.21–4.22. In South Australia, the Northern Territory, Tasmania, and Western Australia, however, certain persons, such as those involved in the proceedings, cannot be excluded from a hearing: see para 4.38–4.40.

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

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

282 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(ii). That provision is discussed in Chapter 5 (Documents before the Tribunal).

4.10 While hearings must generally be in public, section 109(2)(d) provides that the Tribunal may:

> (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
>
> (i) information given before the tribunal; or
>
> (ii) matters contained in documents filed with, or received by, the tribunal;[283]
>
> … [note added]

Criteria for making a confidentiality order

4.11 The Tribunal's power to make confidentiality orders under section 109(2) is guided by a number of criteria.

4.12 Section 109(2) provides that the Tribunal may make a confidentiality order if it 'is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason'. While this power is worded in very broad terms, the discretion must be exercised judicially and in accordance with accepted principles.

4.13 A similarly worded power is given to the Commonwealth Administrative Appeals Tribunal.[284] Section 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) relevantly provides:

> **Hearings to be in public except in special circumstances**
>
> …
>
> *Private hearing etc.*
>
> (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:
>
> (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and
>
> …
>
> (3) In considering:
>
> (a) whether the hearing of a proceeding should be held in private;
>
> …

283 This is examined in Chapter 5 (Documents before the Tribunal).

284 *Administrative Appeals Tribunal Act 1975* (Cth) s 35(2)(a).

> *the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public* and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted. (emphasis added)

4.14 Significantly, that provision includes a specific requirement for the Tribunal to take the principle of the desirability of public hearings as the basis for its considerations as to whether such an order should be made.[285]

4.15 The Administrative Appeals Tribunal's power to hold hearings in private and to exclude people from a hearing was considered in *Re Pochi and Minister for Immigration and Ethnic Affairs.*[286] In that case, Brennan J held that the exercise of the Tribunal's discretion is informed by the principle of open justice and the requirements of procedural fairness.[287] Accordingly, Brennan J proposed certain 'strict criteria' that would guide the exercise of that Tribunal's discretion.[288]

4.16 When examining the Tribunal's discretion to exclude the *public*, Brennan J considered that such an order could be made only if the Tribunal was satisfied that:[289]

- there is 'a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public'; or
- 'publication of the proceedings would be contrary to the public interest'.

4.17 In relation to the Tribunal's discretion to exclude a *party* Brennan J considered that 'a further criterion' would need to be satisfied, namely, that 'the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party'.[290]

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285 *Administrative Appeals Tribunal Act 1975* (Cth) s 35(3).

286 (1979) 26 ALR 247.

287 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 270–3.

288 Ibid 272–3. See also *Re An Applicant and Australian Prudential Regulation Authority* (2005) 89 ALD 643, 661–2.

289 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 273. Brennan J also considered that the Administrative Appeals Tribunal could exclude the public from a hearing if the information to be given in the proceedings was of the kind described in s 36 of *Administrative Appeals Tribunal Act 1975* (Cth): 273. That section provides that the Attorney-General may certify that disclosure of particular material (that would prejudice national security, defence or international relations, disclose Cabinet deliberations or decisions, or that could form the basis of a claim for Crown privilege) would be contrary to the public interest.

290 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 273. Note that this criterion is derived from Brennan's J interpretation of the Administrative Appeals Tribunal's discretion being one that is intended to facilitate the flow of information to it while preserving the confidentiality of that information: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 272.

4.18 Similar considerations are likely to inform the operation of the Guardianship and Administration Tribunal's discretion. It is noted, however, that the requirement in section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) expressly tips the balance in favour of open hearings. At present, the guardianship legislation does not contain such a provision.

4.19 The Tribunal must also apply the General Principles contained in the legislation in exercising its power to make a confidentiality order.[291] This includes General Principle 11 which provides that the adult's right to confidentiality of information be recognised and taken into account.[292]

4.20 A recent case in which a confidentiality order was made excluding a person from a Tribunal hearing, who was not an active party, was *Re RJE*.[293] This order was made by the Deputy President of the Tribunal prior to the hearing on the grounds that the person had been declared a vexatious litigant in the Supreme Court.[294] At the hearing, the Tribunal also had regard to the person's previous behaviour in the Tribunal and other proceedings, and was concerned that:[295]

- the person was likely to disrupt the hearing;
- the person was likely to exert undue influence on the adult at the hearing;
- the adult would be likely to answer Tribunal questions according to how the person would wish her to if the person were present; and
- the person would be likely to continually introduce material that was irrelevant to the hearing.

291 *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2). See, for example, *Re RJE* [2005] QGAAT 4, [10].

292 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1. Note that none of the equivalent 'General Principles' contained in the guardianship legislation of other Australian jurisdictions contain a similar principle about confidentiality.

293 *Re RJE* [2005] QGAAT 4, [10]. The decision to make a confidentiality order excluding the person from the hearing was upheld on appeal: *Rickleman v Public Trustee* [2005] QSC 336, [23] (Douglas J). See also *Bird v Public Trustee of Queensland* [2005] QSC 054; *Lohe v Bird* [2004] QSC 023.

294 *Re RJE* [2005] QGAAT 4, [10].

295 Ibid. The Tribunal also noted its reliance on the General Principles, particularly General Principle 7, as the 'Tribunal was keen to hear the adult's views if possible': [10].

Views about special health care

4.21 A final criterion must be satisfied in proceedings to obtain the Tribunal's consent to 'special health care'. Special health care includes such medical procedures as sterilisation and termination of pregnancy.[296] In proceedings in relation to those matters, section 109(4) provides that a confidentiality order must not impede the adult's relevant substitute decision-maker for health matters from forming and expressing a view about the special health care.[297] This might mean in a particular case that such people should not be excluded from a hearing.[298]

4.22 Section 109(4) provides:

> **109 Open**
>
> …
>
> (4) In a proceeding to obtain the tribunal's consent to special health care for an adult, the tribunal may not make a confidentiality order that is likely to affect the ability of any of the following persons to form and express a considered view about the special health care—
>
> (a) a guardian for the adult;[299]
>
> (b) an attorney for a health matter for the adult under an enduring document;[300]

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

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

297 Note that s 80G(4) of the *Guardianship and Administration Act 2000* (Qld), which applies in relation to proceedings for consent to sterilisation of a child with an impairment, provides that the Tribunal may not make a confidentiality order that is likely to affect the ability of any active party to form and express a considered view about the proposed sterilisation. The active parties in such matters are the child, the applicant, the child's parent or guardian, the child's primary carer (if the child's parent or guardian is not the child's primary carer), the child's treating doctor, the child representative for the child, and any person joined as a party by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 80K.

298 There is also a similar provision in South Australia: *Guardianship and Administration Act 1993* (SA) s 61(5). See para 4.40.

299 A 'guardian' means a person appointed as a guardian for a personal matter for an adult under s 12(1) of the *Guardianship and Administration Act 2000* (Qld): *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'guardian').

300 An 'attorney' means an attorney appointed by an adult under an enduring power of attorney or an advance health directive: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'attorney'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'enduring document').

(c) the statutory health attorney for the adult.[301] [notes added]

Who may make a confidentiality order

4.23 Section 109(2) of the *Guardianship and Administration Act 2000* (Qld) gives the Tribunal power to make confidentiality orders, including orders in relation to hearings. However, such an order may also be made by the Registrar.

4.24 Section 99(3) of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal Rules may specify 'non-contentious matters' under the legislation that may be dealt with by the Registrar. Such matters are described as 'prescribed non-contentious matters'.[302] Section 85(1) of the Act provides that the Registrar may perform the functions and exercise the powers of the Tribunal in relation to such prescribed non-contentious matters.[303]

4.25 Rule 2(1) of the *Guardianship and Administration Tribunal Rule 2004* (Qld) specifies that matters related to a number of provisions in the *Guardianship and Administration Act 2000* (Qld) are prescribed non-contentious matters for section 99(3) of the Act. One of those provisions is section 109(2), which deals with confidentiality orders.[304] However, rule 2(2) provides that such a matter will cease to be a prescribed non-contentious matter if an active party to the proceeding advises the Registrar of an objection to the matter being dealt with by the Registrar.

4.26 The Commission understands that the purpose of this rule was to permit the Registrar to facilitate the inspection of documents in accordance with paragraph six of the Presidential Direction entitled 'General Information in relation to the Inspection of Files and Confidentiality Orders'.[305] However, it appears the rule also empowers the

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301 A 'statutory health attorney' for an adult means the first of the following who is readily available and culturally appropriate to exercise power for a health matter:

- the adult's spouse, if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer of the adult; or
- a close friend or relation of the adult 18 years or older and who is not a paid carer of the adult.

If no-one from that list is readily available and culturally appropriate, the Adult Guardian becomes the adult's statutory health attorney. See *Powers of Attorney Act 1998* (Qld) s 3, sch 3, s 63(1)–(2).

302 *Guardianship and Administration Act 2000* (Qld) s 99(3).

303 Section 85 of the *Guardianship and Administration Act 2000* (Qld) also addresses other matters relating to the Registrar's power to deal with prescribed non-contentious matters. For example, the Tribunal may direct the Registrar to refer a particular matter to the Tribunal and the Registrar may also refer such a matter if he or she considers it more appropriate for the Tribunal to deal with that matter: *Guardianship and Administration Act 2000* (Qld) s 85(3)–(5).

304 *Guardianship and Administration Tribunal Rule 2004* (Qld) r 2, sch.

305 Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in Relation to the Inspection of Files and Confidentiality Orders' (formerly 'Conditions for File Inspection', amended 29 May 2006); Information provided by the President of the Guardianship and Administration Tribunal, 29 March 2006. The Presidential Direction is discussed at para 5.27–5.28 in Chapter 5 (Documents before the Tribunal).

Registrar to make confidentiality orders. The Commission understands that no confidentiality orders have in fact been made by the Registrar.[306]

Excuse for non-compliance with a confidentiality order

4.27 Section 109(6) of the *Guardianship and Administration Act 2000* (Qld) provides that a person must not contravene a confidentiality order unless the person has a reasonable excuse. What may constitute a 'reasonable excuse' has not been considered in the context of the guardianship legislation.[307] However, at common law, the phrase 'reasonable excuse' has been given its ordinary meaning.[308] The question of whether a person has such an excuse in a particular case is to be determined in the light of the purpose of the legislation[309] and having regard to what a reasonable person would accept as appropriate.[310]

Confidentiality orders in practice

4.28 The Tribunal has provided the Commission with empirical information about confidentiality orders made during an eleven month period from 1 July 2005 to 26 May 2006.[311] The Commission understands that in that period, the Tribunal did not make a confidentiality order closing a hearing or excluding people from a hearing.[312] The Tribunal has, however, made at least one such confidentiality order outside the relevant period.[313]

4.29 In addition, the Tribunal has in some hearings spoken with the adult in the absence of some or all of the parties. This was done with the consent of the relevant parties, and so the Tribunal was of the view that a confidentiality order was unnecessary. After speaking with the adult, the Tribunal would then inform those parties who were absent of the substance of the adult's evidence.[314] One question which

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306 Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006. See also Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in Relation to the Inspection of Files and Confidentiality Orders' in which no reference is made to the Registrar's power to make a confidentiality order.

307 None of the Tribunal decisions published on the AustLII website provide a detailed discussion of what might amount to a 'reasonable excuse': <http://www.austlii.edu.au/au/cases/qld/QGAAT/> at 24 July 2006. The phrase is referred to very briefly in *Re ONF* [2004] QGAAT 19 when the Tribunal revoked the appointment of an administrator, but there was no need to discuss its meaning.

308 *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423, 436 (Kirby P); *Weeks v Nominal Defendant* [2005] QCA 118, [7] (McPherson JA).

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

310 *Bank of Valletta v National Crime Authority* (1999) 164 ALR 45, 55 (Hely J). This case was cited with approval in *Callanan v Bush* [2004] QSC 88.

311 See para 2.109–2.110 in Chapter 2 (Overview of the law in Queensland).

312 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006.

313 *Re RJE* [2005] QGAAT 4.

314 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006. This approach was adopted on the basis of the decision of *Re SU* (Unreported, Supreme Court of NSW Equity Division, Windeyer J, September 2001, [17]) which held that in New South Wales such a course did not breach the rules of procedural fairness.

arises is whether, in the absence of a confidentiality order being made, the adoption of such a process is consistent with the legislative intention expressed in section 109(1) of the *Guardianship and Administration Act 2000* (Qld) that hearings must be in public.

LEGISLATION IN OTHER JURISDICTIONS

4.30 The guardianship legislation in other jurisdictions also contains provisions dealing with closed hearings and the exclusion of particular people from hearings. These provisions fall into three general categories that are discussed below:

- open proceedings with power to hold them in private and/or to exclude particular people;
- open proceedings with power to hold them in private and/or to exclude particular people except for specific individuals who cannot be excluded; and
- closed proceedings with power to permit particular people to attend.

4.31 None of the other jurisdictions in Australia specifically provide for the prohibition or restriction of disclosure of information or evidence given at a hearing to any of the *parties*[315] to the proceeding. Of course, the access of parties to information and evidence given at a hearing may be indirectly restricted by an order excluding that party from the hearing. However, whether such information can be kept from those active parties who are excluded will depend on the rules of procedural fairness at common law.[316]

Open hearings with power to close, or to exclude particular people

4.32 In jurisdictions falling into the first category, hearings are required generally to be held in public but the legislation confers discretion on the Tribunal to close a hearing to members of the public, or to exclude particular people from a hearing.[317] In some of these jurisdictions, the exercise of this discretion is governed by specific legislative criteria.

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315 The prohibition on publishing information about Tribunal proceedings under s 112 of the *Guardianship and Administration Act 2000* (Qld) applies to people *generally* rather than to the parties. That provision is the subject of Chapter 7 (Publication of Tribunal proceedings).

316 *GM v Guardianship Tribunal* [2003] NSWADTAP 59.

317 See also, for example, *Coroners Act 2003* (Qld) ss 31, 43(1): inquests must be held in open court except when the coroner orders otherwise 'while particular evidence is given' and the Court may exclude a person from an inquest 'if the court considers it is in the interests of justice, the public or a particular person to do so'; *Federal Court of Australia Act 1976* (Cth) s 17: hearings shall be in open court but the Court may exclude the public or specified persons 'where the Court is satisfied that the presence of the public or of those persons, as the case may be, would be contrary to the interests of justice'; and *Family Law Act 1975* (Cth) s 97: hearings shall be in open court but the Court may exclude a specified person, a specified class of persons, or all persons other than the parties, their legal representatives and any other specified persons from a hearing or part of a hearing.

4.33 In New South Wales, hearings are to be open unless the Tribunal determines in a particular case that the hearing shall be conducted wholly or partly in the absence of the public.[318]

4.34 In Victoria, hearings must be held in public unless the Tribunal directs that the hearing or part of it be held in private.[319]

4.35 In the Australian Capital Territory, hearings are to be open to the public unless the Tribunal orders otherwise.[320]

4.36 In Queensland, the Tribunal has power both to exclude the public from a hearing, or part of a hearing, and to direct that particular people must not be present at a hearing. The Tribunal may only exercise its discretion, however, in certain circumstances which were discussed earlier.[321]

Open hearings with power to close, or to exclude, but not particular people

4.37 In jurisdictions in this category, hearings are again generally required to be conducted in public and the Tribunal is empowered to close a hearing and to exclude particular people. The additional element though is that the power to exclude does not apply to certain categories of people.

4.38 In Western Australia, while hearings are generally to be held in public,[322] the Tribunal may direct that people shall not be present, unless they are directly interested in the proceedings or otherwise authorised by the Tribunal to be present.[323] The Tribunal may make such a direction only if it is in 'the best interests of the person to whom the proceedings relate for the hearing or part of the hearing to be closed to the public'.[324] The Tribunal is precluded, however, from excluding the news media from a hearing.[325]

4.39 In the Northern Territory and Tasmania, proceedings are required to be open to the public unless a person directly interested in the proceedings requests otherwise.

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318 *Guardianship Act 1987* (NSW) s 56.

319 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(1)–(2).

320 *Guardianship and Management of Property Act 1991* (ACT) s 37(1).

321 See para 4.11–4.22.

322 *State Administrative Tribunal Act 2004* (WA) s 61(1).

323 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2). Note that s 61(2) of the *State Administrative Tribunal Act 2004* (WA) also grants the Tribunal a power to make orders in relation to who may be present at a hearing. That provision, however, is inconsistent with the relevant provision of the *Guardianship and Administration Act 1990* (WA) because it sets out different criteria, and so will not apply: *State Administrative Tribunal Act 2004* (WA) s 5.

324 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2).

325 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(3): 'Any person bona fide engaged in reporting or commenting upon the proceedings of the State Administrative Tribunal commenced under this Act for dissemination through a public news medium shall not be excluded from the place where the hearings are being held'. This provision is unique among the Australian guardianship jurisdictions.

Such a request enlivens a discretion to exclude a person or people from the hearing.[326] The discretion to exclude people from a hearing does not, however, extend to people who are directly interested in the proceedings or who are otherwise authorised to be present at the hearing.[327]

4.40 The legislation in South Australia requires the Board to hold open hearings, but grants it an 'absolute discretion' to exclude the public or particular people.[328] The Board must not, however, exclude those people involved in the proceedings.[329] Additionally, in proceedings regarding prescribed medical treatment,[330] the Board must allow the adult's parents a reasonable opportunity to make submissions to the Board 'if it thinks appropriate to do so' and unless it does not consider it to be in the adult's best interest.[331]

Closed hearings with power to admit people

4.41 In jurisdictions falling into this category, the general rule is reversed so that proceedings are required to be closed to the public except as otherwise permitted by the court or tribunal. None of the Australian jurisdictions take this approach.[332]

4.42 By contrast, in New Zealand, where the guardianship jurisdiction is vested in the Family Court, legislation provides that hearings are generally to be closed to the public, except in respect of certain specified interested parties such as the adult's parent or guardian.[333] However, the Court has the power to require the adult's parent or guardian, or their representative, to withdraw from the Court while the adult addresses the Court.[334] It also has discretion to permit other people to attend a hearing.[335]

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326 *Adult Guardianship Act* (NT) s 25; *Guardianship and Administration Act 1995* (Tas) s 12. The Northern Territory provision adds the words 'if the court thinks fit' when granting the discretion to exclude: *Adult Guardianship Act* (NT) s 25(3).

327 *Adult Guardianship Act* (NT) s 25; *Guardianship and Administration Act 1995* (Tas) s 12.

328 *Guardianship and Administration Act 1993* (SA) s 14(10)–(11).

329 *Guardianship and Administration Act 1993* (SA) s 14(10)–(11).

330 'Prescribed medical treatment' is analogous to 'special health care' under the *Guardianship and Administration Act 2000* (Qld). See *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'prescribed medical treatment').

331 *Guardianship and Administration Act 1993* (SA) s 61(5).

332 See, however, the approach taken under the *Mental Health Act 2000* (Qld) for proceedings of the Mental Health Review Tribunal which are to be held in private unless the Tribunal otherwise orders. The Act imposes conditions upon when the Tribunal may exercise its discretion to open proceedings: *Mental Health Act 2000* (Qld) s 460. See also, for example, s 71 of the *Justices Act 1886* (Qld) which provides that committal hearings are not to be held in open court and persons may be excluded from a hearing if it appears 'that the ends of justice' require it. Also see *Childrens Court Act 1992* (Qld) s 20; *Adoption of Children Act 1964* (Qld) s 58; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

333 *Protection of Personal and Property Rights Act 1988* (NZ) s 79(1). See also *Family Court Act*, RSNS 1989, c 159 (Nova Scotia) s 10(3).

334 *Protection of Personal and Property Rights Act 1988* (NZ) s 75(2).

335 *Protection of Personal and Property Rights Act 1988* (NZ) ss 79(1)(f), 63(3).

ISSUES FOR CONSIDERATION

4.43 This part of the chapter identifies the following issues for consideration when examining the Tribunal's discretion to hold hearings in private, to exclude people from a hearing, and to prevent active parties from accessing information given at a hearing:

- Should hearings generally be conducted in public or in private?
- Should the Tribunal have power to close a hearing or to exclude particular people from a hearing?
- If the Tribunal should have such power, in what circumstances should it be exercised?
- Are there particular people who should never be excluded from a hearing?
- Should the Tribunal have power to limit disclosure of information given at a hearing to an active party to the proceeding?
- Should the Tribunal be able to initiate a confidentiality order?
- Who should be able to make a confidentiality order?
- Is 'reasonable excuse' an appropriate way to define when a person is permitted to breach a confidentiality order?

4.44 These last three issues relate to confidentiality orders generally and so will also be relevant to the discussion of these orders in Chapter 5 (Documents before the Tribunal), Chapter 6 (Tribunal decisions and reasons), and Chapter 7 (Publication of Tribunal proceedings). However, to avoid repetition, these issues will be examined only in this chapter.

Should hearings be held in public or private?

4.45 As discussed in Chapter 3, it is a fundamental common law principle that judicial proceedings be conducted in public.[336] The primary reason for this is that public access to open hearings enhances accountability in decision-making.[337] Both the common law and statute, however, provide exceptions to this principle in recognition of the fact that some circumstances may demand a level of confidentiality.[338]

4.46 This may be the case in guardianship proceedings because of the protective nature of the system and the sensitive and inherently private nature of many of the matters under consideration. However, the considerations that warrant exclusion of the

336 *Scott v Scott* [1913] AC 417, 438 (Lord Haldane LC). See para 3.18 in Chapter 3 (Guardianship and confidentiality).

337 See para 3.24–3.25 in Chapter 3 (Guardianship and confidentiality).

338 See para 3.27–3.30 in Chapter 3 (Guardianship and confidentiality).

public may arise only in relation to some hearings rather than across all hearings. If this is so, the presumption should probably be that hearings would normally be open.

Should the Tribunal have power to close a hearing or exclude particular people?

4.47 If it is considered preferable for hearings generally to be held in public, an issue to consider is whether the Tribunal should have power to exclude the public by closing a hearing, or to exclude particular people from a hearing. As mentioned above, it may be suggested that there are times when this is appropriate in order to protect the adult from harm, or when highly sensitive and private matters are under discussion. Intimidation or the inability of an adult to speak freely in the presence of particular people may also be an issue.

4.48 There may, of course, be other ways in which the adult could be protected from harm that do not involve the making of a confidentiality order. This may be a relevant consideration when examining whether the power to make such orders should be retained. For example, concerns about intimidation may be addressed if parties could be involved in Tribunal proceedings without being physically present at the hearing or for part of the hearing. This could be done through the use of telephone or video link-up facilities.[339]

When should the Tribunal be able to close a hearing or exclude particular people?

4.49 If the Tribunal has power to exclude the public or other people from a hearing, a question arises as to the principles that should guide the exercise of that power. For example, should a provision similar to section 35(3) of the *Administrative Appeals Tribunal Act* 1975 (Cth), discussed above,[340] be included in the legislation?

4.50 Another issue to consider is whether different criteria should apply to the power to exclude the *public* and to the power to exclude a *party* from a hearing.[341] Also relevant to when confidentiality orders should be able to be made is whether a hearing could be conducted in another way to avoid particular harm or concerns, for example, by receiving evidence through the use of telephone or video link-up facilities.

General criteria in Queensland

4.51 At present in Queensland, the Tribunal may direct that a hearing be held in private or that certain people not be present at a hearing only in certain circumstances.[342] The same test is applied in relation to both discretions. The Tribunal

339 The Tribunal has wide powers as to how it conducts its hearings. For example, the Tribunal is not bound by the rules of evidence and may inform itself as it considers appropriate, and it is expressly permitted to utilise technology to allow people to participate in its hearings or to give evidence: *Guardianship and Administration Act 2000* (Qld) ss 107, 111.

340 See para 4.13, 4.18.

341 See para 4.16–4.17

342 See para 4.11–4.22.

must be satisfied it is desirable to do so because of the confidential nature of information or matter or for another reason.[343] What is required to satisfy that criterion is partly to be assessed in light of the common law's interpretation of similar provisions in other legislative regimes, which will include having regard to the principle of open justice and the requirements of procedural fairness.[344] The Tribunal would also need to consider the General Principles, including General Principle 11 which deals with confidentiality.[345]

General criteria in other jurisdictions

4.52 The only other Australian jurisdiction that provides general criteria for the exercise of the Tribunal's discretion is Western Australia. It provides that the Tribunal may close a hearing only if it is in the best interests of the person to whom the proceedings relate.[346]

4.53 A different approach, which focuses on the likelihood of harm, is found in Ontario. In that jurisdiction, the court may exclude the public in guardianship hearings where there is a possibility of serious harm or injustice to any person which justifies departure from the general principle that proceedings be open.[347]

Criteria specific to special health care proceedings

4.54 In addition to the general criteria of which the Tribunal must be satisfied before it may make a confidentiality order under section 109(2), the Queensland legislation provides an additional criterion in proceedings relating to consent to special health care. In such proceedings, the Tribunal must not make a confidentiality order if it is likely to affect the adult's guardian, attorney, or statutory health attorney from forming and expressing a view on the proposed special health care.[348] This may mean that, in a particular case, the Tribunal may not exclude the adult's guardian, attorney, or statutory health attorney from a hearing.

4.55 Similarly, in South Australia, the Board must, if it thinks it appropriate and unless it considers it is not in the adult's best interest, allow the adult's parents a reasonable opportunity to make submissions to the Board in proceedings regarding prescribed medical treatment.[349]

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343 *Guardianship and Administration Act 2000* (Qld) s 109(2).

344 See para 4.13–4.17.

345 *Guardianship and Administration Act 2000* (Qld) s 11(1). See para 4.19.

346 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2).

347 *Courts of Justice Act* RSO 1990 c 43 s 135(1)–(2).

348 *Guardianship and Administration Act 2000* (Qld) s 109(4). See para 4.21–4.22.

349 *Guardianship and Administration Act 1993* (SA) s 61(5).

Are there any people who should never be excluded?

4.56 Such people might include the adult, the parties to the proceeding, those who are directly interested in the proceeding, and representatives of the media.

4.57 In Queensland, there are no legislative limitations on the categories of people who may be excluded.[350]

4.58 In South Australia, the Northern Territory, Tasmania, and Western Australia, however, people who are involved or directly interested in the proceedings cannot be excluded from the hearing.[351] Additionally, the legislation in Western Australia specifically provides that members of the press cannot be excluded from a hearing.[352]

Should the Tribunal have power to limit disclosure of information given at a hearing to an active party?

4.59 A related issue to consider is whether the Tribunal should have an additional power to restrict or prohibit disclosure of information given at a hearing to an active party to the proceeding. Queensland is the only jurisdiction that grants the Tribunal such a discretion. The same criteria as must be satisfied in making other confidentiality orders applies in relation to the exercise of that power.[353]

4.60 It would be difficult to give effect to an order about non-disclosure unless the party does not attend the relevant part of the hearing, either by that person's choice or because of a direction made to exclude the person from that part of the hearing.

4.61 It seems likely, therefore, that such an order might be considered in conjunction with an order to exclude the party from attending the hearing. However, the reasons that compel the party's non-attendance at the hearing may not additionally justify that the party be deprived of access to the information heard in their absence. It may be, for example, that the party is excluded from the hearing because their presence would be upsetting to a witness and would affect the witness's testimony. There may be no reason, however, to prevent that information later being disclosed to the party.

4.62 A power to prohibit or restrict disclosure of information given at a hearing is also conferred upon the Mental Health Review Tribunal of Queensland. The role of that tribunal is quite different[354] from that of the Guardianship and Administration Tribunal,

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350 But see para 4.21 in relation to proceedings regarding consent to special health care.

351 *Guardianship and Administration Act 1993* (SA) s 14(10)–(11); *Adult Guardianship Act* (NT) s 25; *Guardianship and Administration Act 1995* (Tas) s 12; *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2)–(3). See para 4.38–4.40.

352 *Guardianship and Administration Act 1990* (WA) s 17, sch 1 pt B cl 11(2)–(3).

353 See para 4.11–4.22. Note that what it means to 'restrict' disclosure of information is considered in Chapter 5 (Documents before the Tribunal).

354 The role of the Mental Health Review Tribunal includes reviewing whether a person should continue to be subject to involuntary treatment or detention (or both) and reviewing a person's fitness for trial if previously found to be unfit. For the Tribunal's jurisdiction, see *Mental Health Act 2000* (Qld) s 437.

and the ability of people to attend its hearings is significantly more restrictive.[355] However, it is useful to examine this aspect of its power to make confidentiality orders because of the lack of other comparative jurisdictions and also because it has jurisdiction over some adults with impaired capacity.

4.63 The Mental Health Review Tribunal has power to make a confidentiality order prohibiting or restricting disclosure of information given before it to the person the subject of the proceeding or the patient the subject of the application.[356] It may make such an order, however, only if it is satisfied the disclosure would:[357]

- cause serious harm to the health of the person or patient; or
- put the safety of someone else at risk.

4.64 In addition, if the Tribunal makes such an order, it must disclose the information to the person's lawyer or agent along with written reasons for making the confidentiality order.[358]

Should the Tribunal be able to initiate a confidentiality order?

4.65 At present, the Tribunal has power to make a confidentiality order either on application by an active party or on its own initiative.[359] An issue to consider is whether the Tribunal should be able to make such an order on its own initiative and in the absence of any application made by a party and, if so, in what circumstances.[360]

Who may make a confidentiality order?

4.66 Another issue for consideration is whether the power to make a confidentiality order to hold a hearing in private, to direct who may or may not be present at a hearing, or to prohibit or restrict disclosure to an active party of information given at a hearing,

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355 Proceedings of the Mental Health Review Tribunal are to be held in private unless the Tribunal orders otherwise and there are conditions upon when the Tribunal may exercise its discretion to open proceedings: *Mental Health Act 2000* (Qld) s 460. Section 460A of the Act deals with the attendance of an 'observer' at a hearing. See also ss 450–455 of the *Mental Health Act 2000* (Qld) regarding rights of appearance. Only the patient (or person subject to a treatment order) and the applicant have a right of appearance in treatment applications and applications for notification orders: *Mental Health Act 2000* (Qld) ss 451, 453. For appeals against decisions to exclude a visitor, rights of appearance are limited to the appellant and the administrator of a mental health service: *Mental Health Act 2000* (Qld) s 454. For reviews and applications to move a patient out of Queensland, the right of appearance is slightly broader, to include, for example sometimes the Attorney-General: ss 450, 452. In most instances, a person who appears may be represented by a lawyer, or with the Tribunal's leave, an agent: ss 450–452, 454. However, note that s 453 requires an applicant to have the Tribunal's leave to be represented by either a lawyer or agent. Section 455 of the *Mental Health Act* 2000 (Qld) also provides that an allied person or someone else to whom the Tribunal grants leave, may attend a hearing to help an involuntary patient express their views, wishes and interests.

356 *Mental Health Act 2000* (Qld) s 458(1)(a).

357 *Mental Health Act 2000* (Qld) s 458(2).

358 *Mental Health Act 2000* (Qld) s 458(3).

359 *Guardianship and Administration Act 2000* (Qld) s 109(5).

360 This issue relates to confidentiality orders generally and so will also be relevant to the discussion of these orders in Chapter 5 (Documents before the Tribunal), Chapter 6 (Tribunal decisions and reasons), and Chapter 7 (Publication of Tribunal proceedings).

should be capable of being made by the Registrar.[361] It would appear that, given the gravity of these types of orders, the power to make such orders should reside solely with the Tribunal.

Is 'reasonable excuse' an appropriate way to define when a person is permitted to breach a confidentiality order?

4.67 There are advantages in excusing otherwise unlawful conduct by reference to the phrase 'reasonable excuse'.[362] The inherent flexibility of the defence means that liability is not rigidly imposed in circumstances where it would be unjust to do so. However, another consequence of this flexibility is uncertainty about what types of behaviour will be excused. For example, a person may contravene a confidentiality order believing that he or she has a reasonable excuse, only to discover subsequently that their conduct was judged not to be reasonable.

BALANCING CONCEPTS

4.68 This part of the chapter briefly considers, in the context of access to Tribunal hearings, the three concepts examined in Chapter 3 that need to be balanced when determining the role of confidentiality in the guardianship system: open justice, procedural fairness, and the nature of the guardianship system.

Open justice

4.69 The right of attendance at proceedings, including the ability to hear the evidence given at a hearing, by members of the public, and therefore by media representatives, is regarded as 'the very core of the idea of open justice'.[363] It is a fundamental principle of the common law that judicial and quasi-judicial proceedings be conducted in open court.[364] The primary goal of open justice, to promote accountability in decision-making, depends on the scrutiny that an open hearing allows. However, open justice is not an absolute concept. For example, the traditional recognition that the courts' *parens patriae* jurisdiction need not always be exercised in public is an exception to the principle of open justice.[365]

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361 See para 4.23–4.26. This issue relates to confidentiality orders generally and so will also be relevant to the discussion of these orders in Chapter 5 (Documents before the Tribunal), Chapter 6 (Tribunal decisions and reasons), and Chapter 7 (Publication of Tribunal proceedings).

362 This issue relates to confidentiality orders generally and so will also be relevant to the discussion of these orders in Chapter 5 (Documents before the Tribunal), Chapter 6 (Tribunal decisions and reasons), and Chapter 7 (Publication of Tribunal proceedings).

363 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2. See also A Monson, 'Privacy and the Administration of Justice' in M Tugendhat and I Christie (eds), *The Law of Privacy and the Media* (2002) 477, [12.10]; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995) 128. However, note the discussion of some of the limitations of achieving open justice through open hearings in PW Young, 'Open Courts' (2006) 80 *Australian Law Journal* 83.

364 *R v Hamilton* (1930) 30 SR (NSW) 277; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs CJ).

365 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.40]; *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane), 445 (Earl Loreburn). See para 3.29 in Chapter 3 (Guardianship and confidentiality).

Procedural fairness

4.70 Restrictions on a party's access to a hearing may also result in a failure to accord procedural fairness.[366] The hearing rule requires that evidence upon which a decision-maker intends to rely in making its decision must be disclosed to the person whose interests are to be affected and that the person must be given the opportunity to respond to the evidence.[367] A party may be denied this opportunity if they are excluded from the hearing.[368] This may not only be unfair, it may also reduce the quality of decision-making.[369]

4.71 However, what is required by procedural fairness depends on what is fair in the circumstances.[370] It may be that procedural fairness will still be accorded if a summary of the information received in a party's absence is subsequently provided to that party.[371]

Nature of the guardianship system

4.72 While open justice and procedural fairness may generally favour non-exclusion of people from hearings and the disclosure of information given at a hearing to the parties, the nature of the guardianship system may weigh in favour of some measure of confidentiality.

4.73 The guardianship system is a protective one with its primary focus on safeguarding the rights and interests of the adult. This may warrant excluding either the public or particular people because the adult may 'feel they cannot speak freely in front

366 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 270–3 (Brennan J). See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (2004) 529 for a discussion as to whether procedural fairness should play a role in determining whether a hearing should be public or not.

367 WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8; J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122; *Kioa v West* (1985) 159 CLR 550, 587 (Mason J), 629 (Brennan J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 653 (Kirby J).

368 See, for example, *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [51], [63] in which it was held that the Tribunal breached the requirements of procedural fairness by failing to disclose to the applicant certain adverse evidence received in the applicant's absence and by failing to give the applicant an opportunity to respond to that evidence. Also see *PRA v MA & VCAT* [2004] VSCA 20, [39] in which it was held that the parties' failure to attend the hearing was a result of inadequate prior notice of the hearing and meant that the parties were denied the opportunity to put their case, in breach of the rules of procedural fairness. Compare with *PS v Public Guardian* [2005] NSWADTAP 23, [9]; *RJ v Public Guardian* [2005] NSWADTAP 70, [8], [11]; and *Bruce v Guardianship Board* [1997] SADC 3603, in which it was held that adequate prior notice of the hearing and the opportunity to participate were given. It is also possible that a party's exclusion from a hearing may result in a lack of procedural fairness through a breach of the bias rule: M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (2004) 529, n 458.

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

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

371 See, for example, *Re SU* (Unreported, Supreme Court of NSW Equity Division, Windeyer J, 17 September 2001), [17]–[18] in which it was held that the New South Wales Guardianship Tribunal had acted properly in receiving evidence in the parties' absence and later conveying the substance of that evidence to the parties. See also JRS Forbes, *Justice in Tribunals* (2002) [12.30]; T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian Quasi-Judicial Tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 99, n 79; J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 128; Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 5.

of other people'.[372] It may also be appropriate to exclude a person from a hearing 'to prevent them from intimidating or embarrassing another by their presence'.[373] Safeguarding an adult's rights and interests might also require steps to be taken to avoid unnecessary intrusions into the adult's privacy.[374] Finally, it might also be argued that the private and sensitive nature of the information about people connected with the adult, which may be discussed in the guardianship system, may justify a limitation on who can attend proceedings and hear this information.

4.74 In contrast, the fact that Tribunal adjudications relate to questions about fundamental legal rights, such as those involved in matters dealing with the withdrawal or withholding of life-sustaining measures, may favour open hearings and the accountability that openness affords.

POSSIBLE LEGAL MODELS

4.75 The Commission has identified four possible models for how the law might deal with the issue of access to Tribunal hearings. While these models do not capture all of the relevant issues that the Commission is examining, they provide a useful starting point for considering what general approach the law should take. A hypothetical case study will be used to illustrate these models and how they might operate.

Model 1: open hearings with no power to close

4.76 Under this model, hearings would be required to be conducted in public in all cases, with no exceptions. None of the jurisdictions in Australia adopt this approach.

Model 2: open hearings with power to close, or to exclude particular people

4.77 Under this model, hearings would generally be required to be conducted in public but the Tribunal would have power to close proceedings and hold them in private and/or to exclude particular people from a hearing. Under this model, there would be no restriction on the categories of people who could be excluded.

4.78 This is the current position in Queensland. Similarly, in New South Wales, Victoria, and the Australian Capital Territory, hearings are generally open to the public unless otherwise ordered.[375] The legislative criteria, if any, for when this power can be exercised may be either quite broad (as it is currently in Queensland) or more detailed and specific.

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372 Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 5.

373 Ibid 6; *Re RJE* [2005] QGAAT 4, [10].

374 Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 5. See also General Principle 11 of the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) sch 1 pt 1 s 11.

375 See para 4.33–4.35.

4.79 It might additionally be provided, as it currently is in Queensland, that the Tribunal may prohibit or restrict disclosure of information given at a hearing to the parties to a proceeding. None of the other jurisdictions provide such a power.

Model 3: open hearings with power to close, or to exclude, but not particular people

4.80 As with model 2, hearings would generally be required to be conducted in public but the Tribunal would have power to close proceedings and/or exclude particular people from the hearing. However, under this model, the Tribunal would not be able to exclude particular categories of people from a hearing, such as the parties or other people directly interested or involved in the proceeding.

4.81 This is the approach taken in Western Australia, the Northern Territory, Tasmania, and South Australia.[376] Again, the criteria to guide the exercise of this power will need to be considered.

Model 4: closed hearings with power to admit people

4.82 Under this model, all hearings would be required to be held in private. Power to permit the public or particular people to attend a hearing might also be provided. None of the Australian jurisdictions take this approach, though it is the model adopted in New Zealand where guardianship matters are dealt with by the Family Court.[377]

A case study

Marlene is a 31 year old woman with an intellectual disability who lives with, and is cared for by her mother, Gwen. They live next door to Marlene's cousin, Jim. He is an accountant and was previously appointed by the Tribunal as Marlene's administrator to manage a large sum of money that she had inherited.

It was recently discovered that Marlene is pregnant. Jim was subsequently charged with a sexual offence against Marlene (which is being dealt with in another court). The police allege that Marlene did not consent to sexual intercourse. Jim asserts his innocence and denies he is the person responsible.

Gwen has brought an application before the Tribunal to terminate Marlene's pregnancy. She has also applied to the Tribunal to remove Jim as administrator on the basis of the criminal charges, but that application is being heard at a later date.

376 See para 4.38–4.40.

377 See para 4.42.

The active parties before the Tribunal at the hearing of the application to terminate the pregnancy are Marlene, Gwen and Jim. Also present at the hearing are two members of the public who are unconnected with the family and a member of the press.

Gwen is concerned that Marlene is frightened of Jim and feels intimidated in his presence. She wants Jim to be excluded from the hearing while Marlene answers the Tribunal's questions. Gwen also feels very embarrassed talking about Marlene's pregnancy in front of so many people. She doesn't think members of the public should be allowed at the hearing. Jim protests and says that this is the first he has ever heard of Marlene being frightened of him. He complains that it is not fair to exclude him at any time.

Outcome of case study

4.83 Under model 1, the Tribunal would have no authority to exclude Jim, the attending members of the public or the press from proceedings.

4.84 In contrast, under model 2 (the current law), the Tribunal would be empowered to exclude any of these people provided certain criteria is met. At present in Queensland, the Tribunal would have to be satisfied that exclusion is desirable because of the confidential nature of the information or matter or for another reason, having regard, as discussed above, to the principle of open justice, what is required by procedural fairness and the General Principles. If the Tribunal considered that Jim's presence at the hearing, or part of it, would frighten or intimidate Marlene and compromise her ability to give evidence, it might be satisfied that Jim should be excluded from that part of the hearing. (In that case, the Tribunal would need to take other steps to inform Jim of what has occurred in his absence in order to accord him procedural fairness.)

4.85 However, given the importance of giving Jim an opportunity to respond to any allegations that might be made against him, the Tribunal may consider that he should not be excluded from the hearing. It is also noted that even if Jim is excluded, the factors warranting his exclusion may be insufficient to justify an order that members of the public or the press also be excluded.

4.86 Under model 3, the Tribunal would be empowered to close proceedings to members of the public. However, it may be precluded from excluding certain people, such as active parties. In that case, Jim could not be excluded from the hearing because, as Marlene's administrator, he is an active party to the proceeding.

