VICTORIAN
LAW
REFORM*
COMMISSION

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February 2025

‘I Want to Tell My Story’: The Guardianship and Administration Confidentiality Law

VICTORIAN
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This office is located on the land of the Traditional Custodians, the people of the Kulin Nations. We acknowledge their history, culture and Elders both past and present.

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About Spotlight papers

Spotlights are research papers about topics drawn to our attention by members of the community. Their purpose is to shed light on areas of potential law reform.

Spotlights differ from the VLRC's usual publications, which consist of issues papers, consultation papers and reports. Those publications are produced as part of full-scale inquiries, either referred to us by the Attorney-General or self-initiated as community law reform projects. Inquiries typically take 12-to-18 months to complete and involve extensive community consultations and public submissions. Reports include the VLRC's recommendations for law reform. They are delivered to the Attorney-General for consideration, then tabled in Parliament.

In contrast, Spotlights are stand-alone research publications. In preparing a Spotlight we do not consult as widely as we do for our full-scale inquiries and we do not call for submissions. Instead, we hold a small number of consultations with key stakeholders to draw on their knowledge, expertise and views.

Spotlights do not include a list of recommendations for specific legal or policy changes as our reports do. Instead, we intend Spotlights to inform and educate the community, encourage discussion and contribute to policy debate in Victoria and elsewhere. Spotlights are published on our website and provided to government but are not tabled in Parliament.

Introduction

1 This is the first of a new series published by the Victorian Law Reform Commission (VLRC): Spotlight papers.

2 This Spotlight examines clause 37 in Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act). This law says that a person 'must not publish or broadcast or cause to be published or broadcast any report of a proceeding under the *Guardianship and Administration Act 2019* (Vic) (G&A Act 2019) that identifies, or could reasonably lead to the identification of, a party to the proceeding' without first getting permission from the Victorian Civil and Administrative Tribunal (VCAT).

3 There is no further guidance in the legislation about the operation of the clause and there is little case law that considers its scope. It is clear from our consultations there is a broad view of the prohibition in clause 37 being taken. We were told that the impact of the law is that it stops people from talking publicly about any of their experiences of being on a guardianship administration order or any of their experiences at VCAT, for this reason clause 37 is sometimes described as a 'gag law'.

4 Uli Cartwright, a person with disability and a disability advocate, has been a long-standing advocate for reform of this law. His concern about this law began when a documentary he had created about his life was removed from the internet because it was apparently in breach of clause 37 (see paragraph 89 onwards). Mr Cartwright told us:

> This law meant I couldn't speak publicly about my own life. I came up against it when the movie I made about my life called *Life is a Battlefield* came out. It was the first time in Victoria that someone contested it. It's time to move away from protectionism and not be afraid of what people under these orders have to share.[1]

5 Disability advocates believe that people who are the subject of a guardianship or administration order should have the right to identify themselves and give an account of their experiences if they choose.[2] The counter-argument is that the law is there to protect people's privacy so careful attention is needed to guard against exposing sensitive personal information to public scrutiny and risking harm when reforming the law.

6 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Disability Royal Commission) accepted that confidentiality laws impact the rights of people with disability and called for states and territories to repeal provisions prohibiting publication of material identifying a party to the proceedings as the default position.[3]

7 The origin of this Spotlight was a suggestion from Mr Cartwright and the Victorian Advocacy League for Individuals with Disability (VALiD). We thank Mr Cartwright for the project idea and for his significant contribution to our research.

Our process

8 To complete this paper, we:

- conducted 13 consultations from July to October 2024 to hear views and experiences of the law[4]
- examined literature on the topic
- examined the approach in other states and territories and overseas
- identified some of the advantages and risks associated with reforming the law
- identified some possible options for how the law could be changed.

Limitations of this research paper

9 The VLRC acknowledges the importance of 'the full and effective participation'[5] of people with lived experience of any matter we consider, in line with the principle 'nothing about us, without us'. While we were researching this project, advocates raised concerns that if people with lived experience talked to us about their experiences they might breach the very laws that we are examining.[6]

10 The focus of this Spotlight is on raising issues with the confidentiality law as it appears to be currently understood. The existence of the prohibition and lack of clarity about its scope increases the risk and difficulty of undertaking law reform in this space. Further consultation with people directly affected by the confidentiality law is a necessary step in any future reform. Importantly, if Government decides to examine reform in this area, it should prioritise enabling people with disability to safely and comfortably participate in discussions about law reform that directly impacts them.

11 Disability advocates agreed that this Spotlight would be a useful starting point to encourage further participation and reflection from people with lived experience.[7] To assist, we have prepared an accessible summary of this paper in Easy Read format, available on the VLRC website.

Language

12 As we have said in previous reports, the way language is used can help improve inclusivity in our community. People with disability have worked hard to reframe language to support the protection of their human rights.[8]

13 Recently, the Disability Royal Commission recommended changes to the language used in guardianship and administration legislation around the country to remove paternalistic connotations and reflect a more contemporary and human rights-based approach to disability and decision-making.[9] For example, the Disability Royal Commission recommended changing:

- 'decision-making capacity' and 'capacity' to 'decision-making ability'. Decision-making ability is 'the ability of a person to make a particular decision with the provision of relevant and appropriate support at a time when a decision needs to be made'
- 'guardian' and 'administrator' to 'representative'
- 'enduring power of attorney' to 'enduring representation agreement'[10]

14 The Commission notes these recommendations. However, to avoid confusion, for the purposes of this Spotlight we will refer to the language used in the G&A Act 2019 when describing its provisions and operation.

What is guardianship and administration?

15 The primary object of the G&A Act 2019 is 'to protect and promote the human rights and dignity of persons with a disability'.[11] The Act recognises the need to support persons with disability to make, participate in and implement decisions that affect their lives.[12]

16 The G&A Act 2019 provides the legal framework for the appointment of a guardian or administrator and statutory recognition for supported decision-making in Victoria.

Substitute and supported decision-making

17 Some adults with disability may be unable to make decisions about their personal and financial affairs, even with support. If VCAT is satisfied that a person does not have 'decision-making capacity'[13] because of their disability, it can make an order that gives a guardian and/or an administrator legal authority to make decisions on that person's behalf.[14] VCAT manages guardianship and administration matters through its Guardianship List in the Human Rights Division.

18 When a guardian or administrator makes decisions for somebody, it is sometimes called 'substitute decision-making'. The person for whom a guardianship or administration order is made is called the 'represented person' (or the 'protected person' in some interstate legislation).[15] Guardianship and administration orders are only available for people aged 18 or over.

19 A guardian has legal authority to make decisions or support decision-making for a represented person about their personal and lifestyle matters that are specified in the order. For example, where the represented person lives, which services they use and what medical treatment they have.

20 An administrator has legal authority to make decisions or support decision-making about financial and property matters. For example, paying bills or buying and selling real estate.

21 According to VCAT, in December 2024 there were 18,266 people on guardianship and/or administration orders in Victoria.[16]

22 Supported decision-making is decision-making with the help of other people. Many adults with disability do not need a guardian or administrator because they have decision-making ability. But some adults with disability may need some support from another person to make decisions.

23 Supported decision-making arrangements are often made informally. But VCAT can formally appoint a 'supportive guardian or administrator' to help an adult make decisions about their personal and financial matters'.[17] Any adult can apply to VCAT for a supportive guardianship or supportive administration order as long as the represented person consents and someone is willing and able to take on the role. VCAT must determine that the nominated supporter is suitable.[18] VCAT does not appoint the Victorian Public Advocate or State Trustees as supportive decision makers.

24 Victoria is the only Australian jurisdiction that provides for the formal appointment of supportive decision-makers in line with the Convention on the Rights of Persons with Disabilities (CRPD).[19]

25 In Victoria, in December 2024, there were around 118 represented persons with a supportive administration appointment and 62 with a supportive guardianship appointment.[20]

Who are guardians and administrators?

26 Guardians and administrators can be public or private. In the first instance, VCAT will try to appoint a friend or family member to act as a private guardian and a friend, family member, solicitor, accountant or organisation to act as a private administrator. The G&A Act 2019 stipulates that the Public Advocate (through the Office of the Public Advocate (OPA))[21] may be appointed if there is no other suitable option available.[22] In practice, State Trustees acts as administrator when there is no one else suitable.[23]

27 In 2022-23, VCAT made 1,555 new guardianship orders and 2,340 new administration orders. Of the new guardianship orders, VCAT appointed the Victorian Public Advocate in 495 cases and a private guardian in 1,060. Of the administration orders it made, VCAT appointed State Trustees in 514 cases and a private administrator in 1,826 cases.[24]

Who does the guardianship and administration system assist?

28 The guardianship and administration framework assists a broad range of people with disability. According to the Victorian Public Advocate's 2022-23 Annual Report, it represents clients with dementia, an intellectual disability, a mental health issue,[25] an acquired brain injury and/or a physical disability.[26]

29 The Victorian Public Advocate consistently sees between 35 and 40 per cent of orders carried over at any given point of time each year.[27] The Victorian Public Advocate's 2022-23 Annual Report noted that it was working with more young clients, more clients with a mental health issue and fewer clients with dementia than in the past.[28] The number of First Peoples on guardianship orders increased from 22 in 2016-17 to 49 in 2022-23.[29] First Peoples are over-represented as a proportion of those on guardianship orders.[30]

30 State Trustees represented 9,013 clients as at 30 June 2024.[31] In 2023-24, people with mental health issues constituted the most significant client group represented by State Trustees. This group accounted for approximately 35 per cent of clients, followed by people with intellectual impairment (approximately 33 per cent), dementia (approximately 17 per cent) or an acquired brain injury (approximately 15 per cent).[32] According to State Trustees, First Peoples clients tend to be younger than their other clients. There are currently 202 First Peoples on administration orders, most of whom are aged under 44.[33] In contrast, the broader client group is predominantly aged 45 or over.[34]

31 First Peoples in the guardianship system 'deal with multiple factors of disadvantage'.[35] We were told that young First Peoples clients tend to be on guardianship orders for much longer than older people,[36] which means they are likely to be disproportionately impacted by the confidentiality law.

What is clause 37?

32 Clause 37 in Schedule 1 of the VCAT Act contains the 'confidentiality of proceedings' clause.

The origins of clause 37

33 Clause 37 has its origins in a 1982 review by the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (the Cocks Committee).[37] The review led to an entirely new framework for disability legislation in Victoria.[38]

34 The 1982 Cocks Committee report recommended that new guardianship laws should include a confidentiality of proceedings clause. The Committee examined confidentiality of proceedings during a broader discussion about whether guardianship hearings should be open or closed to the public and the media. In this discussion, the main focus was the protection of privacy and the conduct of journalists.

35 The report noted the differing views of members of the public who made submissions to the Committee on the question of open/closed hearings:

> Those who leaned towards closed hearings emphasised the very private nature of the evidence to be presented and the stigma and embarrassment which could be suffered by the subject of the application, his relatives and his friends who might not wish it to be known that he is the subject of an application. Others stressed the need for open hearings in order to ensure public scrutiny of proceedings.[39]

36 The Cocks Committee concluded that guardianship proceedings should generally be open to the public. Open hearings, the Committee wrote, would 'not only enable persons to familiarise themselves with procedure before the Tribunal, but more importantly, will enable persons to "keep an eye on" the Tribunal in order to satisfy themselves that justice is being done as well as seen to be done'.[40]

37 The Cocks Committee made a number of key recommendations:

- Journalists should be allowed to attend hearings but should not 'be permitted to release any information that would reveal the identity of the subject of the application'.
- Strict penalties should be imposed for breach of this requirement.
- The tribunal should have the power to close hearings to journalists and the public if it determined that an open hearing would not be in the represented person's best interests. Importantly, the Cocks Committee reasoned that the balance between public scrutiny of the judicial process and citizen privacy should be assessed by the tribunal:

> the Tribunal would be a more appropriate arbiter of these competing interests than the subject of the application, his advocate, relatives or friends. For this reason, the Tribunal should not be bound by the wishes of any of these persons regarding the closure of proceedings though it would be expected to give careful consideration to their views.[41]

38 The confidentiality law subsequently included in the *Guardianship and Administration Board Act* 1986 (Vic) (the 1986 Board Act) contained some differences from what was proposed by the Cocks Committee.[42] Section 8 prohibited the publication of *any report of a proceeding* of the Board[43] (the authority established to oversee the new legislation) without its permission. A discretion was also added to allow the Board to authorise publication of information from a proceeding where it was in the public interest, provided *it did not contain any identifying information*.[44]

39 No rationale was given for these changes, or about the provision more generally, in the second reading speeches accompanying the Bills[45] for the 1986 Board Act.[46]

40 In 1998, the Board was abolished and its powers transferred to the newly established VCAT. The Act was renamed the *Guardianship and Administration Act 1986* (Vic) (the 1986 Act). Section 8 was moved to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic),[47] where it became clause 37 in Schedule 1.

41 When the confidentiality law moved into the VCAT Act it was amended again so that the prohibition only applied to publication of *identifying material* rather than the broader prohibition on publication of *any report* of a proceeding as in the 1986 Act. The discretion of the tribunal was also modified. While previously the tribunal could only allow publication of *de-identified* material in the public interest, the VCAT Act empowered the tribunal to allow publication of *identifying* material in the public interest. The reasoning behind these changes is not explained in publicly available material.[48]

The operation of clause 37

42 The principle of open justice applies to VCAT hearings unless circumstances require its displacement. In the Kaplan case Deputy President Nihill stated:

> Hearings in VCAT are open, like most other court hearings. It is good that what happens in tribunals and courts is open and transparent. Anyone can come to a tribunal or court hearing, and can read about what happens there, with few exceptions. That is open justice, and it is important. It is also important that the right of each person to privacy is respected, and that it is protected particularly in circumstances where a person's capacity to assert that right is compromised.[49]

43 Clause 37 states:

1. Unless the Tribunal orders otherwise, a person must *not publish or broadcast* or cause to be published or broadcast *any report of a proceeding* under the Guardianship and Administration Act[50] 2019 *that identifies, or could reasonably lead to the identification of, a party to the proceeding*. Penalty: 20 penalty units.
2. The Tribunal may make an order under subclause (1) only if it considers that it would be in the public interest to do so.
3. An order of the Tribunal under subclause (1) must specify that pictures are not to be taken of any party to the proceeding.
4. This clause does not apply to an application for an administration (missing person) order under Part 5 of the Guardianship and Administration Act 2019.

44 The legislation provides no further detail or explanation about the behaviour that clause 37 is intended to encompass. Further, there have only been a small number of VCAT decisions regarding applications seeking an order under subclause 1 (discussed below from paragraph 59). Those decisions concern public interest applications for media stories or requests to share information with other agencies. There are no decisions regarding breach of the prohibition in clause 37(1).

