Standing Committee on Law and Justice

The prohibition on the publication of names of children involved in criminal proceedings

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Terms of reference

That the Standing Committee on Law and Justice inquire into and report on the current prohibition on the publication and broadcasting of names under section 11 of the *Children (Criminal Proceedings) Act 1987* (the Act), in particular:

1. The extent to which the policy objectives of the prohibition remain valid, including to:

    (a) reduce the community stigma associated with a child's involvement in a crime, thereby allowing the child to be reintegrated into the community with a view to full rehabilitation;

    (b) protect victims from the stigma associated with crimes; and

    (c) reduce the stigma for siblings of the offender and victim, allowing them to participate in community life.

2. The extent to which section 11 of the Act is achieving these objectives.

3. Whether the prohibition on the publication and broadcasting of names under section 11 of the Act should cover:

    (a) Children who have been arrested, but who have not yet been charged;

    (b) Children, other than the accused, who are reasonably likely to be involved in proceedings; and/or

    (c) Any other circumstance.

Any other relevant matter involving the prohibition on the publication and broadcasting of names, including consideration of prohibitions in the *Young Offenders Act 1997* and the *Crimes Act 1900*.

The terms of reference for this Inquiry were referred to the Committee by the Attorney General and Minister for Justice, the Hon John Hatzistergos MLC on 16 October 2007.

Committee membership

The Hon Christine Robertson MLC	Australian Labor Party	*Chair*
The Hon David Clarke MLC	Liberal Party	*Deputy Chair*
The Hon John Ajaka MLC	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Amanda Fazio MLC	Australian Labor Party	
Ms Sylvia Hale MLC	The Greens	

Secretariat

Mr Simon Johnston, A/Director

Mr Jonathan Clark, Principal Council Officer

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Chair's foreword

The current prohibition in NSW on naming children who are involved in criminal proceedings is contained primarily in section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW). It reflects Australia's endorsement of various United Nations instruments relating to the differential treatment of children in the criminal justice system, and recognises their cognitive and emotional immaturity and increased vulnerability compared to adults.

High profile crimes involving juveniles, such as the recent attack on a Sydney school, often lead to a call for the 'naming and shaming' of offenders. Whatever short-term purpose such a response might serve, it is ultimately shortsighted since it is likely to stigmatise the offender and impact negatively on their rehabilitation, increasing the likelihood of reoffending.

Juvenile offenders can be punished and encouraged to take responsibility for their actions without being publicly named. Judicial sentences for juveniles can and do reflect community outrage, denouncement of the crime and acknowledgement of the harm caused to victims. There are confidential processes such as juvenile youth conferences, in which the offender must often face their family and the victim of their crime, that utilise shame constructively and supportively to help the offender reintegrate into the community. The importance of rehabilitation is all the greater when a juvenile offender is involved, since the benefits flowing to the offender and the community will continue for the rest of their life.

The prohibition impacts not just on juvenile offenders, but also victims, their families and the media. I greatly appreciate the contribution made by members of various victim support groups in helping the Committee understand the impact of the prohibition on victims and their families, and acknowledge that in some cases naming juvenile offenders would give them a sense of vindication. I appreciate also the contribution of the media representatives who described the difficulties the prohibition causes the media, particularly when reporting on matters involving deceased juvenile victims.

However, the weight of evidence presented to the Committee clearly indicates support for the current prohibition, and in fact warrants its extension to cover the period prior to the official commencement of criminal proceedings and the inclusion of any child with a reasonable likelihood of becoming involved in criminal proceedings.

I would like to thank the many contributors to the Inquiry, including my colleagues on the Committee, submission authors and the witnesses at hearings. I would like to particularly thank the Committee secretariat for their assistance in preparing this report.

Hon Christine Robertson MLC
Committee Chair

Executive summary

Chapter 1 (Introduction)

Section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) prohibits the publication of the names of children involved in criminal proceedings - as defendants, offenders, victims, siblings of victims, witnesses, or who are otherwise mentioned - in order to reduce the stigma for the child of being associated with a crime and assist in their recovery and rehabilitation.

The NSW Attorney General and Minister for Justice, the Hon John Hatzistergos MLC, referred this Inquiry to the Committee on 16 October 2007. The terms of reference ask the Committee to report on the validity of the policy objectives underpinning section 11, the effectiveness of section 11 in achieving these objectives and whether or not the prohibition should be extended in coverage.

Chapter 2 (Background)

In Chapter 2, the Committee provides detail of the prohibition contained in section 11 of the Children (Criminal Proceedings) Act 1987 (NSW) and the several amendments to it, and gives a brief overview of other NSW legislation prohibiting the publication of the names of children involved in criminal and non-criminal proceedings and similar prohibitions in other Australian states and territories and international jurisdictions. Within Australia, the Northern Territory is unique in legislating a presumption in favour of naming juveniles involved in criminal proceedings.

International instruments

The Committee also provides an overview of international instruments relevant to the administration of juvenile justice, namely several United Nations declarations, covenants, guidelines and rules. These instruments, which Australia has endorsed, make numerous statements about the importance of privacy for juveniles involved in the criminal justice system and in particular the importance of avoiding labelling children as 'delinquent' or 'criminal.' A number of Inquiry participants expressed support for these instruments and the principles underpinning them.

Rationale for treating juveniles differently within the criminal justice system

The existence of separate juvenile justice systems is based on the recognition that children warrant different treatment to adults involved in criminal proceedings. Children, due to the continuing development of the frontal lobes that does not culminate until the early to mid-twenties, exhibit behavioural and emotional deficits compared to adults. They have less capacity for forward planning, delaying gratification and for regulating impulse. Impulsivity is a commonly observed element in juvenile offending and raises questions as to the culpability of juveniles in relation to criminal behaviour.

Other reports

Previous reports from the NSW Law Reform Commission and the Human Rights and Equal Opportunity Commission express support for the current prohibition against naming children involved in criminal proceedings.

Chapter 3 (The impact of naming on juvenile offenders)

In Chapter 3 the Committee considers the validity of the policy objective behind the prohibition in section 11 as it relates specifically to juvenile offenders – that is, to reduce the stigma associated with the child's association with crime, allowing reintegration into the community with a view to full rehabilitation. After consideration of the evidence presented to it, the Committee reaffirms the validity of this policy objective.

The Committee believes that naming juvenile offenders would stigmatise them and have a negative impact on their rehabilitation, potentially leading to increased recidivism by strengthening a juvenile's bonds with criminal subcultures and their self-identity as a 'criminal' or 'deviant,' and undermining attempts to address the underlying causes of offending.

The Committee acknowledges that it is important for juvenile offenders to recognise their actions have caused harm and it is right that they should experience shame. However, the shame should be constructive, promoting rehabilitation and assisting the child to make a positive contribution to society over the rest of their lives.

Reintegrative shaming, as utilised in youth justice conferences, is an example of the constructive use of shame. The Committee has heard evidence that youth justice conferences have been of benefit to offenders.

The weight of evidence heard by the Committee throughout this Inquiry points to public naming ('naming and shaming') as being a form of stigmatic shaming that is unlikely to contribute positively to the juvenile offender's rehabilitation.

Impulsivity amongst juveniles and their reduced ability to foresee the consequences of their actions reduces the deterrent effect of criminal justice outcomes in relation to juveniles. The Committee found that naming juvenile offenders was unlikely to act as a significant deterrent to either the named offender or would-be juvenile offenders. Deterrence is appropriately de-emphasised when sentencing juveniles in favour of an emphasis on rehabilitation.

Chapter 4 (The impact of naming on victims)

In Chapter 4 the Committee considers the validity of the policy objective behind the prohibition in section 11 as it relates to juvenile victims – that is, to protect juvenile victims from the stigma of crime. The Committee reaffirms the validity of this policy objective.

It is important to note that there are various victim-offender scenarios covered by the *Children (Criminal Proceedings) Act*: juvenile victim – juvenile offender; juvenile victim – adult offender; and adult victim – juvenile offender. Whilst the policy objective addressed in this chapter refers to juvenile victims, the Committee also considers the impact of naming juvenile offenders on victims in general and on the family of victims, particularly in cases where the victim is deceased.

While there was broad agreement among Inquiry participants on the importance of protecting juvenile victims from the stigma associated with crime by not publishing their names, there was considerable disagreement over the impact of naming juvenile offenders on victims (adult or juvenile) and their families.

The Committee acknowledges in particular the extreme distress of the families of deceased victims of crime and also the views of some Inquiry participants that naming juvenile offenders might in some cases give individual victims a sense of vindication and justice and assist their recovery.

However, the Committee believes that the policy objective of section 11 of the *Children (Criminal Proceedings) Act* - to protect juvenile victims from the stigma of crime - remains valid. The prohibition on naming juvenile victims and offenders is intended to protect the juvenile victim and the juvenile offender and to support the recovery of the former and the rehabilitation of the latter. Therefore, the Committee reaffirms the policy objectives of this section in protecting victims from the stigma of crime, including protecting the identity of offenders where their identification could lead to the identification of the victim.

It is important to stress that the prohibition is not intended to help juvenile offenders avoid responsibility for their actions. Offenders are still held accountable by the criminal justice system with their sentence intended to reflect denouncement of their conduct and punishment for the harm caused.

Chapter 5 (Naming and the public interest)

'Public interest' and the 'interests of justice' are two sometimes overlapping terms that occur in section 11. The issue of public interest was raised during the Inquiry in reference to media reports of criminal proceedings involving juveniles, the public's interest in such reports and the important principle of open justice underpinning our criminal justice system.

The Committee supports the distinction made by some Inquiry participants between what is "of" public interest and what is "in" the public interest. The former equates more with curiosity and a possibly prurient interest in criminal matters, while the latter equates to issues of public safety and the public interest in judicial processes being subject to the scrutiny of the public gaze.

The Committee acknowledges the important role the media plays in bringing issues in the public interest to the attention of the community, and notes the concern expressed during this Inquiry that the absence of names in a news story reduces the story's impact and leads to less prominence in media publications.

However, the Committee is persuaded by the evidence presented to it that names are not essential details when reporting on criminal proceedings involving children and that the public can be adequately informed about a particular case and judicial processes in general without the inclusion of the names of juveniles involved.

The Committee notes an anomaly with regard to interstate publication. The name of a juvenile involved in criminal proceedings in NSW may be prohibited from publication within NSW, but can be published in other states and territories. The effect of this is that the policy objective of reducing the stigma for juveniles of association with a crime only has effect within NSW, and that if that juvenile was to travel or move to a state where their name had been published, they may be subject to that very stigma. The same would apply to juveniles in other states and territories who travel or move to NSW and who may have been named by NSW media outlets in relation to criminal proceedings in other states or territories.

The Committee recommends that the NSW Attorney General seek co-operation from the Attorneys-General in other states and territories in implementing a consistent prohibition relating to the

publication of names of children involved in criminal proceedings regardless of in which state those criminal proceedings occur.

The Committee considered the issue of publishing the names of deceased victims and the impact of the 2004 and 2007 amendments to section 11, which include deceased juvenile victims in the general prohibition but allow publication with the consent of the senior available next of kin. The Committee notes the difficulties caused by the amendments described by the media but reaffirms the policy objectives of these amendments – that is, to protect the juvenile siblings of deceased juvenile victims and to put the power to authorise publication of the deceased's name in the hands of their family.

Chapter 6 (Implementation and enforcement of section 11)

In this chapter the Committee looks at the implementation and enforcement of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW). In particular, the decision - currently the sentencing judge's responsibility - to allow an exception to the general prohibition on naming of children involved in criminal proceedings, the history of prosecutions under section 11, and the process through which breaches are reported and prosecuted are examined.

The Committee reaffirms that the judge at the time of sentencing is best placed to decide whether or not to authorise the publication of the name of a juvenile offender in cases where the offender has been convicted of a serious children's indictable offence.

The Committee believes that the current mechanism for enforcing section 11 can and should be improved, particularly in regard to registering and investigating complaints.

The Committee recommends that an existing office within the NSW Police Force, such as the Office of the General Counsel, be identified as the primary recipient of all complaints relating to breaches of section 11. It would be the responsibility of that office to investigate the complaint and prepare a brief of evidence for the Office of the Director of Public Prosecutions.

This would provide a single point of contact for those wishing to report alleged breaches of section 11, remove the potential for a real or perceived conflict of interest for police officers who receive complaints in regard to the naming of juveniles they are involved in prosecuting, and would bring the necessary expertise to investigations into alleged breaches of section 11.

In order to maximise the effectiveness of this newly identified office as the recipient of complaints, the Committee recommends that staff of the NSW Police Force and key organisations likely to become aware of breaches of section 11 are made aware of the responsibilities of the office.

Chapter 7 (Improving the effectiveness of section 11)

In this chapter the Committee considers proposals to improve the operation of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW). These proposals include extending the prohibition in section 11 to cover the period prior to the commencement of criminal proceedings and juveniles other than the accused who are reasonably likely to be involved in criminal proceedings, and applying the section 11 prohibition differentially to different categories of juveniles and offences.

The arguments in favour of the prohibition in section 11 covering the period prior to charging are essentially the same as those in favour of its application to the period after charging – that is, to reduce the stigma associated with a juvenile's involvement in criminal proceedings and the potential for long

term damage. There is impetus added to this argument from the fact that a juvenile who is the subject of an investigation and/or has been arrested may not subsequently be charged with any offence. The Committee agrees with several Inquiry participants that the principles and policy objectives underpinning the current prohibition apply equally to the entire period prior to charging, including the period of investigation prior to arrest, and that the prohibition should be extended to cover this period, and that in addition it be worded so as cover children who are 'reasonably likely' to become involved in criminal proceedings.

The Committee also recommends that the current prohibition, and proposed extension, should be carefully worded so as to ensure the legitimate law enforcement and investigative activities of police and the legitimate activities of judicial officers and court staff conducted in the normal course of their work are not hampered.

The Committee does not support any differential application of the prohibition to juveniles in different age or offence categories, other than the current discretion the court has to name juveniles convicted of a serious children's indictable offence. The Committee recommends, however, that 16-18 year olds giving permission for the publication of their names be required to do so in the presence of a legal representative of the child's choosing.

In relation to civil proceedings, the Committee believes on the basis of the evidence presented to it that there is merit in investigating the feasibility of applying the protections of section 11 to civil matters.

Summary of recommendations

Recommendation 8 **86**

That section 11 of the *Children (Criminal Proceedings) Act 1987*, including any amendments recommended in this report, be worded in such a way as not to limit the legitimate activities of judicial officers and court staff conducted in the normal course of their work, and in particular not hinder their ability to post court lists, call defendants to court and request reports and other information relating to defendants.

Chapter 1 Introduction

This chapter gives an overview of the Inquiry process, including the methods the Committee used to encourage participation by members of the public, government agencies and relevant organisations. It also includes a brief outline of the report structure.

Inquiry terms of reference

1.1 The terms of reference for the Inquiry were referred to the Committee by the Attorney General and Minister for Justice, the Hon John Hatzistergos MLC on 16 October 2007. The terms of reference are reproduced on page iv.

Conduct of the Inquiry

Submissions

1.2 A call for public submissions was advertised in the *Sydney Morning Herald* and the *Daily Telegraph* in October 2007. A media release announcing the Inquiry and the call for submissions was sent to all media outlets in NSW. The Committee also wrote to a large number of relevant stakeholder organisations and individuals inviting them to participate in the Inquiry process. The submission closing date was 12 December 2007.

1.3 The Committee received a total of 27 submissions and one supplementary submission. Submissions were received from a range of stakeholders, including government agencies, legal organisations, businesses, community organisations, academics and private citizens.

1.4 A list of submissions is contained in Appendix 1. The submissions are available on the Committee's website: www.parliament.nsw.gov.au/lawandjustice.

Public hearings

1.5 The Committee held three public hearings at Parliament House on 18, 20 and 29 February 2008. The Committee heard from a broad range of stakeholders, including the NSW Attorney General's Department, the NSW Department of Juvenile Justice, the NSW Director of Public Prosecutions, the Legal Aid Commission of NSW, the NSW Public Defenders Office, the Office of the Chief Magistrate, the NSW Police Force, the NSW Commissioner for Children and Young People, youth legal centres, victim support groups, representatives of media groups, the Australian Press Council and academics.

1.6 The Committee particularly appreciates the involvement of victim support groups, including the Victims of Crime Assistance League, the Enough is Enough Anti-Violence Movement, the Homicide Victims Support Group and the Homicide Survivors Support After Murder Group.

1.7 The Committee thanks all the individuals and organisations that made a submission or gave evidence during the Inquiry.

1.8 A list of witnesses is reproduced in Appendix 2. The transcripts of all hearings are available on the Committee's website.

Other contributors

1.9 The Committee acknowledges the contribution of State and Territory Attorneys General, who provided information on the legal situation in their jurisdictions in relation to the naming of children involved in criminal proceedings.

Report structure

1.10 **Chapter 2** provides background information on section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) (hereafter *Children (Criminal Proceedings) Act*) and other relevant legislation. The chapter also outlines the relevant legislation in other states and territories of Australia, provides information on the international instruments relevant to the administration of juvenile justice and explores the rationale behind treating juveniles differently to adults in the criminal justice system.

1.11 In **Chapter 3** the Committee examines the impact of naming on juvenile offenders, in relation to their rehabilitation and in relation to levels of recidivism.

1.12 In **Chapter 4** the Committee examines the impact of naming on victims and their families.

1.13 In **Chapter 5** the Committee examines the issues of public interest and the interests of justice in relation to naming children involved in criminal proceedings, with particular emphasis on the effect of the recent 2004 and 2007 amendments to the *Children (Criminal Proceedings) Act* restricting the naming of deceased children.

1.14 In **Chapter 6** the Committee considers issues associated with the implementation and enforcement of section 11 of the *Children (Criminal Proceedings) Act.*

1.15 **Chapter 7** examines ways of improving the effectiveness of section 11 and considers proposals to extend the prohibition's coverage to situations where children have been arrested but not yet charges, or are reasonably likely to be involved in criminal proceedings. The chapter includes an examination of the appropriateness of the current age and offence categories used in the *Children (Criminal Proceedings) Act.*

Chapter 2 Background

This chapter provides an overview of existing legislation prohibiting the publication of the names of children involved in court proceedings, principally section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) and subsequent amendments, but also other instances of a similar prohibition found in the *Young Offenders Act 1997* (NSW), the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), and the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The chapter also covers similar legislation in other Australian states and territories, international instruments relevant to the administration of juvenile justice, the rationale for treating juveniles differently to adults, previous reports addressing the issue of naming juveniles involved in criminal proceedings and the experience of other jurisdictions.

Section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW)

2.1 The terms of reference for this Inquiry are principally concerned with the prohibition on the publication of the names of children in criminal proceedings as detailed in section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) (hereafter the *Children (Criminal Proceedings) Act*).

2.2 The prohibition is a departure from the general principle of transparency in justice - that criminal proceedings are subject to the check of being carried out in the public eye. An exception to this principle is made in the case of naming children involved in criminal proceedings in recognition of their vulnerability to the negative impacts that may flow from their names being published.

2.3 The *Children (Criminal Proceedings) Act* defines a child as a person who is under 18 years of age.[1]

2.4 The *Children (Criminal Proceedings) Act* defines the commencement of criminal proceedings as the point where charges are laid or a court attendance notice is issued.[2]

2.5 Naming a person includes publishing or broadcasting any information, picture or other material that identifies the person or is likely to lead to the identification of the person.[3]

2.6 The policy objectives of section 11, as detailed in the Inquiry terms of reference, include reducing community stigma for juvenile offenders thereby facilitating their reintegration into society and rehabilitation, protecting victims from stigma associated with a crime and reducing the stigma for siblings of offenders and victims.

2.7 The prohibition in section 11 of the *Children (Criminal Proceedings) Act* is a general prohibition, covering:

- offenders, victims and witnesses who were children at the time of the offence
- any person mentioned in criminal proceedings who was a child when the events referred to occurred

1 *Children (Criminal Proceedings) Act 1987* (NSW), s 3(1)

2 *Children (Criminal Proceedings) Act 1987* (NSW), s 8

3 *Children (Criminal Proceedings) Act 1987* (NSW), s 11 (5)

- any person otherwise involved in criminal proceedings who was a child at the time of their involvement
- any sibling of a victim to which criminal proceedings relate provided the sibling and victim were both children at the time of the offence.

2.8 The above prohibition is qualified by subsection 11(4). This subsection permits publication or broadcasting of a juvenile's name in the following circumstances:

- if the child's name is published in an official report of court proceedings – s 11 (4) (a)
- if the child is under 16 at the time of publication or broadcasting, with the consent of the court and the concurrence of the child – s 11 (4) (b) (i)
- if the child is under 16 and considered incapable of concurring for the purposes of section 11(4) (b) (i) and the court is of the opinion that publication or broadcasting is required in the public interest – s 11 (4A)
- if the child is 16 or older at the time of publication or broadcasting, with the child's consent – s 11 (4) (b) (ii)
- if the child is convicted of a serious children's indictable offence and the court, at the time of sentencing, deems it is in the interests of justice and the prejudice to the child does not outweigh those interests – s 11 (4) (c), (4B) and (4C) (a) and (b)
- in a matter involving a deceased child, with the consent of a senior available next of kin – s 11 (4) (d).

2.9 The maximum penalty for breach of section 11 is a $5,500 fine and/or 12 months imprisonment for an individual and a fine of $55,000 for a corporation.[4]

2.10 The Committee examines issues associated with the enforcement of section 11 in Chapter 6.

Amendments to the *Children (Criminal Proceedings) Act 1987* (NSW)

2.11 Section 11 of the *Children (Criminal Proceedings) Act* has been amended several times, notably in 1999, 2001, 2004 and 2007.

2.12 The 1999 amendment allowed courts to authorise the naming of a juvenile convicted of a serious children's indictable offence, with or without the juvenile's consent. A 'serious children's indictable offence' refers to 'homicide, offences carrying a maximum penalty of life or 25 years' imprisonment, and some other serious sexual and firearms offences'.[5] The court must be satisfied that naming the juvenile offender is in the interests of justice and that the prejudice to the juvenile arising from identification does not outweigh those interests.[6]

2.13 In 2001, an amendment was made to section 11 clarifying that the prohibition applied even if, at the time of publication or broadcast, the person was no longer a child. Before this

4 *Children (Criminal Proceedings) Act 1987* (NSW), s 11(3)

5 Submission 20, NSW Government, p 1

6 *Children (Criminal Proceedings) Act 1987* (NSW) s 11 (4C) (a) and (b)

amendment was made, it was arguable that children charged with an offence could be named once they turned 18.[7]

2.14 In 2004, amendments to section 11 were passed that prohibited publication and broadcast of the names of deceased child victims and child siblings of child victims. The purpose of these amendments was 'to minimise the trauma to the family of the deceased'.[8] Even though a sibling may not have been involved in the case, they could still be adversely affected by the publicity surrounding it.[9] The amendment applies to proceedings begun prior to its commencement.[10]

2.15 The 2007 amendments attempt to 'ameliorate the 2004 prohibition to some extent by permitting a suitable person to consent to the publication of the name of the deceased child'.[11] The 2007 amendment allows a senior available next of kin of a deceased child to consent to the publication or broadcast of a child's name, unless the senior available next of kin is the accused or is convicted in criminal proceedings relating to the child's death. The senior available next of kin must make reasonable inquiries to ensure that no other senior available next of kin objects to the deceased child's name being published. The senior available next of kin must also consider the impact on any child siblings the victim may have had. These siblings must be consulted, or the impact on them considered, before consent for publication or broadcast of the victim's name or identifying information can be given.[12]

2.16 The amended section 11 applies to proceedings that began both before and after the commencement of the 2007 amending legislation. Another 2007 amendment provided that prohibition on publication and broadcasting did not apply in certain circumstances. These relate to names already published or broadcast before the 2001 and 2004 amendments to section 11.[13]

2.17 The impact of the 2004 and 2007 amendments is addressed in Chapter 5.

Other relevant legislation

2.18 Although section 11 of the *Children (Criminal Proceedings) Act* is the primary focus of this Inquiry, a number of other pieces of legislation have similar prohibitions.

7 Submission 20, p 2

8 Tabled documents, Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, Monday 18 February 2008, pp 1-2

9 Submission 20, p 2

10 Tabled documents, Mr Cowdery AM QC, 18 February 2008, p 1

11 Tabled documents, Mr Cowdery AM QC, 18 February 2008, p 4

12 Submission 20, p 2

13 Tabled documents, Mr Cowdery AM QC, 18 February 2008, p 3; Submission 20, p 2

Young Offenders Act 1997 (NSW)

2.19 The primary objective of the *Young Offenders Act 1997*(NSW) (hereafter the *Young Offenders Act*) is:

> … to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings.[14]

2.20 Section 65 of the *Young Offenders Act* deals specifically with publication and broadcasting of names of children dealt with under the legislation. This provision prohibits the publication of the names or any information that may identify such a child either before or after the matter involving the child has been finally dealt with under the *Young Offenders Act*.[15] This relates to the youth justice conferencing process as well as to cautions and warnings.

2.21 Section 65 states that the maximum penalty for breaching the prohibition is a $5,500 fine and/or 12 months' imprisonment for an individual, or a $55,000 fine for a corporation.[16] This is the same penalty as stated in section 11(3) of the *Children (Criminal Proceedings) Act.*

2.22 Subsection 3 of section 65 states that the prohibition does not extend to the publication or broadcasting of an official report of proceedings or to where a child who is over the age of 16 years consents.

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

2.23 Section 45 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (hereafter the *Crimes (Domestic and Personal Violence) Act*) deals with the publication of names and identifying information about children and other persons involved in apprehended violence order (AVO) proceedings.

2.24 Children cannot be named in relation to AVO proceedings. This covers proceedings where:

- an AVO is sought to protect a child
- an AVO is sought against a child
- a child appears, or is reasonably likely to appear as a witness
- a child is, or is reasonably likely to be, mentioned or otherwise involved in proceedings.[17]

2.25 The maximum penalty for breach of section 45 is a $22,000 fine and/or two years imprisonment for an individual and a $220,000 fine for a corporation.[18] The prohibition no longer applies after the AVO is granted or refused, and can be waived by the court.[19]

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14 *Young Offenders Act 1997* (NSW), s 3(a)

15 *Young Offenders Act 1997* (NSW), s 65(1)

16 *Young Offenders Act 1997* (NSW), s 65(2)

17 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 45(1)

18 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 45(3)

2.26 Before 10 March 2008, the prohibition in section 45 of the *Crimes (Domestic and Personal Violence) Act* was contained in the *Crimes Act 1900* (NSW), section 562ZJ.

Children and Young Person (Care and Protection) Act 1998 (NSW)

2.27 The *Children and Young Person (Care and Protection) Act 1998* (NSW) (hereafter the *Children and Young Person (Care and Protection) Act*) is primarily concerned with the safety, welfare and wellbeing of persons under the age of 18. The *Children and Young Person (Care and Protection) Act* distinguishes between a 'child' and a 'young person' as follows: a child is under 16 and a young person is 16 or older but not yet 18.[20]

2.28 Section 105 of the *Children and Young Person (Care and Protection) Act* deals with the publication of the names and identifying information of children and young persons involved in non-criminal proceedings before the Children's Court. It identifies a prohibition in the following circumstances:

- for a child or young person who has appeared or is reasonably likely to appear before the Children's Court as the subject of proceedings or as a witness
- for a child or young person who is involved or is reasonably likely to be involved in any capacity in any non-court proceedings
- for a child or young person mentioned or involved, or who is reasonably likely to be mentioned or involved in any proceedings before the Children's Court or in any non-court proceedings.[21]

2.29 It is important to note that this section does not refer to criminal proceedings.[22]

2.30 The prohibition is only applicable until the child or young person turns 25 or dies.[23] This differs from the *Children (Criminal Proceedings) Act*, which is an ongoing prohibition.