4.87 Under model 4, Tribunal proceedings would be closed to both members of the public and press, unless the Tribunal otherwise permits. As an active party, Jim would generally be able to attend but the Tribunal may have discretion to exclude him. Such discretion would likely be applied in much the same way as it would under model 2.

A preliminary view

4.88 At this stage of its review, the Commission has a preliminary preference for a version of model 2: open hearings with power to close proceedings and hold them in private and/or to exclude particular people from a hearing, with that power being guided by specific legislative criteria. The Commission also considers a power to prohibit or restrict disclosure of information to a party may, in some cases, be necessary to give effect to a direction to exclude a person from part of hearing.

4.89 Open hearings are important because the principle of open justice and the accountability that it brings is critical in this jurisdiction given the significance of the decisions being made. However, a discretion to close proceedings to the public and to exclude particular people should be available, given the protective nature of the system and the private and sensitive information that is often discussed. This includes the exclusion of an active party. Although such a step is a more serious matter than closing proceedings to the public,[378] there may be situations where it is warranted.

4.90 The Commission does not have views at this stage as to what the legislative criteria that guides this discretion should be. However, it is suggested that it would need to be sufficiently broad so as to avoid constraining what needs to be a relatively flexible discretion.[379] The Commission is conscious that any discretion will need to be exercised having regard to the principle of open justice, what is required by procedural fairness and the General Principles.

CALL FOR SUBMISSIONS

4.91 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the issue of access to Tribunal hearings. You may wish to nominate your preferred legal model, or provide more detailed comment on the particular issues that follow.

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378 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 272–3.

379 The Commission also notes that unlike some tribunals in other jurisdictions, the Queensland Tribunal does not have a specific power to exclude people on the basis of misconduct other than the general power contained in s 109 of the *Guardianship and Administration Act 2000* (Qld). (Compare, for example, *Guardianship Act 1987* (NSW) s 70 and *Guardianship and Management of Property Act 1991* (ACT) s 48.) This may be another reason to avoid unduly constraining this discretion.

Possible legal models

4-1 Should Queensland's guardianship legislation reflect one of the following models in relation to access to Tribunal hearings:

(a) Model 1: open hearings with no power to close;

(b) Model 2: open hearings with power to close, or to exclude particular people;

(c) Model 3: open hearings with power to close, or to exclude, but not particular people;

(d) Model 4: closed hearings with power to admit people; or

(e) other models?

Particular issues

4-2 Should Tribunal hearings generally be required to be held in public or in private?

4-3 If hearings are generally required to be held in *public*, should the Tribunal have power to make an order to close a hearing or part of a hearing to the public, or to exclude particular people from a hearing, or part of a hearing?

4-4 If so, what legislative criteria, if any, should guide the Tribunal's power:

(a) the Tribunal may make an order if it is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason (the current legislative test in Queensland);

(b) the Tribunal may make an order taking into account as the basis for its consideration the principle that it is desirable that hearings should be held in public (the requirement imposed by section 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth));

(c) the Tribunal may make an order if it is satisfied there is a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public (a criterion suggested by Brennan J in *Re Pochi and Minister for Immigration and Ethnic Affairs*);

(d) the Tribunal may make an order if it is satisfied it is in the best interests of the person to whom the proceedings relate (the legislative test in Western Australia);

(e) the Tribunal may make an order if it is satisfied it is necessary to avoid the possibility of serious harm or injustice to any person (the legislative test in Ontario);

(f) other criteria?

4-5 In relation to question 4-4, should different legislative criteria apply to the exclusion of the public and to the exclusion of a party, and if so, what should the criteria be?

4-6 If the Tribunal has power to make an order to close a hearing or part of a hearing to the public or to exclude particular people, are there particular categories of people who should not be excluded:

(a) people who are directly interested in the proceedings or otherwise authorised by the Tribunal to be present (the legislative requirement in Western Australia and the Northern Territory);

(b) people who are involved in the proceedings (the legislative requirement in South Australia);

(c) for proceedings about special health matters, the adult's guardian, attorney, or statutory health attorney (a current legislative requirement in Queensland);

(d) other people?

4-7 Should the Tribunal have power to make an order to prohibit or restrict disclosure of information given at a hearing to an active party?

4-8 If so, what legislative criteria, if any, should guide the Tribunal's power to make such an order:

(a) the same criteria as should apply to the power to close a hearing or part of a hearing to the public or to exclude particular people (see question 4-4 above);

(b) if the Tribunal is satisfied disclosure would cause serious harm to the adult's health or put a person's safety at risk (as is provided in relation to the Mental Health Review Tribunal);

(c) other criteria?

4-9 If the Tribunal prohibits or restricts the disclosure of information given at a hearing to an active party, should the Tribunal be required to disclose the information to a representative of that party?

4-10 **If the Tribunal has power to make an order to close a hearing or part of a hearing to the public or to exclude particular people, or to prohibit or restrict disclosure of information given at a hearing to an active party, should the legislation recognise a 'reasonable excuse' for not complying with such an order?**

4-11 **If hearings are generally required to be held in *private*, should the Tribunal have power to make an order to admit the public or particular people to a hearing, or part of a hearing?**

4-12 **If so, what legislative criteria, if any, should guide the Tribunal's power?**

4-13 **In relation to question 4-12, should different legislative criteria apply to the admission of the public and the admission of particular people and, if so, what should the criteria be?**

4-14 **If the Tribunal has power to make an order about who may or may not attend a hearing, or part of a hearing, or make an order prohibiting or restricting disclosure of information given at a hearing to an active party, should it have power to make such an order on its own initiative or only on the application of an active party?**

4-15 **If the Tribunal has power to make an order about who may or may not attend a hearing, or part of a hearing, or prohibiting or restricting disclosure of information given at a hearing to an active party, who should be able to make such an order:**

(a) **the Tribunal;**

(b) **the Registrar?**

Chapter 5

Documents before the Tribunal

INTRODUCTION

5.1 Queensland's guardianship legislation creates a statutory right for active parties to a proceeding to inspect documents that are before the Tribunal. However, that right may be displaced by the Tribunal through a confidentiality order, which may prohibit or restrict the disclosure of those documents. The issue examined in this chapter is whether and, if so, in what circumstances, an active party's *current* right to inspect documents before the Tribunal should be capable of being displaced by a confidentiality order.

THE LAW IN QUEENSLAND

A general right of inspection for active parties

5.2 Section 108 of the *Guardianship and Administration Act 2000* (Qld) provides that each active party in a proceeding must be given a reasonable opportunity to present their case. This includes inspecting documents before the Tribunal that are directly relevant to an issue in the proceeding.[380] The active parties to a proceeding are:[381]

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

5.3 Section 134 of the *Guardianship and Administration Act 2000* (Qld), which deals with written reports prepared by Tribunal staff, provides that each of the active parties in a proceeding must be advised of the contents of and, upon request, be given a copy of any such report that is received in evidence in a proceeding.[382] The

380 *Guardianship and Administration Act 2000* (Qld) s 108(2).

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

382 *Guardianship and Administration Act 2000* (Qld) s 134(1)–(2). See also s 76 of the *Protection of Personal and Property Rights Act 1988* (NZ) which provides that the Court may request any person it considers qualified to do so to prepare a medical, psychiatric, psychological, or other report on the person in respect of whom the application is made: *Protection of Personal and Property Rights Act 1988* (NZ) s 76(1). A copy of any report obtained is to be given either to each of the adult's and other parties' legal representatives or, if the adult or party is unrepresented, to the adult or party themselves: *Protection of Personal and Property Rights Act 1988* (NZ) s 76(3). The Court may also order that a report given to a legal representative must not be given or shown to the party for whom the representative is acting: *Protection of Personal and Property Rights Act 1988* (NZ) s 76(4).

Commission understands, however, that Tribunal staff prepare such written reports in only a very limited category of cases.[383]

5.4 The rights to inspect documents under section 108 and to receive a copy of a report under section 134 are subject to limitations. Section 108(3) provides that the Tribunal may displace the right to inspect a document in a confidentiality order. It also provides that the Tribunal may make rules to prescribe conditions in relation to document inspection. Section 134(3) similarly provides that the right to be given a copy of a report by Tribunal staff may be displaced in a confidentiality order.

5.5 Sections 108 and 134 of the *Guardianship and Administration Act 2000* (Qld) relevantly provide:

> **108 Procedural fairness**
>
> (1) The tribunal must observe the rules of procedural fairness.
>
> (2) Each active party in a proceeding must be given a reasonable opportunity to present the active party's case and, in particular, to inspect a document before the tribunal directly relevant to an issue in the proceeding and to make submissions about the document.
>
> (3) However—
>
> (a) the tribunal may displace the right to inspect the document in a confidentiality order; and
>
> (b) the tribunal rules may prescribe conditions in relation to the inspection of the document. [note omitted]
>
> **134 Report by tribunal staff**
>
> (1) The tribunal may—
>
> (a) receive in evidence in a proceeding a written report by tribunal staff on a matter in the proceeding; and
>
> (b) have regard to the report.
>
> (2) Generally, if the tribunal receives the report in evidence in a proceeding, the adult concerned in the proceeding and each other active party in the proceeding must be—
>
> (a) advised of the contents of the report; and
>
> (b) upon request, given a copy of the report.
>
> (3) However, the right to be given a copy may be displaced in a confidentiality order.

383 The Commission has been advised that virtually the only situation where Tribunal staff would prepare a report is when the Registry's Financial Assessment Officer prepares financial summary reports in matters where there are limited assets: Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006 and 16 June 2006.

Scope of right to inspect

5.6 The right to inspect documents under section 108 is granted to a person who is an 'active party in a proceeding' as part of giving him or her 'a reasonable opportunity to present the active party's case'.[384] An issue to consider is the scope of this right to inspect and to whom it applies.

Which documents

5.7 Section 108(2) permits the 'inspection of a document directly relevant to an issue in the proceeding'. This appears to be a relatively broad right, particularly if disparate applications are characterised and dealt with as a single proceeding. For example, if a proceeding involved separate applications for guardianship and administration, the provision as currently worded might allow a person with an interest in the administration application to also inspect documents relevant only to the guardianship application.

5.8 This wide interpretation may be read down, however, in that the power to inspect documents is conferred in order to provide an active party with a reasonable opportunity to present his or her case. If, for example, a party's application related to an adult's health matters, section 108(2) would not create a right to inspect those documents relevant only to financial matters.[385] The scope of the provision may benefit, however, from some clarification.

Non-parties

5.9 The right to inspect documents does not extend to non-parties to a proceeding. A non-party is not an 'active party' and so falls outside section 108. There are no other specific provisions in the guardianship legislation that grant non-parties a right to inspect documents.[386] One option available to a non-party who wishes to acquire such a right is to seek to be joined as a party.[387]

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384 *Guardianship and Administration Act 2000* (Qld) s 108(2).

385 The Commission understands that, in practice, applications for an adult's personal matters and financial matters are to some extent dealt with separately by the Tribunal permitting some quarantining of financial and personal documents: Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006. However, separating personal and financial matters may not always be possible or appropriate. There are some issues that are relevant to both matters, such as capacity. Further, decisions about one type of matter may need to be informed by information that arises in the other. For example, what decisions are made in relation to health matters may depend on the adult's financial situation.

386 Such a right of access is also unlikely to be implied under the test of necessity: see the discussion in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) NSWLR 512, 522–3 (Spigelman CJ), and, in particular, the statement that while the test may be approached as one of 'reasonable necessity', more is required than the implication of a right or power being 'merely desirable or useful'. Given the overall approach to confidentiality taken by the *Guardianship and Administration Act 2000* (Qld), noting, for example, the prohibition in s 112 on publication of Tribunal proceedings, it would be difficult to argue that a right of non-party access to Tribunal files should be implied as 'reasonably necessary'. See also Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in relation to the Inspection of Files and Confidentiality Orders' (formerly 'Conditions for File Inspection', amended 29 May 2006), heading 'Access to File Information and Document Inspection: *General Conditions – Non Active and Interested Parties only*'.

387 Section 110(2)(a) of the *Guardianship and Administration Act 2000* (Qld) provides that a procedural direction by the President or the presiding member of the Tribunal may include a direction joining a person as a party to proceedings. A person so joined becomes an active party: *Guardianship and Administration Act 2000* (Qld) s 119(g).

5.10 Although non-parties do not have a *right* to inspect documents, the Tribunal may have power to permit the disclosure of documents to some non-parties in appropriate cases. While the Tribunal does not have an inherent jurisdiction to do so,[388] it has been granted relatively wide statutory powers in relation to the conduct of its proceedings.[389] Those powers may permit some non-party disclosures such as showing to a witness a document about which he or she is asked to comment.

5.11 Those powers would apply, however, only while proceedings were active and so would not permit disclosure after the Tribunal has made a decision, which is the situation considered next.

Inspection by parties after a decision and prior to an appeal

5.12 Doubts have been raised about whether such a right to inspect documents arises in the situation where the Tribunal's decision in a proceeding has been made.[390] It seems that the right to inspect documents in section 108 of the *Guardianship and Administration Act 2000* (Qld) would not apply in that situation.

5.13 Once a decision has been made by the Tribunal, there may no longer be a 'proceeding' for which a person could be an active party.[391] Where the Tribunal has made its decision, the only avenue of appeal is to the Supreme Court.[392] After handing down its decision, the Tribunal no longer has a role in the matter, which suggests the 'proceeding' has concluded.

5.14 Further, the right to inspect documents that is granted in section 108(2) is framed in terms of allowing a person a reasonable opportunity to present their case, rather than as a more general right to inspect. This view is consistent with the

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388 The Tribunal is a creature of statute and as such only has that jurisdiction which is expressly or impliedly granted by statute: see, for example, *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 353 (Spigelman CJ). See also *Herald and Weekly Times Ltd v Psychologists' Registration Board of Victoria* [1998] VSC 141, [54] (Warren J), citing *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 606 (Latham CJ). In contrast, the inherent jurisdiction of superior courts includes the power to allow non-party access to court files in appropriate cases: *Dobson v Hastings* [1992] 2 All ER 94, 100; *Hammond v Scheinberg* (2001) 52 NSWLR 49; *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 3)* [2002] FCA 609, [6] (Finkelstein J). Most superior courts have rules that govern such inspection: see, for example, in relation to the Queensland Supreme Court, *Uniform Civil Procedures Rules 1999* (Qld) r 981.

389 *Guardianship and Administration Act 2000* (Qld) ss 100 (Tribunal's business and approval of forms), 104 (Way procedure to be decided), 107 (Informal) and 110 (Procedural directions). See also *Guardianship and Administration Act 2000* (Qld) s 83(2) which confers the Tribunal with power to do all things necessary or convenient to perform the Tribunal's functions.

390 Guardianship and Administration Reform Drivers (GARD), *Review of Guardianship Laws and Associated Practices in Queensland* (2005), 62 <http://www.qai.org.au/documents/doc_180.pdf> or <http://www.carersqld.asn.au/gard_submission.pdf> at 24 July 2006.

391 The term 'proceeding' is not defined in the *Guardianship and Administration Act 2000* (Qld) and the definition contained in s 36 of the *Acts Interpretation Act 1954* (Qld) ('a legal or other action or proceeding') is of little assistance in resolving this issue. Compare with the *Supreme Court Act 1991* (Qld) which specifically defines 'proceeding' to include an appeal: *Supreme Court Act 1991* (Qld) s 2 sch 2 (definition of 'proceeding').

392 *Guardianship and Administration Act 2000* (Qld) s 164(1).

Presidential Direction 'General Information in relation to the Inspection of Files and Confidentiality Orders' which is discussed below.[393]

5.15 It has been argued that section 108(1) of the *Guardianship and Administration Act 2000* (Qld) provides an alternate basis for a right to inspect documents by a person who was an active party to proceedings in which a decision has been handed down.[394] That provision requires the Tribunal to observe the rules of procedural fairness. The argument is that part of the requirement to observe procedural fairness includes an obligation to allow inspection of documents after a decision has been made.[395]

5.16 However, the argument supposes that the fair hearing rule of procedural fairness requires access to documents *after* a decision has been made in the proceeding. It is suggested that the fair hearing limb of procedural fairness imposes obligations only in relation to the *hearing* itself and so would not require the Tribunal to allow inspection of documents after the hearing has concluded and a decision has been made.[396]

5.17 It is suggested, therefore, that any rights of active parties to inspect documents under section 108 are likely to cease on the determination of the proceedings before the Tribunal. This would mean that once a decision has been made for a proceeding, a person who was an active party for that proceeding will not have a right to inspect the relevant documents under section 108 of the *Guardianship and Administration Act 2000* (Qld).

5.18 Such a right may arise, however, once an appeal has been filed with the Supreme Court. When the Tribunal receives notice that an appeal has been lodged, a copy of the Tribunal's file is transferred to the Supreme Court Registry.[397] This will enliven the Supreme Court's processes relating to the inspection of its file.[398]

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393 Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in relation to the Inspection of Files and Confidentiality Orders'. See para 5.27–5.28. Note, however, the interpretation of s 112(1) of the *Guardianship and Administration Act 1990* (WA) which gives a represented person a right to inspect documents 'held by the Board for the purposes of any application in respect of that person'. In *MB* [2004] WAGAB 25, [39] the Western Australian Guardianship and Administration Board found that 'any application' included potential appeals and held:

> On its proper construction, the right given by s 112(1) to relevant persons to inspect relevant documents and materials, unless the Board in any case otherwise orders, is exercisable in the course of pending proceedings and is no longer relevant once proceedings have been determined *and a matter is not subject to review or appeal*. It is a right given to facilitate a proper hearing of an application before the Board. (emphasis added)

394 Guardianship and Administration Reform Drivers (GARD), *Review of Guardianship Laws and Associated Practices in Queensland* (2005), 62 <http://www.qai.org.au/documents/doc_180.pdf> or <http://www.carersqld.asn.au/gard_submission.pdf> at 24 July 2006.

395 Ibid.

396 *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72, [16]; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 670 (Gibbs CJ). See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 561; *Perkins v County Court of Victoria* [2000] 2 VR 246, 272 (Buchanan JA).

397 See *Uniform Civil Procedures Rules 1999* (Qld) r 784. The Commission understands that when the Tribunal Registry forwards a copy of the file to the Supreme Court Registry, it places any confidential information (such as documents subject to a confidentiality order) in a sealed envelope with a direction that it is not to be opened except by order of the Court: Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006.

398 See *Uniform Civil Procedures Rules 1999* (Qld) r 981.

5.19 Although no right of inspection exists after a decision has been made under section 108, the Tribunal may potentially be able to grant a person access to a limited category of documents under section 249 of the *Guardianship and Administration Act 2000* (Qld).[399] That section imposes a duty of confidentiality on those involved in the administration of the Act,[400] but creates an exception that permits disclosure where it is authorised by the person to whom the information relates.[401] This may allow the Registry to permit inspection of documents that are on the Tribunal file which would otherwise be 'confidential information' under the Act.[402] However, the category of information released will be narrow as a person can authorise disclosure of information only to the extent the information relates to his or her own personal affairs.[403]

5.20 In this chapter, the Commission will proceed as outlined above and examine the operation of the confidentiality provisions so far as they impact upon the right of active parties to a proceeding to inspect documents where that proceeding has not yet been determined. As noted above, the question whether the application of this right should be extended to cover situations where, firstly, the Tribunal has made a decision but an appeal has not yet been lodged, and secondly, to non-parties, will be considered in stage two of the Commission's review.[404]

Confidentiality orders

5.21 Under section 109(2)(d) of *Guardianship and Administration Act 2000* (Qld), the Tribunal may give directions in a confidentiality order to prohibit or restrict disclosure, to an active party, of matters contained in documents filed with, or received by, the Tribunal.[405] The reference to 'matters contained in documents' permits the Tribunal to make a limited order that imposes confidentiality in relation to particular parts of a document only.

5.22 In making such an order, the Tribunal must be 'satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason',[406] having regard to what is required in its jurisdiction by open justice and procedural fairness.[407] The Tribunal must also apply the General Principles, including

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399 There may be, however, concerns about breaching the prohibition on the publication of information about Tribunal proceedings contained in s 112 of the *Guardianship and Administration Act 2000* (Qld), depending on how widely that provision is interpreted and what information is disclosed. This prohibition is discussed in Chapter 7 (Publication of Tribunal proceedings).

400 This duty is considered in detail in Chapter 8 (The general duty of confidentiality).

401 *Guardianship and Administration Act 2000* (Qld) s 249(3)(e).

402 *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of 'confidential information').

403 The issue of 'mixed personal information' is discussed at para 8.83, 8.96–8.97 in Chapter 8 (The general duty of confidentiality).

404 The Commission's terms of reference and the timelines for the three stages of this review are discussed at para 1.2–1.6 in Chapter 1 (Introduction to the review).

405 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(ii).

406 *Guardianship and Administration Act 2000* (Qld) s 109(2).

407 See para 4.12–4.18 in Chapter 4 (Tribunal hearings).

General Principle 11, which refers to the adult's right to confidentiality of information.[408] Finally, if the matter is one relating to special health care, the Tribunal must ensure that any confidentiality order does not impede the adult's relevant substitute decision-maker for health matters from forming and expressing a view about the proposed special health care.[409]

5.23 Section 109 of the *Guardianship and Administration Act 2000* (Qld) relevantly provides:

> **109 Open**
>
> …
>
> (2) … [I]f the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a ***confidentiality order***)—
>
> …
>
> (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
>
> …
>
> (ii) matters contained in documents filed with, or received by, the tribunal …
>
> …

5.24 Very similar provisions in other jurisdictions have also received judicial and quasi-judicial consideration. An almost identical power is conferred on the New South Wales Administrative Decisions Tribunal,[410] the Appeal Panel of which has jurisdiction to hear appeals of decisions of that State's Guardianship Tribunal.[411]

5.25 When considering whether it was 'desirable' to make such an order in relation to an appeal of a decision by the Guardianship Tribunal, the Appeal Panel considered that '[t]he fundamental principles of open justice and procedural fairness mean that [the relevant provision] should be construed narrowly'.[412]

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408 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

409 *Guardianship and Administration Act 2000* (Qld) s 109(4).

410 *Administrative Decisions Tribunal Act 1997* (NSW) s 75(2).

411 Note the Appeal Panel's jurisdiction does not include decisions of the Guardianship Tribunal made under pt 4A (Adoption information directions) and pt 5 (Medical and dental treatment) div 4 (Consents given by the Tribunal) or div 4A (Clinical trials) of the *Guardianship Act 1987* (NSW). See *Administrative Decisions Tribunal Act 1997* (NSW) s 8; *Guardianship Act 1987* (NSW) s 67A.

412 *TP v TR* [2006] NSWADTAP 7, [6]. Accordingly, it made a non-disclosure order in relation to those documents that contained 'highly sensitive personal information … not relevant to any issue that was before the Guardianship Tribunal': [8]. It did not, however, make such an order in relation to other documents relevant to an issue in the proceeding and for which it considered there was no compelling reason for non-disclosure that outweighed the public interest in open justice and procedural fairness: [11]–[13]. Note that the Tribunal also made a non-disclosure order in relation to other documents to which the relevant party consented: [7].

5.26 The Commonwealth Administrative Appeals Tribunal also has a similarly worded power.[413] In relation to that power, the Federal Court has held that even where a confidentiality order is made, the Tribunal's obligation to accord procedural fairness remains.[414] The Tribunal must act as fairly as possible given the existence and content of the confidentiality order it has made.[415]

The Presidential Direction

5.27 Under section 108(3)(b) of the *Guardianship and Administration Act 2000* (Qld), Tribunal rules may prescribe conditions in relation to the inspection of a document. At present, no such rules have been made. However, the Tribunal has issued a Presidential Direction entitled 'General Information in relation to the Inspection of Files and Confidentiality Orders'[416] to 'provide information to parties as to the general procedures the Tribunal has adopted' in relation to file inspection.[417]

5.28 The Direction summarises the position under the legislation for inspection of and access to filed documents that are directly relevant to an issue in the proceeding (prior to and at a hearing) by active parties. It also contains a list of the types of documents that are accessible, and outlines the practical arrangements for file inspection prior to hearings. It also refers to inspection rights of representatives of active parties.[418]

The Tribunal Administration Practice

5.29 The Tribunal has also developed an Administration Practice for dealing with requests for confidentiality orders in relation to documents provided for a proceeding, particularly pre-hearing requests.[419] Requests for documents provided to the Tribunal to be treated as confidential are to be made in writing.[420] The matter is then heard in chambers by the President or the presiding member.[421]

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413 *Administrative Appeals Tribunal Act 1975* (Cth) ss 35(2)(c), 39(1).

414 *Applicant S214 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 38 AAR 425, 446.

415 Ibid 446, 458.

416 Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in relation to the Inspection of Files and Confidentiality Orders'.

417 To ensure the 'quick and efficient discharge of the tribunal's business', the Tribunal President may give directions of general application about the Tribunal's procedure: *Guardianship and Administration Act 2000* (Qld) s 100(2). See also *Guardianship and Administration Act 2000* (Qld) s 110. For the powers of courts to make practice directions generally, see E Campbell, *Rules of Court* (1985) 40–4.

418 Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in relation to the Inspection of Files and Confidentiality Orders', headings 'Inspection Conditions Prior to Hearing' and 'At the Hearing'.

419 Guardianship and Administration Tribunal, Administration Practice 7 of 2005, 'Confidentiality Orders'.

420 Ibid heading 2.

421 Ibid.

5.30 The person is advised by Registry staff if their request for confidentiality is denied. Unless the person can provide additional information to support their request, they must nominate whether the document will either be returned to them and not be considered by the Tribunal or, alternatively, remain with the Tribunal and be able to be viewed by the active parties.[422]

5.31 The Administration Practice also includes three examples of when the Tribunal may be satisfied it is desirable to make a confidentiality order, namely, where the inspection or access may:[423]

- cause serious harm to the health or safety of a person; or
- involve the unreasonable disclosure of information relating to a person's personal affairs; or
- breach a confidentiality provision imposed by a person who supplied the information.

Confidentiality orders in practice

5.32 The Commission was given empirical information by the Tribunal about how and when confidentiality orders were made during an eleven month period from 1 July 2005 to 26 May 2006. All but two of the confidentiality orders made during that period related to the non-disclosure of documents. This means that 49 such orders were made in 46 applications, out of the 5083 applications that were made to the Tribunal during that period.[424] The vast majority of those orders (42 out of 49) were made prior to the hearing.[425]

Who is applying for confidentiality orders and what documents are they seeking to protect?

5.33 The Commission understands that the majority of the Tribunal's confidentiality orders were sought by health and other professionals in respect of reports and other documents relating to an adult's medical and health matters.[426] Most of the other orders were sought by the adult's family members.[427] Some orders were also sought by the Adult Guardian and the Public Trustee.[428]

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422 Ibid heading 2.2.

423 Ibid heading 1. Note that these examples are very similar to the criteria set out in the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) for non-disclosure of documents in Victoria: see para 5.40–5.46.

424 Information provided by the President of the Guardianship and Administration Tribunal, 26 May 2006. This difference between the number of confidentiality orders made in relation to documents and the number of applications is due to the fact that in three of the applications, two confidentiality orders were made.

425 Five confidentiality orders were made at the hearing and the timing of two orders is unknown: Information provided by the President of the Guardianship and Administration Tribunal, 26 May 2006 and 31 May 2006.

426 Information provided by the President of the Guardianship and Administration Tribunal, 31 May 2006.

427 Ibid.

428 Ibid.

Why is the Tribunal making confidentiality orders?

5.34 The reason most often indicated for the making of a confidentiality order has been a risk of harm to the adult, being either a risk to the therapeutic relationship and associated psychological distress, or a risk of harm to the adult more generally.[429] The next most commonly indicated reason has been the confidential source of the information.[430] Several other reasons have also been cited, including the risk of harm to a third party, and professional privilege.[431]

5.35 The Commission also understands that, in applying the General Principles, the Tribunal has, on one occasion, granted a confidentiality order preventing the adult and his or her family from inspecting a medical or related health report on the ground there was a history of the family misusing the adult's confidential information.[432]

Who is the Tribunal precluding from document inspection?

5.36 The Commission understands that most often, confidentiality orders have been made to prevent disclosure to the adult.[433] Many other orders have precluded all of the parties involved in the proceeding from inspecting the relevant document and some orders have been made in respect of the adult's family members only.[434] The Commission understands that in one case, everyone except for the parties' legal representatives was precluded from viewing a document.[435]

LEGISLATION IN OTHER JURISDICTIONS

5.37 Victoria and Western Australia are the only jurisdictions in which parties to a proceeding for a guardianship matter have a statutory right of document inspection.[436] The legislation in those States also permits the discretionary limitation of those rights. In those jurisdictions without equivalent legislative provisions, such as New South

429 Ibid.

430 Ibid.

431 Ibid.

432 Ibid.

433 Ibid.

434 Ibid.

435 Ibid.

436 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146; *Guardianship and Administration Act 1990* (WA) s 112.

Wales, the rights of parties to access documents, and the circumstances in which those rights can be displaced, are based on the requirements of procedural fairness.[437]

Victoria

5.38 Section 146 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) establishes statutory rights to inspect and copy documents filed with the Victorian Civil and Administrative Tribunal.

5.39 It provides that a party in a proceeding may, without charge, inspect the file of that proceeding,[438] which contains all documents lodged in the proceeding.[439] A party is also permitted to copy these documents, although this attracts a fee.[440] Non-parties may also, on payment of a fee, inspect a file and obtain a copy of any part of the file.[441] These rights are, however, subject to:[442]

- any conditions specified in the Tribunal rules;[443]
- any contrary direction of the Tribunal;[444]

437 The 'hearing rule' of procedural fairness requires that a party be apprised of the substance of matters to be relied on in any documentary evidence and given an opportunity to respond to those matters: WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8. All tribunals, including guardianship tribunals, are required at common law to observe procedural fairness: J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122; JRS Forbes, *Justice in Tribunals* (2002) [7.5]. A number of jurisdictions have also specifically imposed this obligation on their guardianship tribunals through statute: *Guardianship and Management of Property Act 1991* (ACT) s 37(3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(a); *Guardianship and Administration Act 1995* (Tas) s 11(2)(b); *State Administrative Tribunal Act 2004* (WA) s 32(1); *Guardianship and Administration Act 2000* (Qld) s108(1). See also the discussion of the position in other States in J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 126.

438 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(2).

439 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(1).

440 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(3). There is no specific provision in relation to parties copying documents, but this would fall under general provisions regulating copying by any person.

441 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(3).

442 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 146(4).

443 The power granted to the Rules Committee of the Tribunal to make those rules is limited to the regulation of 'practice and procedure': *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 157(1). As to the scope of this power, see *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2005] VSC 44, which is discussed at para 5.46.

444 For a discussion of the scope of the Tribunal's power to make a 'contrary direction', see *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7.

- any order of the Tribunal under section 101 of the Act;[445] or
- any certificate under section 53 or 54 of the Act.[446]

Tribunal Rules

5.40 As permitted by section 146(4)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal's Rules Committee has made rules that regulate the way in which these rights may be exercised.[447] Rule 6.23 of the *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) deals with parties to a proceeding and distinguishes between a represented or proposed represented person and other parties to a proceeding.

Represented person (the adult)

5.41 Rule 6.23(a) regulates the right of a represented or proposed represented person to personally inspect the file. It provides that the represented person may inspect or obtain a copy of the file 'except to the extent' that a member of the Tribunal is satisfied that the person 'should not be entitled personally to inspect or otherwise have access to all or any part of the file' because the inspection or access would:[448]

- cause serious harm to the health of the person or to the health or safety or another person; or
- involve the unreasonable disclosure of information relating to the personal affairs of any person; or
- breach a confidentiality provision imposed by a person who supplied information that is contained in that part of the file.

5.42 However, if a represented or proposed represented person is unable to inspect the file or a document on the file under that rule, the Tribunal may permit a person who is representing that person before the Tribunal to inspect or obtain a copy of the file or otherwise have access to the document.[449]

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445 Under s 101 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal may, in certain circumstances, order that any evidence given before it, the contents of any documents produced to it, or any information that might enable a person who has appeared before it to be identified must not be published except in the manner and to the people (if any) specified by the Tribunal: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3). Section 101(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) is discussed at para 7.27–7.29 in Chapter 7 (Publication of Tribunal proceedings).

446 Under s 53 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), disclosure of information or a matter contained in a document may be certified by the Premier as being contrary to the public interest because it would involve disclosure of Cabinet deliberations. Section 54 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) makes provision for similar certification by the Attorney-General in relation to Crown privilege. The Tribunal must ensure that information to which such a certificate applies is not disclosed to any person other than a Tribunal member: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 53(2), 54(2).

447 In relation to the power of the Rules Committee of the Tribunal, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 157.

448 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(a).

449 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(b).

Other parties

5.43 Rules 6.23(c) and (d) impose limits on the right of any other party to inspect and obtain a copy of the file. Those limitations differ depending on the stage of the proceeding at which the inspection is sought.

5.44 Prior to the hearing, such a party may inspect and obtain a copy of certain limited documents on the file, including those containing adverse criticism of him or her.[450] However, that inspection may occur only if a Tribunal member is satisfied the inspection would not:[451]

- cause serious harm to the health or safety of another person; or
- involve the unreasonable disclosure of information relating to the personal affairs of any person; or
- breach a confidentiality provision imposed by a person who supplied information that is contained in the documents or document.

5.45 After the hearing, a party's right of inspection applies to all documents that were relied on by the Tribunal in making its decision.[452] In this situation, inspection may occur, except where the Tribunal is satisfied that one of the above outcomes may be caused as a result of that inspection.[453]

Non-parties

5.46 Finally, former rule 6.24 was intended to regulate the right of non-parties to inspect and obtain copies of a file for a proceeding. It stated that a non-party must be specifically authorised by a Tribunal member to inspect and obtain a copy of any part of a file, although it did not set out the circumstances in which the Tribunal may authorise such inspection.[454] However, in *Herald and Weekly Times Ltd v VCAT*,[455] the Victorian Supreme Court declared that the Tribunal's Rules Committee did not have the power to

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450 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(c). The other documents specified are the application form, any report from the Public Advocate, and any report from an administrator.

451 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(c).

452 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(d).

453 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(d).

454 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.24, repealed by *Victorian Civil and Administrative Tribunal (Amendment No. 16) Rules 2006* (Vic) r 5.

455 [2005] VSC 44.

make this rule and so it had 'always been void and of no effect'.[456] Rule 6.24 has now been repealed.[457]

Western Australia

5.47 In Western Australia, section 112 of the *Guardianship and Administration Act 1990* (WA) creates a right to inspect documents before the Tribunal.[458] The legislation distinguishes between the rights of the adult (or the person representing him or her), other parties, and non-parties, but no distinction is made between inspection before and after a hearing. The Tribunal is also granted a broad discretion to displace the rights of inspection.[459]

5.48 Section 112(1) of the *Guardianship and Administration Act 1990* (WA) provides that a represented person, a person in respect of whom an application under the Act is made, or a person representing any such person in a proceeding is entitled to inspect or otherwise have access to documents and material lodged with or held by the Tribunal for the purposes of the application. The same entitlements apply to any accounts submitted by an administrator to the Public Trustee.

5.49 The legislation then confers discretion on the Tribunal to 'order otherwise',[460] although the circumstances in which the Tribunal may exercise that discretion are not specified.

5.50 Section 112(2) of the Act grants a right of inspection to other parties and their representatives in a proceeding, to documents and material lodged with or held by the Tribunal for the proceeding except:

- a document or material that is or contains a medical opinion not concerning that party; or
- if the Tribunal otherwise orders.

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456 Ibid [26]. While the Tribunal's Rules Committee had the power to make rules regulating 'practice and procedure' under s 157 of *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Supreme Court found that the rule had granted the Tribunal a discretion to determine whether inspection could occur, rather than simply *regulating the method* through which it could occur, and was therefore *ultra vires*. Non-party inspection remains capable of being regulated, however, by a 'contrary direction' under s 147(4)(b): *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7; *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2005] VSC 44, [25].

457 *Victorian Civil and Administrative Tribunal (Amendment No. 16) Rules 2006* (Vic) r 5, commenced on 1 June 2006.

458 Unless authorised by the Tribunal, inspection of or other access to a document other than in accordance with s 112 of the *Guardianship and Administration Act 1990* (WA) is an offence: *Guardianship and Administration Act 1990* (WA) s 112(3).

459 The power to displace these rights of inspection 'reinforce[s] two important policies: firstly, the protection of the privacy of the person involved in the proceedings before the Board and in particular a proposed represented or a represented person; and secondly, the public interest in the integrity of the Board processes which relies on the ability to obtain sensitive information from a variety of sources': *MB* [2004] WAGAB 25, [35].

460 *Guardianship and Administration Act 1990* (WA) s 112(1).

5.51 Again, the circumstances in which the Tribunal may exercise the discretion to order that a party not inspect or have access to certain material are not specified. The Tribunal has said, however, that in some circumstances, the right of inspection might be limited to documents 'commensurate with the nature of their [the party's] interest in the matter'.[461]

5.52 Finally, section 112(4) gives discretion to the Tribunal to authorise a non-party, upon application, to inspect or otherwise have access to documents or material lodged with or held by the Tribunal for an application. The Tribunal may authorise such inspection or access either conditionally or unconditionally[462] and may make any other order 'contemplated by this section'.[463] The circumstances in which the Tribunal may authorise such inspection are not specified.[464]

Procedural fairness at common law: New South Wales

5.53 In the remaining jurisdictions without legislative provisions dealing with access to documents and when that access can be denied, these matters will be decided by reference to the common law and what it requires by way of procedural fairness.[465] For example, in New South Wales, the *Guardianship Act 1987* (NSW) does not specify whether or when a party to a proceeding should be given access to documents before the Guardianship Tribunal, but nevertheless the Tribunal is required at common law to observe the rules of procedural fairness.[466]

5.54 The law in New South Wales in relation to what is required by procedural fairness in relation to documents relied on by the Guardianship Tribunal will be

461 See *MB* [2004] WAGAB 25, [54]. This statement was made with reference to the wide definition of who is a 'party', which includes any person with a proper interest in the proceedings who is heard by the Board: *Guardianship and Administration Act 1990* (WA) s 3, sch 1 pt B cl 13(2)(a). In *MB* [2004] WAGAB 25, the Board considered that where a person is a party but they have been given only a limited right to be heard in the proceedings, it was within the Board's power to limit that person's right to access documents 'on a need to know basis'.

462 *Guardianship and Administration Act 1990* (WA) s 112(14)(a).

463 *Guardianship and Administration Act 1990* (WA) s 112(4)(b).

464 Note that unlike s 112(1) and (2), s 112(4) of the *Guardianship and Administration Act 1990* (WA) gives the Tribunal a wide discretion to permit inspection or access to documents after the conclusion of the proceeding and for purposes other than proceedings before the Tribunal: *Re MB* [2004] WAGAB 25, [55], [59]–[60]. In such circumstances, the person seeking inspection must demonstrate a 'cogent' reason for the disclosure and 'a reasonable relationship between the purpose to which the requested information is to be put and [the] intentions and objectives' of the legislation: *Re MB* [2004] WAGAB 25, [66]; *IR* [2005] WASAT 111, [12]; *LT (deceased) and JTW* [2005] WASAT 264, [32]. In relation to s 112(4) of the *Guardianship and Administration Act 1990* (WA), see also *BJP* [2005] WASAT 137; *Public Trustee* [2005] WASAT 199.

465 See n 437.

466 While the *Guardianship Act 1987* (NSW) does not contain a provision to this effect, the obligation to accord procedural fairness will apply unless a contrary intention is clearly expressed in the legislation: *Kioa v West* (1985) 159 CLR 550, 609 (Brennan J). It has been held that no such intention is manifest in the *Guardianship Act 1987* (NSW) and that it must, accordingly, comply with the rules of procedural fairness: *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [37]; *KV v Protective (No 2)* [2004] NSWADTAP 48, [22]; and *TC v Public Guardian* [2006] NSWADTAP 15, [22].

considered further because there are a number of recent decisions of the Appeal Panel of the Administrative Decisions Tribunal that examine this issue.[467]

5.55 The most significant decision is *GM v Guardianship Tribunal*.[468] Although that decision did not deal specifically with access to documents,[469] the Appeal Panel established a two-step process of inquiry in determining the Guardianship Tribunal's obligation to accord procedural fairness, and in particular the hearing rule, which has been applied subsequently to situations involving parties' rights to inspect documents.[470]

5.56 The *first* inquiry is whether the particular person is entitled to be afforded procedural fairness.[471] This involves two questions:

- whether the person's rights, interests, or legitimate expectations are affected.[472] The Appeal Panel found that the making of an order by the Guardianship Tribunal (for example to appoint a guardian) will always affect the rights of the adult, and that the rights, interests or legitimate expectations of others may also be affected, although this does not occur simply because a person is a party to the proceedings.[473]

- whether the requirements of procedural fairness are excluded by the legislation.[474] The Appeal Panel concluded that no intention to exclude the rules of procedural fairness is demonstrated in the *Guardianship Act 1987* (NSW).[475]

5.57 The *second* inquiry is, if the rules of procedural fairness do apply, what steps is the Guardianship Tribunal required to take.[476] In *GM v Guardianship Tribunal*,[477] the relevant rule was the hearing rule. In determining the operation of the hearing rule, the Appeal Panel considered the following principles:

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467 The Appeal Panel of the Administrative Decisions Tribunal has jurisdiction to hear appeals of certain decisions of the Guardianship Tribunal including guardianship and financial administration orders: *Administrative Decisions Tribunal Act 1997* (NSW) s 8; *Guardianship Act 1987* (NSW) s 67A. See n 411.

468 [2003] NSWADTAP 59.