45 While it is open to interpret clause 37 narrowly as only prohibiting the publication or broadcasting of a 'report of a proceeding' or an account of what happened in the tribunal, our consultations confirmed that clause 37 is being interpreted more broadly. Some of the uncertainty concerns what it means to 'publish' or 'broadcast' a 'report of a proceeding'. The terms 'report of proceedings', 'publish' and 'broadcast' are not defined in the VCAT Act. While there is no authoritative interpretation of the use of these terms in the clause 37 context,[51] there is some guidance in cases related to similar laws prohibiting publication of reports of proceedings in the Family Court[52] and Children's Court.[53] The Queensland Law Reform Commission also considered the meaning of the term 'publish' in its 2007 report.[54]

46 VCAT appears to interpret the law in a broad sense, describing the clause in this way:

> Under the law, no-one can publish or broadcast a report identifying any party in a case about guardians, administrators or powers of attorney, unless we order it. There are penalties for doing this.[55]

47 Guardianship List matters discuss and address a range of very personal issues including information about health, finance, decision-making ability, friendships and family.[56] Deputy President Nihill noted, 'open justice is important, as is the right to privacy, and to having confidential information handled carefully and respectfully, and not exposed to public scrutiny'.[57] In *Kaplan*, Deputy President Nihill identified that 'Clause 37 acts as a check against private information about a hearing under the GA Act going out into the world without careful attention being given to whether that is the right thing to do'.[58]

48 As noted above, our consultations have repeatedly revealed the view that the law applies to prohibit people from mentioning that they are on a guardianship or administration order and talking about any aspect of their experiences on those orders publicly. Our consultations raised concerns about whether the prohibition in clause 37(1) might be breached by a person:

- talking about their experiences of guardianship or administration on social media or an online forum, at a conference or other public speaking event, or to the media
- talking about their experiences even when the order is no longer in place
- talking about their experiences while giving evidence at an inquiry or at a consultation
- talking about a loved one's experiences under an order even after the loved one has died

- talking about VCAT proceedings even where an order for a guardianship or administration was not made.

49 The prohibition in clause 37(1) only applies to a report which identifies or could reasonably lead to the identification of a party to the proceeding. It may be possible to publish a report of a proceeding using pseudonyms, but only if any other information which could reasonably lead to identification is also removed or changed. While anonymisation may be used to avoid breaching the prohibition in clause 37(1),[59] such an approach does not support the right of a person to tell their own story. We have also been told that even if a story is published on an anonymous basis, it may still be possible to identify people in the disability community based on the details of the story.[60]

50 We have been told there are many reasons why people might want to talk about their experiences or why their family or the media might want to talk on their behalf. A person might want to talk about:

- not being happy about moving from their home to an aged care facility
- wanting to manage their own funds or manage them differently
- their belief that they should not be on an order
- not being happy with their guardian or administrator
- positive experiences of being on an order or coming off an order
- a VCAT decision not to appoint a guardian or administrator
- concerns of abuse or coercion and control
- wanting a different service provider or to live in a different residence
- wanting to expose poor performance of a service provider or government agency
- wanting to participate in research, policy consultations, law reform initiatives, conferences, a documentary or a film.

Even if there is no special reason, people might also just want to know that they can talk about their experiences without needing permission from VCAT first.

51 To address some of these concerns, a represented person could return to VCAT to seek a variation to their order.[61] However, we heard that some people do not want to go back to VCAT because this is too difficult or traumatic. Some people told us that they felt VCAT did not listen or respond appropriately to them previously and that they would rather speak publicly about their concerns as a consequence.[62]

52 The penalty for breaching clause 37 is 20 penalty units. At the end of 2024, this equated to $3,952 ($197.59 per unit).[63] This is a daunting amount for most people, but we were told that for many people with a disability, and their family and friends or for people who are seniors or unemployed, it is a particularly daunting prospect. The VLRC has heard that there have been very few prosecutions (if any) for breach of the clause, but the possibility of a fine is still a significant cause of concern for those aware of clause 37.

The public interest exception to clause 37

53 Under clause 37(2) of the VCAT Act, VCAT may allow publication of identifying information about guardianship proceedings where it considers that it would be in the public interest to do so.

54 The VCAT Act does not define 'public interest'. It has generally been accepted by the courts in various legal contexts that 'public interest' means more than just public curiosity.[64] In paragraphs 59-99 we discuss VCAT cases that consider 'public interest' in the context of clause 37.

55 Privacy is itself a public interest consideration that must be balanced with other public interest considerations.[65] In 2014, the Australian Law Reform Commission published the following non-exhaustive list of public interest matters a court may consider when deciding whether an invasion of a person's privacy was justified:

a) freedom of expression, including political communication and artistic expression

b) freedom of the media, particularly to responsibly investigate and report matters of public concern and importance

c) the proper administration of government

d) open justice

e) public health and safety

f) national security; and

g) the prevention and detection of crime and fraud.[66]

56 In the guardianship context, in 2005 the then VCAT President, His Honour Stuart Morris, ruled that something more than a general claim to 'open justice' is required to pass the 'public interest' threshold, since Parliament deliberately chose to override that principle in enacting the confidentiality law. His Honour concluded that in the 'vast majority of applications under the Guardianship and Administration Act it would be inappropriate for the identity of a party to be broadcast or published.'[67]

57 VCAT has not permitted publication where:

- There was no consent, or it was unclear if there was consent, from the represented person to publish.[68]
- The application was opposed by other family members.[69]
- Public advocacy could be pursued through other means without any need to identify the person.[70]
- The facts of the case did not involve an institution, and did not affect a significant number of people or raise issues of broad public concern.[71]

58 Nevertheless, VCAT has allowed publication in the public interest in a small number of cases, discussed in the following paragraphs. The main reasons cited by VCAT for exercising the discretion include:

- The represented person initiated or supported the application and was able to clearly express their will and preference and consent to being identified.[72]
- The issues involved were 'the subject of public concern and public debate… [and] have a moral dimension'.[73]
- There was already significant publicity about the represented person and their medical condition in the public domain.[74]
- Publication could help locate a missing represented person and enable their family to take care of their affairs in their absence.[75]
- Publication could help improve public understanding of issues related to guardianship and disability.[76]

VCAT decisions about clause 37

MK[77]

59 MK suffered a severe brain injury and was in hospital on life support after being discovered in the boot of a car in 2005. MK's husband and another person were charged with serious criminal offences related to her injury. The case attracted extensive media coverage.

60 VCAT was asked to make an order appointing the Victorian Public Advocate as a limited guardian for MK to make decisions about where she lived, who could see her and her medical treatment. *The Age* newspaper, supported by other media organisations, applied to VCAT for an order permitting them to publish and broadcast information revealing the identity of the parties. The application was opposed by MK's financial administrator (her child), the hospital and MK's husband.

61 *The Age* argued that an order permitting it to publish would be consistent with the principle of open justice. It also argued that the case had special features which set it apart from the great majority of guardianship matters.

62 Those opposing the application said that the matters in issue were private and sensitive, especially because MK had a young child. They argued that any genuine public interest in the case was only in the outcome (whether or not a guardian was appointed) and not in the details.

63 In his published reasons for making the orders, as noted above the then President of VCAT, Justice Stuart Morris, stated that the principle of open justice 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'.[78]

64 President Morris observed that when Parliament enacted the VCAT Act it made a choice to exclude guardianship matters from the 'open justice' principle because of their sensitive nature:

> 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.[79]

65 But President Morris agreed with *The Age* that the case had special features which made it of particular public interest. MK needed a guardian to make medical decisions about her, including the possible withdrawal of treatment that would lead to her death:

> These types of cases involve issues that are sometimes the subject of public concern and public debate; as they raise issues which have a moral dimension. Regardless of whether this case is about [MK] or any other person, that fact sets the matter apart from the typical application for a guardian.[80]

66 President Morris took into account that the case had received 'saturation publicity'. MK's name and details of her medical condition were already known, partly as a result of the criminal charges. The charges were another factor that made the case unusual. This affected President's Morris' decision:

> the fact that publicity has already occurred is clearly a relevant consideration. Indeed if there has been extensive publicity about a particular matter, it is sometimes better to allow more detail to be made public in order to shed light upon the truth of the matter.[81]

67 Ultimately, President Morris decided that it was in the public interest to make an order permitting *The Age* and the other media outlets to publish and broadcast the identity of the parties. However, he imposed a condition preventing the publication or broadcast of photographs of MK and her child together at the hospital.

GMcG[82]

68 GMcG was an 81-year-old man with dementia and a history of strokes and falls. In March 2007, the Victorian Public Advocate was appointed as his guardian with powers to make decisions about his accommodation, medical treatment and other services.

69 In April, the ABC applied for an order permitting it to broadcast an episode of *Stateline* identifying the parties. The episode featured an interview with GMcG and his wife. The intention was to raise public awareness of the rising number of guardianship orders and the role of the Victorian Public Advocate, and to encourage a public debate about the issue by telling the family's story.

70 Deputy President Billings, in his reasons for granting the order, took into account that during the interview:

> GMcG was involved in the discussion to the extent it was possible for him to be and that there was no indication that he was in any way unhappy about that.[83]

71 Deputy President Billings referred to a statement from the Victorian Public Advocate that GMcG's wife had agreed to the broadcast, and given the couple's long and close relationship, 'I was mindful that he might, if he were able, be willing to consent to that which she clearly desires'.[84]

72 The Victorian Public Advocate stated that the broadcast was unlikely to cause harm to GMcG, there was unlikely to be follow-up media coverage to disturb him and his level of care would not be affected. The Public Advocate did not object to GMcG being identified as long as the broadcast did not reveal personal and medical information.

73 Deputy President Billings agreed with the decision in [MK] that, 'in the vast majority of applications under the Guardianship and Administration Act it would be inappropriate for the identity of a party to be broadcast or published.'[85] But he reasoned that some factors made the case of GMcG 'exceptional'. They included the wishes of the represented person, as far as they could be inferred, and his wife.

74 He also considered that the broadcast was in the public interest:

> There can be no doubt that there is a public interest in the community having a proper general understanding of the legislation and the role of guardians, including the Public Advocate, administrators and the Tribunal. There will be cases when identification of the represented person will be unnecessary for this purpose. … In the present case I accept the submission that it was necessary to identify GMcG to convey adequately an understanding of him and his needs and general situation and why a guardian should be appointed.[86]

75 The order was granted, subject to the ABC undertaking not to disclose personal or medical information beyond what was needed for a fair and accurate report, or that was likely to cause distress or embarrassment.

DR[87]

76 DR went missing in January 2010. When he had not been located after several months, his family sought to pay his bills, redirect his mail and deal with his landlord. They found that Victorian law did not allow anyone to be appointed to manage the estate of a missing person.

77 The *Guardianship and Administration Act 1986* (Vic) was amended to allow VCAT to appoint an administrator in respect of the estate of a missing person. The change came into force in October 2010.

78 In November 2010, DR's father applied to VCAT to be appointed administrator of his estate. The tribunal granted the order. In addition, with the applicant's consent, VCAT made an order allowing the names of the parties to be published. In the reasons, Deputy President Coghlan stated:

> I made the order permitting publication of his name with the applicant's consent. I was satisfied that there was a strong public interest favouring such publication. That [DR] is missing is already well publicised and continues to be publicised. Anything that might assist in locating him and assuring him his affairs are being properly looked after, is in his and the public interest.[88]

XKJ[89]

79 XKJ had been diagnosed with Alzheimer's dementia. In April 2015, VCAT appointed the Victorian Public Advocate as her guardian to make decisions about her accommodation, medical and dental treatment and access to services. Three of her five adult children were appointed as her financial administrators. XKJ died on 6 June 2016.

80 After her death, one of XKJ's sons (Son A) applied for an order to publish documents relating to his mother's guardianship. The son had various complaints about the care his mother had received, especially medical care. He believed she had experienced neglect and elder abuse.[90]

81 Son A sought leave to publish reports of the proceeding to assist him to make various complaints about agencies and individuals associated with the care of his mother and to make broader law reform suggestions to improve the aged care system and elder law. His stated reason was 'to achieve better outcomes for vulnerable people with dementia'.[91] Son A's application was supported by Son B.

82 XKJ's daughter and Son C also sought leave under clause 37 to publish reports of the proceedings in relation to a complaint raised about Son A, a lawyer, with the Legal Services Board.

83 XKJ's daughter and a third son (son C) opposed Son A's application and did not believe it was in the public interest:

> XKJ's daughter submitted that she had concerns about her brother's capacity to act responsibly with sensitive material, that his personal attacks on [the hospital, carers and] the Public Advocate were unfounded, and that her mother was well cared for and treated respectfully in her time at the aged care facility and at hospital.[92]

84 The Victorian Public Advocate opposed the application, arguing that 'son A had not given sufficient reasons to establish that the order sought would be in the public interest, and the apparent reason was to pursue a complaint or an interest of his own'.[93] It said that complaints about XKJ's care could be pursued in other ways without identifying her. It also said that there was no evidence that the application was in XKJ's best interests.

85 Deputy President Nihill considered whether it would be in the public interest and the best interests of XKJ to allow the material to be published. Her discussion analysed and distinguished previous cases. The Deputy President explained that the details of this case were not already in the public domain, there was no compelling reason to identify XKJ, and XKJ had not granted or implied her consent to publication. Son A claimed that his mother would have supported his actions if she was still alive, but XKJ's daughter disagreed.

86 Deputy President Nihill rejected the broader publication request. She permitted publication only in connection with pursuing complaints with certain agencies. She ruled that it would not be in the public interest to permit the broader publication of all and any matter relating to proceedings, including to the media.

> Reports of this proceeding contain confidential details about the decision-making capacity of the represented person, and also about her highly personal and private health and care needs. In addition, there is voluminous evidence about conflicts and disagreements between the adult children of a mother who can no longer intervene and speak for herself. These are all private matters, and it is for these kinds of reasons, I am persuaded, that Clause 37 was enacted.[94]

87 In making this decision, Deputy President Nihill noted that any investigations or law reform proposals about aged care could be pursued without 'exposing the intimate and personal details of the life of a person who has not been able to control what is said about her for some years, and whose interests include a right to privacy'.[95]

88 Deputy President Nihill also ruled that it would also not be in the best interests of XKJ or 'consistent with her wishes as best they can be acertained, for the proposed widespread publication to be authorised'.[96]

Kaplan/Cartwright[97]

89 Uli Cartwright (previously known as Uli Kaplan), an advocate for people with disability, worked with a film-maker to create a documentary about his life, *Life is a Battlefield*. It was broadcast on SBS Television on 4 December 2021, as part of the International Day of People with Disability and was then available online. The documentary identified Mr Cartwright and referred to VCAT's order appointing State Trustees as his administrator. That order was subsequently revoked.

90 SBS removed the documentary from its website when it was reminded about the confidentiality law by VCAT.

91 Mr Cartwright, through Villamanta Disability Rights Legal Service, applied to VCAT for a declaration that clause 37 did not apply in this case so that his story could be broadcast.

92 In her 2022 decision, Deputy President Nihill explained that clause 37 was intended to provide a balance between the principles of open justice and privacy:

> Clause 37 has an important job to do. Applications under the GA Act are about personal matters, and usually the person about whom the application has been made is, for a short time or a long time, a person who is experiencing a disability that is affecting their capacity to make decisions. So usually, for a time at least, that person is not able to control what other people say or write about them. Their private information is in other people's hands. Hearings in VCAT are open, like most other court hearings. It is good that what happens in the tribunals and courts is open and transparent. Anyone can come to a tribunal or court hearing, and can read about what happens there, with few exceptions. That is open justice, and it is important. It is also important that the right each person has to privacy is respected, and that it is protected particularly in circumstances where a person's capacity to assert that right is compromised.[98]

93 Deputy President Nihill went on to say that information in guardianship matters was often highly sensitive, involving a person's health, finances and relationships. To expose this information could be a significant breach of privacy.

