OUR REFERENCE

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DATE

DIRECTOR'S CHAMBERS

DPP
NEW SOUTH WALES

25 February 2008

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

Dear Mr Clark

I refer to your letter dated 19 February 2008 concerning my appearance on 18 February 2008.

I enclose the transcript with a few minor corrections noted.

At page 15 I took a question on notice. The answer is as follows:

> "Nationwide News Ltd, publisher of the Daily Telegraph, was prosecuted along with Alan Jones and Harbour Radio Pty Ltd (licensee of Radio 2GB). They were all convicted in the Local Court and appealed to the District Court.
>
> On 11 February 2008 Judge Finnane found the offences proven against all appellants.
>
> In relation to Nationwide News Ltd its conviction and fine in the Local Court and order to pay court costs were confirmed."

I note that five questions on notice were not reached at the hearing and therefore remain unanswered. I assume that by the inclusion of those questions in your letter you would like answers and they are enclosed. I believe that the first question was in fact addressed orally, but a written response is included in any event.

Yours faithfully

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Director of Public Prosecutions

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Q. **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?**

A. This is not a new concept. Section 105 of the Children and Young Persons (Care and Protection) Act 1998 prohibits the publication of the name of a child likely to be or otherwise involved in any proceedings before the Children's Court before the proceedings are commenced.

It would be a matter for the appropriate parties (police) to ensure protocols are put in place. Police are used to dealing with children and vulnerable witnesses in specific and different ways from adult offenders already. Police would have to make certain determinations at certain points after an allegation of an offence and during an investigation.

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

A. This is a question for police to answer as the ODPP cannot speculate on the impact. However, police are already used to dealing with children in specific ways as regulated and as per their own policies. Extending the prohibition to the time of arrest (or earlier) would require additional protocols for them and for other interested parties (including the media) to learn.

Q. In the case of the K brothers, where all names were suppressed because two of the brothers were under 18, could the court have named them anyway because the offence was a 'serious children's indictable offence'? And did the court therefore decide not to name them because it was not in the public interest to do so?

A. Subsection 11(4) of the Act sets out exceptions to the prohibition in s11(1). Section 11(4)(c) provides that s11(1) does not prohibit "the publication or broadcasting of the name of a person who has been convicted of a serious children's indictable offence, if the publication or broadcasting is authorised by a court under subsection (4B)." A "serious children's indictable offence" is defined in s3 of the Act to include "an offence punishable by imprisonment for life or for 25 years."

The definition applies to an offence under s61JA of the Crimes Act which has a maximum penalty of life imprisonment.

An offence under s66C(1) is not a "serious children's indictable offence" with a maximum penalty of imprisonment for 8 years.

All accused were charged with offences under s61JA and MMK (a juvenile) was charged with an offence under section 61C(1). The exception in s11(4)(c) did not apply to the latter charge for MMK so a court had no power to authorise the publication of MMK's name in a way that connected him with the criminal proceedings for that offence.

The Court did not name the accused because the application for the accused to be named was made by John Fairfax Publications Pty Ltd **after** the sentence and the CCA held that the application was too late because applications for orders under s11(4B) are confined to the time of sentencing. The Crown did not make any application (because of further trials to come), nor did the Crown take any position in relation to the Fairfax Application.

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

A. The purpose of the legislation is to provide protection for a child (accused) and other children who are involved in (or connected with) the proceedings.

It provides the child an opportunity for rehabilitation and provides an opportunity for a child witness not to be burdened by public association with criminal proceedings.

The situation where a child is killed and there are no criminal proceedings does not therefore fit within the parameters of the intent of the legislation.

However, in my view the legislation could and should be extended to this kind of situation for the better protection of children (and families) generally, consistently with the objects of the existing legislation.

Q. 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?

A. The protections provided by NSW legislation would stop at the border. The protection is required within NSW as the alleged crime would have had some nexus with the State.

It may be argued that further protection (ie cross borders or overseas) is impractical and not required. There would not be an easy way to ensure NSW legislation requirements (or orders) applied outside the jurisdiction. It may be that inter-state publicity placed on the internet may thwart the intent of the legislation if persons in NSW accessed it. Again there is no easy manner in which to overcome this concern.

If the issue is to be addressed at all, the most practical means would be by having the Standing Committee of Attorneys General place it on their agenda for the development of uniform and complementary legislation in all Australian jurisdictions.

(Reference should also be made to the Australian Law Reform submission at paragraph 15.)