Commonwealth legislation

2.31 Section 20C of the *Crimes Act 1914* (Cth) states that a child or young person in a State or Territory charged with an offence against Commonwealth law may be 'tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory'.[24] Children charged in New South Wales with any offence under Commonwealth law are therefore covered by section 11 of the *Children (Criminal Proceedings) Act*.

2.32 The Australian Law Reform Commission (ALRC) commented on the differences in juvenile justice systems across Australian states and territories, and noted that a 1997 ALRC and

19 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 45(1) and (7)

20 *Children and Young Person (Care and Protection) Act 1998* (NSW), s 3

21 *Children and Young Person (Care and Protection) Act 1998* (NSW), s 105(1)

22 *Children and Young Person (Care and Protection) Act 1998* (NSW), s 105(6)

23 *Children and Young Person (Care and Protection) Act 1998* (NSW), s 105(1A)(a) and (b)

24 *Crimes Act 1914* (Cth), s 20C

Human Rights and Equal Opportunity Commission report, *Seen and Heard: Priority for Children in the Legal Process* had recommended national standards for juvenile justice, based on international instruments.[25] The ALRC also referred to its 2006 report *Same Crime, Same Time: Sentencing of Federal Offenders*, in which it recommended that federal sentencing legislation 'include a set of minimum standards to apply to the sentencing, administration and release of young federal offenders'.[26]

2.33 The recommended minimum standards referred to by the ALRC specifically include a prohibition on the publication of a report of proceedings involving a young person who is 'charged with, found guilty of, or has pleaded guilty to, a federal offence' that identifies or is likely to identify the young person.[27] The *Same Crime, Same Time* report and its recommendations are under consideration by the Australian Government.

Legislation in other Australian states and territories

2.34 Similar, if less detailed, prohibitions to section 11 exist in most other states and territories in Australia.

2.35 In Queensland, the relevant legislation is the *Juvenile Justice Act 1992* (Qld) (hereafter the *Juvenile Justice Act*). Under section 301 of the *Juvenile Justice Act* no 'identifying information' can be published about a child. The *Juvenile Justice Act*, under section 234, allows a court to publish the name or identifying information of a child if:

- the child is found guilty of a serious offence that is a life offence
- the offence involves the commission of violence against a person
- the offence is particularly heinous and it would be in the interests of justice to allow publication of identifying information.[28]

2.36 Section 193(2) of the *Child Protection Act 1999* (Qld) gives discretion to the court or judge to prevent publication of identifying information relating to a child witness or where the child is an alleged victim. However, section 193(1) states that if the proceedings are related to offences of a sexual nature, child witnesses and alleged victims may not have their identifying information published unless the court expressly authorises the matter to be included in a report.[29]

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25 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997),Rec 192, cited in Submission 11, Australian Law Reform Commission, p 2

26 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 27–1; cited in Submission 11, p 3

27 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 27–1(f); cited in Submission 11, p 3

28 Correspondence from the Hon Kerry Shine MP, Queensland Attorney-General and Minister for Justice, to Chair, 4 February 2008, p 3

29 *Child Protection Act 1999* (Qld), s 193; Correspondence from the Hon Kerry Shine MP, 4 February 2008, p 3

South Australia

2.37 In South Australia the *Young Offenders Act 1993* (SA) (hereafter the *Young Offenders Act*) is the main source for a prohibition on naming. The *Young Offenders Act* provides for a 'diversion of more minor offences and for the Youth Court or, in some cases, the adult courts, to hear more serious matters'.[30] Section 13 limits publicity of proceedings involving children. Names or identifying information of children cannot be published. Section 13 also states that 'a person wishing to make a documentary or conduct research may apply to the Youth Court for permission, with the written consent of the youth and their guardian' to publish names of children.[31]

Western Australia

2.38 Section 40 of the *Young Offenders Act 1994* (WA) 'prohibits the publication or broadcasting of any information that is likely to identify a young person dealt with by the juvenile justice team (who deal with more minor offences for which the offender has admitted responsibility)'.[32]

2.39 Section 35(1) of the *Children's Court of Western Australia Act 1988* (WA) provides that a child's name or identifying information shall not be broadcast or published if they are either a party to the proceedings or a witness. Section 35(2) also prohibits the naming of a child in any other court where the naming would have an adverse effect on the child. Section 36A allows the Supreme Court to publish a child's name after considering the public interest and the rights of the child. In Western Australia only the Attorney General or Commissioner of Police may make this request. [33]

Tasmania

2.40 In Tasmania the *Youth Justice Act 1997* (Tas) (hereafter the *Youth Justice Act*) imposes restrictions on reporting proceedings that involve a child who is either the subject of proceedings or a witness. Section 22 of the *Youth Justice Act* provides that information regarding community conferencing proceedings cannot be published if the information would lead to the identification of the youth. Section 31 states that a child involved in court proceedings may only have their name published if the court gives permission.[34]

Victoria

2.41 In Victoria section 534 of the *Children, Youth and Families Act 2005* (Vic) 'prohibits the publication of Children's Court proceedings that might lead to the identification of the child'.

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30 Correspondence from the Hon Michael Atkinson, South Australian Attorney-General, to Chair, received 19 February 2008, p 1

31 Submission 20, p 4

32 Submission 20, p 4

33 Correspondence from the Hon Jim McGinty MLA, Western Australian Attorney-General, to Chair, received 6 February 2008, p 1

34 Correspondence from the Hon Lara Giddings MP, Tasmanian Acting Attorney-General, to Chair, received 5 February 2008, p 1

The prohibition does not extend to 'publication of accounts of proceedings of the court approved by the President of the Court'.[35]

Australian Capital Territory

2.42 In the Australian Capital Territory, under section 61A of the *Children and Young People Act 1999* (ACT), it is an offence to publish a report or account of a court proceeding if it discloses the name or identifying information of a child, young person or family member of that child or young person.[36]

2.43 The *Children and Young People Bill 2008*, currently before the ACT Legislative Assembly, will enforce tougher penalties for breaches of prohibition. The maximum penalty will be raised from 100 penalty units and/or twelve months' imprisonment to 300 penalty units and/or three years' imprisonment for an individual.[37]

2.44 The *Children and Young People Bill 2008* (ACT) is amending the *Criminal Code 2002* (ACT) (hereafter *Criminal Code*). In the *Criminal Code* the prohibition does not apply if:

- the person that is the subject of proceedings is an adult and consents to the publication of the information
- the person that is the subject of proceedings has died and either their legal representative consents to publication, or the information is published 100 years after the person's death.[38]

Northern Territory

2.45 The Northern Territory is unique amongst Australian states and territories in having a presumption in favour of publishing and broadcasting the names of children names involved in criminal proceedings. The *Youth Justice Act* (NT) (hereafter the *Youth Justice Act*) allows the names of children to be published unless there is a court order restricting the publication. The Youth Justice Court can make an order directing either: a report of proceedings; information relating to proceedings; or the result of proceedings not to be published.

2.46 Section 3 provides the objectives of the *Youth Justice Act*, which include:

- to provide how a youth who has committed, or is alleged to have committed, an offence is to be dealt with
- to ensure that a youth who has committed an offence is made aware of his or her obligations (and rights) under the law and of the consequences of contravening the law
- to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation.[39]

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35 Submission 20, p 4

36 Correspondence from the Hon Simon Corbell MLA, Australian Capital Territory Attorney-General and Minister for Police and Emergency Services, to Chair, received 31 March 2008, p 1

37 Correspondence from the Hon Simon Corbell MLA, received 31 March 2008, p 2

38 *Criminal Code 2002* (ACT), s 712(3)

2.47 The stance taken on naming children is explained by the Northern Territory Department of Justice:

> [The] Government's position in regard to the presumption in favour of open courts is based on the public's right to be informed of court proceedings. While negative impacts have been considered, the Government has decided that it is more important that justice is seen to be done and that the court processes are seen to be commensurate with community expectations of justice.[40]

2.48 In 2006 the Northern Territory Court of Appeal was asked to rule on an appeal against a judge's decision to suppress the name of a convicted juvenile. In that judgement, the court supported the judge in taking into account the possible negative effects on the juvenile's psychological well-being and rehabilitation prospects in his decision to suppress the juvenile's name:

> In our opinion it is proper to take into account in a case such as the present where the juvenile has been found guilty by a court, the age and relative immaturity of the offender, the offender's prospects of rehabilitation and the likely impact which publicly identifying him or her as the offender will have on his or her psychological well-being and rehabilitation prospects.[41]

2.49 The effect of that judgement is that Northern Territory judges now have a precedent in support of not naming in cases where naming a juvenile offender is considered harmful to that juvenile.

International instruments

2.50 There are five main international instruments that Australia is party to that contain principles relevant to the administration of juvenile justice generally and the privacy of children in the legal system specifically. These five international instruments are:

- the United Nations Declaration on the Rights of the Child 1959 (DROC)
- the United Nations Convention on the Rights of the Child 1989 (CROC)
- the United Nations International Covenant on Civil and Political Rights (ICCPR)
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules)
- the United Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines).

2.51 These instruments include the following principles, articles, and rules relevant to the current Inquiry:

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39 Correspondence from Ms Jenni Daniel-Yee, Northern Territory Department of Justice, Senior Legal Policy Lawyer, on behalf of the Northern Territory Attorney General, to Chair, received 4 February 2008, p 2

40 Correspondence from Ms Daniel-Yee, received 4 February 2008, pp 1-2

41 *MCT v McKinney & Ors* [2006] NTCA 10 at 22

- The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally and spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[42]
- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[43]
- The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.[44]
- In principle, no information that may lead to the identification of a juvenile offender shall be published.[45]
- Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as 'delinquent' or 'criminal'.

  Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted).[46]
- Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.[47]
- [I]n the predominant opinion of experts, labelling a young person as 'deviant', 'delinquent' or 'pre-delinquent' often contributes to the development of a consistent pattern of undesirable behaviour by young persons.[48]

2.52 A number of Inquiry participants expressed support for these international instruments and the principles underpinning them.[49]

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42 United Nations Declaration on the Rights of the Child 1959, Principle 2

43 United Nations Convention on the Rights of the Child 1989, Article 3(1)

44 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985, Rule 8.1

45 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985, Rule 8.2

46 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985, Commentary to Rule 8

47 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985, Rule 21.1

48 United Guidelines for the Prevention of Juvenile Delinquency 1990, Fundamental Principle 5(f)

49 Ms Penny Musgrave, Director, Criminal Law Review Division, New South Wales Attorney General's Department, Evidence, 18 February 2008, pp 2-3; Submission 3, Human Rights and Equal Opportunity Commission, p 3; Submission 12, Youth Justice Coalition, p 6; Submission 24, National Children's and Youth Law Centre, pp 4-5; Submission 11, p 2; Ms Mari Wilson, Policy

2.53 The Australian Law Reform Commission noted that the Beijing rules, although not legally binding on Australia represented internationally accepted minimum standards and that the Commission used them as an important reference point in the development of policies underpinning its recommendations for reform.[50]

2.54 Similarly, Ms Penny Musgrave, Director of the Criminal Law Review Division, NSW Attorney General's Department, noted that the Beijing rules were not legally binding but did serve as a reference point for policy development, and that failure to adhere to the principles underpinning the rules could attract international criticism:

> Although they are not binding the rules do, however, articulate internationally accepted minimum standards and they are used as an important reference point in the development of policies of reform and harmonisation … As Australia has ratified but not implemented the relevant instruments, New South Wales is free to pass laws that arguably may not conform with these international instruments … however, Australia as a whole is bound by these treaties and international law.[51]

2.55 The National Children's and Youth Law Centre noted that Australia and New South Wales' general adherence to the principles contained in these international instruments contributed to the high regard in which our youth justice system is held internationally:

> Australia's (and New South Wales') young offender laws are generally consistent with these instruments of international law. As a result our laws and the youth justice system of this country and this state have been held in high regard internationally.[52]

Rationale for the differential treatment of juveniles in the criminal justice system

2.56 The international instruments outlined above reflect the belief that juvenile justice systems should be different from adult justice systems. In this section a brief examination of the rationale behind this belief is provided.

2.57 Several Inquiry participants referred to research from the fields of psychology and neuropsychology to the effect that juveniles, due to the relative underdevelopment of the frontal lobes of their brain compared to adults, warrant differential treatment within the criminal justice system.[53]

Officer, Federation of Parents and Citizens Associations of New South Wales, Evidence, 18 February 2008, p 70

50 Submission 11, p 2

51 Ms Musgrave, Evidence, 18 February 2008, p 2

52 Submission 24, National Children's and Youth Law Centre, p 5

53 Professor Duncan Chappell, Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong, Evidence, 20 February 2008, p 60; Mr Peter Muir, Deputy Director General (Operations), Department of Juvenile Justice, Evidence, 18 February 2008, pp 6-7; Ms Gillian Calvert, Commissioner, NSW Commission for Children and Young People, Evidence, 18 February 2008, pp 64-65; Ms Wilson, Evidence, 18 February 2008, pp 70-72; Submission 12, p 7; Submission 1, Mr Chris Bonner, p 2.

2.58 The relative underdevelopment of the frontal lobes is responsible for some of the behavioural and emotional deficits observed in children. Professor Duncan Chappell from the Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong, explained the significance the frontal lobes have for higher level thinking:

> The frontal lobes and their connections are responsible for higher thinking, for extraction, hypothesising, juggling different ideas and possible solutions, forward planning and associated voluntary delay of gratification for a future desired goal.[54]

2.59 Ms Gillian Calvert, the NSW Commissioner for Children and Young People, also noted the significance the developing frontal lobes of children have for behavioural and emotional control:

> What that research has found is that the area of brain related to thinking ahead, to planning, and the area of the brain related to impulse, which is generally the frontal lobe part of the brain, does not develop until later in the teenage years and sometimes up into young adulthood - say about 24.[55]

2.60 Several Inquiry participants also noted that the development of the frontal lobes and related abilities continued through adolescence and did not culminate until the early to mid twenties.[56]

2.61 The effect of the deficits in frontal lobe development outlined above is that juveniles tend to be more impulsive. Ms Calvert commented that this information from brain research accords with common observations about young people:

> What that means is that we know - if we did not know it through experience we now know it because of brain research - that adolescents often lack the capacity for self-regulation of impulses and emotion.[57]

2.62 Ms Calvert went on to note the close connection between impulsivity and offending:

> If adolescents find it hard to control their impulses, if they cannot plan ahead, if they cannot see the consequences of their behaviour, then they are more likely to offend on impulse …[58]

2.63 Deputy Chief Magistrate Helen Syme also noted the connection between impulsivity and juvenile offending, and the role played by substance use and risk-taking:

> Younger offenders, by reason of their lack of maturity, tend to commit offences impulsively either because of that lack of maturity, which is the lack of their ability to foresee the consequences of what they are doing for themselves personally or for the wider community, or the disinhibiting effects of substances.

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54 Professor Chappell, Evidence, 20 February 2008, p 60

55 Ms Calvert, Evidence, 18 February 2008, p 64

56 Professor Chappell, Evidence, 20 February 2008, p 60; Mr Muir, Evidence, 18 February 2008, p 6; Ms Calvert, 18 February 2008, p 64; Ms Wilson, Evidence, 18 February 2008, p 72.

57 Ms Calvert, Evidence, 18 February 2008, pp 64-65

58 Ms Calvert, Evidence, 18 February 2008, p 65

> Younger offenders are, almost by definition, risk takers - either again because of the effects of their immaturity or because of hormonal changes that are happening in their lives at that time. Therefore, for all those reasons, juvenile offenders and impulsivity tend to go together. Risk taking tends to equal impulsive behaviour.[59]

2.64 Mr Peter Muir, the Deputy Director General (Operations), Department of Juvenile Justice, suggested that the research has a bearing on the issue of criminal culpability for juveniles:

> This research has extended into a debate on the culpability of juveniles and whether their brains are as capable of impulse control, decision making and reasoning as the adult brain.
>
> Brain researchers are more often answering the question with a resounding no. Harvard Medical School notes that teens have difficulty assessing future consequences of their behaviour due to the lack of experiences and challenges in mentally processing those experiences. Recent findings are leading experts to conclude that capabilities relevant to criminal responsibility are still developing at the ages of 16 and 17.[60]

2.65 Ms Mari Wilson, Policy Officer for the Federation of Parents and Citizens Associations of New South Wales, argued that making mistakes is an important part of learning and that allowances should be made for juveniles based on the understanding that they are still developing into adults:

> The brain is continually developing during this time and there must be societal scaffolding to ensure that the physical, mental, emotional and relational development is protected. Making mistakes is a vital part of the learning process. It is how we respond to these mistakes that children are either alienated from or integrated into society. We cannot expect young people to fully comprehend and understand the laws of society and the ramifications of breaking them.[61]

2.66 The NSW Public Defenders Office quoted a judgement from the New Zealand Court of Criminal Appeal providing an example of the court's recognition that the differential treatment of juveniles is justified on the above arguments.[62] The judgement also noted the particular vulnerability of juveniles to peer group pressure and coercion:

> It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults … Adolescents have difficulty regulating their moods, impulses and behaviours … Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear

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59 Deputy Chief Magistrate Helen Syme, Chief Magistrate's Office, Evidence, 18 February 2008, p 29

60 Mr Muir, Evidence, 18 February 2008, pp 6-7

61 Ms Wilson, Evidence, 18 February 2008, pp 70-71

62 Submission 26, NSW Public Defenders Office, p 4

> coercion … Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.[63]

Relevant reports

2.67 There have been a number of reports relevant to the issues covered by this Inquiry. The two reports of the Australian Law Reform Commission, the 1997 *Seen and Heard: Priority for Children in the Legal Process* and the 2006 *Same Crime, Same Time: Sentencing of Federal Offenders* have already been discussed in the context of Commonwealth legislation previously in this chapter.

2.68 A 2005 report by the NSW Law Reform Commission, *Report 104: Young Offenders*, found that participants in that report 'generally agreed that the prohibition on the publication as it relates to young offenders should not be relaxed'.[64]

2.69 In the report, the NSW Law Reform Commission acknowledged the difficulty in balancing the interests of open justice and rehabilitation but concludes that the weight of evidence it received did not support any relaxing of the current prohibition on naming young offenders:

> The process of balancing the requirement for 'open justice' and the rehabilitation of young offenders may at times be difficult…The Commission has considered together the weight of the evidence in favour of retaining the discretionary prohibition on publication and the courts' ability to publish when it considers it is in the public interest to do so and, on balance, do not support any relaxation of the current prohibitions on identifying young offenders contained in s 11 of the *Children (Criminal Proceedings) Act* and s 65 of the *Young Offenders Act*.[65]

2.70 In their submission to the NSW Law Reform's Inquiry, the NSW Young Lawyers described the current system as the 'very minimum protections necessary to protect young offenders from being unnecessarily identified'.[66]

2.71 A 2002 Position Paper by the NSW Privacy Commissioner on *Child Offenders and Privacy* argued that naming convicted children is in effect an additional punishment, one that substantially reduces the child's prospects for rehabilitation:[67]

> To allow the naming of children convicted of mid-level crimes will deprive children of their human dignity, and damage their chances of rehabilitation. Publication of a child offender's name will effectively add to the sentence imposed by the court, doubly punishing child offenders with lifelong stigmatisation – a constant fear that one day a future employer, or neighbour, a friend or colleague will trawl the Internet or

63 *Slade v The Queen* [2005] NZCA 19

64 NSW Law Reform Commission, 2005, *Report 104, Young Offenders*, 8.26

65 NSW Law Reform Commission, 2005, *Report 104, Young Offenders*, 8.32

66 NSW Young Lawyers, Submission 6 in: NSW Law Reform Commission, 2005, *Report 104, Young Offenders*, 8.26

67 Johnston A., '*The Privacy Commissioner's Report on Child Offenders and Privacy*', Position Paper, 23 July 2002, p 3

> newspaper archives and find out about the mistakes they made as a 15 year old. Their chances of rehabilitation will be substantially reduced as a result.[68]

2.72 A 2006 report updating the Human Rights and Equal Opportunity Commission's activities, *An Update on the Work of the Human Rights and Equal Opportunities Commission*, also argued that naming further punishes juvenile offenders to the detriment of their rehabilitation:

> In practice, the consequences of 'naming and shaming' juvenile offenders are often far worse than the punishment imposed by the court. Naming young offenders can jeopardise their prospects of future employment, inflict psychological damage and lead to verbal or physical abuse. In short, 'naming and shaming' juvenile offenders can deal a knock-out blow to the prospect of rehabilitation.[69]

2.73 The report suggested that the onus should be on the prosecution or the press to prove that the public interest in naming a child offender outweighs the public interest in protecting the child's privacy.[70]

Overseas jurisdictions

2.74 This section discusses laws in relation to the naming of children in criminal proceedings in overseas jurisdictions, the United Kingdom, the United States, Canada and New Zealand.

United Kingdom

2.75 In England and Wales's Youth Court there is a presumption against divulging a child's personal details. However, a young offender can be publicly named by the court in the following circumstances:

- if it avoids an injustice to the young person
- if the young person is at large and has been charged or convicted of a violent, sexual or other offence punishable by at least 14 years' imprisonment
- if it is in the public interest.[71]

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68 Johnston A., '*The Privacy Commissioner's Report on Child Offenders and Privacy*', Position Paper, 23 July 2002, p 2, quoted in Submission 16, Shopfront Youth Legal Centre, p 7

69 Mr John von Doussa, HREOC, 2006, *An Update on the Work of the Human Rights and Equal Opportunities Commission,*<http://www.hreoc.gov.au/about/media/speeches/speeches_president/2006/20061031_darwin.html> last updated 1 November 2006

70 Mr John von Doussa, HREOC, 2006, *An Update on the Work of the Human Rights and Equal Opportunities Commission,*http://www.hreoc.gov.au/about/media/speeches/speeches_president/2006/20061031_darwin.html> last updated 1 November 2006

71 Answers to questions taken on notice during evidence 18 February 2008, Ms Penny Musgrave, Director, Criminal Law Division, NSW Attorney-General's Department, p 5

2.76 The public interest exception was introduced in 1997. Youth Courts were encouraged to use this power in cases where young persons were persistent reoffenders and their behaviour had a serious impact on the community.[72]

2.77 In 2006, the United Kingdom's National Audit Office reported on the use of civil Anti-Social Behaviour Orders (ASBOs) in a publication entitled *The Home Office: Tackling Anti-Social Behaviour*. The report defined anti-social behaviour as encompassing a broad range of behaviours including intimidation, vandalism and nuisance behaviours[73] and noted that although 'anti-social behaviour does not always constitute an offence, there is a strong link between high levels of anti-social behaviour and high levels of crime'.[74]

2.78 The significance of ASBOs to the current Inquiry is that they allow the identity of the subject to be publicised by utilising local press coverage or targeted leafleting. The UK Home Office states that the purpose of publicising the subject's identity and the details of their ASBO is to allow local people to report breaches, to deter, by virtue of this increased community surveillance, both the subject of the ASBO and any would-be perpetrators, and to reassure the local community that action is being taken to protect their safety.[75]

2.79 The research conducted by the National Audit Office established that 38 per cent of people with ASBOs were under the age of 18.[76] In relation to ASBOs acting as a deterrent for future offences the report found that 55% of those given an ASBO breached its conditions within a median time of 296 days.[77]

2.80 This research does not establish a link between public identification and the failure to comply with an ASBO. The Committee did not hear other evidence in relation to the effectiveness of ASBOs.

United States

2.81 In the United States different states have different restrictions in relation to the naming of children involved in criminal proceedings. In 2006 the US Department of Justice reported that the media have access to young offender's identities in most states.

- In 14 states the media have access to and may publish the names of young offenders.
- In 30 states the media have access in circumstances of a serious offence and criminal history.
- Four states provide access if the court grants permission.

72 Answers to questions taken on notice during evidence 18 February 2008, Ms Musgrave, p 5

73 United Kingdom, National Audit Office, *The Home Office: Tackling Anti-Social Behaviour,* December 2006, p 4

74 United Kingdom, National Audit Office, *The Home Office: Tackling Anti-Social Behaviour,* December 2006, p 9

75 United Kingdom, Home Office, <http://www.respect.gov.uk/members/article.aspx?id=7844>

76 United Kingdom, National Audit Office, *The Home Office: Tackling Anti-Social Behaviour,* December 2006, p 21

77 United Kingdom, National Audit Office, *The Home Office: Tackling Anti-Social Behaviour,* December 2006, p 19

- In three states the court may prohibit the media from revealing a child's identity under certain circumstances.
- Two states prohibit the release of young offender's names.[78]

Canada

2.82 In Canada the *Youth Criminal Justice Act 2002* (Can) allows restrictions on publication to be lifted in cases 'where a young person receives an adult sentence, or receives a youth sentence for murder, or attempted murder manslaughter, attempted sexual assault or a serious violent offence for which an adult is punishable by more than two years' imprisonment'.[79]

2.83 A youth appearing as a victim or witness may also apply to the Youth Justice Court for their name or identifying information to be published. The court must consider whether the application is in the best interests of the individual as well as the public.[80]

New Zealand

2.84 Youth Court hearings in New Zealand are held in private. The *Children, Young Persons and their Families Act 1989* (NZ) prohibits the publication or broadcast of identifying details of young offenders, except in relation to the conduct of research.

2.85 Young people that commit serious offences such as murder, manslaughter, serious assault and rape and those that repeatedly offend may have their case held in an adult court where the protections relating to publication and broadcasting in the *Children, Young Persons and their Families Act 1989* do not apply.[81]

78 Answers to questions taken on notice during evidence 18 February 2008, Ms Musgrave, p 6

79 Answers to questions taken on notice during evidence 18 February 2008, Ms Musgrave, p 5

80 *Youth Criminal Justice Act 2002* (Can), s 111(3)

81 Answers to questions taken on notice during evidence 18 February 2008, Ms Musgrave, p 6

Chapter 3 The impact of naming on juvenile offenders

In this chapter the Committee examines the impact on juvenile offenders of the publication of their names, in terms of their rehabilitation and recidivism. One of the policy objectives of section 11 is to prevent stigma for juvenile offenders. The Committee heard arguments that publicly naming juvenile offenders can cause stigma, hinder their rehabilitation and lead to an increase in recidivism. However, other Inquiry participants argued that public naming of juveniles could help their rehabilitation prospects. These arguments are addressed in this chapter. The current function of shaming within the NSW criminal justice system and the deterrent value of publicly naming juvenile offenders is also addressed.

The general effect on rehabilitation

3.1 Several Inquiry participants expressed the view that publishing the names of juvenile offenders would have a negative effect on their rehabilitation.[82]

3.2 The NSW Public Defenders Office quoted a 1991 NSW Court of Criminal Appeal judgement emphasising the community's interest in offender rehabilitation, particularly when the offender is a juvenile:

> The community [has] a real interest in rehabilitation. The interest to no small extent relates to its own protection … The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, are high.[83]

3.3 The Chief Magistrate's Office quoted a 2006 judgement from the Northern Territory Court of Appeal as an example of the court's formal recognition of views from psychiatry, psychology and criminology that naming juvenile offenders is likely to act against their rehabilitation:

> [T]he fact now almost universally acknowledged by international conventions, State legislatures and experts in child psychiatry, psychology and criminology, [is] that the publication of a child offender's identity often serves no legitimate criminal justice objective, is usually psychologically harmful to the adolescents involved and acts negatively towards their rehabilitation.[84]

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82 Mr Peter Muir, Deputy Director General (Operations), Department of Juvenile Justice, Evidence, 18 February 2008, pp 12-13; Submission 5, Federation of Parents and Citizens' Associations of New South Wales, p 2; Submission 7, Chief Magistrate's Office, p 2; Submission 14, NSW Commission for Children and Young People, p 2; Submission 24, National Children's and Youth Law Centre, p 8; Submission 19, Law Society of NSW, p 2.