94 Deputy President Nihill concluded that in this case there was a public interest in making an order permitting the material to be published. A key factor was that Mr Cartwright was not only giving his permission but asserting that he wanted to identify himself in the documentary as part of his advocacy work. She said:

> He wants to tell the story about his life, so that others can learn from it, and feel inspired and encouraged by it. This is a compelling reason to make an order under Clause 37(2).[99]

95 In this case, Deputy President Nihill emphasised that the guiding principles of the new G&A Act 2019 differ from the original 1986 Act. Where the 1986 Act focused on promoting the best interests of the represented person, the 2019 Act focuses on protecting and promoting the human rights and dignity of people with disability, 'including the right to make, participate in and implement decisions that affect their lives'.[100] Deputy President Nihill also noted:

> Section 8 of the GA Act says that the will and preferences of a person with a disability should direct decisions made for that person, and that powers, functions and duties under this Act should be exercised in way that is the least restrictive of the ability of a person with a disability to decide and act.[101]

96 Deputy President Nihill also held that Mr Cartwright, 'like every Victorian, is entitled to recognition and equality under section 8 of the Charter and there is no apparent basis for limiting this right he is choosing to exercise'.[102]

97 VCAT ultimately made an order permitting the documentary to be broadcast identifying Mr Cartwright and the other parties to the proceeding.

ZBF[103]

98 In this guardianship application hearing, Villamanta Legal Service made an application on ZBF's behalf to exempt him from the prohibition in clause 37. Villamanta requested that ZBF 'be able to speak about his experience at VCAT in relation to this proceeding and for an order to ensure that there was no legal barrier to him doing so'.[104]

99 Senior Member Steele granted the application, ruling:

> In this case, where the represented person says he may wish in future to be able to speak publicly about his experiences of guardianship and administration and is able to express his wish and preference about such issues, I agreed it is in the public interest that he should not be in fear of prosecution for so speaking.[105]

Shifts in disability law and policy and calls for reform

100 Clause 37 fits into a broader framework of laws and policies that aim to assist people with disability in our community. There have been significant changes to this framework in the last 50 years. Whereas law and policy previously focussed on protection and best interest decision-making, there has been a shift to supporting people with disability to make their own choices and decisions about their lives and promoting their dignity, equality and autonomy. Key legislation in this modern framework includes the:

- *Disability Discrimination Act 1992* (Cth)[106]
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- United Nations Convention on the Rights of Persons with Disabilities (CRPD) 2008
- *Equal Opportunity Act 2010* (Vic)[107]
- *National Disability Insurance Scheme Act 2013* (Cth)[108]
- *Guardianship and Administration Act 2019* (Vic).

The *Charter of Human Rights and Responsibilities Act 2006* (Vic)

101 The *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the Charter) is the legislative framework that protects and promotes human rights in Victoria. It came into effect on 1 January 2008.

102 Many human rights are relevant to guardianship. For example, section 13 protects the right to privacy, section 15 contains the right to freedom of expression and section 8 protects the right to recognition and equality before the law:

- the right to recognition as a person before the law
- the right to enjoy human rights without discrimination
- the right to equal protection of the law without discrimination and effective protection against discrimination.[109]

103 As the VLRC stated in our *Guardianship* report:

> The human rights protections in the Convention and the Charter are of particular importance to people with impaired decision-making ability because of their emphasis upon equality and participation.[110]

104 Section 7(2) of the Charter provides that rights can only be limited in certain circumstances if it is reasonable, necessary, justified and proportionate. The Charter rights served as a guide and informed the development of new guardianship laws introduced in 2019.[111]

The United Nations Convention on the Rights of Persons with Disabilities

105 The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is the most comprehensive international human rights statement of the rights of people with disability. Article 1 of the CRPD contains its purpose:

> to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.[112]

106 The CRPD has an inclusive definition of 'persons with disabilities' to include people 'who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.[113]

107 Article 3 of the CRPD identifies the general principles that underpin it. One of them is 'individual autonomy, including the freedom to make one's own choices'.[114]

108 Australia was one of the first nations to ratify the CRPD on 17 July 2008.[115]

109 Article 12(3) of the CRPD provides that 'State parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. The Disability Royal Commission observed that Article 12(3) 'emphasises that the provision of support is the first response to any compromise in decision-making ability'.[116] Article 12(3) has been interpreted to include providing support for decision-making on matters that may have legal consequences.[117]

110 Various law reform bodies around Australia recommended changes to state/territory laws to give effect to Article 12(3) of the CRPD. Victoria is the only state to have enacted supportive decision-making appointments in legislation.[118]

111 In 2023, the Disability Royal Commission recommended the enactment of a new national Disability Rights Act that would 'translate and implement rights and obligations recognised in the CRPD in a way that is practical, workable and capable of effective enforcement in the Australian legal context'.[119]

The *Guardianship and Administration Act 2019* (Vic)

112 The G&A Act 2019 significantly amended the 1986 Act. It drew on the CRPD and the recommendations of the VLRC in its 2012 report, *Guardianship*,[120] to modernise Victoria's laws and create a new system of guardianship.

113 The VLRC's 2012 *Guardianship* report identified that people have different levels of decision-making capacity and therefore need different amounts of support to make decisions. It recommended that a new Act make it possible to receive different kinds and degrees of support.[121] In her second reading speech for the 2018 Bill, then Attorney-General, the Hon. Jill Hennessy said:

> The Bill … [recognises] the need to support people with disability to make, participate in and implement decisions that affect their lives, and otherwise providing that a person's will and preferences should direct decisions affecting the person as far as possible.[122]

114 The purpose of the G&A Act 2019 is to 'protect and promote the human rights and dignity of persons with a disability'.[123] The Act departed from what many have described as a paternalistic concept of making decisions in the 'best interests' of a person with disability[124] and replaced it with the represented person's 'will and preferences'.

Decision-making under the G&A Act 2019

115 A person making a decision for a represented person must do so in accordance with the decision-making principles in section 9 and the general principles in section 8 of the G&A Act 2019.

Giving effect to will and preferences

116 Guardians and administrators are required by section 9 of the G&A Act 2019 to make decisions that give effect to the represented person's 'will and preferences' as far as they can be known, unless the person is at risk of serious harm.[125] 'Will and preferences' is not defined in the G&A Act 2019 but is derived from the CRPD and has a wide scope.[126]

117 If the represented person has not directly expressed their will and preferences, the guardian or administrator can infer what they might be by talking with the represented person's family, close friends and carers.[127]

Acting in a manner that promotes the represented person's personal and social well-being

118 If no will and preferences can be determined, then the guardian or administrator should act in a manner which promotes the represented person's 'personal and social wellbeing',[128] which is defined in the Act.[129]

General principles in section 8 of the G&A Act 2019

119 VCAT and anyone else exercising a power, carrying out a function or performing a duty under the G&A Act 2019 must have regard to the general principles set out in section 8. This means that VCAT must have regard to these principles when making a decision in relation to its powers under clause 37.

120 The section 8 principles are:

- a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances:
  - to make and participate in decisions affecting the person; and
  - to express the person's will and preferences; and
  - to develop the person's decision-making capacity.
- the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person;
- powers, functions and duties under the G&A Act 2019 should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances.[130]

121 While the G&A Act 2019 contained significant reforms the confidentiality law has remained largely unchanged since the 1986 Board Act was released.

Inquiries and calls for reform to confidentiality laws

122 This section briefly covers a few of the most significant recent calls for reform to clause 37.

The Disability Royal Commission

123 The Commonwealth Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Disability Royal Commission) delivered its final report in September 2023. In the Chair's foreword to the final report, His Honour, Justice Sackville, stated that the Disability Royal Commission intends the final report to be the means through which Australia could be transformed into:

> a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.[131]

124 The Disability Royal Commission identified that (at the time) legislation in all states and territories except the Australian Capital Territory restricted the disclosure of information identifying a person subject to a guardianship or administration order without tribunal permission. It stated that the purpose of the confidentiality laws is protective:

> Guardianship and administration, and tribunal proceedings, involve private and personal information. Some people may be vulnerable and at risk of suffering harm if personal information about them, or the fact that they are subject to guardianship and administration applications and orders, is widely known.[132]

125 The Disability Royal Commission went on to conclude that the confidentiality laws restricted the ability of people with disability to talk about this aspect of their lives. In reaching the decision to make recommendation 6.12 (noted below) the Disability Royal Commission concluded as follows:

> We consider the default position under legislation should not be a prohibition on publication of material related to tribunal proceedings. Rather, the legislation should allow publication unless the tribunal makes an order preventing public identification of the person or their circumstances. The effect of this proposal is that the tribunal will need to be persuaded to exercise a discretion to prohibit publication, rather than starting with a presumption that publication should be prohibited. Ordinarily, the tribunal would be expected to give effect to the will and preferences of the party in the proceedings, thereby upholding that person's right to freedom of expression concerning their own affairs.[133]

126 The Disability Royal Commission identified that existing confidentiality laws may prevent organisations from being held to account:

> The provisions create a risk institutions such as hospitals, disability service providers and public guardians and public trustees will be shielded from transparency and accountability because people cannot recount their experiences of tribunal proceedings.[134]

127 The Disability Royal Commission recommended:

> **Recommendation 6.12 Public disclosure and confidentiality restrictions**
>
> States and territories should amend their guardianship and administration laws or tribunals acts to:
>
> - repeal provisions prohibiting publication of material identifying a party to the proceedings as the default position
> - empower the tribunal to make an order prohibiting publication of material identifying the party to the proceedings if the circumstances justify such an order, taking into account the will and preferences of that party.[135]

Victorian investigation into State Trustees

128 A report by the Victorian Ombudsman into State Trustees in 2019 highlighted a range of problems experienced by clients of State Trustees. The Ombudsman recommended a review of the confidentiality law to improve the transparency and accountability of State Trustees. In the course of making a range of findings about the gaps and concerns about the model and operation of State Trustees, the Ombudsman concluded as follows:

> The Victorian Government could further improve State Trustees' transparency and accountability by reviewing the application of freedom of information laws to State Trustees. This is particularly so in light of the shift towards recognising the rights of people with disabilities to make decisions about their own lives. It is also timely to review the restrictions in the Victorian Civil and Administrative Tribunal Act that restrict State Trustees' clients choosing to identify themselves in the media. While the Act reflects a concern for the privacy of vulnerable people, it requires people with disabilities to go to the effort of seeking an order from a tribunal to exercise rights others can take for granted. Reviewing these laws in light of the Charter and the UN Convention on the Rights of People with Disabilities may identify options that strike a better balance between the rights and interests of State Trustees' clients.[136]

129 As a result of these findings the Ombudsman recommended:

> *Recommendation 14: Accountability and transparency*
> Review schedule 1, clause 37 to the Victorian Civil and Administrative Tribunal Act 1998 (Vic) to ensure it does not prevent public debate about State Trustees, including in the media, where people consent to being identified.[137]

Queensland reports

130 The *Guardianship and Administration Act 2000* (Qld) (Qld GAA Act) was amended in 2009 in response to a 2007 report by the Queensland Law Reform Commission.[138] As part of these reforms, the prohibition against publication of information about guardianship proceedings was repealed and replaced with a general presumption that publication is permitted as long as it does not identify an adult subject to a guardianship or administration order.[139] We describe the law in Queensland in paragraphs 202-205 below. While similar to the law in Victoria, there are some additional exceptions in the Queensland legislation that allow publication with the permission of the tribunal.

131 In 2022, the Queensland Public Advocate published a report recommending that the confidentiality law in section 114A of the Qld GAA Act be repealed. The Queensland Public Advocate noted: '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'.[140]

132 The Queensland Public Advocate observed that section 114A 'disempowers the individual and arguably represents an outdated, paternalistic approach to this issue'.[141] While applications to the Queensland Civil and Administrative Tribunal (QCAT) to have identities published are uncommon, the Queensland Public Advocate stated that this should not be taken as an indicator that those under guardianship orders do not want to speak out. Rather, the law could be having a stifling effect. The report stated: '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'.[142]

133 The Queensland Public Advocate argued that there are other safeguards in the Qld GAA Act that are sufficient to guard against harm.[143] At the time of writing the Queensland Government has not acted on these recommendations and section 114A remains in place.

Reforms in Tasmania

134 Changes to the Tasmanian legislation were catalysed by a long-running public campaign for reform to the confidentiality law by disability advocates. The Commission understands that there was bipartisan support for reform. Additionally, we heard in consultations that a 2018 review of the state's guardianship and administration legislation by the Tasmanian Law Reform Institute contributed to the government's decision to reform the confidentiality law.[144] The current Tasmanian model is discussed further in paragraphs 188-198.

135 We were told that Tasmania's new provision, 'provides a sense of choice that is aligned with the broader changes to the legislation about empowering people to have control over their destiny and decisions in their lives'.[145]

Considerations for possible law reform

Arguments for reforming clause 37

136 The following arguments for reforming the law were raised in VLRC consultations and/or identified by the VLRC in our review of literature on the topic. The arguments challenge the view that the law should always default to protection of the identities of those involved in proceedings. The paragraphs that follow go into each argument in more depth.

- The VCAT Act should align with modern understandings of human rights.
- Reform would enable people to tell more positive stories of disability.
- Reform would assist people to hold service providers to account.
- Clause 37 acts as a barrier to media reporting.
- There is uncertainty about how clause 37 operates.
- Going back to VCAT to seek permission to publish is traumatic for represented persons and their families and friends.
- Reform would address concerns about overreach of clause 37.
- Greater certainty and consistency are needed than is currently the case.
- The benefits of change outweigh any risks.

Aligning the VCAT Act with modern human rights

'The right to use your own voice to tell your own story is a fundamental human right. "It's my story and I own it. I can tell it."
The Victorian Public Advocate.[146]

137 Based on the literature, contemporary reviews and inquiries and our consultations, the key argument in favour of reforming clause 37 is that it is out of step with human rights and the principles underpinning modern laws.[147]

138 In calling for reform to clause 37, the Victorian Public Advocate referred to the rights to privacy and freedom of expression contained in the Charter and the purpose of the CRPD:

> In light of the Convention, OPA considers that greater weight should be placed on the person's right to freedom of expression, and as a result, the current legislative restriction on a person's freedom to speak about their own experiences without VCAT's prior consent is no longer demonstrably justified or proportionate.[148]

139 Consultation participants told us that removing a represented person's right to decide how, where and when to tell their own story can have a negative impact on their freedom of expression, dignity and autonomy. The prohibition in clause 37 'perpetuates myths that decisions or processes involving people with disability are best dealt with privately and secretly'.[149] Consultees told us that this approach is disempowering, outdated, protectionist and paternalistic.[150] Instead the 'starting point has to be that the person should be able to tell their own story'.[151]

140 Another consultation participant explained:

> Most of our clients have an intellectual disability: but they have capacity to manage their own circumstances and make decisions for themselves. They have opinions about what they want and how they want to live their lives.
>
> Our clients feel that they should be allowed to talk to the world about what's happening in their lives, to tell their own stories of their experiences of guardianship and administration. This is critical so the same mistakes don't keep getting made. Well-meaning people who make guardianship applications don't generally want things to go public. The reality is that the clients are usually quite prepared to discuss what's happened to them but they're being gagged by clause 37.[152]

141 We were told that the clause 37 can cause trauma and confusion:

> a lot of my clients feel like guardianship and administration is being done to them. It feels like a punishment, that they've done something wrong … so adding extra restrictions to these people can cause extra trauma and confusion for our clients.[153]

142 Another consultation participant noted that having a default ban on publication of identifying information means that VCAT is not looking at individual needs, but is instead treating everyone the same way.[154] It was further observed that some people with disability do not have anyone to make a challenge to the law on their behalf.[155]

Sharing positive stories about disability

143 During consultations we were told that allowing people to tell their stories would pave the way for positive stories of people with disability to be shared with the public. This could improve community understanding of disability and the guardianship system and reduce discrimination.

