Mr Jonathon Clark
Principal Council Officer
Legislative Council
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Clark,

I refer to questions taken on notice for the *Inquiry into the prohibition on the publication of names of children involved in criminal proceedings*, and respond as follows:

1. Unanswered Questions on Notice for AGD/DJJ

Please find attached **(Tab A)** the Attorney General Department's responses to the Questions on Notice that were not asked by Committee members at the February 18 hearing. The remainder of the responses will be provided by the Department of Juvenile Justice as these come within that Department's portfolio responsibilities.

2. Additional questions arising during and from the February 18 hearing

Additional Information regarding potential breaches of international instruments to which Australia is a party (pages 2-5 of draft transcript)

Treaties do not have a direct effect on domestic Australian law. A number of judicial decisions, most notably *Minister for Immigration and Ethnic Affairs v Teoh (1995)*[1] have found that a treaty must be implemented by legislation before it becomes legally binding.

Article 16 of the Convention on the Rights of the Child (CROC) stipulates that no child shall be subjected to arbitrary or unlawful interference with his or her privacy. The Committee on the Rights of the Child also completed a document entitled the Standard Minimum Rules for the Administration of Juvenile Justice (also known as the Beijing Rules). Rule 8 of the Beijing Rules states that no

[1] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7 (per Mason CJ and Deane J); *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 at 193 (Gibbs CJ); *Victoria v The Commonwealth* (1996) 138 ALR 129.

information that may lead to the identification of a juvenile offender should be published.

The United Nations has produced Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) which list as a fundamental principle upon which most experts agree that the labelling of children as “delinquent” often increases the likelihood of ongoing delinquency.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that no one should be subject to arbitrary or unlawful interference with his or her privacy.

As requested by the Committee, a list of the members of the United Nations Human Rights Committee is attached at **Tab B.**

Additional information regarding other jurisdictions internationally where the naming of children involved in criminal proceedings is used and how effective that approach has been (page 11 of draft transcript)

The additional information requested by the Committee is provided at **Tab A.**

Definition of a Juvenile (pages 11-12 of draft transcript)

The additional information requested by the Committee is provided at **Tab C.**

The submission of Media Groups to this inquiry (Submission 13) states that the name of a child murder victim can be published interstate even after a person has been charged with the offence, because the provisions of section 11 of the Children (Criminal Proceedings) Act 1987 do not apply to other jurisdictions. What measures are being taken by the Attorney General’s Department to address this situation? Is there a national attempt to address this issue? (letter from Committee dated 21 February 2008)

In all Australian States and Territories there are some form of restrictions placed on the publication of the identity of children involved in criminal court proceedings. The restrictions on identifying children are consonant with Australia's international obligations to protect the privacy of children in the criminal justice system.

The protection of the name of the child is based on a policy adopted here in NSW and in every Australian jurisdiction, that due to their age, children who come into contact with the criminal justice system require special protections. This general principle of course can be displaced by the subjective circumstances of the case, and hence the ability for courts to make orders to allow the publishing of the names where it is in the public's interest.

It may be that a matter will be subject to a non publication order in NSW and yet be able to be reported elsewhere and vice versa. However the only way to address this issue would be to have uniform non-publication laws across the nation to ensure that legislation prevented inter-jurisdictional publication as well.

When considering issues such as these, there will always need to be a delicate balancing exercise between the rights of the families who are left behind and the rights of the media to accurately report on matters of public interest. NSW's obligation is to protect children in the criminal justice system and compliance to a high standard with international obligations. It would be highly desirable if all other jurisdictions adopted a model in line with NSW however there does not appear to any current plans for other jurisdictions to do so.

I trust that this is of assistance. Please do not hesitate to contact me should you require anything further.

Yours faithfully

Penny Musgrave
Director, Criminal Law Review Division

For Director General

TAB A

UNANSWERED QUESTIONS ON NOTICE FOR AGD

Should there be a distinction between the way juveniles under 16 years and juveniles 16 to 18 years are treated in terms of being named?

