

Administration Tribunal

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Tuesday 15 August 2006 8:30AM ([view full episode](#))

We all accept that kids who come before criminal or family courts should never be identified in the media.

But what about the elderly and the frail? Currently there are tight restrictions on reporting what happens in the Queensland Adult Guardianship and Administration Tribunal.

In Queensland even those under guardianship orders and their kids or carers can't speak out if they have concerns about what they regard as unfair decisions. Critics say this has a detrimental impact on accountability.

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Damien Carrick: The Queensland guardianship regime is again under the spotlight.

At some point, every family has to deal with a loved one who isn't able to make their own decisions. Be it through old age or disability, these vulnerable adults need someone to look after their welfare. And if a decision is made that there is no appropriate family member who can take on that role, the state steps in. But of course when bureaucracy walks through the front door of a family home and takes control, tensions can run high. And in some parts of the country, Queensland, South Australia and the Northern Territory, angry relatives can't even go to the media.

Margaret Wenham: It's an oldie but a goodie, and this is referred to in the discussion paper 'Open Justice', where there is no publicity, there is no justice. Publicity is the very soul of justice, and I think that that says it all.

Damien Carrick: Protecting the privacy of vulnerable people is a good thing, but can privacy be used to stifle discussion and criticism? Around the country adult guardianship and administration tribunals have the task of determining if there's

a need to appoint a guardian, be it a family member or the office of the adult guardian.

In the ACT, New South Wales, Tasmania, Victoria and WA, the media can publish details of these types of proceedings, providing no-one is identified. But in some places the whole process is conducted in a media vacuum. Queensland, along with South Australia and the Northern Territory, have blanket bans on any media coverage of these tribunal hearings. In Queensland, this blackout has been heavily criticised. Angry families say without media scrutiny, there is no accountability, and bad decisions are conveniently swept under the carpet.

The Queensland Law Reform Commission is currently looking at the issue, and just last week released its discussion paper on the topic. Heather Stewart reports from Brisbane.

Heather Stewart: Hana Sokal died last year. For the last three years of her life the responsibility for her health and wellbeing rested with the Queensland office of the Adult Guardian. Her son Henry was denied the right to act as her guardian by the Queensland Guardianship and Administration Tribunal. Under the provisions of the existing legislation, the Law Report is unable to gain access to, or provide any details about why the decision went against him. I spoke to Henry Sokal shortly after the Queensland Law Reform Commission's discussion paper was released by the Attorney-General.

Henry Sokal: She was suffering so much, she begged to come home, she wanted to die in her own home. To have this happen to her, she died in hospital; I didn't miss a day in seeing her. The only time I couldn't see her, when I spoke to her through the window of the nursing home, I was outside, it was a ground-floor nursing home, thank goodness, and I begged the nurses, 'Please let me speak to her.' And I spoke to her through the window, because the nursing home was in a containment of some sort because of an outbreak of diarrhoea, and she was begging and begging to come home. She was so miserable and unhappy in the nursing home, but the Adult Guardian put her there, and the Tribunal gave all the decision-making about her to the Adult Guardian. She had quite a big stroke, but mentally she was OK, but because of the stroke she lost her ability to speak, she could understand everything, but she could not speak, so they said that she's

incompetent, and they gave her to Adult Guardian. For three years I tried to bring her home, for three years we fought with the Adult Guardian. To no avail. Finally I found someone fabulous called Margaret Wenham, who's a journalist with *The Courier Mail*, and she did a story about us. The amazing thing about the story was our names could not be mentioned, and nothing could be mentioned to identify who we are, because of the privacy provisions that govern the Adult Guardian and Tribunal Acts.

So if a citizen has a complaint against the Adult Guardian or the Tribunal, they are silenced, like in a communist country, and they can't speak out to the newspapers, to the television, to the radio. We were also on television my mother and I, my beautiful mother, such a beautiful woman, we were on television and our faces were blacked out on television, which is the amazing thing, because it could not be shown that our faces...to identify us because of the Act.

Heather Stewart: Why is it that you weren't awarded guardianship of your mother?

Henry Sokal: That I'm not sure about, I don't really know the reason for that. I was told when I went to the Tribunal 'You don't need a lawyer, just come by yourself, it will be very friendly and informal'. As soon as we got to the Tribunal, and as soon as we are at the Tribunal, the first thing that happened was they started to argue about what the Act says. So I needed a lawyer for that. And I was told that I don't need a lawyer. I was misled.

