Public accountability, private lives

Reconsidering the Queensland guardianship system's confidentiality requirements

August 2022

The Public Advocate

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Office details
Location: State Law Building, 50 Ann Street, Brisbane, QLD 4000
Mail: GPO Box 149, Brisbane, QLD 4000
Telephone: + (61 7) 3738 9513
Facsimile: + (61 7) 3738 9516
Website: www.publicadvocate.qld.gov.au
Email: public.advocate@justice.qld.gov.au

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Foreword

This report has been prepared for two related reasons.

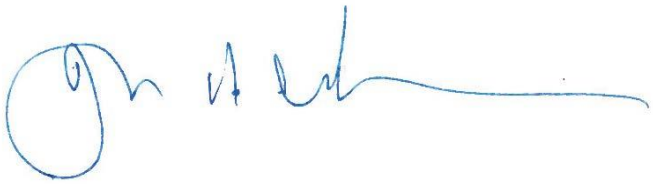
The first is to provide the first-ever publicly-available analysis of the range of 'limitation orders' that are made by the Queensland Civil and Administrative Tribunal. These orders, copies of which are required by the *Guardianship and Administration Act* to be forwarded to my office, seek in a variety of ways to provide 'confidentiality' protections to individuals who are involved in guardianship proceedings.

The second reason for preparing this report is to query the ongoing need for another provision in the guardianship legislation that also has the aim of protecting the confidentiality of people involved in guardianship processes. This provision, section 114A of the *Guardianship and Administration Act,* prohibits publication of the identity of a person who is subject to a guardianship proceeding, unless certain other conditions apply.

The report has three recommendations, which would, should they be adopted: improve the experiences of people in guardianship hearings; enable people to speak publicly about their experiences; and deliver some modest administrative efficiencies.

The writing of this report has been informed by numerous discussions and interactions that I, and other staff members of the office, have had over an extended period of time with many stakeholders, including advocates, representatives, and staff in key guardianship agencies, which include the offices of the Public Guardian, the Public Trustee, members of the Queensland Civil and Administrative Tribunal, as well as their inter-jurisdictional equivalents. I thank all these people for their assistance, while noting that the conclusions and recommendations in the report are not necessarily agreed to by all of them.

The research and writing of this report has been led by Yuu Matsuyama, who has been ably assisted by Tracey Martell, and I thank Yuu and Tracey for their excellent work.



John Chesterman (Dr)
Public Advocate

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Executive Summary

This report considers two aspects of the *Guardianship and Administration Act* that seek to protect the interests of an adult who is the subject of a guardianship proceeding.

The first part of this report concerns limitation orders issued by QCAT during guardianship proceedings. Although proceedings are generally open to the public, QCAT has the ability to make a number of limitation orders that restrict access to the evidence provided to the tribunal during the proceeding. Types of limitation orders that can be made include; adult evidence orders, closure orders, confidentiality orders and non-publication orders.

This report is the first time that the Public Advocate has published an analysis of limitation orders. The report analyses limitation order material received from QCAT for hearings conducted between 2016 and 2020.

Analysis of 217 limitation orders issued between 2016 and 2020 (based on 143 individual cases) found that most were made by QCAT due to situations involving family conflict, child protection proceedings (under the *Child Protection Act 1*999) or other legal proceedings.

Two conclusions were reached;

- limitation orders are often made due to information being confidential under another law, a process that could be streamlined to achieve improved efficiency; and
- some inconsistencies exist in proceedings before QCAT, and further guidance would be helpful to build awareness and understanding of limitation orders and guardianship proceedings.

The second part of this report concerns the current requirement that individuals who are subject to guardianship proceedings cannot be publicly named, unless this is permitted by QCAT or another provision of the *Guardianship and Administration Act.*

The report examines the history and impact of this requirement and concludes that its 'protective' benefit is now outweighed by its cost in inhibiting people from talking publicly about their experiences.

Recommendations

Recommendation 1

The Queensland government should consider creating a new type of limitation order that would automatically apply to information provided to the Queensland Civil and Administrative Tribunal in a guardianship proceeding which is already subject to a confidentiality requirement under another rule or law.

Recommendation 2

The Queensland Civil and Administrative Tribunal should make publicly available the guardianship bench book, or a version of the bench book suitable for use by members of the general public involved in guardianship proceedings. This will assist all parties to participate optimally in proceedings and should be accompanied by an Easy English guide to assist people with impaired decision-making ability to better understand guardianship proceedings.

Recommendation 3

Section 114A of the *Guardianship and Administration Act* should be repealed.

Introduction

The Public Advocate

The position of Public Advocate is established under chapter 9 of the *Guardianship and Administration Act 2000* to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity through systemic advocacy.