469 The grounds of appeal instead included being given insufficient time to instruct a solicitor or prepare for the hearing, and a failure to disclose evidence given in the absence of a person seeking an appointment as guardian and financial manager: *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [23].

470 *KA v Public Guardian* [2004] NSWADTAP 25; *KV v Protective (No 2)* [2004] NSWADTAP 48; *NG v Protective Commissioner* [2005] NSWADTAP 11; *Carew v Protective Commissioner* [2005] NSWADTAP 13; *Cachia v Public Guardian* [2005] NSWADTAP 16; *QJ v Public Guardian* [2005] NSWADTAP 45; *TC v Public Guardian* [2006] NSWADTAP 15; *TP v TR (No 2)* [2006] NSWADTAP 12; and *VP v Public Guardian* [2006] NSWADTAP 30.

471 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [26].

472 Ibid [27], citing *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

473 Ibid [29]–[35].

474 Ibid [36], citing *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

475 Ibid [37].

476 Ibid [26].

477 [2003] NSWADTAP 59.

- The hearing rule will only arise in relation to adverse information that is 'credible, relevant and significant to the decision'.[478]

- The content of the hearing rule must be 'appropriate and adapted to the circumstances of the particular case'.[479] The Appeal Panel considered the task 'is to determine the content of the hearing rule in light of the Tribunal's jurisdiction, the statutory requirements about how that jurisdiction is to be exercised and judicial statements concerning the meaning of the obligation to abide by the rules of natural justice'.[480]

- At a minimum, the 'substance or gravamen' of the adverse evidence should be disclosed to the person.[481]

- However, the general rule that the person be given an opportunity to respond to adverse information may be displaced in 'exceptional circumstances' such as where there is a 'need to keep material confidential, to maintain secrecy or to hear a matter urgently'.[482]

5.58 One issue raised in some of the decisions of the Appeal Panel that followed *GM v Guardianship Tribunal* is the role of procedural fairness in a protective jurisdiction. While some commentators have suggested that the rights and interests of the adult may warrant limiting the strict application of the requirements of procedural fairness,[483] the Appeal Panel has suggested instead that disclosure of documents to a party whose interests are affected will ordinarily help to ensure the best decision for the adult is made:[484]

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478 Ibid [59].

479 Ibid [39], citing *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

480 Ibid [39]. In considering the protective nature of the Guardianship Tribunal's jurisdiction, the Appeal Panel stated in *TC v Public Guardian* [2006] NSWADTAP 15, [23]:

> The Guardianship Tribunal's jurisdiction is a protective one. That means that one of its primary aims is to protect vulnerable people from neglect, abuse and exploitation. … But that is not its only obligation. The Guardianship Tribunal is also obliged to ensure that people who are parties to applications receive a fair hearing from an impartial decision-maker.

481 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [57], citing *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247; *Re Pergamon Press Ltd* [1971] CH 388; and *Ansell v Wells* (1982) 43 ALR 41.

482 *GM v Guardianship Tribunal* [2003] NSWADTAP 59, [62], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 116 (Kirby J), 100 (McHugh J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 633–4 (McHugh J); and *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).

483 See paras 3.44–3.46 in Chapter 3 (Guardianship and confidentiality).

484 *TC v Public Guardian* [2006] NSWADTAP 15, [37]. See also *KA v Public Guardian* [2004] NSWADTAP 25, [13]:

> It is the duty of everyone exercising functions under the *Guardianship Act* to observe the principle that 'the welfare and interests' of the person who is the subject of the application should be given 'paramount consideration'. Affording procedural fairness to KA does not elevate his interests beyond those of his son, KC. On the contrary, acknowledging that KA has an interest in the decision and allowing him the opportunity to address any adverse material ensures that the Guardianship Tribunal will make the best informed decision possible as to KA's suitability to be KC's guardian or financial manager. Without KA's input on relevant issues, the Guardianship Tribunal would have only one side of the story. KC's interest in having the most suitable guardian or financial manager making decisions for him are therefore enhanced by giving KA the opportunity to be heard, and in particular to address any adverse material.

> A fairer and more transparent approach which accords with the principles of procedural fairness, is to give parties access to documents (or communicate the substance of those documents) so that they can respond to the material and raise any concerns they may have. In doing so, the interests of the subject person in being free from exploitation and abuse, will generally be promoted.

ISSUES FOR CONSIDERATION

5.59 There are several issues to consider when examining the displacement by a confidentiality order of an active party's right to inspect documents before the Tribunal:

- Should the Tribunal be able to make a confidentiality order in relation to documents?
- If so, when should it be able to make a confidentiality order?
- What is the meaning of 'restricting' disclosure of documents?
- Should there be an option to disclose documents to a party's representative only?

Should the Tribunal be able to make a confidentiality order in relation to documents?

5.60 A threshold question is whether the Tribunal should have the power to order that the content of a document, or part of a document, be kept confidential from some or all of the active parties. It may be thought appropriate to do so in particular circumstances.[485]

When should the Tribunal be able to make a confidentiality order?

5.61 In Queensland, the Tribunal may make a confidentiality order only if it is 'satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason'.[486] The Tribunal must also have regard to what is required in its jurisdiction by open justice and procedural fairness,[487] and apply the General Principles, including General Principle 11, which refers to the adult's right to confidentiality of information.[488]

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485 It has been suggested, for example, that it may be appropriate that particularly sensitive information contained in an adult's will, that would normally be available only after the adult's death, and that is not relevant to a party's interest in the proceeding, be withheld from that party: Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006.

486 *Guardianship and Administration Act 2000* (Qld) s 109(2). Note also that if the matter is one relating to special health care, the Tribunal must ensure that any confidentiality order does not impede the adult's relevant substitute decision-maker for health matters from forming and expressing a view about the proposed special health care: *Guardianship and Administration Act 2000* (Qld) 109(4).

487 See para 4.12–4.18 in Chapter 4 (Tribunal hearings).

488 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

5.62 The criteria in Victoria's Rules are more detailed and refer to:

- serious harm to the health or safety of the adult or another person;
- unreasonable disclosure of information relating to the personal affairs of any person; and
- breaching a confidentiality provision imposed by a person who supplied the information contained in the document.

5.63 These three factors are also referred to in the Queensland Tribunal's Administration Practice as examples of when confidentiality orders might be made by the Tribunal.[489]

5.64 A preliminary issue to consider is what criteria should guide the Tribunal when making a confidentiality order in relation to the inspection of documents. Consideration might be given to whether the more detailed Victorian approach should be adopted, particularly if those criteria already reflect the circumstances in which orders are being made. If such an approach is taken, it may also be valuable, however, to retain the current reference to making an order 'for any other reason' as there may be circumstances that fall outside more detailed criteria where it is still appropriate for the Tribunal to make a confidentiality order.

5.65 Another issue for consideration is whether the harm that might result from not disclosing information should be considered when making a confidentiality order. While this may currently be considered in practice, there is no express obligation in the legislation to consider the potentially harmful implications (for both the adult and others) of withholding the document.

5.66 A further issue is whether a distinction should be made between making such an order in relation to the adult and making one in relation to another active party. In Queensland, no such distinction is made with the Tribunal being given power to displace the statutory right of 'some or all of the active parties' in a proceeding to inspect filed documents.[490] Similarly, no distinction is made under the relevant legislation in Western Australia.[491]

5.67 The Victorian Rules do distinguish, however, between the adult and other parties.[492] First, harm to the person seeking access to documents is only relevant if that person is the adult.[493] The criterion based on harm in relation to access by other parties

489 Guardianship and Administration Tribunal, Administration Practice 7 of 2005, 'Confidentiality Orders', heading 1. See para 5.29–5.31.

490 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(ii).

491 Although the adult has wider rights to *inspect* documents than the other parties, the power given to the Tribunal to refuse the adult and those other parties such access is the same: *Guardianship and Administration Act 1990* (WA) s 112. See para 5.48–5.51.

492 This is in addition to, as is the case in Western Australia, granting the adult wider rights to inspect documents than the other parties: *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23. See para 5.41–5.45.

493 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(a).

refers only to harm to another person and so would not include harm to the party themselves.[494]

5.68 Second, there is a shift in onus depending on the circumstances of inspection. If the adult is the person seeking inspection, then they are entitled to have access to the documents *unless* the Tribunal is satisfied that harm, or one of the other listed consequences, would result.[495] However, if the person is a party and they are seeking inspection before a hearing, they must first show that none of the listed consequences will result before that right of inspection will arise.[496]

What is the meaning of 'restricting' disclosure of documents?

5.69 The Tribunal is empowered to *restrict* (in addition to prohibiting) the disclosure of matters contained in documents before the Tribunal. The meaning of the word 'prohibit' in this context is relatively clear: disclosure of matters contained in a document to the particular person or people would not be permitted at all. However, the scope of a power to 'restrict' such disclosure may allow for confidentiality orders that grant some, though limited, access.

5.70 This might occur if a confidentiality order allows conditional inspection. For example, a person may be granted access to a document but be required to keep the information from certain other people who might misuse it. Another example might be permitting access to a document, but on the condition that the person undertakes counselling to minimise any harm that might be caused by seeing the document.[497]

Should there be an option to disclose to a party's representative only?

5.71 If a decision is made to withhold a document from a party, it may still be possible to disclose the document in confidence to the party's representative, for example, their lawyer. This may be regarded as preferable to not disclosing the document at all.

5.72 In Victoria, the Tribunal is specifically granted a discretion to allow a party's representative to inspect a document, even if the document is not disclosed to the actual party.[498]

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494 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(c)–(d).

495 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(a). The situation is similar in relation to a party seeking inspection *after* a hearing: *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(d)

496 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(c). See para 5.41–5.44.

497 Another way in which restricting disclosure might allow for a limited confidentiality order is by permitting access to part of the document only. However, being able to 'restrict' disclosure is not necessary to achieve this because the phrasing of the criteria refers to 'matters contained in a document' and so already would allow for limited inspection. Compare the position of confidentiality orders made in relation to the Tribunal's decisions and reasons which is discussed in Chapter 6 (Tribunal decisions and reasons).

498 *Victorian Civil and Administrative Tribunal Rules 1998* (Vic) r 6.23(b). See para 5.42.

5.73 In Queensland, this is referred to in the Presidential Direction[499] and the Commission also understands that such an approach has been adopted in cases before the Tribunal.[500] This raises the question whether such a practice should be expressly authorised, or required, by the legislation.[501]

BALANCING CONCEPTS

5.74 This part of the chapter briefly considers, in the context of access to documents, the three concepts examined in Chapter 3 that need to be balanced when determining the role of confidentiality in the guardianship system: open justice, procedural fairness, and the nature of the guardianship system.

Open justice

5.75 The principle of open justice requires that members of the public should be able to inspect documents that have come into existence for the purpose of judicial proceedings.[502] To achieve the goals of open justice, namely, accountability of decision-making through public scrutiny[503] and public education about the law and legal processes,[504] members of the public must be able to follow the court or tribunal's decision-making process. This is difficult without knowing what is contained in documents being considered by the court or tribunal, particularly given that documents are often read by the judge prior to a hearing and not discussed in detail during proceedings.[505]

5.76 These arguments about open justice relate to access by the public at large, but apply with even greater force in relation to the parties to a proceeding. As such, open justice would favour parties to a proceeding being able to inspect documents that are before the court or tribunal.

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499 See para 5.28; Guardianship and Administration Tribunal, Presidential Direction No 1 of 2005, 'General Information in relation to the Inspection of Files and Confidentiality Orders', headings 'Inspection Conditions Prior to Hearing' and 'At the Hearing'.

500 Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006 and 16 June 2006. An example mentioned was where the adult objected to their children and others being able to see the contents of the adult's will: Information provided by the President of the Guardianship and Administration Tribunal, 16 June 2006.

501 It could be argued that such a practice could already be permitted as part of giving a party a 'reasonable opportunity' to inspect under s 108(2) of the *Guardianship and Administration Act 2000* (Qld).

502 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2–3. Also see S Walker, *The Law of Journalism* (1989) [1.2.01]; PW Young, 'Open Courts' (2006) 80 *Australian Law Journal* 83.

503 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60], citing *R v Davis* (1995) 57 FCR 512, 513–4.

504 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 39; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15]; JH Wigmore, *Evidence in Trials at Common Law*, Vol 6 (Chadbourn rev 1976) §1834.

505 PW Young, 'Open Courts' (2006) 80 *Australian Law Journal* 83.

Procedural fairness

5.77 Restricting a party's access to documents may breach the rules of procedural fairness. The hearing rule requires first, that any evidence upon which the decision-maker intends to rely be disclosed to the person whose interests will be affected and second, that the person be given the opportunity to respond to that evidence.[506] That is, the person should be given an opportunity to 'deal with adverse information that is credible, relevant or significant to the decision to be made'.[507] Precisely what is required will depend on the circumstances of each case.[508]

5.78 It may be sufficient that a person be given an opportunity to respond to the substance of a document,[509] but the nature of the document itself may be such as to require its actual production so that a party has a meaningful opportunity to deal with the information.[510] It might also be necessary to allow the person to ask questions and

506 WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8; J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122; *Kioa v West* (1985) 159 CLR 550, 587 (Mason J), 629 (Brennan J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, 653 (Kirby J). Also see, for example, *Raymond Matthew Canham* [2002] SADC 88, [16] in which it was held that the Guardianship Board had denied the adult procedural fairness by failing to inform him of certain evidence upon which it relied and by failing to give him an opportunity to respond to that evidence.

507 *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J). See also *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

508 JRS Forbes, *Justice in Tribunals* (2002) [7.1]; WB Lane and S Young, *Administrative Law in Queensland* (2001) 53; *Kioa v West* (1985) 159 CLR 550, 584–5 (Mason J).

509 Procedural fairness may not necessarily require that the person be given a copy of the document itself as it may be sufficient that the substance of its contents be brought to the person's attention: J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 122, 123, 128–9, citing *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417, 413; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 197, 205, 223; *Gilson v Minister for Immigration and Multicultural Affairs* (Unreported, Federal Court of Australia, Lehane J, 21 July 1997) 8–9; *Pilbara Aboriginal Land Council Aboriginal Corp Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539, 557; and *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 741, 748–9 (which was subsequently appealed to the High Court: *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72). See also JRS Forbes, *Justice in Tribunals* (2002) [12.31].

510 This was the finding in *Moore v Guardianship and Administration Board* [1990] VR 902. In that case, Gobbo J held that more than a 'limited invitation' to view the document was required given the particular nature of the document, namely, that much of the material contained in the document constituted unsubstantiated allegations and was highly prejudicial, but of minimal probative value: *Moore v Guardianship and Administration Board* [1990] VR 902, 912 (Gobbo J). See the discussion in T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 102–3; and R Kune and G Kune, 'Expert medico-scientific evidence before tribunals: Approaches to proof, expertise and conflicting opinions' (2006) 13 *Australian Journal of Administrative Law* 69, 76. Also see *KV v Protective* [2004] NSWADTAP 48, [27], [30] in which it was held that the New South Wales Guardianship Tribunal breached the hearing rule of procedural fairness by failing to give a full copy of the medical report, upon which it relied, to the party in order to give him an adequate opportunity to obtain expert evidence responding to the report:

> …there are times when a party will need to respond to a document and cannot realistically do so unless they have access to a copy of the whole document. … Unless there is a persuasive reason for not disclosing a medical report, a copy of the whole report should be disclosed if the content is disputed.

Also see *Cachia v Public Guardian* [2005] NSWADTAP 16, [33].

to adjourn proceedings to enable them to consider the document and to obtain further evidence of their own.[511]

5.79 Although it is possible to make a confidentiality order and still meet the requirements of procedural fairness,[512] depriving a party of access to a relevant document sits uncomfortably with the notion of the fair and transparent decision-making process favoured by the hearing rule.[513] Concerns have also been raised about the quality of decision-making that is not based on complete and tested evidence.[514]

Nature of the guardianship system

5.80 The protective nature of the guardianship system may call for documents before the Tribunal to be kept confidential in some circumstances. Of primary concern is the safeguarding of the adult's rights and interests, and this includes the adult's privacy interests.[515] This issue may be especially acute in relation to the disclosure of material prior to a hearing and, therefore, prior to the material's relevance and veracity having been tested:[516]

> [N]ot all information received by a board or tribunal will necessarily be relevant to a hearing, nor may it in fact be substantiated. To distribute it may cause significant and unnecessary embarrassment to the person with a disability or to others involved in the hearing.

511 See, for example, *KV v Protective (No 2)* [2004] NSWADTAP 48, [28]; *NG v Protective Commissioner* [2005] NSWADTAP 11; [13]; *Cachia v Public Guardian* [2005] NSWADTAP 16, [34]; and *TP v TR (No 2)* [2006] NSWADTAP 12, [28], [30]–[31]. Also see *Hess v Public Guardian* [2005] NSWADTAP 43, [28]–[29]. In that case, the person, who was unrepresented, did not read English. He was given a copy of an expert report at the hearing, upon which the Tribunal relied, but it was not interpreted. In addition, the person was not made aware that he could seek an adjournment in order to consider the expert evidence and to obtain expert evidence of his own. The Appeal Panel of the New South Wales Administrative Decisions Tribunal held that the Guardianship Tribunal had accordingly failed to afford the person procedural fairness.

512 Indeed, the making of a confidentiality order does not exempt a court or tribunal from according parties procedural fairness: see para 5.26.

513 See, for example, *TC v Public Guardian* [2006] NSWADTAP 15, [33]–[35]:

> Contrary to the Tribunal's approach of balancing the right to privacy of a person against the right to procedural fairness, the correct approach is that the rules of procedural fairness prevail unless there are exceptional circumstances which override those rules. … the acceptance of secret evidence should be an exceptional rather than a routine event.

In making these comments, the Appeal Panel of the New South Wales Administrative Decisions Tribunal specifically noted that the Guardianship Tribunal does not have an express statutory power to withhold evidence from a party: [34]. See para 5.53–5.58. This is different from Queensland's Tribunal which has been granted such a power.

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

515 In the context of information generally causing harm to an adult, see T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101.

516 Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 4.

5.81 As such, the nature of the guardianship system may favour non-disclosure of the private and sensitive information considered in these proceedings.[517] This may be particularly appropriate in non-contentious proceedings where each of the parties is already aware of the matters contained in the document or documents so further dissemination is unnecessary.[518]

5.82 The protective nature of the system may also weigh against disclosure of a document to an adult if such disclosure may be harmful to the adult. For example, there may be concerns that disclosure to the adult of a medical report may damage the therapeutic relationship the adult has with the health professional who provided the report.[519]

5.83 Decisions by the Tribunal, however, affect fundamental rights of the adult (and other parties).[520] The Tribunal also deals with claims adverse to particular parties that can involve serious, and sometimes criminal, misbehaviour. The significance of these matters suggests that a party should not be deprived of an opportunity to respond to a prejudicial document. It may also be that allowing a person to respond to a document should be preferred as that may assist the Tribunal to make a decision that best meets the adult's needs.[521]

POSSIBLE LEGAL MODELS

5.84 The Commission has identified three possible models, outlined below, for how the law might deal with the issue of confidentiality in relation to documents before the Tribunal. A hypothetical case study will be used to illustrate these models and how they might operate.

Model 1: No power to limit disclosure of documents to parties

5.85 In this model, the Tribunal would have no power to make an order prohibiting or restricting disclosure of matters contained in documents before the Tribunal. The current statutory entitlement to inspect documents could not be overridden.

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

518 Ibid.

519 See generally, Privacy Commissioner and Office of the Public Advocate, *Natural Justice and Privacy: Policy and Procedures of Boards and Tribunals* (1995) 4 and J Blackwood, 'Fairness v Privacy: Disclosure of Documents by Guardianship Tribunals' (2004) 11 *Psychiatry, Psychology and Law* 122, 129.

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

521 See *TC v Public Guardian* [2006] NSWADTAP 15, [23], [37]; and *KA v Public Guardian* [2004] NSWADTAP 25, [13]. See para 5.58.

Model 2: Power to limit disclosure of documents to parties but no criteria to guide discretion

5.86 Model 2 reflects the current position in Western Australia. The relevant tribunal in that State is empowered to limit disclosure of documents to parties but there are no legislative criteria specified for the exercise of that discretion. The legislation provides that parties may have access to the documents unless the 'Tribunal orders otherwise'.[522]

Model 3: Power to limit disclosure of documents to parties with criteria to guide discretion

5.87 This model reflects the current approach in Queensland and Victoria.[523] Again, the Tribunal is empowered to limit disclosure of matters contained in documents before it but the exercise of this discretion is guided by specific criteria. If this model is preferred, a further question arises as to what matters should be included in those criteria.

5.88 Under the Queensland legislation, the Tribunal must be satisfied that matters in a document warrant non-disclosure because of the 'confidential nature of particular information or matter or for another reason'.[524]

A case study

Edward is 84 years old and lives in an aged care facility. He had been living independently but he had a stroke a year ago and acquired brain damage as a result. He has a son, Peter, and a daughter, Emily. Peter believes Edward has impaired capacity for decisions involving a moderate level of complexity and that his needs are not being met so he brings an application to the Tribunal to be appointed as guardian and administrator. Emily wishes to contest Peter's application and seeks those appointments for herself. Edward is also experiencing clinical depression and is being treated by Padam, a psychiatrist.

There are a number of documents before the Tribunal at the hearing and an issue arises as to whether a confidentiality order should be made (and to whom it should apply) in relation to two of them: a statement by Jo, a member of the nursing staff who looks after Edward, and a report by Padam.

522 *Guardianship and Administration Act 1990* (WA) s 112(1)–(2).

523 See para 5.21–5.23, 5.38–5.46.

524 *Guardianship and Administration Act 2000* (Qld) s 109(2).

Jo's statement says that she has often heard Emily yelling at Edward and being aggressive and bullying towards him. Jo is worried that if Emily finds out about this statement, Emily will try to move Edward out of the aged care facility. Jo is concerned about how this might affect Edward's welfare.

In part of her psychiatric report, Padam indicates that Edward has a fixed delusion that his son, Peter, has been poisoning him. This is not true, but Padam notes that Edward refuses to accept that his belief is a delusion. She suggests that Edward requires ongoing treatment but is concerned that if Edward learns of her statement to the Tribunal, he will feel betrayed and angry, and that this may affect their ongoing therapeutic relationship. Accordingly, Padam has requested that her report be kept confidential.

Outcome of case study

5.89 The relevant documents in the case study that might be made subject to a confidentiality order are the statement from Jo at the aged care facility and the psychiatric report by Padam. If such orders are to be made, it is likely they would be made in relation to Emily for Jo's statement and in relation to Edward for the Padam's report.

5.90 Under model 1, the Tribunal has no power to displace a right to inspect documents so both documents would need to be disclosed to all of the parties, including Emily and Edward. The Tribunal would be precluded from considering whether such an outcome is appropriate in the circumstances.

5.91 Under models 2 and 3, however, the Tribunal would be able to limit the disclosure of matters contained in the documents to active parties to the proceeding, including Emily and Edward. The Tribunal's discretion to do so would be wider under model 2 than model 3 given that its discretion under model 2 is not bounded by statutory criteria. However, in practice, it is suggested the Tribunal would take into account similar factors as those likely to be considered in relation to the model 3 criteria and that the result would probably be similar.

5.92 Model 3 requires the Tribunal to have regard to specific criteria, and the current Queensland law will be used to illustrate how this model might operate.

5.93 In relation to allowing Emily access to Jo's statement, the Tribunal would be able to make a confidentiality order, if it considers it desirable because of the confidential nature of the information or for another reason.[525] Though it is not specified in the legislation, the Tribunal is likely to have regard to the potentially harmful impact that disclosure may have on Edward. Consideration would probably be given to the likelihood of that harm occurring and its seriousness. When making this

525 The Tribunal must also have regard to the principle of open justice, the requirements of procedural fairness and the General Principles: see para 5.22.

assessment, the Tribunal would consider the assertions that Emily has bullied her father and that she may cause difficulties for Edward's care at the aged care facility if she learns of Jo's statement.

5.94 Also likely to be relevant, although not specifically stated in the legislation, is the significance of the allegations made about Emily and the desirability of her having an opportunity to comment on what has been said. What is required will depend on the circumstances of the case, but if the Tribunal decided to make a confidentiality order to refuse to provide access to the Jo's statement, it may be required nevertheless to convey to Emily the substance of the allegations made against her.[526]

5.95 In relation to allowing Edward to inspect Padam's report, the Tribunal may again, in practice, consider the potential harm to Edward that might be caused by such disclosure, including the likelihood of harm and its seriousness. Padam's request for confidentiality would also be relevant to encouraging the ongoing and frank engagement with the Tribunal by health professionals who might be reluctant to participate if their views are to be disclosed to others.

5.96 Again, the Tribunal may decide to make a confidentiality order in relation to Padam's report, although it would require a balancing of these factors. The option of making such an order but conveying to Edward the substance of the report would also be available.[527]

A preliminary view

5.97 The Commission's preliminary view is that there may be circumstances when it is appropriate to withhold information from a party, particularly in cases where disclosure would result in harm to an adult.

5.98 Accordingly, the Commission has a preliminary preference for model 3: that the Tribunal should have power to limit disclosure to parties of matters contained in documents before it, but that the exercise of this discretion should be guided by specific criteria. Although the Tribunal would be likely to consider similar factors under model 2 to the criteria set out under model 3, the Commission prefers that any criteria to be considered when making a confidentiality order should be expressly set out in the legislation.

5.99 The Commission particularly welcomes comment as to what any such legislative criteria should be.

526 Indeed, the requirements of procedural fairness may dictate such disclosure if Emily is not to receive an actual copy of the document.

527 Again, the requirements of procedural fairness may in fact dictate such disclosure if Edward is not to receive an actual copy of the document.

CALL FOR SUBMISSIONS

5.100 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to limiting the disclosure to parties of matters contained in documents before the Tribunal. You may wish to nominate your preferred legal model or provide more detailed comment on the particular issues that follow.

Possible legal models

5-1 Should Queensland's guardianship legislation reflect one of the following models in relation to limiting the disclosure to an active party of documents before the Tribunal in a proceeding:

(a) Model 1: No power to limit disclosure of documents to parties;

(b) Model 2: Power to limit disclosure of documents to parties but no criteria to guide discretion;

(c) Model 3: Power to limit disclosure of documents to parties with criteria to guide discretion;

(d) other models?

Particular issues

5-2 Should the Tribunal have power to make an order to keep documents (or matters in documents) before it in a proceeding confidential from an active party?

5-3 If so, what legislative criteria, if any, should guide the Tribunal's power:

(a) the Tribunal may make an order if it is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason (the current legislative test in Queensland);

(b) the Tribunal may make an order if it is satisfied it is necessary to avoid:

(i) causing serious harm to the health or safety of the adult; or

(ii) causing serious harm to the health or safety of another person; or

(iii) unreasonable disclosure of information relating to the personal affairs of any person; or

(iv) breaching a confidentiality provision imposed by a person who supplied information that is contained in the relevant document;

(the current approach in Victoria);

(c) other criteria?

5-4 In relation to question 5-3, should different legislative criteria apply to orders limiting disclosure of documents to an adult and to those directed at other active parties, and if so, what should the criteria be?

5-5 If the Tribunal has power to make an order to keep documents (or matters in documents) before it in a proceeding confidential in relation to an active party, should the Tribunal also have power to impose conditions on inspection (by restricting, rather than prohibiting, disclosure)?

5-6 If the Tribunal has power to make an order to keep documents (or matters in documents) before it in a proceeding confidential in relation to an active party, should the Tribunal be permitted or required to allow the party's representative to inspect the document?

Chapter 6

Tribunal decisions and reasons

INTRODUCTION

6.1 As part of its review of the confidentiality provisions of the guardianship legislation, the Commission is required to consider those provisions that permit the Tribunal to prohibit or restrict disclosure of a decision made in a proceeding, or the reasons for that decision, from a person who is otherwise entitled to this information. Generally, Queensland's guardianship legislation creates a statutory right for particular people involved in a proceeding to receive a copy of the Tribunal's decision and reasons. However, that right may be displaced by a confidentiality order made by the Tribunal.

6.2 The focus of this chapter is the question of whether the Tribunal should be able to displace a person's *current* statutory entitlement to receive a copy of the Tribunal's decision and/or reasons. In stage three of the review, the Commission will consider the related issues of whether and, if so, when the Tribunal should be required to give reasons for a decision, and to whom Tribunal decisions and reasons should be given.[528] The general confidentiality of decisions and reasons imposed by the prohibition on publishing information about Tribunal proceedings under section 112 of the *Guardianship and Administration Act 2000* (Qld) is examined in Chapter 7 of this Discussion Paper.

THE LAW IN QUEENSLAND

6.3 Section 158 of the *Guardianship and Administration Act 2000* (Qld) provides that, generally, the Tribunal must give a copy of its decision and any written reasons for the decision[529] to the adult concerned in the matter and to each other active party in the proceeding.[530] Those other active parties are:[531]

- the applicant (if not the adult);
- the proposed guardian, administrator or attorney for the adult if the proceeding is for the appointment or reappointment of such person;
- any current guardian, administrator or attorney for the adult;

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528 The Commission's terms of reference and the timelines for the three stages of this review are discussed at para 1.2–1.6 in Chapter 1 (Introduction to the review).

529 The Tribunal is required to give written reasons for a decision within 28 days after giving the decision if directed by the President of the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 157(1). Written reasons are also required if, within 28 days of notification of the decision, a person aggrieved by the decision makes a written request for reasons. In such a case, reasons must be given within 28 days from that request: *Guardianship and Administration Act 2000* (Qld) s 157(2), (3), (5).

530 *Guardianship and Administration Act 2000* (Qld) s 158(1). Note also that s 80N(1) of the *Guardianship and Administration Act 2000* (Qld), which applies in relation to proceedings for consent to the sterilisation of a child with an impairment, provides that the Tribunal is generally required to give a copy of its decision and any written reasons for its decision to each active party in the proceeding. The active parties in such matters are the child, the applicant, the child's parent or guardian, the child's primary carer (if the child's parent or guardian is not the child's primary carer), the child's treating doctor, the child representative for the child, and any person joined as a party by the Tribunal: *Guardianship and Administration Act 2000* (Qld) s 80K.

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

- the Adult Guardian;
- the Public Trustee; and
- any other person joined as a party to the proceeding.

6.4 A copy of the Tribunal's decision (although not a copy of any written reasons for the decision) must also be given to each of the people who were given notice of the hearing.[532] The effect of this is that, in addition to those who receive the Tribunal's decision as an active party listed above, members of the adult's family, any primary carer of the adult, and anyone else the Tribunal considered should have been notified of the hearing will also receive a copy of the decision.[533]

6.5 The Tribunal is also empowered to order that anyone else may be given a copy of its decision or its reasons for a decision in a proceeding.[534]

6.6 The rights which a person might have to the Tribunal's decisions or reasons may, however, be displaced. Section 158(3) of the *Guardianship and Administration Act 2000* (Qld) provides that a requirement to give copies of a decision or reasons may be displaced by a confidentiality order made by the Tribunal under section 109.[535]

6.7 Under section 109(2) of the *Guardianship and Administration Act 2000* (Qld), the Tribunal may give directions 'prohibiting or restricting the disclosure to some or all of the active parties in a proceeding' of the Tribunal's decision or reasons.[536] Before making such a confidentiality order, the Tribunal must be 'satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason'.[537] The Tribunal will also need to consider what is required in its jurisdiction by open justice and procedural fairness,[538] and must also apply the General Principles.[539]

6.8 If the Tribunal wishes to make such an order in relation to the adult, a further criterion must be satisfied. The Tribunal may only take such a step if it considers the

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532 *Guardianship and Administration Act 2000* (Qld) s 158(2). The same is required for proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80N(2).

533 *Guardianship and Administration Act 2000* (Qld) s 118(1).

534 *Guardianship and Administration Act 2000* (Qld) s 158(4). This also applies in proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80N(4).

535 This also applies in proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80N(3).

536 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(iii).

537 *Guardianship and Administration Act 2000* (Qld) s 109(2).

538 See the discussion of this issue at para 4.12–4.18 in Chapter 4 (Tribunal hearings).

539 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

disclosure 'might be prejudicial to the physical or mental health or wellbeing of the adult'.[540]

6.9 Section 109 of the Act relevantly provides:

> **109 Open**
>
> …
>
> (2) … [I]f the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a ***confidentiality order***)—
>
> …
>
> (d) give directions prohibiting or restricting the disclosure to some or all of the active parties in a proceeding of—
>
> …
>
> (iii) subject to subsection (3), the tribunal's decision or reasons.
>
> (3) The tribunal may make a confidentiality order prohibiting or restricting disclosure of the tribunal's decision or reasons to the adult concerned only if the tribunal considers disclosure to the adult might be prejudicial to the physical or mental health or wellbeing of the adult.
>
> …

6.10 The Commission understands that the Tribunal has never displaced an active party's right to decisions or reasons by making a confidentiality order.[541]

LEGISLATION IN OTHER JURISDICTIONS

6.11 In all but one Australian jurisdiction, the guardianship or other relevant legislation creates rights for a party to a proceeding (and sometimes others) to receive (either as of right or by request) a decision made in that proceeding and the reasons for the decision. In addition to Queensland, such provisions exist in the Australian Capital Territory,[542] New South Wales,[543] South Australia,[544] Tasmania,[545] Victoria[546] and

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540 *Guardianship and Administration Act 2000* (Qld) s 109(3). Note that the same restriction applies in relation to the child in proceedings in relation to consent to the sterilisation of a child with an impairment: *Guardianship and Administration Act 2000* (Qld) s 80G(3).

541 Information provided by the President of the Guardianship and Administration Tribunal, 24 May 2006.

542 In the Australian Capital Territory, a statement of reasons must be given within 28 days after a request from a person entitled to appeal the decision: *Guardianship and Management of Property Act 1991* (ACT) s 45(2). People entitled to appeal a decision are the parties and any of the people who were entitled to notice of the proceeding: *Guardianship and Management of Property Act 1991* (ACT) ss 56(1), 36(1), 35(1).

543 In New South Wales, each party must be furnished with a copy of the decision and reasons as soon as is practicable: *Guardianship Act 1987* (NSW) s 68(1A)(b)–(1B).

Western Australia.[547] In the remaining jurisdiction, the Northern Territory, the guardianship legislation creates a right for people involved in the proceedings to receive the Court's order, but not its reasons.[548]

6.12 Apart from Queensland, none of the other Australian jurisdictions provide for the displacement of these statutory rights to allow a tribunal to deny a party (or any other person so entitled) a copy of the decision and accompanying reasons.

Western Australia

6.13 Apart from Queensland, Western Australia is the only jurisdiction that makes provision for confidentiality in relation to decisions or reasons. It is, however, only a limited recognition of confidentiality in that it applies only to the *content* of the reasons for decisions given by the State Administrative Tribunal.

6.14 Under section 80 of the *State Administrative Tribunal Act 2004* (WA), the provisions that provide for the giving of reasons must be complied with in a way that:

- is consistent with any order that was made under section 61(2) to hold the proceeding in private and in the absence of a particular person; and
- gives effect to the Tribunal's general obligation not to disclose 'protected matter' under section 160.

6.15 The effect of the first limb of section 80 is that it permits the exclusion of material considered during non-public proceedings from the reasons for decision.[549] However, it is suggested that this provision does not permit a blanket exclusion of all such material. The grounds for excluding a particular person or members of the public

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544 In South Australia, a written statement of reasons must be given to people with a right of appeal or who have a proper interest in the matter upon a request being made within three months of the decision: *Guardianship and Administration Act 1993* (SA) s 14(13). A statement of the effect of the decision or order must also be given to a person when a decision or order is made in relation to the person: *Guardianship and Administration Act 1993* (SA) s 55. The people with a right of appeal against a decision of the Board are the applicant, the person to whom the proceeding relates, any person who gave evidence or made submissions, the Public Advocate and any other person the Board is satisfied has a proper interest: *Guardianship and Administration Act 1993* (SA) s 67(1).

545 In Tasmania, a statement of reasons must be given to a person aggrieved by the decision within 21 days after the person has requested the statement (if that request is made within 21 days of the decision): *Guardianship and Administration Act 1995* (Tas) s 74(1)–(2).

546 In Victoria, each party and each of the people who were entitled to notice of the proceeding must be furnished with a copy of the decision and reasons: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 116(2), 117(1), (6). This must generally be done within 60 days of making the decision: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117(1).

547 In Western Australia, the State Administrative Tribunal must give all final decisions (and some other types of decisions) in writing and provide a copy of the decision to each party, each person entitled to notice of the proceedings, and anyone else prescribed under the rules: *State Administrative Tribunal Act 2004* (WA) ss 74, 75(1). The Tribunal must also give reasons for all final decisions: *State Administrative Tribunal Act 2004* (WA) s 77(1). Requests for these reasons to be in writing may be made by a party within 28 days of the decision and the Tribunal must give those reasons within 90 days of that request: *State Administrative Tribunal Act 2004* (WA) s 78.

548 *Adult Guardianship Act* (NT) s 15(3).

549 The power of the State Administrative Tribunal to hold a guardianship proceeding in private or in the absence of a particular person was discussed at para 4.38 in Chapter 4 (Tribunal hearings).

will determine whether the reasons for decision need to be modified to be consistent with the order to have a non-public hearing. If the order was made to protect confidential information, then it may be appropriate that the reasons for decision reflect that confidentiality. However, if the order was made to allow the adult to participate in the hearing free from the influence of a particular person, and there was no issue of confidentiality, the reasons for decision may not need to be modified.

6.16 The second limb of section 80 of the *State Administrative Tribunal Act 2004* (WA) requires that any reasons given must give effect to the Tribunal's obligation under section 160 not to disclose 'protected matter'. 'Protected matter' means:[550]

- certain types of information in relation to which the Attorney-General has certified that disclosure is contrary to the public interest for reasons such as endangering national security or revealing information protected by parliamentary privilege;[551] and

- information that is exempt from disclosure under the freedom of information legislation.[552]

6.17 The duty in section 160 prevents disclosure of such matter other than to a sitting member of the Tribunal.[553] A further exception to the duty is that the Tribunal may give a party access to matters that have been certified by the Attorney-General, unless the matter is exempt under freedom of information legislation.[554] The effect of the second limb of section 80 is that the State Administrative Tribunal must exclude 'protected matter' from its reasons for decision.[555]

Mental Health Act 2000 (Qld)

6.18 The Mental Health Review Tribunal was established by the *Mental Health Act 2000* (Qld) to safeguard the rights of people with a mental illness who are receiving involuntary treatment under that Act.[556] This Tribunal has quite a different role from that of the Guardianship and Administration Tribunal.[557] However, in the absence of comparable legislative provisions dealing with guardianship proceedings, and given that

550 *State Administrative Tribunal Act 2004* (WA) s 3 (definition of 'protected matter').

551 *State Administrative Tribunal Act 2004* (WA) ss 3 (definition of 'protected matter'), 159.

552 *State Administrative Tribunal Act 2004* (WA) s 3 (definitions of 'protected matter' and 'exempt matter'); *Freedom of Information Act 1992* (WA) s 9, sch 1 (definition of 'exempt matter'). Exempt matter includes, for example, certain types of personal information.

553 *State Administrative Tribunal Act 2004* (WA) s 160(2).

554 *State Administrative Tribunal Act 2004* (WA) s 160(3).

555 There is perhaps one exception to this. The relevant duty to keep protected matter confidential may still be met if all parties have already been given access to particular certified material and the reasons will not be available to people other than the parties.

556 Mental Health Review Tribunal, *Annual Report 2004–2005* (2005) 8; *Mental Health Act 2000* (Qld) ch 12 pt 1.

557 The role of the Mental Health Review Tribunal includes reviewing whether a person should continue to be subject to involuntary treatment or detention (or both) and reviewing a person's fitness for trial if previously found to be unfit. For the Tribunal's jurisdiction, see s 437 of the *Mental Health Act 2000* (Qld).

some of the people who fall within its jurisdiction have impaired capacity, an examination of the Tribunal's power to make confidentiality orders in relation to reasons for decisions may be instructive.

6.19 Under section 458 of the *Mental Health Act 2000* (Qld), the Mental Health Review Tribunal may make confidentiality orders prohibiting or restricting the disclosure of reasons for a decision (but not the decision itself) to the adult who is the subject of the proceeding.[558] However, the Tribunal may make such orders only if it is satisfied the disclosure would:[559]

- cause serious harm to the health of the adult; or
- put the safety of someone else at serious risk.

6.20 Unlike the relevant provision in Queensland's guardianship legislation, the *Mental Health Act 2000* (Qld) provides that if such an order is made, the Tribunal must disclose the information or matters that have been withheld from the adult to the adult's lawyer or agent along with written reasons for making the confidentiality order.[560]

ISSUES FOR CONSIDERATION

6.21 This section raises issues for consideration when examining the Tribunal's ability to prohibit or restrict disclosure of its decision or reasons:

- Should the Tribunal be able to make a confidentiality order in relation to its decisions or reasons?
- Should the legislation distinguish between a decision and its reasons?
- From whom should a copy of the Tribunal's decision or reasons be able to be withheld?
- What criteria should guide the Tribunal's discretion to prohibit or restrict disclosure of its decision or reasons?
- What does it mean to 'restrict' disclosure of the Tribunal's decision or reasons?

Should the Tribunal be able to make a confidentiality order in relation to its decisions or reasons?

6.22 A threshold question to consider is whether the Tribunal should have the power to order that its decisions and the reasons for those decisions be kept confidential from those people who are otherwise entitled to a copy of those documents. A related

558 *Mental Health Act 2000* (Qld) s 458(1)(c).

559 *Mental Health Act 2000* (Qld) s 458(2).

560 *Mental Health Act 2000* (Qld) s 458(3).

issue is whether the Tribunal should be permitted to exercise such a power on its own initiative or only on the application of an active party.[561]

Should the legislation distinguish between decisions and reasons?