Heather Stewart: In terms of, though, the guardianship restrictions and the confidentiality provisions, how misrepresented do you think your interests were?

Henry Sokal: The Adult Guardian moved my mother out of the hospital after keeping her there for a whole year. They wouldn't let her come home despite the fact that the hospital said after two or three months she can go home. But the Adult Guardian kept her at the hospital for a whole year, 12 months. Then one day I came to the hospital at the start of visiting hours which was around midday, and her bed was empty, and I said, 'Where is she?' and I was told that she had put up a tremendous struggle, she didn't agree to go to the nursing home, she only wanted to come home and she was transported by ambulance forcibly to the nursing home. Well I rushed to the nursing home and I was there with her every day.

Heather Stewart: What do you want to see happen now?

Henry Sokal: The first issue, that unless a relative is abusive, if he is the only relative in Queensland he should be the one to help decide what his mother or his relative wants. The Act should say that; the Act is very fuzzy about that, it says 'what is best for the adult'. It completely ignores the rights of the relative, who is suffering immensely because they know what's happened to the adult, and because they know what's happened to the adult, they are the only ones who can help enforce the decisions that the adult wants to make. So where there is no attitude of abuse, and that's what I was told, 'You are not abusing her in any way', but they didn't want me to decide about her or anything. Also her wishes were ignored. I said to the Tribunal 'Ask her who she wants to be her guardian, ask her'. And when I said that, my mother shouted out, and she pointed at me. They completely ignored that at the Tribunal. They weren't interested in what my mother had to say at all.

The second issue is that there should always be the right of a relative or anyone to go to the press, to the newspapers, to the radio, to the television, and complain about government action. These semi-quasi-judicial entities like the Adult Guardian, like the Tribunal, they have decided that they are a law unto themselves which cannot be challenged by the newspapers or the radio or the television. This is outrageous that there are government instrumentalities which cannot be overseen and commented upon freely by the newspapers, by the radio, by the television, by the internet, by anyone. It should be completely free to comment on any government policy, any government decision. Whether or not the Minister has jurisdiction.

Finally, I would need to think about this. The fact that the Minister can't interfere is not something that I'm in favour of. Dr Bruce Flegg, who is a very wonderful person, he helped me and he wrote to the Minister and begged the Minister, begged him, to bring my mother home, and the Minister wrote him back that it's nothing to do with him, he can't interfere at all. He provided the funds to the Adult Guardian, but he can't always see or comment or do anything about the Adult Guardian decision-making process. I wonder if that's the way it should be, that the Minister doesn't have the final say.

Heather Stewart: Henry Sokal, son of Hana Sokal.

Felicity Madison is the parent of two adult children with decision-making incapacities, and had to seek guardianship through the Tribunal to care for them. And Margaret Wenham is a *Courier-Mail* reporter who wrote the article on Henry and Hana Sokal.

Margaret Wenham, in your coverage involving Henry, it was often fraught because of the legislation; can you explain that to us?

Margaret Wenham: Yes. The first time I did a story on the Sokals, and I should say that I met both Henry and his mother, and she is indeed a beautiful woman. Or she was, I'm sorry. It became apparent that any story that I was going to do after we had legal advice on it, I was not able to identify the parties, I wasn't even able to identify the statutory authorities if you like, and the type of audit that may or may not have been issued. The story that *The Courier-Mail* actually ran was actually emasculated, so we have this photo with the faces pixillated out, we've got pseudonyms given to the parties involved; we're referring to a statutory authority but we're not naming it; we can't talk about very much at all. It was actually a real effort to try and get the story out there. The second time we wrote a story, the Courier Mai published a story on it was because Dr Bruce Flegg, in Parliament, raised the issue of Mrs Sokal's incarceration in a nursing home against her will, and using qualified parliamentary privilege we were able to report what Dr Flegg said in parliament. Although I understand that there was at the time, problems attached to that, with us assuming that we had qualified parliamentary privilege to report what was said in parliament, because of the constricting nature of Section 112 of the Guardianship and Administration Act.

Heather Stewart: Felicity Madison, you too are aware of Henry Sokal's family situation, and you have your own circumstances. How are you finding the legislation and, from Henry's comments, what do you feel?