144 People might want to talk about coming off an order after successfully completing the State Trustees Financial Independence Program.[156] We were told about a person on a order who was invited to talk at a disability conference about a decision they had made about medical treatment:

> This person was really proud to have made the decision themselves about their medical treatment. Nobody else made that call. They probably would have also liked to discuss their experiences with VCAT but couldn't. This person went to VCAT many times to argue for the right to make their own decisions instead of family making decisions for them.[157]

145 The Acting Tasmanian Public Guardian observed that the provision might also be used in a positive way to celebrate the success of guardianship. The Tasmanian Public Guardian has met with protected persons over the years and told their stories in a de-identified way in annual reports and publications with their approval. These stories are 'often good news stories highlighting the positive impact of guardianship where it has achieved critical outcomes for the protected person'.[158]

Holding service providers to account

146 Another argument in favour of reform is that the current regime prevents people from speaking out when they receive sub-standard support or care.[159] This can mean that guardians, administrators and providers of care such as nursing homes and hospitals are shielded from scrutiny.[160]

147 The Australian Age Discrimination Commissioner noted:

> Confidentiality laws should not protect state institutions who provide guardianship and administration services even though these institutions may be wary of scrutiny. There is a long-established culture within state organisations that 'we know best'. This should be interrogated. There are many examples of bad decision-making with dire consequences particularly in the financial decision-making area.[161]

148 We were told that there has been an increase in guardianship applications across the country after the introduction of NDIS because many more decisions are being made for people with impaired decision-making ability.[162] Increasingly, aged care providers and other disability service providers are requiring formal tribunal appointments before they will recognise a substitute decision maker. It was observed that 'the ability to tell your own story becomes much more important in a context where appointments are being sought more readily'.[163]

149 Notwithstanding the Victorian Public Advocate[164], State Trustees[165] and VCAT[166] have various internal complaints mechanisms, recent inquiries have suggested that some of these mechanisms could be improved. We heard in consultations that people approach the media as a last resort when they have not been able to resolve their concerns in other ways.

> The people I have been speaking to are frustrated with the system. They don't understand how their money's being invested or why they have such a small allowance or the fees they are being charged. There are no effective complaints mechanism or if there is one, they say it does not resolve the matter. People feel voiceless, and they are confused. … It doesn't make sense that people are gagged from talking about their own experiences of the system that they are in when they already have a disability. They can go to the Attorney General's Department, but they will just get a standard response letter. There's nowhere for them to go so they're entirely powerless.[167]

150 Consultees argued that greater transparency and openness would also enhance public understanding of and confidence in the guardianship and administration system, relevant legislation and the roles of guardians and administrators. In its Position Statement the Victorian Public Advocate noted:

> Ensuring people can freely tell their own stories will increase transparency and promote public trust in this essential safeguarding system.[168]

Clause 37 acts as a barrier to media reporting

151 While it appears possible under the current law to publish de-identified information about guardianship and administration proceedings, we have heard that clause 37 dissuades represented persons, their families and the media from telling those stories.[169]

152 A journalist told us:

> Many people aren't familiar with the law and it's very frightening to them. I have to explain it to them. They are so concerned about being fined, jailed or other repercussions for themselves or their loved ones that they do not want to speak out.[170]

153 Speaking in 2022 (before the recent amendments to Tasmania's law came into effect), CEO of Advocacy Tasmania Leanne Groombridge told the ABC's *Four Corners* program:

> We couldn't get media coverage from mainstream press because everybody is too worried about the fact that they can't show this, and the people who are on orders are … terrified about speaking out for fear of making things worse.[171]

154 We also heard that media organisations are reluctant to go to the tribunal to seek an exemption to report in the public interest:

> There is too much fear among media organisations. The media is risk averse. … Challenging restrictions on publication in the public interest costs money and takes time. We don't have the resources to do this. Junior lawyers and journalists don't necessarily know how to advocate for this, so most stories are not told.[172]

155 Media outlets have published stories relating to guardianship and administration on a small number of occasions.[173] Reports have drawn attention to systemic failings in several states and territories. Individuals profiled in the stories have pointed to mismanagement and mistreatment by public administrators and public guardians and alleged that this has caused them serious harm and trauma.[174]

Uncertainty about how clause 37 operates

156 Our consultations revealed uncertainty about the meaning and impact of clause 37. Some consultation participants suggested that many people do not know what clause 37 means and that some talk about their lives in ignorance of the provision.[175]

157 One consultation participant queried how the law could ever work in practice:

> [It] only relates to talking about this one specific element of a person's life, nothing else. People aren't going to remember to exclude that one little piece of their story. Should we expect them to?[176]

158 Lawyers representing clients in the Guardianship List told us that their clients are currently not informed about the restrictions in clause 37 at hearings.[177] Another participant told us: 'There should be a tick box from the outset asking, "Do you want to be able to tell your story in the future?"'[178]

Going back to VCAT to seek permission to publish is traumatic

159 We heard that having to return to the tribunal to request an exemption from the prohibition in clause 37 causes trauma and anxiety. A disability lawyer spoke about the systemic trauma their clients have experienced:

> When a family seeks advice about administration, they often say: 'I never want to go back to that tribunal ever again.' They've often had a horrific experience even on a good day having their dirty laundry aired in a courtroom and they never want to go through that again. Consideration would need to be given to making it a less traumatic process for people who have already gone through the tribunal process to seek permission to publish.[179]

160 A stakeholder working in disability law informed us that about 90-95 per cent of their clients, when asked, are in favour of pursuing an exemption at the tribunal. This consultee said: 'Anxiety around the process is a big issue and if the VCAT member pushes back at all during the hearing then that anxiety can surface and not want to pursue it any longer.'[180]

Concerns about overreach of clause 37

161 In consultations we heard that clause 37 is being interpreted by some to prohibit people with disability from talking about their experiences even after a guardianship or administration order has ended, or where a person successfully defends an application, such that they were never on an order in the first place.[181]

The need for certainty and consistency about the application of clause 37

162 We heard from disability advocates and lawyers that inconsistency in how tribunal members respond to requests for exemptions has led to confusion and unfairness.[182]

163 A consultation participant suggested that it now seeks an exemption from the prohibition in clause 37 for its clients at VCAT hearings. It said that even though a client might not know at that moment if they want to publish a story, they may want to speak at a conference or on social media later on:

> One issue that is arising during hearings is that some VCAT members are requesting specifics about why an exemption is being sought. While some members are happy to grant an exemption purely because our client says, 'I want to be able to talk about my life', others want to know exactly what project you want the exemption for. This is unfair because we don't always know for what purpose somebody will want to speak in the future.[183]

The benefits outweigh the risks

164 Most consultation participants acknowledged that there is a balance to be struck between autonomy and protection of privacy and prevention from harm. But they thought that the benefits outweighed the risks when it came to the represented person being able to tell their own story.

165 The Victorian Public Advocate noted:

> OPA recognises that there are valid reasons to limit the disclosure of sensitive and personal information discussed in guardianship and administration proceedings, to protect the privacy of people under these orders. These protections should only apply to other parties' use of information shared in guardianship or administration hearings and ensure the person's right to tell their own story is not inadvertently limited.[184]

166 In calling for reform to the Queensland law, the Queensland Public Advocate said that the risk that a person's information could be used to jeopardise their wellbeing should be weighed against 'the self-actualisation benefit of enabling people to tell their own stories without requiring permission to do so'.[185] In response to questions about whether there is a need for safeguards to address concerns about exploitation or influence by third parties in the Victorian context, the Queensland Public Advocate noted:

> We can't completely mitigate this risk. But we need to understand the impact the current law has on preventing people from telling their own story on the premise that it's protecting them from harm.
>
> We can think of comparable risks in other areas of life where we don't, as a default position, stop people from being able to identify themselves and speak about their experiences, eg in-patients at mental health facilities.
>
> Sometimes people won't tell the truth or might tell conspiracy theories but that's up to the media to handle. We can't deal with that by completely prohibiting their right to speak.
>
> There is a slightly greater risk that people might be taken advantage of and that their stories might be used for nefarious reasons. The risk that family members could exploit a story has increased with the advent of social media. But this risk is substantially outweighed by the cost of silencing people.[186]

167 The Queensland Public Advocate argued that the main responsibility for monitoring this risk should fall to the tribunal that should retain a discretion to supress or limit publication where appropriate. He suggested that risk will often be known at the time of appointment of a guardian and a limit on publication could form part of an initial order. The Queensland Public Advocate noted that these situations are unusual and that confidentiality should not be the default position.[187]

168 A journalist thought that risk to the represented person was exaggerated:

> I disagree with the argument that people on guardianship and administration orders need more protection. People who are happy with how their funds are being administered and the funds they are receiving don't go to the media. It is only the people who have run out of options and have nowhere else to turn that approach the media. To put more barriers in place would not solve the problem. After the public became aware of this system through our *Four Corners*, 'State Control', they were surprised that in a country like Australia we should prevent people from voicing their concerns, especially when there has been abuse or maladministration.[188]

Calls for the retention of safeguards

169 While there was general support for reform to clause 37 among those we consulted, many participants also raised concerns about privacy and an elevated risk that information about a represented person could be used by others to harm them.

170 During consultation, VALiD noted:

> People do not want to splash their story across the media. They should have the right to do so if they want, but they should also have the right to say no to others telling their story.
>
> ...The balance question comes into play again. There needs to be a brake or control to stop others from telling someone's story but the person themselves should be able to tell their story as a default.[189]

171 A representative of State Trustees also spoke of the need for balance:

> We understand it would be very confronting to be told you can't speak about your own experiences and that this would impede you from living a normal life in a way that is meaningful to you. Conversely, privacy considerations and risk are also important. These are the issues that need to be balanced here.[190]

Protecting privacy and protecting from harm

172 We heard that the type of information discussed in guardianship and administration hearings is often highly sensitive and personal. It can include information about the person's health and decision-making capacity, personal care arrangements, finances, relationships, family dynamics and, potentially, family conflicts or even family violence.[191]

173 We heard that the publication of information like this could cause harm to a represented person including an increased risk of family violence.[192] Consultees highlighted that a perpetrator could seek to use information about a represented person that is published as a further tool of abuse.[193]

174 One stakeholder noted:

> In the health area there are many people with reduced decision-making capacity who are at significant risk of harm. Reform should not create a situation where more harm is caused. It may be that there are a lot more people at risk of harm than people who actually want to speak out. A nuanced position is required, rather than just a blanket prohibition or blanket allowance. We need to find a middle ground.[194]

175 The Victorian Public Advocate noted that when a problem arises in relation to guardianship or administration it is often because of conflict. Splits and differences

of opinions amongst family members happen regularly.[195] Representatives of VCAT noted that drawing on clause 37 can be a way of upholding the right to privacy for the represented person who may have found themselves unwillingly in the middle of a dispute relating to their care or finances.[196]

176 In broader discussions both State Trustees and the Victorian Public Advocate raised concerns about the potential for undue influence on a person's expressed will and preference. In consultation, the Victorian Public Advocate noted that 'will and preference' can be used to mask the control and influence a family violence perpetrator has over the person with decision-making incapacity. It was observed that the exploitation of 'will and preference' tends to happen more in relation to financial abuse.[197] A representative of State Trustees cautioned:

> One of the general challenges with the new guardianship legislation's move from best interest decision making to will and preference is that we are starting to see that influence and coercion is impacting a represented person's expressed will and preference. […] We want to protect people's rights and the right to make their own decisions but there is also a risk. While the law needs to be contemporary and in line with the [G&A Act 2019] so that represented people can tell their stories, we need to be sure it is actually their story and that they have not been unduly influenced.[198]

177 Some potential harm scenarios were discussed in consultations including:

- A third party, including an abusive or coercive family member or partner, could use personal information about a protected person for their own ends.
- A third party could publish, circulate or misuse information to further their abuse, manipulation or control of a protected person.
- A third party could use social media to reveal personal information about a protected person that impacts their well-being.
- Other legal cases or matters might be jeopardised by the revelation of sensitive information about a protected person.
- A person's job prospects could be affected if it was known they were under a guardianship order.[199]

Smaller changes to Victorian law

178 A few consultation participants were comfortable with the protective element of clause 37 but thought that smaller changes could help balance protection aims with human rights considerations.[200]

179 In addition to suggestions that VCAT should proactively ask represented people at their hearings if they wanted to speak publicly, it was suggested that the public interest exception could be replaced so that there is a presumption that the tribunal will grant permission unless there is a risk of serious harm to the represented person.[201]

180 One participant said: 'Serious harm would be a more appropriate test than public interest. We have to strike the right balance between protection and being paternalistic.'[202]

Confidentiality laws in other jurisdictions

181 Most states and territories in Australia, except the Australian Capital Territory, prohibit the publication of information about guardianship proceedings in some way. The nature of the prohibition varies state by state. The Australian Capital Territory and Tasmania have appreciably different approaches to the other states.

182 We also examined confidentiality laws in the overseas jurisdictions of New Zealand,[203] England and Wales,[204] and the United States.[205] We found that New Zealand and England and Wales operate under a comparable model to Victoria. In the United States, there is a good deal of variance across the states, with some states adopting a much more open approach than others.[206] None of the overseas jurisdictions the Commission looked at offered appreciably different models for Victoria to follow.

183 More information about the approaches in other jurisdictions will be published separately by the Commission and made available on our website.

The law in the Australian Capital Territory

184 In the Australian Capital Territory, in the legislation governing the ACT Civil and Administrative Tribunal,[207] there is no prohibition on the publication of identifying information about guardianship or administration proceedings and hearings are conducted in public.[208]

185 However, where the tribunal is satisfied that the right to a public hearing is outweighed by competing interests[209] it can make an order:

- to close or restrict access to a hearing;[210] and/or
- to prohibit/restrict the publication of evidence given at a hearing, whether in public or private, or of matters contained in documents filed with the tribunal or received in evidence by the tribunal for the hearing;[211] and/or
- to prohibit or restrict the disclosure of evidence or matters disclosed in documents lodged or received in evidence by the tribunal to some or all of the parties.[212]

186 'Competing interests' might include:

- protecting morals, public order or national security
- maintaining the privacy of the represented person
- because publicity would otherwise prejudice the interests of justice.[213]

187 The tribunal can make such an order or orders on its own initiative or on application by a party.[214]

The law in Tasmania

188 The new law in Tasmania, operational since 1st September 2024, gives the represented person the ability to tell their own story and to consent to the publication of their story by a third party.

189 The *Guardianship and Administration Act 1995* (Tas) (Tasmanian G&A Act) prohibits the disclosure of information obtained in relation to a represented person (called 'protected information') by the Tasmanian Civil and Administrative Tribunal (TASCAT) or the Tasmanian Public Guardian, except where:

- the disclosure has been consented to by, and with the full understanding of, the protected person; and

- the disclosure of the protected information does not involve the disclosure of information relating to another person, unless the other person has also consented to the disclosure of that information.[215]

190 'Protected information' includes information that identifies a represented person or proposed represented person, and information that deals with their personal history or records, that has been obtained by the tribunal or Public Guardian under the Tasmanian G&A Act or the TASCAT Act.[216]

191 The represented person does not have to return to the tribunal to demonstrate they have consented to publication. The onus is on the publisher to obtain consent with the full understanding of the protected person. Whether this threshold is met would likely only be tested in the event that it was challenged. That may happen if the Tasmanian Public Guardian, or another party named in a story, wanted to dispute that the represented person had given fully informed consent.