6.23 An issue for consideration is whether a distinction should be made between a decision in relation to a proceeding and the reasons given for that decision. Under Queensland's guardianship legislation, the Tribunal may not only withhold a copy of its reasons from an active party but also a copy of its decision.[562] This can be contrasted with the *Mental Health Act 2000* (Qld) which prohibits or restricts access to the reasons for a decision only.[563]

From whom should decisions or reasons be able to be withheld?

6.24 Those who are currently entitled to a copy of the Tribunal decision are the adult, any other active parties,[564] and those people who were given notice of the hearing.[565] The Tribunal has power, however, to prohibit or restrict disclosure of decisions only in relation to active parties. It seems anomalous that the legislation does not provide a similar power in respect of those who were not necessarily involved in the hearing but were merely given notice of the hearing. It may be thought that participating as a party gives rise to a greater entitlement to a copy of the decision than might arise from simply being notified of the proceedings.

6.25 Another issue to consider is whether, if an adult is being denied a decision or reasons for a decision, there should be a requirement that the information be given to another person on the adult's behalf. There is a provision to this effect in the *Mental Health Act 2000* (Qld).[566]

What criteria should guide the Tribunal's discretion?

6.26 Another matter to consider is the criteria upon which the Tribunal may exercise its discretion to prohibit or restrict the disclosure of its decisions and reasons. Under Queensland's guardianship legislation, such a confidentiality order may be made only if the Tribunal is 'satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason'.[567] The Tribunal would also

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561 Section 109(5) of the *Guardianship and Administration Act 2000* (Qld) currently provides that '[t]he Tribunal may make a confidentiality order on its own initiative or on the application of an active party'.

562 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(iii).

563 *Mental Health Act 2000* (Qld) s 458(1)(c).

564 *Guardianship and Administration Act 2000* (Qld) s 158(1). As discussed above, the adult and any other active parties are also entitled to be given reasons for the decision. See para 6.3.

565 *Guardianship and Administration Act 2000* (Qld) s 158(2). See para 6.4.

566 *Mental Health Act 2000* (Qld) s 458(3).

567 *Guardianship and Administration Act 2000* (Qld) s 109(2).

need to have regard to what is required in its jurisdiction by open justice and procedural fairness[568] and to apply the General Principles.[569]

6.27 In the case of a restriction on the adult's entitlement to receive a copy of the decision or reasons, the Tribunal must additionally consider whether the disclosure 'might be prejudicial to the physical or mental health or wellbeing of the adult'.[570]

6.28 The *Mental Health Act 2000* (Qld) contains more demanding criteria in relation to the adult who is the subject of the proceeding. The Mental Health Review Tribunal may make a confidentiality order prohibiting or restricting disclosure of its reasons to the adult if satisfied the disclosure would 'cause serious harm to the health of the person' or would 'put the safety of someone else at serious risk'.[571]

6.29 If harm is to be a criterion for the exercise of this discretion (and there may be others), some other issues should be considered. One issue is who must be harmed. Queensland's guardianship legislation refers to harm to the adult only whereas the mental health legislation additionally refers to harm to other people.

6.30 A second issue is whether such a criterion should include a reference to the seriousness of the harm and its likelihood of occurring. The current test in the guardianship legislation appears to be relatively undemanding. There is only the need to show harm to the 'physical or mental health or wellbeing of the adult'. There is no threshold level of harm that needs to be met; only that some harm may occur. Presumably this could include relatively minor harm. This test is further weakened because it is only necessary to show that the disclosure of decisions or reasons 'might' cause this harm.

6.31 This can be contrasted with the approach taken under the *Mental Health Act 2000* (Qld). That legislation requires that the disclosure 'would' result in either 'serious harm' or 'serious risk' to safety, rather than a mere possibility of some harm occurring.

6.32 A further issue to consider in relation to harm is whether the criteria should include some consideration of any harm that might be caused by failing to disclose the information. There are very compelling justifications for providing parties to a proceeding with a decision and accompanying reasons as is discussed below,[572] so a determination not to disclose this information is significant. Such a decision may cause harm to the parties in that a person who is denied reasons cannot decide whether or not to appeal. It may also cause harm on a wider level to the administration of justice by undermining the accountability of decision-makers. It may be appropriate that any criteria not only require consideration of why decisions or reasons should not be disclosed, but also of any corresponding implications of such a course.

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568 See para 4.12–4.18 in Chapter 4 (Tribunal hearings).

569 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

570 *Guardianship and Administration Act 2000* (Qld) s 109(3).

571 *Mental Health Act 2000* (Qld) s 458(2).

572 See para 6.41–6.50, 6.53.

What does it mean to 'restrict' disclosure?

6.33 Another matter to consider is the implications of empowering the Tribunal to *restrict* (in addition to prohibit) the disclosure of its decisions and reasons.

6.34 The meaning of the word 'prohibit' in this context is relatively clear: a person will not be permitted to receive the decisions or reasons at all. However, the scope of a power to 'restrict' disclosure of decisions and reasons may permit two different types of confidentiality orders:

- those that impose conditions upon which decisions or reasons are disclosed; and
- those that restrict access to part of the content of a decision or reasons.

Conditional disclosure of decisions and reasons

6.35 The power of the Tribunal to impose conditions upon which a decision or its reasons are disclosed might allow a confidentiality order that says, for example, that a copy of the reasons may be given to a person on the condition that the person does not disclose it to a third party. Another example might be that access to reasons is only permitted if accompanied by appropriate support such as counselling to minimise any harm that might be caused by learning of the decision or reasons.

Restrictions on content of decisions and reasons

6.36 A power to restrict the disclosure of a decision and its reasons might also permit a copy of these documents to be given to some or all of the parties with certain material omitted. This material might be information given before the Tribunal or matters in documents received by the Tribunal or findings made by the Tribunal.

6.37 This appears to be the effect of the Western Australian provisions discussed above.[573] Section 80 of the *State Administrative Tribunal Act 2004* (WA) requires the giving of reasons to be consistent with provisions that impose confidentiality either because confidential material emerged in a non-public hearing or because information is regarded as 'protected matter'. To comply with these provisions, reference to such material would probably need to be excluded from a statement of reasons.

6.38 The power to exclude certain material from reasons raises the issue of how this is best achieved. One option is to produce a comprehensive set of reasons that refers to the relevant material which is then deleted where necessary when giving those reasons to some, one, or all of the parties. A disadvantage of such an approach is the confusion that may arise with more than one version of reasons being generated.

6.39 Another option is to produce reasons that do not refer to that material at all, which appears to be the approach of the Western Australian provisions. A disadvantage of such an approach is that it may not be possible to make clear in the reasons that the relevant material influenced the decision.

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573 See para 6.13–6.17.

6.40 A final issue to note is the potential interaction between this issue and the confidentiality orders discussed in Chapters 4 and 5. These orders can be made by the Tribunal to prohibit or restrict disclosure to an active party of information given before the Tribunal and matters contained in documents filed with or received by the Tribunal.[574] A question arises as to how material which is the subject of one of those confidentiality orders should be treated in the Tribunal's reasons for decision.

BALANCING CONCEPTS

6.41 This section outlines some of the relevant issues to consider when examining whether and when the Tribunal should be able to displace a person's statutory entitlement to decisions and reasons. In considering these issues, it is useful to examine why the provision of reasons is generally regarded as an important feature of judicial and quasi-judicial decision-making. The obligation to give reasons has been described as a normal incident of the judicial process[575] and as being 'of the essence of the administration of justice'.[576] Some of the arguments advanced in relation to the giving of reasons generally are helpful in exploring whether and when it might be appropriate to displace a person's statutory right to this information.

6.42 It is useful to consider these issues by drawing on the three concepts examined in Chapter 3 that need to be balanced when determining the role of confidentiality in the guardianship system: open justice, procedural fairness, and the nature of the guardianship system. The impact of reasons on a party's ability to appeal a decision is also critical and is considered first.

Reasons and the right of appeal

6.43 Although the obligation to give reasons for a decision is not limited to those situations where an appeal is available,[577] a failure to do so can defeat a party's ability to exercise that right.[578] The provision of reasons enables a person 'to determine whether he has good grounds for an appeal and will inform him of the case he will have

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574 *Guardianship and Administration Act 2000* (Qld) s 109(2)(d)(i)–(ii).

575 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ); Justice MD Kirby, 'Ex Tempore Judgments' (1995) 25 *Western Australian Law Review* 213, 220.

576 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing H Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494. There is not, however, an absolute rule that a judge must give reasons for decisions. The statement of Gibbs CJ quoted above included the qualification that the provision of reasons is a normal 'but not a universal' incident of the judicial process: *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 667. The limited exceptions include situations such as the making of procedural decisions where the reasons are clear because of the context or the foregoing exchanges between the parties: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.3], citing Justice MD Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 694. See also *Perkins v County Court of Victoria* [2000] 2 VR 246, 272 (Buchanan JA); *Brittingham v Williams* [1932] VLR 237, 239.

577 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 269 (Mahoney JA). Also see *Re Tam Anh Le and Secretary, Department of Education, Science and Training* [2006] AATA 208, [28]–[29].

578 See P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 189. See also *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 269–70 (Mahoney JA), citing *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 385–6 (Mahoney JA); *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 444 (Meagher JA).

to meet if he does decide to appeal'.[579] This has been used as the basis for recognising a duty to give reasons in some cases[580] and in other cases, it has been described as '[p]erhaps the primary reason' for the giving of reasons.[581]

6.44 These arguments would also apply to provisions that permit confidentiality in relation to reasons, and particularly in relation to the decision itself.

Open justice

6.45 The principle of open justice 'includes the promulgation of reasoned decisions'.[582] This promotes one of the core functions of open justice, that is, to afford a measure of accountability on decision-makers through public scrutiny.[583] This public scrutiny of reasons operates as a disincentive against partial, arbitrary decision-making and instead encourages decision-making that is careful and rational.[584] The principle of open justice also recognises that the provision of reasons can have an educative function in that it explains to people how and why particular decisions were made.[585]

6.46 Although these arguments about open justice relate to the public at large, they are also compelling in relation to the parties to a proceeding. For example, withholding reasons from a party, who is directly interested in the outcome of the matter and who may therefore take issue with an inadequately reasoned decision, would remove the decision from the proper scrutiny of that party. Further, a party's ability to understand

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579 GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 118. See also M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 560.

580 See *Pettitt v Dunkley* [1971] NSWLR 376; *King Ranch Australia Pty Ltd v Cardwell Shire Council* [1985] 2 Qd R 182; and *Adamson v Queensland Law Society Inc* [1990] 1 Qd R 498, 508 (Thomas J).

581 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 441 (Meagher JA).

582 Committee on Administrative Tribunals and Enquiries, UK House of Commons, *Report of the Committee on Administrative Tribunals and Enquiries* (1957, Cmnd 218) [76]. Also see Chief Justice JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (Paper presented at the Media Law Resource Centre Conference, London, 20 September 2005) 7; Chief Justice JJ Spigelman, 'Seen to be Done: The Principle of Open Justice: Part 1' (2000) 74 *Australian Law Journal* 290, 294; Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at the Law via the Internet Conference, Sydney, 28 November 2003) 5; Chief Justice JJ Spigelman, 'Reasons for Judgment and the Rule of Law' (Speech delivered at the National Judicial College, Beijing, 10 November 2003); *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 442 (Meagher JA); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA); and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565–6. See also para 3.20 in Chapter 3 (Guardianship and confidentiality).

583 P Mallam, S Dawson and J Moriarty, *Media and Internet Law and Practice* (revised ed, 2005) [15.60]; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 118–9; J Bannister, 'The public/private divide: personal information in the public domain' [2002] 3 *Privacy Law and Policy Reporter*. See para 3.24 in Chapter 3 (Guardianship and confidentiality).

584 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 554; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 118–9; D Foulkes, *Administrative Law* (8th ed, 1995) 324; Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) [19.9]. See, for example, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 278–9 (McHugh JA):

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

585 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.15]. Traditionally, judges read reasons in open court 'so that the parties, the profession and the public could understand the outcome of the case and follow it from beginning to end': Justice MD Kirby, 'Ex Tempore Judgments' (1995) 25 *Western Australian Law Review* 213, 214.

how and why the decision was made will be constrained without reasons. These concerns become even more acute if a party is also deprived of the Tribunal's decision.

Procedural fairness

6.47 In England[586] and Canada,[587] the courts have recognised that a duty to give reasons may arise if required by procedural fairness in the circumstances of the particular case.[588] In Australia, however, the law has not yet developed in this direction.[589]

6.48 Nevertheless, it has been argued that without reasons, the right to a fair hearing is 'devalued'.[590] The essential feature of the hearing rule is participation,[591] and it has been suggested that meaningful participation requires the giving of reasons for a decision: without reasons, the parties cannot be confident their cases 'were duly noted, understood and properly considered'.[592] It has been said that it is:[593]

> a fundamental requirement of fair play … that parties should know at the end of the day why a particular decision has been taken.

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586 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 556; *Halsbury's Laws of England*, Vol 1(1) 'Administrative Law' [113]. See *R v Secretary of State for the Home Department, Ex Parte Doody* [1994] 1 AC 531; *R v DPP; Ex parte Manning* [2001] QB 330.

587 M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 558, citing *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193; *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 208 DLR (4th) 1, 54; *Re Sheppard* (2002) 210 DLR (4th) 608 (SCC).

588 See *Halsbury's Laws of England*, Vol 1(1) 'Administrative Law' [113], n 3:

> [T]he obligation to provide a reasoned decision will exist when general considerations of procedural fairness require it. On this basis it is relevant to consider factors such as the need for reasons to give substance to a right of appeal; to explain an otherwise aberrant outcome; to demonstrate that issues had been properly addressed; the nature of the interest affected by the decision and the extent to which the interest is affected by the decision; the need to promote transparency in the decision making process; whether the duty would impose an undue burden on the decision maker; and the extent to which the judgments made were capable of being reasoned, or whether they were simply matters of academic or other evaluation. This list is not exhaustive. What is relevant will depend on the particular context concerned.

589 There has been some limited recognition of such a development (for example, *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* [1996] 2 Qd R 462, 476 (Fitzgerald P, dissenting)), but others have suggested otherwise: for example, R Creyke and J McMillan, *Control of Government Action: Text, Cases and Commentary* (2005) [18.2.1], [18.2.4], citing *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, and particularly 670 (Gibbs CJ), albeit in the context of an administrative decision:

> The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made.

See also *Perkins v County Court of Victoria* [2000] 2 VR 246, 271–2 (Buchanan JA).

590 JRS Forbes, *Justice in Tribunals* (2002) [13.2].

591 DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) 333. See para 3.34 in Chapter 3 (Guardianship and confidentiality).

592 JRS Forbes, *Justice in Tribunals* (2002) [13.2]. Also see P Cane, *An Introduction to Administrative Law* (2nd ed, 1992) 190.

593 D Foulkes, *Administrative Law* (8th ed, 1995) 324. See also Committee on Administrative Tribunals and Enquiries, UK House of Commons, *Report of the Committee on Administrative Tribunals and Enquiries* (1957, Cmnd 218) [98]–[99]; GA Flick, *Natural Justice: Principles and Practical Application* (2nd ed, 1984) 119.

6.49 Further, providing reasons for a decision can help a party know and understand why they did not succeed and avoid the grievance of feeling that an injustice has occurred.[594]

6.50 If these arguments are accepted in relation to the provision of reasons, they would also apply in the context of provisions that permit the imposition of confidentiality in relation to reasons and decisions. Again, any sense of unfairness would be more significant if a party were not only denied a copy of the reasons for the decision, but also of the decision itself.

Nature of the guardianship system

6.51 The nature of the guardianship system, however, may justify some measure of confidentiality in relation to decisions and reasons, in appropriate cases.

6.52 The protective nature of the system might warrant such a discretion for the Tribunal as it may be necessary to keep reasons or decisions from the adult to avoid harming him or her.[595] Confidentiality in relation to other parties may also be justified as a means of safeguarding the rights and interests of the adult. This might arise, for example, if the reasons contained an adverse finding about a person based on the adult's evidence such that its disclosure is likely to prompt retribution from the person directed at the adult.

6.53 In contrast, the fact that the decisions made in the guardianship system affect fundamental rights suggests that decisions and reasons ought not to be withheld. The magnitude of the decisions being made gives importance to accountability of decision-making and fairness to the parties.

POSSIBLE LEGAL MODELS

6.54 The Commission has identified three possible models, outlined below, for how the law might deal with the issue of confidentiality in relation to the Tribunal's decisions and reasons. These models do not capture all of the relevant issues the Commission is considering, but may provide a useful starting point for thinking about the general approach the law should take. A hypothetical case study is used to illustrate these models and how they might operate.

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594 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430, 442 (Meagher JA); *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (McHugh JA).

595 In the context of the provision of information (other than decisions and reasons) causing harm to an adult, see T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101. Foulkes has also recognised that one of the situations where the provision of reasons might not be appropriate is if it may cause distress to a person with a mental illness during mental health proceedings: D Foulkes, *Administrative Law* (8th ed, 1995) 326.

Model 1: no power to make decisions or reasons confidential

6.55 In this model, the Tribunal has no power to make an order prohibiting or restricting disclosure of a decision or its reasons. The current statutory entitlement to decisions and reasons cannot be overridden. This is the position in most of the guardianship systems in Australia, other than Queensland.[596]

Model 2: power to make reasons confidential, but not decisions

6.56 In this model, the current statutory entitlement to the Tribunal's decision remains, but there is discretion to prohibit or restrict disclosure of the Tribunal's reasons for the decision. This is the approach adopted under the *Mental Health Act 2000* (Qld). It is also reflected, to some extent, in the Western Australian legislation, which provides for the removal of particular information from the reasons for decision.[597]

6.57 Variations of this model will depend on matters such as whether any distinction is made between different categories of people, the criteria (if any) upon which the Tribunal's discretion can be exercised, and whether the orders can be made to restrict, as well as prohibit, disclosure.[598]

Model 3: power to make both decisions and reasons confidential

6.58 As is currently the law in Queensland, this model permits the Tribunal to prohibit or restrict the disclosure of both its decisions and the reasons for those decisions. Again, the scope of the model will vary depending on whether a distinction is made between different people, what criteria (if any) will apply to the discretion, and whether orders will be able to restrict, as well as to prohibit, disclosure.[599]

A case study

Stephen is a 24 year old man with a mental illness. He lives with his parents, Carmella and Allan. Stephen's illness is such that he is unable to manage his own finances, so Allan has been managing Stephen's money informally. The relationship between Stephen and Allan is turbulent and has sometimes resulted in Allan being physically violent. Despite this, Stephen idolises his father.

596 See para 6.11–6.12. The only other jurisdiction that seeks to impose some confidentiality on reasons for decisions is Western Australia, although that is only in relation to the content of those reasons: see para 6.13–6.17.

597 *State Administrative Tribunal Act 2004* (WA) s 80.

598 See para 6.21–6.40.

599 See para 6.21–6.40.

After a number of unhappy years, Carmella and Allan decide to separate. This was in part because of Carmella's concerns about the way in which Allan has been managing Stephen's money.

After the separation, Carmella applies to the Tribunal to be appointed as Stephen's administrator. Despite Allan's opposition, Carmella is appointed. Stephen is not present at the hearing so is unaware of the decision. Upon being informed of the decision at the conclusion of the hearing, Allan requests written reasons as he intends to appeal the decision.

During the Tribunal hearing, there was conflicting evidence from Carmella and Allan. In reaching its decision, the Tribunal made adverse findings about Allan in relation to his management of Stephen's money and also found him to be an untruthful witness.

Carmella has concerns that these findings may upset Stephen and affect his medical treatment given his admiration for his father. She also has a concern, given Allan's past aggressive behaviour, that giving reasons to Allan may trigger an assault against Stephen or, perhaps, her. The issue for the Tribunal is whether it should make a confidentiality order about its decision or reasons in relation to Stephen or Allan.

Outcome of case study

6.59 Both Stephen and Allan are active parties to the proceeding and would be entitled under the *Guardianship and Administration Act 2000* (Qld) to a copy of the decision and reasons.[600] Under model 1, there is no entitlement to displace the right to this information, regardless of what impact it may have.

6.60 Under model 2, the Tribunal would continue to be required to provide its decision to both Stephen and Allan although it would have discretion to refuse to provide its reasons. Under model 3, the discretion would widen to allow the Tribunal to include preventing Stephen or Allan from having access to the decision itself.

6.61 The material likely to be of concern in this case is the Tribunal's adverse findings about Allan's conduct. This means it is the provision of a copy of the Tribunal's reasons for the decision that is the critical issue, rather than of the decision itself. The concern in disclosing the reasons to Allan is the potential violence that may ensue in reaction to the adverse findings. There is also a concern the disclosure may adversely affect Stephen's medical treatment.

6.62 Whether or not the Tribunal decides to exercise its discretion in relation to disclosure of reasons will depend on the relevant criteria and what evidence is received in relation to those matters.

600 *Guardianship and Administration Act 2000* (Qld) ss 158(1), 119 (definition of 'active party').

6.63 The question under the current Queensland law in relation to Allan is whether non-disclosure 'is desirable … because of the confidential nature of particular information or matter or for another reason'.[601] The Tribunal would also need to have regard to what is required by open justice and procedural fairness, and apply the General Principles.

6.64 The risk of a violent reaction by Allan to the findings, directed at Stephen, may be considered sufficient reason. However, the Tribunal may also consider the prejudice that non-disclosure may have on Allan's ability to appeal the Tribunal's decision.

6.65 It would be more difficult to refuse to disclose a copy of the reasons to Stephen (as the adult) than to Allan (as another active party). This is because the Tribunal must additionally find that the disclosure of reasons 'might be prejudicial' to Stephen's physical or mental health or wellbeing.[602]

6.66 However, that additional test is relatively undemanding. The suggestion of some damage to Stephen's medical treatment may be sufficient to establish a possibility of prejudice. An alternative and more robust test may require the Tribunal to be satisfied the disclosure 'would cause serious harm'. Whether this could be shown would depend on the evidence. It would also include some consideration of the impact of a failure to disclose the reasons to Stephen.

6.67 It would be open to the Tribunal under models 2 and 3 to limit disclosure of the adverse findings to either, or both, Stephen and Allan. Depending on the formulation of the legislative provision and whether it provides for such an approach, the Tribunal might still be able to give Stephen and Allan a copy of the reasons with references to the adverse findings removed.

A preliminary view

6.68 At this stage of the review, the Commission has a preliminary preference for model 2: that any statutory entitlement to decisions is absolute but that the Tribunal is given discretion to make confidentiality orders in relation to the reasons for a decision in appropriate circumstances.

6.69 The Commission has serious reservations about withholding the reasons for a Tribunal decision from the active parties to a proceeding. The importance of reasons was discussed above[603] and the Commission notes that no other guardianship legislation in Australia contains a provision empowering the withholding of a decision or statement of reasons from a person who is statutorily entitled to that information. (The Western Australian legislation permits only the removal of particular material from a statement of reasons.)

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601 *Guardianship and Administration Act 2000* (Qld) s 109(2).

602 *Guardianship and Administration Act 2000* (Qld) s 109(3).

603 See para 6.43–6.50, 6.53.

6.70 However, the Commission recognises that there may be some circumstances in which it is appropriate to withhold certain information contained in a statement of reasons from a person otherwise entitled to receive this information. The Commission considers that those occasions would be exceptional and so favours a tightly constrained discretion. The Commission also considers that it is preferable that the Tribunal, in exercising its discretion, remove material from a statement of reasons where possible rather than make an order for non-disclosure of the entirety of its reasons for the decision.

6.71 The Commission also has serious reservations about not informing an active party of a Tribunal's decisions, which is why its preferred model moves away from that position under the current law.

6.72 The difficulties where an active party does not receive reasons for a decision have already been outlined and would be compounded if the person is deprived of even knowing the outcome of a matter. A party who is unaware of the decision is not only unable to consider whether an appeal might be warranted, they are also precluded from knowing whether an appeal is even necessary.

CALL FOR SUBMISSIONS

6.73 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the displacement of a person's current statutory entitlement to decisions and reasons. You may wish to nominate your preferred legal model or provide more detailed comment on the particular issues that follow.

Possible legal models

6-1 Should Queensland's guardianship legislation reflect one of the following models in relation to the displacement of a person's current statutory entitlement to Tribunal decisions and reasons:

(a) Model 1: no power to make decisions or reasons confidential;

(b) Model 2: power to make reasons confidential, but not decisions;

(c) Model 3: power to make both decisions and reasons confidential;

(d) Other models?

Particular issues

6-2 Should the Tribunal have power to make an order to keep its decision and/or the reasons for its decision (or part of the reasons) confidential from the adult, any other active party, or another person who is currently entitled to a copy of that information?

6-3 In relation to question 6-2, should any such power include both a Tribunal's decision and the reasons for that decision, or only the reasons?

6-4 If the Tribunal should have such a power, what legislative criteria, if any, should guide its exercise:

(a) the Tribunal may make an order if it is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason (the current legislative test in Queensland);

(b) the Tribunal may make an order if it is satisfied it is necessary to avoid:

(i) causing serious harm to the health of the adult; or

(ii) putting the safety of a person at serious risk.

(such as the test provided under the *Mental Health Act 2000* (Qld));

(c) the Tribunal may make an order to the extent necessary to give effect to any other order that has been made by the Tribunal in the proceeding (such as the provisions in Western Australia)? That other order could be one to hold a hearing in private, or to exclude a person from that hearing, or to limit disclosure to a person of information or matters contained in documents before the Tribunal;

(d) other criteria?

6-5 In relation to question 6-4, should different legislative criteria apply for orders limiting disclosure to an adult and to those directed at other people, and, if so, what should the criteria be? For example:

(a) the Tribunal may make an order in relation to an adult if it is satisfied the disclosure might be prejudicial to the physical or mental health or wellbeing of the adult (the current legislative test in Queensland);

(b) other criteria?

6-6 **If the Tribunal has power to make an order to keep its decision and/or the reasons for that decision (or part of the reasons) confidential, should the Tribunal also have power to impose conditions on disclosure (by restricting, rather than prohibiting, disclosure)?**

6-7 **If the Tribunal has power to make an order to keep its decision and/or the reasons for that decision (or part of the reasons) confidential, should the Tribunal be permitted or required to allow disclosure of the information to the party's representative?**

Chapter 7

Publication of Tribunal proceedings

THE LAW IN QUEENSLAND

7.1 As part of its review of the confidentiality provisions of the guardianship legislation, the Commission is required to consider those provisions that restrict the publication of Tribunal proceedings.

7.2 There are two provisions that address this issue, namely, sections 109 and 112 of the *Guardianship and Administration Act 2000* (Qld). It is convenient to deal with section 112 first, because it has the wider operation.

Section 112

7.3 Section 112(3) of the *Guardianship and Administration Act 2000* (Qld) contains two prohibitions that restrict the way in which Tribunal proceedings may be reported. First, it prohibits the publication of information about a Tribunal proceeding.[604] This includes information given before the Tribunal, matters contained in documents given to the Tribunal, and the Tribunal's decisions and reasons.[605] Second, it prohibits the disclosure of the identity of a person involved in a Tribunal proceeding.[606] A person 'involved in a proceeding' includes a person:[607]

- who makes an application to the Tribunal in the proceeding;
- about whom an application is made in the proceeding;
- who is an active party in the proceeding;[608]
- who gives information or documents to a person performing a function under the Act relevant to the proceeding; and
- who appears as a witness at the hearing of the proceeding.

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

605 *Guardianship and Administration Act 2000* (Qld) s 112(4).

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

607 *Guardianship and Administration Act 2000* (Qld) s 112(4).

608 Section 119 of the *Guardianship and Administration Act 2000* (Qld) provides that the following people are an active party for a proceeding:

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

7.4 There are exceptions to these prohibitions. The Tribunal may make an order permitting the publication of information about a proceeding or the disclosure of a person's identity if it is satisfied that to do so would be in the public interest.[609] For example, in a small number of cases, the Tribunal has used this provision to make orders allowing the publication of de-identified Tribunal decisions on the AustLII website.[610] A person will also be permitted to publish this information, or to disclose a person's identity, if he or she has a reasonable excuse.[611]

7.5 Section 112 relevantly provides:[612]

> **112 Publication about proceeding or disclosure of identity**
>
> (1) If the tribunal is satisfied publication of information about a proceeding is in the public interest, the tribunal may, by order, permit publication of the information.
>
> (2) If the tribunal is satisfied publication of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit disclosure of the person's identity.
>
> (3) A person must not, without reasonable excuse, publish information about a proceeding, or disclose the identity of a person involved in a proceeding, unless the tribunal has, by order, permitted the publication or disclosure.
>
> Maximum penalty—200 penalty units.
>
> …
>
> (4) In this section—
>
> …
>
> ***information***, about a proceeding, includes—
>
> (a) information given before the tribunal; and
>
> (b) matters contained in documents filed with, or received by, the tribunal; and
>
> (c) the tribunal's decision or reasons.

609 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

610 These decisions can be accessed at the AustLII website <http://www.austlii.edu.au/au/cases/qld/QGAAT> at 24 July 2006.

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

612 Section 112 of the *Guardianship and Administration Act 2000* (Qld) also provides a limited exception for disclosure of information about a proceeding, including a person's identity, to a member of this Commission or to its staff or consultants in order to facilitate the Commission's review of the guardianship legislation: *Guardianship and Administration Act 2000* (Qld) s 112(3A)–(6). The Commission has prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission's consultation process. The *Protocol* can be viewed at the Commission's website: <http://www.qlrc.qld.gov.au/guardianship/protocol.htm>.

> ***involved***, in a proceeding, includes—
>
> (a) making an application in the proceeding to the tribunal; and
>
> (b) being a person about whom an application is made in a proceeding; and
>
> (c) being an active party for the proceeding; and
>
> (d) giving information or documents to a person who is performing a function under this Act relevant to the proceeding; and
>
> (e) appearing as a witness at the hearing of the proceeding.
>
> …

7.6 A recent case in which the issue arose of making an order permitting the wider publication of information in the public interest was *Re WEK No 2*.[613] Although there was no formal application before the Tribunal on that occasion, the issue was raised by the parties.[614] The Tribunal commented, after considering section 112 of the *Guardianship and Administration Act 2000* (Qld) and the General Principles (particularly General Principle 11), that:[615]

> … there were insufficient reasons advanced to convince it that it was in the public interest to agree to any other means to publish information related to this matter other than via Austlii. It is accepted that publication on Austlii in a de-identified format allows public scrutiny of Tribunal processes, yet respects the confidentiality of the adult.

7.7 The Tribunal did, however, make such an order in *Re MHE*[616] concluding that the circumstances of that case meant that some level of public disclosure was in the public interest. It commented:[617]

> … there had already been wide publicity about MHE, and his family. Some of the published information, particularly quotes attributed to some politicians were incorrect, misleading and confusing to the public. It is in the public interest for citizens to know how decisions around 'end of life' can be made.

7.8 The Tribunal also made an order permitting wider publication in *Re MLI*.[618] In that case, the Tribunal considered that it was in the public interest for those people

613 [2005] QGAAT 25.

614 Ibid [78], [107].

615 Ibid [106].

616 [2006] QGAAT 9.

617 Ibid [75].

618 [2006] QGAAT 31.

and bodies with responsibility for reviewing the relevant area of law to be permitted to receive information about the proceeding, including the identity of the parties.[619]

Section 109

7.9 The second provision of the *Guardianship and Administration Act 2000* (Qld) that may restrict the reporting of Tribunal proceedings is section 109(2)(c). This provision gives the Tribunal power to make directions prohibiting or restricting the publication of information given before the Tribunal or of matters contained in documents filed with or received by the Tribunal.[620] The reference to 'restricting' would permit the Tribunal to impose conditions upon publication, such as limiting the people to whom the information can be published.

7.10 As with other confidentiality orders, the test employed by the Tribunal is whether 'it is satisfied it is desirable to do so because of the confidential nature of the information or matter or for another reason'.[621] The Tribunal would also need to have regard to what is required in its jurisdiction by open justice and procedural fairness,[622] and to apply the General Principles contained in the legislation.[623] A person must comply with a confidentiality order unless they have a reasonable excuse.[624]

7.11 Section 109 relevantly provides:

> **109 Open**
>
> (1) Generally, a hearing by the tribunal of a proceeding must be in public.
>
> (2) However, if the tribunal is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason, the tribunal may, by order (a ***confidentiality order***)—
>
> …
>
> (c) give directions prohibiting or restricting the publication of information given before the tribunal, whether in public or in private, or of matters contained in documents filed with, or received by, the tribunal;
>
> ….

619 In *Re MLI* [2006] QGAAT 31, the Tribunal made orders permitting the publication of information about proceedings to the Queensland Law Reform Commission, the Honourable Bill Carter QC, and the Attorney-General and Minister for Justice: [91]–[92]. Such an order was also made in relation to the Public Advocate, given the systemic issues that this case involved: [92].

620 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c). Note that a similarly worded power granted to the Administrative Appeals Tribunal by s 35(2)(b) of the *Administrative Appeals Tribunal Act 1975* (Cth) has been held to include the power to suppress the name of a party contained in such documents and to use, instead, a pseudonym: *Re An Applicant and Australian Prudential Regulation Authority* (2005) 89 ALD 643, 665–6.

621 *Guardianship and Administration Act 2000* (Qld) s 109(2).

622 See para 4.12–4.18 in Chapter 4 (Tribunal hearings).

623 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1.

624 *Guardianship and Administration Act 2000* (Qld) s 109(6).

7.12 Two recent cases in which confidentiality orders were made under section 109(2)(c) are *Re MLI*[625] and *Re MHE*.[626] In *Re MLI*, the Tribunal made a confidentiality order so that MLI's matter could 'be determined without MLI attracting the media notoriety he attracted in his home town.'[627] In *Re MHE*, which involved decisions in relation to withdrawing life-sustaining measures, the Tribunal made a limited confidentiality order having regard to 'the intensely private nature of the matters before the Tribunal'.[628]

7.13 The Commission has been informed that in the period between 1 July 2005 and 26 May 2006, the Tribunal has made only these two confidentiality orders in relation to the publication of information about a proceeding under section 109(2)(c).[629]

The interaction between sections 109 and 112

7.14 As the law currently stands, it appears that section 109(2)(c) is unnecessary. This provision permits the Tribunal to make a confidentiality order in relation to information about a proceeding, but such information is already prohibited from being published by section 112.[630] In other words, the discretion to prohibit information from being published is superfluous if the publication of that information is already prohibited.[631]

7.15 As such, any recommendations in relation to the operation of section 112 may affect the extent to which section 109(2)(c) is considered necessary or desirable. This chapter will therefore consider both provisions.

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625 [2006] QGAAT 31.

626 [2006] QGAAT 9.

627 [2006] QGAAT 31, [90].

628 [2006] QGAAT 9, [75]–[76]. In this case, the Tribunal did, however, also make an order under s 112(1) of the *Guardianship and Administration Act 2000* (Qld) permitting the publication of certain information about the proceeding due to the public interest: see para 7.7.

629 Information provided by the President of the Guardianship and Administration Tribunal, 26 May 2006. The Commission notes, however, that the formal collection of information by the Tribunal in relation to confidentiality orders under s 109(2)(c) of the *Guardianship and Administration Act 2000* (Qld) only began in February 2006.

630 One explanation for this may be a shift in the Commission's recommendations during its first Guardianship Review in the 1990s. The Commission had originally proposed in its draft report that proceedings would be open to reporting, but that the Tribunal should have power to give directions prohibiting or restricting the publication of information about proceedings in particular cases: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Draft Report No 43 (1995) cl 163(2)(b). However, after further consideration and in light of submissions received in response to that draft report, the Commission instead proposed in its final report to reverse the position and impose a prohibition on publication but grant the Tribunal a discretion to waive that prohibition: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) cl 202, 206. This rendered unnecessary the Tribunal's discretion to restrict or prohibit publication which was originally recommended, although the provision was not removed.

631 Note, however, that the making of a confidentiality order specifically directed at an active party may be more effective in practice than the generally worded prohibition in s 112 of the *Guardianship and Administration Act 2000* (Qld).

7.16 The Commission also notes some inconsistency or tension in the policy that underpins section 109(1) (that proceedings are to be held in public, although there is a power to change that position) and that which underpins section 112 (that information about proceedings is not to be published, although there is a power to change that position). The primary objectives in permitting people to attend hearings are to improve accountability in decision-making and to enhance community understanding of the law. The tension in policy between the two provisions arises because those objectives are then undermined by the imposition of strict limits on what people can do with the information they receive during those open hearings.

LEGISLATION IN OTHER JURISDICTIONS

7.17 The relevant statutes in all of the Australian jurisdictions impose various prohibitions or restrictions on the publication of information about guardianship proceedings. These prohibitions and restrictions can be categorised into three broad approaches that are considered in this section:

- A general prohibition on publication of information about proceedings with power given to the Tribunal to allow publication of de-identified information.
- A general prohibition on publication of information about proceedings with power given to the Tribunal to allow the publication of both de-identified and other information.
- A general prohibition on publication of information about proceedings that would identify people (with publication of de-identified information otherwise permitted) and with power given to the Tribunal to allow the publication of identifying information.

7.18 This section also considers those jurisdictions in which the Tribunal is conferred with discretion to make an order prohibiting publication of information in particular cases, in addition to any general legislative prohibition or restriction on the publication of information.

General prohibition with power to permit publication of de-identified information

7.19 The guardianship legislation in both South Australia and the Northern Territory prohibits the publication of information about proceedings, subject to the Tribunal's discretion to permit the publication of information in a de-identified form. This limited discretion permits publication only if it does not contain 'particulars calculated to lead to the identification' of the adult or others concerned in the proceedings[632] or if it does not contain material that 'identifies or could tend to identify'

632 *Adult Guardianship Act* (NT) s 26(2).

the adult.[633]

7.20 In the Northern Territory, this discretion may be exercised only if publication is in the public interest.[634] There are no criteria specified for the exercise of the discretion in South Australia.[635]

General prohibition with power to permit publication of all information

7.21 Whilst the guardianship legislation in Queensland imposes a blanket prohibition on the publication of information about proceedings,[636] the Tribunal has a wide discretion to permit not only publication of de-identified information but also the publication of information about proceedings generally.[637] This is similarly the position in New Zealand.[638] In Queensland, the Tribunal can exercise its discretion where it is satisfied that publication is in the public interest,[639] whilst in New Zealand there is no express test, only the requirement that the court grant leave.[640] The law in Queensland is discussed in more detail above.[641]

Prohibition on publication of identity with power to permit

7.22 The relevant legislation in the Australian Capital Territory, New South Wales, Tasmania, Victoria and Western Australia have taken the third approach: the only information that is prohibited from publication is information that would identify relevant people, but the Tribunal is granted discretion to override that prohibition in appropriate cases.[642] The provisions in these jurisdictions generally contain two common elements, which are outlined briefly here to illustrate the operation of this

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633 *Guardianship and Administration Act 1993* (SA) s 81(3). The South Australian legislation expressly defines the term 'person to whom proceedings relate' as an individual with a mental incapacity, mental illness or who is subject to a guardianship or administration order made under the Act: *Guardianship and Administration Act 1993* (SA) s 3. This definition includes reference to 'protected persons' defined as the person the subject of a guardianship or administration order (or both) under the Act: *Guardianship and Administration Act 1993* (SA) s 3.

634 *Adult Guardianship Act* (NT) s 26(2).

635 Section 81(2) of the *Guardianship and Administration Act 1993* (SA) states that the Guardianship Board may exercise a discretion to enable publication upon application of a person who has a proper interest in the matter. However, this requirement relates to the issue of standing, and not to the exercise of the discretion.

636 *Guardianship and Administration Act 2000* (Qld) s 112(3). The legislation also specifically prohibits the identification of people involved in the proceedings: *Guardianship and Administration Act 2000* (Qld) s 112(3).

637 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

638 *Protection of Personal and Property Rights Act 1988* (NZ) s 80(1). Note, however, that there is no express reference in this jurisdiction to 'identifying information'.

639 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2).

640 *Protection of Personal and Property Rights Act 1988* (NZ) s 80(1).

641 See para 7.3–7.8.

642 See n 644.

approach, but are considered in more detail in the next section 'Issues for Consideration'.[643]

7.23 First, all jurisdictions begin by imposing a prohibition on the publication of information that will identify certain people.[644] The people whose identity must not be published vary in each jurisdiction and include the adult only,[645] parties to the proceedings,[646] or people generally involved or concerned in the proceedings.[647]

7.24 There are varying approaches taken to the question of what will be sufficient to identify a person. Some legislation, such as that in Victoria, contains a generic test where the prohibition relates to information that 'identifies, or could reasonably lead to the identification' of a person.[648] Other jurisdictions go further and expressly state some of the ways in which a person may be identified. The most comprehensive example of this is in Western Australia where the legislation refers to matters such as a person's name or alias, their voice, their address, their physical description, their occupation, or their relationships or associations with others.[649]

7.25 Second, having prohibited the publication of information that would identify a person, the respective Tribunals are then granted discretion to permit the publication of such information.[650] Victoria and Tasmania are the only jurisdictions in which a

643 See para 7.36–7.76.

644 *Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Administration Act 1995* (Tas) s 13(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1). In Western Australia, there is also a separate prohibition on the publication of a list of the names of people involved in guardianship proceedings, with an exception for a notice on display on the Tribunal's premises: *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(2). The *State Administrative Tribunal Act 2004* (WA) also imposes a prohibition on the publication of 'protected matter' in that State. This is matter the disclosure of which has been certified as contrary to the public interest by the Attorney-General under s 159 of the *State Administrative Tribunal Act 2004* (WA) or an exempt matter or document under the *Freedom of Information Act 1992* (WA): *State Administrative Tribunal Act 2004* (WA) s 3 (definitions of 'protected matter', 'exempt document' and 'exempt'). This prohibition on the publication of protected matter is one that applies to all matters before the State Administrative Tribunal (not just those involving issues of guardianship) and so is not considered further.