Section 209 of the *Guardianship and Administration Act* states that the functions of the Public Advocate are:

> '(a) promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
> (b) promoting the protection of the adults from neglect, exploitation, or abuse;
> (c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
> (d) promoting the provision of services and facilities for the adults;
> (e) monitoring and reviewing the delivery of services and facilities to the adults.'

Impaired decision-making capacity

'Having capacity' means a person can understand the nature and effect of decisions about a matter, can freely and voluntarily make decisions about it, and can communicate their decisions in some way.[1] If a person is unable to do one or more of these things, they may have impaired decision-making capacity.

There are several conditions that may affect a person's decision-making capacity. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse. While not all people with these conditions will experience impaired decision-making capacity, many will at some point in their lives. For some, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times, while others may require lifelong support with decision-making and communicating their choices and decisions.

People with impaired decision-making capacity are a broad and diverse group. They can be from all age groups, cultures, and demographics.

[1] *Guardianship and Administration Act 2000* (Qld) sch 4.

Confidentiality in the guardianship system

This report focuses on two aspects of the *Guardianship and Administration Act* that seek to protect the interests of an adult who is the subject of a proceeding under that Act.

The first relates to limitation orders issued by the Queensland Civil and Administrative Tribunal (QCAT, tribunal) during guardianship proceedings. A 'guardianship proceeding' is defined as including any proceeding under the *Guardianship and Administration Act,*[2] which can include proceedings involving issues around guardianship, administration and enduring powers of attorney.[3] As will be explained in more detail below, limitation orders limit the open nature of proceedings under the *Guardianship and Administration Act* to prevent certain information being disclosed.

Under sections 112 and 113 of the Act, the Public Advocate must receive all material associated with limitation orders issued by tribunal members in guardianship proceedings, including written reasons for decisions. The Public Advocate is then able to report on any systemic issues related to the information provided by the Tribunal.[4]

In the preparation of this report, the Public Advocate has analysed limitation order material sent from QCAT associated with hearings conducted in the five-year period from the start of 2016 to the end of 2020. The report details the type and reasons for the issuing of orders (and trends) and draws conclusions from this analysis about the effectiveness of the relevant provisions.

The second focus of this report is the broad prohibition, pursuant to section 114A of the Act, on the publication of the identity of an adult who is the subject of a guardianship proceeding. This report explains how this provision operates and discusses its history and use. The report then assesses whether this prohibition is still fit for purpose, considering the original thinking behind its adoption, and subsequent developments concerning the rights of people with disability.

The guardianship system

Guardians, administrators and enduring powers of attorney

The *Guardianship and Administration Act* along with the *Powers of Attorney Act 1998* authorise a system of different substitute decision-makers to make decisions on behalf of an adult with impaired decision-making ability.

This includes:

- Guardians: appointed by the tribunal to make decisions about personal matters on behalf of the adult.[5] Personal matters include where to live, who to have contact with, health care and other services, employment and education,[6] but not financial matters.

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[2] *Guardianship and Administration Act* 2000 (Qld) sch 4.

[3] *Guardianship and Administration Act* 2000 (Qld) s 115(1).

[4] Explanatory Notes, *Guardianship and Administration and Other Acts Amendment Bill 2008* 4.

[5] *Guardianship and Administration Act 2000* (Qld) s 12.

[6] *Guardianship and Administration Act 2000* (Qld) sch 2 pt 2.

- Administrators: appointed by the tribunal to make decisions about financial matters on behalf of the adult.[7] Financial matters involve decisions that concern the adult's finances, including paying bills, receiving money, investing and generally all activities that involve the adult's finances or property.[8]
- Attorneys – powers of attorney allow a person (the principal) to appoint another (the attorney) to make decisions for the principal.[9] An enduring power of attorney allows the principal to have an attorney who can make decisions for personal and/or financial matters even after the principal loses capacity to make decisions.[10]

An appointment of a guardian or administrator is to be made only if:

'the tribunal is satisfied—

> (a) the adult has impaired capacity for the matter; and
> (b) there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the adult's health, welfare or property; and
> (c) without an appointment—
> (i) the adult's needs will not be adequately met; or
> (ii) the adult's interests will not be adequately protected.'[11]

Queensland Civil and Administrative Tribunal

The *Guardianship and Administration Act* provides the tribunal with the jurisdiction to hear matters that involve people with impaired decision-making ability related to that Act or the *Powers of Attorney Act*.[12]

Broadly speaking, this means that the tribunal has jurisdiction for hearings that involve guardians, administrators and attorneys. Examples of the powers of the tribunal include; appointing guardians and administrators,[13] providing advice, directions or recommendations to guardians, administrators or attorneys,[14] and making declarations regarding an adult's capacity to make decisions.[15]