192 The explanatory memorandum to the new provision explains that consent differs from capacity to make decisions under the Act:

> Crucially, consent of the represented person is different to an assessment of impaired decision-making. The intention is not to require that the person undergo an assessment of decision-making ability in relation to their ability to provide that consent. Consent is an appropriate and necessary safeguard for the represented persons to be able to express their will and preference. Where they wish to provide their consent to the publication of information about them, it would be inappropriate to allow a represented person's experiences to be shared without their consent. Consent in this context refers to the ordinary meaning of consent–that is, the represented person is freely giving their agreement to make the information public. Matters relevant to the protected person's understanding of what is being made public may include, for example, matters such as what is being disclosed, who it is being disclosed to and the purpose of the disclosure.[217]

193 No information is provided about whether the consent required of 'another person' extends to state agencies or service providers.

194 The recent Tasmanian reforms also included a change to the former discretion for the tribunal to permit publication where it considered it was in the 'best interests' of the represented person. The test in the new section 86(2)(b) is whether 'in the opinion of the Tribunal or the Public Guardian, the disclosure of the protected information would *promote the personal and social well-being of the protected person'*.

195 In introducing the Guardianship and Administration Amendment Act Bill 2023, the Tasmanian Deputy Premier stated:

> the Government has listened to stakeholder concerns that confidentiality restrictions or so-called 'gag provisions' can currently limit people under guardianship and administration in telling their stories. … the bill explicitly amends the Guardianship and Administration Act to allow people under guardianship orders to consent to publication of their information, if they so choose.[218]

196 Section 123(1) of the TASCAT Act also prohibits publication of any identifying information about a person involved in a guardianship proceeding in Tasmania, unless:

- the tribunal determines that it is in the public interest to allow publication;[219] or
- one of the exceptions listed in section 86(2A) or (2B) of the *Guardianship Act 1995* outlined above applies.[220]

197 Protections in the TASCAT Act also extend to photographs and videos of protected/represented persons.[221]

198 At the time of writing there were no published decisions examining the new Tasmanian provisions.

The law in New South Wales, the Northern Territory and Queensland

199 In New South Wales, the Northern Territory and Queensland, the publication of information about proceedings that identify a represented person is prohibited, as it is in Victoria.

200 In New South Wales, it is prohibited under the *Civil and Administrative Tribunal Act 2013 No 2* (NSW) (NCAT Act) to publish or broadcast the names or any information that could lead to the identification of individuals involved in proceedings in the Guardianship Division of the Tribunal, except with NCAT's consent.[222] There is no guidance given as to how the tribunal may exercise its discretion to grant consent. There are no further exceptions provided to the rule.

201 In the Northern Territory the *Guardianship of Adults Act 2016* (NT) provides that 'the publication of information about proceedings that identifies the adult to whom the proceedings relates or enables the identity of the adult to be ascertained is prohibited'.[223] The tribunal may make an order authorising publication that identifies a represented adult if it is consistent with guardianship principles *and* it is in the public interest. An application may be made by 'any person who the Tribunal is satisfied has a proper interest in the proceedings'.[224]

202 In Queensland, although the *Guardianship and Administration Act 2000* (Qld) contains an express presumption that publication about guardianship proceedings is allowed, a person cannot publish any information[225] that could lead to the identification of the relevant adult by a member of the public, unless they have a reasonable excuse.[226] Reasonable excuse is not defined in the legislation.[227] The tribunal may authorise publication where it considers it is in the public interest or the relevant adult's interest[228] or where the protected person has died.[229]

203 In Queensland, the public advocate or guardian has a right to reply to a prohibited publication where it considers it would be in the public interest to do so.[230]

204 If the Queensland Tribunal is satisfied it is necessary to avoid serious harm or injustice to a person, it may also issue a non-publication order under section 108 of the *Guardianship and Administration Act 2000* (Qld) prohibiting the publication of information not already prohibited from publication under section 114A. Non-publication orders under section 108 may prohibit publication of information about a proceeding disclosing health information about a person even after their death.

205 Non-parties cannot access documents until after the hearing is finalised and must demonstrate 'sufficient interest' in the proceedings to gain access.[231]

The law in South Australia

206 In South Australia, a person must not publish a report of any guardianship or administration proceedings. On application by someone with a 'proper interest in the matter', the tribunal has the discretion to authorise publication, but only where it does not disclose any identifying information about the protected person.[232] The South Australian legislation does not specify any parameters for the exercise of the tribunal's discretion.

The law in Western Australia

207 Western Australia has the strictest regime for non-publication of guardianship proceedings in the country. Under the *Guardianship and Administration Act 1990* (WA), a person must not publish or broadcast any report that identifies, or could lead to the identification of, a protected person.[233]

208 Identifying a person includes the use of name, title, pseudonym or alias of the person, residential or work address, physical description or style of dress of the person, employment, recreational interests, or photographs of the person in the case of a written publication and in a broadcast where voice is sufficient to identify them to a member of the public.[234]

209 There is no discretion in the Western Australian legislation empowering the tribunal to allow publication under any circumstances.

Views on the safeguards in interstate models

210 We explored the approach to statutory safeguards by comparing models across Australia. In particular, we examined the law in the Australian Capital Territory and Tasmania. While there was general consensus that safeguards are needed, there was no consensus on the form the safeguards should take.

The Australian Capital Territory model

211 There were varying views among consultation participants about law reform along the lines of the Australian Capital Territory approach. In that jurisdiction, the publication prohibition has been removed but the tribunal retains power to prohibit publication if needed. Consultation participants generally thought that this model went 'too far' because it did not have enough privacy protections for represented persons if other people were telling their story.[235] This approach 'arguably does not enable a represented person to exercise choice and control directly' and 'arguably places an undue burden on the represented individual to protect their own privacy in circumstances where they may not be aware that this is necessary and may not be in a position to commence an application due to temporary or permanent incapacity'.[236] Another participant noted that VCAT might not be perfect, but a review by a tribunal member is better than no review.[237]

> Hopefully a tribunal quickly sees that someone like Uli who wants to tell his story should have their application granted. There is very sensitive information disclosed in a VCAT proceeding. Yes, people should be able to tell their own story, but sometimes a person doesn't quite understand what's involved in the process or the extent of the sensitive information that is disclosed. The idea of moving to a position like the ACT is worrying.[238]

212 However, a few consultation participants thought that the Australian Capital Territory approach with safeguards was worth considering. They observed that problems are not arising in the Australian Capital Territory because of this law.[239]

213 One participant was concerned that 'consent' in the Tasmanian model was another barrier that might deter media from reporting important stories.[240] Some disability lawyers thought that the Tasmanian consent model seemed too complicated and could create more challenges for the represented person. They preferred the simplicity of the Australian Capital Territory approach:

> To me, it would be more appropriate to have the ACT position—giving people the ability to apply to prevent publication if needed or wanted but for the default position to be that the person can talk.[241]

214 Supporters of the Australian Capital Territory approach thought that it was important for the tribunal to retain the discretion to prohibit publication, if needed to protect the represented person from harm.

215 In his report calling for the repeal of the Queensland prohibition,[242] the Queensland Public Advocate referred to the importance of other safeguards in the *Guardianship and Administration Act 2000* (Qld), namely the power to issue a non-publication order in section 108[243] and a tribunal practice direction that restricts non-party access to tribunal files to only those with a 'sufficient interest.[244] The Queensland Public Advocate provided examples of situations where a non-publication order might be sought:

> 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.[245]

Perspectives on the Tasmanian consent model

216 Some support was expressed for the Tasmanian consent-based approach (discussed in paragraphs 188-198) on the basis that it contained privacy protections and represented a better balance than the Australian Capital Territory model between openness and privacy.[246]

217 In talking about the experiences of First Peoples, the Victorian Commissioner for Aboriginal Children and Young People thought that consent was vital. Historical experiences of the collection and misuse of information and data by the state without First People's consent, coupled with racism and demonisation by the media, has led to a strong desire among First Peoples to keep their information private and and not put it up for public consultation and discussion. It was suggested that First Peoples need to be engaged directly and asked if they consent to publication so they can have autonomy over their own story, in line with the principle of self-determination.[247]

218 Despite some support for a consent model, questions were raised about how this new law would work in practice. Some of the concerns raised included:

- A represented person with a cognitive impairment might not fully understand the consequences of consenting or might be manipulated into providing consent.
- A represented person who is not capable of meeting the threshold of consent may still want to tell their story or a guardian might want to tell their story for them and this should still be possible either through the use of pseudonyms or via an application to the tribunal.[248] We were also told that reform 'should not prevent represented individuals or their guardians from discussing matters with family members, seeking legal advice, making a complaint to regulators, engaging with a member of Parliament or seeking support or assistance'. It would be preferable for any prohibition of identifying information (in the absence of consent) to only apply 'to the publication of that information to the public or a section of the public, rather than prohibiting the disclosure of that information generally'.[249]
- Consent and capacity are not static. The law needs to be able to respond to these fluctuations.
- Participants did not think that it should be necessary to obtain consent from state parties like Public Guardians and Trustees and service providers. They noted that the Tasmanian model is not clear about this and called for clarity in any new legislative provisions in Victoria.[250]

Possible options for reforming clause 37

219 Through research and discussion with stakeholders, the VLRC has identified four possible options for reform, outlined in the table below. This is not a complete list of all possible reform options. It includes ideas that attracted the most feedback in our discussions with stakeholders. Each option could also be subject to additional detail.[251] Penalties may also apply but were beyond the scope of this discussion.

Possible reform for clause 37	Benefits	Risks and considerations
Option 1 Clause 37 is repealed. The default position is that there is no ban on the publication of identifying information about a guardianship or administration order or what happened in the tribunal hearing unless VCAT orders otherwise (of its own motion or on application by any interested party on grounds to be determined). This approach is based on the Australian Capital Territory model.	• Simplifies the current law, which may improve accessibility. • Similar to the approach recommended by the Disability Royal Commission. • Easy to understand.	• The represented person's right to privacy is not automatically protected. • A third party could publish information about a represented person without considering their wishes unless the represented person or someone else asks the tribunal to prevent it. • Puts the burden on the represented person to apply for a non-publication order to protect their privacy and sensitive information. This could be counteracted by legislative guidance about how the tribunal could use its own motion power. • Education of represented persons and supporters will be needed so that people know to ask the tribunal to keep information confidential. • If clause 37 were repealed, consideration should be given to whether the existing laws in the G&A Act and the VCAT Act provide VCAT with sufficient powers to close hearings and keep VCAT files confidential. Section 108 of the Queensland Act and related practice direction may provide a possible example for Victoria to follow. • Legislation should clearly define legal concepts including 'publication' and the type of information that is sought to be protected by the provision.

Possible reform for clause 37	Benefits	Risks and considerations
Option 2 The prohibition against publication that identifies a represented person or a party is retained but there is an exception where the represented person has given free and fully informed consent to the publication. This approach is based on the Tasmanian model. This option allows the represented person to tell their own story and for someone else to tell their story with their consent. Consent would be different to an assessment of capacity. In Tasmania, consent means that the represented person is freely giving their agreement to make the information public. The tribunal could also retain a discretion to allow publication if it is in the public interest and/or it promotes the personal and social well-being of the represented person. Otherwise, information could continue to be shared provided it does not identify any parties.	• Balances protection of privacy with giving represented persons control over their own story. • A represented person can control the use of their information by choosing whether to give consent to a third party to tell their story. • Does not require a represented person or a third party to go back to the Tribunal to seek an order to publish if consent is given or if the represented person wants to tell their own story (e.g. on social media or at a conference). • Permission can be sought from VCAT on public interest/personal and social well-being grounds if the represented person is unable to consent.	• Defining or assessing the required 'consent' may not be straightforward. Legislative guidance about consent would be needed as well as training for VCAT members. • A represented person might be coerced into giving consent. • A represented person might consent without really understanding what is happening or the potential consequences of publication. • If this model is used, legislation should clarify that consent does not have to be obtained from state authorities or service providers to mention those organisations in a story by or about a represented person. Otherwise, under the Tasmanian model consent would be needed to disclose information relating to another person. • Legislation should clearly define legal concepts including 'publication' and the type of information that is sought to be protected by the provision.

Possible reform for clause 37	Benefits	Risks and considerations
Option 3 A represented person could tell their own story, but a third party needs to seek permission from VCAT even if the represented person has provided consent to publish. There could be a presumption that the tribunal will allow a third-party publication request unless it is against the wishes of the represented person or it could cause them serious harm. Information could continue to be shared provided it does not identify any parties. This is a mixture of the approaches in the Australian Capital Territory and Tasmania.	• Represented people would be empowered to tell their own stories without fear of being in breach of the law. • It simplifies the law for people with disability because they would be free to talk at any point. • VCAT would still be performing a supervisory role in relation to third party publication.	• Does not give full effect to human rights obligations. • The media would still need to seek permission of the tribunal to publish a story that identifies a represented person. • Some represented people may feel that it is their right to ask media to publish their stories for them. • The law could still act as a barrier to media reporting. The media does not always have the resources or time to seek approval. • Consideration will need to be given to the formulation of the test by which to assess third party requests.

Possible reform for clause 37	Benefits	Risks and considerations
Option 4 Simple steps could be taken to improve the status quo. Guidance could stipulate that tribunal members should explain the operation of the confidentiality law at every hearing for a guardianship or administration order. Guidance could also state that members should ask represented persons if they would like to seek an exemption to the operation of the clause at hearings in the Guardianship and Administration list. If the represented person is seeking an exemption to the operation of clause 37 there could be a presumption that VCAT will provide permission unless it is against the wishes of the represented person, or it could cause them serious harm. Legislation could be amended to provide clear examples of the type of conduct that constitutes a breach of clause 37 and include statutory definitions for 'publish', 'broadcast' and 'report of proceedings'.	• May improve understanding and reduce confusion about obligations under clause 37. • Would lead to greater consistency in how cases are managed at the tribunal. • VCAT maintains a supervisory role.	• These changes do not give full effect to human rights obligations. • The burden remains on represented persons to request tribunal permission to tell their story in any identifying way.

Next steps

220 This Spotlight discusses how clause 37 in the VCAT Act is out of touch with a modern human rights-based approach that promotes the full and effective participation of people with disability in the community, on an equal basis with others.[252] Some jurisdictions have pursued reform, but Victoria has not done so to date.

221 A range of stakeholders expressed support for reform, but did not agree on the most appropriate way of doing so. In particular, participants disagreed about how to achieve a balance between protecting privacy on the one hand and supporting autonomy and dignity on the other.

222 Wider consultation with people directly affected by clause 37 is a necessary step in any future reform.

223 As noted at the outset, this Spotlight paper may be used as a resource to inform and generate further community discussion about clause 37. An Easy Read summary of the Spotlight paper is available on the Commission's website. We thank those who participated in our consultations and shared their ideas and views with us about improving the operation of clause 37.