The law recognises that children are an especially vulnerable class of people. There is a presumption at law that any child under the age of 18 who commits a crime will be dealt with in the Children's Court where a whole scheme has been devoted to emphasising rehabilitation over punishment and general deterrence. There are exceptions to this, for instance where the crime is a serious children's indictable offence such as murder, however by and large, children are treated quite differently to adults in the criminal justice system.

The Young Offenders Act 1997 is part of this approach. It recognises that the justice system needs to treat children differently to adults and that children should generally be held in detention as a last resort. The Act also recognises young offenders need to bear responsibility for their actions but require guidance and assistance because of their age.

The Act provides for a hierarchy of four increasingly serious levels of intervention into juvenile offending, beginning with police warnings and cautions and graduating through to conferencing and finally, attendance at court. Under the Act, a "child' is defined as a person who is of or over the age of 10 years and under the age of 18 years. Under the Act, a child is entitled to have a matter dealt with by a warning, caution or conference provided the matter meets the relevant criteria.

By creating a distinction between 16 year olds and 18 year olds, a dichotomy would be established which would, arguably, discriminate against 17 year olds who for all other purposes are treated as children by the law.

Can you tell us about other jurisdictions internationally where the naming of children involved in criminal proceedings is used and how effective that approach has been?

United Kingdom

In criminal proceedings in the youth court in England and Wales, there is a presumption that a child's personal details should not be divulged.

The court can allow a young offender to be publicly named in three situations: to avoid an injustice to the young person; if the young person is at large and has been charged with, or convicted of a violent, sexual or other offence punishable by at least 14 years imprisonment; or if the court is satisfied that it is in the public interest to order that a young person who has been convicted of an offence may be publicly identified.

Since the public interest exception was introduced in 1997, the Home Office and Lord Chancellor's Department have encouraged Youth Courts to consider using this power in cases where the young persons offending is persistant, serious or has impacted on a number of people or the local community in general, or if alerting other to the young person's behaviour would help prevent reoffending.

Canada

In Canada similar restrictions apply to naming young people involved in criminal proceedings. The *Youth Criminal Justice Act* allows these restrictions 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 2 years imprisonment.

Recently, Justice Minister Cecil Clarke announced that he will put forward amendments to the Youth Criminal Justice Act to allow the publication of the names of convicted young offenders charged with a subsequent offence.

New Zealand

In New Zealand, Youth Court hearings are private and identifying details of young offenders cannot be recorded in the media. The Children, Young Persons and Their Families Act 1989 provides for exceptions relating to research only.

However, young people who commit serious offences such as murder, manslaughter, burglary, robbery or serious assault or rape or those who repeatedly offend may be transferred to an adult court. The protections in the Young Persons and Their Families Act do not apply to adult criminal courts.

United States

In the United States different restrictions on naming young people involved in criminal proceedings apply in different states. In its 2006 National Report: Juvenile Offenders and Victims the US Department of Justice reported that the media have access to young offenders identities in most states.

In 14 US States media have access to and may publish the names of young offenders.

In 30 States media can access a young offenders identity in certain circumstances, depending on characteristics such as the offence, young persons age, criminal history or whether the case is transferred to criminal court.

Four States provide for access if the Court gives permission.

In three States the media may be prohibited from revealing the young persons identity under certain circumstances.

Two States prohibit release of young offender's names.

Allowing the names of juvenile offenders would in many cases create a permanent electronic record of the offence. Does this clash with other regulations governing juvenile criminal records? What currently happens to a juvenile's criminal record when s/he turns 18?

A juvenile's "criminal record" is a record of *convictions* recorded by the Court against the juvenile. This is distinct from a juvenile's "criminal history" which is held by police and includes details of *all* court matters, whether the juvenile has been convicted or not.

A Children's Court magistrate does not have the power to record a conviction against a person under 16 years of age. The magistrate can choose whether or not to record a conviction against a person aged 16 or over.

A child of any age who is being dealt with for a more serious offence by a higher court (for example at the District Court) may have a conviction recorded against them.[2]

A child who is dealt with by warning, caution or conference under the *Young Offenders Act 1997* cannot have a conviction recorded against them (except in the rare situation where a child has been found guilty by a court and then referred to a conference).