645 *Guardianship and Management of Property Act 1991* (ACT) s 49(1). In New South Wales, reference is made to a 'prescribed person' which means a person under guardianship, a person whose estate is subject to a financial management order, a child, or a person to whom an application relates: *Guardianship Act 1987* (NSW) s 57(4).

646 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1). See also s 59(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) which outlines who are the parties to a proceeding.

647 *Guardianship and Administration Act 1995* (Tas) s 13(1); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1).

648 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

649 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3).

650 *Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Administration Act 1995* (Tas) s 13(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8)(d), although note that the provision in this Act is worded as an exception to the prohibition, rather than as a discretion of the Tribunal.

criterion for the exercise of that discretion, that of the 'public interest', is imposed.[651]

Further discretion to prohibit the publication of information

7.26 In addition to a legislative prohibition or restriction on the publication of certain types of information, some jurisdictions grant the Tribunal a further discretion to prohibit the publication of information in particular cases. This is the position in Queensland where, as discussed above,[652] the Tribunal may make a confidentiality order in relation to the publication of information in addition to the legislative prohibition on the reporting of proceedings.[653]

7.27 The Tribunals in Western Australia and Victoria are granted a similar discretion and may order that specific evidence or documents must not be published except in the manner and to the people specified by the Tribunal.[654] The criteria for the exercise of this discretion include whether such an order is necessary to avoid, for example, endangering national security, prejudicing the administration of justice, endangering a person's safety, offending public decency or morality, the publication of confidential information, or 'for any other reason in the interests of justice'.[655]

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651 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1995* (Tas) s 13(2). In *Korp (Guardianship)* [2005] VCAT 779, [7] the Victorian Civil and Administrative Tribunal stated that something more than a general claim to 'open justice' is required to override the general rule that publication of identifying information is prohibited:

> Clause 37 of the *VCAT Act* provides in guardianship cases what the Parliament regards as a proper balance between the competing considerations; that is, without order, it prohibits the publication or broadcasting of a report of such proceedings that identifies, or could reasonably lead to the identification of, a party to the proceeding. Because this is the general rule that the parliament has applied to guardianship matters, no argument based upon a principle of "open justice" is sufficient in itself to override that general rule. Clearly the Parliament knew of that principle when it enacted clause 37. It deliberately chose that matters under the *Guardianship and Administration Act* be regarded as an exception to that principle, unless having regard to the public interest the tribunal makes an order allowing such publication.

In that case, the Victorian Civil and Administrative Tribunal found that there were three 'special features' that set it apart and, together, warranted permitting publication in the public interest (although subject to conditions). Those were, first, that the purpose of the proceeding was to seek appointment of a guardian for Mrs Korp, a 'severely disabled' person, to facilitate decisions about medical treatment that could include refusal of life-sustaining medical treatment; second, that Mrs Korp's circumstances had already received 'saturation publicity'; and third, that two people had been charged with criminal offences in relation to how Mrs Korp acquired her brain injury. See *Korp (Guardianship)* [2005] VCAT 779, [9]–[11].

652 See para 7.9–7.13.

653 *Guardianship and Administration Act 2000* (Qld) s 109(2)(c).

654 *State Administrative Tribunal Act 2004* (WA) s 62(1), (3); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3). These Tribunals are also granted power to make such an order in relation to 'information that might enable a person who has appeared before [the Tribunal] to be identified': *State Administrative Tribunal Act 2004* (WA) s 62(1)(c); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3)(c). However, it appears that in the context of the guardianship jurisdiction that such a power is unnecessary because of the prohibitions that already exist in relation to identifying material: see para 7.23–7.24.

Note also that the exercise of this discretion is limited to either a legally qualified member of the Tribunal or otherwise the presiding member: *State Administrative Tribunal Act 2004* (WA) s 62(4); or the presiding member: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(5). For an example of when such an order has been made under the Victorian legislation, see *Korp (Guardianship)* [2005] VCAT 779.

655 *State Administrative Tribunal Act 2004* (WA) ss 62(3), 61(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(4).

7.28 The effect of these provisions is to grant the Tribunal the power to extend the prohibition on material that cannot be published. The publication of information that identifies a person is already prohibited in Western Australia and Victoria. This discretion further allows the Tribunal to order that specific evidence or documents not be published, even if they do not identify a person.

7.29 The discretion in Victoria, so far as it relates to identifying information, may also be wider than the legislative prohibition because it relates to 'information that might enable a person who has appeared before [the Tribunal] to be identified'.[656] This is wider than the wording of the legislative prohibition, which refers only to a 'party to the proceedings'.[657] The discretion is wide enough, for example, to allow suppression of identifying information about witnesses as well.

ISSUES FOR CONSIDERATION

7.30 The discussion of the legislation in different jurisdictions above raises several issues to consider when examining any potential prohibitions on what can be published about Tribunal proceedings:

- Should there be a prohibition on publishing information about a proceeding or publishing the identity of people involved proceedings?
- If there should be a prohibition in relation to people involved in proceedings, whose identity should be protected?
- In terms of prohibitions generally, to whom should the publication of information be prohibited?
- What discretion should there be to permit publication?
- Should there be any exceptions or defences to the prohibition?
- Should there be any additional discretion to prohibit the publication of information in particular cases?

7.31 First, however, a threshold question arises as to the purpose of prohibiting the publication of Tribunal proceedings. Is the prohibition designed to prevent only widespread discussion and reporting of Tribunal proceedings, such as in the media, or is it designed to apply more widely to prevent general discussion of proceedings?

7.32 Both approaches are considered below when examining the meaning of specific aspects of the various statutes. However, the issue is raised at the outset as the answer to this question (which involves a policy choice as to the appropriate balance to be struck between open justice and confidentiality) will inform how the specific issues considered below might be resolved.

656 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(3).

657 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

Should there be a prohibition on publishing information about a proceeding?

7.33 The first issue to consider is what, if anything, should be prohibited from being published. The guardianship legislation in all Australian jurisdictions imposes at least some restriction on the publication of information about proceedings.[658] A threshold issue to consider is whether there should be such a prohibition. Generally, proceedings in court, including any evidence given and the identity of those people involved, are capable of being reported and publicly discussed, unless a specific suppression order has been made.[659] Although there are reasons why the guardianship system might be treated differently from some other legal settings,[660] this is a threshold issue that should be considered.[661]

7.34 If it is considered appropriate for the legislation to contain some prohibition on the publication of information, the issue then arises as to what information should be the subject of a prohibition. The major question revealed by the comparison of legislation in other jurisdictions is whether the prohibition should apply to proceedings generally, or whether it should be limited to information that would identify relevant people.

7.35 Another issue that arises in relation to the scope of any prohibition is whether it should also extend to guardianship matters heard before the Supreme Court. Such a matter may be before the Court at first instance[662] or it may come before the Court on

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658 See para 7.17.

659 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.05]–[4.230]. While the power of courts to make a suppression order pursuant to a statutory provision is clear, there is some doubt as to whether a court, in its inherent jurisdiction, can do so. In relation to the courts' inherent jurisdiction, see *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 53–8 where Kirby J said that 'the principles which support and justify the open doors of our courts likewise require that what passes in court should be capable of being reported': 55. Kirby J also concluded in that case that: '[s]tatute apart, it is doubtful on the authorities, that courts have the power to make an order, operating outside the court, which suppresses the publication of anything said in open court': 55. See also *John Fairfax & Sons Ltd v Police Tribunal of New South Wales and Another* (1986) 5 NSWLR 465, 477–80. A slightly wider approach seems to have been suggested in *Ex parte the Queensland Law Society Incorporated* [1984] 1 Qd R 166. In that case, McPherson J examined the authorities in other common law jurisdictions, namely *R v Clement* (1821) 4 B & Ald 218; 106 ER 918 and *Taylor v Attorney General* [1975] 2 NZLR 675, stating (at 170):

> The result of these authorities seems to me to be that, apart from specific statutory provisions, the power of the court under general law to prohibit publication of proceedings conducted in open court has been recognised and does exist as an aspect of the inherent power. That does not mean that it is an unlimited power. The only inherent power that a court possesses is power to regulate its own proceedings for the purpose of administering justice; and, apart from securing that purpose in proceedings before it, there is no power to prohibit publication of an accurate report of those proceedings if they are conducted in open court, as in all but exceptional cases they must be.

See also *Brennan v State of New South Wales* [2006] NSWSC 167 (Hall J). For examples of statutory provisions which empower the court to make suppression orders in relation to publication, see s 13A(8) of the *Penalties and Sentences Act 1992* (Qld) and s 121(1) of the *Drugs Misuse Act 1986* (Qld).

660 See para 7.91.

661 See the discussion of open justice at para 3.18–3.30 in Chapter 3 (Guardianship and confidentiality).

662 Section 84(1) of the *Guardianship and Administration Act 2000* (Qld) states that subject to s 245, the Tribunal has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity. Section 245 of the *Guardianship and Administration Act 2000* (Qld) provides that the Supreme Court may exercise the Tribunal's exclusive jurisdiction where, in a civil proceeding, the Court sanctions a settlement or orders an amount to be paid to an adult it considers is a person with impaired capacity. The Tribunal and the Supreme Court have concurrent jurisdiction for enduring documents and attorneys under enduring documents: *Guardianship and Administration Act 2000* (Qld) s 84(2). See also *Re Crowson* [2001] QSC 393 and *Goode v Thompson and Suncorp General Insurance Ltd* [2001] QSC 287 as examples of matters that the Supreme Court heard at first instance.

appeal from the Tribunal.[663] Currently, there is no prohibition on the publication of information in guardianship proceedings before the Supreme Court, although some cases have been reported in a de-identified format.[664] It might be regarded as anomalous if a matter cannot be reported upon or discussed while it is before the Tribunal, but may be freely reported on appeal.

Whose identity should be protected?

7.36 If the prohibition on the publication of information about guardianship proceedings is to be limited to information that will identify a relevant person, an issue to consider is who those people should be. There are three categories of people whose identity might be protected, each of which builds cumulatively to include the previous categories.

7.37 The first is the adult. This is the position in the Australian Capital Territory,[665] South Australia[666] and New South Wales.[667]

7.38 The second category is the parties to the proceeding, as is the case in Victoria.[668]

7.39 The third category is the widest as it captures all people who are involved in the proceedings. In addition to the adult and the parties to the proceeding, this would include any person who gives information or documents to the Tribunal and any witnesses. This represents the law in the Queensland,[669] the Northern Territory,[670] Western Australia[671] and Tasmania.[672]

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663 Section 80O of the *Guardianship and Administration Act 2000* (Qld) allows an active party to appeal a Tribunal decision relating to sterilisation of a child with impairment to the Supreme Court; and s 164 of the *Guardianship and Administration Act 2000* (Qld) allows appeals against other Tribunal decisions to be made to the Supreme Court.

664 See, for example, *EJR & Anor v RFHR & Ors* [2003] QCA 276; *VJC v NSC* [2005] QSC 68. Compare with *Re Langham* [2005] QSC 127; *Adult Guardian v Hunt* [2003] QSC 297; *Rickleman v Public Trustee & Ors* [2005] QSC 336.

665 *Guardianship and Management of Property Act 1991* (ACT) s 49(1).

666 Section 81(3) of the *Guardianship and Administration Act 1993* (SA) refers to 'the person to whom the proceedings relate'. This is an individual with a mental incapacity, mental illness or who is subject to a guardianship or administration order made under the Act: *Guardianship and Administration Act 1993* (SA) s 3 (definitions of 'persons to whom proceedings relate' and 'protected person').

667 The test in New South Wales includes any adult with impaired capacity who participates in the proceeding, not just the adult to whom the proceeding relates. Section 57 of the *Guardianship Act 1987* (NSW) refers to a 'prescribed person', which means a person under guardianship, a person whose estate is subject to a financial management order, a child, or a person to whom an application relates: *Guardianship Act 1987* (NSW) s 57(4). All prescribed persons who are witnesses before the Tribunal, to whom the proceedings relate, or who are mentioned or otherwise involved in the proceedings fall within the prohibition on publication: *Guardianship Act 1987* (NSW) s 57(1).

668 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1). See also s 59(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) which outlines who are the parties to a proceeding.

669 *Guardianship and Administration Act 2000* (Qld) s 112(4).

670 *Adult Guardianship Act* (NT) s 26(2).

671 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1).

672 *Guardianship and Administration Act 1995* (Tas) s 13(1).

7.40 In practice, the difference between these categories may be less distinct than first appears because, for example, a restriction on the disclosure of an adult's identity may have the practical consequence of restricting disclosure of other people's identities, particularly family members, given that such information may indirectly identify the adult.

7.41 This raises the question, however, of what information will be sufficient to identify a person.

What information will identify a person?

7.42 The guardianship legislation in all Australian jurisdictions refers to the identification of a person. A threshold matter to resolve is what it means 'to identify' a person. Some guidance may be afforded by the law of defamation. One of the elements of an action for defamation is that the defamatory material 'must reasonably be taken to refer to the plaintiff'.[673] For defamation cases, a reference to the plaintiff's name or inclusion of the plaintiff's picture will be sufficient, but is not necessary, to satisfy that test.[674]

7.43 The legislation of the various Australian jurisdictions deals with the issue of identification differently. An issue for consideration is what test should be adopted in the Queensland legislation as to when a person is regarded as having been identified.

7.44 All of the Australian jurisdictions have a generic test of some kind that outlines when information will be sufficient to identify a person. There are three such tests within the different jurisdictions. The first refers to information that would actually identify a person. In the Australian Capital Territory, the legislation refers to information that would 'enable a person to be identified',[675] the Western Australian Act applies to information 'being particulars that are sufficient to identify that person'[676] and in Queensland, the legislation forbids a person to 'disclose the identity' of another.[677]

7.45 The second test is a little broader as it refers, in addition to information that *would* result in identification, to a *likelihood* or *probability* of the information being sufficient to identify a person. The South Australian and Victorian legislation respectively prohibit the disclosure of 'any information … that identifies, or could tend

673 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.190], citing *Bjelke-Petersen v Warburton & Burns* [1987] 2 Qd R 465, 467.

674 D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.195], citing *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239; *Knupffer v London Express Newspaper Limited* [1944] AC 116, 119; *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331; *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348, 373–4.

675 *Guardianship and Management of Property Act 1991* (ACT) s 49(1). See also the similar wording of s 101(3)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), although this provision relates to that Tribunal's power to impose a further prohibition on publishing information about proceedings rather than the general prohibition on publication: see para 7.29.

676 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3)(a).

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

to identify, the person'[678] and information that 'identifies or could reasonably lead to the identification of a party to proceedings'.[679] The legislation in New South Wales prohibits the publication of a person's name,[680] and goes on to state that a reference to a person's name includes a reference to any information that 'identifies the person or is likely to lead to the identification of the person'.[681]

7.46 The third type of test is found in Tasmania and the Northern Territory, where identification occurs with the publication of any 'particulars calculated to lead to the identification of any person'.[682] This shares with the second category the notion of probability of identification, but differs in that the word 'calculated' may be interpreted as requiring some element of intent.[683]

7.47 In addition to these generic tests for identification, some of the statutes list specific ways in which a person may be identified. Most of these centre on the publication of a person's picture on television or in the print media. This is specified to amount to identification in Western Australia,[684] and is the subject of specific prohibitions in the Australian Capital Territory[685] and Tasmania.[686] In Victoria, the Tribunal is required to specify, if exercising its discretion to permit publication about proceedings, that pictures of the relevant people must not be taken.[687]

7.48 The Western Australian legislation goes further and sets out a detailed list of examples of the ways in which a person may be identified. In determining whether the information is sufficient to identify a person, reference may be had to matters such as the person's name or alias, their voice,[688] their home or work address, a physical

678 *Guardianship and Administration Act 1993* (SA) s 81(3).

679 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1).

680 *Guardianship Act 1987* (NSW) s 57(1).

681 *Guardianship Act 1987* (NSW) s 57(3).

682 *Guardianship and Administration Act 1995* (Tas) s 13(1); *Adult Guardianship Act* (NT) s 26(2).

683 Australian courts have recognised that the term 'calculated' has two distinct meanings: an objective meaning of 'likely' and a subjective meaning of 'intended or designed'. The meaning attributed to the term in a particular statute is determined by reference to the context in which it is used: *O'Sullivan v Lunnon* (1986) 163 CLR 545, 549 (Gibbs CJ) and *R v Lansbury* [1988] 2 Qd R 180, 182, 184 (Macrossan J). For cases where 'calculated' has been interpreted objectively as meaning 'likely', see *Thurley v Hayes* (1920) 27 CLR 548; *Howard v Gallagher* (1988) 85 ALR 496 and *R v Lansbury* [1988] 2 Qd R 180 (Macrossan and McPherson JJ). For examples of when courts have construed the term subjectively as meaning 'intended or designed', see *Crafter v Webster and Guscott* (No 2) (1980) 23 SASR 321; *O'Sullivan v Lunnon* (1986) 163 CLR 545; *R v Lansbury* [1988] 2 Qd R 180, 184–8 (Derrington J) and *Adlam v Noack* [1999] ACL Rep 105 FC 8.

684 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3)(b). In contrast, the New South Wales legislation provides that the publication or broadcast of a picture *may* be prohibited if it 'identifies the person or is likely to result in the identification of the person': *Guardianship Act 1987* (NSW) s 57(3).

685 *Guardianship and Management of Property Act 1991* (ACT) s 49(2). See also the definition of 'photograph' in s 49(3) of the *Guardianship and Management of Property Act 1991* (ACT).

686 *Guardianship and Administration Act 1995* (Tas) 13(1)(b).

687 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(3).

688 Section 49(1)(b) of the *Guardianship and Management of Property Act 1991* (ACT) also refers to a sound recording of an inquiry that would enable a person to be identified.

description of the person or their dress, their occupation or their relationships or associations with others.[689]

7.49 In considering the framing of the identification test, a final issue to consider is whether section 112 of the *Guardianship and Administration Act 2000* (Qld) should be consistent with section 249 of that Act and section 74 of the *Powers of Attorney Act 1998* (Qld).[690] Section 112 states that people must not 'disclose the identity' of a person, whereas sections 249 and 74 exclude a duty of confidentiality in relation to statistical or other information 'that could not reasonably be expected to result in the identification of the person to whom the information relates'.[691] The Commission favours a consistent approach in how the legislation deals with the issue of identification.

Who must be able to identify the person?

7.50 Having examined the various legislative formulations for what it means for information to identify a person, a further issue to consider is who must be capable of making that identification. In other words, who needs to be able to identify the person from that information for the prohibition to be breached?

7.51 There are broadly two categories of people, at either end of a spectrum, who may be able to identify a person. The first is private individuals, such as family members and close friends, who may be able to identify the person from minimal and non-specific information. The second category is members of the public or of a section of the public who could only identify the person from reasonably specific information. In between these two ends of the spectrum are a range of other people, such as service providers, work colleagues, neighbours, and members of the person's local community, who would require varying levels of detail in order to identify the person.

7.52 An issue for consideration is whether identification by *any* of those people, including people in intimate relationships with the person, is sufficient for the information to identify the person for the purpose of the prohibition. If so, it would be relatively easy for identification to occur and for a publication to breach the prohibition, even when common identifying particulars, such as the person's name or address, have not been disclosed.

7.53 At present, the Queensland legislation does not specify the people to whom someone's identity must be apparent for the disclosure to breach the prohibition. The only guardianship legislation in Australia that does address this issue is that in Western Australia, which refers to particulars being 'sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account

689 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(3)(a), (c). This provision is drafted in similar terms to s 121 of the *Family Law Act 1975* (Cth).

690 Section 74 of the *Powers of Attorney Act 1998* (Qld) and s 249 of the *Guardianship and Administration Act 2000* (Qld) prohibit any person who gains 'confidential information' through their involvement in the administration of the legislation from recording or disclosing the information. Those provisions are considered in Chapter 8 (The general duty of confidentiality).

691 *Powers of Attorney Act 1998* (Qld) s 74(4), *Guardianship and Administration Act 2000* (Qld) s 249(4).

is disseminated, as the case requires'.[692] That provision has not been judicially considered. Nor have the prohibitions contained in the guardianship legislation of the other Australian jurisdictions, including Queensland, been judicially considered in relation to this question.

7.54 Similar legislative provisions that apply in other protective legal regimes, however, have received some, though limited, judicial consideration.

7.55 One is section 121 of the *Family Law Act 1975* (Cth) which prohibits publication of an account of proceedings if it contains particulars that are 'sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires'.[693] This uses identical wording to that of the Western Australian provision referred to above.[694] The prohibition is aimed at preventing 'ridicule or curiosity or some kind of notoriety' attaching to the parties and their children.[695]

7.56 This raises the issue of who constitutes a 'section of the public'. It appears that for the purposes of the prohibition in section 121, any group of people can constitute a 'section of the public', although this is a matter to be determined in the circumstances of each case.[696] If the special characteristics of a group give its members a 'significant and legitimate interest' above that of other sections of the public in receiving the particular information, the group, for that purpose, is isolated in a private capacity and is no longer considered a section of the public.[697]

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692 *Guardianship and Administration Act 1900* (WA) sch 1 pt B cl 12(3)(a), (c). Some jurisdictions do refer to this but only in relation to what will amount to publication: *Guardianship and Management of Property Act 1991* (ACT) s 49(1)–(2).

693 *Family Law Act 1975* (Cth) s 121(3)(a).

694 See para 7.53.

695 *Re South Australian Telecasters Ltd* (1998) 23 Fam LR 692, [35] (Nicholson CJ). Also see *Re W: Publication Application* (1997) 21 Fam LR 788, 801–8 (Fogarty, Baker JJ) as to the history and policy behind s 121 of the *Family Law Act 1975* (Cth).

696 *Re W: Publication Application* (1997) 21 Fam LR 788, 809 (Fogarty and Baker JJ), citing *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, 208 (Mason ACJ, Wilson, Deane and Dawson JJ) where, in relation to a prohibition on the offer of any prescribed interest by a company to the public or to any section of the public, it was stated:

> The question whether a particular group of persons constitutes a section of the public … cannot be answered in the abstract. For some purposes and in some circumstances, each citizen is a member of the public and any group of persons can constitute a section of the public. For other purposes and in other circumstances, the same person or the same group can be seen as identified by some special characteristic which isolates him or them in a private capacity and places him or them in a position of contrast with a member or section of the public.

697 *Re W: Publication Application* (1997) 21 Fam LR 788, 810 (Fogarty and Baker JJ), applying *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201, 208 (Mason ACJ, Wilson, Deane and Dawson JJ).

7.57 For example, child welfare authorities have a legitimate interest, not shared by other sections of the public, in receiving copies of Family Court judgments insofar as they relate to matters of child protection with which those authorities are concerned.[698] Similarly, section 121 does not apply to 'conversations between a party to Family Court proceedings and a close personal friend'.[699] By contrast, the Family Court has held that residents of the parties' small semi-rural township were a section of the public for the purpose of the prohibition.[700]

7.58 Another provision in a protective jurisdiction that imposes a prohibition on identification that has been judicially considered is section 36A of the *Children's Court of Western Australian Act 1998* (WA). It prohibits publication of 'any particulars or other matter likely to lead to the identification of a child concerned in proceedings' as an accused, victim or witness and is aimed at preventing 'the victimisation, humiliation and harassment' of such children.[701] This provision is more likely than the law surrounding the *Family Law Act 1975* (Cth) to be of assistance in ascertaining the current Queensland prohibition, as this provision does not specify the audience whose identification is relevant.

7.59 In interpreting this provision, the Western Australian Court of Appeal considered that the relevant capacity for identification is that by the public, including those members of the public in the child's community, such as neighbours, 'whose identification would be most likely to have practical consequences for the child'.[702] The Court of Appeal distinguished between people 'closely and intimately connected with the child or the child's family' whose capacity for identification would *not* be relevant, and the 'ordinary general reader' who 'may be a person who lives in the same small town as the child, or who attends or teaches at, or is the parent of a child who attends, the child's school' whose capacity for identification *would* be relevant.[703]

7.60 This test is very similar to that which applies to the prohibition under the *Family Law Act 1975* (Cth). The Court of Appeal referred only once to the words 'section of the public', but its treatment of identification could comfortably sit with the definition of that phrase in the family law context.

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698 *Re W: Publication Application* (1997) 21 Fam LR 788, 810, 812 (Fogarty and Baker JJ). Although the meaning of 'section of the public' in this case (and some of the others in this area) was considered in relation to who was precluded from receiving information about proceedings, rather than who was capable of identifying a person from particular information.

699 *Re Edelsten; Ex parte Donnelly* (1988) 80 ALR 704, 706 (Morling J). See also *Hinchcliffe v Commissioner of Police of the Australian Federal Police* (2001) 118 FCR 308, 324–5 (Kenny J) where it was held that communications by one party to Family Court proceedings to 'associates' of another party were held to fall outside the prohibition as they were 'essentially personal, ie, as being made … in a private way'.

700 *Re South Australian Telecasters Ltd* (1998) 23 Fam LR 692, 697 (Nicholson CJ).

701 *Western Australia v West Australian Newspapers Ltd; Ex parte A-G (WA)* (2005) 30 WAR 434, 440.

702 Ibid 440–1.

703 Ibid.

7.61 The issue for consideration raised by this discussion is who must be capable of identifying a person. The spectrum of people discussed above started with those very close to the adult and ranged through to the public, or a section of the public. Although the law in Queensland is unclear, based on the cases discussed above, it seems that identification will only occur if a member of the public, or of a section of the public, is capable of identifying the relevant person. If such an approach is to be preferred, there may be some advantage in making this clear with a specific reference in the legislation.

To whom should publication be prohibited?

7.62 Another issue to consider is to whom the publication of information about proceedings should be prohibited. This is a distinct issue from the one previously considered and arises regardless of whether the prohibition applies absolutely to all information about proceedings or only to information that identifies a person.

7.63 The statutes in the various jurisdictions take two approaches to this issue: one is to specify the people who shall not receive the relevant information; the other is to impose a prohibition without reference to the people who shall not receive the relevant information.

Where people are specified

7.64 The first approach in relation to the people in respect of whom the prohibition should apply, is to specify those people. This is the position in the Australian Capital Territory, where a person must not 'publish' or 'broadcast or play' information 'to the public, or to a section of the public'.[704] It is also the position in Western Australia. The prohibition in that State is drafted in very similar terms to the relevant prohibition under the *Family Law Act 1975* (Qld) and refers to 'publishes in a newspaper or periodical publication or by radio broadcast or television, or otherwise disseminates to the public or to a section of the public by any means'.[705] The meaning of the phrase 'public or to a section of the public' was discussed above.[706]

Where people are not specified

7.65 The second approach is to impose a prohibition without specifying the people to whom the relevant information must not be published. This is the approach taken in most jurisdictions with the legislation simply forbidding a person to 'publish' information, and in some cases, additionally prohibiting its 'broadcast'.[707] The

704 *Guardianship and Management of Property Act 1991* (ACT) s 49(1)–(2).

705 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(1)–(2).

706 See para 7.56–7.60.

707 *Adult Guardianship Act* (NT) s 26(1) 'publish or broadcast'; *Guardianship and Administration Act 1993* (SA) s 81(1) 'publish'; *Guardianship Act 1987* (NSW) s 57(1) 'publish or broadcast'; *Guardianship and Administration Act 1995* (Tas) s 13(1) 'publish'; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(1) 'publish or broadcast'.

Queensland legislation also refers to 'publish' in terms of information, but uses the term 'disclose' in relation to a person's identity.[708]

7.66 Where it is not stipulated in the legislation, the question arises whether communication of information to a single person, rather than to the public or a section of the public, would be covered by the prohibition. This is the position under defamation law where publication occurs even if information is only disclosed to one person.[709]

7.67 Such an interpretation in relation to the prohibition in the guardianship legislation may be problematic, however, because of its potential breadth. If the prohibition applies to all communications to a single individual, the current law in Queensland could potentially forbid a wide range of publications that might otherwise be regarded as appropriate. For example, it could prohibit a person from informing their spouse about guardianship proceedings in relation to their child (if the spouse was unable to attend the hearing and so did not know what occurred). It could also prohibit a person from seeking legal advice about appealing a Tribunal decision, as this would involve publication of information about proceedings to the lawyer.

7.68 Section 112 of the *Guardianship and Administration Act 2000* (Qld) does contain the defence of a reasonable excuse, which may cover the above examples. However, as is discussed below,[710] uncertainty as to what will be a reasonable excuse may mean that it is preferable to clarify the scope of the intended prohibition.

7.69 Given these difficulties, it could be argued that a more limited interpretation of 'publish' should be adopted. There is some authority for such an approach in relation to legislative prohibitions in other legal systems with a similar protective focus. When considering the scope of a prohibition on the publication of information about victims of sexual offences, the Victorian Court of Appeal has concluded that to 'publish' under that legislation means 'to make public, to make generally known, to disseminate to the public at large', despite the provisions themselves being silent about the people to whom publication must be made.[711] The Court's reasoning was informed by similar considerations to those outlined above, namely, to avoid a number of absurd outcomes, one of which was that a person could not tell their spouse of a sexual assault on their child.[712]

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

709 See para 7.42. See also *Encyclopaedic Australian Legal Dictionary*, 'publish'; *Pullman v Walter Hill & Co* [1891] 1 QB 524. Note that while communication to one person, other than the plaintiff, is sufficient to constitute publication, the size of the group of people to whom the defamatory material is published may be relevant in the determination of any award of damages to the plaintiff: D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [2.230].

710 See para 7.79.

711 *Hinch v Director of Public Prosecutions* [1996] 1 VR 683, 692.

712 Ibid.

7.70 A similar interpretation has also been suggested in respect of wardship proceedings in the United Kingdom so that the relevant prohibition is limited to communications 'addressed to the public at large or any section of the public', which would exclude communications within the family and to experts.[713]

7.71 The foregoing discussion raises for consideration the issue of whether the legislation should specify the people to whom publication is prohibited. Although the meaning of the phrase 'a section of the public' is relatively amorphous, it may give greater certainty than not specifying who is forbidden to receive information about proceedings.

7.72 Another issue to consider is the matter raised above about who must be capable of identifying a person.[714] Decisions made in relation to this issue are related to those made about the breadth of any prohibition on publication. For example, if the decision is made to impose a prohibition on publication only to the public or a section of the public (and not individuals), then it may be unnecessary to address the issue whether a close family member is capable of piecing together information that would identify the adult.

7.73 A final issue to consider is whether the Queensland prohibition in relation to a person's identity should continue to refer to 'disclose' rather than 'publish' as is the case in relation to information about proceedings. The word 'disclose' has been judicially defined as revealing information that is previously unknown to the person receiving that information.[715] This current wording may be regarded as undesirable if it allows a person to reveal the identity of another person simply because the information is already known publicly or to particular individuals.

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713 NV Lowe and RAH White, *Wards of Court* (2nd ed, 1986) 169–70. The authors argue, in the context of contempt proceedings in wardship, that if the term 'publication' in s 12(1) of the *Administration of Justice Act 1960* (UK) meant communication in *any* form then it would 'cast the contempt net too widely' and capture communication within families and disclosure of information to experts. They prefer instead to adopt an approach consistent with s 21(1) of the *Contempt of Court Act 1981* (UK), which refers to publication as being to 'the public at large or any section of the public'. See also *Re M (a child) (children and family reporter: disclosure)* [2002] 4 All ER 401, which takes a similar approach to Lowe and White in relation to the meaning of 'publication' in s 12(1) of the *Administration of Justice Act 1960* (UK). See now r 10.20A of the *Family Proceedings Rules 1991* (UK) which provides exceptions to the prohibition on publication contained in s 12 of the *Administration of Justice Act 1960* (UK) for communications made, for example, to a party's legal representative, adviser, or expert, to the party's spouse, or to a health care or counselling service for the child or the family. See also *Clayton v Clayton* [2006] EWCA Civ 878, [31]–[33] (Potter P).

714 See para 7.50–7.61.

715 *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606, 614–5 (Latham CJ) (disclosing material facts in a tax return); *R v Gidlow* [1983] 2 Qd R 557, 559 (Connolly J) (disclosing illegal conduct as a defence in criminal law); *Dun & Bradstreet v Lyle* (1977) 15 SASR 297, 299 (Mitchell J) (disclosure in relation to credit reporting). Compare, however, with the suggestion in *R v Scott* that 'disclose' may mean the same as 'inform', although the possibility of the alternative interpretation discussed above was also acknowledged: (1996) 137 ALR 347, 352–4 (Doyle CJ) (disclosure of bankruptcy).

What discretion should there be to permit publication that is otherwise prohibited?

7.74 In all Australian jurisdictions, the various Tribunals are conferred with discretion to override the general prohibition against publication of information.[716]

7.75 An issue to consider, if such a power is to continue, is the criteria, if any, upon which such discretion must be exercised. In some jurisdictions, including Queensland, the test applied is whether disclosure is in the 'public interest'.[717] In other jurisdictions, the legislation is silent as to when the Tribunal can exercise its discretion.[718]

7.76 A further issue to consider is the information to which the discretion should relate. In South Australia and the Northern Territory, where there is a blanket prohibition on publication of information, the Tribunal has discretion to allow the publication only of de-identified information.[719] A blanket prohibition also operates in Queensland, but the Tribunal is afforded a wider discretion to permit the publication not only of information generally but also of identifying information.[720] In all other jurisdictions, where there is a prohibition on publication only of identifying information, there is discretion to permit publication of that information.[721]

Should there be any exceptions or defences?

7.77 Having considered in detail the prohibition on publishing information about proceedings, an issue for consideration is whether there should be any exceptions to this prohibition.

7.78 In Queensland, the defence of a 'reasonable excuse' is available in relation to a breach of the relevant prohibition in section 112(3) of the *Guardianship and*

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716 *Guardianship and Administration Act 1993* (SA) s 81(2)–(3); *Adult Guardianship Act* (NT) s 26(2); *Guardianship and Administration Act 2000* (Qld) s 112(2)–(3); *Guardianship and Administration Act 1995* (Tas) s 13(2); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8)(d) (although note that the provision in this Act is worded as an exception to the prohibition, rather than as a discretion).

717 *Adult Guardianship Act* (NT) s 26(2); *Guardianship and Administration Act 2000* (Qld) s 112(2)–(3); Victorian *Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2); *Guardianship and Administration Act 1995* (Tas) s 13(2).

718 *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8)(d). Section 81(2) of the *Guardianship and Administration Act 1993* (SA) states that the Guardianship Board may exercise a discretion to enable publication upon application of a person who has a proper interest in the matter. This requirement relates to the issue of standing rather than establishing a criterion to be taken into account when deciding whether to exercise the discretion.

719 *Guardianship and Administration Act 1993* (SA) s 81(2)–(3); *Adult Guardianship Act* (NT) s 26(2).

720 *Guardianship and Administration Act 2000* (Qld) s 112(1)–(2). See also *Protection of Personal and Property Rights Act 1988* (NZ) s 80(1).

721 *Guardianship and Administration Act 1995* (Tas) s 13(2); *Guardianship Act 1987* (NSW) s 57(1); *Guardianship and Management of Property Act 1991* (ACT) s 49(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1 cl 37(2) (note, however, that the legislation does not allow the Tribunal to use its discretion to allow the taking or publication of pictures of 'any party to proceedings').

Administration Act 2000 (Qld).[722] The phrase 'reasonable excuse' has been given its ordinary meaning[723] and the issue of whether a person has such an excuse in a particular case is determined in light of the purpose of the legislation[724] and having regard to what a reasonable person would accept as appropriate.[725]

7.79 There are advantages in excluding conduct that involves a 'reasonable excuse' from the prohibition. The inherent flexibility of the defence means that liability is not rigidly imposed when it would be unjust to do so. However, this flexibility also gives rise to uncertainty. A person may breach the prohibition believing he or she has a reasonable excuse, only to find out subsequently that their conduct was not judged to be reasonable. An issue for consideration is whether reasonable excuse should remain in the legislation.

7.80 If there is a desire for greater certainty as to when the prohibition will be breached, a further issue for consideration is whether the legislation should include a list of specific exceptions. This is the position in Western Australia where, in equivalent terms to the prohibition in section 121 of the *Family Law Act 1975* (Cth),[726] its guardianship legislation includes the following exceptions:[727]

- the communication of a transcript of evidence or other document to people concerned in court proceedings for use in connection with those proceedings;
- the communication of a transcript of evidence or other document to a body responsible for disciplining members of the legal or medical professions or to people concerned in proceedings before such disciplinary bodies;
- the communication of a transcript of evidence or other document to a body that grants legal aid assistance in order to facilitate a decision whether such assistance should be provided;
- the bona fide publication of any material intended primarily for use by any profession being a law report or any other publication of a technical nature; and

722 None of the Tribunal decisions published on the AustLII website provide a detailed discussion of what might amount to a 'reasonable excuse': <http://www.austlii.edu.au/au/cases/qld/QGAAT/> at 24 July 2006. The phrase is referred to very briefly in *Re ONF* [2004] QGAAT 19 when the Tribunal revoked the appointment of an administrator, but there was no need to discuss its meaning.

An additional exception to the prohibition in s 112(3) of the *Guardianship and Administration Act 2000* (Qld) permits the Queensland Law Reform Commission to conduct its review of the guardianship legislation: see *Guardianship and Administration Act* 2000 (Qld) s 112(3A), (3B), (4)–(6).

723 *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423, 436 (Kirby P); *Weeks v Nominal Defendant* [2005] QCA 118, [7] (McPherson JA).

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

725 *Bank of Valletta v National Crime Authority* (1999) 164 ALR 45, 55 (Hely J). This case was cited with approval in *Callanan v Bush* [2004] QSC 88.

726 *Family Law Act 1975* (Cth) s 121(9).

727 *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12(8).

- the publication or other dissemination of an account of proceedings to a member of a profession in connection with the person's practice of that profession or in the course of professional training, or to a person who is a student in connection with the person's studies.

7.81 The guardianship legislation in New South Wales also provides a specific exception for the publication or broadcast of identifying material contained in an official report of the proceedings of the Tribunal.[728] Similarly, in New Zealand, the prohibition on publication of information about proceedings does not apply in respect of a publication of a bona fide professional or technical nature intended for circulation amongst members of the legal or medical profession.[729]

7.82 If such a list of exceptions should be included, a further issue to consider is what exceptions should be included, and whether such a list should be exhaustive. One exception not mentioned above that might be considered is whether a person should be able to authorise publication of proceedings that involve them, so long as that publication does not identify others (without their additional authorisation). A provision analogous to that contained in section 249 of the *Guardianship and Administration Act 2000* (Qld) discussed in Chapter 8 might be appropriate.[730]

Further discretion to prohibit the publication of information

7.83 As was discussed above,[731] in addition to the general prohibitions on publishing information about guardianship proceedings, the Tribunals in Queensland, Victoria and Western Australia also have a further discretion to prohibit the publication of information. One issue for consideration is the interaction between the prohibition and this further discretion. Currently, the prohibition on publishing information in Queensland is sufficiently broad that the additional discretion to prohibit publication is probably unnecessary. Whether such a provision serves a useful function will depend on what form the general prohibition takes.

7.84 A further issue for consideration is the criteria upon which any discretion should be exercised. In Queensland, the criteria are quite broad as the Tribunal may make a confidentiality order where 'it is desirable to do so because of the confidential nature of particular information or matter or for any other reason'.[732] The Tribunal will also need to consider what is required in its jurisdiction by open justice and procedural fairness,[733] and must also apply the General Principles.[734]

728 *Guardianship Act 1987* (NSW) s 57(2).

729 *Protection of Personal and Property Rights Act 1988* (NZ) s 80(4).

730 See para 8.18 in Chapter 8 (The general duty of confidentiality).

731 See para 7.26–7.29.

732 *Guardianship and Administration Act 2000* (Qld) s 109(2).

733 See para 4.12–4.18 in Chapter 4 (Tribunal hearings).

734 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

7.85 The criteria guiding the discretion in Western Australia and Victoria are even broader, partly because the Tribunals in those States have jurisdiction for a range of matters other than guardianship. Those criteria include having regard to matters such as national security, the administration of justice, a person's safety, public decency or morality, the protection of confidential information, and 'the interests of justice'.[735]

BALANCING CONCEPTS

7.86 This part of the chapter briefly considers the three concepts examined in Chapter 3 that need to be balanced when determining the role of confidentiality in the guardianship system in the context of publication of information about Tribunal proceedings: open justice, procedural fairness, and the nature of the guardianship system.

Open justice

7.87 Open justice is a fundamental principle of the common law aimed at holding decision-makers accountable through public scrutiny. It also promotes consistency and predictability of decision-making. The right of public, and therefore media, attendance at judicial proceedings is a core requirement of open justice.[736] Derivative of that right are a right to report proceedings and a requirement that the names of those involved in proceedings, such as the parties and witnesses, be available to the public.[737]

7.88 While the principle of open justice favours open reporting of proceedings, it is not an absolute concept.[738] There are many types of proceedings in which the principle of open justice has been modified, either at common law or by statutory provisions. One modification that is sometimes adopted is to permit the publication of information about proceedings but only if it does not identify particular people.[739] An example of

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735 *State Administrative Tribunal Act 2004* (WA) ss 62(3), 61(4); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 101(4).

736 J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 2.

737 *Brennan v State of New South Wales* [2006] NSWSC 167, [31]; J Jaconelli, *Open Justice: A Critique of the Public Trial* (2002) 3; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.90].