224 Some additional issues arose during our examination of clause 37 that are beyond the scope of this paper, but any reform of the law should consider these further matters:

- **Access to VCAT Guardianship List files:** Reform should consider whether VCAT needs any specific new powers to restrict access to files in the Guardianship List, given the sensitive and often confidential nature of those files.[253]
- **Clear legislation:** New laws should be clear and contain examples of how the law might be applied to guide decision makers under the G&A Act 2019 as well as the community.[254]
- **The provision of education resources:** Appropriate resources should be provided to assist the represented person to understand the law, the impact of their decision-making and where to get support and assistance. [255]
- **Consistency of related legislation:** A representative of State Trustees said there is also a need to examine the way that the G&A Act 2019 and other connected legislation handles secrecy and privacy, to ensure consistent approach and language.[256]
- **Right of reply to publications that name state authorities:** Stories containing incorrect information may shake confidence in state agencies and discourage people from using their services. However, a number of state agencies that we spoke to were wary of creating a legislative right of reply to criticisms about their operations.[257]
- **The publication of a story about a represented person who has died:** Not everyone thought that an exception allowing the publication of identifying information after death would be helpful, because privacy concerns endure beyond death and so do family disputes. Others thought that families who had advocated for loved ones should be given the opportunity to speak in this situation.[258]

Endnotes

1. Consultation 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla). Uli Cartwright organised this roundtable discussion with disability advocacy organisations and supporters - see inside cover for further details about participants.
2. For example: 'Break the Silence – Advocates Call for Urgent Reform of State's Gag Law', *VALiD* (Web Page, 8 February 2024) <https://valid.org.au/break-the-silence-advocates-call-for-urgent-reform-of-states-gag-law/>; 'Position Statement: Right to Tell One's Own Story', *Office of the Public Advocate* (Web Page, 6 April 2023) <https://www.publicadvocate.vic.gov.au/the-public-advocate/speeches/499-position-statement-right-to-tell-one-s-own-story>.
3. See Recommendation [6.12], Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 194–196 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>.
4. The names of people and organisations we met with while preparing this Spotlight paper are noted in the inside cover.
5. This principle is laid out in Article 3 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). *Convention on the Rights of Persons with Disabilities* (3 May 2008, Adopted 12 December 2006 No UN Doc A/RES/61/106) <https://www.ohchr.org/sites/default/files/Ch_IV_15.pdf>.
6. Consultation 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla).
7. Ibid.
8. See the discussion in Victorian Law Reform Commission, *Inclusive Juries — Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision* (Report, May 2023) Introduction, 5 [1.16] <https://www.lawreform.vic.gov.au/wp-content/uploads/2023/05/VLRC_Inclusive-Juries-Report-Parl-May_23.pdf>.
9. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 160–161 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>.
10. Ibid 15 [Rec 6.4], 160–61 [6.2.11].
11. *Guardianship and Administration Act 2019* (Vic) s 7.
12. Ibid s 7.
13. Ibid s 5(1) provides that a person has capacity to make a decision in relation to a matter if the person is able '(a) to understand the information relevant to the decision and the effect of the decision; and (b) to retain that information to the extent necessary to make the decision; and (c) to use or weigh that information as part of the process of making the decision; and (d) to communicate the decision and the person's views and needs as to the decision in some way, including by speech, gesture or other means.' Decision-making capacity is presumed unless there is evidence to the contrary. The Act recognises that a person may have decision-making capacity for some matters and not others and that a loss of decision-making capacity may be temporary. Further, it shouldn't be assumed that just because a person makes an unwise decision, that they lack decision-making capacity. In addition, a person has decision-making capacity in relation to a matter if it is possible for the person to make the decision with practicable and appropriate support.
14. *Guardianship and Administration Act 2019* (Vic) ss 30(1)-(2). A person who has decision-making capacity can appoint someone to make decisions for them later on in life, in the event they lose capacity to make those decisions. This is called an 'enduring power of attorney'. Guardians and administrators will only be appointed if a person does not already have an enduring power of attorney set up or where the enduring attorney has not been given the power to make all the decisions that need to be made. See *Powers of Attorney Act 2014* (Vic) pt 3, s 22.
15. *Guardianship and Administration Act 2019* (Vic) s 3.
16. Information provided by VCAT to the VLRC dated 6 December 2024.
17. *Guardianship and Administration Act 2019* (Vic) pt 4.
18. Ibid s 87.
19. Article 12(2) of the CRPD recognises that people with disability have legal capacity on an equal basis with others. Article 12(3) stipulates that, 'states shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'. Article 12(4) provides that states must put safeguards in place to protect against abuse of these support mechanisms. *Convention on the Rights of Persons with Disabilities* (3 May 2008, Adopted 12 December 2006 No UN Doc A/RES/61/106) <https://www.ohchr.org/sites/default/files/Ch_IV_15.pdf>.
20. Information provided by VCAT to the VLRC dated 6 December 2024.
21. The Public Advocate is an independent statutory officer who promotes and protects the rights of people with disability. The Public Advocate is supported by around 120 staff who work at Office of the Public Advocate (OPA) as part of the Victorian Public Service. The Public Advocate's powers and duties are set out in sections 15 and 16 of the *Guardianship and Administration Act 2019* (Vic). They include being appointed a guardian of last resort by VCAT; investigating any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship; and reporting to VCAT about the need for guardianship or administration. *Guardianship and Administration Act 2019* (Vic) ss 15-16; Office of the Public Advocate, *2024 Annual Report* (Report, 2024) <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/755-opa-annual-report-2023-2024>.
22. *Guardianship and Administration Act 2019* (Vic) s 33(1).
23. State Trustees is Victoria's public trustee. It manages the financial affairs of people who cannot do so for themselves, administers trusts, prepares wills and powers of attorney and acts as an executor for the deceased. Section 21 of the *State Trustees (State Owned Company) Act 1994* (Vic) provides that the Treasurer has an obligation to ensure that members of the public, including children, have access to services relating to the management and administration of their estates and property, including trustee and administration services. In 2023-24, State Trustees managed more than 11,000 personal financial administration clients with assets worth $2.9 billion. Of these clients, approximately 9,000 were represented persons. State Trustees, *State Trustees Annual Report 2023-24* (Report, 2024) 10, 20. <https://www.statetrustees.com.au/wp-content/uploads/annual-reports/2023_24-State-Trustees-Annual-Report_.pdf>.
24. Australian Adult Guardianship and Administration Council, *Australian Adult Guardianship Orders 2022-2023* (Report, Office of the Public Advocate (Qld), 2023) 1 <https://www.agac.org.au/assets/documents/Adult-Guardianship-Orders/AGAC-Guardianship-orders-Report-2022-2023.pdf>.
25. The NDIS uses the term 'psychosocial disability', which it defines as the 'reduced capacity to do daily life activities and tasks due to your mental health'. NDIS, 'Do You Meet the Disability Requirements?', *National Disability Insurance Agency* (Web Page, 3 October 2024) <https://ourguidelines.ndis.gov.au/home/becoming-participant/applying-ndis/do-you-meet-disability-requirements#caused-by-impairment>; Article 1 of the CRPD refers to long-term mental impairments. *Convention on the Rights of Persons with Disabilities* (3 May 2008, Adopted 12 December 2006 No UN Doc A/RES/61/106) art 1 <https://www.ohchr.org/sites/default/files/Ch_IV_15.pdf>.
26. These are the categories used by the Office of the Public Advocate (Vic) in its Annual Reports.
27. Information provided by the Victorian Public Advocate to the VLRC dated 18 December 2024.

28 Office of the Public Advocate (Vic), *2023 Annual Report* (Report, 2023) 35 <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/648-opa-annual-report-2022-2023>. Note, the Public Advocate's latest 2023-24 Annual Report did not contain a demographic breakdown of its client base. For information about who orders are made for please see the 2022-23 Annual Report.

29 Office of the Public Advocate (Vic), *2024 Annual Report* (Report, 2024) 34 <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/755-opa-annual-report-2023-2024>.

30 First Peoples comprise around 1.0% of the Victorian population (66,000 people as at the 2021 Census) but make up 2.4% of the guardianship population (49 of 2,079 as at 2023). Australian Bureau of Statistics, *Victoria: Aboriginal and Torres Strait Islander Population Summary* (Web Page, 1 July 2022) <https://www.abs.gov.au/articles/victoria-aboriginal-and-torres-strait-islander-population-summary>; Office of the Public Advocate, *2023 Annual Report* (Report, 2023) 34 <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/648-opa-annual-report-2022-2023>.

31 Information provided by State Trustees to the VLRC dated 16 December 2024.

32 Ibid.

33 State Trustees suggests that 29 per cent of First Peoples clients under administration are aged 18-29 years, 28 per cent are aged 30-44 years, 19 per cent are aged 45-59 years, 18 per cent are aged 60-74 years and 5 per cent are aged 75 years or older. Information provided by State Trustees to the VLRC dated 16 December 2024.

34 State Trustees suggests that 7 per cent of all clients under administration are aged 18-29 years, 18 per cent are aged 30-44 years, 29 per cent are aged 45-59 years, 28 per cent are aged 60-74 years and 18 per cent are aged 75 years or older. Information provided by State Trustees to the VLRC dated 16 December 2024.

35 Office of the Public Advocate (Vic), *2023 Annual Report* (Report, 2023) 34 <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/648-opa-annual-report-2022-2023>.

36 Consultation 1 (Public Advocate (Vic)). At the time of our consultation the Victorian Public Advocate was Dr Colleen Pearce.

37 Errol Cocks and Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons (Victoria), *Report of the Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons* (Report, 1982).

38 Comprising the *Mental Health Act 1986 (Vic)*; *Intellectually Disabled Persons' Services Act (Vic) 1986*; and *Guardianship and Administration Board Act 1986 (Vic)*.

39 Errol Cocks and Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons (Victoria), *Report of the Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons* (Report, 1982) 38–39.

40 Ibid 39.

41 Ibid 39-40.

42 Explanatory Memorandum, Guardianship and Administration Board Bill 1985 (Vic); Explanatory Memorandum, Guardianship and Administration Board Bill 1985 (No.2) (Vic); Guardianship and Administration Board Bill 1985 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 2618 (Thomas Roper, Minister for Transport).

43 The *Guardianship and Administration Board Act 1986 (Vic)* established a Guardianship and Administration Board to appoint guardians and administrators and the Office of the Public Advocate.

44 There was also a change to the Board's discretion to close hearings where it would be in the best interests of the represented person. This was removed and replaced with a requirement for the Board to close a hearing if it received a request to do so from someone directly interested in the matter: Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 2619 (Thomas Roper, Minister for Transport).

45 There were two Bills for the 1986 Board Act. The second bill for the 1986 Act contained a number of amendments to the first bill after the latter was released for public consultation.

46 Victoria, *Parliamentary Debates*, Legislative Assembly, 30 May 1985, 939 (Thomas Roper, Minister for Transport); Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 2618 (Thomas Roper, Minister for Transport).

47 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1, cl 37.

48 Explanatory Memorandum, Victorian Civil and Administrative Tribunal Bill 1998 (Vic) sch 1.

49 *Kaplan (Guardianship)* [2022] VCAT 6, [13]. See also *Open Courts Act 2013* (Vic) s 3 and 4.

50 This includes hearings to appoint a guardian, administrator and supportive guardian or administrator.

51 In *XKJ (Guardianship)* [2017] VCAT 1654 Deputy President Nihill briefly considered the meaning of a report of proceedings by drawing on the case *Hinchcliffe v Commissioner of Police of the Australian Federal Police* [2001] FCA 1747; (2001) 118 FCR 308. This case concerned section 121 of the *Family Law Act 1975* (Cth), which prohibits the publication of an account of Family Law Court proceedings. In XKJ, the Deputy President accepted that a report of proceedings: 'applies to a wider scope of publication than just the publication of documents. The phrase "report of a proceeding" includes a communication which purports to "narrate, describe, retell or recite something that has happened in the proceedings, or about the proceedings". This means that, unless an order is made under Clause 37 (2), Clause 37 prohibits any person from publishing and broadcasting his or her own account of guardianship proceedings, as well as from publishing or broadcasting any documents or other material from the proceeding file, if publication or broadcast would identify a party to the proceeding.' *XKJ (Guardianship)* [2017] VCAT 1654, [34].

52 See *Hinchcliffe v Commissioner of Police of the Australian Federal Police* [2001] FCA 1747, [53]-[57]; (2001) 118 FCR 308, 323-325.

53 See the discussion of the meaning of 'report of a proceeding' in *Howe & Ors v Harvey; DPP v Tinkler & Ors* [2008] VSCA 181; (2008) 20 VR 638. This case concerned section 26(1) of the *Children and Young Persons Act 1989* (Vic), which contains a confidentiality law in relation to proceedings in the Children's Court. The Court of Appeal upheld the finding of the Supreme Court and the Magistrates' Court that it was enough if the publication would have disclosed to an ordinary reasonable person with only general knowledge that what was being reported was the result or outcome of a proceeding that took place in that court, and that the proceeding itself and the name of the court need not be directly mentioned.

54 Submissions to QLRC's 2007 review of confidentiality laws in guardianship expressed concern about uncertainty in the Queensland law at the time in terms of what 'publish' meant. In calling for greater clarity, the Queensland Public Advocate commented that: 'It is not clear that publication under the guardianship regime is limited to publication in the media or to a section of the public as suggested. Although the better view may be that publication is not intended to cover disclosures of the information to a neighbour or close friend, as it currently stands, s112(3) is open to that interpretation.' Public Advocate (Qld), Submission 1H to Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System - Vol 1* (No 62, June 2007) 320 [7.131] <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0005/372533/R62Vol1.pdf>.

55 See 'Access to Documents - Guardians and Administrators Cases', *VCAT - Victorian Civil and Administrative Tribunal* (Web Page) <https://www.vcat.vic.gov.au/case-types/guardians-and-administrators/access-to-documents-guardians-administrators>.

56 See the discussion in *Kaplan (Guardianship)* [2022] VCAT 6, [14].

57 Ibid [15].

58 Ibid.

59 We note that published guardianship decisions are anonymised by VCAT. VCAT considers that clause 37 supports or requires anonymisation. Consultation 14 (representatives of VCAT).

60 Consultation 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla).

61 *Guardianship and Administration Act 2019* (Vic) pt 7.

62 Consultations 5 (LIV Elder, Disability and Health Law Committees), 6 (Villamanta).

63 Victoria, *Government Gazette* (No S 225, 7 May 2024) <https://www.gazette.vic.gov.au/gazette/Gazettes2024/GG2024S225.pdf#page=1>.

64 For example, the dictum: 'There is a world of difference between what is in the public interest and what is of interest to the public', *Lion Laboratories Ltd v Evans* [1985] QB 526, 553. 'Public interest' can be interpreted narrowly or flexibly, depending on the purpose and scope of the legislation in which it appears: see *Hogan v Hinch* [2011] HCA 4, [31]; (2011) 243 CLR 506, 536; *Allworth v John Fairfax Group Pty Ltd* [1993] ACTSC 22 [57]; (1993) 113 FLR 254, 262. citing *London Artists Ltd v Littler* [1969] 2 QB 375, 391 (Lord Denning MR). Courts have held that it should be construed as an interest of the public generally, not the interest of an individual or group of individuals: *Director of Public Prosecutions v Smith* [1991] 1 VR 63, 75*; Osland v Secretary, Department of Justice* [2008] HCA 37, [119]; (2008) 234 CLR 275, 318 (Kirby J). The number of people involved or impacted is irrelevant, as is the material's newsworthiness: *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 122 [319] (Lee J) citing R Parkes KC, A Mullis et al (eds), *Gatley on Libel and Slander* (Sweet & Maxwell Ltd, 13th ed, 2022) [625]; *Doyle v Smith* [2018] EWHC 2935 (QB) [70] (Warby J); and *Jameel v Wall Street Journal* [2006] UKHL 44 [408] (Baroness Hale). In the defamation context, courts have held that the public interest includes: 1) matters relating to the public life of the community and those who take part in it: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 177 (Bingham CJ) and cited with approval by Lee J *in Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 [319]; 2) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 176–177; 3) matters published in the course of, or for the purposes of, a discussion of the conduct of some person or institution that invites public criticism or discussion: *Bellino v Australian Broadcasting Corporation* [1996] HCA 47, [24]; (1996) 185 CLR 183, 221–222 (Dawson, McHugh and Gummow JJ) cited with approval by Lee J in *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 [319].