Open justice and procedural fairness are fundamental aspects of the legal system (inclusive of tribunal hearings), which need to be balanced with the need for privacy and confidentiality in certain situations.[16] Open justice requires several elements, including the right of attendance by the public and media, the ability to report on proceedings, the identification of those involved in proceedings, and access to documents relating to proceedings.[17]

These concepts, in the context of the guardianship system, were explored by the Queensland Law Reform Commission (the QLRC) in its 2007 report, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System.*[18]

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[7] *Guardianship and Administration Act 2000* (Qld) s 12.
[8] *Guardianship and Administration Act 2000* (Qld) sch 2 pt 1.
[9] *Powers of Attorney Act 1998* (Qld) s 5.
[10] *Powers of Attorney Act 1998* (Qld) s 32.
[11] *Guardianship and Administration Act 2000* (Qld) s 12(1).
[12] *Guardianship and Administration Act 2000* (Qld) s 115.
[13] *Guardianship and Administration Act 2000* (Qld) s 12.
[14] *Guardianship and Administration Act 2000* (Qld) s 138.
[15] *Guardianship and Administration Act 2000* (Qld) s 146.
[16] See, for example, discussions in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) 45.
[17] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) 51.
[18] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007).

The QLRC report examined and created the provisions of the Act that are discussed below, which seek to balance the need for openness alongside unique aspects of the guardianship system. Overall, the guardianship system retains the broad principles of open justice however includes several limitations relating to confidentiality and limitation orders discussed below.

Since the introduction of these provisions in the Act, QCAT has also released a practice direction pertaining to this area (September 2021). The Practice Direction (No. 8 of 2021) states that, although all parties to a proceeding can access documents held by QCAT for a guardianship proceeding, non-parties cannot access documents until after the hearing is finalised, and even then must show a 'sufficient interest' in the proceedings before being able to access those documents.[19] As this report examines limitation orders made up until the end of 2020, the effect of this practice direction is not reflected in the analysis.

Limitation orders

The current suite of limitation orders were put in place in keeping with the recommendations from the QLRC on how the Queensland guardianship system should balance the need to protect the privacy of individuals while also ensuring 'public justice' – adequate accountability of the appointment and practices of individuals and agencies with guardianship roles and responsibilities.

Limitation orders have the effect of restricting access to evidence that is provided to QCAT during guardianship proceedings. Although QCAT proceedings are generally open and are conducted in public,[20] this can be limited through 'limitation orders' when there needs to be a balance between openness and other considerations that require a level of confidentiality. This section of the report examines the use of the four types of limitation orders available to QCAT[21] over a five-year period and analyses key themes that have emerged.

Four different types of limitation orders can be issued as detailed below.

Adult evidence order

If QCAT is satisfied that it is necessary to avoid serious harm or injustice to any person or to obtain relevant information QCAT would not otherwise receive, QCAT may, by an adult evidence order, obtain relevant information from the adult concerned in the matter at a hearing in the absence of anyone else, including parties to the proceedings.[22]

Closure order

If QCAT is satisfied that it is necessary to avoid serious harm or injustice to any person, QCAT may to the extent necessary make a closure order.[23] This can result in the closure of the hearing or part of the hearing to all or some members of the public, including parties to the proceedings.

[19] This Practice Direction relies upon section 103 of the *Guardianship and Administration Act* and clarifies QCAT's position in relation to how this provision interacted with section 230 of the *Queensland Civil and Administrative Tribunal Act*; for further information, see discussion in Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (Report No 67, September 2010) ch 21.
[20] *Guardianship and Administration Act* 2000 (Qld) s 105.
[21] *Guardianship and Administration Act* 2000 (Qld) ss 106-109.
[22] *Guardianship and Administration Act* 2000 (Qld) s 106.
[23] *Guardianship and Administration Act* 2000 (Qld) s 107.

Non-publication order

If QCAT is satisfied that it is necessary to avoid serious harm or injustice to any person, QCAT may to the extent necessary make a non-publication order and prohibit publication of information about a guardianship proceeding.[24]

Confidentiality order

If QCAT is satisfied that it is necessary to avoid serious harm or injustice to any person, QCAT may to the extent necessary make a confidentiality order and withhold from a party or other person a document, part of a document or information that is before QCAT.[25]

History of limitation orders

In its 2007 report, the QLRC made recommendations to review and revise what are now called 'limitation orders'.[26]

The QLRC reviewed what were then similar provisions in the *Guardianship and Administration Act* called 'confidentiality orders' (not to be confused with the order of the same name today) that had similar functions to limitation orders today, in that they allowed the tribunal in a matter before it to:[27]

- direct who can be present at a hearing;
- direct that a hearing or part thereof be held in private;
- prohibit or restrict publication of information that is before QCAT, or information contained in documents that are before QCAT; or
- prohibit or restrict disclosure to a party of information that is before QCAT, or QCAT's decisions or reasons.