83 *R v Webster* (unreported, Court of Criminal Appeal, Allen J, 15 July 1991), quoted in Submission 26, NSW Public Defenders Office, p 2

84 *MCT v McKinney & Ors* (2006) NTCA 10 at 20, quoted in Submission 7, p 2

3.4 Mr Peter Muir, Deputy Director General (Operations) of the Department of Juvenile Justice, stated that naming juvenile offenders would impede his Department's attempts to rehabilitate juvenile offenders.[85]

3.5 Most Inquiry participants acknowledged the importance of rehabilitating juvenile offenders in order to reduce recidivism. The impact of publicly naming juvenile offenders on their rehabilitation prospects was the point of difference. Some Inquiry participants maintained that publicly naming juvenile offenders leads to stigmatisation, while other participants maintained that naming was a way of ensuring that juvenile offenders took responsibility for their actions and that the effect of stigmatisation would be minimal.

The impact of stigmatisation

3.6 Those opposed to naming juvenile offenders argued that the effect of doing so would be stigmatising, and that this would have a negative impact on the juvenile's rehabilitation prospects.[86]

3.7 The Committee heard evidence that the impact of stigmatisation on juvenile offenders can come from two directions: firstly, other people's views of the offender, and secondly, the offender's view of him or herself. The impact in terms of other people's views can be in the form of prejudice, and the impact in terms of the offender's view of himself or herself can be in the form of negative self-identity.

Stigmatisation leading to prejudice from other people

3.8 Stigmatisation leading to prejudice from other people can hinder a juvenile offender's reintegration into the community. Reintegration, in the form of securing employment and accommodation, pursuing educational opportunities and involvement in community-based groups, was considered by some Inquiry participants to be of prime importance in the rehabilitation of juvenile offenders.[87]

Employment

3.9 Several Inquiry participants suggested that the stigma of being named as a juvenile offender would reduce that offender's prospects for employment.[88]

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85 Mr Muir, Evidence, 18 February 2008, p 12

86 See for example: Ms Katrina Wong, Solicitor, Marrickville Legal Centre and Convenor, Youth Justice Coalition, Evidence, 20 February 2008, p 33; Ms Mari Wilson, Policy Officer, Federation of Parents and Citizens Associations of New South Wales, Evidence, 18 February 2008, p 72; Submission 16, Shopfront Youth Legal Centre, p 6; Submission 14, p 5; Submission 24, p 8

87 Mr Muir, Evidence, 18 February 2008, pp 12-13; Mr Brett Collins, Coordinator, Justice Action, Evidence, 20 February 2008, pp 26-27

88 Mr Muir, Evidence, 18 February 2008, p 12; Submission 24, p 9; Submission 19, p 2; Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defenders Office, Evidence, 18 February 2008, p 44; Submission 18, Legal Aid Commission of New South Wales, p 6; Submission 22, Council of Social Services of New South Wales, p 1

3.10 Mr Muir explained that if a young person is known as an offender 'there is a chance that employers may not be as willing to give that young person employment.'[89]

3.11 The National Children's and Youth Law Centre noted the inverse relationship between employment and crime and the fact that jeopardising employment prospects increases the likelihood of juvenile's reoffending.[90]

Accommodation

3.12 Some Inquiry participants also noted the negative effect that stigmatisation can have on juvenile offenders seeking accommodation.[91]

3.13 The Youth Justice Coalition argued that this adverse impact would be contrary to a NSW State Plan goal to provide stable accommodation to offenders:

> The naming of young offenders will also have an adverse impact in relation to finding appropriate supported accommodation for those young people at risk of homelessness. Currently, a major target of the NSW State Plan is to provide stable accommodation at pivotal points in the re-offending cycle, particularly when exiting custody.[92]

Education

3.14 It was also noted by some Inquiry participants that stigmatisation arising from being named in relation to a criminal offence could lead to a reduction in educational opportunities.[93]

Involvement in community-based activities

3.15 Some Inquiry participants recognised the importance of involving juvenile offenders in community-based activities as part of their rehabilitation, and the impediment that being named in relation to criminal proceedings could pose to that involvement.[94]

3.16 Mr Muir noted that involvement in such activities was an opportunity for juvenile offenders to associate with non-criminal peers, and that this involvement would be impeded if they were known to be offenders:

> If one of those offending factors is young people associating with criminal peers we have to find ways of engaging them with non-criminal peers and we do that through things like involvement with sporting groups, social clubs, church groups, and the like.

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89 Mr Muir, Evidence, 18 February 2008, p 12

90 Submission 24, p 9

91 Mr Haesler, Evidence, 18 February 2008, p 44; Submission 22, p 1; Submission 12, Youth Justice Coalition, p 12

92 Submission 12, p 12

93 Professor Duncan Chappell, Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong, Evidence, 20 February 2008, p 64; Mr Muir, Evidence, 18 February 2008, pp 12-13; Submission 18, p 6

94 Mr Muir, Evidence, 18 February 2008, p 13; Professor Chappell, Evidence, 20 February 2008, p 64

> Certainly a young person being branded as an offender from the beginning would impede that process.[95]

3.17 Mr Brett Collins, the Coordinator of Justice Action, commented that naming a juvenile offender can cause difficulties for potential supporters that the offender may have in the community, who may not then want to be associated with the offender:

> [Naming] means that people around them no longer want to be as closely associated with them. It makes it difficult for anyone who wants to give them support because there is this counter pressure on the individual … It gives them a wash of that guilt and it makes it difficult for the whole process of rehabilitation.[96]

Stigmatisation leading to negative self-identity

3.18 Several Inquiry participants suggested that in addition to attracting prejudice from others, stigmatisation can affect juvenile offenders more personally, including through the formation of negative self-identity and association with the norms of criminal subcultures.[97] The Youth Justice Coalition argued that naming juvenile offenders can lead to the self-image of being a delinquent:

> '[N]aming and shaming', instead of leading to deterrence, will entrench a young offender's feelings of rejection by the community at large and invariably cause them to associate themselves with the only self-image that has been imposed on them: 'delinquent'.[98]

3.19 Similarly, Professor Duncan Chappell from the Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong, suggested that naming juveniles can lead to feelings of defiance and a continuation of deviant behaviour:

> [T]here does seem to be some evidence if you do name people, it may push those very people into continuing deviant behaviour because of the way in which they feel defiant and excluded from the broader community.[99]

Labelling

3.20 As outlined in Chapter 2, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) specifically refer to the possibility of 'labelling' as a reason to protect the privacy of the juvenile offender.

3.21 Some Inquiry participants referred to 'labelling theory' as a framework in which to view the negative effect that stigmatisation can have on juvenile offenders.[100]

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95 Mr Muir, Evidence, 18 February 2008, p 13

96 Mr Collins, Evidence, 20 February 2008, p 27

97 Professor Chappell, Evidence, 20 February 2008, pp 68-69; Submission 16, pp 7-8; Submission 24, p 8; Ms Gillian Calvert, Commissioner, NSW Commission for Children and Young People, Evidence, 18 February 2008, p 68; Mr Muir, Evidence, 18 February 2008, p 9; Submission 12, p 9

98 Submission 12, p 9

99 Professor Chappell, Evidence, 20 February 2008, pp 68-69

3.22 Mr Muir explained that labelling theory holds that juveniles labelled as 'criminal' tend to adopt that label as a self-identity, leading to further reoffending:

> [Labelling theory] holds that young people officially labelled as criminals tend to adopt a criminal identity from which they find it very difficult to subsequently escape. Research suggests that contrary to the assumption that stigmatising shame deters people from engaging in undesirable behaviours, people who are high in shame proneness are actually more likely to commit immoral and illegal actions.[101]

3.23 Mr Muir reported that it 'is quite clear that where some young people are labelled as criminals they can actually assume that label and act out according to the label.'[102]

3.24 Ms Gillian Calvert, the NSW Commissioner for Children and Young People, referred to the work of Dr Andrew McGrath, currently a lecturer with the School of Social Sciences and Liberal Studies at Charles Sturt University, in the field of labelling theory, and his research that demonstrates a connection between a child feeling they are being stigmatised and subsequent reoffending:

> [Andrew McGrath] found that feelings of stigmatisation perception—if the child perceives they are being stigmatised—does appear to lead to high rates of subsequent offending. He also found that young people who felt they had been dealt with more severely by the Children's Court were more likely to feel stigmatised and, therefore, more likely to reoffend.[103]

Association with criminal subcultures

3.25 Some Inquiry participants argued that stigmatising juvenile offenders through naming would lead to a strengthening of bonds, and increased association with, other offenders and the adoption of the norms of criminal subcultures.[104]

3.26 Ms Calvert noted that, '[w]hen you are rejected by your community or you are rejected by your parents, your family or your neighbourhood, you will turn to those who accept you'.[105] The submission of the NSW Commission for Children and Young People stated that shamed and excluded children will turn to other offenders for support:

> Shaming children by publicly naming them can lead to further social exclusion as these children often do not have support to assist them [to] deal with the impact of shaming. As a result, these children may turn to other groups of offenders for support and to gain a sense of belonging.[106]

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100 Mr Muir, Evidence, 18 February 2008, pp 9-10; Ms Calvert, Evidence, 18 February 2008, p 68; Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre, Evidence, 20 February 2008, p 34

101 Mr Muir, Evidence, 18 February 2008, p 9

102 Mr Muir, Evidence, 18 February 2008, pp 9-10

103 Ms Calvert, Evidence, 18 February 2008, p 68

104 Submission 14, p 6; Submission 16, p 5

105 Ms Calvert, Evidence, 18 February 2008, p 68

106 Submission 14, p 6

3.27 The Shopfront Youth Legal Centre quoted Australian National University criminologist John Braithwaite, who discusses the attraction of criminal subcultures to stigmatised juveniles:

> Shaming that is stigmatising … makes criminal subcultures more attractive because these are in some sense subcultures that reject the rejectors … the deviant is both attracted to criminal subcultures and cut off from other interdependencies.[107]

Reinforcing deviant behaviour

3.28 Many Inquiry participants argued that naming juvenile offenders could be counterproductive, and that the effects of stigmatisation discussed above, and also the desire for notoriety, can lead to a reinforcement of deviant behaviour and increased reoffending.[108]

3.29 Ms Calvert noted that one of the dangers of naming was that some juveniles would consider it a 'badge of honour.'[109] The Federation of Parents and Citizens Associations of NSW warned that naming young offenders 'amplifies the image they are attempting to create for themselves.'[110]

3.30 Similarly, the Legal Aid Commission of NSW suggested that career offenders may see naming as enhancing a tough reputation, or that paradoxically, the burden of shame may result in some juveniles actually seeking publicity:

> Children who are already at risk of becoming career offenders may welcome the publicity as enhancing their reputation for toughness. Alternatively they may find it so difficult to accept the burden of shame that they are pressured into a coping strategy of treating adverse publicity as a badge of honour.[111]

3.31 Mr Collins explained that for some children who feel they have never been recognised for anything else, publicity about their offending is welcomed. That recognition is also sought by other children, who then compete for it by committing more and more serious offences:

> There is the bravado of someone who has previously been told that he or she is just rubbish and of no consequence and quite often has suffered physical, emotional and psychological abuse. If for the first time they actually have their name in the paper and they are seen as having a status, instead of as previously having been regarded as a person of no worth, they then take on a hero status, and not only hero status, they then for the first time feel as though they have been recognised, and in that recognition they also provide a beacon to other children, how they could also become recognised ... Then they compete with one another for the more horrendous crime

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107 Braithwaite J, *Crime, Shame and Reintegration*, New York, Cambridge University Press, 1989, p 102, quoted in Submission 16, p 5

108 Professor Chappell, Evidence, 20 February 2008, pp 68-69; Ms Wilson, Evidence, 18 February 2008, p 72; Ms Calvert, 18 February 2008, p 68; Submission 5, p 4; Submission 18, p 6; Mr Collins, Evidence, 20 February 2008, pp 28-29; Ms Sanders, Evidence, 20 February 2008, p 34

109 Ms Calvert, Evidence, 18 February 2008, p 68

110 Submission 5, p 4

111 Submission 18, p 6

> that they can actually commit as a way in which they can actually at least boast of their hero status.[112]

3.32 However, Mr Kenneth Marslew AM, Chief Executive Officer of the Enough is Enough Anti-Violence Movement Inc, stated that from his experience with young offenders within correctional centres, most are afraid of such publicity:

> [M]ost of the young people that we have spoken to would say that they are afraid of having their name in print. They are using their age to hide from a crime and putting their name in print. [113]

Stigmatisation in smaller communities, including Aboriginal communities

3.33 Several Inquiry participants argued that the effects of stigmatisation were likely to be greater in smaller communities.[114]

3.34 Mr Muir argued that juveniles from smaller communities with their own print media would be more exposed to the effects of stigmatisation than juveniles from Sydney:

> [Y]oung people in smaller rural communities and, I would argue, up to populations as large as Wollongong and Newcastle that have their own electronic and print media, certainly I think would be much more exposed to the consequences of this than the young people in Sydney. The smaller the community comes the greater the impact for young people.[115]

3.35 The Legal Aid Commission of NSW also noted that, '[t]he stigmatising effect of publicity is often greater in smaller communities where there is a single source of news.'[116]

3.36 Ms Linda Crawford, Policy Officer with the New South Wales Aboriginal Justice Advisory Council, made the point that Aboriginal children, in particular, are well known in small communities.[117]

Further marginalising already marginalised juveniles

3.37 Some Inquiry participants argued that naming juvenile offenders would serve to further marginalise a group largely made up of individuals who are already marginalised. The Youth Justice Coalition suggested that naming will only increase hardship for those already experiencing significant hardship:

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112 Mr Collins, Evidence, 20 February 2008, pp 28-29

113 Mr Kenneth Marslew AM, Chief Executive Officer, Enough is Enough Anti-Violence Movement Inc, Evidence, 20 February 2008, p 54

114 Ms Linda Crawford, Policy Officer, New South Wales Aboriginal Justice Advisory Council, Evidence, 20 February 2008, p 18; Mr Muir, Evidence, 18 February 2008, p 9; Submission 7, p 3; Submission 18, p 8; Submission 20, NSW Government, p 3

115 Mr Muir, Evidence, 18 February 2008, p 9

116 Submission 18, p 8

117 Ms Crawford, Evidence, 20 February 2008, p 18

> It is important to note that many young people who come in contact with the juvenile justice system are the most vulnerable and marginalised in the community … the naming of young offenders will have the effect of further disadvantaging those young people already experiencing significant hardship in their lives.[118]

3.38 Similarly, in her submission, Dr Dorothy Bottrell, Senior Research Associate in Child and Youth Studies in the Faculty of Education and Social Work at the University of Sydney, suggested that naming would simply further shame juveniles already experiencing the negative effects of shame:

> Many young people who come into the juvenile justice system are sufferers of the consequences of inadequate care and protection. They are already shamed in ways which detrimentally affect their self-concept, understanding of life options and hopes for the future … To consider exacerbating this burden by naming young offenders and potentially subjecting them to further shaming in their communities is, in my view, the shame of those adults and authorities who would use their power over young people in this way.[119]

3.39 Ms Crawford noted that Aboriginal juvenile offenders in particular already experience a high degree of marginalisation that would only be exacerbated by being named:

> We particularly say that Aboriginal children are already marginalised. Aboriginal children who come before the courts are already stigmatised. Naming Aboriginal children will further stigmatise them and further impact on their prospects for rehabilitation.[120]

Naming leading to a focus on individual rather environmental factors

3.40 Some Inquiry participants expressed concern that naming juvenile offenders focussed attention on the individual at the expense of addressing environmental factors, where a greater impact in terms of reoffending can be made.[121]

3.41 Justice Action suggested that naming obscured environmental factors and encouraged the view that an offender may have 'bad genes':

> [Naming leads to] obscuring the true environmental predisposing factors that led to the crime and instead focusing, hence shifting, the blame almost entirely on a bad person or bad genes.[122]

3.42 Dr Bottrell suggested that, in terms of rehabilitation, it may be more relevant to look at circumstances as underlying causes:

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118 Submission 12, p 13

119 Submission 10, Dr Dorothy Bottrell, Senior Research Associate in Child and Youth Studies, Faculty of Education and Social Work, University of Sydney, pp 2-3

120 Ms Crawford, Evidence, 20 February 2008, pp 18-19

121 Dr Bottrell, Evidence, 20 February 2008, p 62; Mr Collins, Evidence, 20 February 2008, p 25; Submission 8, p 2

122 Submission 8, p 2

> You could argue it is more relevant to look at changing the circumstances and the conditions in which young people are growing up in which offending is taking place and to actually address those as underlying causes or conditions.[123]

Stigmatisation of other groups

3.43 As well as stigmatising an individual, some Inquiry participants argued that naming a juvenile offender can stigmatise young people in general, or the family, community or ethnic group the juvenile offender comes from.

3.44 The Shopfront Youth Legal Centre was concerned by the disproportionate media coverage and demonisation of juvenile offenders:

> In our view, there is already a disproportionate amount of media coverage, and associated "moral panic", about juvenile crime. In general, juvenile offenders seem to be demonised to a greater degree than adult offenders (sex offenders aside).[124]

3.45 The Youth Justice Coalition had similar concerns with 'sensationalised' representations of youth crime and the influence this had on the perception of young people in the wider community:

> Media portrayals of youth crime are often inappropriate and sensationalised … Media representations play a crucial role in the way young people are perceived by the wider community, particularly in relation to images of deviance.[125]

3.46 Ms Katrina Wong, Solicitor at the Marrickville Legal Centre and Convenor of the Youth Justice Coalition, noted that sensationalised media portrayals of young people can negatively affect their rehabilitation:

> There is significant research that shows that young people are stereotyped and sensationalised in the media … lots of terms are usually used to describe young people, hoons, delinquents and I think that this can be counterproductive to the principles of rehabilitation and certainly it has a flow on effect in terms of how they are able to participate in therapeutic counselling, a lot of that is inhibited.[126]

3.47 Mr Collins informed the Committee that in his experience family members and whole communities can be 'demonised' by the publicity surrounding an incident:

> We have had many situations where in fact other members of the family who are close by are also damaged in the process. In fact the whole community around that individual … is demonised in the process.[127]

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123 Dr Bottrell, Evidence, 20 February 2008, p 73

124 Submission 16, p 8

125 Submission 12, p 10

126 Ms Katrina Wong, Solicitor, Marrickville Legal Centre and Convenor, Youth Justice Coalition, Evidence, 20 February 2008, p 41

127 Mr Collins, Evidence, 20 February 2008, p 26

3.48 However, Mr Howard Brown OAM, Vice President of the Victims of Crime Assistance League, argued that any stigmatisation of the family of a juvenile offender was likely to be brief given the public's tendency to rapidly leave news stories behind:

> What is today's headlines is tomorrow's fish and chips wrapper and unfortunately as a society that is the way we are, and even if we were in a situation where we have an offender who is obviously quite recalcitrant, and obviously has an ongoing issue with re-offending, the fact that it has the potential to stigmatise other members of the family, it would, at best, last a day or two …[128]

3.49 Mr Collins expressed particular concern about labelling ethnic origin:

> We are most concerned about the labelling of any ethnic origin. That lays a smear on the whole of that particular community and we are totally against it.[129]

3.50 Ms Crawford expressed her concern about the stigmatisation of Aboriginal communities, stating that, '[n]aming indigenous people can, we submit, feed into an already intolerant view of the way indigenous communities live and behave.'[130] The Youth Justice Coalition shared this concern.[131]

3.51 Ms Crawford was similarly concerned about the use of other ethnic labels such as 'Lebanese' or 'Chinese' stating that that 'it is unnecessary to label the ethnicity of a person.'[132]

3.52 However Mr Nicholas Cowdery AM QC, the NSW Director of Public Prosecutions, expressed some sympathy for police using certain ethnic descriptors in the course of their work, who faced the challenge of choosing terms that were not offensive yet were relevant to their work carrying out investigations:

> I have some sympathy with the police who are looking for some way of describing what it is that they are doing, and describing it in a way that will not offend, prejudice or stigmatise individuals, or groups of individuals … I think it is a real dilemma and it is a matter of continuing to try to find relevant descriptors that will be useful to police carrying out their investigations.[133]

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128 Mr Howard Brown OAM, Vice President, Victims of Crime Assistance League, Evidence, 20 February 2008, p 53

129 Mr Collins, Evidence, 20 February 2008, p 26

130 Ms Crawford, Evidence, 20 February 2008, p 20

131 Submission 12, p 13

132 Ms Crawford, Evidence, 20 February 2008, p 21

133 Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, Evidence, 18 February 2008, p 23

Stigmatisation and the role of the Internet

3.53 Some Inquiry participants expressed concern that publishing the names of juvenile offenders in the age of the Internet effectively created an informal online criminal history that could be accessed by anyone in the future.[134]

3.54 Mr Collins noted that this effect of publishing the names of offenders was particularly unfortunate when an offender had overcome their problems to become a contributing member of society, only for those contributions to be undermined when their criminal history is discovered:

> We have many instances in fact of men and women who have gone on to significant positions of authority … where they are in fact contributing to the community, through an Internet search they have been uncovered and have been shamed in their community and the projects on which they have been working have actually had pressure put on them to have funding withdrawn if they are not removed from those projects. This is a matter of major concern to us where people have transcended their problems and are still limited by their histories …[135]

3.55 Other Inquiry participants noted that a ban on a juvenile offender's name appearing in official publications would not prevent a record being created in unofficial forums. The Legal Aid Commission of NSW suggested that a prohibition on naming would not be heeded by users of chat-lines, news groups and mobile phones:

> Prohibitions on publication or broadcast, rarely affect participants on Internet chat-lines and news groups or mobile phone users even though these forms of communication now support widespread dissemination of information. A person who is particularly interested in the identity of a child offender can usually find it out …[136]

3.56 Similarly, the Homicide Victims Support Group expressed the view that despite prohibitions, the identity of juvenile offenders can be disseminated quickly with today's technology, particularly amongst other juveniles:

> For good or ill, news of a violent crime and the identity of the supposed perpetrator … is around the world within hours. With today's technology the violent juvenile criminal has no anonymity amongst his peers or – if the violence is newsworthy enough – to his age cohort around the world.[137]

3.57 Mr Andrew Haesler SC, a Deputy Senior Public Defender with the NSW Public Defenders Office, noted that the impact of the Internet on privacy issues was yet to become clear, however the fact that Internet searches can find references to anyone named in the media was an argument in favour of the prohibition in section 11:

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134 Ms Wilson, Evidence, 18 February 2008, p 72; Submission 22, p 2; Mr Collins, Evidence, 20 February 2008, p 25

135 Mr Collins, Evidence, 20 February 2008, p 30

136 Submission 18, p 3

137 Submission 27, Partially confidential, Homicide Victims Support Group, p 3

> We have yet to fully comprehend the inroads into privacy that will be occasioned by the Internet, however it is clear that even using today's technology, Internet searches can find references to anyone named in the media … The prospect that a child once named could never put their crime behind them is a powerful argument in favour of the current prohibition.[138]

3.58 However, Deputy Chief Magistrate Helen Syme, while noting the difficulty of the problem, reported there were precedents that suggested prohibitions on Internet publication were enforceable:

> There are cases that already have decided how publication occurs over the Internet, whether it occurs when it is posted or when it is read. The answer to that case, according to the Court of Criminal Appeal decision, is both. Therefore, it is a matter of enforceability. It may be harder, but just because it is harder does not mean that it should be ignored, in my view.[139]

Vigilantism

3.59 Several Inquiry participants expressed concern that naming juvenile offenders could make them targets of vigilantism.[140]

3.60 The Shopfront Legal Centre expressed particular concern about vigilantism in light of their above comments in relation to the demonisation of juvenile offenders in the media:

> Against this backdrop, we hold serious concerns that the publication of names (or other identifying details) of juvenile offenders may lead to public vilification and even violence.[141]

Deterrence

3.61 The Committee heard evidence in relation to the issue of deterrence – that is, the function of criminal justice outcomes in deterring convicted juvenile offenders from reoffending (specific deterrence) and in deterring 'would-be' offenders from offending (general deterrence).

The function of deterrence in sentencing juvenile offenders

3.62 Mr Cowdery AM QC drew the Committee's attention to a 2002 NSW Court of Criminal Appeal judgement expressing the Court's view that the issue of general deterrence was less important than rehabilitation when sentencing young offenders:

> [H]is Honour made reference to the well-known principle that when courts are required to sentence a young offender considerations of punishment and general

138 Answers to questions on notice taken during evidence 18 February 2008, Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defenders Office, Question 1, p 1

139 Deputy Chief Magistrate Helen Syme, Chief Magistrate's Office, Evidence, 18 February 2008, p 35

140 Submission 16, pp 8-9; Mr Muir, Evidence, 18 February 2008, p 15; Mr Haesler, Evidence, 18 February 2008, p 44; Submission 18, p 6; Submission 14, p 7

141 Submission 16, pp 8-9

> deterrence should in general be regarded as subordinate to the need to foster the offender's rehabilitation.[142]

3.63 Two other Inquiry participants referred to NSW Supreme Court judgements that expressed the same view that when sentencing juvenile offenders, issues of deterrence should be subordinate to those of rehabilitation.[143]

3.64 Deputy Chief Magistrate Syme, noting specifically the contribution that impulsivity makes to many juvenile offences, also stated that the issue of deterrence was of less importance when sentencing juveniles:

> In understanding the correlation between juvenile offending and impulsivity, it would seem to me that the issue of general deterrence is a less important criterion for sentencing. If we are dealing, as we frequently deal, with offences relating to impulsivity, I think as a general conclusion you can say that if the offence is committed as an offence of impulse, the issue of general and specific deterrence is something that is going to be less uppermost in your mind in how to deal with it.[144]

3.65 Ms Calvert agreed, noting that in addition to impulsivity, the reduced capacity of juveniles to plan ahead made deterrence less important:

> If you cannot plan ahead, if you cannot control your impulses, if you cannot think through the consequences, then deterrence is less likely to work because you do not see the consequences of your behaviour and therefore it does not deter you from undertaking that behaviour.[145]

The relationship between naming juveniles and deterrence

3.66 Mr Jack Herman, the Executive Secretary of the Australian Press Council, maintained that naming juvenile offenders would be effective as a general deterrent, that is, a deterrent to 'would-be' offenders:

> … one of the points we make about naming and shaming is not so much the impact it has on the particular offender, but the effect that it may have as a deterrent to other offenders for whom the potential public shaming may in fact be a deterrent.[146]

3.67 In response to a question taken on notice during his evidence, Mr Herman clarified this statement:

> The Press Council is not making any assertions that 'naming and shaming' is relevant to the process or prospects for the rehabilitation of offenders. What it is saying is that

142 *R v TVC* (2002) NSW CCA 325, quoted in Submission 4, Director of Public Prosecutions, p 2

143 *R v Wilcox* (unreported, NSW SC, Yeldham J, 15 August 1979), quoted in Submission 16, p 4; *R v GDP* (1991) 53 A Crim R 112, quoted in Submission 26, p 2

144 Deputy Chief Magistrate Syme, Evidence, 18 February 2008, p 29

145 Ms Calvert, Evidence, 18 February 2008, p 65

146 Mr Jack Herman, Executive Secretary, Australian Press Council, Evidence, 20 February 2008, p 12

> deterrence – i.e. the deterrence of *potential* offenders who have not yet committed a crime – is facilitated by the naming of those offenders who have been convicted.[147]

3.68 Mr Herman provided references for a number of articles in support of the proposition that naming of offenders who have been convicted is a general deterrent.[148] While the articles provide support for reintegrative shaming (discussed below in detail in paragraphs 3.87-3.93) and outline existing notification measures in effect in the United States of America and other places, they do not provide specific evidence of the effectiveness of naming juvenile and other offenders as a general deterrent.