65 *Korp (Guardianship)* [2005] VCAT 779, [6].

66 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era: Final Report* (Report No 123, 3 September 2019) <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/>; See also the discussion in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System - Vol 1* (No 62, June 2007) 342–3 [7.210] – [7.213] <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0005/372533/R62Vol1.pdf>.

67 *Korp (Guardianship)* [2005] VCAT 779, [8], also cited in *GMcG (Guardianship)* [2007] VCAT 646, [14].

68 *RCF (Guardianship)* [2024] VCAT 748; *XKJ (Guardianship)* [2017] VCAT 1654.

69 Ibid.

70 *XKJ (Guardianship)* [2017] VCAT 1654.

71 *RCF (Guardianship)* [2024] VCAT 748, [356].

72 *ZBF (Guardianship)* [2024] VCAT 1011, [62].

73 *Korp (Guardianship)* [2005] VCAT 779, [9].

74 *Korp (Guardianship)* [2005] VCAT 779; *Rosewall (Guardianship)* [2010] VCAT 1994.

75 *Rosewall (Guardianship)* [2010] VCAT 1994.

76 *GMcG (Guardianship)* [2007] VCAT 646; *Kaplan (Guardianship)* [2022] VCAT 6.

77 *Korp (Guardianship)* [2005] VCAT 779.

78 Ibid [6].

79 Ibid [7].

80 Ibid [9].

81 Ibid [10].

82 *GMcG (Guardianship)* [2007] VCAT 646.

83 Ibid [8].

84 Ibid [7].

85 Ibid [18].

86 Ibid [19].

87 *Rosewall (Guardianship)* [2010] VCAT 1994.

88 Ibid [34]. Deputy President Coghlan referring to her decision of 4 November 2010.

89 *XKJ (Guardianship)* [2017] VCAT 1654.

90 Ibid [11].

91 Ibid [10].

92 Ibid [40].

93 Ibid [43].

94 Ibid [57].

95 Ibid.

96 Ibid [62].

97 *Kaplan (Guardianship)* [2022] VCAT 6.

98 Ibid [13].

99 Ibid [18].

100 Ibid [20].

101 Ibid.

102 Ibid.

103 *ZBF (Guardianship)* [2024] VCAT 1011

104 Ibid [8].

105 Ibid [62].

106 Under the *Disability Discrimination Act 1992* (Cth), it is unlawful to directly or indirectly discriminate against a person based on their disability in certain settings, including employment, education, the provision of goods and services, and accommodation. In 2023, the Disability Royal Commission recommended that Government implement a range of amendments to the Disability Discrimination Act to make it more effective. See Recommendations [4.23]-[4.34] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report -Volume 4, Realising the Human Rights of People with Disability* (Report, 29 September 2023) 29–34 <https://disability.royalcommission.gov.au/publications/final-report-volume-4-realising-human-rights-people-disability>.

107 The *Equal Opportunity Act 2010* (Vic) pt 4. protects against discrimination, sexual harassment and victimisation in certain areas of public life, including employment, education, sports, local government, clubs, accommodation, healthcare, aged care, shops, restaurants and nightclubs and more. For more information, see 'Discrimination', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <https://www.humanrights.vic.gov.au/for-individuals/discrimination/>. The Act creates a positive duty on some employers to take steps to prevent and eliminate discrimination, sexual harassment and victimisation from occurring in their workspaces (s 15), and for some employers to make reasonable adjustments for people with disabilities (ss 20 ,40, 45).

108 See the 'Objects of the Act' in section 1 which include giving effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD) and enabling people with disability to exercise choice and control in pursuit of their goals and the planning and delivery of their supports: *National Disability Insurance Scheme Act 2013* (Cth) s 1.

109 Many other human rights relevant to guardianship are addressed in the Charter, including protection from cruel, inhuman, degrading treatment or punishment and not being subjected to medical or scientific experimentation or treatment without consent (s 10); freedom of movement and a person's right to choose where they live (s 12); the right to privacy and reputation (s 13); protection against the removal of a person's property without lawful reason (s 20); the right to liberty and security, including freedom from detention without lawful reason (s 21); the right to have a proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing (s 24). *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 10, 12, 13, 20, 21, 24.

110 Victorian Law Reform Commission, *Guardianship: Final Report* (No 24, 2012) 90 [6.79] <https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Guardianship_FinalReport_Full-text.pdf>.

111 Ibid 45.

112 *Convention on the Rights of Persons with Disabilities* (3 May 2008, Adopted 12 December 2006 No UN Doc A/RES/61/106) art 1. <https://www.ohchr.org/sites/default/files/Ch_IV_15.pdf>.

113 Ibid.

114 Ibid art 3(a).

115 In 2009, Australia also ratified the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (3 May 2008, Adopted 12 December 2006 No UN Doc A/RES/61/106) <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-persons-disabilities> enabling people with disability to bring complaints to the United Nations Committee on the Rights of Persons with Disabilities.

116 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 121 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access> citing Gerard Quinn & Abigail Rekas-Rosalbo, 'Civil death: Rethinking the foundations of legal personhood for persons with a disability' (2016) 56 *Irish Jurist* 301.

117 Bernadette McSherry and Andrew Butler, 'Support for the Exercise of Legal Capacity : The Role of the Law' (2015) 22(4) *Journal of Law and Medicine* 739.

118 See *Guardianship and Administration Act 2019* (Vic) pt 4.

119 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report -Volume 4, Realising the Human Rights of People with Disability* (Report, 29 September 2023) 10, Recommendations [4.1]-[4.22] <https://disability.royalcommission.gov.au/publications/final-report-volume-4-realising-human-rights-people-disability>.

120 Victorian Law Reform Commission, *Guardianship: Final Report* (No 24, 2012) <https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Guardianship_FinalReport_Full-text.pdf>.

121 Ibid xxi.

122 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 December 2018, 60 (Jill Hennessy, Attorney-General).

123 *Guardianship and Administration Act 2019* (Vic) s 7.

124 For example, see *Guardianship and Administration Act 1986* (Vic) s 22.

125 *Guardianship and Administration Act 2019* (Vic) s 9(1)(a) and see also s 8(1)(a)(ii).

126 Judicial College of Victoria, *Bench Book: Guardianship, Administration and Enduring Powers of Attorney* (Online Manual, 17 November 2022) 5 <https://resources.judicialcollege.vic.edu.au/article/1044918>; George Szmukler, '"Capacity", "Best Interests", "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18(1) *World Psychiatry* 34 <https://onlinelibrary.wiley.com/doi/full/10.1002/wps.20584?msockid=376e4408726d635d112a510573626270>.

127 *Guardianship and Administration Act 2019* (Vic) s 9(1)(b). The Australian Law Reform Commission considered how a decision-maker should act in the circumstances where the represented person's will and preferences could not be determined in a 2014 report. See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (Report No 124, 24 November 2014) 78 [3.62] <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/>.

128 *Guardianship and Administration Act 2019* (Vic) s 9(1)(c).

129 See 'meaning of promote the personal and social wellbeing of a person' in Ibid s 4(a)-(e).

130 Ibid s 8.

131 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Executive Summary, Our Vision for an Inclusive Australia and Recommendations* (Report, 29 September 2023) ix. <https://disability.royalcommission.gov.au/publications/final-report-executive-summary-our-vision-inclusive-australia-and-recommendations>.

132 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 194 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>.

133 Ibid 196.

134 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Executive Summary, Our Vision for an Inclusive Australia and Recommendations* (Report, 29 September 2023) 73 <https://disability.royalcommission.gov.au/publications/final-report-executive-summary-our-vision-inclusive-australia-and-recommendations>.

135 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 194 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>.

136 Victorian Ombudsman, *Investigation into State Trustees* (Parliamentary Paper No 42, June 2019) 4, 92 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/>.

137 Ibid 99.

138 Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System - Vol 1* (No 62, June 2007) <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0005/372533/R62Vol1.pdf>.

139 *Guardianship and Administration Act 2000* (Qld) s 114A.

140 Public Advocate (Qld), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 20 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/737779/20220811-report-final.pdf>.

141 Ibid 19.

142 Ibid.

143 Ibid 20; Namely a non-publication order in the *Guardianship and Administration Act 2000* (Qld) s 108 and Queensland Civil and Administrative Tribunal, *Accessing and Obtaining Copies of Documents in Guardianship Proceedings* (QCAT Practice Direction No.8 of 2021) <https://www.qcat.qld.gov.au/__data/assets/pdf_file/0011/692372/qcat-practice-direction-no.-8-of-2021-rop-accessing-documents-guardianship.pdf>.

144 Consultation 11 (Acting Tasmanian Public Guardian and Tasmanian Department of Justice representatives). See also Review of *Guardianship and Administration Act 1995* (Tas) (Final Report No 26, December 2018) <https://www.utas.edu.au/lawreform/publications/completed-lawreform-projects>.

145 Ibid.

146 Consultation 1 (Public Advocate (Vic)).

147 For example see: Break the Silence – Advocates Call for Urgent Reform of State's Gag Law', *VALiD* (Web Page, 8 February 2024) <https://valid.org.au/break-the-silence-advocates-call-for-urgent-reform-of-states-gag-law/>; Public Advocate (Vic), 'Position Statement: Right to Tell One's Own Story', *Office of the Public Advocate* (Web Page, 6 April 2023) <https://www.publicadvocate.vic.gov.au/the-public-advocate/speeches/499-position-statement-right-to-tell-one-s-own-story>; Recommendation [6.12], Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 196 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>; Victorian Ombudsman, *Investigation into State Trustees* (Parliamentary Paper No 42, June 2019) 92 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/>; and Yooralla discussion paper titled 'Guardianship and administration orders and confidentiality: Preliminary observations on potential reform options', provided to the VLRC at the roundtable consultation.

148 Public Advocate (Vic), 'Position Statement: Right to Tell One's Own Story', *Office of the Public Advocate* (Web Page, 6 April 2023) <https://www.publicadvocate.vic.gov.au/the-public-advocate/speeches/499-position-statement-right-to-tell-one-s-own-story>.

149 Yooralla Discussion paper titled 'Guardianship and administration orders and confidentiality: Preliminary observations on potential reform options', provided to the VLRC at the roundtable consultation.

150 Consultations 4 (Public Advocate (Qld)), 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla).

151 Consultation 5 (LIV Elder, Disability and Health Law Committees).

152 Consultation 6 (Villamanta).

153 Ibid.

154 Consultation 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla).

155 Consultation 5 (LIV Elder, Disability, Health Law Committees).

156 State Trustees, *Our Financial Independence Program* (Web Page, September 2022) <https://www.statetrustees.com.au/wp-content/uploads/PDFs/STL_Financial-Independence-Program_A5_Flyer_Web.pdf>.

157 Consultation 6 (Villamanta).

158 Consultation 11 (Acting Tasmanian Public Guardian and Tasmanian Department of Justice representatives).

159 Consultations 5 (LIV Elder, Disability and Health Law Committees), 6 (Villamanta), and see Anne Connolly and Hannah Meagher, 'Silenced by the State', *ABC News* (Web Page, 19 June 2023) <https://www.abc.net.au/news/2023-06-20/former-public-trustees-clients-speak-out-on-state-control/102488532>.

160 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enabling-autonomy-and-access>.

161 Consultation 2 (Robert Fitzgerald AM, Age Discrimination Commissioner, AHRC)

162 Consultations 2 (Robert Fitzgerald AM, Age Discrimination Commissioner, AHRC), 4 (Public Advocate (Qld)). See also Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Executive Summary, Our Vision for an Inclusive Australia and Recommendations* (Report, 29 September 2023) 71 <https://disability.royalcommission.gov.au/publications/final-report-executive-summaryour-vision-inclusive-australia-andrecommendations>; and Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Cth), *Final Report - Volume 6, Enabling Autonomy and Access* (Report, 29 September 2023) 139 <https://disability.royalcommission.gov.au/publications/final-report-volume-6-enablingautonomy-and-access>.

163 Consultation 2 (Robert Fitzgerald AM, Age Discrimination Commissioner, AHRC)

164 'Feedback and Complaints', *Office of the Public Advocate* (Web Page) <https://www.publicadvocate.vic.gov.au/feedback-and-complaints>; The Victorian Ombudsman can also take complaints about the Public Advocate. See 'Complaints', *Victorian Ombudsman* (Web Page) <https://www.ombudsman.vic.gov.au/complaints/>; A 2024 audit of the Office of the Victorian Public Advocate by the Victorian Auditor General's Office (VAGO) suggested ways to improve its complaint handling process. See Victorian Auditor-General's Office, *Guardianship and Decision-Making for Vulnerable Adults* (Independent Assurance Report to Parliament No 2023– 24: 16, May 2024) <https://www.audit.vic.gov.au/sites/default/files/2024-05/20240529_Guardianship-and-Decision-making-for-Vulnerable-Adults.pdf?>.

165 See 'Compliments, Complaints and Suggestions', *State Trustees* (Web Page) <https://www.statetrustees.com.au/contact-us/complaints-and-feedback/>; The Victorian Ombudsman can also take complaints about State Trustees. 'Complaints', *Victorian Ombudsman* (Web Page) <https://www.ombudsman.vic.gov.au/complaints/>; A 2019 inquiry into the State Trustees by the Victorian Ombudsman found its complaint handling system was not always effective in practice. See Victorian Ombudsman, *Investigation into State Trustees* (Parliamentary Paper No 42, June 2019) 9 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-state-trustees/>.

166 'Feedback and Complaints', *VCAT* (Web Page) <https://www.vcat.vic.gov.au/about-vcat/feedback-and-complaints>; The Judicial Commission handles complaints about the conduct and capacity of VCAT members. See 'Guiding the Highest Standards of Judicial Behaviour', *Judicial Commission of Victoria* (Web Page) <https://www.judicialcommission.vic.gov.au/>.

167 Consultation 13 (Anne Connolly, reporter, ABC Investigations).

168 'Position Statement: Right to Tell One's Own Story', *Office of the Public Advocate* (Web Page, 6 April 2023) <https://www.publicadvocate.vic.gov.au/the-public-advocate/speeches/499-position-statement-right-to-tell-one-s-own-story>. See also Public Advocate (Qld), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 21 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/737779/20220811-report-final.pdf>.

169 Consultations 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla), 13 (Anne Connolly, reporter, ABC Investigations).

170 Consultation 13 (Anne Connolly, reporter, ABC Investigations).

171 'State Control: Australians Trapped, Stripped of Assets and Silenced', *Four Corners* (Australian Broadcasting Corporation, 14 March 2022) <https://www.abc.net.au/news/2022-03-14/state-control:-australians-trapped,-stripped-of/13795520>.