Most convictions[3] will become "spent" after a certain period of time. This means that, for most purposes, the conviction is no longer part of a person's criminal record. This means that, in general, the person does not have to disclose it (and the police can't disclose it) to anyone. There are some exceptions for certain types of employment (for example if the person is applying to be a judge, police officer, prison officer, teacher, child care worker etc).

[2] See section 14 of the Children (Criminal Proceedings) Act 1987.

For children, a conviction is “spent” for children after a 3 year “crime-free period” from the date of the Children’s Court conviction. A “crime-free period” is where the child has not been:

- convicted of an offence punishable by imprisonment (this would not include a police caution or youth justice conference);
- subject to a control order (ie a sentence in a juvenile detention centre); or
- unlawfully at large (on the run).

However, just because a conviction may no longer be part of a child’s criminal record, it doesn’t mean that all records of it will disappear. It will still be on a person’s criminal history and may be disclosed in certain circumstances (for example police may be ordered by the court to disclose a person’s spent convictions – as spent convictions can be taken into account by the court when sentencing a person for other offences; also police can tell other law enforcement agencies about spent convictions[4])

[3] A conviction imposed for a NSW offence can become spent unless it involved a prison sentence of more than six months (this does not include a juvenile control order or periodic detention), or it was for a sexual offence.

[4] See sections 12 and 13(4) of the Criminal Records Act 1991

The NSW Government submission to this inquiry suggests making information about juvenile offenders available to certain groups, such as Rural Fire Service in the case of arsonists. How could this suggestion be practically implemented? Does it conflict with existing procedures relating to juvenile criminal records?

As the NSW Government submission to the Inquiry suggests, this proposal could be implemented by amending the legislation to provide that Court may permit disclosure where this would, for example, be in the interests of justice and public safety.

For information regarding juvenile criminal records, see the response above.

Currently, who, other than the prosecuting authority, can make a submission to the court to publish a child's name? How are such submissions made?

Any party with standing can make an application. Standing is the right to appear in court and argue a case. In the case of an application to publish the name of a child, the legislation is clear that it can only be published if:

- it is published in an official report of the proceedings of a court
- the child consents
- it is in the public interest to publish the name,
- where a senior available next of kin consents, or
- a court makes an order for publication upon the sentence of a person on conviction for a serious children's indictable offence.

Any person or party who can demonstrate to the court's satisfaction that they have standing in relation to one of the above categories may make an application. It is made in court, and usually way by of oral submissions. An application for the section 11 prohibition to be waived is normally made by the media and usually on the grounds of public interest.

An important and as yet unsettled related question is whether the media have standing to argue the public interest when a suppression order is proposed or requested in court. There are conflicting decisions. The Supreme Court of Western Australia has ruled that the media does have standing5; the Supreme Court of New South Wales has ruled to the contrary6.

[5] *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153
[6] *John Fairfax Group Pty Ltd v. Local Court* (NSW) (1 991) 26 NSWLR 131

If the prohibition is extended to children arrested but not charged, and those likely to be involved in criminal proceedings, then how would that be enforced? How would the 'reasonable likelihood' of a child being involved in criminal proceedings be determined?

Presently, the prohibition against naming a child is triggered by the commencement of proceedings. A police officer may commence the proceedings by issuing a court attendance notice and filing the notice. All proceedings are taken to have commenced on the date on which a notice is filed with the registry of the court.

It has been suggested that the prohibition on the publication and broadcasting of names under section 11 could apply from an earlier point; namely, from the point at which the young person is arrested, or indeed even earlier from the point at which an investigation commences. This prohibition would be enforced in the same manner in which the provision is currently enforced.

It has been suggested that the prohibition on the publication and broadcasting of names under section 11 could be extended to apply where there is a 'reasonable likelihood' that the young person has an involvement in the criminal proceedings. The 'reasonable likelihood' test is contained in other legislation, such as the *Legal Profession Act 2004* and the *Children and Young Persons (Care and Protection) Act 1994,* and guidance could be gained from these other contexts in determining what considerations should apply.