738 See, for example, *Korp (Guardianship)* [2005] VCAT 779, [6]:

> This principle [open justice] is important as the public has a proper interest in knowing how the system of justice operates. However it is not a principle that requires proceedings to be open in every case, as there are other legitimate matters of public interest that sometimes operate in the other direction. One such other public interest is the interest in privacy. It is only in recent years that privacy has become a matter of greater focus, although I would hazard to say it has always been important. Matters in which a person seeks an administrator or guardian under the *Guardianship and Administration Act* often involve the disclosure of personal and sensitive information. The revelation of that information can significantly infringe legitimate rights to privacy, even when it occurs in the context of a tribunal proceeding.

739 This has been described as a 'minimalist interference with open justice': *Witness v Marsden* [2000] NSWCA 52, [144] (Heydon JA); *R v Kwok* [2005] NSWCCA 245, [29] (Hodgson JA), [39] (Howie J). Others have gone further and expressed doubt as to whether there is even a public interest in knowing the identities of people involved in court proceedings: C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 111.

this is the prohibition in family law proceedings of an account that identifies a party or witness.[740]

7.89 It should also be recognised that the nature of open justice as it relates to publication of information about proceedings has changed with the advent of the internet. For example, in relation to the publication of court and tribunal decisions, the internet has resulted in their wide dissemination, accessibility and searchability to the public at large.[741] This is in stark contrast to the 'practical obscurity'[742] previously afforded by paper records which were difficult to search and not widely available.[743] This has led some to suggest that judges, being aware of the potential dissemination of their judgments, should adopt a cautious approach and avoid 'unnecessary personal identifiers'[744] to reduce disclosure of personal information.[745] The breadth of possible publication may also be relevant when considering any prohibitions on how that information should be treated outside proceedings.

Procedural fairness

7.90 Prohibitions on a party's ability to discuss proceedings could also potentially lead to a failure to accord procedural fairness, depending on the scope of those prohibitions. An inability to discuss a proceeding may, for example, inhibit an active party from seeking to join another party who has not previously attended any hearings, or from discussing matters with others as part of preparing for an appeal.

740 *Family Law Act 1975* (Cth) s 121. Other examples include *Child Protection Act 1999* (Qld) ss 189, 192, 193; *Mental Health Act 2000* (Qld) ss 524–7; *Criminal Law (Sexual Offences) Act 1978* (Qld) ss 6–7; *Adoption of Children Act 1964* (Qld) s 45. See also D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [4.170], [4.230].

741 See Justice DA Mullins, 'Judicial Writing in the Electronic Age' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 23–27 January 2005); Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at The Law via the Internet 2003 Conference, Sydney, 28 November 2003); and K Curtis, 'Access and Privacy: Getting the Balance Right' (Paper presented at Australian Courts Administrators Group: Courts and Tribunals Annual Conference, Homebush Bay, 25 November 2005).

742 See Justice DA Mullins, 'Judicial Writing in the Electronic Age' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 23–27 January 2005) 1–2, citing *United States Department of Justice et al Petitioners v Reporters Committee for Freedom of the Press et al* (1989) 489 US 749, 764. See also Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003) and K Curtis, 'Access and Privacy: Getting the Balance Right' (Paper presented at the Australian Courts Administrators Group: Courts and Tribunals Annual Conference, Homebush Bay, 25 November 2005).

743 See Justice DA Mullins, 'Judicial Writing in the Electronic Age' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 23–27 January 2005); Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003); and K Curtis, 'Access and Privacy: Getting the Balance Right' (Paper presented at the Australian Courts Administrators Group: Courts and Tribunals Annual Conference, Homebush Bay, 25 November 2005).

744 Personal identifiers include a date and place of birth, residential address, financial details and family members' names: Justice DA Mullins, 'Judicial Writing in the Electronic Age' (Paper presented at Supreme and Federal Courts Judges' Conference, Darwin, 23–27 January 2005) 3.

745 Chief Justice JJ Spigelman, 'Open Justice and the Internet' (Paper presented at the Law via the Internet 2003 Conference, Sydney, 28 November 2003).

Nature of the guardianship system

7.91 The nature of the guardianship system may weigh against an absolute right to open reporting. The guardianship system is a protective one in which the primary concern is the safeguarding of the rights and interests of adults with impaired capacity, and this includes the adult's privacy interests.[746] Permitting widespread publication of information about an adult's private life, which is only disclosed for a limited purpose, may infringe those privacy interests. Such publication may also cause other harm to the adult, for example, in relation to employment opportunities if people make assumptions about the adult's abilities based on a finding of impaired capacity for a particular matter.

7.92 It may also be that future participation in the Tribunal's proceedings will be facilitated by an assurance that the information disclosed to the Tribunal will not be the subject of public discussion.[747]

7.93 That decisions made in the guardianship system often affect the fundamental legal rights of an adult and people close to the adult may, however, weigh in favour of adherence to the principle of open justice. Transparency of decision-making processes enhances accountability, and a proceeding may also raise issues of wider importance to the community. For example, it may be in the public interest to allow publication about a proceeding that 'reveals information of systemic abuse of persons with a decision-making disability … so as to assist in preventing further abuse'.[748]

POSSIBLE LEGAL MODELS

7.94 The Commission has identified a number of possible models, outlined below, for how the law might deal with the issue of open reporting of Tribunal proceedings and the identification of people appearing before the Tribunal. These models do not capture all of the relevant issues the Commission is considering, but may provide a useful starting point for thinking about the general approach the law should take.[749] A hypothetical case study is used to illustrate these models and how they might operate.

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746 In the context of information generally causing harm to an adult, see T Henning and J Blackwood, 'The rules of evidence and the right to procedural fairness in proceedings of four Tasmanian quasi-judicial tribunals' (2003) 10 *Australian Journal of Administrative Law* 84, 101.

747 It has been suggested, for example, that in the case of sexual offence proceedings, a prohibition on publication of a complainant's identity is justified on the basis that protection of anonymity will encourage complainants to come forward and to testify in court: C Davis, 'The Injustice of Open Justice' (2001) 8 *James Cook University Law Review* 92, 110.

748 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report 49 (1996) Vol 1, 249.

749 See the detailed discussion of issues for consideration at para 7.30–7.85.

Model 1: no prohibition but power to order that information or identity not be published

7.95 One model is to provide that reporting about proceedings, including disclosure of identifying information, is generally permissible, unless the Tribunal orders that information must not be published. None of the jurisdictions in Australia currently adopt this model.

Model 2: general prohibition with power to permit publication of de-identified information

7.96 Another model is the one adopted in the Northern Territory and South Australia. In those jurisdictions, there is a prohibition on publication of information about a proceeding but the Tribunal is conferred with discretion to permit publication on the condition that it does not identify the people concerned in the proceeding.[750] Under this model, the most that may ever be published is a de-identified report of proceedings.

Model 3: general prohibition with power to permit publication of all information

7.97 At present, section 112 of the *Guardianship and Administration Act 2000* (Qld) provides that neither information about a proceeding nor the identity of a person involved in a proceeding may be disclosed, without reasonable excuse, unless the Tribunal is satisfied the disclosure is in the public interest and permits the disclosure by order.

7.98 This reflects a further model, namely, that there is a general prohibition on publication of any information about a proceeding, including the identity of a person involved in a proceeding, but that the Tribunal has discretion to permit publication.

Model 4: prohibition on publication of identity with power to permit publication

7.99 A final model is to allow reporting of proceedings but prohibit the publication of identifying information, except as permitted by the Tribunal. This model would allow, without the need for an order from the Tribunal, the reporting and disclosure of de-identified information about proceedings.

7.100 This represents the position in the Australian Capital Territory, New South Wales, Tasmania, and Western Australia where there is a general prohibition on publication of identifying information unless the Tribunal otherwise permits it.[751]

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750 *Adult Guardian Act* (NT) s 26(2); *Guardianship and Administration Act 1993* (SA) s 81(3).

751 *Guardianship and Management of Property Act 1991* (ACT) s 49; *Guardianship Act 1987* (NSW) s 57; *Guardianship and Administration Act 1995* (Tas) s 13; *Guardianship and Administration Act 1990* (WA) sch 1 pt B cl 12.

A case study

Li is a 54 year old man with Alzheimer's disease who is now unable to manage his own financial affairs. He lives with his 42 year old wife, Justine, who helps him with some day-to-day decisions and also decisions about financial matters. A dispute has arisen between Mei-Ching, Li's daughter from his first marriage, and Justine as to how Li's money is being spent. Mei-Ching believes Justine is living off Li's wealth and is using his money for her own purposes. Justine denies this and believes Mei-Ching's only interest in her father is the inheritance she will receive from Li.

Both Justine and Mei-Ching seek to be appointed as Li's administrator by the Tribunal. After hearing the evidence, the Tribunal decides to appoint Justine.

Mei-Ching is upset about the decision and wants to seek legal advice about an appeal. She also decides to approach a reporter with a television station. She gives an interview which is subsequently broadcast on television although the station decides to obscure Mei-Ching's face and omit any references to the names of the people involved.

The reporter then approaches Justine who refuses to give an interview, saying that it would infringe Li's privacy and that family disputes should not be aired in public. Justine does, however, tell her sister and her neighbour about the case.

Outcome of case study

7.101 The relevant disclosures in the case study that might be made the subject of a legislative or discretionary prohibition are:

- Mei-Ching's disclosures to her lawyer and to the reporter;
- Justine's disclosure to her sister and neighbour; and
- the television station's disclosure to the public.

7.102 The permissibility of those disclosures would differ under each of the models.

Model 1

7.103 Under model 1, there would be no impediment to any of the disclosures, even with identifying information, unless the Tribunal made a specific order that information must not be published.

Models 2 and 3

7.104 The effect of models 2 and 3 will depend on whether the relevant prohibition applies to all disclosures or only to those made to the public or to a section of the public.

7.105 If the prohibition were limited to disclosures made to the public or to a section of the public, the only prohibited disclosure requiring Tribunal permission would be the airing of the television report. Mei-Ching's and Justine's disclosures, being made privately and to individuals, would be unlikely to fall within the scope of the prohibition.

7.106 If, however, the prohibition under models 2 or 3 were not limited to disclosures made to the public or to a section of the public, each of the disclosures would be prohibited and would require the Tribunal's permission.

7.107 If the prohibition under models 2 or 3 applies, it will prohibit the publication of any information, even that information which does not identify people. This means the television station's report of proceedings will be unlawful, even if no-one can identify the people involved.

7.108 Of course, the Tribunal has the power to permit the publication of such a report and it is this power that distinguishes model 2 and model 3. Under model 2, the Tribunal may only permit the publication of information that will not identify the people involved. Model 3 is wider in that it permits the Tribunal to authorise publication of identifying information as well. This would mean, for example, the television station could be authorised by the Tribunal to air its story and show pictures of Li, Mei-Ching and Justine.

Model 4

7.109 Under model 4, there would be no impediment to any of the disclosures provided the information is de-identified. This means that the television report, assuming that it conceals the identities of those people involved, could be aired without the need to seek the Tribunal's authorisation. If the television station wanted the report to include identifying information, it could approach the Tribunal to exercise its discretion to permit the publication of that information.

7.110 Mei-Ching's and Justine's private disclosures are not in de-identified form, but there are doubts (discussed above) as to whether those disclosures would be covered by the prohibition as they are not made to the public or a section of the public. If the disclosures do fall within the prohibition, both would require Tribunal authorisation before they would be permitted.

A preliminary view

7.111 At this stage of the review, the Commission's preliminary preference is for model 4: that publication of Tribunal proceedings should ordinarily occur but only in a way that does not identify the people involved. This is the position in most jurisdictions and appears to strike a reasonable balance between respecting the privacy of those involved in proceedings and promoting the transparency and accountability favoured by open justice.

CALL FOR SUBMISSIONS

7.112 The Commission is seeking submissions in response to the following questions, or on any other issues respondents consider relevant to the publication of Tribunal proceedings. You may wish to nominate your preferred legal model or provide more detailed comment on the particular issues that follow.

Possible legal models

7-1 Should the guardianship legislation in Queensland reflect one of the following models in relation to the reporting of Tribunal proceedings:

(a) Model 1: no prohibition but power to order that information or identity not be published;

(b) Model 2: general prohibition with power to permit publication of de-identified information;

(c) Model 3: general prohibition with power to permit publication of all information;

(d) Model 4: prohibition on publication of identity with power to permit publication;

(e) Other models?

Particular issues

7-2 Should publication of information about Tribunal proceedings generally be permitted or prohibited?

7-3 If publication of information about Tribunal proceedings should generally be *permitted*, should a publication that *identifies* a person involved in a proceeding be permitted or prohibited?

7-4 If publication of a person's identity should be *prohibited*, which people should not be identified:

(a) the adult;

(b) the active parties to the proceeding;

(c) any person involved in the proceeding including any witnesses and any person who has given information or documents to the Tribunal for the proceeding;

(d) other people?

7-5 If publication of a person's *identity* should be prohibited, should the legislation establish criteria for when identification will be taken to have occurred, or specify what kinds of information will be taken to identify a person? If so, what criteria or what kinds of information should determine when a person has been identified:

- **(a) information that will identify the person;**
- **(b) information that could reasonably, or is likely to, lead to the identification of the person;**
- **(c) particulars calculated to lead to the identification of the person;**
- **(d) the person's name, address, or physical description;**
- **(e) a picture or photograph of the person;**
- **(f) a voice recording of the person;**
- **(g) other criteria or information?**

7-6 If publication of a person's *identity* should be prohibited, should the prohibition relate to when identification is capable by any person or only by a member of the public or a section of the public to whom the publication is disseminated?

7-7 If publication of information about Tribunal proceedings generally, or of identifying information, should be *prohibited*, should the Tribunal have power to make an order to permit the publication of information about a particular proceeding? If so, should that power permit the publication of information generally, or only permit publication of information that would not identify a person?

7-8 If the Tribunal should have power to make an order to permit the publication of information about a proceeding, what legislative criteria, if any, should guide the Tribunal's power:

- **(a) the Tribunal may make an order if it is satisfied the publication is in the public interest (the current legislative test in Queensland);**
- **(b) other criteria?**

7-9 Whether or not publication of information about a Tribunal proceeding is prohibited, should the Tribunal have an *additional power* to make an order to prohibit publication of information about a particular proceeding?

7-10 If so, what legislative criteria, if any, should guide the Tribunal's power:

(a) the Tribunal may make an order if it is satisfied it is desirable to do so because of the confidential nature of particular information or matter or for another reason (the current legislative test in Queensland);

(b) the Tribunal may make an order if it is satisfied it is necessary for reasons such as:

(i) that it is in the interests of justice;

(ii) to avoid endangering the safety of a person;

(iii) for the protection of confidential information

(some of the criteria set out in the legislation in Western Australian and Victoria);

(c) other criteria?

7-11 If publication of information about Tribunal proceedings is prohibited in any way, should the prohibition relate to all discussions of the proceeding or only to publications that are made to the public or to a section of the public?

7-12 Should the legislation recognise a 'reasonable excuse' for not complying with any prohibition or Tribunal order against publication of information about a Tribunal proceeding?

7-13 Should the legislation contain any other exceptions to any prohibition or Tribunal order against publication of information about a Tribunal proceeding and, if so, what should those exceptions be:

(a) the bona fide publication of any material intended primarily for use by any profession being a law report or any other publication of a technical nature (such as the exceptions provided in New South Wales, Western Australia, and New Zealand);

(b) the communication of a transcript of evidence or other document to:

(i) people concerned in court proceedings for use in connection with those proceedings;

(ii) a body responsible for disciplining members of the legal or medical professions or to people concerned in proceedings before such disciplinary bodies;

(iii) a body that grants legal aid assistance in order to facilitate a decision whether such assistance should be provided

(such as the exceptions provided in the Western Australian legislation);

(c) the publication of information that is authorised by the person to whom the information about a proceeding relates;

(d) other exceptions?

7-14 Should any legislative prohibition on publication of information about Tribunal proceedings also apply to the publication of information about proceedings under the guardianship legislation that are conducted in the Supreme Court?

Chapter 8

The general duty of confidentiality

INTRODUCTION

8.1 In the course of performing relevant roles under the legislation, many people will gain information about an adult and other people who are involved in the adult's life. Much of this information will be private, sensitive, or personal.

8.2 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld)[752] impose a duty on a number of people, such as attorneys, guardians and administrators, Tribunal members and staff, and the Adult Guardian and his or her staff, as to how they deal with this personal information. The legislation also contains a number of exceptions to the duty, including section 250 of the *Guardianship and Administration Act 2000* (Qld) which specifically qualifies the Adult Guardian's confidentiality obligations.

8.3 As part of its review of the guardianship legislation's confidentiality provisions, the Commission is required to consider these provisions, which regulate how people who act under the legislation may deal with confidential information about a person that they gain in the course of those actions. Throughout this chapter, the phrases 'confidential information' and 'information about a person's affairs' will be used to refer to the type of information that is the subject of those provisions.

8.4 It is noted that there are also other ways in which the law protects certain types of private and personal information from disclosure to other people. In certain circumstances, the general law will impose an obligation of confidence on a person to whom confidential information has been disclosed.[753] Dealings with personal information by Commonwealth Government agencies, private sector health service providers, and some other private sector entities are regulated by the federal *Privacy Act 1988* (Cth).[754] Queensland Government agencies are not regulated by the federal privacy legislation but are required to protect personal information under an administrative standard containing a number of information privacy principles.[755]

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752 Section 74 of the *Powers of Attorney Act 1998* (Qld) is set out at para 8.9. Section 249 of the *Guardianship and Administration Act 2000* (Qld) is set out at para 8.11.

753 A duty of confidentiality may arise in contract or in equity. See para 3.11–3.15 in Chapter 3 (Guardianship and confidentiality). This duty may also attach to government departments and agencies: *Smith Kline & French Laboratories (Australia) Ltd v Department of Community Services and Health* (1990) 22 FCR 73; *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 187 (McHugh J).

754 The *Privacy Act 1988* (Cth) contains 11 Information Privacy Principles that apply to Commonwealth and Australian Capital Territory Government agencies and 10 National Privacy Principles that apply to all private health service providers, and to private sector organisations with an annual turnover of more than $3 million: *Privacy Act 1998* (Cth) ss 16, 16A(2), 6C(1) (definition of 'organisation'). The National Privacy Principles must also be complied with by some small businesses (with an annual turnover of $3 million or less) such as those that disclose personal information about another individual to anyone else for a benefit, service or advantage: see *Privacy Act 1998* (Cth) s 6D(4)(c)–(e).

755 Information Standard 42 Information Privacy, issued under *Financial Management Standard 1997* (Qld) ss 22(2), 56(1), <http://www.governmentict.qld.gov.au//02_infostand/standards.htm> at 24 July 2006. Information Standard 42 requires that Queensland Government agencies comply with 11 information privacy principles, modelled on those in the *Privacy Act 1998* (Cth), governing the collection, storage, use, and disclosure of personal information: Information Standard 42 Information Privacy, 7. Courts and tribunals, however, are exempt from the application of the Information Standard to the extent of their judicial and quasi-judicial functions: Information Standard 42 Information Privacy, 4.

8.5 Depending on the circumstances, the guardianship legislation may impose additional confidentiality obligations. To the extent of any inconsistency, the relevant provisions of the guardianship legislation will prevail over any general law or administrative obligations, while any applicable provisions of the federal privacy legislation will prevail over those of the guardianship legislation.

THE LAW IN QUEENSLAND

8.6 This section of the chapter outlines the general duty of confidentiality imposed by section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld). It also outlines the exceptions to this duty, including the exception for the Adult Guardian in section 250 of the *Guardianship and Administration Act 2000* (Qld).

The general duty of confidentiality

8.7 Both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) impose a duty on certain people acting under those statutes to preserve the confidentiality of particular information.[756] The legislation generally provides that information about a person's affairs obtained as a consequence of a person's role under the guardianship legislation must not be disclosed. The provisions are discussed in this section under the following three headings:

- the people who are subject to the duty;
- the information that is protected by the duty; and
- the type of conduct the duty prohibits.

The people who are subject to the duty

8.8 Section 74 of the *Powers of Attorney Act 1998* (Qld) applies to confidential information that is gained by a person because of being, or an opportunity given by being, an attorney or statutory health attorney.[757]

8.9 Subsections 74(1) and (3) of the *Powers of Attorney Act 1998* (Qld) relevantly provide:

> **74 Preservation of confidentiality**
>
> (1) If a person gains confidential information because of being, or an opportunity given by being, an attorney …, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (2).

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

757 *Powers of Attorney Act 1998* (Qld) s 74(1), (3).

Maximum penalty—200 penalty units.

…

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

8.10 Section 249(1) of the *Guardianship and Administration Act 2000* (Qld) provides that the duty imposed by that section applies to 'a person [who] gains confidential information because of the person's involvement in this Act's administration'. Section 249(2) then appears to set out an exhaustive list of those people. It provides that a person gains confidential information through involvement in the Act's administration if the person gains the information because of being, or an opportunity given by being:

- a Tribunal member, a member of the Tribunal's staff, or an expert engaged by the Tribunal;
- the Adult Guardian and his or her staff, including consultants and those delegated by him or her to conduct investigations;
- the Public Advocate and his or her staff;
- a guardian or administrator; or
- a community visitor.

8.11 Subsections 249(1) and (2) of the *Guardianship and Administration Act 2000* (Qld) relevantly provide:

249 Preservation of confidentiality

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

Maximum penalty—100 penalty units.

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

(a) the president, a deputy president or another tribunal member; or

(b) the registrar, a member of the tribunal staff or a tribunal expert; or

(c) the adult guardian or a member of the adult guardian's staff; or

(d) a professional consulted or employed by the adult guardian or an adult guardian's delegate for an investigation; or

(e) the public advocate or a member of the public advocate's staff; or

(f) a guardian or administrator; or

(g) a community visitor;

…

The information that is protected by the duty

8.12 The duty imposed by section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) applies to 'confidential information'. For both statutes, 'confidential information' is defined as including 'information about a person's affairs'.[758] However 'confidential information' does not include information that is already publicly disclosed (unless further publication is prohibited by law) or statistical or other information that is not reasonably expected to reveal a person's identity.[759]

8.13 Sections 74(4) of the *Powers of Attorney Act 1998* (Qld) and 249(4) of the *Guardianship and Administration Act 2000* (Qld) relevantly provide:

> ***confidential information*** includes information about a person's affairs but does not include—
>
> (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or
>
> (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates.

The type of conduct the duty prohibits

8.14 Both section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) prohibit:[760]

- the making of a record of confidential information; and
- the intentional or reckless disclosure of the confidential information to any person.

8.15 Section 74(1) of the *Powers of Attorney Act 1998* (Qld) relevantly provides:

> **74 Preservation of confidentiality**
>
> (1) If a person gains confidential information because of being, or an opportunity given by being, an attorney …, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (2).

758 *Powers of Attorney Act 1998* (Qld) s 74(4); *Guardianship and Administration Act 2000* (Qld) s 249(4).

759 *Powers of Attorney Act 1998* (Qld) s 74(4); *Guardianship and Administration Act 2000* (Qld) s 249(4).

760 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1).

8.16 Section 249(1) of the *Guardianship and Administration Act 2000* (Qld) provides:

> **249 Preservation of confidentiality**
>
> (1) If a person gains confidential information because of the person's involvement in this Act's administration, the person must not make a record of the information or intentionally or recklessly disclose the information to anyone other than under subsection (3).

Exceptions to the duty

8.17 This part of the chapter outlines the general exceptions to the duty contained in section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld), and the exceptions that apply in respect of the Adult Guardian contained in section 250 of the *Guardianship and Administration Act 2000* (Qld).

The general exceptions

8.18 Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) permit a person to make a record of or disclose confidential information, which would otherwise be prohibited, in a range of circumstances:[761]

- if acting under the *Guardianship and Administration Act 2000* (Qld);[762]
- if discharging a function under another law (including the *Powers of Attorney Act 1998* (Qld));[763]
- during a proceeding in a court or relevant tribunal;
- if authorised under a regulation or another law;
- if authorised by the person to whom the information relates; or

761 *Powers of Attorney Act 1998* (Qld) s 74(2); *Guardianship and Administration Act 2000* (Qld) s 249(3). Note also the limited exception for disclosure of confidential information to a member of this Commission or to its staff or consultants in order to facilitate the Commission's review of the guardianship legislation: *Powers of Attorney Act 1998* (Qld) s 74(2)(f); *Guardianship and Administration Act 2000* (Qld) s 249(3)(g). The Commission has prepared a document called *Confidentiality in Consultation Protocol* to assist people to comply with the confidentiality provisions of the guardianship legislation when participating in the Commission's consultation process. The *Protocol* can be viewed at the Commission's website: <http://www.qlrc.qld.gov.au/guardianship/protocol.htm>.

762 This provision does not specifically appear in s 74 of the *Powers of Attorney Act 1998* (Qld). However, acting under the *Guardianship and Administration Act 2000* (Qld) would fall within the exception provided in s 74(2)(c) of the *Powers of Attorney Act 1998* (Qld): 'if authorised under a regulation or another law'.

763 Section 74(2)(a) of the *Powers of Attorney Act 1998* (Qld) makes specific reference to that Act, whereas the *Guardianship and Administration Act 2000* (Qld) refers generally to 'another law', which would include the *Powers of Attorney Act 1998* (Qld): *Guardianship and Administration Act 2000* (Qld) s 249(3)(b).

- if authorised by the Tribunal[764] in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered.

8.19 There are some drafting differences in the exceptions provided in the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). For example, the *Powers of Attorney Act 1998* (Qld) provides an exception for disclosures made 'to discharge a function under this Act or another law'.[765] The *Guardianship and Administration Act 2000* (Qld), however, provides two separate exceptions for disclosures made 'for this Act' or 'to discharge a function under another law'.[766]

8.20 Section 74(2) of the *Powers of Attorney Act 1998* (Qld) relevantly provides:

> **74 Preservation of confidentiality**
>
> …
>
> (2) A person may make a record of confidential information, or disclose it to someone else—
>
> (a) to discharge a function under this Act or another law; or
>
> (b) for a proceeding in a court or relevant tribunal; or
>
> (c) if authorised under a regulation or another law; or
>
> (d) if authorised by the person to whom the information relates; or
>
> (e) if authorised by the court in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;
>
> …

8.21 Section 249(3) of the *Guardianship and Administration Act 2000* (Qld) relevantly provides:

> **249 Preservation of confidentiality**
>
> …
>
> (3) A person may make a record of confidential information, or disclose it to someone else—
>
> (a) for this Act; or
>
> (b) to discharge a function under another law; or

764 Section 74(2)(e) of the *Powers of Attorney Act 1998* (Qld) refers to 'court' rather than Tribunal, which is defined to mean the Supreme Court: *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'court'). Note, however, that s 109A(2) of the *Powers of Attorney Act 1998* (Qld) provides that 'this Act applies … as if references to the Supreme Court were references to the tribunal'.

765 *Powers of Attorney Act 1998* (Qld) s 74(2)(a).

766 *Guardianship and Administration Act 2000* (Qld) s 249(3)(a)–(b).

(c) for a proceeding in a court or relevant tribunal; or

(d) if authorised under a regulation or another law; or

(e) if authorised by the person to whom the information relates; or

(f) if authorised by the tribunal in the public interest because a person's life or physical safety could otherwise reasonably be expected to be endangered;

…

Exceptions that apply to the Adult Guardian

8.22 The Adult Guardian has a range of functions under the *Guardianship and Administration Act 2000* (Qld), including the investigation of complaints and allegations about the actions of substitute decision-makers for an adult.[767] He or she also has power to investigate complaints or allegations of neglect, exploitation, or abuse of an adult, or of inappropriate or inadequate decision-making arrangements for an adult.[768] If the Adult Guardian is appointed as a guardian for an adult, he or she will also have the functions and powers that are conferred on guardians under the guardianship legislation.[769]

8.23 In carrying out these functions and exercising these powers, the Adult Guardian is subject to the duty imposed by section 249.[770] The Adult Guardian may, however, disclose confidential information under one or more of the general exceptions to the duty. For example, one of those general exceptions permits disclosures made 'for this Act', that is, the *Guardianship and Administration Act 2000* (Qld).[771] In addition, section 250 expressly permits the Adult Guardian to disclose confidential information about an investigation in certain circumstances. These exceptions are considered in turn.

Disclosures made 'for this Act'

8.24 Section 249(3)(a) of the *Guardianship and Administration Act 2000* (Qld) provides that confidential information may be disclosed (or recorded) 'for this Act'. A disclosure by the Adult Guardian may be made 'for [the] Act' in a number of circumstances, which are described further below:

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

768 *Guardianship and Administration Act 2000* (Qld) s 180.

769 The Adult Guardian may be appointed as an adult's guardian under s 14(1)(a)(ii) of the *Guardianship and Administration Act 2000* (Qld). The functions and powers of guardians are set out in ch 4, pts 1 and 3 of the *Guardianship and Administration Act 2000* (Qld) and include the obligations to apply the General Principles (s 34) and to consult with the adult's other substitute decision-makers (s 40).

770 *Guardianship and Administration Act 2000* (Qld) s 249(1), (2)(c).

771 *Guardianship and Administration Act 2000* (Qld) s 249(3)(a).

- where the disclosure is required or compelled under the Act;
- where the disclosure is necessary to carry out a function or power under the Act; and
- where the disclosure is a 'matter' for an adult for which the Adult Guardian has power to decide as the appointed guardian.

8.25 The Adult Guardian would be disclosing information 'for [the] Act' if its disclosure is required or compelled under the legislation. This would include, for example, disclosure of information that the Adult Guardian is compelled to give to the Tribunal under section 130,[772] or as part of a written report of an investigation or audit that is required to be given under section 193.[773]

8.26 It is also likely that the Adult Guardian would be disclosing information 'for [the] Act' if the disclosure is a necessary incident of the Adult Guardian's other functions or powers under the Act, such as in the exercise of protective powers[774] or in the course of conducting an investigation. In determining whether a disclosure is necessary, the Adult Guardian would be required to apply the General Principles, including General Principle 11 about the adult's right to confidentiality of information.[775]

8.27 Finally, if the Adult Guardian is appointed as guardian for an adult, he or she may also disclose otherwise confidential information 'for [the] Act' by deciding to do so as a matter for which he or she has power. It is likely that a guardian has power to disclose confidential information in relation to matters for which the guardian has been appointed. For example, a guardian appointed for health matters may be able to make a decision to disclose confidential information about health care as a matter for which they have power. If the Adult Guardian was to consider such a disclosure as guardian, he or she would also need to apply the General Principles, including General Principle 11 on confidentiality, in making such decisions.[776] This issue is considered further below.[777]

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772 Section 130 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may order a person to give information or material to the Tribunal and that a person must comply with such an order unless the person has a reasonable excuse. That section overrides any legislative or common law restriction on disclosure of the information: *Guardianship and Administration Act 2000* (Qld) s 130(6).

773 Section 193 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian must make a written report after an investigation or audit and give a copy to every attorney (appointed under a power of attorney or an advance health directive), guardian, or administrator for the adult and, upon request and at the person's expense, to any interested person.

774 The Adult Guardian has a range of protective powers under ch 8 pt 3 of the *Guardianship and Administration Act 2000* (Qld). He or she has power, in certain circumstances, to take action to recover possession of an adult's property, to suspend the operation of an attorney's power, and to apply to the Tribunal for a warrant to remove an adult from a place: *Guardianship and Administration Act 2000* (Qld) ss 194(a), 195(1), 197.

775 Every person who performs a function or exercises a power for a matter for an adult under the legislation must apply the General Principles: *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

776 *Guardianship and Administration Act 2000* (Qld) s 34, sch 1 pt 1.

777 See para 8.107–8.112.

Disclosures during the course of an investigation

8.28 Section 250 of the *Guardianship and Administration Act 2000* (Qld) provides a specific exception for the Adult Guardian in relation to the duty of confidentiality imposed by section 249. It provides that, despite section 249, the Adult Guardian may disclose information about an issue that is the subject of an investigation if satisfied it is 'necessary and reasonable in the public interest'.[778]

8.29 However, the exception provided by section 250 is limited. First, a disclosure must not be made if it 'is likely to prejudice the investigation'.[779] Second, a disclosure may only express a criticism of an entity if the entity has been given an opportunity to answer the criticism.[780] Third, the disclosure may only identify the complainant if it is 'necessary and reasonable' to do so.[781]

8.30 Section 250 provides:

> **250 Disclosure of information about investigations**
>
> (1) Section 249 does not prevent the adult guardian from disclosing information to a person or to members of the public about an issue the subject of an investigation by the adult guardian if the adult guardian is satisfied the disclosure is necessary and reasonable in the public interest.
>
> (2) However, the adult guardian must not make the disclosure if it is likely to prejudice the investigation.
>
> (3) In a disclosure under subsection (1), the adult guardian—
>
> (a) may express an opinion expressly or impliedly critical of an entity only if the adult guardian has given the entity an opportunity to answer the criticism; and
>
> (b) may identify the complainant, directly or indirectly, only if it is necessary and reasonable.

LEGISLATION IN OTHER JURISDICTIONS

8.31 This section of the chapter outlines the general duty of confidentiality imposed by the guardianship legislation of other Australian jurisdictions and the exceptions to that duty, including exceptions specifically for the 'Adult Guardian' equivalents in those jurisdictions.[782]

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778 *Guardianship and Administration Act 2000* (Qld) s 250(1).

779 *Guardianship and Administration Act 2000* (Qld) s 250(2).

780 *Guardianship and Administration Act 2000* (Qld) s 250(3)(a).

781 *Guardianship and Administration Act 2000* (Qld) s 250(3)(b).

782 In Victoria, Western Australia, South Australia and the Australian Capital Territory, the equivalent of the Adult Guardian is the Public Advocate. New South Wales, Tasmania and the Northern Territory have a Public Guardian. The functions and powers of the Adult Guardian equivalents vary from jurisdiction to jurisdiction.

The general duty of confidentiality

8.32 Provisions similar to section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) exist in all of the other Australian guardianship legislation, apart from the Northern Territory.[783] In each of those jurisdictions, there is a general duty of confidentiality imposed in relation to certain information gained by particular people in the performance of actions under the legislation. The various statutes also create a number of exceptions to that duty. The following aspects of the different jurisdictions are discussed below:

- the people who are subject to the duty;
- the information that is protected by the duty; and
- the type of conduct the duty prohibits.

The people who are subject to the duty

8.33 The provisions in other jurisdictions generally follow one of two approaches in specifying the people who are subject to the duty.[784] The first is to refer broadly to any people who perform functions under, or act in connection with the administration or execution of, the particular legislation.[785] For example, section 80 of the *Guardianship and Administration Act 1993* (SA) applies to '[a] person engaged in the administration of this Act'[786] and section 101 of the *Guardianship Act 1987* (NSW) applies to '[a] person' who obtains information 'in connection with the administration or execution of this Act'.

8.34 The second approach is to refer, alternatively or additionally, to specific people to whom the provision applies, such as members of the relevant Tribunal's

783 *Guardianship and Management of Property Act 1991* (ACT) s 66D; *Public Advocate Act 2005* (ACT) s 16; *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80; *Guardianship and Administration Act 1995* (Tas) s 86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 34–36; *Guardianship and Administration Act 1986* (Vic) s 14(1), sch 3 cl 3(b); *Guardianship and Administration Act 1990* (WA) s 113; *State Administrative Tribunal Act 2004* (WA) ss 157–158. Also see *Dependent Adults Act* RSA 2000 c D–11 (Alberta) s 68; *Guardianship and Trusteeship Act* SNWT 1994 c 29 (Northwest Territories) s 58; and *Adult Guardianship Act* RSBC 1996 c 6 (Supplement) (British Columbia) s 32. Note also that similar provisions apply in respect of a number of other tribunals and commissions. See, for example, *Australian Security Intelligence Organisation Act 1979* (Cth) s 81 which applies to the Administrative Appeals Tribunal; *Industrial Relations Act 1999* (Qld) s 706; *Mental Health Act 2000* (Qld) ss 528, 529; and *Children Services Tribunal Act 2000* (Qld) s 142.

784 Note that this chapter deals only with specific statutory duties of confidentiality and is not concerned with, for example, the range of general duties imposed on guardians, administrators or attorneys for an adult that may, or may not, also import obligations of confidentiality.

785 *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80(1).

786 The duty does not, however, apply to a guardian or administrator*: Guardianship and Administration Act 1993* (SA) s 80(3). This seems a surprising omission particularly given that there is no alternative provision in that Act that specifically requires guardians and administrators to maintain the confidentiality of information gained in the course of carrying out their functions under the legislation.

staff.[787] The Queensland provisions adopt this course by specifying the particular people to whom the provisions apply.[788]

8.35 The Western Australian provisions, which are spread across two statutes, apply both to any 'person performing any function' under the guardianship legislation[789] and, more specifically, to 'any person who is or has been' a member of the Tribunal, the executive officer or any other member of staff of the Tribunal, or a person acting under the authority of the Tribunal.[790]

8.36 In Tasmania, the duty applies to the Board and the Public Guardian.[791] In the Australian Capital Territory, the duty in the guardianship legislation applies to the Tribunal, its staff, and other people authorised to act in relation to the Tribunal.[792] A separate duty of similar effect is contained in that Territory's Public Advocate legislation, which applies to the Public Advocate and his or her staff in the exercise of the Public Advocate's functions, including those functions under the guardianship legislation.[793] Similarly, in Victoria, the legislation governing the Tribunal imposes a duty on the Tribunal, its staff, and other people acting under the Tribunal's authority[794] while the guardianship legislation imposes a duty on the Public Advocate.[795]

8.37 In both Western Australia and Victoria, the legislation governing the Tribunals additionally extends the application of the duty to any person who receives information from a person under an exception to the general duty.[796]

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787 *Guardianship and Management of Property Act 1991* (ACT) s 66D(1); *Public Advocate Act 2005* (ACT) s 16; *Guardianship and Administration Act 1995* (Tas) s 86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 34–36; *Guardianship and Administration Act 1986* (Vic) s14(1), sch 3 cl 3(b); *Guardianship and Administration Act 1990* (WA) s 113; *State Administrative Tribunal Act 2004* (WA) ss 157–158. Also see s 68(1) of the *Dependent Adults Act* RSA 2000 c D–11 (Alberta) which applies to the Public Guardian and the Public Trustee; s 58(1) of the *Guardianship and Trusteeship Act* SNWT 1994 c 29 (Northwest Territories) which applies to guardians and trustees; and s 32(1) of the *Adult Guardianship Act* RSBC 1996 c 6 (Supplement) (British Columbia) which applies to decision makers, guardians and monitors.

788 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(2).

789 *Guardianship and Administration Act 1990* (WA) s 113(1).

790 *State Administrative Tribunal Act 2004* (WA) s 157(1).

791 *Guardianship and Administration Act 1995* (Tas) s 86(1).

792 *Guardianship and Management of Property Act 1991* (ACT) s 66D(1): 'a person who is or has been' a member of the Tribunal, or the registrar or a deputy registrar of the Tribunal, or authorised to exercise a function or power under this Act in relation to the Tribunal.

793 *Public Advocate Act 2005* (ACT) s 16(1). The Public Advocate's functions include acting as a guardian or manager when appointed by the Tribunal and exercising the functions of that office under the *Guardianship and Management of Property Act 1991* (ACT); *Public Advocate Act 2005* (ACT) s 10(h), (j). See *Guardianship and Management of Property Act 1991* (ACT) ss 9(1), 10(2), 67(1), 68.

794 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(1): 'any person who is or has been' a member of the Tribunal, a registrar or other member of staff of the Tribunal, or a person acting under the authority of the Tribunal.

795 *Guardianship and Administration Act 1986* (Vic) s 14(1), sch 3 cl 3(b).

796 *State Administrative Tribunal Act 2004* (WA) s 158; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 35. Note, these duties imposed in relation to 'secondary disclosure' are discussed further at para 8.43.

The information that is protected by the duty

8.38 The legislation of other jurisdictions specifies the type of information that is protected from disclosure and/or recording with varying degrees of particularity. At one end of the spectrum, the legislation in New South Wales refers simply to 'any information obtained in connection with the administration or execution of this Act'.[797]

8.39 Of more particularity are the provisions that apply to the Tribunals in Victoria and the Australian Capital Territory. In Victoria, the duty applies to 'any information *about the affairs of a person* acquired in the performance of functions under or in connection with this Act or an enabling enactment' (emphasis added).[798] Similarly, the duty in the Australian Capital Territory applies to 'information *about a person* that is disclosed to, or obtained by, a person … because of the exercise of a function or power under this Act in relation to the tribunal' (emphasis added).[799]

8.40 Finally, the duties in the South Australian, Tasmanian, and the Western Australian guardianship legislation apply with even greater particularity (and therefore more narrowly) to personal information of a particular person, *namely the adult*, that is obtained through involvement in the legislation.[800] For example, section 80(1) of the *Guardianship and Administration Act 1993* (SA) prohibits a person from divulging 'any personal information relating to a person in respect of whom any proceedings under this Act have been taken' that is obtained in the course of administration of the Act.

The type of conduct the duty prohibits

8.41 The duties imposed by the legislation of other jurisdictions fall into three categories. Statutes in the first category prohibit the person from disclosing or

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797 *Guardianship Act 1987* (NSW) s 101. Note also s 14(1) and sch 3 cl 3(b) of the *Guardianship and Administration Act 1986* (Vic) which imposes a duty on the Public Advocate not to divulge 'information received or obtained under this Act'. Also see s 32(1) of the *Adult Guardianship Act* RSBC 1996 c 6 (Supplement) (British Columbia) which applies to any 'information provided under this Act, obtained in exercising authority as a decision maker, guardian or monitor'.

798 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(2). Note also that the duty does not apply to anything said or done at a hearing of the Tribunal (other than one that is held in private) or to any decision or order, or reasons for a decision or order, of the Tribunal: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(6). Also see s 4 of the *Accounts and Records of Attorneys and Guardians O Reg 100/96* (Ontario) which provides that attorneys and guardians must not, except in certain circumstances, disclose any information contained in the accounts and financial and personal records required to be kept in respect of the incapable person.