For QCAT to make such an order, the tribunal had to find that the making of such an order was 'desirable to do so because of the confidential nature of particular information or matter or for another reason.'[28]

The QLRC review renamed confidentiality orders as 'limitation orders' and proposed four types of orders, giving each a specific name as detailed above. Additionally, the QLRC proposed changing the grounds on which QCAT could make such an order, moving from the broad test of the orders being 'desirable' due to the information's 'confidential nature' or 'another reason' to the requirement of avoiding serious harm or injustice. In the case of adult evidence orders this was extended to include QCAT hearing information from an adult it would otherwise not receive.

The QLRC's 2007 report also recommended that the Public Advocate potentially have a role in every proceeding in which limitation orders were to be made.[29] The QLRC considered that QCAT should be required to inform the Public Advocate when it was considering making a limitation order and invite the Public Advocate to make submissions regarding that order.

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[24] *Guardianship and Administration Act* 2000 (Qld) s 108.
[25] *Guardianship and Administration Act* 2000 (Qld) s 109.
[26] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007).
[27] *Guardianship and Administration Act 2000* (Qld) s 109(1), later amended by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 10.
[28] *Guardianship and Administration Act 2000* (Qld) s 109(2), later amended by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 10.
[29] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) [4.331].

The QLRC's reasons were that this was due to limitation orders requiring the imposition of safeguards to ensure orders are made after proper scrutiny and consideration. The QLRC believed that the Public Advocate could appear and make submissions to assist the tribunal in testing the necessity of making the order.[30] This was compared to the role of the Public Interest Monitor in applications for surveillance and covert search warrants, with the QLRC considering that such matters required the involvement of an additional 'contradictor'.[31]

Hearing from active parties alone was not considered to be adequate, as limitation orders may involve considerations that 'go beyond the immediate interests of the individuals concerned.'[32]

The QLRC considered that the Public Advocate was in an ideal position to test the appropriateness of a limitation order due to the position being an independent statutory official tasked with systemic advocacy functions under guardianship legislation.[33] The QLRC further considered that the Public Advocate could usefully assist QCAT in testing whether the criteria for making the order would be satisfied, including the Public Advocate receiving all of the information on a matter.

However, when the amendments to change the now section 114A and limitation orders were passed, the only QLRC recommendation that was not implemented concerned the involvement of the Public Advocate as described above.

Reasons provided for not implementing this recommendation included:

- this would constitute a move towards intervention in individual cases that could potentially draw the Public Advocate away from the core role of systemic advocacy;
- the suite of other safeguards to be implemented would result in increased openness and transparency in the guardianship system; and
- the Public Advocate in any case retained the right to intervene in proceedings where there are systemic issues involved.[34]

As an alternative to the QLRC recommendation, the amendments instead implemented the current system of QCAT sending the Public Advocate all relevant information regarding a limitation order after the order is made.[35] The Public Advocate is then able to report on any systemic issues based on the information provided by the tribunal.

Data and analysis

Data

The Public Advocate has reviewed the material sent by QCAT when making limitation orders and analysed each case to determine whether any systemic issues exist. This report concentrates upon broad issues only, and not issues that may have arisen in the making of limitation orders in individual cases.

Material received regarding limitation orders made between the calendar years 2016 through to 2020 were analysed. Although the Public Advocate has received material since 2010 and continues to do so up to the time of the writing of this report, this timeframe was chosen as it was considered to cover a wide range of matters over a relatively recent time period.

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[30] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) [4.332].
[31] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) [4.333].
[32] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) [4.335].
[33] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) [4.336].
[34] Explanatory Notes, *Guardianship and Administration and Other Acts Amendment Bill 2008* 3-4.
[35] Explanatory Notes, *Guardianship and Administration and Other Acts Amendment Bill 2008* 4.

In all, 143 individual cases were analysed, with a total of 217 limitation orders made. There were 26 limitation orders that were considered but not made.

Individual types of limitation orders made were as follows:

Limitation orders	Orders made
Adult Evidence Order	25
Closure Order	27
Non-Publication Order	50
Confidentiality Order	115
Total	**217**

The causal factors in the originating applications of these cases were also analysed. This required placing the original reason as to why the adult and their matter were before QCAT into categories to determine if there were any significant patterns that created the need for limitation orders.

Eight categories were identified as being the most predominant reasons as to why a matter was before QCAT in the context of limitation orders. They were:

- matter involving the *Child Protection Act 1999* (child protection)
- matter involving orders under the *Domestic and Family Violence Protection Act 2012* (DFVPA)
- family conflict
- non-family conflict
- high profile matters
- ongoing legal proceedings (legal proceedings)
- miscellaneous
- matters in which the material did not disclose the exact nature of the causal factor (unknown)

Matter involving the *Child Protection Act 1999* (child protection)

This category involves a matter where the adult in question was a parent or otherwise responsible for a child who was subject to a proceeding under the *Child Protection Act 1999*.