3.69 Mr Haesler SC questioned the notion of general deterrence and in particular the contribution naming juvenile offenders could make to it:

> My personal view … is that the notion of general deterrence is a myth. People are deterred if they think they are going to get caught or by changes to their behaviour, whether that is enforced or learnt. Naming does not assist any of those processes.[149]

3.70 The Law Society of NSW expressed the same view in relation to specific deterrence:

> The [Law Society's Criminal Law Committee] is of the view that identifying a young offender is ineffective in deterring a young person from re-offending.[150]

3.71 Mr Muir noted that in relation to young offenders, the notion of specific deterrence was largely redundant since most young offenders only offended once:

> The vast bulk of young people who offend only ever do so once … [They] have some sort of commitment to the mainstream values, laws and mores of our community, once they are caught the act of being caught is a sufficient deterrent to them.[151]

3.72 The small group of offenders responsible for the bulk of serious repeat crime, Mr Muir suggested, were not going to be deterred by the prospect of being named.[152]

3.73 Mr Muir explained that the idea that publicly naming juvenile offenders would act as a deterrent assumed that offenders had a connection to their community and cared about being

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147 Answers to questions taken on notice during evidence 20 February 2008, Mr Jack Herman, Australian Press Council, Question 1, p 1

148 Answers to questions taken on notice during evidence 20 February 2008, Mr Herman, Question 1, p 1. The articles cited are: Coddington D, *The Australian Paedophile and Sex Offender Index*, Sydney, Mount View Trust, 1997; Ronken C and Lincoln R, 'Deborah's law: the effects of naming and shaming on sex offenders in Australia*', Australian and New Zealand Journal of Criminology,* 2001, Vol 34, No 3, pp 235-255; Sherman LW and Strang H, *Reintegrative Shaming Experiments: The Right Kind of Shame for Crime Prevention*, RISE Working Papers No 1, Canberra, Australian National University, 1997; Karp DR, 'The judicial and judicious: use of shame penalties', *Crime and Delinquency*, 1998, Vol 44, No 2

149 Mr Haesler, Evidence, 18 February 2008, p 44

150 Submission 19, p 2

151 Mr Muir, Evidence, 18 February 2008, pp 8-9

152 Mr Muir, Evidence, 18 February 2008, p 9

named. This, he argued, would only be true in the case of offenders, who by virtue of that connection to their community, were unlikely to reoffend in any case:

> Deterrence would largely only have effect with offenders who already have a connection to the community. Therefore, by definition, they are already the offenders most likely not to reoffend. The ones that have the least connection to a community, the most serious offenders, would probably not be affected in terms of a deterrence.[153]

3.74 Ms Sanders of the Shopfront Youth Legal Centre made a similar point, noting that children from middle class families who may be deterred by the prospect of being named were not at a high risk of re-offending anyway:

> Children from solid middle class families who might perhaps be sufficiently shamed or sufficiently deterred by the prospect of being named. But those are generally not the sort of young people who we are terribly worried about anyway as offenders. They are the sort of young people who are probably going to be deterred by other things.[154]

3.75 Ms Mari Wilson, Policy Officer for the Federation of Parents and Citizens Associations suggested that juveniles would not be aware of the prohibition on the publication of their names, and so its removal could not act as a deterrent:

> The reality is that a young person under the age of 18 has little understanding of the protection they currently enjoy. Therefore, taking it away offers no disincentive for juvenile offenders.[155]

The positive effects for the offender

3.76 Not all Inquiry participants believed that naming would have a negative effect on juvenile offenders or their rehabilitation prospects.

Naming as a means of increasing the juvenile offender's sense of responsibility

3.77 Mr Peter Rolfe, the President of the Homicide Survivors Support After Murder Group Inc, argued that naming young offenders would force them to take responsibility for their actions when they would otherwise not do so:

> But we feel that in a lot of cases they will not take responsibility unless they feel it is absolutely necessary or unless they are forced to. We feel that naming them would be a way of doing this so they would not be able to hide behind anonymity and people not knowing their names.[156]

3.78 Furthermore, Mr Rolfe argued, taking responsibility as early as possible saves time in terms of rehabilitation:

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153 Mr Muir, Evidence, 18 February 2008, p 8

154 Ms Sanders, Evidence, 20 February 2008, p 48

155 Ms Wilson, Evidence, 18 February 2008, p 71

156 Mr Peter Rolfe, President, Homicide Survivors Support After Murder Group Inc, Evidence, 18 February 2008, p 52

> That is what we feel juveniles need to do at the beginning. It saves them a lot of time in trying to rehabilitate themselves.[157]

3.79 The Victims of Crime Assistance League also argued that anonymity discouraged young people from taking responsibility, citing juvenile re-offending rates as evidence:

> By hiding behind the veil of anonymity, taking responsibility is discouraged and I feel that this is evidenced by the fact that over two thirds of juvenile offenders re-offend.[158]

3.80 Mr Brown OAM suggested that juvenile reoffence rates indicated the current prohibition on naming was not assisting offenders in their rehabilitation:

> In fact there is absolutely no evidence to indicate, on recidivism rates, that not naming them has provided them any encouragement.[159]

3.81 Mr Rolfe quoted a NSW Bureau of Crime Statistics and Research report showing juvenile reoffence rates and also suggested that the high rate indicated the current system was not working:

> According to BOCSAR, Bulletin 86, 68 per cent of offenders reappear before a court for a subsequent offence within eight years. This would give the impression that the current system is simply not working.[160]

3.82 Mr Marslew AM reported that from his experience running programs in juvenile correctional facilities, holding juvenile offenders accountable was a key to the success of those programs:

> To hold them accountable for what they have done is one of the prime reasons for the success that we are having.[161]

Naming offenders as a means of increasing parental responsibility

3.83 Some Inquiry participants argued that naming juvenile offenders was a way of increasing parental responsibility. The Homicide Victims Support Group suggested that denying anonymity to juvenile offenders will encourage parents to acknowledge the harm their children have done and take more responsibility for their behaviour:

> The lack of anonymity will encourage parents to take responsibility, they also need to acknowledge the pain and harm their child/ren have caused to the victims, to society.[162]

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157 Mr Rolfe, Evidence, 18 February 2008, p 56

158 Submission 6, Victims of Crime Assistance League, p 1

159 Mr Brown, Evidence, 20 February 2008, p 51

160 Mr Rolfe, Evidence, 18 February 2008, p 52

161 Mr Marslew AM, Evidence, 20 February 2008, p 54

162 Submission 27a, Homicide Victims Support Group, p 3

3.84 Mr Marslew AM made a similar point, noting that naming juvenile offenders would prevent their parents from hiding behind the anonymity currently afforded those offenders and thereby avoiding accountablility:

> Also, in naming young offenders it starts to hold parental responsibility further up the tree, because the parents will not want their name in the papers or wherever the media decides to put it … What we have got now is young offenders hiding behind their age and you have got parents hiding behind the fact that their children are not being named, so they are not being held accountable.[163]

3.85 However, the Legal Aid Commission of NSW argued that making increasing parental responsibility was inconsistent with increasing the juvenile's responsibility:

> It is difficult to maintain at the same time that naming a child is a way of making them responsible for their behaviour and that it is a mechanism for enforcing parental responsibility.[164]

3.86 Ms Calvert, noted that identification would simply be an added stress to many parents of juvenile offenders and would not assist the juvenile's reintegration into the family:

> Many parents of juvenile offenders are themselves struggling with difficulties like domestic violence, mental illness and substance abuse … [I]n my view, parents in this situation are unlikely to be motivated to do a better job by details of a child's crime being made public. Shaming families would not help a child's rehabilitation and certainly would not help that child's reintegration back into the family at a time when they really need their family …[165]

Reintegrative shaming

3.87 Some Inquiry participants referred to the work of Australian National University criminologist John Braithwaite to describe different types of shaming, and in particular to his distinction between 'stigmatic' and 'reintegrative' shaming within the context of the criminal justice system.[166]

3.88 Braithwaite describes shaming generally as a process of disapproval leading to remorse:

> [Shaming includes] all societal processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming.[167]

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163 Mr Marslew AM, Evidence, 20 February 2008, p 55

164 Submission 18, p 7

165 Ms Calvert, Evidence, 18 February 2008, p 60

166 Professor Chappell, Evidence, 20 February 2008, pp 67-68; Dr Bottrell, Evidence, 20 February 2008, p 68; Ms Crawford, Evidence, 20 February 2008, p 18; Mr Marslew AM, Evidence, 20 February 2008, p 55

167 Braithwaite J, *Crime, Shame and Reintegration,* New York, Cambridge University Press, 1989, p 100

3.89 'Stigmatic' shaming is described as disintegrative, where the offender is outcast and no effort is made to reconcile the offender with the community.[168] It involves humiliation, the labelling of the person, not just the offence, as evil, and the taking on by the offender of the label 'deviant'.[169]

3.90 'Reintegrative' shaming is defined as that which expresses disapproval within a relationship of respect. It labels the offence and not the person as evil and therefore does not allow the offender to take on the label of 'deviant.'[170]

3.91 Professor Chappell suggested that reintegrative shaming can be used effectively as part of a nurtured process that strengthens links between offenders and their family and community:

> [S]haming can be used as a device not to stigmatise people but to make them aware of what they have done and through then a carefully nurtured process, as I described earlier, to bring the person back into the fold of the family and of the community, rather than holding them out to degradation and ejection from the community, which is what stigmatised shaming really is about.[171]

3.92 Dr Bottrell noted that according to Braithwaite's theory, reintegrative shaming helps develop of the juvenile's conscience and self-regulation skills, and that this flows from the disapproval of people that matter:

> Braithwaite's theory of reintegrative shaming says that the disapproval that young people experience in that kind of setting helps to shape conscience and helps the individual to learn to be self regulating, that they are actually internalising the social disapproval and using it as a guide to future behaviour and choices because it is coming from people that matter …[172]

3.93 The Chief Magistrate's Office quoted from the PhD dissertation of Dr Nathan Harris to illustrate the point that shame is only experienced if it comes from the disapproval of people the offender respects, and not from officers of the criminal justice system or consumers of media:

> [S]haming by people the offender does not respect fails to induce shame. Indeed, the only shaming that induces shame is disapproval of the act by those who we respect very highly. Just respecting them a bit is not enough. So shaming by police, judges and television viewers or the readership of newspapers is mostly beside the point.[173]

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168 Braithwaite J, *Crime, Shame and Reintegration,* New York, Cambridge University Press, 1989, p 101

169 Ahmed E, Harris N, Braithwaite J & Braithwaite V, *Shame Management Through Reintegration,* Melbourne, Cambridge University Press, 2001, p 135

170 Ahmed E, Harris N, Braithwaite J & Braithwaite V, *Shame Management Through Reintegration,* Melbourne, Cambridge University Press, 2001, p 135

171 Professor Chappell, Evidence, 20 February 2008, pp 67-68

172 Dr Bottrell, Evidence, 20 February 2008, p 68

173 Harris N, *Shaming and Shame: An Empirical Analysis*, PhD dissertation, Law Program, Australian National University, Canberra, 1999, quoted in Submission 7, p 3

Shaming within the criminal justice system

3.94 Within the criminal justice system the concept of 'naming' is often linked with the concept of 'shaming.' Some Inquiry participants noted the role shame currently plays in our criminal justice system.

3.95 The Chief Magistrate's Office suggested that shaming in front of supportive family members was effective:

> If a young person has effective and supportive family members then they will become aware of the commission of the offences in question. The shame that the young person will suffer because of this will be the most effective form of shaming.[174]

3.96 Ms Calvert noted that juvenile offenders potentially face their family members, as well as the victim and other witnesses inside the courtroom:

> While in the courtroom the victims or other witnesses may be present to give evidence and the family of the accused may also be in the courtroom.[175]

3.97 The Committee heard evidence that whilst this type of shaming (reintegrative shaming), that arises in a controlled environment where the offender is held accountable in front of a group of people he or she respects and which may include the victim, can be effective, the type of shame arising from public naming (stigmatic shaming), where the offender's name becomes known to the readership and viewers of various media - most of whom the offender does not know or respect - makes no positive contribution to the rehabilitation of juvenile offenders.[176]

Programs within the NSW criminal justice system that utilise reintegrative shaming

3.98 The Committee heard evidence about two programs within the NSW criminal justice system that utilise reintegrative shaming: Circle Sentencing and youth justice conferencing.

Circle sentencing

3.99 Circle Sentencing is a program for adult Aboriginal offenders that involves the offender, the magistrate and members from the offender's Aboriginal community sitting in a circle in order to discuss the background to the offence, the impact of the offence on the community and victim, and to tailor a sentence for the offender.[177]

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174 Submission 7, pp 2-3

175 Ms Calvert, Evidence, 18 February 2008, p 59

176 Ms Crawford, Evidence, 20 February 2008, pp 19-20; Mr Muir, Evidence, 18 February 2008, p 9; Submission 7, pp 2-3; Mr James McDougall, Director and Principal Solicitor, National Children's and Youth Law Centre, Evidence, 20 February 2008, p 36; Professor Chappell, Evidence, 20 February 2008, pp 67-68; Dr Bottrell, Evidence, 20 February 2008, p 68

177 Crime Prevention Division, Attorney General's Department of NSW, *Crime Prevention: Circle Sentencing*, Factsheet, February 2007, accessed 4 April 2008, p 1, <www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/ vwFiles/Circle%20 Sentencing _feb 07.pdf/$file/Circle%20Sentencing_feb07.pdf>

3.100 Ms Crawford explained the particular function of shaming within the Circle Sentencing program and that its effectiveness lay in the offender being shamed in front of respected elders rather than in the media:

> The shaming aspect of the Circle Sentencing has a different meaning and impact to shaming in the media … many indigenous offenders who come before the courts have come through the system from an early age and do not have the same respect that they have for the circle, the elders who make up the circle … To be shunned from your community has a greater impact than to do gaol time, for example, or to be shamed within the media. There is a greater impact to be shamed in your community.[178]

Youth justice conferencing

3.101 Youth justice conferencing is a NSW Department of Juvenile Justice program for 10 to 18 year olds. The program allows police to divert eligible young offenders from formal court processes and deal with them by way of a conference. The conference is attended by a conference convenor, the offender, the victim or their representative, families and support people, the investigating police officer, the offender's legal representative, and other people considered relevant. An outcome plan is drafted that that may include an apology and reparation to the victim and steps to link the young offender back into the community.[179]

3.102 Mr James McDougal, the Director of the National Children's and Youth Law Centre, gave support for youth justice conferences as 'a good example of the reintegrative shaming model.'[180]

3.103 Ms Wong also supported the model in its use of shaming and in facilitating the offender taking responsibility for the actions:

> [T]he young person is really able to take responsibility for their actions and able to see the consequences of their actions on that particular victim and also make reparations to that. I think if you are looking at a way of really deterring them from re-offending again and also getting them to acknowledge what they have done, then that is pretty much a model that we should be basing this naming and shaming kind of effect on.[181]

3.104 The Chief Magistrate's Office also expressed support for the conferencing model, noting that it occurred in a confidential setting:

> The provisions for … youth justice conferencing in the *Young Offenders Act* provide the most effective form of shaming of young offenders. Where these options are employed a parent or other support person will be present. The process occurs in a confidential setting …[182]

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178 Ms Crawford, Evidence, 20 February 2008, p 19

179 NSW Department of Juvenile Justice, *Youth Justice Conferencing: A different approach to dealing with young people who offend*, Brochure, accessed 4 April 2008, < http://www.djj.nsw.gov.au/pdf_htm/publications/yjc/YJCBrochure.pdf>

180 Mr McDougall, Evidence, 20 February 2008, p 36

181 Ms Wong, Evidence, 20 February 2008, p 41

182 Submission 7, p 4

3.105 Mr Brown OAM suggested this very confidentiality was a drawback in the conferencing system because it allowed juvenile offenders to hide behind anonymity and not take ownership of their actions:

> [N]o-one can name that child outside [a conference] and that is why we see reoffending because they do not have to take ownership of it. They can hide behind this anonymity. The problem is they do not have to put their hand up and "I say I did that", and when they get out they can say "that wasn't me".[183]

3.106 However, Professor Chappell emphasised the importance of this confidentiality and the negative effect publicity in the form of naming juvenile offenders would have on the conferencing process:

> [T]he whole concept of family group conferences, youth conferences and so on, all depended on a very carefully nurtured and controlled meeting between the young person, the young person's family, the victims, the justice system representatives and so on. The last thing that is required is for that to be given the full blast of publicity, which would be associated with the naming of the young person there.[184]

3.107 In Chapter 4 the Committee further examines the role of youth justice conferencing in relation to victims and their families.

Committee comment

3.108 The Committee notes the evidence presented by Inquiry participants that publicly naming juvenile offenders is likely to lead to stigmatisation resulting in prejudice from other people and the formation of negative self-identity. The Committee believes that this would have a negative impact on the rehabilitation of juvenile offenders and could potentially lead to increased recidivism by strengthening a juvenile's bonds with criminal subcultures and their self-identity as a 'criminal' or 'deviant,' and undermining attempts to address the underlying causes of offending.

3.109 The Committee reaffirms the validity of the policy objective underpinning section 11 of the *Children (Criminal Proceedings) Act* in relation to juvenile offenders, which is to reduce the community stigma associated with a child's involvement in a crime, thereby allowing the child to be reintegrated into the community with a view to full rehabilitation.

3.110 The Committee notes the evidence from some Inquiry participants that the effects of stigmatisation would be greater in smaller communities, including Aboriginal communities, and would serve to further marginalise already marginalised juveniles.

3.111 The Committee acknowledges the view expressed by some Inquiry participants that naming juvenile offenders would encourage them to take responsibility for their actions and thereby impact positively on their rehabilitation. The Committee agrees that responsibility and accountability are important elements in the rehabilitation of offenders but believes that these ends can be achieved without publicly naming juvenile offenders, and without the risk of negatively affecting their rehabilitation and increasing recidivism. The Committee refers to

183 Mr Brown, Evidence, 20 February 2008, p 52

184 Professor Chappell, Evidence, 20 February 2008, p 63

the following comments in this chapter that address reintegrative shaming and its use in the criminal justice system, particularly in regards to youth justice conferencing.

3.112 The Committee notes the argument put forward by some representatives from victim support groups that current juvenile recidivism rates indicate that the prohibition contained in section 11 is not working. However, the Committee does not accept that juvenile recidivism can be directly linked to the section 11 prohibition on naming children involved in criminal proceedings. There is a wide range of factors contributing to juvenile recidivism rates and the Committee is not aware of any research that indicates not publicly naming juvenile offenders is one of those factors.

3.113 The Committee acknowledges that it is important for juvenile offenders to recognise that their actions have caused harm and it is right that they should experience shame. However, the shame should be constructive, promoting rehabilitation and assisting the child to make a positive contribution to society over the rest of their lives.

3.114 Reintegrative shaming, as utilised in youth justice conferences, is an example of the constructive use of shame. The Committee has heard evidence that youth justice conferences have been of benefit to offenders. The benefit to victims of youth justice conferences is discussed in the following chapter.

3.115 The weight of evidence heard by the Committee throughout this Inquiry points to public naming ('naming and shaming') as being a form of stigmatic shaming that is unlikely to contribute positively to the juvenile offender's rehabilitation.

3.116 The Committee agrees with Inquiry participants who suggested that criminal justice outcomes in relation to juveniles should emphasise rehabilitation over deterrence. We also recognise that rehabilitation, where it results in reduced recidivism, achieves the same goal as deterrence.

3.117 The Committee notes the evidence presented to it that impulsivity and lack of planning are common characteristics of juvenile offending, and that therefore the deterrent effect to juveniles of criminal justice outcomes is likely to be minimal. The Committee does not believe that naming juvenile offenders will act a significant deterrent to either that offender or other would-be offenders.

3.118 The Committee notes that all Inquiry participants had the same goal of reducing juvenile recidivism and differed only in the effect they thought publicly naming juveniles would have in regard to recidivism.

3.119 This chapter has focussed on juvenile offenders and the impact of public naming on them. In considering the effect on juvenile offenders of public naming and their prospects for rehabilitation the Committee is not suggesting that the recovery and rights of victims are less important. The Committee recognises the suffering and trauma associated with being a victim of crime. In the following chapter the Committee examines the impact of public naming on children involved in criminal proceedings from the perspective of victims and their families.

Chapter 4 The impact of naming on victims

In this chapter the Committee examines the impact the prohibition in section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) has on victims of juvenile offenders and their families. The Committee considers the role that naming juvenile offenders plays in victim recovery, and also considers issues associated with naming juvenile victims themselves.

Application of section 11 to victims

4.1 Section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) (hereafter the *Children (Criminal Proceedings) Act*) prohibits the publication of a juvenile victim's name or material that may lead to the identification of the victim.[185] This may include the identification of the offender, even if the offender is an adult, if by identifying the offender the juvenile victim could also be identified. The policy objective of this part of the *Children (Criminal Proceedings) Act* is to protect juvenile victims from the stigma associated with crimes in order to assist their recovery and participation in community life.[186]

4.2 It is important to note that there are various victim-offender scenarios covered by the *Children (Criminal Proceedings) Act*: juvenile victim – juvenile offender; juvenile victim – adult offender; and adult victim – juvenile offender.

4.3 The following sections of the report address the impact on a victim's recovery of naming in the context of the victim's anonymity and the offender's anonymity.

Victim anonymity and victim recovery

4.4 The NSW Government observed that in its current form, section 11 of the *Children (Criminal Proceedings) Act* as it relates to juveniles accords 'overriding importance … to protecting victims and witnesses from damaging publicity.'[187]

4.5 Several Inquiry participants expressed support for this policy objective.[188]

4.6 The Federation of Parents and Citizens Associations, for example, commented on the particular importance of protecting victims from the stigma associated with being a victim of crime:

185 *Children (Criminal Proceedings) Act 1987,* s 11 (1) (a)-(b), s 11 (5)

186 Terms of Reference, 1 (b)

187 Submission 20, NSW Government, p 3

188 See, for example: Submission 4, The Office of the Director of Public Prosecutions, p 3; Submission 5, Federation of Parents and Citizens' Associations of New South Wales, p 4; Ms Gillian Calvert, Commissioner, NSW Commission for Children and Young People, Evidence, 18 February 2008, p 59; Ms Linda Crawford, Policy Officer, New South Wales Aboriginal Justice Advisory Council, Evidence, 20 February 2008, pp 21-22

> … special protection should continue to be offered under this Act to prevent the embarrassment, fear and shame associated with being a victim of any crime.[189]

4.7 In evidence to the Committee. Ms Linda Crawford, policy officer with the NSW Aboriginal Justice Advisory Council, concurred and further commented on the importance of protecting victims of crimes such as sex offences:

> We submit that victims also should not be named, because they can then be further stigmatised, depending on what the offence was that was committed against them. We see this in the sorts of crimes like sex offences. Victims can then be often labelled later on and can carry those labels with them. Although it is not punishing the victim as such, it is a further stigmatization that they can then carry with them.[190]

4.8 The Office of the Director of Public Prosecutions also observed that the protections of section 11 rightly extended to child witnesses.[191]

4.9 Ms Gillian Calvert, the NSW Commissioner for Children and Young People, noted the positive contribution anonymity can make to a victim's rehabilitation:

> … the prohibition on naming children who offend can help victims maintain their own privacy, helping them in the process of recovery by protecting them from unwarranted outside attention.[192]

Offender anonymity and victim recovery

4.10 While there was broad agreement among Inquiry participants on the importance of protecting juvenile victims from the stigma associated with crime by not publishing their names, there was considerable disagreement over the impact of naming juvenile offenders on victims (adult or juvenile) and their families.

4.11 Some Inquiry participants contended that the prohibition on naming juvenile offenders was not in the best interests of victims. Mr Kenneth Marslew AM, the Chief Executive Officer of Enough is Enough Anti-Violence Movement Inc, suggested that naming juvenile offenders has a rehabilitative effect on victims.[193]

4.12 Similarly, the Homicide Victims Support Group argued that naming the offender would be equitable for victims:

> In the case of any crime of violence in the community the justice system needs to publicly reveal the identity and purpose of the criminal, in the interests of equity to the many, many victims of that crime.[194]

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189 Submission 5, p 4

190 Ms Crawford, Evidence, 20 February 2008, pp 21-22

191 Submission 4, p 3

192 Ms Calvert, Evidence, 18 February 2008, p 59

193 Mr Kenneth Marslew AM, Chief Executive Officer, Enough is Enough Anti-Violence Movement Inc, Evidence, 20 February 2008, p 57

194 Submission 27 (partially confidential), Homicide Victims Support Group, p 4

4.13 The Australian Press Council supported this view, stating that protecting the anonymity of offenders can lead to a sense of injustice amongst victims:

> … the exposure of offenders to public 'shaming' has an important function in vindicating the victims of crime and providing them with a sense of justice. Inappropriate protection of the confidentiality of offenders can cause victims to feel resentment and anger and sense of betrayal by the courts.[195]

4.14 However, Mr Brett Collins, the Coordinator of Justice Action, reported that from Justice Action members who were not only offenders but victims as well, and from the victims groups with which Justice Action have a relationship, he has not heard the view that naming offenders assists victims.[196]

4.15 The Federation of Parents and Citizens' Associations of New South Wales strongly supported the prohibition on naming as it relates to juvenile offenders, stating that 'under no circumstances should the victims of a juvenile crime be identified' on the grounds that identifying the victim might identify the juvenile offender.[197]

4.16 A number of Inquiry participants suggested that youth justice conferences, which the Committee considers in relation to offenders in Chapter 3, are an example of a process that could be of assistance to victims without publicly identifying juvenile offenders.[198]

4.17 Youth justice conferencing involves conferences attended by (juvenile or adult) victims and juvenile offenders, who are identified within the conference but whose identification outside of the conference is prohibited by the *Young Offenders Act 1997*.[199] Some Inquiry participants referred to a 2000 NSW Bureau of Crime Statistics and Research (BOCSAR) review of the program, which reported that 94% of victim participants thought the conference was 'somewhat fair' or 'very fair' to them.[200]

4.18 Ms Calvert, noting that youth justice conferences take place in a one-on-one environment, expressed support for the process as it relates to victims:

> By participating in the process of deciding how the offenders should be dealt with, victims are able to recover a sense of power they might have lost as someone who has had a criminal act perpetrated on them.[201]

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195 Submission 9, Australian Press Council, p 2

196 Mr Brett Collins, Coordinator, Justice Action, Evidence, 20 February 2008, p 25

197 Submission 5, p 4

198 Mr Peter Muir, Deputy Director General (Operations), Department of Juvenile Justice, Evidence, 18 February 2008, p 15; Ms Calvert, Evidence, 18 2008, p 61; Mr James McDougall, Director and Principal Solicitor, National Children's and Youth Law Centre, Evidence, 20 February 2008, p 36; Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre, Evidence, 20 February 2008, p 42

199 *Young Offenders Act 1997,* s 65

200 Trimboli L, *An Evaluation of the NSW Youth Justice Conferencing Scheme,* NSW Bureau of Crime Statistics and Research, Attorney Generals Department, Sydney, 2000, p 59

201 Ms Calvert, Evidence, 18 February 2008, p 59

4.19 Mr James McDougall, the Director of the National Children's and Youth Law Centre, also supported youth justice conferences in relation to victims, noting that the exchange of information between offender and victim can assist victims in their recovery:

> The provision of information to a victim to identify that they have not been targeted specifically by an offender is often a very important part in addressing that victim's concerns and in the future making them feel safer.[202]

4.20 Ms Calvert noted that while there is a lack of conclusive evidence to support the contention that naming juvenile offenders assists the victim's recovery, there is evidence to show that naming juvenile offenders can harm the offenders:

> I am going to be arguing that we should not be naming children in criminal proceedings because the evidence shows that it harms young people who are the offenders and we do not have the evidence either way for the impact on victims.[203]

Offender anonymity and 'family victim'[204] recovery

4.21 The death of a victim of crime causes immense trauma and distress for that person's family. The impact of the current prohibition on naming juvenile offenders on the surviving family is considered here.