799 *Guardianship and Management of Property Act 1991* (ACT) s 66D(1). Similar wording is adopted in s 16 of the *Public Advocate Act 2005* (ACT) which applies to the Public Advocate and his or her staff in the exercise of that office's functions, including those functions under the *Guardianship and Management of Property Act 1991* (ACT). Also see s 157(2) of the *State Administrative Tribunal Act 2004* (WA) which prohibits members, staff and others acting with the authority of the Tribunal from disclosing or recording 'information about the affairs of a person acquired in the performance of functions under or in connection with this Act or an enabling Act'. Also see s 68(1) of the *Dependent Adults Act* RSA 2000 c D–11 (Alberta) and s 58(1) of the *Guardianship and Trusteeship Act* SNWT 1994 c 29 (Northwest Territories) which apply to information that 'deals with the personal history or records of' the adult.

800 *Guardianship and Administration Act 1993* (SA) s 80(1): a person in respect of whom proceedings under the Act have been taken; *Guardianship and Administration Act 1995* (Tas) s 86(1): a represented person, proposed represented person, or a person to whom Part 6 (consent to medical and dental treatment) applies; *Guardianship and Administration Act 1990* (WA) s 113(1): a represented person or a person in respect of whom an application is made.

divulging the particular information.[801] For example, section 101 of the *Guardianship Act 1987* (NSW) provides that a person 'shall not disclose' certain information and section 80(1) of the *Guardianship and Administration Act 1993* (SA) provides that it is an offence to 'divulge' particular information.

8.42 Statutes in the second category prohibit a person from disclosing or divulging the information and also from making a record of the information.[802] That is the approach adopted in the Queensland provisions, which prohibit the making of a record of the information and the 'intentional or reckless disclosure' of the information.[803] For example, section 66D(2) of the *Guardianship and Management of Property Act 1991* (ACT) provides:

> **66D Secrecy**
>
> …
>
> (2) A person to whom this section applies must not—
>
> (a) make a record of protected information; or
>
> (b) directly or indirectly, divulge or communicate to a person protected information about someone else.

8.43 Statutes in the third category additionally prohibit 'secondary disclosure' of the particular information.[804] For example, section 35(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides:

> **35 Prohibition on secondary disclosures**
>
> (1) A person to whom information referred to in section 34(2)[805] is disclosed, and any employee of that person, is subject to the same obligations and liabilities with respect to the recording or disclosure of the information as they would be if they were a person referred to in section 34(1) who had acquired the information in the performance of functions under this Act or an enabling enactment.
>
> … [note added]

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801 *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80(1); *Guardianship and Administration Act 1995* (Tas) s 86(1); *Guardianship and Administration Act 1990* (WA) s 113(1); *Guardianship and Administration Act 1986* (Vic) s 14(1), sch 3 cl 3(b). Also see s 68(1) of the *Dependent Adults Act* RSA 2000 c D–11 (Alberta); s 58(1) of the *Guardianship and Trusteeship Act* SNWT 1994 c 29 (Northwest Territories); and s 32(1) of the *Adult Guardianship Act* RSBC 1996 c 6 (Supplement) (British Columbia) which prohibit disclosure of information.

802 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2); *Public Advocate Act 2005* (ACT) s 16(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(2); *State Administrative Tribunal Act 2004* (WA) s 157(2).

803 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1).

804 *State Administrative Tribunal Act 2004* (WA) s 158; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 35.

805 Section 34 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) contains the primary duty imposed on the Tribunal in relation to not disclosing or recording personal information.

Exceptions to the duty

8.44 This section of the chapter outlines the general exceptions to the duty imposed by the legislation of other Australian jurisdictions and the exceptions that apply specifically to the Adult Guardian equivalents of those jurisdictions.

The general exceptions

8.45 The statutes in other jurisdictions contain a number of exceptions that permit the disclosure and/or recording of otherwise confidential information, and they are outlined below. Many of the exceptions are similar across jurisdictions, though there are some differences.

Disclosures made in the performance of functions under legislation

8.46 All of the jurisdictions include an exception for disclosures made (or the making of records) 'in connection with the performance of functions' under the legislation, or a similarly worded circumstance.[806] For example, section 101(b) of the *Guardianship Act 1987* (NSW) provides an exception for disclosures made 'in connection with the administration or execution of this Act'. In Queensland, section 249(3)(a) of the *Guardianship and Administration Act 2000* (Qld) includes an exception for disclosures or records made 'for this Act'. Similarly, section 74(2)(a) of the *Powers of Attorney Act 1998* (Qld) includes an exception for disclosures or records made 'to discharge a function under this Act or another law'.

Disclosures required or authorised by law

8.47 In addition, many of the jurisdictions contain an exception for disclosing (or making a record of) information if authorised or required by law.[807] The Western Australian guardianship legislation, for example, permits otherwise prohibited disclosures if they are 'authorised or required … by this Act or any other law'.[808] In

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806 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2): 'in relation to the exercise of a function or power, as a person to whom this section applies, under this Act or another Act'; *Public Advocate Act 2005* (ACT) s 16(3)(b): the prohibition does not apply if the record is made or the information is divulged 'in relation to the exercise of a function … under this Act or another territory law'; *Guardianship Act 1987* (NSW) s 101(b): 'in connection with the administration or execution of this Act'; *Guardianship and Administration Act 1993* (SA) s 80(2)(a): 'if authorised or required to do so by law or by his or her employer'; *Guardianship and Administration Act 1995* (Tas) s 86(1)(c): 'by a person authorised in writing either generally or in a particular case by the President'; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)(b): 'in connection with the performance of functions under this Act or an enabling enactment'; *Guardianship and Administration Act 1990* (WA) s 113(1)(a): 'in the course of duty'; *State Administrative Tribunal Act 2004* (WA) s 157(3)(b): 'in connection with the performance of functions under this Act or an enabling Act'.

807 *Guardianship and Administration Act 1990* (WA) s 113(1)(b): the duty does not apply to information the person 'is authorised or required to divulge by this Act or any other law'; *Guardianship and Administration Act 1993* (SA) s 80(2)(a): the duty does not prevent a person from 'divulging information if authorised or required to do so by law or by his or her employer'; *Guardianship and Administration Act 1995* (Tas) s 86(2): 'Subsection (1) does not prevent the disclosure of information as required or permitted by any law if, in the case of information relating to the personal affairs of another person, that other person has given consent in writing'; *Guardianship and Management of Property Act 1991* (ACT) s 66D(4): a person is not required to divulge information or produce a document to a court 'unless it is necessary to do so for this Act or another Act'; *Public Advocate Act 2005* (ACT) s 16(3)(a): the duty does not apply if the record is made or the information is divulged 'under this Act or another territory law'; *Guardianship Act 1987* (NSW) s 101(e): 'with other lawful excuse'; *Guardianship and Administration Act 1986* (Vic) s14(1), sch 3 cl 3(b): the Public Advocate must not divulge information 'except in accordance with this Act'.

808 *Guardianship and Administration Act 1990* (WA) s 113(1)(b).

South Australia, an exception is provided for divulging information 'if authorised or required to do so by law'.[809]

8.48 In Queensland, an exception for disclosures or records made 'if authorised under a regulation or another law' is contained in both the *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld).[810]

Disclosures made with consent

8.49 Several jurisdictions also include an exception for disclosures (or records) made with the consent of the person to whom the information relates. In New South Wales and the Australian Capital Territory, disclosure is permitted 'with the consent of the person'.[811] In Victoria, disclosure by the Tribunal and its staff may be made with the person's written consent.[812]

8.50 In Queensland, both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) contain an exception for disclosures or making of records 'if authorised by the person to whom the information relates'.[813]

Statistical information that does not identify the person

8.51 As noted earlier, in Queensland, statistical or other information that could not reasonably identify the person to whom the information relates is specifically excluded from the duty of confidentiality. This is done by exempting such information from the definition of 'confidential information'.[814]

8.52 Two other Australian jurisdictions also exclude de-identified information from the duty of confidentiality, although this is done by way of an *exception* to the duty. Under the Victorian Tribunal legislation, a person may disclose information 'for statistical purposes … provided the information does not identify any person to whom it relates'.[815] An identical provision applies to the Tribunal in Western Australia.[816]

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809 *Guardianship and Administration Act 1993* (SA) s 80(2)(a).

810 *Powers of Attorney Act 1998* (Qld) s 74(2)(c); *Guardianship and Administration Act 2000* (Qld) s 249(3)(d).

811 *Guardianship Act 1987* (NSW) s 101(a); *Guardianship and Management of Property Act 1991* (ACT) s 66D(3); *Public Advocate Act 2005* (ACT) s 16(4). Also see s 113(1)(c) of the *Guardianship and Administration Act 1990* (WA) which applies to persons performing functions under that Act and in relation to personal information of a represented or proposed represented person.

812 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)(a). Also see s 157(3)(a) of the *State Administrative Tribunal Act 2004* (WA) which applies to the Tribunal, its members, staff and others acting with its authority and in relation to information about the affairs of any person.

813 *Powers of Attorney Act 1998* (Qld) s 74(2)(d); *Guardianship and Administration Act 2000* (Qld) s 249(3)(e).

814 *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of 'confidential information'); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of 'confidential information'). See para 8.12–8.13.

815 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(5).

816 *State Administrative Tribunal Act 2004* (WA) s 157(5).

8.53 Additionally, the guardianship legislation in Western Australia permits a person performing a function under that legislation to disclose 'statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates'.[817]

Disclosures at a hearing or proceeding under the legislation

8.54 Some of the other jurisdictions also provide that the duty in relation to disclosure and/or the making of a record of confidential information does not apply in respect of proceedings or hearings conducted under the legislation.

8.55 In Tasmania, disclosure is permitted 'at a hearing under this Act'[818] and in New South Wales, disclosure is permitted 'for the purposes of any legal proceedings arising out of this Act or of any report of any such proceedings'.[819]

8.56 In Queensland, the legislation provides exceptions for disclosures and records of information made 'for a proceeding in a court or relevant tribunal'.[820]

8.57 In the Australian Capital Territory, by contrast, the legislation provides that a person to whom the duty applies cannot be required to divulge protected information or to produce a document containing protected information to a court, 'unless it is necessary to do so' for the guardianship legislation or another Act.[821] Only those disclosures that are *required* to be made under legislation may be made in a court proceeding. This is narrower than the exception in Queensland which would allow *any* disclosures made for a court or Tribunal proceeding to be made.

Other exceptions

8.58 A few other exceptions are also included in the various jurisdictions.

8.59 Under the Victorian Tribunal legislation, for example, a person may disclose personal information 'to a member of the police force for the purposes of reporting a suspected offence or assisting in the investigation of a suspected offence'.[822] An identical provision is contained in the *State Administrative Tribunal Act 2004* (WA).[823]

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817 *Guardianship and Administration Act 1990* (WA) s 113(2).

818 *Guardianship and Administration Act 1995* (Tas) s 86(1)(a). See also s 86(3) of the *Guardianship and Administration Act 1995* (Tas) which provides that '[n]othing in this section prohibits the Board from publishing notices of hearings or other notices that may be necessary in the interests of justice or for the proper administration of this Act'.

819 *Guardianship Act 1987* (NSW) s 101(c).

820 *Powers of Attorney Act 1998* (Qld) s 74(2)(b); *Guardianship and Administration Act 2000* (Qld) s 249(3)(c).

821 *Guardianship and Management of Property Act 1991* (ACT) s 66D(4); *Public Advocate Act 2005* (ACT) s 16(5).

822 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(4).

823 *State Administrative Tribunal Act 2004* (WA) s 157(4).

8.60 In Tasmania, a much broader exception is provided to permit disclosure 'where in the opinion of the Board or the Public Guardian it is in the best interests of the represented person to disclose the information'.[824] An exception of this type is considered further below.[825]

8.61 In Queensland, a disclosure of, or the making of a record of, confidential information is permitted 'if authorised by the tribunal [or the court] in the public interest because a person's life or physical safety could otherwise be expected to be endangered'.[826]

Specific exceptions for the Adult Guardian

8.62 Many of the other Australian jurisdictions have Adult Guardian equivalents conferred with similar investigatory functions to the Queensland Adult Guardian.[827] In those jurisdictions, disclosure of information that would otherwise be subject to the duty of confidentiality may fall under one of the general exceptions to that duty. Like Queensland, one such exception is where a disclosure is made in the performance of legislative functions.[828] To the extent that disclosure of otherwise confidential information is a necessary incident of the performance of a function, the disclosure would probably be permitted.[829]

8.63 In addition, the Australian Capital Territory and Tasmania provide specific exceptions for their Adult Guardian equivalents.

8.64 The Australian Capital Territory's Public Advocate is prohibited from recklessly recording or divulging protected information except in certain circumstances.[830] Section 17 of the *Public Advocate Act 2005* (ACT), however, provides an exemption from that duty of confidentiality in relation to information about

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824 *Guardianship and Administration Act 1995* (Tas) s 86(1)(b). See also *Dependent Adults Act* RSA 2000 c D–11 (Alberta) s 68(1)(c): 'where in the opinion of the Public Guardian or the Public Trustee, as the case may be, it is in the best interests of the dependent adult to disclose the file, document or information'; and *Guardianship and Trusteeship Act* SNWT 1994 c 29 (Northwest Territories) s 58(1)(b): 'where, in the opinion of the guardian or trustee, as the case may be, it is in the best interest of the represented person'.

825 See para 8.114.

826 *Powers of Attorney Act 1998* (Qld) s 74(2)(e); *Guardianship and Administration Act 2000* (Qld) s 249(3)(f).

827 The Adult Guardian equivalents in Victoria, South Australia, Western Australia, the Australian Capital Territory, and Tasmania are each conferred with investigatory functions and/or powers: *Guardianship and Administration Act 1986* (Vic) s 16(1)(h); *Guardianship and Administration Act 1993* (SA) s 28; *Guardianship and Administration Act 1990* (WA) s 97(c); *Public Advocate Act 2005* (ACT) s 11(1)(c); *Guardianship and Administration Act 1995* (Tas) s 17. Note that in New South Wales, the Public Guardian is not conferred with investigatory functions or powers: see *Guardianship Act 1987* (NSW) pt 7.

828 *Guardianship and Management of Property Act 1991* (ACT) s 66D(2); *Public Advocate Act 2005* (ACT) s 16(3)(b); *Guardianship Act 1987* (NSW) s 101(b); *Guardianship and Administration Act 1993* (SA) s 80(2)(a); *Guardianship and Administration Act 1995* (Tas) s 86(1)(c); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 34(3)(b); *Guardianship and Administration Act 1990* (WA) s 113(1)(a) and *State Administrative Tribunal Act 2004* (WA) s 157(3)(b). See para 8.46.

829 Note also that in Western Australia, the Public Advocate is also expressly permitted to 'do all things necessary or convenient to be done for or in connection with the performance of his functions': *Guardianship and Administration Act 1990* (WA) s 97(2). This may include the release of otherwise confidential information about an investigation in certain circumstances. See also para 8.26.

830 *Public Advocate Act 2005* (ACT) s 16. See para 8.36 and n 793, 799, 802.

investigations[831] in substantially the same terms as section 250 of the *Guardianship and Administration Act 2000* (Qld). It provides:

> **17 Disclosure of information about investigations**
>
> (1) Section 16 does not prevent the public advocate from disclosing information to a person (including members of the public) about an investigation by the public advocate if the public advocate is satisfied that the disclosure is necessary and reasonable in the public interest.
>
> (2) The public advocate must not make a disclosure mentioned in subsection (1) that is likely to prejudice the investigation.
>
> (3) In a disclosure mentioned in subsection (1), the public advocate must not—
>
> (a) express an opinion that is (expressly or impliedly) critical of a person or body unless the public advocate has given the person, or the principal officer of the body, an opportunity to answer the criticism; or
>
> (b) identify the complainant (directly or indirectly) unless it is necessary and reasonable to do so.

8.65 In Tasmania, a discretion to disclose confidential information is also conferred on the Public Guardian, although it is not specific to information about investigations.[832] The Public Guardian is generally subject to a duty not to disclose the personal history or records of a represented or proposed represented person.[833] However, he or she has a general discretion under section 86(1) of the *Guardianship and Administration Act 1995* (Tas) to disclose such information 'where in the opinion of the … Public Guardian it is in the best interests of the represented person to disclose the information'.[834]

ISSUES FOR CONSIDERATION

8.66 This section of the chapter raises several issues to consider when examining the duty in relation to confidential information gained in the course of a person's involvement in the administration of the guardianship legislation:

- Should there be a general duty of confidentiality under the guardianship legislation?
- If so, who should be subject to the duty?

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831 The Public Advocate may investigate complaints and allegations about the actions of a guardian, a manager, or an attorney for an adult: *Public Advocate Act 2005* (ACT) s 11(1)(c).

832 The Public Guardian has power to investigate complaints and allegations concerning the actions of a guardian, an administrator or a person acting under an enduring power of attorney: *Guardianship and Administration Act 1995* (Tas) s 17(1).

833 *Guardianship and Administration Act 1995* (Tas) s 86(1).

834 *Guardianship and Administration Act 1995* (Tas) s 86(1)(b). See para 8.60.

- What information should be protected by the duty?
- What sort of conduct should the duty prohibit?
- Should there be any exceptions to the duty, and, if so, what should they be?

Should there be a general duty of confidentiality under the guardianship legislation?

8.67 A threshold question is whether the guardianship legislation should impose any general duty that imposes confidentiality on those involved in the administration of the legislation. Except for the Northern Territory, the guardianship legislation of all Australian jurisdictions imposes a duty of confidentiality in some form.[835]

Who should be subject to the duty?

8.68 There may be a range of people who acquire different information about an adult with impaired capacity (or information about other persons' affairs) in a number of ways.[836] At present, however, the duty imposed by the guardianship legislation applies only to certain people who are involved in the administration of that legislation. The duty does not apply to other people who may gain confidential information in other ways, such as service providers, informal decision-makers, or family members. An issue for consideration is whether the duty should also apply more widely to any of those people.

People involved in the administration of the legislation

8.69 Section 249 of the *Guardianship and Administration Act 2000* (Qld) imposes a duty to maintain the confidentiality of particular information, but only to the extent that the information is generated or received as a consequence of involvement with the legislation itself. It therefore applies only to those people who gain information in the course of their involvement in the Act's administration. Section 249(2) of the Act appears to set out an exhaustive list of those people.

8.70 Apart from the people included in the list in section 249(2) of the *Guardianship and Administration Act 2000* (Qld), however, there are other people involved in the Act's administration, and who may thereby gain confidential information, but who are not specifically referred to in that list.

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835 *Guardianship and Management of Property Act 1991* (ACT) s 66D; *Public Advocate Act 2005* (ACT) s 16; *Guardianship Act 1987* (NSW) s 101; *Guardianship and Administration Act 1993* (SA) s 80; *Guardianship and Administration Act 1995* (Tas) s 86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 34–36; *Guardianship and Administration Act 1990* (WA) s 113; and *State Administrative Tribunal Act 2004* (WA) ss 157–158.

836 For example, some people may gain information about an adult through the ordinary course of their relationship with the adult; they might be family members, friends, carers, or service providers. Other people, such as Tribunal members and members of the public, may gain particular information about an adult through their involvement in a Tribunal proceeding or attendance at a Tribunal hearing. Others, such as the Public Advocate or the Adult Guardian, may gain certain information about an adult through the course of performing a function or exercising a power under the guardianship legislation. Some people may gain information in more than one of those capacities.

8.71 First, while section 249(2) refers to 'community visitors', it does not refer to *other* staff of the community visitor program who are not themselves 'community visitors', such as the coordinator of the program.

8.72 Second, section 249(2) does not refer to police officers or occupiers who may assist in the exercise of the Adult Guardian's powers under a warrant to remove an adult from a place.[837]

8.73 Despite not being specifically referred to in section 249, such people should observe General Principle 11 which provides:[838]

> **11 Confidentiality**
>
> An adult's right to confidentiality of information about the adult must be recognised and taken into account.

8.74 In addition, the information privacy principles contained in Information Standard 42, which govern the collection, storage, use, and disclosure of personal information by public sector agencies, apply to the operations of both the staff of the community visitor program and members of the police service.[839] Information disclosed to such people might also be subject to an equitable obligation of confidence.[840]

8.75 An issue for consideration is whether the duty in section 249 of the *Guardianship and Administration Act 2000* (Qld) should also specifically apply to those people.

Other people, including service providers

8.76 While a range of people may gain confidential information about an adult,[841] the duty contained in the legislation does not apply to people who are *not* involved in its administration. Therefore, unless they gain information in this way as one of the people listed in the provision, people such as service providers, informal decision-makers, carers, family, and friends of an adult are not covered by the duty.

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837 The Tribunal may issue a warrant authorising the Adult Guardian to enter a place and remove an adult if it is satisfied there are reasonable grounds for suspecting an immediate risk of harm: *Guardianship and Administration Act 2000* (Qld) s 149. The Adult Guardian may ask a police officer to help in the exercise of its powers under a warrant: *Guardianship and Administration Act 2000* (Qld) s 149(2)(b). The Adult Guardian may also require an occupier of a place to help in the exercise of its powers under a warrant: *Guardianship and Administration Act 2000* (Qld) s 150.

838 *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1. Any person who performs a function or exercises a power for a matter for an adult under the legislation must apply the General Principles: *Guardianship and Administration Act 2000* (Qld) s 11(1). Section 11(3) of the *Guardianship and Administration Act 2000* (Qld) also provides that '[t]he community is encouraged to apply and promote the general principles'.

839 Information Standard 42 Information Privacy, issued under *Financial Management Standard 1997* (Qld) ss 22(2), 56(1), <http://www.governmentict.qld.gov.au//02_infostand/standards.htm> at 24 July 2006. Note also that Queensland Police Service personnel are prohibited from disclosing personal information other than in performance of their duties: *Police Service Administration Act 1990* (Qld) s 10.1.

840 A government, its departments and agencies can be held liable for breaching an equitable obligation of confidence: *Smith Kline & French Laboratories (Australia) Ltd v Department of Community Services and Health* (1990) 22 FCR 73; *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 191 (McHugh J).

841 See n 836.

8.77 This raises a much broader question about the circumstances in which people should be required to protect the privacy of information they obtain about others. As discussed in Chapter 3, there is no general right to privacy of information in Australia.[842] A certain amount of idle conversation and curiosity about others' personal affairs is an ordinary incident of day-to-day life and is not unique to people who are subject to decision-making regimes or to people with impaired capacity.[843] As such, the law protects the confidentiality of information about a person in only limited circumstances.

8.78 In some circumstances, the general law may impose an obligation of confidence preventing a person from disclosing confidential information that is in their hands. As discussed in Chapter 3, an obligation of confidence may arise as an incident of contract[844] or in equity.[845] This ordinarily arises in the context of professional and commercial relationships.[846]

8.79 In addition, members of the community are 'encouraged to apply and promote the general principles' contained in the guardianship legislation, including General Principle 11, which deals with an adult's right to confidentiality of information.[847]

8.80 Further, the operations of any Queensland public sector service providers, such as Disability Services Queensland, are subject to the information privacy principles contained in the Queensland Government's administrative standard, Information Standard 42.[848] Finally, some private sector organisations, including health service

842 See para 3.7 in Chapter 3 (Guardianship and confidentiality).

843 See JG Fleming, *The Law of Torts* (9th ed, 1998) 665: 'The mere fact of living in the crowded society of today exposes everyone to annoying contacts with others, most of which must be borne as the price of social existence'. Also see C Doyle and M Bagaric, *Privacy Law in Australia* (2005) 184: 'Human perceptions and social conventions mean that it is not possible or easy to conceal some types of information'; and Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1, [53].

844 For example, it may be an express term of a contract with a service provider that particular information gained in the course of the contractual relationship must not be disclosed to any third party: RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4103]; L Clarke (ed) *Confidentiality and the Law* (1990) 66; D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [6.100]. Alternatively, the nature of a contractual relationship, such as one between patient and doctor, may be such as to found an implied contractual term of secrecy: RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4103]; M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) 195, [6.08], [6.115].

845 RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4105]. See para 3.12–3.14 in Chapter 3 (Guardianship and confidentiality).

846 M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) 195, [6.07].

847 *Guardianship and Administration Act 2000* (Qld) s 11(3), sch 1 pt 1.

848 Information Standard 42 Information Privacy, issued under *Financial Management Standard 1997* (Qld) ss 22(2), 56(1), <http://www.governmentict.qld.gov.au//02_infostand/standards.htm> at 24 July 2006. Note also that while statutory bodies administered by the Minister for Health are subject to Information Standard 42, the Queensland Department of Health is instead subject to the Information Standard 42A Information Privacy for the Queensland Department of Health, <http://www.governmentict.qld.gov.au//02_infostand/standards.htm> at 24 July 2006. Note that the Information Standard 42 also applies to the Office of the Adult Guardian, the Office of the Public Advocate, and staff of the community visitor program but does not apply to the Tribunal to the extent of its judicial and quasi-judicial functions: Information Standard 42 Information Privacy, 4.

providers, must comply with the requirements of the *Privacy Act 1998* (Cth).[849]

8.81 An issue for consideration is whether the duty in section 249 of the *Guardianship and Administration Act 2000* (Qld) should also apply to service providers, informal decision-makers, carers, family, and friends of an adult, who are not currently covered by the duty. The Commission notes that imposing a duty on such people would substantially widen its scope. It also notes that disclosures of confidential information by these groups of people occur frequently outside of regimes such as this and that enforcement of the duty may be very difficult.

What information should be protected by the duty?

8.82 For both section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld), 'confidential information' is defined as including 'information about a person's affairs', but not information that is either already publicly disclosed (unless further publication is prohibited by law), or statistical or other information that is not reasonably expected to reveal a person's identity.[850]

Information about a person's affairs

8.83 A question arises as to what information will be regarded as 'information about a person's affairs'. This phrase is not defined in the guardianship legislation and has not received judicial consideration. However, 'personal affairs' information refers in freedom of information legislation to information that affects an individual or that is of private concern to a person.[851] For example, information about a person's financial affairs, state of health, personal relationships, or personal attributes might be considered personal affairs information.[852] A similar meaning is likely to be ascribed to the phrase 'information about a person's affairs' under the guardianship legislation.

8.84 It is also noted that information may relate to the affairs of more than one person.[853] For example, a document produced by one person may contain details of an

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849 The National Privacy Principles of the *Privacy Act 1998* (Cth) apply to all private health service providers, and to private sector organisations with an annual turnover of more than $3 million: *Privacy Act 1998* (Cth) ss 16, 16A(2), 6C(1) definition of 'organisation'. The National Privacy Principles must also be complied with by some small businesses (with an annual turnover of $3 million or less) such as those that disclose personal information about another individual to anyone else for a benefit, service or advantage: see *Privacy Act 1998* (Cth) s 6D(4)(c)–(e). The National Privacy Principles provide, in part, that personal information must not be used or disclosed for a purpose other than the purpose for which it was collected except in certain circumstances: *Privacy Act 1998* (Cth) sch 3, s 2.

850 *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of 'confidential information'); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of 'confidential information').

851 See *Re Williams and Registrar of the Federal Court of Australia* (1985) 8 ALD 219, 221 (Beaumont J); *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 435 (Lockhart J); *Director of Public Prosecutions (Vic) v Smith* [1991] VR 63, 69 (Kaye, Fullagar and Ormiston JJ). See also, for example, s 4(1) of the *Freedom of Information Act 1991* (SA) which provides that personal affairs of a person includes that person's financial records, criminal records, marital or other personal relationships, employment records, and personal qualities or attributes.

852 See *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533, 539 (Sweeny, Keely and Ryan JJ).

853 That information in a single document can contain personal information about more than one person is acknowledged in the context of freedom of information legislation where such information is referred to as 'mixed personal information'*: Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556, 565 (Deputy President SA Forgie); *Richardson and Commissioner of Taxation* [2004] 81 ALD 486, 503 (Deputy President SA Forgie).

opinion expressed by a second person about a third person. Information about a person's affairs will be confidential, however, only if it could reasonably identify 'the person to whom the information relates'.[854] This issue is of particular significance in relation to the disclosure of information and is discussed below in relation to the exceptions to the duty.[855]

8.85 Another issue for consideration is whether the duty should apply to information about a person's affairs and/or to some other information. As noted above, the legislation in other Australian jurisdictions refers to different types of information. In New South Wales, *any* information that is gained in connection with the administration of the legislation is protected.[856] In Queensland, confidential information *includes* information about a person's affairs, but presumably can also include other information too.[857]

8.86 In other jurisdictions, the only information that is captured by the duty is that which deals with a person's affairs.[858] In some other jurisdictions, however, it is only information about an *adult's* affairs that must be kept confidential.[859] An issue for consideration is whether the duty should apply to all information, information about a person's affairs, or information about an adult's affairs.

Information that is not publicly disclosed

8.87 A further issue for consideration is whether information that is known to some people, but not to others, is 'publicly disclosed' and therefore not confidential. Information about a person's affairs will only be treated as confidential under the guardianship legislation if it has not already been publicly disclosed (unless further disclosure is prohibited by law).[860] This is consistent with the equitable doctrine of confidence which provides that once information has entered the public domain, it no longer has the necessary quality of confidentiality.[861]

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854 *Powers of Attorney Act 1998* (Qld) s 74(3)(b); *Guardianship and Administration Act 2000* (Qld) s 249(4)(b). This is consistent with the definition of 'personal information' adopted by much of the freedom of information and privacy legislation and standards in Australia as information about a person whose identity is apparent or can reasonably be ascertained: *Freedom of Information Act 1982* (Cth) s 4(1); *Privacy Act 1998* (Cth) s 6; *Privacy and Personal Information Protection Act 1998* (NSW) s 4; Information Standard 42 Information Privacy (Qld), 7; *Information Privacy Act 2000* (Vic) s 3; PCO21 Information Privacy Principles Instruction, Cabinet Administrative Instruction No 1 of 1989 (SA) s 3; *Freedom of Information Act 1992* (WA) s 9, sch 1; *Information Act* (NT) s 4; *Personal Information Protection Act 2004* (Tas) s 3.

855 See para 8.99–8.102.

856 See para 8.38.

857 *Powers of Attorney Act 1998* (Qld) s 74(4) (definition of 'confidential information'); *Guardianship and Administration Act 2000* (Qld) s 249(4) (definition of 'confidential information').

858 See para 8.39.

859 See para 8.40.

860 *Powers of Attorney Act 1998* (Qld) s 74(3)(a); *Guardianship and Administration Act 2000* (Qld) s 249(4)(a).

861 Mallam P, Dawson S and Moriarty J, *Media and Internet Law and Practice* (revised ed, 2005) [12.1850]; RP Meagher, WMC Gummow and JRF Lehane, *Equity Doctrines and Remedies* (3rd ed, 1992) [4112].

8.88 It is not clear, however, what is required for information to be 'publicly disclosed' under the guardianship legislation. In other contexts, information has been regarded as being publicly disclosed only if it is disclosed to the public at large,[862] to a substantial number of people,[863] or to a wide audience.[864] If a similar interpretation is adopted for the guardianship legislation, limited disclosures, made under an exception to the duty for example, would be unlikely to affect the continued confidentiality of the information. However, a disclosure made to a wide audience, for example, in breach of the duty or by a person who is not subject to the duty (such as a journalist), may mean that the information subsequently loses its protection.

8.89 This raises the appropriateness of excluding information that has already been publicly disclosed from the application of the duty. The duty of confidentiality is imposed because the information is personal; that may not change if the information is published.[865] It may seem unreasonable, for example, for a fleeting or inconspicuous publication of such information, particularly one that is made in breach of the duty, to remove any subsequent protection and allow future, and possibly more enduring forms of, disclosure.[866]

Identifying information

8.90 Section 74(4) of the *Powers of Attorney Act 1998* (Qld) and section 249(4) of the *Guardianship and Administration Act 2000* (Qld) provide that 'confidential information' does not include 'statistical or other information that could not reasonably be expected to result in the identification of the person to whom it relates'. It is noted, however, that the same formulation is not adopted for section 112 of the *Guardianship and Administration Act 2000* (Qld) which prohibits the disclosure of 'the identity of a

862 In the context of a provision that prohibits publication of 'any particulars likely to lead to the identification of a person against whom a sexual assault is alleged to have been committed', the term 'publish' has been construed as meaning 'to make public, to make generally known, to disseminate to the public at large': *Hinch v Director of Public Prosecutions* [1996] 1 VR 683. This construction was adopted to prevent 'disclosures made in confidence' being caught by the legislation, including, for example, the absurdity of a parent being unable to tell their spouse of an assault upon their child: *Hinch v Director of Public Prosecutions* [1996] 1 VR 683, 692 (Phillips JA and McDonald AJA).

863 The public domain exception to the equitable obligation of confidence is such that 'information only ceases to be confidential when it is known to a substantial number of people' and will remain confidential even if it is shared on a consensual basis with a limited number of friends and acquaintances: M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) 195, [6.93], [6.95], citing *Stephens v Avery* [1988] Ch 449, 454–5, 554–5; *A v B plc* [2001] 1 WLR 2341.

864 In the family law context, the term 'disseminates to the public' has been interpreted as meaning 'widespread communication with the aim of reaching a wide audience' and so would not include communications 'between persons who can demonstrate an interest beyond that of an ordinary member of the public': *Re Edelsten; Donnelly v Edelsten* (1988) 80 ALR 704, 708; *Hinchcliffe v Commissioner of Police of the Australian Federal Police* (2001) 118 FCR 308; *Re W: Publication Application* (1997) 21 Fam LR 788, 809 (Fogarty and Baker JJ). By contrast, for the law of defamation, a 'publication' is any communication or conveyance of the information to a third party, so that information may be published even if it is disclosed to one person: *Encyclopaedic Australian Legal Dictionary*, 'publish or cause to be published'; *Pullman v Walter Hill & Co* [1891] 1 QB 524.

865 This might be contrasted with information such as trade secrets, for which further protection from disclosure is not warranted because the value of the information is lost once it becomes public: M Warby et al, 'Privacy and Confidentiality' in M Tugendhat and I Christie (eds) *The Law of Privacy and the Media* (2002) 195, [6.93], citing *A-G v Times Newspapers Ltd* [2001] 1 WLR 885.

866 See the discussion of this in the context of equitable breach of confidence cases in D Butler and S Rodrick, *Australian Media Law* (2nd ed, 2004) [6.60].

person involved in a proceeding'.[867] An issue for consideration is whether the references to identifying information under each of these provisions should be consistent.

What sort of conduct should the duty prohibit?

8.91 Another issue for consideration is the type of conduct that should be prohibited by the legislation. Section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) prohibit both the making of a record of confidential information and the intentional or reckless disclosure of confidential information.[868]

Intentional and reckless disclosures

8.92 The duty not to disclose confidential information is currently limited to intentional or reckless disclosures. 'Intentional' disclosures are those made for the purpose of disclosing the information[869] and 'reckless' disclosures are those where there is foresight of the probable consequences of actions but a person displays indifference as to whether or not those consequences occur.[870] An issue for consideration is whether the duty should also prohibit the disclosure of information that occurs in circumstances where the person *ought* to have foreseen that the disclosure was likely to occur as a consequence of their actions. In other words, it may be that the duty should also prohibit negligent disclosures.

8.93 There is also an inconsistency between the duty not to disclose information, which is prohibited if it occurs intentionally or recklessly, and the duty not to make a record, which is not subject to those qualifications, and so is stricter in its application.[871] The rationale for such a distinction may be that a person has greater control over when they make a record as that is usually a deliberate act, and so the duty imposed can be stricter.

Secondary disclosures

8.94 Whether the duty should also prohibit secondary disclosures as it does in some other jurisdictions is another issue to consider.[872] Presently, information may, under an exception to the duty, be disclosed to a person who is not subsequently required by the

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867 *Guardianship and Administration Act 2000* (Qld) s 112(3). See para 7.3–7.5 in Chapter 7 (Publication of Tribunal proceedings).

868 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1).

869 See, for example, *Ianella v French* (1968) 119 CLR 84, 95 (Barwick J):

> The word intention itself obscures a difficulty. Thus it is said on some occasions to be satisfied by mere volition to do the specific act in question. But in truth, in my opinion, the word contains in its connotation elements of purpose.

870 See, for example, *R v Nuri* [1990] VR 641, 643 (Young CJ, Crockett and Nathan JJ), citing *R v Crabbe* (1985) 156 CLR 464 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).

871 *Powers of Attorney Act 1998* (Qld) s 74(1); *Guardianship and Administration Act 2000* (Qld) s 249(1).

872 See para 8.43.

legislation to keep the information confidential. It may seem incongruous with the intent of the duty not to prevent that third party from further disclosing information that they received under one of the limited exceptions permitted by the legislation.

8.95 However, a prohibition on secondary disclosures would have significant implications for the scope of the duty as it could involve imposing a legislative duty on people beyond those involved in the administration of the legislation. It may catch, for example, people who receive information casually or inadvertently. It may also lead to the unintended situation that information given to a court during proceedings, which is a disclosure already permitted by the guardianship legislation, may then be prohibited from being further disclosed in that court's reasons for judgment.

Making a record

8.96 One issue to consider is whether the duty of confidentiality should continue to include the making of a record of confidential information. It could be argued a general duty not to make a record of information (unless one of the legislation's exceptions applies) may undermine a person's ability to properly undertake the tasks for which they have received the information. Another consideration is whether the harm of widespread dissemination of confidential information is sufficiently addressed by prohibiting the disclosure of that information.

8.97 However, privacy legislation has recognised the importance of regulating the collection, storage, and use of personal information as part of protecting information privacy.[873] For example, one of the concerns that arises with recording information, particularly on centralised computerised storage systems, is that it gives rise to a risk of unauthorised disclosure or misuse[874] which is prolonged the longer the record is kept.[875]

Should there be any exceptions to the duty, and what should they be?

8.98 Although section 74 of the *Powers of Attorney Act 1998* (Qld) and section 249 of the *Guardianship and Administration Act 2000* (Qld) impose a duty of confidentiality upon certain people, those provisions also recognise a number of exceptions to that duty.[876] This section of the chapter outlines some issues to consider in relation to the general exceptions to the duty (those that apply generally) and the exceptions that apply specifically to the Adult Guardian:

- disclosures authorised by the person to whom the information relates;
- disclosures made for the Act;

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873 See, for example, the Information Privacy Principles and National Privacy Principles contained in the *Privacy Act 1988* (Cth) and the Information Privacy Principles contained in the Information Standard 42 Information Privacy, issued under *Financial Management Standard 1997* (Qld) ss 22(2), 56(1), <http://www.governmentict.qld.gov.au//02_infostand/standards.htm> at 24 July 2006. See n 754 and 755.

874 Australian Law Reform Commission, *Privacy*, Report No 22 (1983) Vol 1, [572]–[579], [1031], Vol 2, [1222].

875 Ibid [575].

876 *Powers of Attorney Act 1998* (Qld) s 74(2); *Guardianship and Administration Act 2000* (Qld) s 249(3). See para 8.18.

- disclosures in the adult's interests;
- other potentially reasonable disclosures;
- consistency within the guardianship legislation; and
- specific exceptions for the Adult Guardian.

Disclosures authorised by the person to whom the information relates

8.99 One of the general exceptions to the duty is where the disclosure is authorised 'by the person to whom the information relates.'[877] An issue for consideration is how that exception might operate when the information relates to more than one person.

8.100 Under federal freedom of information legislation, information about the personal affairs of both the person seeking access to the information (the applicant) and of a third person is known as 'mixed personal information.'[878] In that regime, information can be released to the applicant only to the extent that it can be separated from information about the affairs of the third person, unless the third person consents to the release of information about their personal affairs.[879] While freedom of information legislation is not directly concerned with personal information but with access to government information, the approach of that regime to the release of personal information that would otherwise be exempt from disclosure may be instructive for the guardianship legislation.

8.101 As such, it seems likely that to the extent that information about one person is separable from information about another, that person may authorise its disclosure. It would follow that if the information cannot be separated, it could be disclosed only with the authorisation of the other person to whom it also relates.

8.102 This may cause particular difficulties in relation to information about an adult who does not have capacity to consent to disclosure. It is likely that much of the confidential information which is gained by a person in the administration of the guardianship legislation will relate, at least indirectly, to an adult with impaired capacity. Such information will often be difficult, if not impossible, to disentangle from information about the other person to whom the information may also relate. For example, information about a person's actions in caring for an adult may simultaneously comprise information about the carer and the adult. In such cases, it is suggested that a substitute decision-maker for the adult will have power to provide authorisation on the adult's behalf.[880] This is considered below.[881]

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877 *Powers of Attorney Act 1998* (Qld) s 74(2)(d); *Guardianship and Administration Act 2000* (Qld) s 249(3)(e).

878 *Re Collie and Deputy Commissioner of Taxation* (1997) 45 ALD 556, 565 (Deputy President SA Forgie), *Richardson and Commissioner of Taxation* [2004] 81 ALD 486, 503 (Deputy President SA Forgie).

879 *Richardson and Commissioner of Taxation* [2004] 81 ALD 486, 503 (Deputy President SA Forgie).

880 See para 8.27.

881 See para 8.107–8.112.

Disclosures made for the Act

8.103 Another general exception to the duty of confidentiality is where the disclosure or record is made 'for this Act', which includes both the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld).[882] As discussed earlier in relation to the Adult Guardian,[883] information may be disclosed 'for [the] Act' in a number of circumstances.

8.104 For example, a person compelled to give information to the Tribunal[884] or to the Adult Guardian[885] under the legislation would be a disclosure 'for [the] Act'.