Matter involving orders under the *Domestic and Family Violence Protection Act 2012* (DFVPA)

This category involves matters where there was a Protection Order in place through the *Domestic and Family Violence Protection Act* for a person involved in the proceeding, which may include an adult's partner, relative or the adult themselves.

Family conflict

This is a broad category that covers any issues that involve the adult and their family. This could range from general disagreement about family issues to physical, emotional and/or financial abuse. Although subcategories could have been created under this heading, it was decided for the purpose of analysing limitation orders, a broader heading of family conflict was sufficient.

Non-family conflict

This is similar to the above 'family conflict' category, but not involving relatives of the adult.

High profile

This category involves matters where the adult had a media profile, and information from the proceedings had the potential to be widely reported for other purposes.

Legal proceedings

This category involves matters where there were ongoing legal proceedings (in either civil or criminal jurisdictions) involving the adult, and limitation orders were put in place to not prejudice or disrupt those legal proceedings.

Miscellaneous

This category was created for matters that were not prevalent enough to warrant their own categories. They include matters where information was subject to limitation orders to avoid distress to the adult, to keep private information that was thought of as highly sensitive, or to prevent potential repercussions due to certain information contained in a report.

Unknown

This category is regarding matters where the material received by the Public Advocate did not disclose enough information so that the cause of the matter could be clearly categorised.

The following table details the number, by main causal factor, among limitation order cases:

Causal factor	Number (cases)
Family conflict	45
Child protection	30
Legal proceedings	22
Miscellaneous	16
DFVPA	12
Non-family conflict	6
High profile	6
Unknown	6
Total	**143**

Analysis

It is unsurprising that the most common causal factor in a limitation order being made is family conflict, which is very likely to exist in guardianship proceedings in general. Guardianship matters tend to be very personal and generally relate to conflict that occurs in an adult's life involving those people close to them.

However, the next most common causal factor is more unexpected, being matters that involve the *Child Protection Act*. This Act, among other functions, allows for the making of a child protection order though proceedings in the Childrens Court.[36] A child protection order includes directions from the court requiring or authorising a person to give Child Safety Services custody or guardianship

[36] *Child Protection Act 1999* (Qld) ch 2 pt 4.

(not the same type of guardianship as exists under the *Guardianship and Administration Act*) of a child and to authorise placing a child in out-of-home care.[37]

Issues regarding making limitation orders involving this type of matter, along with *Domestic and Family Violence Protection Act* (DFVPA) matters, are discussed further below.

Legal proceedings are also another category which represents a significant proportion of matters. This is in line with the prevalence of general conflict in an adult's life. The type of legal proceedings can vary, from personal injury compensation matters to property settlements of former close or familial relationships. These limitation orders are generally made for privileged legal information that has been disclosed to QCAT for the tribunal to make decisions for the purposes of guardianship proceedings, but the parties involved felt that it should not be disclosed further as it may affect current or future legal proceedings.

From a systemic standpoint, there are two main issues regarding limitation orders that have been identified, which are discussed below.

Issues

Limitation orders due to information being made confidential under another law

When a child protection order comes before the Childrens Court and it is found that one or both parents involved may have impaired decision-making capacity, the court refers the matter to QCAT to declare whether the adult has capacity, and potentially to have a guardian appointed for the adult under the *Guardianship and Administration Act*. This process is similar to other legal proceedings where a party is thought to lack capacity, as QCAT has the jurisdiction to legally declare capacity[38] and appoint a guardian or administrator[39] so that the adult's interests are properly represented, and the adult's lawyer can take instructions for the case.

However, the *Child Protection Act* includes a number of provisions that make information that was prepared for the purpose of that Act confidential, especially the identities of children who are subject to various actions under the Act.[40] When the adult then comes before QCAT, material that was prepared for the purposes of the *Child Protection Act* is used to support the QCAT application, as the material generally contains information relevant to the adult's capacity, circumstances, and the need for a guardianship order.

Due to the requirements of the *Child Protection Act* to keep identities confidential, QCAT will make a confidentiality order to suppress this information when the tribunal makes its decision. This limitation order is critical to prevent anyone without authorisation from accessing information about a child under the *Child Protection Act* through the QCAT registry.

Although there is no impropriety in this procedure, several issues arise when relying upon limitation orders to suppress information on a QCAT file for which other laws require confidentiality. Although it may be in the adult's interests in making such information confidential, a large factor in these orders being made is undoubtedly the requirement to keep the information confidential due to the *Child Protection Act*. Two observations can be made about this.

Firstly, it is unlikely that limitation orders were intended to be used for this purpose. The limitation order process requires that QCAT apply an 'avoid serious harm or injustice test' to every case in which an order is considered. There are questions around whether the tribunal can determine, in a matter involving the *Child Protection Act*, that 'serious harm or injustice' will occur should the name of a child involved in the proceeding be released.