4.22 Mr Robert Taylor, President, Homicide Victims Support Group, whose adult son was murdered in 2003 by two brothers, one of whom was a juvenile at the time, reported that he and his wife felt a sense of injustice throughout the trial of their son's murderers arising from the fact that the offenders could not be named.[205]

4.23 This sentiment was shared by Mr David Berret, also of the Homicide Victims Support Group, whose juvenile son was murdered by a juvenile offender. He described the trial of his son's murderer as a 'wretched experience' for him and his wife:

> … a lot of that was to do with the fact that we seemed to be unimportant, because the court was closed, it seemed to be protecting the offender rather than them making any provision for the victim.[206]

4.24 Mr Peter Rolfe, President of the Homicide Survivors Support After Murder Group Incorporated, reported a similar experience amongst the group's members:

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202 Mr McDougall, Evidence, 20 February 2008, p 37

203 Ms Calvert, Evidence, 18 February 2008, p 62

204 Section 10 of the *Children (Criminal Proceedings) Act 1987* defines a 'family victim' as 'a person who, at the time the offence was committed, was a member of the immediate family of a deceased victim of the offence (whether or not the person suffered personal harm as a result of the offence.' The term does not appear in section 11 but is used here in the interests of consistency.

205 Mr Robert Taylor, President, Homicide Victims Support Group, Evidence, 20 February 2008, p 48

206 Mr David Berret, Homicide Victims Support Group, Evidence, 20 February 2008, p 45

> According to our members who have lost a loved one to homicide, there is a feeling of incompleteness after the trial because the offender is able to hide behind the fact that people do not know who he is - he or she is just known by their initials.[207]

4.25 Mr Rolfe provided an instance where the prohibition on naming two juveniles convicted of murder caused particular distress to the surviving family:

> One family who lost a son to homicide who had been missing for three years had to suffer the indignity of people asking them in the street whether their son had been found. As soon as one of the juveniles confessed to the murder and accused another juvenile of complicity, their son's name was never mentioned again in the media.[208]

Committee comment

4.26 The Committee acknowledges the views of Enough is Enough Anti-Violence Movement, the Homicide Victims Support Group and the Australian Press Council - that naming juvenile offenders might in some cases give individual victims a sense of vindication and justice and assist their recovery.

4.27 However, the Committee believes that the policy objective of section 11 of the *Children (Criminal Proceedings) Act* - to protect juvenile victims from the stigma of crime - remains valid. The prohibition on naming juvenile victims and offenders is intended to protect the juvenile victim and the juvenile offender and to support the recovery of the former and the rehabilitation of the latter. Therefore, the Committee reaffirms the policy objectives of this section in protecting victims from the stigma of crime, including protecting the identity of offenders where their identification could lead to the identification of the victim.

4.28 It is important to stress that the prohibition is not intended to help juvenile offenders avoid responsibility for their actions. Offenders are still held accountable by the criminal justice system with their sentence intended to reflect denouncement of their conduct and punishment for the harm caused.

4.29 The Committee acknowledges the importance of the victim's recovery and notes that programs such as youth justice conferencing offer a way of addressing victim's issues without publicly naming the offenders, by identifying the offender and victim within a controlled environment.

4.30 The Committee acknowledges the extreme distress of the families of deceased victims of crime. The offence of murder falls into the category of a serious children's indictable offence and section 11 currently allows the prosecuting authority to make a submission to publish the name of the offender(s). In such cases the court can authorise publication if publication is deemed to be in the interests of justice and the prejudice to the offender does not outweigh those interests.[209] The Committee reaffirms that these competing interests should be weighed

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207 Mr Peter Rolfe, President, Homicide Survivors Support After Murder Group Incorporated, Evidence, 18 February 2008, p 52

208 Mr Rolfe, Evidence, 18 February 2008, p 53

209 *Children (Criminal Proceedings) Act 1987,* s 11 (4B), (4C), (4D)

and that a decision about whether or not to publish is appropriately made at the time of sentencing by the sentencing judge.

4.31 The Committee also notes that where the deceased victim is a juvenile, the senior available next of kin can give permission for the publication of their name, but that in such instances those seeking to publish the deceased child's name must consider whether doing so could lead to the identification of any juveniles involved in criminal proceedings.[210] The Committee acknowledges that balance between the rights of the victim's families to name their relative and the protection of the juvenile offender is a sensitive one.

210 *Children (Criminal Proceedings) Act 1987,* s 11 (4) (d)

Chapter 5 Naming and the public interest

Throughout the Inquiry the Committee heard evidence in relation to whether or not naming children involved in criminal proceedings is in the 'public interest'. In this chapter the terms 'public interest' and 'the interests of justice' are examined. Issues relating to the reporting of matters where a child victim is deceased, regulated by 2004 and 2007 amendments to section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) are particularly examined in the context of the 'public interest'.

'Public interest' and 'the interests of justice' defined

5.1 The terms 'public interest' and 'the interests of justice' both appear within section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) (hereafter the *Children (Criminal Proceedings) Act*), however they are not defined. The following section examines definitions of the terms, provided by Inquiry participants.

'Public interest'

5.2 The term 'public interest' occurs in section 11 of the *Children (Criminal Proceedings) Act* in relation to the court giving consent for the publication of the name of a child under 16 years of age. Both the court and the child must give consent, or, if the child is unable to, the court must be satisfied 'the public interest so requires' that the child's name be published.[211]

5.3 Deputy Chief Magistrate Helen Syme provided the following definition of 'public interest', highlighting the public safety aspect and giving an incident of the poisoning of publicly available products as an example:

> 'Public interest' is the general welfare of the public that warrants recognition and protection and something in which the public as a whole has an interest that justifies government regulation. An example of this is something like the Arnott's biscuit case where it was found to be in the public interest for the public to be told that someone was putting something bad in Arnott's biscuits. That was clearly in the public interest because it is an issue of safety.[212]

5.4 Mr Jack Herman, Executive Secretary of the Australian Press Council, gave a broader definition of 'public interest', equating it with something the community needs to understand:

> What [The Australian Press Council] looks for in trying to determine if something is in the public interest or of the public interest is something in which the community as a whole has a genuine need to understand or know about and in many instances they do relate to matters that concern the public in their day to day activities.[213]

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211 *Children (Criminal Proceedings) Act 1987,* s 11 (4A)

212 Deputy Chief Magistrate Helen Syme, Evidence, 18 February 2008, p 34

213 Mr Jack Herman, Executive Secretary, Australian Press Council, Evidence, 20 February 2008, p 15

5.5 Mr Nicholas Cowdery AM QC, the NSW Director of Public Prosecutions, drew a distinction between what is 'in' the public interest and what is 'of' public interest.[214] Referring to a recent case and the prohibition on the media publishing the names of a deceased child and the names of her parents, who had been charged in relation to her death, Mr Cowdery AM QC suggested that '[n]o doubt details of that kind are of public interest but I dispute that their publication is in the public interest.'[215]

5.6 This distinction was reinforced by Ms Gillian Calvert, the NSW Commissioner for Children and Young People, who noted that something 'of' public interest may be the subject of a prurient interest, whereas something 'in' the public interest pointed to a greater good:

> … 'of public interest' implies that the public has an interest—it may be a prurient interest—whereas 'in the public interest' implies that there is a greater good that overrides the interests of the person involved. So … 'of public interest' I would read as meaning it is of interest but there may not be any betterment to anybody arising from that, whereas 'in the public interest' implies that there is a betterment for the public, if you like, or a good to the public that arises.[216]

5.7 The Shopfront Youth Legal Centre quoted an article on 'naming and shaming' juvenile offenders from the journal of the Northern Territory Law Society, *Balance*, which also drew a distinction between a prurient interest the public may have and what is in the public interest:

> The identity of child offenders is for many citizens interesting. Further satisfying what is often just prurient interest by publishing this information constitutes a failure to serve the public interest. Allowing more 'naming and shaming' of child offenders than is currently allowed under the law might feed public curiosity, but what might interest the public at a particular point in time does not equate to the public interest.[217]

5.8 However, Mr Richard Coleman, Solicitor for Fairfax Media Limited and representative of Media Groups, comprising Australian Broadcasting Commission (ABC), Commercial Radio Australia, Fairfax Media, FreeTV Australia and Special Broadcasting Service (SBS), suggested that the interest of the public in cases involving children was not 'prurient' but reflected a legitimate interest in events:

> I am not sure that I would describe the interest of the reader necessarily as voyeuristic or as prurient … I think it is quite a legitimate interest that the public has in these horrific events. It is a fact of life and very common.[218]

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214 Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, Evidence, 18 February 2008, p 25

215 Mr Cowdery AM QC, Evidence, 18 February 2008, p 25

216 Ms Gillian Calvert, Commissioner, NSW Commission for Children and Young People, Evidence, 18 February 2008, p 67

217 Hunter, M., 'Naming and shaming juvenile offenders in the Northern Territory' (2006), *Balance* (Journal of the Northern Territory Law Society), p 7, cited in Submission 16, Shopfront Youth Legal Centre, p 11

218 Mr Richard Coleman, Solicitor, Fairfax Media Limited, Media Groups, Evidence, 20 February 2008, p 8

'The interests of justice'

5.9 The term 'interests of justice' occurs in section 11 of the *Children (Criminal Proceedings) Act* in relation to the court having the authority to permit the publication of the name of a juvenile convicted of a serious children's indictable offence, whether or not the juvenile consents. The court may only grant such permission if it is satisfied doing so is 'in the interests of justice.'[219]

5.10 Deputy Chief Magistrate Syme provided a definition of 'the interests of justice' that refers to the correctness of the outcome of criminal proceedings in relation to the defendant's guilt or innocence:

> The interests of justice take into account … all that is relevant to an offence and an offender and disregards everything that is irrelevant to an offence and an offender… [T]he interests of justice in a particular criminal case are to ensure that a person who is accused of a crime is convicted if guilty, that is, taking into account all the matters that are relevant, and is acquitted if innocent after he or she has had a fair trial, that is, disregarding all the matters that are irrelevant … The interests of justice can also include a wider element of public interest.[220]

5.11 This definition of 'the interests of justice' focuses on the importance that justice is done, but includes another aspect of the 'interests of justice' – that justice is seen to be done. It is this latter aspect that several Inquiry participants referred to in emphasising the principle of the transparency of justice, or open justice – that justice is carried out in the public eye.

Public interest and the publication of the names of juveniles involved in criminal proceedings

5.12 This section considers evidence presented to the committee about naming juvenile offenders specifically in the context of 'public interest' and the 'interests of justice.' These terms and the concepts they refer to overlap, and were used somewhat interchangeably by Inquiry participants, when the public interest was said to be an interest in transparent justice.

5.13 For example, Media Groups condemned the prohibition in section 11, particularly the 2004 amendment prohibiting the publication of the names of deceased juveniles, as 'an oppressive restriction on the principle of open justice.'[221]

5.14 Mr Coleman argued that including the names of juveniles in a report on criminal proceedings was justified because it provides the public with full information on court matters and the justice system. He argued that the provision of full information served the public interest, particularly where a public organisation is involved:

> I think there is a real interest in the public having information, full information on what happens in open court and in the way that the justice system deals with, for example child homicide. It brings up all different areas of public interest. For example, very often DOCS [the Department of Community Services] is involved and

219 *Children (Criminal Proceedings) Act 1987,* s 11 (4C) (a)

220 Deputy Chief Magistrate Syme, Evidence, 18 February 2008, p 34

221 Submission 13, Media Groups, p 4

> this brings out the role of DOCS and the public is entitled to be informed about that.[222]

5.15 Similarly, Mr Jack Herman, the Executive Secretary of the Australian Press Council, argued that the public interest was injured when such information was not published:

> … the public interest in open justice is a very strong one and … in cases where the law or these amendments have prevented publication of material that the public was entitled to or should have heard, yes it has injured the public interest.[223]

5.16 Mr Herman also pointed out that the media serves the public interest in reporting on accidental deaths by alerting people to issues of public safety, and that such accidents may involve children and the commencement of criminal proceedings, in which case the inclusion of the child's name would be subject to the prohibition:

> Public safety would be [an issue of public interest], and whether that relates to things like in reporting stories that may have involved the death of people in rock fishing accidents or as a result of inadequate care in setting out to sea in boats or as a result of road traffic accidents or people speeding outside schools, all of which may involve the death of a child for which someone may be charged with an offence. We believe the reporting of those matters can be matters that are of public interest.[224]

5.17 The NSW Commission for Children and Young People also recognised there may be situations in which the publication of a juvenile's name is in the interests of justice:

> The Commission recognises that where a child commits a serious offence the interests of justice may outweigh the need to protect the child and therefore it is appropriate that the child's name be publicised.[225]

5.18 However, the NSW Public Defenders Office was less convinced such situations exist:

> … we find it hard to conceive of a situation, even within the most heinous crime where naming could be in the interest of justice …[226]

5.19 The Committee heard evidence that the absence of a juvenile's name from a media report on criminal proceedings was not contrary to the principle of open justice.

5.20 The Chief Magistrate's Office noted that it was not the intention nor the effect of the present legislation to interfere with the media's reporting on court matters:

> … the present legislation is not intended to prevent publication of information about a particular matter … This is an important aspect of the open system of justice which

222 Mr Coleman, Evidence, 20 February 2008, p 3

223 Mr Herman, Evidence, 20 February 2008, p 3

224 Mr Herman, Evidence, 20 February 2008, p 15

225 Submission 14, NSW Commission for Children and Young People, p 3

226 Submission 26, NSW Public Defenders Office, p 5

> we enjoy. The present legislation does not significantly interfere with the ability of the press to report about matters of public interest.[227]

5.21 The Shopfront Youth Legal Centre also stated that the prohibition in section 11 is not contrary to the principle of open justice:

> In our view, the protection currently afforded by section 11 does not compromise the principle of open justice to any significant extent. Proceedings in the Children's Court (or other courts dealing with children's criminal proceedings) are sufficiently transparent for justice to be seen to be done.[228]

5.22 Mr Cowdery AM QC suggested that names were not essential details in news stories covering crimes involving juveniles, and that the prohibition did not unduly interfere with the media's ability to report such stories:

> I do not agree that [the prohibition] denies to the public essential details, essential information relating to particular events. It is possible to describe what has happened, to report on it and to comment on it without identifying the individual. It is only the identification of the individual by name or by other information that the prohibition extends to. So they can still publish their stories. It might involve a bit more work but they can still publish their stories in a way that brings essential information to the attention of the public, which is part of their role, but leaving out the detail of the identification…[229]

5.23 Deputy Chief Magistrate Syme agreed, noting that leaving out the name of a juvenile 'does not detract from the ability of a news organisation to say, "17 year old youth does such and such."'[230]

5.24 This view is echoed in a 2006 Northern Territory Court of Appeal judgement in a matter involving the suppression of a juvenile offender's name:

> [suppressing the name of an offender] does not in any way prevent the media from publishing the details of the offending and every other aspect of the offences.[231]

5.25 The Chief Magistrate's Office noted that media coverage tends to focus on the earlier stages of criminal proceedings when the facts are least known and when the association of a name with this incomplete set of facts would be least appropriate:

> The height of media interest and media coverage attaching to Children's Court proceedings usually occurs when a young person is first arrested for a serious or sensational crime. This is the time when least is known about what has actually happened and the time when the young person's account of events is least likely to be known. Most cases which receive significant publicity are not covered through to

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227 Submission 7, Chief Magistrate's Office, p 1

228 Submission 16, p 11

229 Mr Cowdery AM QC, Evidence, 18 February 2008, p 25

230 Deputy Chief Magistrate Syme, Evidence, 18 February 2008, p 31

231 MCT v McKinney & Ors [2006] NTCA 10, at [32]

> their end and acquittals or sentencing proceedings where significant matters in mitigation are produced are not reported.[232]

5.26 The National Children's and Youth Law Centre also had some reservations about media coverage, which it said often misappropriated the experience of victims, obscuring important issues such as appropriate redress, and sought to polarise rather than inform:

> Too often the experience of victims is misappropriated by the media and rather than raising the important issue of appropriate redress is redirected as 'moral outrage' towards offenders (or suspected offenders) – and sometimes the criminal courts…
>
> …some sections of the media will often resolve an issue with a campaign that seeks to polarise opinion rather than inform. The interests of justice, of victims and of child offenders are not served by this approach.[233]

5.27 Instead, argued the National Children's and Youth Law Centre '[s]ociety can still be informed as to the operation of justice and how a case will be treated by a court. The publication of the name of the child involved in the proceedings does not add to this.' The Centre suggested the current prohibition succeeds in balancing what are sometimes competing interests related to criminal proceedings:

> The prohibition ensures that the competing public interests in responding to crimes committed by children are appropriately balanced – that is, the interests of the child, the rehabilitation of the child, and the interests of society in open justice.[234]

5.28 A 1964 judgement quoted in the Shopfront Youth Legal Centre submission makes a succinct statement about the public interest in young offender rehabilitation:

> In the case of a young offender there can rarely be any conflict between his interest and the public's. The public have no greater interest than that he should become a good citizen.[235]

Reporting on matters involving deceased juvenile victims

5.29 As previously noted in Chapter 2, the 2004 amendment to the *Children (Criminal Proceedings) Act* clarified that deceased children were covered by the prohibition once their deaths became the subject of criminal proceedings.[236] The 2007 amendment provided an exception to that prohibition in instances where permission to publish the deceased victim's name was given by the senior available next of kin.[237]

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232 Submission 7, p 4

233 Submission 24, National Children's and Youth Law Centre, pp 6-7

234 Submission 24, p 3

235 *R v Smith* [1964] Crim L R 70, quoted in Submission 16, p 4

236 *Children (Criminal Proceedings) Act 1987,* s 11 (1A) (b)

237 *Children (Criminal Proceedings) Act 1987,* s 11 (4) (d)

The 2004 amendment

5.30 In regard to the 2004 amendments, Mr Coleman expressed regret that the media had not been consulted when the amendment were made:

> You have to realise that the 2004 amendments were made without any consultation with the media. Of course, the Government is not bound to consult with the media or with anybody, they are perfectly entitled to make these amendments if they want, but these 2004 amendments were a very significant inroad into the media's right to publish what happens in a large number of court cases, that is child homicide cases.[238]

5.31 Mr Coleman also noted that NSW were unique in legislating such a prohibition:

> Nowhere else in Australia is there anything like the 2004 amendments to section 11. There is nothing like the 2004 amendment in England, in New Zealand, and as far as I know in any other common law jurisdiction in the world. None of these jurisdictions ban the identification of a dead child involved in a homicide, in a child homicide case, and that is effectively what the 2004 amendment did.[239]

5.32 This, Mr Coleman pointed out, created an anomalous situation between states whereby:

> … interstate publications, which do not come into New South Wales, can fully report the name of a homicide victim involved in criminal proceedings in New South Wales and that New South Wales newspapers can fully report interstate cases where there is a child homicide victim, just as they can be reported in each of their own states.[240]

5.33 Mr Coleman also described the negative effect this discontinuity has on the reporting of a case. Since the prohibition does not apply until and unless criminal proceedings have commenced, the effect is that the media can report the name of a deceased child up to that point, whereupon subsequent stories must not include the name.

> … suddenly the public is denied effectively information about this case. There could be subsequent stories about the case but they would leave out the names and it is much more likely that there will be very little publicity given to this criminal trial because of the fact there are no names in it.[241]

5.34 Mr Coleman further explained the connection between the deletion of names from a news story and the loss of impact for that story:

> …using names is one of the details of the story that gives it impact. Without the names of those involved, stories tend to have lesser impact and tend to be given less prominence in the newspaper or left out altogether.[242]

5.35 Referring to the issue of public interest, Mr Coleman argued that the importance of the reduced impact and coverage associated with not naming the child victim lay in the fact that it

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238 Mr Coleman, Evidence, 20 February 2008, p 4

239 Mr Coleman, Evidence, 20 February 2008, p 1

240 Mr Coleman, Evidence, 20 February 2008, p 5

241 Mr Coleman, Evidence, 20 February 2008, p 3

242 Mr Coleman, Evidence, 20 February 2008, p 5

reduced the public's opportunity to be fully informed and follow cases through to their conclusion:

> … the public has an interest in being fully informed on cases and being able to follow through a case from the horrifying discovery of the body right through to the arrest of suspects and right through the whole judicial proceeding, so that the public understands how our judicial process copes with these appalling situations.[243]

5.36 In support of his argument Mr Coleman quoted a 2004 United Kingdom House of Lords judgement which dismissed an appeal to prevent the publication of the names of a woman charged with the murder of her juvenile son and of the murdered son, in order to protect the identity of the victim's eight year old brother. The judgement noted the reduced prominence the story would be likely to have if the woman's name was absent and the effect this would have on informed debate about criminal justice:

> [I]t is important to bear in mind that from a newspaper's point of view, a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.[244]

5.37 The reasons given for dismissing the appeal included the fact that the eight year old was not directly involved in the criminal proceedings, in that he was not being called as a witness, and was not directly affected by the proceedings,[245] and that his claim was not stronger by virtue of being a child as opposed to an adult.[246] The judgement also noted that the interests of the child and the interests of freedom of expression needed to be balanced and that it would be wrong to suggest the decision to allow publication of the mother's name would have been reached if the interests of the child had been held paramount.[247]

5.38 It is important to note that section 11 of the *Children (Criminal Proceedings) Act* applies to the juvenile siblings of deceased juvenile victims even when those siblings are not involved in criminal proceedings and that section 11 does recognise the increased vulnerability of children to the adverse effects of publicity compared to adults.

5.39 Mr Jack Herman, Executive Secretary of the Australian Press Council, stated that no public interest was served by applying the prohibition to deceased juvenile victims of crime and suggested that it may be against the interests of some of the victim's family:

> We can see no public interest in continuing to prohibit the identity of a deceased victim of crime, particularly in cases where the surviving family, not necessarily the

243 Mr Coleman, Evidence, 20 February 2008, p 5

244 (2004) re S (FC) (a child) (Appellant) UKHL 47 at 34

245 (2004) re S (FC) (a child) (Appellant) UKHL 47 at 21 and 26

246 (2004) re S (FC) (a child) (Appellant) UKHL 47 at 32

247 (2004) re S (FC) (a child) (Appellant) UKHL 47 at 37

> senior next of kin, would like the publicity or the death to mean something, if I can put it that way.[248]

5.40 Mr Coleman reported that the effect of the 2004 amendment was to induce 'incredulity in news rooms'[249] and was the source of considerable concern:

> We have our own publication here prepared for us by our outside solicitors which refers to dozens and dozens of pieces of legislation which affect what you can and cannot publish. We are used to working with that, but I can say that the heat generated by the 2004 amendment far outweighs the heat generated by all of these other pieces of legislation put together.[250]

5.41 In relation to the policy objective of the 2004 amendment - to protect siblings of deceased victims from the stigma associated with their brother's or sister's murder - Mr Coleman acknowledged that 'undoubtedly there has to be an enormous impact on any sibling of an horrific event like this',[251] however suggested that this was an inevitable consequence of judicial processes occurring in the public eye:

> … this is something that is part of our judicial system and the judicial system we have is not perfect but a very strong part of it is that what happens in the judicial system is done in public and there can be fallout on this and I would think that there could well be fallout for siblings and children.[252]

5.42 Mr Coleman questioned the additional impact on siblings that could be attributed to media coverage given that the juvenile's death is likely to be known of in his or her siblings' immediate circle:

> I would like to see studies to see how much the publicity adds to the impact that a terrible event like this would have on a child. When you think about it, the immediate circle of that child, that is, who the child is going to have contact with, school friends et cetera, they will know about it irrespective of the media, I would suggest, because that sort of horrendous news would get out in their own circle. That will have an impact on a child. Whether or not a reader of the *Sydney Morning Herald* up in Turramurra reads about that, if that has any impact on a child, I doubt it.[253]

5.43 Mr Herman concurred on this point, arguing that information of this kind spreads through channels other than the media:

> In many of these sorts of cases peer knowledge precedes press knowledge anyway. The identity of offenders is known to their peers even when the identity is not made public through the press or through the media, so in some instances you are not going

248 Mr Herman, Evidence, 20 February 2008, p 7

249 Mr Coleman, Evidence, 20 February 2008, p 1

250 Mr Coleman, Evidence, 20 February 2008, p 2

251 Mr Coleman, Evidence, 20 February 2008, p 8

252 Mr Coleman, Evidence, 20 February 2008, p 8

253 Mr Coleman, Evidence, 20 February 2008, p 8

> to be able to prevent these sorts of things happening, nor is it necessarily the media publicity that causes the problem.[254]

5.44 However, Ms Penny Musgrave, the Director of the Criminal Law Review Division, NSW Attorney General's Department, stated that the 2004 amendment was intended to 'minimise the trauma to the family of the deceased' and the impetus for the amendment came from a 2002 matter in which the grandfather of a deceased juvenile swore an affidavit detailing the negative impact the publication of the deceased's name would have upon his family:

> In the affidavit he described the impact the death had had upon the family, their need to move to another community to help the victim's young siblings, who were still receiving counselling and could no longer stand the attention they were receiving, that their surname was relatively unique and was therefore a readily recognisable link to the family and, finally, that the publication of the victim's name would undoubtedly set back the recovery of her siblings.[255]

5.45 Mr Cowdery AM QC echoed this point, stating that the intention and effect of the amendment was to protect the family of deceased victims:

> The impact of that provision was said at the time in the second reading speech, and I think has been in fact, to give parents and family members and those closely connected with the deceased victims and with child siblings of child victims a greater degree of protection from unwanted publicity …[256]

The 2007 amendment

5.46 The 2007 amendment allowed publication of a deceased child's name with permission of the senior available next of kin. Mr Coleman described this amendment as 'cumbersome' in requiring the media to locate the senior available next of kin, noting that 'quite often … there is no senior available next of kin',[257] giving as an example a case where both parents were charged in relation to the death of their child.[258]

5.47 Furthermore, Mr Coleman observed that it led to situations where one media outlet, which had permission from the senior available next of kin, could publish the name of a deceased child, whereas another outlet that did not have permission could not. Mr Coleman argued that the opportunity to publish a deceased child's name 'should be available to all the media, not just to people who luck upon, as happened here, a senior available next of kin who can give the permission.'[259]

5.48 However, Ms Musgrave noted that the 2007 amendment was designed to empower the families of deceased victims:

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254 Mr Herman, Evidence, 20 February 2008, p 12

255 Ms Penny Musgrave, Director, Criminal Law Review Division, New South Wales Attorney General's Department, Evidence, 18 February 2008, p 3

256 Mr Cowdery AM QC, Evidence, 18 February 2008, p 17

257 Mr Coleman, Evidence, 20 February 2008, p 3

258 Mr Coleman, Evidence, 20 February 2008, p 11

259 Mr Coleman, Evidence, 20 February 2008, p 11

> The amendment was designed to give a sense of empowerment to the victim's family, who can make a decision about whether they wish the names of their child to be released to the media.[260]

5.49 Ms Musgrave further noted that the amendment had the endorsement of the Victims Advisory Board, a group established under the *Victims Rights Act 1996* (NSW) to advise the Attorney General on policies, practices and reforms relating to victims compensation and support services, and including representatives of the Victims of Crime Assistance League (VOCAL), the Homicide Victims Support Group and Enough is Enough.[261]

5.50 Mr Cowdery AM QC suggested that while the effect of the 2007 amendment in requiring the media to gain this permission was probably in the public interest, it had the possible side-effect of placing unwanted pressure on the senior available next of kin:

> So, [the 2007 amendment] puts an additional onus on the media if it wants to report the identification of the persons involved. I do not think that is necessarily a bad thing; it may delay publication from time to time and the media may complain about that, but I think requiring more care to be taken before publicity is given to names and other identifying features of children is probably a good thing in the public interest. The down side to that, of course, is that the senior available next of kin may not want to be hounded by the media.[262]

5.51 Ms Jane Sanders, principal solicitor with the Shopfront Youth Legal Centre, also noted that the media's efforts to obtain permission from the senior available next of kin could place stress on the families of deceased victims:

> We see what happens sometimes with the media, they do doorstop interviews with traumatised relatives and if some kind of prohibition on publication of the name of the deceased child can protect families from that sort of trauma, then I think we would support that.[263]

5.52 The identification of deceased persons can have particular significance in Aboriginal communities. Ms Linda Crawford, Policy Officer with the New South Wales Aboriginal Justice Advisory Council, advised the Committee that it can be inappropriate:

> It can be considered in Aboriginal communities inappropriate to name deceased people … individuals who are deceased are not often referred to by photograph or name. It is inappropriate.[264]

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260 Ms Musgrave, Evidence, 18 February 2008, p 4

261 Ms Musgrave, Evidence, 18 February 2008, p 4

262 Mr Cowdery AM QC, Evidence, 18 February 2008, pp 17, 18

263 Ms Jane Sanders, Principal solicitor, Shopfront Youth Legal Centre, Evidence, 20 February 2008, p 39

264 Ms Linda Crawford, Policy Officer, New South Wales Aboriginal Justice Advisory Council, Evidence, 20 February 2008, p 22

Committee comment

5.53 The Committee acknowledges the important role the media plays in bringing issues in the public interest to the attention of the community, and notes the concern expressed during this Inquiry that the absence of names in a news story reduces the story's impact and leads to less prominence in media publications.

