Submission
No 26

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

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PUBLIC DEFENDERS

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Committee Chair
Parliament House
Macquarie Street
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Dear Ms Robertson

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

We refer to your invitation of 17 October 2007 to make submissions to the above inquiry being undertaken by your Committee. We have the following submissions to make.

Generally, it is very important that children who have become caught up in the criminal justice system be treated differently from adults. Rehabilitation in general, and a determination to do everything possible to ensure that the child is not returned to the system in particular, should outweigh notions of retribution or specific and general deterrence.

Very different principles apply to sentencing children because of s 6 *Children (Criminal Proceedings) Act 1987*, and the application of the common law. As Justice Gaudron commented in ***Minister for Immigration and Ethnic Affairs v Teoh*** (1994) 183 CLR 273 at 304, the common law imposes particular obligations to the child in need of protection. Where a child commits crimes deserving a substantial sentence a court is still required to reduce the sentences

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from that which would have been imposed on an adult to accord with principles of general deterrence and community protection (***R v E (A Child)*** (1993) 66 A Crim R 13, per Ipp J at 18).

In ***R v GDP***, Matthews J, with whom Gleeson CJ and Samuels JA agreed, set out the principles and approach to be applied when sentencing children. Specific reliance was placed upon ***R v C, S and T*** (unreported, CCA NSW per Gleeson CJ, Allan and Student JJ 12 October 1989) where the Chief Justice accepted the submission that:

> *"In sentencing young people...the consideration of general deterrence is not as important as would be the case in sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed"*. (Emphasis added).

Accordingly, Justice Matthews noted:

> *"Had it been an adult who committed these offences then the principles of retribution and more importantly, general deterrence would have demanded a custodial sentence of considerable length. Rehabilitation must be the primary aim in relation to an offender as young as this applicant"*. (***R v GDP*** At 116).

Even for older offenders and heinous crimes, youth must remain a significant factor in sentencing.

> *"The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well - principally although by no means only, the deterrence of others... and the rehabilitation of the offender. The community have 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."* (***Webster***, unreported CCA NSW 15/7/1991 Allen J with regard to the murder by a young man of a teenage girl) at pages 11 and 12, emphasis added).

In ***Roper v Simmons*** (2005) 125 S Ct 1183, the US Supreme Court held that the death penalty could not be imposed on children. In doing so Justice Kennedy at

15 & 16 for the majority (with whom Souter, Ginsberg and Breyer JJ joined, Stevens J concurred; Rehnquist CJ, Scalia and Thomas JJ dissented) made the following relevant points, which are of general importance and application:

- *Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.*
- *The character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.*
- *The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult.*
- *Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.*
- *The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.*

For a small number of extremely serious crimes and some juvenile offenders the balance or synthesis of relevant factors can mean that the community interest in punishment can override the community interest in rehabilitation of children. However, even for the most heinous offence a young person's potential for rehabilitation must always be a factor. As David Kirby J said in ***R v Elliot And Blessington*** (2006) 164 A Crim R 208:

> *"[127] A jurisprudence has developed in the context of sentencing young offenders, which recognises the important differences, in terms of responsibility, between adults and children."*

Justice Kirby then referred to the well regarded passage from the New Zealand Court of Appeal decision of ***Slade v The Queen*** [2005] NZCA 19:

> *"[43] It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their*

moods, impulses and behaviours (Spear, 2001). 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 coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent."

For these reasons, it is appropriate that markedly different procedures apply to children, including the prohibition on the publication of their names.

Specifically, we shall deal with each of the terms of reference of your inquiry in turn.

Current prohibition on the publication and broadcasting of names under s.11 of the *Children (Criminal Proceedings) Act 1987* (the Act), in particular:

1. The extent to which the policy adjectives 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;

These policy objectives remain completely valid. There is no reason to reduce the protection afforded to children, whether involved as defendants, witnesses, siblings of defendants, or otherwise.

b) Protect victims from the stigma associated with crimes;

Although it is not our role as Public Defenders to appear for or make submissions on behalf of victims, it seems to us that the policy objectives with regard to this topic remain valid as well.

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

Again, this objective is a most important one, and we know of nothing to suggest that it does not remain valid.

2. The extent to which s.11 of the Act is achieving its objectives.

We are not in a position to judge the efficacy of the provisions in practice with regard to their achievement of general social goals. We would however oppose any move to water down the protections currently afforded to children.

The existing provisions in section 11(4A), 4B and 4C allow for the naming of child offenders in serious matters where that naming is in the "*interests of justice*".

While we find it hard to conceive of a situation, even within the most heinous crime where naming could be in the interests of justice, we accept that Parliament has left this option open. At present we can see no need to further extend the present exception to other categories of offender or to alter the existing tests.

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

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

Yes. A stronger case could be made for the protection of children at that stage, especially because after arrest they may not proceed to even being charged, let alone found guilty. The prospect that an innocent child could be named and shamed is repugnant and could not be in anyone's interests.

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

It seems to us that current s 11 (1)(a)(i) and s 11(1)(b) and (c) would currently operate in these circumstances. However, if examples of inappropriate naming that have occurred because of anomalies in the reach of these provisions can be identified, we would have no objection to them being strengthened: see for example 3c (below):

c) Any other circumstance.

Section 11(1) provides for a prohibition of the "naming" of child witnesses. It does not specifically prohibit publication of material that could lead to the identification of a child. It is conceivable that the spirit of the legislation could be breached were an offender to identify but not specifically name a child and thus avoid prosecution. We would suggest that the section be strengthened by the addition of a specific reference to identification of a child, as well as naming them.

a. Any other relevant matter including 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 prohibition in s 65 of the *Young Offenders Act* is sensible, and consonant with the aims of that Act. You will appreciate that we are not in a position to make specific comment upon the *Young Offenders Act*, because the Public Defenders are not normally involved in that system, constituting as it does a diversion from the criminal justice system.

As for the prohibition in s 578 A *Crimes Act 1900*, again, we are not in a position to comment from experience with regard to the efficacy of that provision in

protecting complainants in sexual assault matters. However, speaking generally, it seems to us that the provision is a good one, and should not be watered down.

Conclusion

In short, our submission is that the prohibition on the publication of names of children involved in the criminal justice system reflects and serves an important and valid social objective, and any move to water down those prohibitions should be resisted.

We would be pleased to have the opportunity to provide oral evidence to your Committee if thought to be useful.

Many thanks for the opportunity to make submissions on these important questions.

Yours sincerely

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