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[37] *Child Protection Act 1999* (Qld) s 61.
[38] *Guardianship and Administration Act* 2000 (Qld) s 146.
[39] *Guardianship and Administration Act* 2000 (Qld) s 12.
[40] *Child Protection Act 1999* (Qld) s 189.

Presumably the 'serious harm or injustice test' will be assessed in relation to the child, however this could require the tribunal to look at a practical level to determine if this is the case. Would the child suffer such harm or injustice if another person knows that they were part of a *Child Protection Act* matter? If so, what will that harm be?

Similar limitation orders are made when people before QCAT are involved in a *Domestic and Family Violence Protection Act* (DFVPA) order, although it is arguably more straightforward for QCAT to determine that serious harm or injustice may occur to a party whose identity is revealed, considering that DFVPA orders are made in specific, individual cases because of the actual or potential harm that individuals face.

The second issue in this context is that under the *Guardianship and Administration Act*, information in a proceeding is generally only limited through section 114A and limitation orders. Guardianship proceedings before QCAT in most cases do not involve lawyers, and the tribunal's leave is required before a party may be represented by a lawyer; [41] yet without a lawyer being involved, relevant people may not be aware of various confidentiality requirements applicable under different laws.

Although QCAT members are generally cogniscant of the requirements under the *Child Protection Act*, unless a party or the tribunal member initiates a limitation order, it may not be made.

Therefore, it is possible that if a limitation order is not made due to no one in a proceeding considering the issue during a matter where there is a child subject to a *Child Protection Act* order, the information may be made available to others in breach of that Act.

The *Child Protection Act* is one example, but there are other laws that prohibit the publication of certain information, including the DFVPA and many others.[42]

Recommendation 1: The Queensland government should consider creating a new type of limitation order that would automatically apply to information provided to the Queensland Civil and Administrative Tribunal in a guardianship proceeding which is already subject to a confidentiality requirement under another rule or law.

Such a development would have several advantages:

- it removes the requirement for QCAT to make a determination as to whether the disclosure of that information will cause 'serious harm or injustice', and instead QCAT could apply a potentially far more straightforward procedure of determining whether that information is covered by another law or rule;
- there is much less danger of otherwise confidential information being 'missed' should no person before the tribunal or the member consider the making of a limitation order, due to inadvertently overlooking the need for an order to be made; and,
- there will not be a need to send material for such matters to the Public Advocate, as the primary reason for such confidentiality would be due to the provisions of another law and would not be related to the *Guardianship and Administration Act*. However, such matters should still be reported by QCAT, most likely in its annual report.

However, it is possible that there may be various unintended consequences caused by the proposed change.

[41] *Guardianship and Administration Act* 2000 (Qld) s 124.
[42] See, for example, victims of sexual offending as discussed below regarding section 114A, unless that victim provides consent.

These could include:

- Future parties who have legitimate reasons to access the information on QCAT's file in the interests of an adult may be unable to do so for a subsequent guardianship proceeding.
- Significant practical implications would exist for the QCAT registry that will need to be worked through so that such information is readily identified and kept confidential on file without an order being made by the tribunal. Such issues could be alleviated through the initial application process by asking the applicants and other parties to identify whether they or any other relevant party or person to their knowledge are involved in proceedings that require confidentiality, such as proceedings involving the *Child Protection Act* or DFVPA.
- The new limitation order could extend to information that is subject to legal professional privilege, however this will require an exploration of the complex nature of legal professional privilege and its role in the ideally informal setting of QCAT.

One way in which further unintended consequences could be avoided would be to allow QCAT to have the authority, on a case-by-case basis, to vary the reach of the proposed new 'automatic' limitation order. This would enable QCAT, for instance, to allow an active party in the guardianship proceeding to have access to information that may be confidential under another law if this were necessary for the optimal hearing and determination of the application.

Consistency of proceedings before QCAT

An additional issue noted in the analysis of material sent to the Public Advocate by QCAT is the consistency of the information provided and discussions had with parties during guardianship proceedings.

The analysis did not reveal any instances of inappropriate orders being made by tribunal members. However, based on the material supplied, there appears to be varying degrees of explanation provided by members during guardianship proceedings, both in terms of what limitation orders are, as well as how and why they were made. From a systemic advocacy perspective, the publication of a bench book would assist parties before QCAT to have a more consistent experience and an improved understanding of what to expect from proceedings.

QCAT, in its 2020-21 annual report, notes that it has developed a 'bench book' to assist members in its guardianship jurisdiction.[43] Bench books are generally considered to be a manual for judicial officers that are intended to improve the efficiency and delivery of justice in a court system, in other words, a 'best-practice' manual.[44] The QCAT bench book is currently not publicly available, however bench books for courts in Queensland are published and available from the Supreme Court Library.[45]

The Public Advocate has been informed that considerable work would be required before a guardianship bench book that would be suitable for public use could be published; this may require additional specific resourcing.