At the moment, a child (offender, victim, sibling or witness) may be named up until the time that the offender is charged, after which time they cannot be named. What is the rationale behind choosing the time of charging as the cut-off point rather than an earlier time?

The time of charge is the commencement of the legal proceedings. Proceedings before the Court are public. Specific provisions are therefore required to prevent the publication of children's names in judicial proceedings. Up until the time the child is charged it cannot be said that judicial proceedings are on foot and hence the existing legislation does not extend to the pre charge phase.

The identification of the child prior to the commencement of the proceedings is not presently governed by legislation. Whether or not the child's name becomes known publicly is governed by the level of media attention and the needs of police in their investigation.

What would be the ramifications for police practice of extending the prohibition to the time of arrest?

As noted above, the conduct by police of their investigation is one of the factors which will affect how widely a child's name is published in the course of an investigation and prior to arrest. In some cases the publication of a name may be necessary to advance the police investigation. If it was proposed to extend the prohibition up to or including the time of arrest then consideration should be given to the provision of exceptions for police to allow the proper investigation of offences.

Extending the prohibition up to and including the time of arrest may also affect the enforcement of the provision by police. At present the point at which a child's name should be published is easily definable, that is when a person is charged. Using an earlier cut off point may lead to uncertainty about when precisely a child's name may not be published. In prosecuting an offence of breaching section 11, one element is that proceedings have commenced. Presently, as the prosecution, provided that the publication took place after the filing of the notice with the court (a reasonably easy thing to ascertain) that element of the offence has been established.

Using the earlier cut off point of "arrest" may lead to great uncertainly as to precisely when that was. This in turn might make a prosecution of a breach more difficult.

Can and should the legislation be amended to extend the prohibition to situations where children have been killed and no charges have been laid (such as murder suicides)?

The legislation could be amended in such a way however a balancing exercise would need to be undertaken first.

The competing interests of the privacy of the family and the interests of the public need to be weighed up. The principle of freedom of the press to report is well established and there is undoubtedly a public interest in the reporting of such material.

Extending the legislative prohibition to matters where no charges have been laid such as in the case of a murder/suicide involving a child could be achieved. For further discussion, see the responses above.

It should also be noted that the Australian Press Council has issued guidelines about the reporting of suicides, child related issues and any matter which concerns the privacy and/or grief of an individual or family.

The media of other states can name NSW child murder victims, and vice versa. How can this problem be addressed? Is it a problem for other categories of criminal offence?

The only way to address this issue would be to have uniform non-publication laws across the nation to ensure that legislation prevented inter-jurisdictional publication as well.

With respect to other criminal offences, the law has also made exceptions to the rule of open justice where sexual assault complainants are concerned.

Section 292 of the Criminal Procedure Act 1986 prohibits publication of evidence in sexual assault proceedings. Similarly, section 578A of the Crimes Act 1900 makes it an offence to publish any matter which identifies or leads to the identification of a complainant in certain sexual offence proceedings.

Recently, both s 292 of the Criminal Procedure Act 1986 and s 578A of the Crimes Act were amended to clarify that publication of evidence, or any report or account of that evidence, includes dissemination via the internet or any other electronic means. Whilst this law is confined to the State of NSW, it has the effect of preventing a person writing in NSW from disseminating that information to other jurisdictions by way of the internet.

TAB B

MEMBERS OF UNITED NATIONS HUMAN RIGHTS COMMITTEE

The members of the United Nations Human Rights Committee are:

1. Angola
2. Azerbaijan
3. Bangladesh
4. Bolivia
5. Bosnia and Herzegovina
6. Brazil
7. Cameroon
8. Canada
9. China
10. Cuba
11. Djibouti
12. Egypt
13. France
14. Gabon
15. Germany
16. Ghana
17. Guatemala
18. India
19. Indonesia
20. Italy
21. Japan
22. Jordan
23. Madagascar
24. Malaysia
25. Mali
26. Mauritius
27. Mexico
28. Netherlands
29. Nicaragua
30. Nigeria
31. Pakistan
32. Peru
33. Philippines
34. Qatar
35. Republic of Korea
36. Romania
37. Russian Federation
38. Saudi Arabia
39. Senegal
40. Slovenia
41. South Africa
42. Sri Lanka
43. Switzerland
44. Ukraine
45. United Kingdom of Great Britain and Northern Ireland

46. Uruguay
47. Zambia

TAB C

TREATMENT OF JUVENILES DOMESTICALLY AND INTERNATIONALLY

Australia

In all States and Territories except Queensland young persons under the age of 18 years are treated as juveniles by the Court. In Queensland, the relevant age is 17. In the Commonwealth no age is specified.