5.54 However, the Committee supports the view expressed by Inquiry participants including the NSW Public Defenders Office, Deputy Chief Magistrate Helen Syme and Mr Nicholas Cowdery AM QC, the NSW Director of Public Prosecutions, that names are not essential details when reporting on criminal proceedings involving children and that the public can be adequately informed about a particular case without the inclusion of the names of juveniles involved.

5.55 We believe that the removal of a child's name from the reporting of a case does not affect the issues in that case that are in the public interest. Naming juvenile offenders or victims may be 'of' public interest and may therefore increase the attention that the public gives the story, but it is not 'in' the public interest.

5.56 The Committee further notes that editors of newspapers and producers of television and radio news are in a position to make decisions in regard to placement and exposure if they consider a story to be in the public interest - whether or not the story contains the names of juveniles.

5.57 The Committee supports the principle of the transparency of justice, or open justice, and believes the prohibition in section 11 does not represent a significant departure from this principle, nor does it compromise the intention and effect that the machinations of justice are subject to the check of public scrutiny. The public can be provided sufficient information about criminal proceedings involving juveniles to carry out this scrutinising function, in regard to particular cases and the conduct of juvenile criminal proceedings in general, without the inclusion of the names of the juveniles involved.

5.58 It is important to note that the *Children (Criminal Proceedings) Act* currently allows for the publication of the names of juvenile offenders where a court decides it is in the interests of justice (provided the prejudice to the offender does not outweigh these interests), a decision properly made by the sentencing court at the time of sentencing.

5.59 The Committee notes that the anomaly of interstate publication described in this chapter in effect means that the policy objective of section 11 in protecting juveniles from the stigma of association with a crime has effect only in NSW. If a juvenile were to move to another state where the publication of their name had been allowed, they may be subjected to that very stigma. A similar situation would apply to juveniles involved in criminal proceedings in states other than NSW who were to come to NSW. Problems arising from the interaction of State legislation across borders are common and require the cooperation and collaboration of all State and Territory Attorneys General to address. The Committee therefore recommends that the NSW Attorney General seek the co-operation of counterparts in other states and territories in implementing a consistent prohibition.

Recommendation 1

That the NSW Attorney General seek co-operation from the Attorneys General in other states and territories in implementing a consistent prohibition relating to the publication of names of children involved in criminal proceedings regardless of in which state those criminal proceedings occur.

5.60 The Committee notes that the issue of discontinuity in news stories about the deaths of children arises from the fact the prohibition on publishing the names of deceased children has force only once charges have been laid in relation to the death, which can be after the media has begun reporting the story. The Committee refers to recommendations in Chapter 7 of this report regarding extending the prohibition to cover the period prior to charges being laid and juveniles with a reasonably likelihood of becoming involved in criminal proceedings. Such an extension would remove the cause of this discontinuity in news stories.

5.61 The Committee acknowledges the point made by both the Australian Press Council and Media Groups that the immediate circle of the siblings of deceased juveniles are likely to have knowledge of the event other than through the media. However, the Committee notes that knowledge amongst an immediate circle and knowledge amongst the general public are different issues and likely to have a different impact on siblings. While knowledge is confined to an immediate circle, families retain the option of removing siblings from that immediate circle to an area where the identity of the deceased victim would not be known.

5.62 The Committee acknowledges the additional burden the 2007 amendment places on the media in their reporting on matters where a juvenile is deceased and the potential it creates for unwanted stress to the family of the deceased who must field requests from the media. However, the Committee gives greater weight to the policy objective of the 2007 amendment in giving the family of the deceased a sense of empowerment in the form of the ability to decide if the deceased's name is published or not.

Chapter 6 Implementation and enforcement of section 11

In this chapter the Committee looks at the implementation and enforcement of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW). In particular, the decision - currently the sentencing judge's responsibility - to allow an exception to the general prohibition on naming of children involved in criminal proceedings, the history of prosecutions under section 11, and the process through which breaches are reported and prosecuted are examined.

The court's discretion to name on sentencing

6.1 The naming of a juvenile involved in criminal proceedings can be authorised by the court, the juvenile themselves, if they are over 16 years of age, or the senior available next of kin in cases where the juvenile is deceased.[265] Scenarios involving the senior available next of kin giving permission for a deceased juvenile's name to be published are covered in Chapter 5.

6.2 The authority to allow the publication of the name of a juvenile offender who has been convicted of a serious indictable offence resides solely with the judge hearing the matter in the District or Supreme Court at the time of sentencing.[266]

6.3 Several Inquiry participants expressed support both for the fact that authority to allow the publication of the name of a juvenile offender who has been convicted of a serious indictable offence lies with the court and that it is exercised at the time of sentencing.[267]

6.4 The Legal Aid Commission of NSW stated that it is only the sentencing judge, having before him or her all matters relevant to the sentencing process, who can decide whether or not the particular features of the offence and offender warrant publication of the latter's name:

> A decision that a particular offence is serious enough to justify going the extra step to remove the protection afforded by the section is one best made by the sentencing judge taking into account all the other matters that have to be considered as part of the sentencing process.[268]

6.5 Similarly, the National Children's and Youth Law Centre argued that it is only at the sentencing stage, when all the evidence relating to the rehabilitation prospects of the offender has been presented, that a decision on naming should be made:

> It is only at the sentencing stage, when all the facts have been placed before an impartial court, that competing interests may be properly weighed for the appropriate

265 *Children (Criminal Proceedings) Act 1987* (NSW), s 11 (4)

266 *Children (Criminal Proceedings) Act 1987* (NSW), s 11 (4B)

267 Submission 14, NSW Commission for Children and Young People, p 4; Submission 18, NSW Legal Aid Commission, p 10; Submission 24, National Children's and Youth Law Centre, p 4; Submission 11, Australian Law Reform Commission, p 1

268 Submission 18, p 10

> outcome. The importance of rehabilitation…is too high to jeopardise by allowing the publication of a child's name before proper consideration of all the issues an interests at hand.[269]

6.6 However, the Australian Press Council, whilst agreeing that a degree of judicial discretion was important, cautioned that it should be limited to ensure it accorded with the public interest:

> … a degree of judicial discretion is required. But that discretion should be subject to limits and guidelines to ensure that it is not exercised in a manner inconsistent with public interest and expectations.[270]

6.7 Furthermore, the Australian Press Council argued that it would be appropriate for the victim's views on naming the offender to be taken into account.[271]

6.8 Media Groups, comprising representatives from all major media organisations, called for section 11 to be amended to allow a decision on naming juvenile offenders to be made at any time after conviction:

> …the section should be amended to allow that any application to the court to exercise its discretion should not be restricted to the time of sentencing but should such an application be permitted at any time after conviction.[272]

6.9 This follows an unsuccessful 2006 application to the NSW Court of Criminal Appeal by John Fairfax Publications to obtain permission to publish the names of four brothers convicted of gang rape, whose identities were protected by virtue of the fact that two of the brothers were juveniles. The Court of Criminal Appeal judgement in that matter reaffirmed that sentencing is the appropriate stage at which the judge should consider the issue of naming offenders:

> It is at the time of sentence that the court reviews the objective gravity of the offence, considers the impact on victims, assesses the weight to be given to general deterrence, acquires the full range of evidence about the subjective features of the offender and assesses the prospects of rehabilitation.[273]

Committee comment

6.10 The Committee agrees with several Inquiry participants and with the NSW Court of Criminal Appeal that the sentencing judge is best placed to decide whether or not to allow the publication of the name of the juvenile offender. The sentencing judge, more than any other individual or group, is in possession of all available evidence relating to the objective and subjective features of both offence and offender. The Committee also agrees that the time of sentencing is the appropriate time for a decision to be made about whether or not to allow the publication of the name of a juvenile offender convicted of a serious indictable offence.

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269 Submission 24, p 11

270 Submission 9, Australian Press Council, p 2

271 Submission 9, p 3

272 Submission 13, Media Groups, p 2

273 *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386, at 16, quoted in: Submission 16, Shopfront Youth Legal Centre, p 12

Enforcement of section 11

Mechanism of enforcement

6.11 In evidence to the Committee, Mr Nicholas Cowdery AM QC, the NSW Director of Public Prosecutions, explained that the prohibition on naming falls into the category of a 'general restriction on conduct' and that therefore no particular government agency has responsibility for its enforcement. Mr Cowdery AM QC explained that if the alleged breach were first reported to the Office of the Director of Public Prosecutions, the matter would then be referred to the police for investigation.[274]

6.12 Mr Michael Antrum, General Counsel for the NSW Police Force explained that investigations into alleged breaches of section 11 of the *Children (Criminal Proceedings) Act* would be investigated in the same manner as other criminal investigations, with statements gathered and the facts reviewed.[275]

6.13 Mr Cowdery AM QC explained that following such a police investigation, the police brief of evidence would be submitted to the Office of the Director of Public Prosecutions. If a breach had been established, one of two courses of action followed:

- the party alleged responsible for the breach would be prosecuted, or
- a letter of warning would be sent, putting the party on notice and asking them to report back to the Office of the Director of Public Prosecutions as to the steps they have taken to prevent further breaches.[276]

6.14 The first and more serious course of action – prosecution - was, explained Mr Cowdery AM QC, appropriate where real damage has been caused by the breach. The second course of action - sending a warning letter - was appropriate and had proved effective in circumstances where the harm caused by the breach is minimal:

> We always have the cooperation of the media outlet to whom we have sent [letters]. We only do that in circumstances where there has been minimal, if any, harm caused by the publication. That is where it is more a technical breach of the section rather than an offence causing real damage to people. If it were in the latter category, then we would prosecute.[277]

6.15 Mr Peter Breen, a former Member of the NSW Legislative Council, in his submission suggested that there is no clear understanding of the operation of the law among organisations that are likely to be the subject of a complaint under the provisions of section 11:

> Publishers appear to have no clear or uniform understanding of the operation of laws to protect the publication of the names and images of children.[278]

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274 Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, Evidence, 18 February 2008, pp 18-19

275 Mr Michael Antrum, General Counsel, NSW Police Force, Evidence, 29 February 2008, p 2

276 Mr Cowdery AM QC, Evidence, 18 February 2008, p 19

277 Mr Cowdery AM QC, Evidence, 18 February 2008, p 19

278 Submission 21, Peter Breen, p 1

6.16 However, Mr Cowdery AM QC expressed his support for the current mechanisms for enforcing section 11, highlighting the need for the ongoing education of media outlets:

> I think with better education and periodic reinforcement with all media outlets, because staff come and go into these organisations and they have to be retrained, the present system is probably adequate.[279]

History of enforcement

6.17 From the evidence presented to the Committee, it is clear that prosecutions under section 11 of the *Children (Criminal Proceedings) Act* are rare.

6.18 Mr Cowdery AM QC identified three prosecutions since 1994, two of which resulted in convictions.[280] With regard to the alternative response to a breach outlined above - the sending of a letter of warning to the offending party - Mr Cowdery AM QC estimated approximately two letters per year were sent.[281]

6.19 The Public Interest Advocacy Centre suggested the small number of prosecutions was a result of less than vigorous enforcement and that section 11 does not work well as a deterrent:

> [Section 11] is an ineffective deterrent to the illegal identification of children and young people as it is not vigorously enforced. Criminal proceedings are rarely initiated where an offence pursuant to section 11 of the Act has been committed.[282]

6.20 The NSW Commission for Children and Young People was also concerned that whilst breaches were occurring they were not being prosecuted:

> The Commission is concerned that there have been a number of instances in NSW in recent years where children allegedly involved in criminal acts have been publicly identified, despite the prohibition against publication.[283]

6.21 The Legal Aid Commission of NSW expressed the same concern about the lack of vigour in prosecuting breaches of section 11 and called for more active prosecution:

> Legal Aid NSW has concerns that a lack of vigour in enforcing section 11 has made the protection it is supposed to provide less effective … We support more active prosecution of breaches.[284]

6.22 Ms Theresa O'Sullivan, Solicitor in Charge of the Children's Legal Service at the Legal Aid Commission of NSW, provided the Committee with two examples which she suggested illustrated a failure to enforce section 11 breaches.

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279 Mr Cowdery AM QC, Evidence, 18 February 2008, p 20

280 One of the two convictions named by Mr Cowdery, involving radio broadcaster Alan Jones, was overturned on appeal in the District Court in March 2008: 'Jones conviction quashed, *Daily Telegraph*, Friday March 28, p 20

281 Mr Cowdery AM QC, Evidence, 18 February 2008, p 19

282 Submission 15, Public Interest Advocacy Centre, p 2

283 Submission 14, p 7

284 Submission 18, pp 8-9

6.23 The first example was that of a young person killed in a motor vehicle collision following a police pursuit. On 1 March 2005, Channel 7's *Today Tonight* program named the dead youth, using his full name and showing a photograph of his face. Ms O'Sullivan reported that the Legal Aid Commission of NSW referred the breach of section 11 to the Office of the Director of Public Prosecutions who prosecuted Channel 7. The magistrate dismissed the case ruling that the wrong legal entity had been prosecuted.[285]

6.24 Ms O'Sullivan noted that although the error could have been rectified and the correct party prosecuted, this was not done in this case, and that '[I]t leads one to speculate that perhaps it is not taken as seriously as other offences.'[286]

6.25 The second example Ms O'Sullivan gave involved a young person who had pleaded guilty to the non-fatal stabbing of a media figure. Network 10 broadcast images of the alleged young offender walking with his parents outside of court in which the faces of his father and mother are identifiable. Ms O'Sullivan stated that despite the judge previously warning the media in open court that showing images of the youth's parents would constitute a breach of section 11, 'we are not aware that there has ever been a prosecution in relation to that matter.'[287]

Issues relating to reporting and investigating breaches of section 11

Problems with reporting procedures

6.26 Mr Cowdery AM QC told the Committee that breaches of section 11 are brought to the attention of the Office of the Director of Public Prosecution through a number of channels, including prosecutors, defence representatives, police officers and judicial officers involved in particular matters, or the family of or people associated with a juvenile who had been named.[288]

6.27 Mr Michael Antrum, General Counsel for the NSW Police Force, noted that reports of breaches of section 11 typically came from juveniles themselves, their guardians or other interested persons such as legal advocates or other advocates.[289]

6.28 Some Inquiry participants suggested that the avenues for complaint in regard to breaches of section 11 were not clear or widely known.[290]

6.29 Mr Andrew Haesler SC, Deputy Senior Public Defender with the NSW Public Defenders Office, argued that part of the problem lay in the fact that there was more than one body

285 Ms Theresa O'Sullivan, Solicitor in Charge, Children's Legal Service, Legal Aid Commission of New South Wales, Evidence, 18 February 2008, pp 36-37

286 Ms O'Sullivan, Evidence, 18 February 2008, p 41

287 Ms O'Sullivan, Evidence, 18 February 2008, p 37

288 Mr Cowdery AM QC, Evidence, 18 February 2008, pp 18-19

289 Mr Antrum, Evidence, 29 February 2008, p 2

290 Ms O'Sullivan, Evidence, 18 February 2008, p 36; Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defenders Office of New South Wales, Evidence, 18 February 2008, p 39

whom complainants might reasonably approach, including the NSW Attorney General's Department, the Office of the Director of Public Prosecutions and the NSW Police Force:

> This is part of the problem, who do you write to? Do you write to the Attorney General, who has prosecution responsibilities, or the independent Director of Public Prosecutions or the Police Force, which is charged with enforcing the laws?[291]

6.30 Mr Gary Charlesworth, the Prosecutions Manager of the Office of Prosecutor's Command, NSW Police Force, noted that in his experience it was the Office of the Director of Public Prosecutions that initiated matters involving breaches of section 11.[292]

Conflict of interest for police officers

6.31 Mr Haesler SC identified a possible conflict of interest in situations where a police officer in charge of a matter in which the accused is a juvenile is approached by or on behalf of that juvenile with a complaint that the juvenile's name has been published. In effect, a police officer in that position would have dual responsibilities, on the one hand continuing their role in the prosecution of the juvenile as accused, and on the other hand responding to the complaint regarding an alleged breach of section 11 in which the same juvenile is now the victim.

6.32 Mr Haesler SC gave as an example a case in which the juvenile defendant complained to the police officer in charge of his prosecution that material had been broadcast which potentially identified him. Mr Haesler SC suggested the juvenile may have been discouraged from pursuing the complaint:

> A complaint was made to the police. Putting it neutrally, they had a word to [the juvenile] and then he decided that he really did not want to go-ahead because he was still facing court and he was unsure about his own position. He was in a very vulnerable position at that time. I do not know that the police ever referred it to the Director of Public Prosecutions. It is not uncommon for young people to be discouraged by a very formal approach from the police. There certainly was no encouragement of him …[293]

6.33 Mr Haesler SC further detailed the conflict of interest for police officers in this situation, particularly when the complaint comes from the juvenile accused, to whom the officer may not feel sympathetic, as opposed to a juvenile victim. He also noted the difficulty the juvenile accused may have in approaching the officer in charge of his or her prosecution with such a complaint:

> Often the only person complained to is the officer with some knowledge of the case and they are not always sympathetic; particularly if the person named is not the victim or a relative of the victim. The police would certainly be more sympathetic to the victim or their relatives than to the person they have charged with the offence…I am not casting aspersions on the police involved, but it is a bit hard to expect a young

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291 Mr Haesler, Evidence, 18 February 2008, p 39

292 Mr Gary Charlesworth, Prosecutions Manager, Office of Prosecutor's Command NSW Police Force, Evidence, 29 February 2008, p 6

293 Mr Haesler, Evidence, 18 February 2008, p 37

> person to go to the police officer that charged him and say, "I want you to prosecute someone else for naming me!"[294]

6.34 Mr Antrum suggested that the problem may lie not in an actual conflict of interest, but in the perception of a conflict of interest, particularly in the eyes of the community:

> … the conflict arises not so much that there may be an actual conflict; most police officers are very aware of their duty and requirement to uphold the law … but, of course, conflict is also about perception. The community, particularly when it comes to juvenile welfare, I think may have a perception that there is a conflict there and we would be keen to avoid that.[295]

An independent investigative body within NSW Police

6.35 Some Inquiry participants suggested the solution to the problems outlined above would be the identification of a particular unit within the NSW Police Force charged with handling complaints regarding breaches of section 11.

6.36 Mr Haesler SC argued that there were already precedents for such specialised police units, in the form of those dedicated to investigating homicides or child sexual assaults, and that a similar unit could be charged with investigating and prosecuting alleged beaches of section 11:

> If you are going to have a piece of legislation then there should be someone charged with enforcing it…somebody in the police force, for instance, who is given regulatory or other responsibility for taking on the prosecution. In theory any police officer could - they all have a general duty to enforce the law of the State - but we have various squads or units within the police force charged with specific responsibilities, whether that is homicide or child sexual assault.[296]

6.37 Ms O'Sullivan suggested that in addition to someone within the NSW Police Force, someone within the Office of the Director of Public Prosecutions could also ensure complaints were investigated and prosecuted:

> Arguably what is needed is someone with specific responsibility within the police force and within the Office of the Director of Public Prosecutions to ensure that complaints are investigated and prosecuted competently.[297]

6.38 Mr Antrum supported the proposal that a specialised unit with NSW Police have responsibility for investigating breaches of section 11. One benefit, he suggested, would be in addressing the perception of the conflict of interest for police officers discussed above.[298]

6.39 Mr Antrum, having previously noted that the experience of police officers is generally related to offences of break and enter and interpersonal violence, also suggested that an identified unit within the police force could bring more specific expertise to bear upon investigations

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294 Mr Haesler, Evidence, 18 February 2008, p 38

295 Mr Antrum, Evidence, 29 February 2008, p 4

296 Mr Haesler, Evidence, 18 February 2008, p 38

297 Ms O'Sullivan, Evidence, 18 February 2008, p 36

298 Mr Antrum, Evidence, 29 February 2008, p 5

into alleged breaches of section 11. He suggested that the Office of the General Counsel within the NSW Police Force was a unit that potentially already had the necessary expertise to take on such role:

> I think [the office of the General Counsel] would be a natural home for those kind of investigations. We do have the expertise, and also the external expertise, if we need to get them in, to ensure that a prosecution, and that investigation, is conducted professionally.[299]

6.40 At the same time, Mr Antrum suggested that an efficient way to deal with breaches of section 11 would be to nominate the Office of the Director of Public Prosecutions as the organisation complainants should first contact.[300]

Committee comment

6.41 The Committee has heard evidence from some Inquiry participants to suggest that the provisions of section 11 are not being effectively enforced.

6.42 The Committee believes that the current mechanism for enforcing section 11 can and should be improved, particularly in regard to registering and investigating complaints.

6.43 Regardless of to whom an alleged breach of section 11 is first reported, the matter must be referred to the police for investigation and the development of the brief of evidence. It is only on the basis of the brief of evidence that the Office of the Director of Public Prosecutions can determine whether or not an offence has been committed and should be prosecuted.

6.44 Nominating the Office of the Director of Public Prosecutions as the first point of contact for complainants would create the unnecessary step for that office of then forwarding all such complaints on to the NSW Police Force. In addition, people wishing to report the commission of an offence would more naturally think of notifying the police rather than the Office of the Director of Public Prosecutions. Therefore, the Committee does not support identifying that office as the first point of contact for complainants.

6.45 The Committee acknowledges the possibility that there is a real or perceived conflict of interest for police in situations where a police officer associated with the juvenile accused is made aware of a breach of section 11 in relation to that juvenile.

6.46 Accordingly, the Committee recommends that an existing office within the NSW Police Force, such as the Office of the General Counsel, be identified as the primary recipient of all complaints relating to breaches of section 11. It would be the responsibility of that office to investigate the complaint and prepare a brief of evidence for the Office of the Director of Public Prosecutions.

6.47 The existence of the office's new responsibilities, once identified, should be made known to NSW Police Force staff and to other organisations likely to become aware of breaches of section 11, such as the Legal Aid Commission of NSW, NSW Public Defenders, the Office of

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299 Mr Antrum, Evidence, 29 February 2008, p 9

300 Mr Antrum, Evidence, 29 February 2008, p 8

the Director of Public Prosecutions and organisations that provide legal and non-legal advocacy services for young people.

Recommendation 2

That the NSW Police Force identify an existing office within the NSW Police Force, such as the Office of the General Counsel, to be the primary recipient of all complaints relating to breaches of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW). The identified office should be responsible for investigating the complaint and forwarding a brief of evidence to the Office of the Director of Public Prosecutions.

Recommendation 3

That the NSW Police Force ensure that staff of the NSW Police Force and key organisations likely to become aware of breaches of section 11 are aware of the responsibilities of the office identified as the primary recipient of all complaints relating to breaches of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW).

6.48 Given the relatively low incidence of complaints under section 11, the Committee believes it is unlikely that additional funding would be required by the NSW Police Force to give effect to these recommendations.

Chapter 7 Improving the effectiveness of section 11

In this chapter the Committee considers proposals to improve the operation of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW). These proposals include extending the prohibition in section 11 to cover the period prior to the commencement of criminal proceedings and juveniles other than the accused who are reasonably likely to be involved in criminal proceedings, and applying the section 11 prohibition differentially to different categories of juveniles and offences.

Extension of section 11 to cover the period prior to the commencement of criminal proceedings

7.1 Currently, the section 11 prohibition on naming children involved in criminal proceedings comes into effect at the commencement of criminal proceedings. This is defined as the point at which charges are laid or a court attendance notice issued.[301] Therefore, prior to this point, juveniles who may subsequently become involved in criminal proceedings as defendants, victims or witnesses can be named. The terms of reference for the Inquiry require the Committee to consider an extension of the prohibition in section 11 to cover the period following arrest but prior to charges being laid.