Felicity Madison: I've not only had my own situation of going to the Tribunal to gain guardianship of my adult children, but I've also supported families and been enjoindered as their agent at Tribunal hearings. Henry's comments are extremely valid. The confidentiality clauses within the legislation are actually being used as a weapon against families and to stifle debate, or open accountability of the process,

and the families that I've actually assisted, it basically comes down to that anyone can make any allegation that remains untested, and it is used as evidence against that family in a tribunal hearing. And that's my major issue, is that there is no rigorous testing of any evidence placed before the Tribunal for the purpose of them making a decision, and it can be defamatory, and there is no recourse or redress for families in that situation. There also seems to be a greater weighting placed on any evidence presented by service providers, be they health professionals or support organisations in the community, as opposed to the intimate knowledge and lengthy time that families have had in supporting a person with a decision-making incapacity. So there's almost a punishment mode, and I think the saddest thing about the Tribunal and the whole guardianship regime, is that whilst it's there to protect, there is no evaluation of the outcomes of their decisions, and some of those decisions have been incredibly punitive to both the person with the disability, the decision-making incapacity, and to the families, which go against the general principles of the Guardianship Act, that it is there to protect.

Heather Stewart: Margaret Wenham, you've had the chance to absorb the discussion paper which was released last week by the Attorney-General; do you have faith that the media will be able to cover these issues and raise public awareness about some of the things that Felicity Madison and Henry Sokal are talking about?

Margaret Wenham: One of the preferences stated the change by the Queensland Law Reform Commission is to remove, if you like, the blanket ban on the reporting of Tribunal proceedings. The non-identifying provisions will remain. However, having said that, the Tribunal from my reading of the discussion paper, the Tribunal will still have the power to remove members of the public from Tribunal hearings, and other people who may even be associated with the hearings, including active parties. It will still have the power to issue confidentiality orders over all or part of the proceedings, and so I just wonder whether the lifting of the blanket ban, if you like, is going to be negated by the ongoing other confidentiality provisions that are going to remain. Felicity alluded to the Act not being particularly unsound, but it is how it is applied by the Tribunal and other

agencies.

Heather Stewart: Felicity, can you give me an example of when you've seen the Act applied to family members and how they have not benefited from this.

Felicity Madison: In the hypothetical situation the Tribunal could, acting on information of another party, cause family members to be arrested, and fingerprinted and charged with breaching a statutory order, that the family had no knowledge that that statutory order was in place, and has not been able to find out or is not able to find out whether or not that order existed at the time that they were actually charged with the offence.

Heather Stewart: Margaret Wenham, you actually are aware of circumstances and were challenged with trying to report them. Can you tell us some detail?

Margaret Wenham: Yes there was a particular set of circumstances involving a family that I wished to report on, and this was after *The Courier-Mail* was fully appraised of the extent of the confidentiality provisions. Under the Act you are able to report proceedings or information relating to some proceedings if you have obtained the express orders of the Tribunal. So, on one occasion I contacted the Tribunal, told them that I wished to prepare a story on a set of circumstances that had affected a family, sought permission. I did so in writing as well. I didn't get a response from the Tribunal registrar myself; our managing editor wrote to the Tribunal seeking these express orders in order for me to prepare a story. It took the Tribunal six weeks to reply, and that was to advise us that they would be holding a special hearing to determine whether they would issue the express orders that would permit me to write a story about quite a significant thing that had happened to a family as a result of being involved in the Guardianship regime. They set a hearing date for it was about two months down the track from that. Now that made it absolutely impossible. The *Courier-Mail* refused to participate in the hearing; I had no say in that, obviously, but the *Courier-Mail* would have had to have engage lawyers at enormous expense in order to try and get permission to publish the details of this story that I wanted to publish. So that particular story, and it was quite an horrific one, has never been told.

Heather Stewart: You're overwhelmed, it appears, by the restrictions that you're facing. And as that's the case, why are you so passionate about trying to raise

awareness about the issues that you've come across, and how frustrated are you?