8.105 It would also be a disclosure 'for [the] Act' if it was necessary to carry out functions or powers under the legislation. This was discussed in relation to the Adult Guardian,[886] but this can also arise in relation to other people. For example, in making decisions about the adult's health care, a guardian may need to disclose otherwise confidential information about the adult's medical history in the course of seeking medical advice.

8.106 One issue for consideration that arises in relation to disclosures 'for [the] Act' is the power of a substitute decision-maker to make a decision for a 'matter' when that 'matter' is the disclosure of otherwise confidential information about the adult.

Disclosure as a decision about a 'matter'

8.107 It is likely that a decision whether or not to disclose confidential information about an adult will itself be a decision for a matter for which a person may have power and, therefore, such disclosure may be one made for the Act.

8.108 Substitute decision-makers for an adult are given power for particular matters under the guardianship legislation. A guardian or attorney (under an enduring power of attorney) appointed for personal matters, including health matters, has power to do anything in relation to those matters that the adult could have done if they had capacity.[887] An administrator or attorney (under an enduring power of attorney) appointed for financial matters, has power to do anything in relation to those matters

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882 *Powers of Attorney Act 1998* (Qld) s 74(2)(a), (c); *Guardianship and Administration Act 2000* (Qld) s 249(3)(a), (b).

883 See para 8.24–8.27.

884 Section 130 of the *Guardianship and Administration Act 2000* (Qld) provides that the Tribunal may order a person to give information or material to the Tribunal and that a person must comply with such an order unless the person has a reasonable excuse. That section overrides any legislative or common law restriction on disclosure of the information: *Guardianship and Administration Act 2000* (Qld) s 130(6).

885 Section 183 of the *Guardianship and Administration Act 2000* (Qld) provides that the Adult Guardian may require a person to give information to the Adult Guardian and that a person must comply with such a requirement unless the person has a reasonable excuse. That section overrides any legislative or common law restriction on disclosure of the information: *Guardianship and Administration Act 2000* (Qld) s 183(5).

886 See para 8.26.

887 *Powers of Attorney Act 1998* (Qld) s 32(1)(a); *Guardianship and Administration Act 2000* (Qld) s 33(1). Note that in relation to the appointment of guardians, the Tribunal will make limited rather than plenary appointments if possible as appointments can only be made to the extent that the adult's needs are not being met in relation to a matter: *Guardianship and Administration Act 2000* (Qld) s 12(1).

that the adult could have done if they had capacity.[888] A statutory health attorney or an attorney under an advance health directive has power to make decisions about health matters for the adult.[889]

8.109 A matter for which a substitute decision-maker has power is defined under the legislation as one 'relating to' particular issues. For example, a health matter, which is a type of personal matter, is 'a matter relating to health care'.[890] Similarly, a financial matter is 'a matter relating to the adult's financial or property matters'.[891] The words 'relating to' are probably wide enough to mean that a matter will include decisions about whether or not information about the matter should be disclosed.[892] This means, for example, that a decision whether or not to disclose information about the adult's health care will itself probably be a decision for a health matter. Indeed, unless it is a matter on which a substitute decision-maker can decide, no other person would have the power to disclose this information on behalf of the adult.

8.110 Like any other exercise of power for a matter under the legislation, a decision about disclosure would need to be made in compliance with the General Principles. In particular, General Principle 11 requires that the adult's right to confidentiality of information be recognised and taken into account.[893]

8.111 In determining the circumstances in which a substitute decision-maker (or other person) should be permitted to disclose confidential information about an adult, the Commission notes there is a fine balance to consider. On the one hand, excessive weight given to confidentiality of information may inappropriately or unreasonably exclude family members or close friends from participating in the adult's life. For example, where the adult's capacity is impaired due to an acquired brain injury and the adult's previous conduct indicates they would have wanted certain family members to know the information, it may be unreasonable to prevent disclosure of that information to those family members, particularly if the disclosure would not harm the adult.

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888 *Powers of Attorney Act 1998* (Qld) s 32(1)(a); *Guardianship and Administration Act 2000* (Qld) s 33(2). Note that in relation to the appointment of administrators, the Tribunal will make limited rather than plenary appointments if possible as appointments can only be made to the extent that the adult's needs that not being met in relation to a matter: *Guardianship and Administration Act 2000* (Qld) s 12(1).

889 *Powers of Attorney Act 1998* (Qld) ss 35(1)(c), 62(1). Note that an attorney appointed under an advance health directive has power only in the event the adult's directions about the health matter prove inadequate: *Powers of Attorney Act 1998* (Qld) s 35(1)(c), (3).

890 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 4 (definition of 'health matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 4 (definition of 'health matter').

891 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 1 (definition of 'financial matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 1 (definition of 'financial matter').

892 Note that the while the words 'relating to' must be read in context, they 'do not ordinarily require a direct or immediate connection': *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 363 (Gaudron J); *Oceanic Life Ltd v Chief Commissioner of Stamps* (1999) 154 FLR 129, 143 (Fitzgerald JA). See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [12.7].

893 *Powers of Attorney Act 1998* (Qld) s 76, sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) ss 11, 34, sch 1 pt 1.

8.112 On the other hand, if insufficient weight is given to confidentiality of information, disclosures that are inappropriate or disrespectful of the adult's privacy may result. For example, disclosing the contents of the adult's will to family members merely to satisfy the family's interest or curiosity, rather than any need to know the information, may be considered by some to be unreasonable and insensitive.

Disclosures in the adult's interests

8.113 Another issue for consideration is whether the guardianship legislation should permit disclosures to family members, friends, or carers made in the adult's interest. There may be circumstances where such a disclosure would benefit the adult, but none of the current exceptions to the duty of confidentiality apply.

8.114 There is currently power for the Supreme Court or the Tribunal to authorise disclosure if the adult's life or physical safety may be endangered.[894] However, the scope of that power is quite limited. By contrast, in Tasmania, a disclosure is excused if, in the opinion of the Tribunal or the Public Guardian, 'it is in the best interests of the represented person to disclose the information'.[895] An issue for consideration is whether a similar provision should be included in Queensland's legislation.

8.115 Alternatively, another issue is whether the Tribunal should be empowered to authorise disclosures in the public interest generally, rather than being limited to circumstances involving harm, or where the disclosure is in the adult's interests.[896] This would be similar to the power granted to the Tribunal in section 112 of the *Guardianship and Administration Act 2000* (Qld).[897]

Other potentially reasonable disclosures

8.116 There may be other disclosures made by a person that might be appropriate for the guardianship legislation to recognise in certain limited circumstances. For example, if a guardian or an attorney for an adult needs to seek counselling or treatment for any stress or anxiety that might arise from their experiences in their role acting for the adult, it may be reasonable that they disclose that information in the course of that treatment.

8.117 Despite the disclosure in such a scenario being legitimate and being made in the context of a confidential professional relationship, it does not currently fall within any of the exceptions to the duty and would not be captured under any exception for disclosures made in the adult's interest. This may be an unintended consequence of the duty which perhaps should be remedied. It may be that disclosures made in such circumstances would be considered to have been made with a 'reasonable excuse', though this is not currently provided for in the legislation.

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894 *Powers of Attorney Act 1998* (Qld) s 74(2)(e); *Guardianship and Administration Act 2000* (Qld) s 249(3)(f).

895 *Guardianship and Administration Act 1995* (Tas) s 86(1)(b).

896 *Powers of Attorney Act 1998* (Qld) s 74(2)(e); *Guardianship and Administration Act 2000* (Qld) s 249(3)(f).

897 Under s 112(1)–(2) of the *Guardianship and Administration Act 2000* (Qld), the Tribunal may permit the publication of information about Tribunal proceedings or the disclosure of the identity of a person involved in Tribunal proceedings if it is satisfied it is in the public interest. This section is considered in Chapter 7 (Publication of Tribunal proceedings).

Consistency within the guardianship legislation

8.118 A further issue for consideration is whether the general exceptions provided in the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld) should be consistent with each other and with the other confidentiality provisions in the legislation.

8.119 There are some drafting differences between the two statutes in relation to the general exceptions that are provided.[898] For example, while each of the other confidentiality provisions in the guardianship legislation provides that disclosures may be made with a 'reasonable excuse',[899] there is no equivalent excuse under section 74 of the *Powers of Attorney Act 1998* (Qld) or section 249 of the *Guardianship and Administration Act 2000* (Qld). An issue for consideration is whether such an excuse should be available.

Specific exceptions for the Adult Guardian

8.120 As discussed earlier, the Adult Guardian may disclose otherwise confidential information under any of the general exceptions to the duty or, where the information relates to an ongoing investigation, under the specific exception provided in section 250 of the *Guardianship and Administration Act 2000* (Qld).[900]

8.121 An issue for consideration is the extent to which section 250 is necessary. That provision permits the Adult Guardian to disclose confidential information about an issue that is the subject of an investigation in certain limited circumstances. As discussed earlier, to the extent that disclosure of otherwise confidential information is necessary for the conduct of an investigation, it would fall within the general exception for disclosures made 'for this Act'.[901] It could be argued therefore that the provision is unnecessary.

8.122 However, there may be some value in having a provision such as section 250 for clarifying the existing law, or in going further and establishing a statutory framework for when these decisions can be made. When it previously examined this issue in the 1990s, the Commission considered that safeguards on the disclosure of information during investigations by the Adult Guardian should be included 'to ensure fairness to both those who make complaints and those against whom complaints are made'.[902] It noted that 'although in some situations it may be in the public interest for

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898 See also para 8.19.

899 A person must not contravene a confidentiality order unless the person has a reasonable excuse: *Guardianship and Administration Act 2000* (Qld) s 109(6). A person must not, without reasonable excuse, publish information about a proceeding, or disclose the identity of a person involved in a proceeding, unless the Tribunal has, by order, permitted the publication or disclosure: *Guardianship and Administration Act 2000* (Qld) s 112(3).

900 See para 8.23.

901 See para 8.25–8.26.

902 Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report 49 (1996) Vol 1, 414.

information about investigations to be disclosed, the information may be highly sensitive and disclosure may have serious consequences'.[903]

8.123 Section 250(3) incorporates some such safeguards. It provides that a complainant can be identified in a disclosure only if it is necessary and reasonable.[904] It also ensures that before an opinion that is critical of an entity is disclosed, the entity has been given a chance to answer the criticism.[905] Subsections 250(1) and (2) also contribute to the statutory framework by establishing some criteria for such disclosures, stating that it is permitted only if it will not prejudice the investigation and if it is 'necessary and reasonable in the public interest'.

8.124 One issue for consideration in relation to section 250 is whether its safeguards and criteria are appropriate. Another is whether the provision should also include a specific reference to permitting the Adult Guardian to disclose critical or adverse information about a person to that person. Although the current wording of section 250(1) is currently wide enough to permit such disclosure, as it refers to 'disclosing information to a person', it may be useful to place the matter beyond doubt.

BALANCING CONCEPTS

8.125 This part of the chapter briefly considers, in the context of the confidentiality of information gained by a person in the course of the administration of the guardianship legislation, the three concepts examined in Chapter 3: open justice, procedural fairness, and the nature of the guardianship system.

Open justice

8.126 The principle of open justice applies to the conduct of judicial or quasi-judicial proceedings[906] and so is of limited application in this chapter. Nevertheless, the factors that underpin open justice, such as accountability and transparency, should inform decision-making generally and so may suggest a more limited duty of confidentiality for those involved in the administration of the guardianship legislation.

Procedural fairness

8.127 Procedural fairness generally militates against strict confidentiality of information that should, in fairness, be made available to people with an interest in the matter. One of the requirements of the 'fair hearing rule', for example, is that a person about whom a decision is being made must be apprised of the substance of the evidence upon which the decision-maker intends to rely and be given a reasonable opportunity to

903 Ibid.

904 *Guardianship and Administration Act 2000* (Qld) s 250(3)(b).

905 *Guardianship and Administration Act 2000* (Qld) s 250(3)(a). An 'entity' includes a 'person' (which includes an individual and a corporation) and an unincorporated body: *Acts Interpretation Act 1954* (Qld) ss 32D(1), 36 (definitions of 'entity' and 'person').

906 *R v Hamilton* (1930) 30 SR (NSW) 277; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs CJ).

respond to it.[907] Such an obligation may arise, for example, in relation to decisions made by the Adult Guardian, such as to suspend the operation of an attorney's powers,[908] and also in relation to investigations conducted by the Adult Guardian.[909]

8.128 Procedural fairness, with its commitment to open decision-making, may therefore prefer a constrained duty of confidentiality. At a minimum, it would require that any duty include sufficient exceptions to permit appropriate disclosures so that any decision made is both fair and based on accurate and complete evidence.

Nature of the guardianship system

8.129 The nature of the guardianship system may favour the confidentiality of personal information that is gained through being involved with the legislation.

8.130 The guardianship system is a protective one in which personal and sensitive information about an adult and people close to the adult is received by many different people and entities.[910] Of primary concern is the avoidance of harm to the adult, including harm to the adult's privacy interests.[911] Privacy is of particular concern in this system given that much of the personal information gained as a consequence of the legislation relates to matters that would, but for the adult's impaired capacity, be dealt with in private.[912] A duty of confidentiality may help protect the adult's privacy interests by limiting disclosures of confidential information.

8.131 However, decisions made within the guardianship system by the Adult Guardian, for example, may have a significant and serious impact on an adult and on other people involved with the adult. The desire for accountability and transparency in decision-making within the guardianship system may favour disclosure of otherwise confidential information in certain circumstances,[913] particularly to the person to whom the information relates.[914]

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907 WB Lane and S Young, *Administrative Law in Queensland* (2001) 57–8. See para 3.34–3.36 in Chapter 3 (Guardianship and confidentiality).

908 *Guardianship and Administration Act 2000* (Qld) s 195(1). See ch 8 pt 3 of the *Guardianship and Administration Act 2000* (Qld) in relation the Adult Guardian's other protective powers.

909 See ch 8 pt 2 of the *Guardianship and Administration Act 2000* (Qld) in relation the Adult Guardian's investigative powers.

910 See para 3.52–3.61 in Chapter 3 (Guardianship and confidentiality).

911 See para 3.54–3.55 in Chapter 3 (Guardianship and confidentiality). Note also, for example, General Principle 11 which provides that '[a]n adult's right to confidentiality of information about the adult must be recognised and taken into account': *Powers of Attorney Act 1998* (Qld) s 76, sch 1 pt 1; *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1.

912 See para 3.56 in Chapter 3 (Guardianship and confidentiality). There may also be privacy-based reasons, independent of the nature of the guardianship system, that favour a duty of confidentiality. One of the policies underpinning such duties generally is the notion that a person who receives confidential information due to that person's special position should not disclose that information except in the fulfilment of the responsibilities of that position.

913 See para 3.50–3.51 in Chapter 3 (Guardianship and confidentiality).

914 Note, for example, that in the context of health information, the prevailing view is that a person should be able to access information about themselves: J Hamblin, 'When less is more: should health information always be disclosed to the individual concerned?' (2006) 14(6) *Australian Health Law Bulletin* 72, 72.

8.132 There is also an argument that the protective nature of the guardianship system may favour, in appropriate cases, the disclosure of information about an adult. An adult's interest in their privacy is only one of an adult's rights and interests and it may be that, on balance, a better decision for the adult may be made if otherwise confidential information is disclosed and tested during the decision-making process.

POSSIBLE LEGAL MODELS

8.133 The Commission has identified four possible models, outlined below, for how the law might deal with the issue of confidentiality of information gained by a person through involvement in the administration of the guardianship legislation. These models do not capture all of the relevant issues the Commission is considering, but may provide a useful starting point for thinking about the general approach the law should take.[915] A hypothetical case study is used to illustrate these models and how they might operate.

Model 1: no general duty of confidentiality

8.134 In this model, there would be no general duty of confidentiality in the guardianship legislation in relation to confidential information gained through the administration of the legislation. This is the position under the *Adult Guardianship Act* (NT). Under this model, information may still be subject to duties imposed by other legislation, the general law obligations of confidence[916] or, where it is collected and held by a public sector agency, obligations under the Queensland Government's information privacy principles.[917]

Model 2: a general duty of confidentiality but with no exceptions

8.135 In this model, the duty of confidentiality would be absolute in that there would be no exceptions that permit the disclosure of information gained through involvement in the administration of the legislation. None of the guardianship systems in Australia currently adopt this approach.

Model 3: a general duty of confidentiality with general exceptions

8.136 In this model, there would be a duty of confidentiality imposed but with any number of general exceptions to the duty. This approach is reflected in New South Wales, Victoria, South Australia, and Western Australia.[918]

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915 See the detailed discussion of these issues at para 8.66–8.124.

916 See para 8.4.

917 See n 755 and para 8.4.

918 *Guardianship Act 1987* (NSW) s 101; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 34–36; *Guardianship and Administration Act 1986* (Vic) s14(1), sch 3 cl 3(b); *Guardianship and Administration Act 1993* (SA) s 80; *Guardianship and Administration Act 1990* (WA) s 113; *State Administrative Tribunal Act 2004* (WA) ss 157–158.

Model 4: a general duty of confidentiality with specific exceptions for the Adult Guardian (with or without other general exceptions)

8.137 In this model, the duty of confidentiality will be subject to specific exceptions that permit the Adult Guardian to disclose information in certain circumstances. There may also be a range of general statutory exceptions to the duty as in model 3. This is the current position in Queensland and is also reflected in the Australian Capital Territory and Tasmania.[919]

A case study

Olga is a 78 year old woman with dementia. She lives with her adult daughter, Laura and has another adult daughter, Sue.

Laura has been Olga's primary carer for many years. Olga's children generally have always cooperated in decisions involving their mother and this has pleased Olga who had always encouraged an open approach to family matters.

Recently, a disagreement between Olga's children has arisen in relation to a proposed change her to medication, which eventually resulted in the Adult Guardian being appointed as Olga's guardian (by agreement of the children).

The Adult Guardian has advised the children that she will make a decision about the proposed change in Olga's medication and that it will be based on advice that she has received from Olga's GP and from a specialist doctor. The children wish to see this information.

Olga's estranged brother, Bastian, is also curious about Olga's health and has asked to see this medical information. He and Olga have not been close since a falling out twenty years ago.

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

919 *Guardianship and Administration Act 2000* (Qld) s 250; *Public Advocate Act 2005* (ACT) s 17; *Guardianship and Administration Act 1995* (Tas) s 80(1). It could also be argued that there is a specific exception that applies only to the Public Advocate in Victoria: *Guardianship and Administration Act 1986* (Vic) s 14(2), sch 3 cl 3(b). That arises, however, because that duty of confidentiality is only imposed on the Public Advocate: *Guardianship and Administration Act 1986* (Vic) s 14(2), sch 3 cl 3(b). In any event, that exception is the same as one of the general exceptions considered earlier: it permits disclosures 'in accordance with [the] Act'.

Outcome of case study

8.138 Unless otherwise noted, under the models below, the Adult Guardian, as Olga's appointed guardian, will probably have the power to disclose information by making a decision for such a matter.[920] In considering whether or not to make such a decision, the Adult Guardian would apply the General Principles, including General Principle 11 on confidentiality.[921] The Adult Guardian may conclude that given Bastian's distant relationship with Olga, disclosure of her medical information to him would not be appropriate. The position is likely to be different in relation to Laura and Sue to whom disclosure may be appropriate.

8.139 Under model 1, there would be no statutory duty in the guardianship legislation requiring the Adult Guardian not to disclose the information provided by Olga's GP and by the specialist doctor to Olga's children. As there is no such duty, the Adult Guardian could consider whether to disclose the information as discussed above without having to identify an exception to that duty.[922]

8.140 Under model 2, it is likely that the Adult Guardian would be unable to make disclosures about the doctors' advice. There would be an absolute statutory duty of confidentiality without exceptions so the information could not be shared with Laura, Sue or Bastian.

8.141 Under model 3, disclosure of the doctors' advices by the Adult Guardian would be prevented unless they fell within one of the general exceptions. One of those exceptions might be where the disclosure is made 'for [the] Act'. This may permit the Adult Guardian to make a decision for that matter as discussed above and authorise the disclosure of the information.

8.142 The position would be the same under model 4 as for model 3 except that the Adult Guardian may be able to disclose the information under a specific exception to the duty. Section 250 of the *Guardianship and Administration Act 2000* (Qld), however, is currently limited to disclosures of information about investigations and would not assist the disclosure of the doctors' advices by the Adult Guardian in this case study.

8.143 The case study also raises the issue of whether or not Laura or Sue should be subject to a duty of confidentiality in relation to the information that they know. Currently, they would not be covered by the duty as neither is listed as a person involved in the administration of the guardianship legislation, although they would be encouraged to apply the General Principles.[923]

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920 See para 8.107–8.112.

921 *Guardianship and Administration Act 2000* (Qld) s 34, sch 1 pt 1.

922 Any power to make such a decision, because it is based in legislation, would also override any duties of confidentiality imposed by the general law or by the Queensland Government's information privacy principles: see para 8.4–8.5.

923 *Guardianship and Administration Act 2000* (Qld) s 11(3), sch 1 pt 1.

A preliminary view

8.144 The Commission's preliminary view is that confidential information received as a consequence of a person's involvement in the administration of the legislation should remain confidential, although there are circumstances in which it is appropriate that the information be disclosed or recorded. The Commission also sees some advantages in providing a statutory framework for disclosures during investigations by the Adult Guardian.

8.145 Accordingly, the Commission has a preliminary preference for model 4: a statutory duty with general exceptions to the duty as well as specific exceptions for the Adult Guardian. The Commission does not have views at this stage as to what should be the precise content or extent of the duty or its exceptions.

CALL FOR SUBMISSIONS

8.146 The Commission is interested in receiving submissions in response to the following questions, or on any other issues respondents consider relevant to the confidentiality of information gained because of a person's involvement in the administration of the legislation. You may wish to nominate your preferred legal model or provide more detailed comment on the particular issues that follow.

Possible legal models

8-1 Should Queensland's guardianship legislation reflect one of the following models in relation to the duty of confidentiality imposed on information gained through a person's involvement in the administration of the legislation:

- **(a) Model 1: no general duty of confidentiality;**
- **(b) Model 2: a general duty of confidentiality but with no exceptions;**
- **(c) Model 3: a general duty of confidentiality with general exceptions;**
- **(d) Model 4: a general duty of confidentiality with specific exceptions for the Adult Guardian (with or without other general exceptions);**
- **(e) Other models?**

Particular issues

8-2 Should a person be subject to a duty of confidentiality in relation to information gained through their involvement in the administration of the guardianship legislation?

8-3 If so, to whom should the duty apply:

(a) specific people who gain information through their involvement in the administration of the legislation such as:

(i) Tribunal members and staff;

(ii) the Adult Guardian and his or her staff;

(iii) the Public Advocate and his or her staff;

(iv) community visitors and other staff of the community visitor program;

(v) guardians, administrators, and attorneys for an adult;

(b) all people who gain information through their involvement in the administration of the legislation;

(c) other people?

8-4 If yes to question 8-2, what information should the duty protect:

(a) any information gained through a person's involvement in the administration of the legislation;

(b) information about any person's affairs;

(c) information about an adult's affairs only;

(d) only information that has not already been publicly disclosed;

(e) only information that could reasonably be expected to identify a person;

(f) other information?

8-5 If yes to question 8-2, what type of conduct should the duty prohibit:

(a) intentional or reckless disclosure of the information;

(b) negligent disclosure of the information;

(c) making a record of the information;

(d) secondary disclosure of the information;

(e) other conduct?

8-6 If yes to question 8-2, should there be any general exceptions to the duty and, if so, what should they be:

(a) exceptions currently provided for under the guardianship legislation:

(i) if acting under the guardianship legislation;

(ii) to discharge a function under another law;

(iii) for a proceeding in a court or relevant tribunal;

(iv) if authorised under a regulation or another law;

(v) if authorised by the person to whom the information relates;

(vi) if authorised by the Tribunal in the public interest because a person's life or physical safety could otherwise be endangered;

(b) if it is in the adult's interests;

(c) if the person has a reasonable excuse;

(d) other exceptions?

8-7 If yes to question 8-2, should there be any exceptions to the duty specific to the Adult Guardian and, if so, what should they be:

(a) if the disclosure is made about an issue the subject of an investigation;

(b) other exceptions?

8-8 If there should be an exception specific to the Adult Guardian for disclosures of information about an issue the subject of an investigation, what criteria should govern that disclosure:

(a) the Adult Guardian must first be satisfied the disclosure is necessary and reasonable in the public interest;

(b) the disclosure must not be likely to prejudice the investigation;

(c) the complainant must not be identified except where the identification is necessary and reasonable;

(d) a critical opinion expressed about an entity to another person may occur only if the entity has been given an opportunity to answer the criticism;

(e) other criteria?

8-9 If there should be an exception specific to the Adult Guardian for disclosures of information about an issue the subject of an investigation, should that exception specifically permit the Adult Guardian to disclose critical or adverse information about a person to that person?

Appendix 1

Terms of reference

A review of the law in relation to the General Principles, the scope of substituted decision-making, the role of the support network, adequacy of investigative powers, health and special health matters, and other miscellaneous matters, under the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*

1. I, LINDA LAVARCH, Attorney-General and Minister for Justice, having regard to—

   - the need to ensure that the General Principles continue to provide an appropriate balance of relevant factors to protect the interests of an adult with impaired capacity;

   - the need to ensure that the powers of guardians, administrators and other officers or bodies established by the legislation are sufficiently extensive to protect the interests of an adult with impaired capacity;

   - the need to ensure that there are adequate and accessible procedures for review of decisions made under the Acts;

   - the need to ensure that adults are not deprived of necessary health care because they have impaired capacity;

   - the need to ensure that adults with impaired capacity receive only treatment that is necessary and appropriate to maintain or promote their health or wellbeing, or that is in their best interests;

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

   - the fact that some parents of a person with impaired capacity (whether or not an adult), may wish to make a binding direction, appointing a guardian or administrator for a matter for the adult, that applies if the parents are no longer alive or are no longer capable of exercising a power for a relevant matter for the adult;

   refer to the Queensland Law Reform Commission (the Commission), for review pursuant to section 10 of the *Law Reform Commission Act 1968*—

(a) the law relating to decisions about personal, financial, health matters and special health matters under the *Guardianship and Administration Act 2000 a*nd the *Powers of Attorney Act 1998* including but not limited to:

- the General Principles;
- the scope of personal matters and financial matters and of the powers of guardians and administrators;
- the scope of investigative and protective powers of bodies involved in the administration of the legislation in relation to allegations of abuse, neglect and exploitation;
- the extent to which the current powers and functions of bodies established under the legislation provide a comprehensive investigative and regulatory framework;
- the processes for review of decisions;
- consent to special medical research or experimental health care; and
- the law relating to advance health directives and enduring powers of attorney; and
- the scope of the decision-making power of statutory health attorneys; and
- the ability of an adult with impaired capacity to object to receiving medical treatment; and
- the law relating to the withholding and withdrawal of life-sustaining measures;

(b) the confidentiality provisions of the *Guardianship and Administration Act 2000*;

(c) whether there is a need to provide protection for people who make complaints about the treatment of an adult with impaired capacity;

(d) whether there are circumstances in which the *Guardianship and Administration Act 2000* should enable a parent of a person with impaired capacity to make a binding direction appointing a person as a guardian for a personal matter for the adult or as an administrator for a financial matter for the adult.

2. In performing its functions under this reference, the Commission is asked to prepare, if relevant, draft legislation based on the Commission's recommendations.

3. The Commission is to provide a final report to the Attorney-General and Minister for Justice on the confidentiality provisions by March 2007, an interim report on the General Principles by September 2007, and a final report on all other matters by the end of 2008.

The Hon Linda Lavarch MP
Attorney-General and Minister for Justice

Appendix 2

Membership of the Reference Group[924]

Ms Paige Armstrong, Manager, Community Advocacy and Support, Endeavour (nominee of ACROD)

Ms Pam Bridges, Residential Care Manager, Aged Care Queensland

Mrs Pat Cartwright, Coordinator, Community Visitor Program

Mr Mark Crofton, Official Solicitor to the Public Trustee

Ms Madonna Cuthbert, Director, Policy and Legislation, Queensland Health

Dr Chris Davis, Director, Geriatric Medicine and Rehabilitation, The Prince Charles Hospital (nominee of Australian Medical Association (Queensland))

Ms Margaret Deane, Manager, Queensland Aged and Disability Advocacy Inc

Mr David Deans, Chief Executive, National Seniors

Mr John Dickinson, Chief Executive Officer, Brain Injury Association of Queensland

Ms Marianne Gevers, Vice-President, Alzheimer's Australia (Qld) Inc

Mr Cameron Gledhill, Communications Officer, Queensland Alliance

Ms Katie Holm, Director, Disability Strategic Policy, Disability Services Queensland

Ms Michelle Howard, Public Advocate

Mrs Bronwyn Jerrard, Principal Legal Consultant, Strategic Policy, Department of Justice and Attorney-General

Ms Ann Lyons, President, Guardianship and Administration Tribunal[925]

Ms Dianne Pendergast, Adult Guardian

Mr Julian Porter, Systems Legal Advocacy, Queensland Advocacy Inc

Mr Graham Schlecht, Executive Director, Carers Queensland

Mr Phil Tomkinson, President, Queensland Parents for People with a Disability Inc

Professor Lindy Willmott, Faculty of Law, QUT

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924 As at July 2006. The Reference Group is chaired by the Honourable Justice Roslyn Atkinson, Chairperson, Queensland Law Reform Commission.

925 Justice Lyons ceased being President of the Guardianship and Administration Tribunal upon her appointment to the Supreme Court of Queensland on 10 July 2006.

Appendix 3

List of submissions and forums

SUBMISSIONS

Prior to the publication of this Discussion Paper, the Commission received 40 submissions from the following interested individuals and organisations:

Mr Stephen Graham Brown

Mr Trevor Croll

Ms Gwenyth Cutler

Mr Rob Davis, President, Queensland Law Society

Mr Ross Davis

Mr Graham Douglas

Mr Brien Dunne and Mr Michael Dunne

Ms Libby Eichmann with Mr Andrew Willis

Guardianship and Administration Reform Drivers (GARD)

Ms Ann Handyside

Ms Jo Hobbs

Mr Neil Hollingsworth

Ms Michelle Howard[926]

Mr Farne Hunt

Ms Bogita Jazazienvski

Ms Norma Kawak

Ms Gabriel Killin

Mr Bob Lee, Sunshine Coast Citizen Advocacy

Ms Felicity Maddison AM

Ms Dianne Moore

Mr Paul Morrison

Mr Doug Peterson

Ms Marion Reid

Mr Neil Reynolds

Ms Angelina Roper

Ms Paula Scully, former Adult Guardian

Mr Harley Sims

Ms Eugenia Slinko

Mrs Jean Tincknell

Dr Laurence Trappett

Ms Katrina Turnbull

Mr Darcy Tyrrell

Uni Research

Mr Matthaus von Schrader

Ms Judy Walker

Ms Mary Walsh OAM

Mr JJ Williams

Ms Karen Williams with Mr Stephen Keim SC

Mrs Beverley Williamson

Mr Mark Wurth

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926 Michelle Howard is currently Queensland's Public Advocate. Her submission was made in a private capacity, prior to her appointment to this position.

FORUMS

The Commission was also invited to participate in two forums at which it received views from the people attending.

Carers Queensland, 'Maintaining a family focus in guardianship reform' (Brisbane, 7 March 2006)

Endeavour, 'Review of Queensland's guardianship laws' (Brisbane, 23 May 2006)

Appendix 4

Glossary

Active party

An active party for a Tribunal proceeding may appear at a hearing before the Tribunal[927] and receive a copy of the Tribunal's decision and any written reasons for the decision.[928] The active parties for a proceeding are:[929]

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

Administrator

A person appointed by the Tribunal as a substitute decision-maker for an adult for a financial matter(s).[930] A person may be appointed as an administrator only if they are 18 years or older, they are not a paid carer or health provider for the adult, and the Tribunal considers them appropriate for appointment.[931]

Adult

A person 18 years or older who has impaired capacity for a matter.

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927 *Guardianship and Administration Act 2000* (Qld) s 123.

928 *Guardianship and Administration Act 2000* (Qld) s 158(1).

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

930 See *Guardianship and Administration Act 2000* (Qld) s 12.

931 *Guardianship and Administration Act 2000* (Qld) s 14(1)(b)–(c).

Adult Guardian

An independent statutory official whose role is to protect the rights and interests of adults with impaired capacity.[932] The Adult Guardian's functions are wide-ranging and include:[933]

- investigating complaints or allegations of neglect, exploitation, or abuse of an adult;
- acting as an attorney for an adult under an enduring document or as an adult's statutory health attorney; and
- acting as an adult's guardian if appointed by the Tribunal.

The Adult Guardian also has a number of protective powers in relation to adults.[934]

Advance health directive

A document made under the *Powers of Attorney Act 1998* (Qld) by a principal (18 years or older) to:[935]

- give directions about a health matter(s) or a special health matter(s) for the principal's future health care; and/or
- appoint an attorney(s) to make decisions about a health matter(s), but not about a special health matter(s), in the event those directions prove inadequate.

An advance health directive may only be made while the principal has sufficient capacity to do so[936] and operates only during a period when the principal no longer has capacity for the matter(s).[937]

Attorney

A person appointed by a principal to exercise decision-making power under a power of attorney, an enduring power of attorney, or an advance health directive for an adult for a matter(s).[938] An attorney may also be a 'statutory health attorney' (also defined in this glossary).[939]

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

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

934 *Guardianship and Administration Act 2000* (Qld) ch 8 pt 3.

935 *Powers of Attorney Act 1998* (Qld) s 35.

936 *Powers of Attorney Act 1998* (Qld) s 42.

937 *Powers of Attorney Act 1998* (Qld) s 36(1).

938 *Powers of Attorney Act 1998* (Qld) ss 8, 32, 35.

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

Capacity

Every adult is presumed to have capacity unless it is otherwise established.[940] An adult will have 'capacity' for a matter if they are capable of:[941]

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

An adult who does not satisfy this criteria in relation to a matter is described as having 'impaired capacity'[942] for that matter.

Community visitors

Community visitors are appointed to safeguard the interests of persons who live or receive services at particular visitable sites.[943] Those sites include residences and services funded by Disability Services Queensland or the Department of Health, some hostels and authorised mental health inpatient services.[944] Community visitors regularly visit those sites and have inquiry and complaint functions.[945]

Confidentiality order

An order made by the Tribunal under section 109 of the *Guardianship and Administration Act 2000* (Qld) to:

- direct who may or may not be present at a hearing;
- direct that a hearing, or part of a hearing, be held in private;
- prohibit or restrict publication of information given before it, or of matters contained in documents before it; or
- prohibit or restrict the disclosure to some or all of the active parties for a proceeding of information given before it, matters contained in documents before it, or the Tribunal's decision or reasons.

De-identified information

Information that has been modified to prevent disclosure of a person's identity.

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

941 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'capacity'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'capacity').

942 *Powers of Attorney Act 1998* (Qld) s 3 sch 3 (definition of 'impaired capacity'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4 (definition of 'impaired capacity').

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

944 *Guardianship and Administration Act 2000* (Qld) s 222; *Guardianship and Administration Regulation 2000* (Qld) s 8 sch 2.

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

Enduring power of attorney

A document made under the *Powers of Attorney Act 1998* (Qld) by a principal (18 years or older) to appoint an attorney(s) to make decisions about a financial or personal matter(s), including a health matter(s).[946] An enduring power of attorney may only be made while the principal has sufficient capacity to do so.[947]

For personal matters, an enduring power of attorney will operate only during a period when the principal no longer has capacity for the particular matter.[948] For financial matters, an enduring power of attorney will operate from the time it is made, unless a different time is specified,[949] and will operate at any time the principal has impaired capacity.[950]

This is different from a *general* power of attorney by which a principal can appoint an attorney(s) to make decisions about a financial or legal matter(s), but not about a personal matter(s).[951] A general power of attorney will operate from the time it is made, unless another time is specified,[952] and will be automatically revoked if the principal no longer has capacity.[953]

Financial matter

A matter relating to an adult's finances or property.[954]

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

947 *Powers of Attorney Act 1998* (Qld) s 41.

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

949 *Powers of Attorney Act 1998* (Qld) s 33(1)–(2).

950 *Powers of Attorney Act 1998* (Qld) s 33(3).

951 *Powers of Attorney Act 1998* (Qld) s 8.

952 *Powers of Attorney Act 1998* (Qld) s 9.

953 *Powers of Attorney Act 1998* (Qld) s 18(1).

954 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 1 (definition of 'financial matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 1 (definition of 'financial matter').

General Principles

Eleven principles contained in the guardianship legislation,[955] which must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a matter for an adult.[956] The community is also encouraged to apply and promote the principles.[957] The General Principles include:[958]

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

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

956 *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2).

957 *Guardianship and Administration Act 2000* (Qld) s 11(3).

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

Guardian

A person appointed by the Tribunal as a substitute decision-maker for an adult for a personal matter(s), including a health matter(s) but not a special health matter(s).[959] A person may only be appointed as a guardian if they are 18 years or older, they are not a paid carer or health provider for the adult, and the Tribunal considers them appropriate for appointment.[960]

Guardianship and Administration Tribunal (the Tribunal)

The Guardianship and Administration Tribunal is a quasi-judicial body whose functions include:[961]

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

Health Care Principle

A principle contained in the guardianship legislation that must be applied by any person or entity performing a function or exercising a power under the guardianship legislation in relation to a health matter(s) or a special health matter(s) for an adult.[962] The Health Care Principle provides that power for a health or special health matter should be exercised in the way least restrictive of the adult's rights and only if the exercise of power :[963]

- is necessary and appropriate to maintain or promote the adult's health or wellbeing, having regard to the adult's views and wishes and information provided by the adult's health provider; or
- is, in all the circumstances, in the adult's best interests.

959 *Guardianship and Administration Act 2000* (Qld) ss 12, 14(2).

960 *Guardianship and Administration Act 2000* (Qld) s 14(1)(a), (c).

961 *Guardianship and Administration Act 2000* (Qld) s 82(1).

962 *Powers of Attorney Act 1998* (Qld) s 76; *Guardianship and Administration Act 2000* (Qld) s 11(1)–(2).

963 *Powers of Attorney Act 1998* (Qld) sch 1 s 12(1)–(2); *Guardianship and Administration Act 2000* (Qld) sch 1 s 12(1)–(2).

Health matters A type of personal matter concerning the adult's health care, other than special health care,[964] including care, treatment, services or procedures for the adult's physical or mental condition carried out or supervised by a health provider.[965]

Impaired capacity When an adult does not have capacity for a matter.

Parens patriae jurisdiction The jurisdiction of superior courts, of ancient origin, deriving from the monarch's obligation to act as *parens patriae* (parent of the people) to protect vulnerable citizens. The jurisdiction allows the court to make a decision on behalf of a person who is incapable of making the decision themselves.

Personal matter A matter (other than a 'special personal matter' or a 'special health matter') relating to an adult's care or welfare. This includes matters about where and with whom an adult lives, health care, diet and education.[966]

Public Advocate An independent statutory official whose role is to promote and protect the rights of adults.[967] The Public Advocate's other functions include:[968]

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

The Public Advocate's functions are aimed at systemic advocacy rather than advocacy on behalf of individual adults.

Public Trustee The Public Trustee of Queensland is a Queensland Government corporation established under the *Public Trustee Act 1978* (Qld),[969] and may be appointed by the Tribunal as an adult's administrator.[970]

964 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 4 (definition of 'health matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 4 (definition of 'health matter').

965 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 5 (definition of 'health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 5 (definition of 'health care').

966 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 2 (definition of 'personal matter'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 2 (definition of 'personal matter').

967 *Guardianship and Administration Act 2000* (Qld) ss 208, 209(a), 211.

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

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

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

Special health matter

A matter relating to an adult's 'special health care' which involves very significant health issues such as:[971]

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

Special personal matter

A matter regarded as being of such an intimate nature that it would generally be inappropriate for another person to make decisions about them on behalf of an adult. These include voting; consenting to marriage; and making or revoking a will, a power of attorney, an enduring power of attorney, or an advance health directive.[972]

Statutory health attorney

A person in a particular relationship with the adult who is declared by the guardianship legislation to be a person with authority to make decisions about health matters for an adult during a period when the adult has impaired capacity for the matter.[973] The legislation lists the relationships in a hierarchical order. The first of the following who is 'readily available and culturally appropriate' to make the decision will be an adult's statutory health attorney:[974]

- the adult's spouse, if the relationship is close and continuing;
- a person 18 years or older who is caring for the adult but who is not a paid carer of the adult; or
- a close friend or relation of the adult 18 years or older and who is not a paid carer for the adult.

If no-one from that list is readily available and culturally appropriate, the Adult Guardian becomes the adult's statutory health attorney.[975]

971 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 7 (definition of 'special health care'); *Guardianship and Administration Act 2000* (Qld) s 3 sch 4, sch 2 s 7 (definition of 'special health care').

972 *Powers of Attorney Act 1998* (Qld) s 3 sch 3, sch 2 s 3 (definition of 'special personal matter'); *Guardianship and Administration Act 2000* (Qld) s sch 4, sch 2 s 3 (definition of 'special personal matter').

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

974 *Powers of Attorney Act 1998* (Qld) s 63(1).

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

Appendix 5

Register an interest

QUEENSLAND LAW REFORM COMMISSION GUARDIANSHIP REVIEW	
Name Mr/Ms/Mrs	
Organisation and position (if appropriate)	
Postal Address	
Telephone Number (optional)	
Email Address	Please tick here □ if you would prefer to be sent information and material via email rather than post
Interest in review (optional) eg, person with a decision-making disability, family, friend, carer, interest group.	

Please return to:

Queensland Law Reform Commission
PO Box 13312
GEORGE STREET POST SHOP QLD 4003

Fax: (07) 3247 9045

Email: qlrcguardianship@justice.qld.gov.au

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