7.2 A large number of Inquiry participants expressed support for the proposal that the prohibition in section 11 be extended to cover the period prior to the commencement of criminal proceedings.[302]

7.3 The Youth Justice Coalition, echoed the view of many Inquiry participants in stating that the lack of a prohibition prior to charging was inconsistent with the principles underlying the justice system, including the presumption of innocence:

> The YJC maintains that the prohibition … should cover young people who have been arrested, but who have not been charged. To do otherwise would be to directly

301 *Children (Criminal Proceedings) Act 1987* (NSW), s 8

302 Professor Duncan Chappell, Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong, Evidence, 20 February 2008, p 61; Mr Brett Collins, Coordinator, Justice Action, Evidence, 20 February 2008, p 29; Ms Mari Wilson, Policy Officer, Federation of Parents and Citizens Associations of New South Wales, Evidence, 18 February 2008, p 75; Ms Gillian Calvert, Commissioner, NSW Commission for Children and Young People, Evidence, 18 February 2008, p 60; Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defenders Office, Evidence, 18 February 2008, p 47; Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, Evidence, 18 February 2008, p 22; Deputy Chief Magistrate Helen Syme, Chief Magistrate's Office, Evidence, 18 February 2008, p 30; Ms Theresa O'Sullivan, Solicitor in Charge, Children's Legal Service, Legal Aid Commission of NSW, Evidence, 18 February 2008, p 43; Submission 12, Youth Justice Coalition, p 17; Submission 16, Shopfront Youth Legal Centre, p 13; Submission 11, Australian Law Reform Commission, p 5; Submission 19, Law Society of NSW, p 2; Ms Linda Crawford, Policy Officer, New South Wales Aboriginal Justice Advisory Council, Evidence, 20 February 2008, p 20; Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre, Evidence, 20 February 2008, p 37

> contradict the principles underlying our system of criminal justice: the rule of law and the presumption of innocence.[303]

7.4 Mr Andrew Haesler SC, Deputy Senior Public Defender with the NSW Public Defenders Office of New South Wales, stated that in his experience the media did not exploit the lack of a prohibition prior to charges being laid and were in general 'pretty responsible about that'.[304] However, he supported an extension of the prohibition to eliminate the possibility that a juvenile's arrest could be reported while the fact that charges were not subsequently laid or the juvenile was acquitted may not be reported:

> … you could have a young person who is, say, arrested in a blaze of publicity, if there was not a prohibition about pre-charging, or investigated in a blaze of publicity and then suddenly there is silence and they are living in a community where they cannot get out to the media the fact that all the charges have been dropped or he has been acquitted.[305]

7.5 Professor Duncan Chappell from the Centre for Transnational Crime Prevention, Faculty of Law, University of Wollongong, agreed that the lack of a prohibition prior to charging was a weakness in the current legislation that allowed the damage resulting from naming to occur during that period:

> I think it is a weakness in the present legislation and by the time that charges are laid the damage is overwhelmingly done. I think it would be preferable to have a wider prohibition than exists at the present time.[306]

7.6 Ms Gillian Calvert, the NSW Commissioner for Children and Young People, noted that extending the prohibition on naming in section 11 to the point of arrest would bring the *Children (Criminal Proceedings) Act 1987* into line with the *Young Offenders Act 1997*:

> The commission advocates extending the naming prohibition to children arrested but not yet charged. This will bring two pieces of legislation - the *Children (Criminal Proceedings) Act* 1987 and the *Young Offenders Act* 1997 - more closely into line, making the prohibition easier to understand and apply.[307]

7.7 Deputy Chief Magistrate Helen Syme also noted that a NSW Bureau of Crime Statistics and Research report on the Youth Conferencing Program, which operates under the *Young Offenders Act 1997*, suggested it was preferable for the program to occur prior to charges being laid. For this reason she supported an extension of the prohibition in section 11 to cover the period prior to charging:

> … I would support any change to the law that stops a child being named prior to charging, especially if it encourages youth conferencing to occur prior to charging.[308]

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303 Submission 12, p 17

304 Mr Haesler, Evidence, 18 February 2008, p 44

305 Mr Haesler, Evidence, 18 February 2008, p 47

306 Professor Chappell, Evidence, 20 February 2008, p 67

307 Ms Calvert, Evidence, 18 February 2008, p 60

308 Deputy Chief Magistrate Syme, Evidence, 18 February 2008, p 31

7.8 Several Inquiry participants argued that the prohibition should come into effect prior even to arrest, so that it covered the period of investigation.[309]

7.9 For example, the Shopfront Youth Legal Centre noted that investigation can precede arrest and argued that juveniles who are considered suspects should be covered by the prohibition:

> [An extension to the prohibition] should not be confined to situations where the young person has actually been arrested. Criminal matters can be investigated, and proceedings commenced, without the necessity for arrest … We support the application of section 11 to children who are suspects …[310]

7.10 Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, agreed, noting that investigations can commence prior to the juvenile being interviewed:

> I would take it back earlier to the point where an investigation is under way. So it does not even have to be the interview of the child. Where the investigation involves a child there should be a prohibition.[311]

7.11 Similarly, the Australian Law Reform Commission argued that the policy objectives relating to section 11 as it currently stands should apply at all points of the criminal process, covering the period of investigation prior to arrest:

> … the same policy reasons underpinning the protections in s 11 apply at all points of the criminal process, commencing with the criminal investigation prior to the official commencement of proceedings …

7.12 Furthermore, the Australian Law Reform Commission suggested, such an extension should apply to deceased juvenile victims:

> The ALRC does … consider that the protection of the privacy of a deceased child involved in a criminal matter – including a child victim – should be extended to cover the stage of criminal investigation prior to the commencement of proceedings.[312]

7.13 The views of Media Groups and the Australian Press Council in relation to the naming of deceased juvenile victims are considered by the Committee in Chapter 5, in the context of an examination of naming and the public interest.

7.14 Mr Michael Antrum, General Counsel for the NSW Police Force, agreed in principle that extending the prohibition prior to charging would be philosophically consistent with the prohibition's current range, but warned that the difficulties of its practical application could doom it to failure. This, he explained, was largely due to the difficulty in establishing at what point a criminal investigation in fact began and the prohibition came into effect:

> There would be a lack of certainty as to when section 11 then crystallises. Investigations sometimes are very lengthy processes. Sometimes there might just be

309 Mr Cowdery AM QC, Evidence, 18 February 2008, p 24; Submission 16, p 13; Submission 11, p 5; Submission 19, p 2; Ms Sanders, Evidence, 20 February 2008, p 45;

310 Submission 16, p 13

311 Mr Cowdery AM QC, Evidence, 18 February 2008, p 24

312 Submission 11, p 5

> initial inquiries by an officer in charge. There may not be an investigation proper at that stage, but it is part of the evidence gathering, it is part of the daily work of police officers … I would fear that were it to be extended, that lack of certainty would doom it to failure.[313]

7.15 Mr Antrum noted that a strength of the current prohibition was the certainty attached to its point of commencement:

> For law to be effective it must be certain. We have a point now under section 11 where we know when the proceedings have been commenced when there is a charge that is when it starts. We are able to say with certainty that there has been a breach or not in accordance with section 11 being invoked. I would be concerned that taking it any further without very careful drafting could create problems in operational policing terms of the sort that we have just discussed and it may fail for lack of certainty.[314]

7.16 Mr Antrum expressed another concern with extending the prohibition to the period prior to charging, and that was the potential for such an extension to inhibit police investigations where they need to use the name of a juvenile suspect to gather information from witnesses:

> My concern would be, to use one practical example, that the definition of 'publishing' or 'broadcasting', but particularly publishing, is quite a wide one. Taken to its extreme, it could prevent an officer from making legitimate inquiries with witnesses using that name. So, we would say that certainly there would need to be a law enforcement exception.[315]

7.17 Mr Antrum emphasised that the difficulty lay in the definition of the words 'publication' and 'broadcasting' and that a strict interpretation, even of the current legislation, would effectively prevent police utilising common internal communication practices in the course of their everyday work:

> It does come down to the definition of 'publication'… To be quite frank, the fact is that, of course, policing would come to a stop if that extreme interpretation of section 11 was applied even today or in the future. We simply could not operate if we could not get on the VKG and say, 'Jimmy Jones is now heading down the M4'. So, practically speaking, I think the intent of the legislation would not be that police were not able to use it internally for legitimate law enforcement purposes.

7.18 In its response to questions taken on notice during evidence, the NSW Police Force reiterated that it was not opposed to an extension, but rather it had concerns that an extension, if not carefully worded, could hinder legitimate police activity. Any extension, the NSW Police Force argued, should not apply to police thus engaged in a law enforcement or investigative function, including the use of internal communication channels:

> The NSWPF respectfully submits that operational imperatives require, for example, that a child's name may be broadcast over the police VKG network, or distributed by other electronic means that may then be transferred into hard copy form by police

313 Mr Michael Antrum, General Counsel, NSW Police Force, Evidence, 29 February 2008, p 4

314 Mr Antrum, Evidence, 29 February 2008, p 11

315 Mr Antrum, Evidence, 29 February 2008, p 5

officers in the normal course of their duties. Such actions should not be considered to be a 'publication' or 'broadcast.'[316]

7.19 The NSW Police Force submitted that the following actions specifically should not constitute a breach of section 11:

- enquiring as to the whereabouts of a child
- enquiring as to the movements, history or features of a child
- broadcasting the name and/or details of a child over any police network, electronic or otherwise, for legitimate law enforcement and investigative purposes
- publishing the name and/or details of a child to other police officers and NSWPF employees for investigation and/or law enforcement purposes
- undertaking any task in the course of a police investigation which might otherwise be a breach of section 11
- undertaking any task ordinarily associated with the Police Prosecutorial function in relation to court proceedings to which the child is a party and which otherwise might be a breach of section 11.[317]

Extending section 11 to cover children reasonably likely to be involved in criminal proceedings

7.20 The terms of reference for this Inquiry also ask the Committee to consider extending the prohibition in section 11 to cover 'children, other than the accused, who are reasonably likely to be involved in proceedings.'[318]

7.21 Arguments relating to children who are 'reasonably likely' to be involved in criminal proceedings overlap almost entirely with those relating to the extension of the prohibition to cover the period prior to charging, since those children 'reasonably likely' to become involved are likely to be amongst those mentioned during the police investigation process.

7.22 An exception to this would be situations in which the media were 'first on the scene' and had contact with a juvenile prior to police having the opportunity. Alternatively, during the course of a criminal proceeding it may arise that juveniles not previously involved become involved, and that again, media may have contact with those juvenile prior to police.

7.23 Mr Cowdery AM QC noted that section 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), prohibited the publication of the name of a child 'reasonably likely'

316 Answers to questions on notice taken during evidence 29 February 2008, Mr Michael Antrum, NSW Police Force, p 1

317 Answers to questions on notice taken during evidence 29 February 2008, Mr Michael Antrum, p 1

318 Correspondence from the Hon John Hatzistergos MLC, Attorney-General and Minister for Justice, to Chair, 5 October 2007

to be or otherwise involved in proceedings before the Children's Court, and supported a similar prohibition in relation to all young offenders.[319]

7.24 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) also uses the phrase in prohibiting the publication of a child's name if the child 'is reasonably likely to appear as a witness' or 'reasonably likely to be mentioned or otherwise involved' in proceedings.[320]

7.25 Mr Haesler SC stated that the phrase 'reasonable likelihood' is not an uncommon phrase in the criminal justice system and is readily understood by lawyers and by Parliament. He gave the example of an offender who having served their full sentence is kept in gaol under the *Crimes (Serious Sex Offences) Act* on the basis of the 'reasonable likelihood' of their reoffending, or a person who hits someone hard enough that there is a 'reasonable prospect' of injury being liable for that injury.[321]

7.26 Furthermore, Mr Haesler SC argued, a test of 'reasonable likelihood' would require media organisations to be diligent in their inquiries and deliberations prior to naming a juvenile:

> You have to place an onus on someone to inquire. Someone has to be forced to ask, particularly in a media organisation, 'Can I publish this child's name? What circumstances are there which stop me publicising that name?', putting aside moral and other issues, privacy or legislative … If the test is a reasonable likelihood that they will be put before the court, the media organisation would have to make more inquiries.[322]

Committee comment

7.27 The arguments in favour of the prohibition in section 11 covering the period prior to charging are essentially the same as those in favour of its application to the period after charging – that is, to reduce the stigma associated with a juvenile's involvement in criminal proceedings and the potential for long term damage. There is impetus added to this argument from the fact that a juvenile who is the subject of an investigation and/or has been arrested may not subsequently be charged with any offence.

7.28 The Committee agrees with several Inquiry participants that the principles and policy objectives underpinning the current prohibition apply equally to the entire period prior to charging, including the period of investigation prior to arrest, and that the prohibition should be extended to cover this period.

7.29 The Committee notes the concern of the NSW Police Force that the legitimate law enforcement and investigative activities of police should not be considered 'publication' or 'broadcasting'. The Committee also notes that the current prohibition in section 11 does not appear to have hindered police activity, despite the NSW Police Force concerns that its strict interpretation could potentially have that effect, nor does the Committee believe that

319 Submission 4, Director of Public Prosecutions, p 3

320 *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 45

321 Mr Haesler, Evidence, 18 February 2008, p 50

322 Mr Haesler, Evidence, 18 February 2008, p 50

extending the prohibition to cover the period prior to charging would hamper the legitimate investigative activities of police.

7.30 Nevertheless, the Committee agrees that the current prohibition, and proposed extension, should be carefully worded so as to ensure that legitimate law enforcement and investigative activities are not hampered.

7.31 The Committee notes that the arguments relating to extending the prohibition to cover children who are 'reasonably likely' to be involved in criminal proceedings overlap with those relating to the extension of the prohibition to cover the period prior to charging. Therefore the Committee supports the extension of the prohibition in section 11 to cover children with a 'reasonable likelihood' of becoming involved in criminal proceedings.

7.32 The Committee further notes the concerns expressed by the NSW Police Force that the difficulty in determining at what point criminal investigations begin may make it difficult to identify the point at which the proposed extension to the prohibition comes into effect. However, the Committee agrees with the opinion expressed by Mr Haesler SC and other Inquiry participants that the concept of 'reasonable likelihood' is readily understood and capable of being applied when attempting to determine if the prohibition of section 11 applies to any given situation.

7.33 The Committee believes that media outlets seeking to satisfy this test of 'reasonable likelihood' would be so satisfied by the fact that a juvenile is the subject of any police activity, regardless of how early in the investigative process that activity is occurring.

Recommendation 4

That the NSW Government amend section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) to extend the prohibition on the naming of juveniles involved in criminal proceedings to cover the period prior to charges being laid and to include juveniles who are reasonably likely to become involved in criminal proceedings. The current wording within the Act that identifies the commencement of the prohibition as being the point at which charges are laid or a court attendance notice is issued should be removed. The new wording of the Act should make it clear that the prohibition commences at the moment a juvenile becomes the subject of, or is reasonably likely to become the subject of, police activity, including a juvenile about whom inquiries are being made, a juvenile from whom information is being sought, or a juvenile who is identified as a person of interest, or a juvenile who is a suspect or who is arrested.

Recommendation 5

That the NSW Government amend section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW), including any extension recommended in this report, in such a way as not to limit legitimate law enforcement and investigative activities conducted by the NSW Police Force, particularly in relation to the use of internal communication channels.

Differential application of section 11 to juveniles in subcategories defined by age or offence type

7.34 The Committee heard evidence relating to whether the prohibition on naming juveniles contained in section 11 should be applied differently to juveniles between the ages of 16 and 18 years, as opposed to under 16 years of age, or to juveniles convicted of or charged with serious children's indictable offences, as opposed to summary offences.

7.35 As outlined in Chapter 2, section 11 currently includes a presumption against naming juveniles involved in criminal proceedings. Exceptions can be made to the general prohibition in section 11 in the following circumstances:

- if a child is under 16 years of age, with consent of the court and the child
- if a child is over 16 years of age, with consent of the child
- if a child is convicted of a serious children's indictable offence, with consent of the court but without the consent of the child.[323]

7.36 The Australian Press Council proposed that for 16-18 year olds, the presumption in relation to naming should be reversed, and that they should be named on conviction, with those parties seeking to prohibit the publication of the juvenile's name bearing the onus of persuading the court that this would be in the public interest. This onus would be discharged, however, if it were established that the juvenile's prospects for rehabilitation were good, or that they did not have the capacity to comprehend their conduct was wrong.[324]

7.37 Similarly, the Victims Advisory Board asked the Committee to consider reversing the presumption for 16-18 year olds so that if dealt with 'according to law' they could be named on conviction, 'unless there are compelling reasons not to do so.'[325]

7.38 The Victims of Crime Assistance League (VOCAL) argued that 16-18 year olds dealt with 'at law' should be automatically named on conviction, with no exceptions. Fourteen - sixteen year olds convicted of a serious indictable offence should be named, but with the court retaining the discretion not to name if there are compelling reasons, with those reasons being published and able to be appealed. In relation to 14-16 year olds, VOCAL further argued that

323 *Children (Criminal Proceedings) Act 1987* (NSW), s 11

324 Submission 9, Australian Press Council, p 3

325 Submission 23, Victims Advisory Board, p 1

for those with more than two previous convictions (even summary convictions), consideration should be given to their being named.[326]

7.39 The Homicide Survivors Support After Murder Group Incorporated agree with the views of VOCAL expressed in the paragraph above.[327]

7.40 Mr Peter Rolfe, the President of Homicide Survivors Support After Murder Group Incorporated, expressed the personal view that the presumption to name should apply only to serious matters in the District and Supreme Courts, but that this may not be the view of all members of the group.[328]

7.41 The Homicide Victims Support Group called for the automatic naming of juveniles regardless of their age where they have been granted bail or convicted of murder. Juveniles over the age of 13 granted bail on or convicted of another crime of violence, as defined by the *Crimes Act 1900* (NSW) should also be automatically named. Where a juvenile over the age of 13 had been granted bail on or convicted of a crime other than a crime of violence, the discretion to name should reside with the court.[329]

7.42 Mr Robert Taylor, the President of the Homicide Victims Support Group, clarified that crimes other than murder were not within the group's brief. However, Mr Taylor reiterated his support for naming juveniles on bail for murder, prior to conviction and prior to trial.[330]

7.43 Many Inquiry participants argued that there should not be any differential application of the prohibition in section 11 to juveniles in different age brackets.[331]

7.44 Mr Cowdery AM QC argued that the community had decided the age of adult responsibility in relation to criminal offending was 18 and that it was 'impracticable to divide up further the age brackets below 18.'[332]

7.45 Doctor Dorothy Bottrell, Senior Research Associate in Child Youth Studies in the Faculty of Education and Social Work, University of Sydney, agreed, emphasising that the distinction between a young person and adult was the important one to maintain:

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326 Submission 6, Victims of Crime Assistance League, pp 2-3

327 Submission 17, Homicide Survivors Support After Murder Group Inc., p 1

328 Mr Peter Rolfe, President, Homicide Survivors Support After Murder Group Incorporated, Evidence, 18 February 2008, p 55

329 Submission 27, Homicide Victims Support Group, p 5

330 Mr Robert Taylor, President, Homicide Victims Support Group, Evidence, 20 February 2008, p 47

331 Mr Cowdery AM QC, Evidence, 18 February 2008, p 22; Deputy Chief Magistrate Syme, Evidence, 18 February 2008, p 35; Mr Haesler, Evidence, 18 February 2008, p 45; Mr Collins, Evidence, 20 February 2008, pp 25-26; Ms O'Sullivan, Evidence, 18 February 2008, p 45; Dr Bottrell, Senior Research Associate in Child Youth Studies, Faculty of Education and Social Work, University of Sydney, Evidence, 20 February 2008, p 61; Professor Chappell, Evidence, 20 February 2008, p 67; Mr Antrum, Evidence, 29 February 2008, p 9

332 Mr Cowdery AM QC, Evidence, 18 February 2008, p 22

> I actually do not think that there should be any distinction made for [the 16-18 year old] age group. I think that it is more important to maintain that young person/adult distinction.[333]

7.46 Ms Theresa O'Sullivan, the Solicitor in Charge of the Children's Legal Service, Legal Aid Commission of NSW, argued that in some ways juveniles closer to the age of 18 were more vulnerable than younger juveniles:

> While there are different vulnerabilities according to age, in some way the older children are more vulnerable in that they are closer to the age where they would be seeking employment.[334]

7.47 Some Inquiry participants also expressed the view that in relation to subcategories by offence type, the current discretion allowed the court in relation to serious children's indictable offences was sufficient and that there should not be an alteration to the presumption against naming in regard to such offences or to include summary offences.[335]

The ability for 16-18 year olds to give permission for the publication of their own name

7.48 The *Children (Criminal Proceedings) Act 1987* currently allows juveniles aged between 16 and 18 years who are involved in criminal proceedings to give permission for the publication of their names, without requiring the consent of the court.

7.49 Ms Jane Sanders, Principal Solicitor with the Shopfront Youth Legal Centre, noted that a child over the age of 16 can give permission directly to the party seeking to publish their name, whereas with a child under the age of 16 the consent of the court is also required:

> … in order to give valid consent to publication, a young person over 16 simply gives consent to whoever is proposing to publish the info. There is no need for the court to be involved [unlike the situation with under 16s which needs an order from the court and the concurrence of the child].[336]

7.50 Mr Brett Collins, Coordinator of Justice Action, expressed the view that the authority to give permission for their own names to be published should not be in the hands of juveniles:

> … it should not be in the hands of the child who is not trusted not to commit an offence, to make that decision for him or herself. That is, the decision should be in the hands of the court…[337]

7.51 Ms Sanders said there was a risk that some juveniles may not be mature enough to make the decision themselves.[338]

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333 Dr Bottrell, Evidence, 20 February 2008, p 61

334 Ms O'Sullivan, Evidence, 18 February 2008, p 45

335 Professor Chappell, Evidence, 20 February 2008, p 67; Ms Calvert, Evidence, 18 February 2008, p 68; Submission 12, p 6; Submission 19, p 2

336 Answers to questions of notice taken during evidence 20 February, Ms Jane Sanders, p 1

337 Mr Brett Collins, Coordinator, Justice Action, Evidence, 20 February 2008, p 34

7.52 Professor Chappell questioned the ability of juveniles to make a rational decision about the publication of their own name and agreed with the proposition that they should seek independent legal advice before exercising their right to give authorisation. He also noted that parental advice should be sought where appropriate.[339]

Committee comment

7.53 The Committee notes that the age at which young people assume adult responsibilities varies according to the context, for example, in relation to driver's licences and voting. In NSW those below the age of 18 are not considered to have reached the age of adult responsibility in relation to criminal offending and are thus afforded differential treatment by the criminal justice system. Therefore, the Committee does not support the differential application of the prohibition in section 11 on the basis on subdivisions by age.

7.54 The Committee acknowledges the arguments that the presumption against naming juveniles convicted of serious children's indictable offences should be reversed. However, the Committee reiterates the views expressed in Chapter 6 of this report, that the sentencing judge is best placed to make a decision in regard to allowing the naming of children involved in criminal proceedings and reaffirms the current intention of section 11 that there be a presumption against naming children involved in criminal proceedings, regardless of offence. In relation to juveniles convicted of serious children's indictable offences, the discretion to allow an exception to the prohibition should remain with the sentencing court at the time of sentencing.

7.55 The Committee agrees with Inquiry participants who suggest that some 16 to 18 years olds may not be mature enough to make a rational decision about giving permission for their own name to be published. The Committee is concerned that the ability for 16 to 18 year olds to give permission directly to the party seeking to publish their name means they could potentially do so in situations where it is not in their best interests and where they have not had the benefit of advice from a parent, other adult or legal representative. The Committee notes particularly that some juveniles seeking notoriety from their association with a crime are able under section 11 to pursue that notoriety by authorising the publication of their own name, again without the benefit of advice from a parent, other adult or legal representative.

7.56 Therefore, the Committee recommends that section 11 be amended to include the requirement that 16-18 year olds giving permission for their own name to be published must do so in the presence of a legal representative of the child's choosing. This would provide a similar protective mechanism for section 11 to that found in section 13 of the *Children (Criminal Proceedings) Act*, which requires that a statement, confession, admission or information made or given by a child to a member of the police force is only admissible in criminal proceedings if it is made or given in the presence of an adult or person responsible for the child or a legal representative of the child's choosing.

338 Ms Jane Sanders, Principal solicitor, Shopfront Youth Legal Centre, Evidence, 20 February 2008, p 39

339 Professor Chappell, Evidence, 20 February 2008, pp 61, 62

Recommendation 6

That the NSW Government amend section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) to include the requirement that 16 to 18 year olds involved in criminal proceedings who wish to give permission for their name to be published can only give that permission in the presence of an Australian legal practitioner of the child's choosing.

Extension of section 11 to cover non-criminal proceedings

7.57 The Committee heard views from Inquiry participants in relation to extending the prohibition in section 11 to non-criminal proceedings such as civil hearings and forensic procedures.

7.58 Mr Peter Breen, former Member of the NSW Legislative Council, proposed the prohibition should be extended to cover children accused of civil wrongs. He gave as an example a civil case where a juvenile accused of being a bully was identified in relation to civil proceedings for compensation to his victim. Mr Breen acknowledged that the prohibition in section 11 related to criminal and not civil proceedings, but suggested it was morally wrong to identify the juvenile who would be considered too young to form criminal intent and who may suffer the consequences of his identification in adulthood:

> … it is morally wrong to publish the photograph of a child who is accused of bullying at a time when he was too young to form the criminal intent to commit a crime. As an adult on the straight and narrow, [he] will be mortified to find his childhood photograph on the front page of the newspaper…[340]

7.59 Mr Haesler SC also supported the protection from naming of children in civil proceedings, giving as an example a hypothetical case in which compensation was being sought for brain injury to a young person. Publishing details such as psychosexual problems, argued Mr Haesler SC, could cause inestimable damage:

> Let us assume that it is someone suing for a horrible brain injury with all sorts of detrimental effects, and psychologists are giving evidence in court about the psychosexual problems of a young child, which are compensable. It would be horrendous if that were reported and it would cause inestimable damage… If the legislation could be drafted in such away as to cover civil proceedings where those sorts of things are revealed, I would not be opposed to it.[341]

7.60 Ms O'Sullivan also pointed out that forensic procedures were not strictly criminal proceedings, and that children who were the subject of forensic procedures could be named when they have only been suspected of a crime but not charged:

> Forensic procedures are not strictly criminal proceedings. There is real danger that the children could be named at a stage before they have been charged. It might be that there has been an application to have a forensic procedure, for instance, for their

340 Submission 21, Mr Peter Breen, p 2

341 Mr Haesler, Evidence, 18 February 2008, p 49

DNA, and for their photograph to be taken. Strictly speaking, they are not protected by section 11.[342]

Committee comment

7.61 The Committee notes that the *Children (Criminal Proceedings) Act* and section 11 within it, to which the terms of reference of this Inquiry refer, relate to criminal proceedings. Nevertheless, some Inquiry participants pointed out that the principles underpinning section 11 of the *Children (Criminal Proceedings) Act* are relevant to civil proceedings.

7.62 The Committee therefore believes that there is merit in investigating the feasibility of applying the protections of section 11 to civil matters.

Recommendation 7

That the NSW Government consider the feasibility of applying the protections of section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) to civil matters.

7.63 In relation to forensic procedures the Committee notes the evidence from Inquiry participants that applications for forensic procedures are made in relation to juveniles who are suspects in a case, and presumably also juveniles whom police wish to rule out as suspects. Therefore, the Committee believes that these juveniles will come within the scope of the prohibition if the extension recommended in Recommendations 4 is implemented, in that they will be both mentioned in the investigative phase and, by virtue of their being the subject of a forensic procedure, will satisfy the test of being 'reasonably likely' to become involved in criminal proceedings.

Relevance to normal court procedures

7.64 The Chief Magistrates Office noted that some of the normal procedures of the Children's Court could, on a strict interpretation of section 11, be said to be breaching the prohibition.

7.65 The submission noted that providing court lists to prosecutors, Legal Aid lawyers and Juvenile Justice representatives, calling a juvenile defendant into court, and providing the name of a defendant to a psychiatrist in the process of requesting a report could all be seen as breaches of section 11.[343]

7.66 Deputy Chief Magistrate Syme also noted that posting a juvenile defendant's name outside a courtroom could constitute 'publication'.[344]

342 Ms O'Sullivan, Evidence, 18 February 2008, p 49

343 Submission 7, Chief Magistrates Office, p 4

344 Deputy Chief Magistrate Syme, Evidence, 18 February 2008, p 33

7.67 The Chief Magistrates Office submission also notes that the current practice of students of law and social work sitting in the Children's Court could 'constitute unlawful publication under the present law'.[345]

Committee comment

7.68 The Committee notes the concerns of the Chief Magistrates Office in relation to normal court procedures in the Children's Court and notes that the intention of section 11 of the *Children (Criminal Proceedings) Act* is not to hinder the normal functioning of courts, whether they be the Children's Court or any other court hearing a matter involving juveniles. The Committee therefore believes that any amendment to section 11 should be worded so as not to limit the legitimate activities of judicial officers and court staff conducted in the normal course of their work.

