

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

Organisation: NSW Local Court
Name: Mr Graeme Henson
Position: Chief Magistrate
Telephone: 02 9287 7773
Date received: 12/12/2007



The Chief Magistrate of the Local Court

12 December 2007

The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

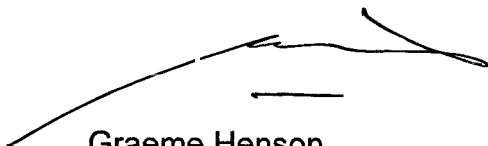
Dear Director

Re: Inquiry into the prohibition on the publication of names of children involved in criminal proceedings

Thank-you for your letter dated 17 October 2007 requesting submissions in relation to your inquiry into the prohibition on the publication of names of children involved in criminal proceedings.

I have sought the views of the Senior Children's Magistrate in relation to this matter and I attach his response, which I endorse.

Yours sincerely



Graeme Henson
Chief Magistrate

Submissions of the Children's Court of New South Wales to the Parliamentary Inquiry into the Prohibition on the Publication of Names of Children Involved in Criminal Proceedings.

This inquiry is being conducted with the following 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.
4. 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*.

Introduction

It should be acknowledge at the outset that the present legislation is not intended to prevent publication of information about a particular matter. Children's Court cases are often covered in the media. This is an important aspect of the open system of justice which we enjoy. The present legislation does not significantly interfere with the ability of the press to report about matters of public interest.

The policy reason behind the provisions of Section 11 is to enable young persons not to be stigmatised by the fact that they have committed a criminal offence. It is submitted that this policy holds good in relation to either a first offence or a subsequent offence and irrespective of whether the offence is a serious offence or a minor one. The Northern

Territory Court of Criminal Appeal explained the principle in *MCT McKinney & Ors* [2006] NTCA 10, at 20, stating that it was necessary:

to weigh in the balance the fact now almost universally acknowledged by international conventions, State legislatures and experts in child psychiatry, psychology and criminology, 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.

It is submitted that the inquiry should have regard to the international obligations imposed by the UN Convention on the Rights of the Child - in particular Articles 3.1, 5, and 40.2 (b)¹. These articles encapsulate principles that are consistent with the provisions of the present legislation.

Why publish names?

It is sometimes argued as a reason for the publication of the name of a young offender that:

1. the shame attached to the publicity will have an effect of bringing home to the young person the seriousness of their offence and its consequences
2. the public will be warned that the person has committed a criminal offence and be able to take protective measures.

Shaming

The role of shaming is one that requires careful consideration. It may be a valid aspect of any punishment that may be imposed on an offender. Any remarks on sentencing by a judge or magistrate should involve condemnation of the behaviour being punished and may include an element of shaming. Any shaming, however, needs to be effective. For the vast majority of young offenders it will be ineffective. If a young person has

¹ UN Convention on the Rights of the Child

Article 3

1. 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 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 40

2 (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

- vii) To have his or her privacy fully respected at all stages of the proceedings.

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. The experience of Children's Magistrates when hearing from young people consistently backs this up.

While powerless common criminals do not have the structural benefit of a corporate veil, strong families can be a functional equivalent, transforming external stigmatization into a loving, reintegrative kind of internal disapproval. The trouble is that the worst juvenile offenders are those least likely to have such families; often their families amplify internally the stigmatizing messages from outside. Hence with common crime it is irresponsible to promote external stigmatization in the hope that it will be transformed into internal reintegration.²

Many young offenders, particularly those who are persistent offenders, lack adequate family or similar support. For them any form of shaming will be ineffective.

Nathan Harris's (1999) analysis of conferencing data shows that shaming 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.³

This will especially be the case for young people who come from the more marginalised parts of the community, especially aboriginal young people and those from non-English-speaking backgrounds.

Our criminal justice system is intended to create fear, shame and conformity to mainstream norms in transgressors, via a system that punishes and deters. Aboriginal people have learnt how to shift the moral burden instead to those who police, try, and imprison them and to re-interpret their experiences of the criminal justice system to subvert those experiences and hence make them tolerable. By these means they gain some fleeting sense of power however illusory and transitory this might be over a system that is overwhelmingly stacked against them.⁴

The adverse effects of shaming are magnified in smaller communities, particularly in regional and rural areas, where the anonymity of urban centres does not exist. This has been demonstrated in the Northern Territory. A 2006 episode of the Radio National Law Report provides two very clear examples.⁵

² John Braithwaite Zero Tolerance, Naming And Shaming: Is There A Case For It With Crimes Of The Powerful? *Australian and New Zealand Society of Criminology Conference, 30 September, 1999, Perth*

³ *ibid.* ref to Harris, Nathan Shaming and Shame: An Empirical Analysis. *PhD Dissertation, Law Program, Australian National University, Canberra 1999.*

⁴ Lynn Atkinson, *Aboriginal Youth, Police And The Juvenile Justice System In Western Australia. National Conference On Juvenile Detention 1994*

⁵ ABC The Law Report Naming and Shaming Juvenile Offenders 3 October 2006
<http://www.abc.net.au/rn/lawreport/stories/2006/1752189.htm>

The provisions for cautioning and 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, and where a youth justice conference has occurred and outcome plan will be promulgated and monitored to ensure that the young person takes some steps which demonstrate his/her taking responsibility for offending.

Crime Prevention

It is sometimes suggested that publicity about particular young offenders who commit serious offences will enable others to be on the lookout and take steps to avoid being victims. There is no evidence that supports that contention. The experience of Children's Magistrates is that it is most unlikely that a young person who is a persistent offender will be known to possible victims and in the overwhelming majority of cases this will not be the case. In those situations where the victim does know the offender, it is unlikely that media publicity will be necessary in order to convey the offender's potential to offend.

Media Coverage and Other Publicity

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 their end and acquittals or sentencing proceedings where significant matters in mitigation are produced are not reported. The result is that media coverage often presents an incomplete and distorted picture of proceedings, which may be unfair and highly prejudicial and of little real benefit to anybody. The most significant beneficiary of any change in the present policy will be the mass media because the impact of their coverage, though not its quality or the social value, will be enhanced.

Helpful Change

The current legislation provides a number of procedural difficulties for the operation of courts in dealing with young offenders. A strict interpretation of the legislation may inhibit a request being sent to the Department of Juvenile Justice for a background report or a defense lawyer seeking to obtain a psychiatric report about a client. Examples of other situations which may infringe include the usual practice of calling young persons into court by name and the production of court lists to prosecutors, legal aid lawyers and Juvenile Justice officers. Concern has been raised in the context of the Justice Link database for the NSW court system about how children's matters can be dealt with.

Another grey area involves the presence of people such as students of law or social work attending court in order to gain greater understanding of the court process. It may be

argued that their presence in Court during proceedings involving young persons may constitute an unlawful publication under the present law. It is most important that this opportunity be available for those with a legitimate interest in observing proceedings and undesirable that it be inhibited by the unintended consequences of section 11.

The Children's Court of New South Wales recommends that provision be made for regulations or Rules of Court to deal in an appropriate fashion with these issues but, otherwise, that the confidentiality provided by section 11 of the *Children (Criminal Proceedings) Act 1987* be preserved as an aide to the protection and rehabilitation of juvenile offenders.

SCOTT MITCHELL,
Senior Children's Magistrate,
Parramatta.
10 December, 2007.