Margaret Wenham: I've done a fair bit of reporting in relation to child protection issues over the years, and there are some pretty strict confidentiality provisions in the Child Protection Act. Now nobody can argue against confidentiality provisions when they are applied in the best interests of, in the case of the Child Protection Act, children who are at risk of abuse, and in respect of the Guardianship Act, people who have an impaired decision-making capacity. However, it's my belief, prior to the Crime and Misconduct Commission Inquiry into foster care in Queensland, it was very easy for the former Department of Families to use those confidentiality provisions to prevent any kind of scrutiny of decisions that had been taken by the Department that may have then led to very bad outcomes for children. And I believe that that is the case with the Guardianship regime as well. I think a good quote to finish one is 'It's an Oldie but a Goodie' by Jeremy Bentham, and this is referred to in the discussion paper, Open Justice: 'Where there is no publicity, there is no justice. Publicity is the very soul of justice', and I think that that says it all.

Heather Stewart: *Courier-Mail* reporter, Margaret Wenham.

The Queensland Guardianship Tribunal president, Susan Gardiner, declined an interview with The Law Report, but Queensland's Adult Guardian, Diane Pendergast, agreed. Thank you for talking to The Law Report, Diane. You've heard the concerns raised by Henry Sokal; even though his mother's died, you're still bound by parts of the legislation in discussing specific details; how frustrating is this when trying to defend your office's actions.

Diane Pendergast: It's really a question of public confidence in the Guardianship regime in Queensland, and for there to be public confidence there needs to be a balanced point of view, and at this point in time the balance simply isn't occurring because we're unable to give our side of the story.

Heather Stewart: You've only started in your role in early May this year; how challenging are you finding it?

Diane Pendergast: I'm enjoying the role; I think that it's a significant opportunity to help a lot of people in Queensland who don't have capacity to make decisions for themselves. We're making some significant changes in the office and in the way

we do business, but nevertheless, we need to respect the provisions of the Act, and of course that means that I can't publicly talk about the sort of issues that Mr Sokal has discussed today. Needless to say that from my point of view, although I understand the very difficult time that Mr Sokal has had, my view is that his recounting of events doesn't tell the full story. But because of the confidentiality provisions and the need to protect his mother's confidentiality, I'm unable to fully discuss the issue.

Heather Stewart: And does that go to the core of some of the issues that reporter Margaret Wenham was saying are very valid for the media?

Diane Pendergast: I still think that we need to respect an individual's right. Don't forget, we're talking about people who don't have capacity to make decisions for themselves. We are only appointed as a last resort, when there really is no-one else to make those decisions. In these sorts of cases that's often because there are huge disputes in the family, or because no family member themselves is able to undertake that role. That means that families start off necessarily being unhappy with our involvement. We still need to respect the rights of the people that we're working for, and that is the adult with incapacity. We need to be inclusive of the family, but ultimately we need to make decisions that benefit the adult with the incapacity, and not necessarily the family that's involved.

Heather Stewart: You've heard also comments from Felicity Madison. What was the most important issue that she raised that you wanted to have a right of reply to?

Diane Pendergast: I agree totally with Felicity about the issue of accountability. I think accountability is intrinsic to everything that we do. There are already lawyers of accountability built into the system, both internal and external reviews of what happens within the office. And we actively encourage members of families who are unhappy with our decision making process, to activate complaint processes so that there will be a review of what happens. So I agree with Felicity that accountability is important. From my point of view the most important thing that's happening at the moment is the entire debate. I would like people to have a look at the discussion paper, to think about the issues because these aren't just issues that happen to someone else. They happen in families like mine and yours

every day of the week, and so if people can start to think about the issues, think about they think that this law should be developed, and have a say, we'll end up with a strong, well-balanced regime that means that we're making the best decisions for these adults.

Heather Stewart: You're saying that you are supporting accountability, but are you supportive of media coverage of the Tribunal?

Diane Pendergast: I wouldn't like to comment on media coverage of the Tribunal because that's not really my responsibility.

Heather Stewart: But as an Adult Guardian you're going to be representing the clients who are under your guardianship. That means your clients' content could be made public. So therefore it is an issue for you.

Diane Pendergast: I've been to hearings and they are often very emotional, very traumatic, and they disclose information about families that's often very personal. I am happy for my office to be accountable for what it does but I think that as a community we need to think more broadly about the implications of having public debates in the media about the intimate details of a person's life. Perhaps there's a way that we can do it for example, de-identifying cases so that they can be discussed in the media; perhaps that's an option. I'm certainly willing to discuss these issues at whatever opportunity that I can, but I also would like to respect the privacy of the adults that we are charged with making decisions for.