7.69 The Committee also recognises the importance of students gaining experience of the court system by attending court and supports the continuation of this practice. The Committee notes that any prohibition contained in section 11 will continue to apply to such students once they leave the courtroom.

Recommendation 8

That section 11 of the *Children (Criminal Proceedings) Act 1987*, including any amendments recommended in this report, be worded in such a way as not to limit the legitimate activities of judicial officers and court staff conducted in the normal course of their work, and in particular not hinder their ability to post court lists, call defendants to court and request reports and other information relating to defendants.

345 Submission 7, pp 4-5

Appendix 1 Submissions

No	Author
1	Mr Chris Bonner
2	Mr Peter Bowes
3	Ms Sarah Winter, Human Rights and Equal Opportunity Commission
4	Mr Nicholas Cowdery AM QC, Office of the Director of Public Prosecutions
5	Ms Dianne Giblin, Federation of Parents and Citizen's Associations of NSW
6	Mr Howard William Brown OAM, Victims of Crime Assistance League
7	Mr Graeme Henson, NSW Local Court
8	Ms Lara Daley, Justice Action
9	Professor Ken McKinnon, Australian Press Council
10	Dr Dorothy Bottrell
11	Professor David Weisbrot AM, Australian Law Reform Commission
12	Ms Katrina Wong, Solicitor, Marrickville Legal Centre and Convenor of the Youth Justice Coalition,
13	Ms Gail Hambly, Media Groups
14	Ms Gillian Calvert, NSW Commission for Children and Young People
15	Ms Robin Banks, Public Interest Advocacy Centre
16	Ms Jane Sanders, Shopfront Youth Legal Centre
17	Mr Peter Rolfe, Homicide Survivors Support, After Murder Group Incorporated
18	Mr John Gaudin, Legal Aid Commission of NSW
19	Mr Hugh Macken, Law Society of NSW
20	Mr John Schmidt, NSW Government
21	Mr Peter Breen
22	Ms Alison Peters, Council of Social Services of NSW
23	Mr Bill Grant, Victims Advisory Board
24	Mr James McDougall, National Children's and Youth Law Centre
25	Ms Claudine Lyons, NSW Youth Advisory Council
26	Mr Mark Ierace SC, Public Defenders
27	Mr Robert Taylor, Homicide Victims' Support Group
27a	Mr Robert Taylor, Homicide Victims' Support Group

Appendix 2 Witnesses

Date	Name	Position and Organisation
18 February 2008	Ms Penny Musgrave	Director, Criminal Law Review Division, NSW Attorney General
Parliament House	Ms Jennifer Mason	Director General, NSW Department of Juvenile Justice
	Mr Peter Muir	Deputy Director General (Operations), NSW Department of Juvenile Justice
	Mr Nicholas Cowdery AM QC	NSW Director of Public Prosecutions, Office of the Director of Public Prosecutions
	Ms Helen Syme	Deputy Chief Magistrate, Office of the Chief Magistrate
	Ms Teresa O'Sullivan	Senior Solicitor, Children's Legal Services, NSW Legal Aid Commission
	Mr Andrew Haesler SC	Deputy Senior Public Defender, NSW Public Defender's Office
	Mr Peter Rolfe	President, Homicide Survivors Support After Murder Group Incorporated
	Ms Gillian Calvert	Commissioner, NSW Commission for Children and Young People
	Mr Robert Hall	General Manager, Federation of Parents and Citizen's Association of NSW
	Ms Mari Wilson	Policy Officer, Federation of Parents and Citizen's Association of NSW
20 February 2008	Mr Jack Herman	Executive Secretary, Australian Press Council
Parliament House	Mr Richard Coleman	Solicitor (Fairfax Media Limited), Media Groups
	Ms Jane Summerhayes	Solicitor (News Limited), Media Groups
	Mr Brett Collins	Coordinator, Justice Action
	Ms Katrina Wong	Solicitor, Marrickville Legal Centre and Convenor of the Youth Justice Coalition
	Ms Jane Sanders	Principal Solicitor, Shopfront Youth Legal Centre
	Mr James McDougall	Director, National Children's and Youth law Centre
	Mr Robert Taylor	President, Homicide Victims Support Group
	Mr David Berrett	Member, Homicide Victims Support Group
	Mr Howard Brown OAM	President, Victims of Crime Assistance League
	Mr Ken Marslew AM	Founder, Enough is Enough, Anti-Violence Movement Incorporated
	Dr Dorothy Bottrell	Senior Research Associate in Child and Youth Studies, University of Sydney
	Prof Duncan Chappell	Professor, Centre for Transnational Crime Prevention, University of Wollongong
29 February 2008	Mr Michael Antrum	General Counsel, NSW Police Force
Parliament House	Mr Gary Charlesworth	Office of Prosecutor's Command, NSW Police Force

Appendix 3 Tabled documents

Monday 18 February 2008
Public Hearing, Parliament House

1. Document providing detail on the significance and impact of the 2004 and 2007changes to the *Children (Criminal Proceedings) Act 1987 – tabled by Mr Nicholas Cowdery AM QC, from the Office of the Director of Public Prosecutions.*

Wednesday 20 February 2008
Public Hearing, Parliament House

1. Document relating to the appeal by John Fairfax Publications Pty Ltd to publish the names of the 'K' brothers – *tabled by Mr Richard Coleman of Media Groups.*

2. Written responses to questions provided to Media Groups witnesses prior to the 20 February 2008 hearing – *tabled by Ms Jane Summerhayes of Media Groups.*

Appendix 4 Minutes

Minutes No 4
Tuesday 16 October 2007
Room 1102, Parliament House, Sydney at 1.00pm

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Fazio
Ms Hale

2. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No 3 be confirmed.

3. Correspondence
The Committee noted the following items of correspondence received and sent:

Received
5 October 2007, from AG referring terms of reference for an Inquiry into the publication of names of children involved in criminal prosecutions.

4. Inquiry into the prohibition on the publication of the names of children involved in criminal proceedings

Adoption of terms of reference

Resolved, on the motion of Ms Fazio: That the Committee adopt the terms of reference received from the Attorney General on 5 October 2007 for an Inquiry into the prohibition on the publication of names of children involved in criminal proceedings.

Reporting terms of reference to the House

Resolved, on the motion of Mr Donnelly: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House of the receipt of the terms of reference for an Inquiry into the prohibition on the publication of names of children involved in criminal prosecutions.

Adoption of time line

Resolved, on the motion of Mr Clarke: That the Committee adopt the time line for the Inquiry prepared by the Secretariat, subject to any changes necessary and determined by the Chair in consultation with the Committee.

Advertising Inquiry and call for submissions

Resolved, on the motion of Mr Ajaka: That the Committee advertise, at the earliest opportunity, the terms of reference and call for submissions, with a closing date of seven weeks, in The Sydney Morning Herald and The Daily Telegraph.

Press release

Resolved, on the motion of Mr Ajaka: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW to coincide with the advertisements.

Invitations to stakeholders to make a submission

Resolved, on the motion of Ms Hale: That the Committee write to stakeholders identified by the Secretariat, as well as any additional stakeholders identified by Committee members and notified to the Secretariat by c.o.b Friday 19 October 2007, informing them of the Inquiry and inviting them to make a submission.

5. Adjournment

The Committee adjourned at 1.15pm until Monday 5 November 2007, 2.00-4.00pm, Room 1102.

Rachel Callinan
Clerk to the Committee

Minutes No. 6
Monday 17 December 2007
Room 1102, Parliament House, Sydney at 10am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Fazio
Ms Hale

2. Correspondence
The Committee noted that the following correspondence had been received and sent:

Received
26 October 2007, Letter from Jim Jolliffe, Deputy Director, Commonwealth Director of Public Prosecutions, advising the Committee that the Commonwealth DPP will not be making a submission to the Inquiry.
30 October 2007, letter from Tonia Wood, Associate to the Chief Judge of the District Court of NSW, advising that the Chief Judge has no comment in regards to the Inquiry.
27 November 2007, Letter from Angela Filippello, Principal Registrar, Family Court of Australia, advising that the Family Court will not be making a submission to the Inquiry.

Sent
End of October 2007, 87 Letters from the chair to various stakeholders inviting them to make a submission to the Inquiry.

3. Publication of Submissions
Resolved, on the motion of Mr Clarke: That the Committee publish submissions 1 to 16.

4. Conduct of the Inquiry
Resolved, on the motion of Mr Donnelly: That the Committee reserve Monday 18 and Wednesday 20 February 2008 for hearings.

The Secretariat undertook to liaise with members concerning their availability for a further half-day hearing later in February, if needed.

Resolved, on the motion of Mr Ajaka: That the Committee leave the selection of witnesses in the hands of the Chair, taking into account the following indicative list circulated by the Secretariat:

- Attorney General's Department
- Department of Juvenile Justice
- Legal Aid Commission
- NSW Public Defenders Office
- Chief Magistrate
- NSW Bar Association
- Victims of Crime Advisory Board
- NSW Council for Civil Liberties
- Aboriginal Justice Advisory Council
- Commission for Children and Young People
- NSW Youth Advisory Council
- Judicial Commission of NSW
- Law Council of Australia
- Office of the Director of Public Prosecutions
- Law Society of NSW
- Youth Action and Policy Association

- Institute of Criminology, Faculty of Law, University of Sydney
- Professor Ted Wright, Director, Justice Policy Research Centre, University of Newcastle

Resolved, on the motion of Mr Donnelly: That Committee members are to contact the Secretariat with any suggested witnesses, in addition to the above list, by COB Friday, 21 December 2007.

5. Adjournment

The Committee adjourned at 10:15am until Monday 18 February 2008.

Jonathan Clark
Clerk to the Committee

Minutes No 7
Monday 18 February 2008
Jubilee Room, Parliament House, Sydney at 9.15am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale

2. Apologies
Ms Fazio

3. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No 6 be confirmed.

4. Correspondence
The Committee noted the following items of correspondence received and sent:

Received
7 November 2007, letter from Mr Franz Krzyminski to Chair and others, complaining of the behaviour of his neighbour.
15 November 2007, letter from Mr David Bowen, General Manager, Motor Accidents Authority (MAA), to Chair providing further information relating to the 8th Review of the MAA and Motor Accidents Council.
4 and 13 December 2007, emails from Mr Darryl Rae to Chair, regarding the Police Integrity Commission and the NSW Police.
12 December 2007, letter from Mr Peter Hennessy, Executive Director, NSW Law Reform Commission, to Chair, referring the Committee to the Law Reform Commission's Report No. 104 on Young Offenders.
14 December 2007, letter from Mr Reynato Reodica, Youth Action Policy Association (YAPA), declining the request to provide a submission in relation to the prohibition on naming of children involved in criminal proceedings and endorsing the submission of the Youth Justice Coalition.
19 December 2007, letter from Mr Phil Thomas, Assistant Auditor-General, Performance Audit, Audit Office of New South Wales, to Director, advising of an audit into the management of NSW Police officers injured at work, and requesting information.
4 February 2008, fax from Ms Jenni Daniel-Yee, Department of Justice for the Northern Territory, to Chair providing information relating to prohibition on naming of children involved in criminal proceedings in the Northern Territory.
6 February 2008, email from Ms Lara Giddings MP, Acting Attorney General, Tasmania, to the Chair, providing information relating to prohibition on naming of children involved in criminal proceedings in Tasmania.
6 February 2008, letter from Hon Kerry Shine MP, Attorney General, Queensland, providing information relating to prohibition on naming of children involved in criminal proceedings in Queensland.
6 February 2008, letter from Hon Jim McGinty MLA, Attorney General, Western Australia, providing information relating to prohibition on naming of children involved in criminal proceedings in Western Australia.

Sent
15 January 2008, letter from Chair to Attorneys General of Australian States and Territories requesting information regarding the prohibition on naming of children involved in criminal proceedings

Resolved, on the motion of Mr Donnelly: That the Chair write to Mr David Bowen of the MAA thanking him for the information provided.

Resolved, on the motion of Mr Donnelly: That the Chair provide a copy of the letter of 15 November 2007 from Mr David Bowen of the MAA to the NSW Bar Association for its information.

5. Sound and television broadcasting of public proceedings
Resolved on the motion of Mr Donnelly: That the Committee authorises the sound and television broadcasting of its public proceedings, in accordance with the resolution of the Legislative Council of 18 October 2007.

6. Publication of submissions

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 223(1), the Committee authorise the publication of submissions no 17-26 received as part of the Inquiry into the prohibition on the publication of names of children involved in criminal proceedings.

7. Return of questions taken on notice

Resolved on the motion of Mr Donnelly: That questions taken on notice during the public hearings be returned to the secretariat within 21 calendar days.

8. Public hearing

Witnesses, the public and media were admitted

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Penny Musgrave, Director, Criminal Law Review Division, NSW Attorney General's Department
- Mr Peter Muir, Deputy Director General (Operations), NSW Department of Juvenile Justice
- Ms Megan Wilson, Executive Director, Conduct, Policy and Government Relations, NSW Department of Juvenile Justice

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, Office of the Director of Public Prosecutions

Mr Cowdery AM QC tabled a document providing detail on the significance and impact of the 2004 and 2007 changes to the *Children (Criminal Proceedings) Act 1987*.

The evidence concluded and the witness withdrew.

The following witnesses was sworn and examined:

- Ms Helen Syme, Deputy Chief Magistrate

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Teresa O'Sullivan, Senior Solicitor, Children's Legal Services, NSW Legal Aid Commission
- Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defender's Office

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Peter Rolfe, President, Homicide Survivor's Support After Murder Group Inc.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Gillian Calvert, NSW Commissioner for Children and Young People

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Bob Hall, General Manager, Federation of Parents and Citizens' Association of NSW
- Ms Mari Wilson, Policy Officer, Federation of Parents and Citizens' Association of NSW

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.00pm. The public and the media withdrew.

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 224, the Committee authorises the Clerk to the Committee to publish the document tendered at today's hearing by Mr Nicolas Cowdery AM QC, NSW Director of Public Prosecutions.

9. Adjournment

The Committee adjourned at 4.00 pm until Wednesday 20 February 2008 in Room 814/815 at 9:25 am.

Simon Johnston
Clerk to the Committee

Minutes No 8
Wednesday 20 February 2008
Room 814/815, Parliament House, Sydney at 9.25am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No 7 be confirmed.

3. Future Public Hearing
Resolved, on the motion of Mr Ajaka: That a further meeting be held on 29 February, with a public hearing from 2.30-3.15pm involving NSW Police, followed by a deliberative meeting to discuss the possible direction of the Committee's report.

4. Publication of submissions
Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 223(1), the Committee authorise the publication of Submission 27, kept partly confidential by the removal of the name of the brother of a juvenile offender.

5. Public hearing

Witnesses, the public and media were admitted

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:
- Mr Jack Herman, Executive Secretary, Australian Press Council
- Mr Richard Coleman, Solicitor (Fairfax Media Ltd), Media Groups
- Ms Jane Summerhayes, Solicitor (News Ltd), Media Groups

Mr Richard Coleman tabled a document relating to the appeal by John Fairfax Publications Pty Ltd to publish the names of the 'K' brothers.

Ms Jane Summerhayes tabled written responses to questions provided to Media Groups witnesses prior to the 20 February 2008 hearing.

The evidence concluded and the witnesses withdrew.

The following witnesses was sworn and examined:
- Ms Linda Crawford, Policy Officer, Aboriginal Justice Advisory Council

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:
- Mr Brett Collins, Coordinator, Justice Action

Mr Collins tabled documents relating to the activities of Justice Action (publicly available).

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:
- Ms Katrina Wong, Solicitor at Marrickville Legal Centre and Convenor of the Youth Justice Coalition

- Ms Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre
- Mr James McDougall, Director, National Children's and Youth Law Centre

Ms Sanders tabled copies of two articles relating to juvenile crime 'The transition from juvenile to adult criminal careers' *Crime and Justice Bulletin* (Number 86, May 2005); and 'Make me a criminal: Preventing youth crime', (Institute for Public Policy Research, February 2008) (publicly available).

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:
- Mr Robert Taylor, President, Homicide Victims Support Group
- Mr David Berret, Member, Homicide Victims Support Group

Mr Taylor tabled a supplementary submission and a number of brochures outlining the activities of the Homicide Victims Support Group (publicly available).

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:
- Mr Howard Brown OAM, President, Victims of Crime Assistance League
- Mr Ken Marslew AM, Founder, Enough is Enough Anti-violence Movement Inc.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:
- Dr Dorothy Bottrell, Senior Research Associate in Child and Youth Studies, University of Sydney
- Prof Duncan Chappell, Institute of Criminology, University of Sydney

Professor Duncan tabled copies of two articles 'Abandoning Identity Protection for Juvenile Offenders' published in *Current Issues in Criminal Justice* (Vol 18, No. 3, March 2007) and Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders in *British Journal of Criminology* (Vol 34, No. 2, Spring 1994) (publicly available).

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.30pm.

The public and the media withdrew.

Resolved, on the motion of Mr John Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 224, the Committee authorises the Clerk to the Committee to publish the documents tendered at today's hearing:
- Documents relating to the appeal by John Fairfax Publications Pty Ltd to publish the names of the 'K' brothers, tabled by Mr Richard Coleman, solicitor for Fairfax Media Ltd.
- Written responses to questions provided to Media Groups witnesses prior to the 20 February 2008 hearing, tabled by Ms Jane Summerhayes, solicitor for News Ltd., with details that may identify a juvenile victim of crime removed.

Resolved, on the motion of Mr John Ajaka: That the Chair write to the Attorney General's Department requesting a response to questions arising from evidence received during public hearings on 18 and 20 February 2008.

Resolved, on the motion of Ms Sylvia Hale: That Submission 13 be amended to remove details that may identify a juvenile victim of crime.

Resolved, on the motion of Mr Greg Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and standing order 223(1), the Committee authorise the publication of Supplementary Submission 27a.

6. Adjournment

The Committee adjourned at 4.35 pm until Friday 29 February 2008 in the Jubilee Room at 2.25 pm.

Simon Johnston
Clerk to the Committee

Minutes No 9
Friday 29 February 2008
Jubilee Room, Parliament House, Sydney at 2:30pm

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale

2. Apologies
Ms Fazio

3. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No 8 be confirmed.

4. Publication of correspondence
The Committee noted the following items of correspondence received and sent:

Received
- 22 February 2008, letter from Hon Michael Atkinson MP, Attorney General, South Australia, providing information relating to prohibition on naming of children involved in criminal proceedings in South Australia.
- 26 February 2008, letter from Linda Crawford, NSW Aboriginal Justice Advisory Council, providing a report cited in her evidence to the Committee at its 20 February 2008 hearing into the prohibition on naming of children involved in criminal proceedings.
- 28 February 2008, facsimile from Enough is Enough Anti Violence Movement containing brochure, press release and evidence transcript detailing activities of the organisation, in relation to Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 28 February 2008, letter from Deputy Chief Magistrate Helen Syme providing answers to questions on notice arising from her February 18 evidence to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 29 February 2008, letter from Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions, providing answers to questions on notice arising from his February 18 evidence to the Inquiry into the prohibition on naming of children involved in criminal proceedings.

Sent
- 21 February 2008, letter from Chair to Mr Laurie Glanfield, Director General of NSW Attorney General's Department, from the Chair, the Hon Christine Robertson MLC, requesting answers to questions arising from the hearings into the prohibition on naming of children involved in criminal proceedings on 18 and 20 February 2008.
- 22 February 2008, letter from Chair to Ms Anna Katzmann SC, President of the NSW Bar Association, forwarding MAA letter of 15 November 2007 regarding a case study.
- 22 February 2008, letter to the Hon David Campbell MP, Minister of Police, advising him of the appearance of the NSW Police Force at the 29 February 2008 hearings into the prohibition on naming of children involved in criminal proceedings.

Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act* 1975 and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice provided by the following organisation and witness:
- Deputy Chief Magistrate Helen Syme, the Chief Magistrate's Office
- Nicholas Cowdery AM QC, the NSW Director of Public Prosecutions.

5. Public hearing
Witnesses, the public and media were admitted

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Michael Antrum, General Counsel, NSW Police Force
- Mr Gary Charlesworth, Office of Prosecutor's Command, NSW Police Force

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 3.20pm.

The public and the media withdrew.

6. Discussion of report themes

The Committee discussed themes for the Naming Inquiry report.

7. Adjournment

The Committee adjourned at 3:50 pm *sine die.*

Simon Johnston
Clerk to the Committee

Minutes No 10
Wednesday 5 March 2008
Members' Lounge, Parliament House, Sydney at 2:15 pm

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Publication of correspondence
The Committee noted the following item of correspondence received:

Received
20 February 2008, email from Mr Jack Herman, Executive Secretary, Australian Press Council, providing a response to question on notice arising from February 20 evidence to the Inquiry into the prohibition on the publication of the names of children involved in criminal proceedings.

Resolved, on the motion of Mr Donnelly: That according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act* 1975 and Standing Order 223(1*)*, the Committee authorise the publication of answers to questions on notice provided by Mr Jack Herman, Executive Secretary, Australian Press Council.

3. …

4. Inquiry into the prohibition on naming of children involved in criminal proceedings
The Committee discussed the proposed date for a deliberative meeting to consider the Inquiry report.

5. Adjournment
The Committee adjourned at 2.28 pm until 10.00 am, Friday 11 April 2008.

Merrin Thompson
Clerk to the Committee

Draft Minutes No 11

Friday 11 April 2008
Room 1102, Parliament House, Sydney at 10:05am

1. Members present
Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Donnelly
Mr Ajaka
Ms Hale
Ms Fazio

2. Minutes
Resolved, on the motion of Mr Donnelly: That draft Minutes No 9 and 10 be confirmed.

3. Publication of correspondence
The Committee noted the following items of correspondence received:

Received

- 13 March 2008, letter to Committee Secretariat from Ms Dianne Giblin, President, Federation of Parents and Citizens' Associations of New South Wales, providing answers to questions on notice arising from the 18 February evidence of representatives of the Federation to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 13 March 2008, letter to Committee Secretariat from Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defenders, providing answers to questions on notice arising from his February 18 evidence to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 13 March 2008, letter to Committee Secretariat from Mr Richard Coleman, Legal Unit, Fairfax Media, providing answers to questions on notice arising from the 18 February evidence of representatives of Media Groups to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 19 March 2008, letter to Committee Secretariat from Mr Michael Antrum, General Counsel, NSW Police Force, providing answers to questions on notice arising from the 29 February evidence of representatives of the NSW Police Force to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 19 March 2008, letter to Committee Secretariat from Ms Penny Musgrave, Director, Criminal Law Review Division, Attorney General's Department, providing answers to questions on notice arising from the 18 February evidence of representatives of the Attorney General's Department to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 26 March 2008, letter to Committee Secretariat from Ms Gillian Calvert, NSW Commissioner for Children and Young People, providing answers to questions on notice arising from her 18 February evidence to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 27 March 2008, letter to Chair from Mr Peter Rolfe, Homicide Survivors Support After Murder Group Inc. providing answers to questions on notice arising from his 20 February evidence to the Inquiry into the prohibition on naming of children involved in criminal proceedings.
- 31 March 2008, letter to Chair from the Hon Simon Corbell MLA, ACT Attorney-General and Minister for Police and Emergency Services providing information relating to the prohibition on naming of children involved in criminal proceedings in the Australian Capital Territory.

Resolved on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice provided by the following organisations and witnesses:

- Ms Dianne Giblin, President, Federation of Parents and Citizens' Associations of New South Wales
- Mr Andrew Haesler SC, Deputy Senior Public Defender, NSW Public Defenders
- Mr Richard Coleman, Fairfax Media (Media Groups)
- Mr Michael Antrum, General Counsel, NSW Police Force
- Ms Gillian Calvert, NSWCommissioner for Children and Young People
- Ms Penny Musgrave, Director, Criminal Law Review Division, Attorney General's Department.

Resolved on the motion of Ms Fazio: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice provided by the following organisation, with the names of some parties replaced with initials:

- Mr Peter Rolfe, Homicide Survivors Support Group After Murder Group Inc.

4. Inquiry into the prohibition on the publication of names of children involved in criminal proceedings

4.1 Consideration of the Chair's Draft Report

The Chair submitted her draft report titled 'The prohibition on the publication of names of children involved in criminal proceedings', Report 35, which, having been circulated was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Ajaka: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Donnelly: That paragraphs 2.27-2.33 titled 'Amendments to the *Children (Criminal Proceedings) Act 1987* (NSW)' be moved to after paragraph 2.10.

Resolved, on the motion of Ms Fazio: That paragraph 2.78 be amended by replacing the following complete paragraph and quote:

> The significance of ASBOs to the current Inquiry is that they allow a person to be 'named and shamed':
>
> > People subject to ASBOs can now also be 'named and shamed' with their photographs and details published in local papers and on leaflets distributed in the area where they live. Even children can be 'named and shamed' in this way.

with the following words:

> The significance of ASBOs to the current Inquiry is that they allow the identity of the subject to be publicised by utilising local press coverage or targeted leafleting. The UK Home Office states that the purpose of publicising the subject's identity and the details of their ASBO is to allow local people to report breaches, to deter, by virtue of this increased community surveillance, both the subject of the ASBO and any would-be perpetrators, and to reassure the local community that action is being taken to protect their safety.

Resolved, on the motion of Ms Hale: That Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Ms Hale: That paragraph 3.47 be amended by replacing the word 'offence' with the word 'incident' immediately after the words 'surrounding in'.

Resolved, on the motion of Mr Donnelly: That Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Ms Fazio: That Chapter 4 be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Ajaka: That recommendation 1 be adopted.

Resolved, on the motion of Mr Ajaka: That Chapter 5 be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Ajaka: That recommendation 2 be adopted.

Resolved, on the motion of Mr Donnelly: That recommendation 3 be adopted.

Resolved, on the motion of Ms Hale: That Chapter 6 be adopted.

Chapter 7 read.

Resolved, on the motion of Ms Fazio: That recommendation 4 be adopted.

Resolved, on the motion of Mr Donnelly: That recommendation 5 be adopted.

Resolved on the motion of Ms Hale: That paragraph 7.56 be amended by deleting the words 'an adult, other than a member of the police force, who is present with the consent of the child, or' immediately after the words 'in the presence of' in the first sentence, and in the second sentence replacing the words 'the same' with the words 'a similar' immediately after the words 'this would provide'.

Resolved, on the motion of Ms Hale: That recommendation 6 be amended by deleting the words 'an adult, other than a member of the police force, who is present with consent of the child, or' immediately after the words 'in the presence of'.

Resolved, on the motion of Ms Hale: That recommendation 6, as amended, be adopted.

Resolved, on the motion of Ms Hale: That recommendation 7 be adopted.

Resolved, on the motion of Mr Clarke: That recommendation 8 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 7, as amended, be adopted.

Executive summary read.

Resolved on the motion of Ms Hale: That the second last paragraph of the executive summary be amended by replacing the words 'an adult or legal representative' with the words 'a legal representative of the child's choosing' immediately after the words 'in the presence of' to reflect the amendments make to paragraph 7.56 of the report.

Resolved, on the motion of Ms Fazio: That the executive summary, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That the report, as amended, be the report of the Committee and be signed by the Chair and presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings, answers to questions on notice and correspondence relating to the inquiry, in accordance with Standing Orders 227(3), 230 and 231.

Resolved, on the motion of Ms Fazio: That the Committee Secretariat be permitted to correct any typographical and grammatical errors in the report prior to tabling.

Resolved on the motion of Ms Fazio: That a media conference arranged by the Committee Secretariat in the week beginning 28 April 2008 at a time and date to be decided after consultation with Committee members, with a media release prepared for that date.

5. Adjournment

The Committee adjourned at 10:50am *sine die*.

Simon Johnston
Clerk to the Committee