172 Consultation 13 (Anne Connolly, reporter, ABC Investigations).

173 Anne Connolly, Ali Russell and Stephanie Zillman, 'Trapped, Stripped of Assets, and Silenced. And It's All Perfectly Legal', *ABC News* (Web Page, 14 March 2022) <https://www.abc.net.au/news/2022-03-14/public-trustee-four-corners-investigation/100883884>; Caitlin Fitzsimmons, 'Penny-Pinching, Raking in Huge Fees: Public Trustees under Scrutiny', *The Sydney Morning Herald* (online, 3 February 2019) <https://www.smh.com.au/business/consumer-affairs/penny-pinching-raking-in-huge-fees-public-trustees-under-scrutiny-20190131-p50uwc.html>; Anne Connolly and Hannah Meagher, 'Silenced by the State', *ABC News* (Web Page, 19 June 2023) <https://www.abc.net.au/news/2023-06-20/former-public-trustees-clients-speak-out-on-state-control/102488532>; 'Prisoner of the State', *Background Briefing* (Australian Broadcasting Corporation, 15 December 2023) <https://www.abc.net.au/listen/programs/backgroundbriefing/prisoner-of-the-state-guardian-dementia-mental-illness-nursing/103220352>; 'State Control: Australians Trapped, Stripped of Assets and Silenced', *Four Corners* (Australian Broadcasting Corporation, 14 March 2022) <https://www.abc.net.au/news/2022-03-14/state-control:-australians-trapped,-stripped-of/13795520>; Angus Thompson, '"$25,000 Fee Unconscionable": NSW Trustee Client Dies in Squalor', *The Sydney Morning Herald* (online, 28 January 2019) <https://www.smh.com.au/national/nsw/25-000-fee-unconscionable-nsw-trustee-client-dies-in-squalor-20190128-p50u4b.html>.

174 'State Control: Australians Trapped, Stripped of Assets and Silenced', *Four Corners* (Australian Broadcasting Corporation, 14 March 2022) <https://www.abc.net.au/news/2022-03-14/state-control:-australians-trapped,-stripped-of/13795520>. The ABC website promoting this program noted, 'Some 50,000 Australians are currently under the control of Public Guardian and Trustee agencies around the country. By law, these 'clients' are banned from speaking out about what happens to them, and journalists can be fined or jailed for reporting on them. Four Corners went to court to fight for the right to have their voices heard'.

175 Consultations 5 (LIV Elder, Disability and Health Law Committees), 6 (Villamanta), 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla).

176 Consultation 6 (Villamanta).

177 VCAT advised us that information about clause 37 is provided in the *'Application for Order – Appointment of an Administrator and/or Guardian'* form and provided to people when they seek to access a file in the Guardianship List, Consultation 14 (Representatives of VCAT). See also 'Access to Documents - Guardians and Administrators Cases', *VCAT - Victorian Civil and Administrative Tribunal* (Web Page) <https://www.vcat.vic.gov.au/case-types/guardians-and-administrators/access-to-documents-guardians-administrators>.

178 Consultation 6 (Villamanta).

179 Consultation 5 (LIV Elder, Disability, Health Law Committees).

180 Consultation 6 (Villamanta).

181 Consultation 5 (LIV Elder, Disability, Health Law Committees).

182 Consultations 5 (LIV Elder, Disability and Health Law Committees), 6 (Villamanta).

183 Consultation 6 (Villamanta).

184 'Position Statement: Right to Tell One's Own Story', *Office of the Public Advocate* (Web Page, 6 April 2023) <https://www.publicadvocate.vic.gov.au/the-public-advocate/speeches/499-position-statement-right-to-tell-one-s-own-story>.

185 Public Advocate (Qld), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 20 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/737779/20220811-report-final.pdf>.

186 Consultation 4 (Public Advocate (Qld)).

187 Ibid.

188 Consultation 13 (Anne Connolly, reporter, ABC Investigations).

189 Consultation 12 (VALiD).

190 Consultation 7 (representatives of State Trustees).

191 Consultation 14 (representatives of VCAT) and see the discussion in *Kaplan (Guardianship)* [2022] VCAT 6, [14].

192 Consultation 5 (LIV Elder, Disability, Health Law Committees). Research suggests that people with disability are at significantly higher risk than others of experiencing violence, including family violence, across all age groups. See Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Executive Summary, Our Vision for an Inclusive Australia and Recommendations* (Report, September 2023) 43 <https://disability.royalcommission.gov.au/publications/final-report-executive-summary-our-vision-inclusive-australia-and-recommendationspdf>. The Disability Royal Commission highlighted that rates of violence are particularly high for First Peoples women with disability, young women with disability, and women with intellectual disability. Evidence heard by the Royal Commission pointed out that, 'the nature of violence and abuse towards women with disability suggests they are targeted by a wider range of perpetrators than people without disability, and also in a wider range of settings' at 137.

193 Consultations 1 (Public Advocate (Vic)), 5 (LIV Elder, Disability, Health Law Committees), 7 (representatives of State Trustees).

194 Consultation 5 (LIV Elder, Disability, Health Law Committees).

195 Consultation 1 (Public Advocate (Vic)).

196 Consultation 14 (representatives of VCAT).

197 Consultation 1 (Public Advocate (Vic)).

198 Consultation 7 (representatives of State Trustees). These concerns were also raised in *AFB (Guardianship)* [2023] VCAT 1081.

199 This last point was raised by Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System - Vol 1* (No 62, June 2007) 296 <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0005/372533/R62Vol1.pdf>.

200 Consultation 5 (LIV Elder, Disability, Health Law Committees).

201 Ibid.

202 Ibid.

203 In New Zealand it is prohibited to publish a report of guardianship or administration proceedings that identifies a represented person. The court may grant leave, with or without conditions, to allow publication but the law does not spell out when this discretion can be exercised: *Family Court Act 1980* (NZ) ss 5, 11B(3).

204 In England and Wales, it is prohibited to publish any information about guardianship and administration proceedings where the court is sitting in private, which it generally is. The Court of Protection has jurisdiction over guardianship and administration proceedings in England and Wales and its rules stipulate that hearings are held in private unless the court makes an order otherwise: see *Administration of Justice Act 1960* (UK) s 12(1)(b); *Court of Protection Rules 2017* (UK) r 4.1. The Court of Protection was established under the *Mental Capacity Act 2005* (UK), which came into force in 2007. Under the *Court of Protection Rules 2017* (UK), the Court can make an order authorising publication on application by any person or of its own motion (r 4.2) and can set parameters around what can and cannot be published (r 4.3(2)). The Court can also make an order to open a hearing to the public (r 4.3(1)). Even when it does open a hearing, it can still restrict the publication of information that could identify a party to the proceedings (r 4.3(2)). To make an order to open the court or allow publication, the court must believe there is 'good reason' to do so (r 4.4). The legislation does not define 'good reason', but it has been interpreted in caselaw as involving a two-stage approach: see *Independent News Media Ltd & Ors v A* [2009] EWHC 2858 (Fam), [25]-[35].

205 A 2017 review of state laws by the American Bar Association Commission on Law and Aging found that in 13 states, all records of guardianship hearings, including all documents, could be sealed—that is, kept confidential and not open for public inspection. In about half of all states, records were partially protected, typically including medical records and financial records. In nearly all states, hearings can be closed to the public on request. States have a range of regulations to protect personal information, "[h]owever, these rules may not be strictly enforced and usually parties bear the responsibility of ensuring this information is redacted" Erica McCrea, 'A Survey of Privacy Protections in Guardianship Statutes and Court Rules' (2017) 38(3) *Bifocal* 50, 51; It is common for people subject to guardianships or conservatorships in the United States, especially celebrities or persons of note, to have their identities and details of their case published in the media, regardless of their consent. Julia Jacobs, 'Britney Spears's Conservatorship: What To Know', *The New York Times* (online, 22 September 2021) <https://www.nytimes.com/article/britney-spears-conservatorship.html>; Meryl Gordon, 'The New Astor Court', *Vanity Fair* (online, 26 September 2009) <https://www.vanityfair.com/news/2009/09/astor-trial200909>.

206 For example, in New York State under the *NY Mental Hygiene Law § 81.14* (2014) <https://www.nysenate.gov/legislation/laws/MHY/81.14>; See also Daniel Reiter, 'Public Access to Adult Guardianship Cases: A World of Inconsistency', *Adult Guardianship Law Blog* (Web Page, 28 December 2020) <https://www.adultguardianshiplawblog.com/2020/12/public-access-to-adult-guardianship-cases-a-world-of-inconsistency/>; *Matter of Caminite (Amelia G)* 57 Misc 3d 720 (2017); *Matter of Doe* 181 Misc 2d 787 (1999).

207 *ACT Civil and Administrative Tribunal Act 2008* (ACT).

208 Ibid s 38.

209 Ibid s 39(1).

210 Ibid s 39(2)(a).

211 Ibid s 39(2)(b).

212 Ibid s 39(2)(c).

213 Ibid s 39(5).

214 Ibid s 39(3).

215 *Guardianship and Administration Act 1995* (Tas) s 86(2). The exception for consent was inserted into the *Guardianship and Administration Act 1995* (Tas) in September 2024 by section 62 of the *Guardianship and Administration Amendment Act 2023* (Tas).

216 *Guardianship and Administration Act 1995 (Tas)* s 86(1).

217 Tasmania, *Parliamentary Debates*, House of Assembly, 10 August 2023, 85 and 88 (Simon Wood, Parliamentary Secretary for Health, Mental Health and Wellbeing).

218 Tasmania, *Parliamentary Debates*, House of Assembly, 10 August 2023, 66 (Mr Ferguson, Deputy Premier).

219 *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) s 123(2).

220 Ibid s 123(1A). The exceptions in the *Guardianship Act 1995* (Tas) are s 86(2A) for 'the disclosure of information as required or permitted by any law if, in the case of information relating to another person, that other person has given consent in writing' and s 86(2B) for the disclosure of protected information where there has been consent with the full understanding of the protected person and with the consent of any third party the protected information relates to.

221 Ibid s 123(1)(b).

222 *Civil and Administrative Tribunal Act 2013* (NSW) s 65(2)(b).

223 *Guardianship of Adults Act 2016* (NT) s 80(2).

224 Ibid s 80(4).

225 The *Guardianship and Administration Act 2000* (Qld) s 114A defines 'prohibited publication' to mean 'publication of information about a guardianship proceeding to the public, or a section of the public, that 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.'

226 Ibid.

227 In its 2007 report looking at confidentiality in the guardianship system, QLRC wrote that the concept of 'reasonable excuse' is 'not capable of being exhaustively judicially defined and is essentially a question of fact' that should be 'determined in light of the purpose of the legislation, having regard to what a reasonable person would accept as appropriate'. Some submissions to the QLRC's inquiry said reasonable excuse should be better defined in the law, but QLRC concluded that this was unnecessary because, 'the flexibility provided by the defence is useful given the multiplicity of potential publications that could occur in the guardianship context'. Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System - Vol 1* (No 62, June 2007) 179 [4.360], 356 [7.270] <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0005/372533/R62Vol1.pdf>.

228 *Guardianship and Administration Act 2000* (Qld) s 114A(4)-(6).

229 Ibid s 114A(3)(b).

230 Ibid s 114A(3)(a).

231 Queensland Civil and Administrative Tribunal, *Accessing and Obtaining Copies of Documents in Guardianship Proceedings* (QCAT Practice Direction No.8 of 2021) <https://www.qcat.qld.gov.au/__data/assets/pdf_file/0011/692372/qcat-practice-direction-no.-8-of-2021-rop-accessing-documents-guardianship.pdf>.

232 *Guardianship and Administration Act 1993* (SA) s 81.

233 *Guardianship and Administration Act 1990* (WA) sch 1 cl 12(1). Note pursuant to Part 3A of the Guardianship and Administration Regulations the Public Advocate and the Public Trustee are permitted to divulge personal information in prescribed circumstances to perform their roles.

234 Ibid sch 1 cl 12(3).

235 For example, Consultation 5 (LIV Elder, Disability, Health Law Committees).

236 Yooralla Discussion paper titled 'Guardianship and administration orders and confidentiality: Preliminary observations on potential reform options', provided to the VLRC at the roundtable consultation.

237 Consultation 5 (LIV Elder, Disability, Health Law Committees).

238 Ibid.

239 Consultations 4 (Public Advocate (Qld)), 13 (Anne Connolly, reporter, ABC Investigations).

240 Consultation 13 (Anne Connolly, reporter, ABC Investigations).

241 Consultation 6 (Villamanta).

242 *Guardianship and Administration Act 2000* (Qld) s 114A.

243 Ibid s 108.

244 Queensland Civil and Administrative Tribunal, *Accessing and Obtaining Copies of Documents in Guardianship Proceedings* (QCAT Practice Direction No.8 of 2021) <https://www.qcat.qld.gov.au/__data/assets/pdf_file/0011/692372/qcat-practice-direction-no.-8-of-2021-rop-accessing-documents-guardianship.pdf>.

245 Public Advocate (Qld), *Public Accountability, Private Lives: Reconsidering the Queensland Guardianship System's Confidentiality Requirements* (Report, August 2022) 20 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0004/737779/20220811-report-final.pdf>.

246 Consultation 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla). Also, Yooralla Discussion paper titled 'Guardianship and administration orders and confidentiality: Preliminary observations on potential reform options', provided to the VLRC at the roundtable consultation.

247 Consultation 10 (Commissioner for Aboriginal Children and Young People, Victoria).

248 Yooralla Discussion paper titled 'Guardianship and administration orders and confidentiality: Preliminary observations on potential reform options', provided to the VLRC at the roundtable consultation.

249 Ibid.

250 Consultation 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla).

251 For instance, additional defences or exceptions such as the defence of reasonable excuse or the exception for disclosure of transcripts or information to public agencies, investigatory bodies or for court proceedings. See discussion in Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System - Vol 1* (No 62, June 2007) 344–353, 355–356 <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0005/372533/R62Vol1.pdf>.

252 *Convention on the Rights of Persons with Disabilities* (3 May 2008, Adopted 12 December 2006 No UN Doc A/RES/61/106) art 3 <https://www.ohchr.org/sites/default/files/Ch_IV_15.pdf>.

253 In determining whether to grant access to these files, VCAT balances concerns about confidentiality with rights to procedural fairness. In *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal & Ors* [2006] VSCA 7, [40]-[42], Justice Maxwell held that VCAT's power to restrict access to documents in s 146(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) is conditioned on the principles of natural justice. A party seeking access to the VCAT file under s 146(4)(b) must be given the opportunity to be heard and respond to VCAT's proposed direction to restrict access to the file.

254 Consultations 9 (Roundtable organised by Uli Cartwright and hosted by Yooralla), 12 (VALiD).

255 Consultation 1 (Public Advocate (Vic)). Also noted in Consultation 7 (representatives of State Trustees) and Consultation 12 (VALiD).

256 Consultation 7 (representatives of State Trustees).

257 We note that VCAT does not take a formal position on this but acknowledges that the public has the right to make complaints about their experience of the tribunal and its processes: Consultation 14 (representatives of VCAT).

258 See *Guardianship and Administration Act 2000* (Qld) s 114A(3)(b) for an example of an exception for publication of identifying information after death.

SPOTLIGHT PAPER Nº1

‘I Want to Tell My Story’: The Guardianship and Administration Confidentiality Law

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