

**INQUIRY INTO THE PROHIBITION ON THE
PUBLICATION OF NAMES OF CHILDREN INVOLVED IN
CRIMINAL PROCEEDINGS**

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Date received: 10/12/2007



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
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SUBMISSIONS

**INQUIRY INTO THE PROHIBITION ON THE PUBLICATION OF NAMES
OF CHILDREN INVOLVED IN CRIMINAL PROCEEDINGS**

1. Section 11 of the *Children (Criminal Proceedings) Act 1987* sets out a scheme to prohibit publication or broadcasting of the names of children involved in criminal proceedings. The scheme protects these children from publicity in an effort to avoid public criticism, stigma, sensational reporting and any other undesirable consequences that may flow from their names being published or broadcast.
2. In limited circumstances children will not be provided with the protection of the section and may be named. There are certain criteria to be met before a court will name a child and the section provides for penalties for breaches.
3. The policy objectives of the prohibition are valid and appropriate. The criminal justice system must reflect the values of a civilised society and uphold the basic principles that a child must be protected and be allowed to reintegrate into society or take part in community life without fear of lingering consequences of past actions or bearing the stigma of being related to an offender, etc.
4. The section achieves these objects by only permitting limited exceptions to the prohibition. The section also reflects the principles outlined in the *Children (Criminal Proceedings) Act 1987* and other instruments and other legislation relating to children. Some examples follow.
 - The principles relating to the exercise of criminal jurisdiction in section 6 of the Act which includes that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance – s6(b) *Children (Criminal Proceedings) Act 1987*.

- The principles outlined in the UN *Convention on the Rights of the Child* (ratified by Australia in 1990) that sets out 11 fundamental binding principles to be reflected in sentencing juvenile offenders that include the following.
 - 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 – Article 3.1
 - No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation – Article 16.1
 - The child has the right to the protection of the law against such interference or attacks – Article 16.2
 - Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society – Article 40
5. Even though there appear to be inconsistencies in sentencing young persons and in some instances less weight is given to the factor of youth as a mitigating circumstance (see **R v AEM & Ors (2002) NSWCCA 58** and **R v KT (2007) NSWSC 83**), the role of rehabilitation does play a pivotal part in the sentencing process. In the case of **R v TVC (2002) NSW CCA 325** the court stated:

In coming to that conclusion his Honour made reference to the well-known principle that when courts are required to sentence a young offender considerations of punishment and general deterrence should in general be regarded as subordinate to the need to foster the offender's rehabilitation... that is a sensible principle to which full effect should be given in appropriate cases.

6. It is only in particular matters that the prohibition will not apply, as in the gang rape trials involving Bilal Skaf, etc. The sentencing court has discretion at the time of sentencing to determine whether to name the young offender and that is the best time for the issue of naming to be canvassed. I refer to the case **In the application by John Fairfax publications Pty Ltd MSK, NHK, MM K and MRK (2006) NSWCCA 386** which covered various aspects relating to the prohibition. In particular at para 9:

The heinous nature of the systematic course of predatory conduct indicates that this is an appropriate case in which the additional element of public shaming could fill the function of retribution and also the function of general deterrence that criminal sentences are designed to serve.

It is at the time of the 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 prospect of rehabilitation.

And at 18

....there is a significant public shaming element involved in such publication. The power to authorise publication should not be exercised for the purpose of punishment, however publication does have an adverse consequence which could be taken into consideration in the exercise of the sentencing discretion. That is to say, where, as part of a distinct statutory process public shaming is to occur, that could influence the sentencing judge to ameliorate the sentence that would otherwise be appropriate.

7. I am of the view that the prohibition is relevant, valid and workable. Even if courts are taking a stronger line with sentencing in some instances, the matter of naming offenders appears to have been kept to a very limited number of cases. This also appears to be an appropriate use of the section.
 8. The section does not apply until criminal proceedings are before the court. To ensure the principles referred to above and the policy of the legislation are maintained, it may be appropriate to consider extending the prohibition to children who have been arrested but not yet charged. I agree with this proposition. I note the provisions of section 105 of the *Children and Young Persons (Care and Protection) Act 1998* prohibit the publication of a name of a child likely to be or otherwise involved in any proceedings before the Children's Court before the proceedings are commenced. Such a similar complete prohibition would protect all young offenders from the earliest time possible in relation to criminal matters. The prohibition should also be extended to offenders under the *Young Offenders Act 1997*. It is appropriate that a court determine only in limited cases when the prohibition should not apply.
 9. The above comments are also valid for child witnesses and the prohibition should remain for them. I do not agree with the lessening of any of the policy objectives behind the legislation and penalties for breaching the section should remain.
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