An accompanying Easy English guide would also assist those involved in proceedings to understand how guardianship and administration proceedings operate, and the various procedures involved. The development of this type of document is a specialised activity, which may require the engagement of an organisation with appropriate skills and experience in this area.

[43] Queensland Civil and Administrative Tribunal, *Annual Report 2020-21* 23.
[44] The Hon. John von Doussa QC, 'Launch of the Supreme Court Equal Treatment Benchbook' (Speech, Banco Court, Supreme Court of Queensland, 15 February 2006).
[45] Supreme Court Library, *Benchbooks* <https://www.sclqld.org.au/benchbooks>.

Recommendation 2: The Queensland Civil and Administrative Tribunal should make publicly available the guardianship bench book, or a version of the bench book suitable for use by members of the general public involved in guardianship proceedings. This will assist all parties to participate optimally in proceedings and should be accompanied by an Easy English guide to assist people with impaired decision-making ability to better understand guardianship proceedings.

Section 114A

In addition to the four limitation orders, a key provision in the calibration of privacy and public accountability in guardianship proceedings is section 114A of the *Guardianship and Administration Act*. Section 114A deals with the publication of information about guardianship proceedings, with the section beginning with one of the key elements of open justice, that: 'Generally, information about a guardianship proceeding may be published.'[46]

This is followed by Section 114A(2) which states:

> 'However, a person must not, without reasonable excuse, publish information about a guardianship proceeding to the public, or a section of the public, if the publication is likely to lead to the identification of the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published.'

There are several exceptions to the prohibition on identifying the adult:[47]

- the Public Guardian or Public Advocate can do so if it is in the public interest in response to a prohibited publication by another entity;
- after the relevant adult has died; or,
- if a court or tribunal authorises the publication of the information on the basis that it is in the public interest or the adult's interests to do so.

Development of section 114A

Prior to its current form, the rules against publication were more prohibitive. The equivalent provision in the past read as follows:[48]

> '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.'

This prevented the publication of any information about a guardianship proceeding, unless otherwise approved by QCAT.[49]

The QLRC in its 2007 report considered this provision and recommended the changes that now comprise section 114A (as above).[50] Justifying this change, the QLRC discussed the need for balance to exist between open justice and privacy, noting that improvements to the transparency

[46] *Guardianship and Administration Act* 2000 (Qld) 114A(1).
[47] *Guardianship and Administration Act 2000* (Qld) 114A(3).
[48] *Guardianship and Administration Act 2000* (Qld) s 112(3), later amended by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 11.
[49] *Guardianship and Administration Act 2000* (Qld) s 112(1)-(2), later amended by the *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 11.
[50] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) ch 7.

of QCAT proceedings could promote accountability and enhance community confidence in guardianship proceedings.[51] The justification also included references to improving community understanding of the law, recommending that information about QCAT proceedings should generally be able to be published. However, the QLRC also recommended that, given the particular vulnerabilities of adults involved in such proceedings, the identity of the adult should not be able to be published.

Data regarding section 114A

The Public Advocate enquired with QCAT regarding how often people applied to the tribunal to authorise the publication of an adult's identity. According to QCAT, such applications are not common, and only one has been made in recent memory.

Issues

The primary issue associated with section 114A, in the Public Advocate's view, is that it prohibits an adult from identifying themselves and speaking about their experiences with QCAT and the guardianship system.

Such an approach disempowers the individual and arguably represents an outdated, paternalistic approach to this issue.

This matter received national prominence in 2022 when the Australian Broadcasting Corporation (ABC), on its Four Corners program, aired concerns about the treatment of several guardianship clients throughout the country. This program placed significant prominence on the compelling argument that the individuals themselves were prohibited from telling their own stories without a tribunal or court order first being made that enabled them to do so.[52]

When the QLRC considered the issue in 2007, an analogy was drawn between adults in a guardianship proceeding and sexual offence victims and children.[53]

With this reference in mind, since December 2008 victims of sexual offending in Queensland have been able to consent to the publication of information that can identify them, provided that this consent is provided in writing, the person is at least 18 years old, and has the capacity to provide that authorisation (with 'capacity' being defined as it is in the *Guardianship and Administration Act*).[54] Other jurisdictions in Australia have also moved towards allowing victims to identify themselves.[55]

Further, contemporary developments in disability law and practice since 2007 highlight that any comparisons between adults with impaired decision-making ability and children are inappropriate.

The lack of applications to QCAT to have identities published is not necessarily an indicator that people subject to guardianship proceedings do not wish to speak out and be identified. The existence of section 114A could be having the effect of discouraging people to express themselves, and it is understandable that individuals do not wish to undergo another hearing before QCAT simply in order to be able to speak about their guardianship experiences.