In all jurisdictions there is no criminal responsibility for children under 10 years and a presumption against criminal responsibility for persons aged between 10 and 14 years.

Table 1: Ages of criminal responsibility by Australian jurisdiction

Jurisdiction	No criminal responsibility	Presumption against criminal responsibility	Treatment as child/juvenile
Commonwealth	Under 10 years Crimes Act 1914, s 4M Criminal Code Act 1995, s 7.1	10 to less than 14 years Crimes Act 1914, s 4N(1) Criminal Code Act 1995, s 7.2	Not specified
Australian Capital Territory	Under 10 years Criminal Code 2002, s 25	10 to less than 14 years Criminal Code 2002, s 26	Under 18 years Children and Young People Act 1999, ss 8,69 ("young person")
New South Wales	Under 10 years Children (Criminal Proceedings) Act 1987, s 5	10 to less than 14 years Common law *doli incapax*	Under 18 years Children (Criminal Proceedings) Act 1987, s 3 ("child")
Northern Territory	Under 10 years Criminal Code Act, s 38(1)	10 to less than 14 years Criminal Code Act, s 38(2)	Under 18 years Youth Justice Act 2005, s 6 ("youth")
Queensland	Under 10 years Criminal Code Act 1899, s 29(1)	10 to less than 14 years Criminal Code Act 1899, s 29(2)	Under 17 years Juvenile Justice Act 1992, Sch 4 ("child")
South Australia	Under 10 years Young Offenders Act 1993, s 5	10 to less than 14 years Common law *doli incapax*	Under 18 years Young Offenders Act 1993, s 4 ("youth")
Tasmania	Under 10 years Criminal Code Act 1924, s 18(1)	10 to less than 14 years Criminal Code Act 1924, s 18(2)	Under 18 years Youth Justice Act 1997, s 3 ("youth")
Victoria	Under 10 years Children, Youth and Families Act 2005, s 344	10 to less than 14 years Common law *doli incapax*	Under 18 years Children, Youth and Families Act 2005, s 3 ("child")
Western Australia	Under 10 years Criminal Code Act Compilation Act 1913,	10 to less than 14 years Criminal Code Act	Under 18 years Young Offenders Act 1994, s3 ("young person")

s 29	Compilation Act 1913, s 29

New Zealand

In NZ, the *Children, Young Persons, and Their Families Act 1989* governs this area. Under the act, a young person (i.e. less than 17) will have a hearing before a Youth Court unless being tried for murder or manslaughter or a traffic offence punishable by imprisonment.

See ss208, 246 and 272 – 320 of the *Children, Young Persons, and Their Families Act 1989*.

Section 21 of the *Crimes Act 1961* states that no person shall be convicted of an offence committed when under the age of 10 years.

Between the ages of 10 and 14, a person can be convicted of an offence only if it is proved that she or he knew that the act was wrong or that it was contrary to law. This is prescribed by section 22 of the Crimes Act.

Canada

In Canada, The *Youth Criminal Justice Act* allows any court to be established as a "youth justice court". A youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person.

A young person refers to any person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old.

Children under the age of 12 cannot be prosecuted for criminal offences.

UK

In the UK, *The Youth Justice and Criminal Evidence Act 1999* governs the treatment of juvenile offenders. Under the act, youths between 10 and under 18 can appear in a Youth Court. A Youth Court can refer young people to a Youth Offender Panel to draw up a Youth Offender Plan.

In 1998, the rebuttable presumption of *doli incapax* was abolished by the *Crime and Disorder Act 1998*.