Heather Stewart: So a lot of work ahead, you believe?

Diane Pendergast: Yes, but I'm excited. I think that if we can have an open, honest public debate about these issues, we will end up with a well-balanced, well-functioning Guardianship regime, and that's good news for everyone.

Heather Stewart: Diane Pendergast, Queensland's Adult Guardian.

Dr Ben White is the Queensland Law Reform Commission's full-time commissioner. He has the responsibility of overseeing the review of Queensland's Guardianship legislation, and is trying to balance the system's accountability and the rights of adults with decision-making incapacity.

Ben White: We're running this consultation process to try and get this legislation right. Mr Sokal's obviously someone who has had an experience with the legislation and we want to know what he thinks. I had an opportunity to learn a

little bit more about that listening to him today, but I welcome him to contact the commission and tell us a little bit more about his story and some of the concerns that he has, so we can try and get this legislation to strike that balance between accountability on one hand, and respecting the privacy of the people involved in the proceedings.

Heather Stewart: Margaret Wenham doesn't appear to have confidence in media being able to cover these issues fairly because of the restrictions she fears will still be in place. What do you say to that?

Ben White: I think the best chance that these laws stand to be cutting-edge Guardianship legislation, because that's what we want, we want the best for the people of Queensland in relation to people who can't make their decisions. The best chance that we have for good Guardianship legislation is an independent and honest review, based on wider and inclusive consultation, and that's what the Queensland Law Reform Commission is aiming to do.

Heather Stewart: Queensland's is the toughest, along with the Northern Territory and South Australia in terms of publicity about the Tribunal matters.

Ben White: In Queensland there is currently a ban in the Guardianship legislation, on the media reporting what happens at the Tribunal, even if that doesn't identify people involved. The Law Reform Commission is looking to permit the coverage by the media of Tribunal proceedings provided they don't identify the people who are involved.

Heather Stewart: Felicity Madison's very concerned about accountability of the Adult Guardian and the Tribunal. Is this another issue that you are having early submissions on?

Ben White: There are three big issues, three competing factors which will determine how we strike this balance between, on the one hand, open accountable decision-making, and on the other hand, protecting the rights and interests of adults with impaired capacity. One is this concept of open justice which says that people who wish to attend Tribunal hearings can do so and the media can report on it. It's all about encouraging open, accountable decision-making. Another is procedural fairness. This is the right of people to participate in a decision that involves them, that affects their rights, and again, that suggests that people might

need to be disclosed information that has been said about them, as part of giving them a fair hearing. So those two suggest open, transparent decision-making, so not confidentiality. On the other hand, there is a third factor to consider here, and that is why do we have this jurisdiction? Why do we have Guardianship legislation and the agencies that are set up to deal with it? The role is to protect and safeguard the rights and interests of a vulnerable group of people, adults with impaired capacity or who can't make their own decision, as part of, I guess, making sure their rights are protected, and safeguarded. We need to think about whether or not confidentiality might be appropriate.

Heather Stewart: Of all the matters you've dealt with in the Commission, is this one of the most tricky because of the conflicting tensions?


Ben White: These are very, very difficult issues. In addition to the difficult legal issues that I've discussed, balancing the importance of accountability and decision-making and transparency and fairness on the one hand, or on the other the importance of safeguarding the rights and interests of people who need help with decision-making. In addition to those difficult legal issues there are also very difficult emotional issues attached to this review. These are issues that affect real people, this is an area of law that all of us either have contact or will have contact. We've all got family members or friends who might need help with decision-making, so there are some very, very difficult issues in here that affect a wide range of people. The Commission has released a number of discussion papers that it wants to seek the community's views on. In striking that balance between accountability and the privacy of the adults involved in this jurisdiction, we need to find out what people think so we can get this legislation right.

Damien Carrick: Ben White from the Queensland Law Reform Commission. And that story was prepared by Heather Stewart in Brisbane. That's The Law Report for this week; a big Thank You to produce Anita Barraud, and also to technical producer Chris Lawson.

Guests

 **Ben White,**

Queensland Law Reform Commissioner

 **Henry Sokal**

Queensland man who is critical of the Adult Guardianship regime

 **Marg Wenham,**

Journalist, Brisbane Courier Mail

Felicity Madison,

Parent and disability advocate

Diane Pendergast,

Queensland Adult Guardian

Credits