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[51] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) 307.
[52] 'State Control: Australians trapped, stripped of assets and silenced', *Four Corners* (ABC, 14 March 2022).
[53] Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* (Report No 62, June 2007) 312.
[54] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 10.
[55] 'About the gag laws' *#LetHerSpeak* < https://www.letusspeak.com.au/about-the-gag-laws/>.

The Australian Capital Territory's guardianship legislation abolished such prohibition on identifying an adult subject to guardianship proceedings in 2008.[56] It does not appear that there have been any broad repercussions as a result of this.

A way forward

It should be noted that, in finalising this report, feedback was sought from a small number of guardianship jurisdiction stakeholders about the report's likely recommendations. These stakeholders uniformly recognised the human rights reasons why protective mechanisms such as exist in the form of section 114A might now be called into question. But, in contemplating the possible repeal of section 114A, concern was raised by some stakeholders about the risks to which this could give rise: principally that an individual could use personal information about an adult who has been subject to a guardianship application in a way that jeopardises that person's wellbeing.

That is a real risk that needs, however, to be weighed against the self-actualisation benefit of enabling people to tell their own stories without requiring permission to do so.

The considered view in this report is that, while the concerns mentioned above do need to be engaged, it is time to shift the balance from the default position that people cannot speak about their guardianship experiences (in a personally identifying way) without tribunal authorisation, to the default position that they can.

If, as this report recommends, section 114A of the *Guardianship and Administration Act* were to be repealed, the possibility would still exist for individuals, or those close to them, to seek to restrain others from publicly identifying the person and their circumstances, where serious harm may ensue. This would be by way of an application, for instance, for a non-publication order (under section 108 of the *Guardianship and Administration Act*) which could be made either before, during, or after a guardianship application hearing.

Situations where a non-publication order might be sought could include, for instance, the discovery that someone was using social media to reveal personal information about a guardianship client that significantly jeopardises their well-being. Similarly, a non-publication order might be sought where identification of the individual could result in other legal cases being prejudiced, such as ongoing criminal proceedings.

As noted, QCAT has issued a Practice Direction (No. 8 of 2021) stating that although all parties to a proceeding can access documents held by QCAT for a guardianship proceeding, non-parties cannot access documents until after the hearing is finalised and must in any case show a 'sufficient interest' in the proceedings prior to accessing any documentation.

Any changes made to section 114A should be considered in the context of this practice direction, which now affords a level of privacy to proceedings that was not necessarily available prior to 2021.

For example, if in the future an adult who has been the subject of a guardianship proceeding is publicly identified (should section 114A be repealed), a member of the public will not be able to access and view material that is on the QCAT file in relation to this proceeding without showing a 'sufficient interest'.

Although the term 'sufficient interest' has not been further defined in this context, should there be a dispute as to whether a third party does hold such an interest (such as journalists, for example, seeking further information for reporting in the public interest), QCAT will be interpreting this term in the context of the *Guardianship and Administration Act,* balancing the interests of the adult with

[56] *Guardianship and Management of Property Act 1991* (ACT) s 49 as repealed by *ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008* (ACT).

that of open justice and its principle of transparency. Considering that this balance is similar to what QCAT must consider when making limitation orders, the tribunal should be well-equipped to make such determinations.

Should section 114A be repealed, it would make sense for the current threshold criteria for the granting of limitation orders to be reviewed. This would involve, for instance, ensuring that the current 'serious harm' requirement for the making of a non-publication order (in the absence of section 114A) is set at the right level, and ensuring that the adult's views and preferences (consistent with the requirements in the general principles[57]) are given adequate weight. This review might also involve ensuring that QCAT has the discretion, for instance when publishing written decisions, to keep identifying details confidential, if it is in the interests of justice to do so.

In addition, there may be other implementation challenges associated with a repeal of section 114A (in relation, for instance, to QCAT registry processes). These implementation challenges do warrant a short delay being put in place between the date of any repeal of section 114A and the date on which the repeal were to come into effect.

Recommendation 3: Section 114A of the *Guardianship and Administration Act* should be repealed.

Conclusion

The Public Advocate has been tasked with receiving material regarding limitation orders to monitor systemic issues regarding the use of such orders in the guardianship system.

This report represents the first time that limitation orders have been collated and analysed. The report has also considered the issue of confidentiality in the guardianship system more broadly, examining the ongoing relevance of section 114A of the *Guardianship and Administration Act*.

The report makes three recommendations. It is anticipated that these recommendations will improve the efficiency and transparency of tribunal proceedings and will also enable people with disability to talk more readily about their experiences of the guardianship and administration system in Queensland.

[57] *Guardianship and Administration Act 2000* (Qld) s 11B.