

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

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Australian Law Reform Commission

**ALRC submission on the publication of names of
children involved in criminal proceedings**

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1. The Australian Law Reform Commission (ALRC) makes the following submission to the NSW Legislative Council's Standing Committee on Law and Justice in relation to the prohibition on the publication of names of children involved in criminal proceedings.

2. In making this submission, the ALRC draws on its experience from current and past inquiries. In particular, the ALRC has addressed similar issues in *Same Crime, Same Time: The Sentencing of Federal Offenders* (ALRC 103, 2006); *Seen and Heard: Priority for Children in the Legal Process* (ALRC 87, 1997); and the current inquiry on the review of Australian privacy law.

3. Overall, the ALRC is supportive of a prohibition on the publication and broadcasting of names of children involved in criminal proceedings. There are clear policy justifications for the existence of such a prohibition. This is also reflected in international instruments. The ALRC supports extension of the existing provision to ensure appropriate protection is applied at all stages of the criminal process, from investigation through to proceedings in a court or alternative diversionary option.

4. The ALRC recognises that there are balancing objectives to be achieved in administering the criminal justice system, and that there may be situations where it is appropriate to modify or abrogate the prohibition. The ALRC considers that these circumstances are best determined on a case by case basis rather than through blanket exemptions. The ALRC further considers that the determination should be made by a judicial officer.

Protection for accused and offenders who are children

5. Section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) appears to have two purposes. One is to provide protection for a child who is the accused or convicted person to which the proceedings relate. The second is to protect *other* children who are involved in or affected by the proceedings.

6. The protections for an accused or convicted child are underpinned by the policy objectives of the juvenile justice system. The approach to juvenile justice has differed from that of the adult criminal justice system since the beginning of the twentieth century, when separate laws,

courts and corrections were established for young offenders. At that time, the newly established system was based on a welfare model, extending the capacity of the state to intervene in people's lives for humanitarian reasons.¹ The system emphasised care and control as part of the response to criminal behaviour. In the second half of the twentieth century the welfare model was criticised by both civil libertarians (concerned about the impact of state intervention on the young person) and the law-and-order lobby (concerned about injustice for the victim). A 'justice' model gained favour, based on due process rights, visible and accountable decision making, and individual responsibility for criminal behaviour.² At the same time came the development of programs to divert young offenders from the formal court system for minor offences, particularly through cautioning and panels (usually involving a social worker and police who met with the child and the parent/guardian). More recently a 'restorative' model of justice has become increasingly influential in Australia, with options such as juvenile conferences and victim reparation schemes becoming popular.³ The *Young Offenders Act 1997* (NSW) provides elements of diversionary programs (through warnings and cautions) and the 'restorative' model (through youth justice conferencing).

7. Every state and territory has introduced new juvenile justice legislation in the last 20 years. All are now based on a justice model, but most jurisdictions also have a variety of diversionary programs, including some form of juvenile conferencing. The procedure and principles in current use reflect a justice model with an emphasis on due process and sentences which are both determinate and proportionate.⁴ While the justice model supports 'just deserts' and deterrence principles, the approach to punishment within the children's courts has retained some features of the welfare model, with rehabilitation being a key factor in the sentencing of young people.⁵

8. The trends that have occurred in the juvenile justice field in Australia are generally consistent with the relevant United Nations conventions, guidelines and rules, in particular the United Nations *Convention on the Rights of the Child* (CROC)⁶ and the *Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules).⁷ Although not necessarily binding on Australia under international law, the rules and commentary in the Beijing Rules represent internationally accepted minimum standards. The ALRC uses them as an important reference point in the development of policies underpinning its recommendations for reform in this field.

9. In the report *Seen and Heard: Priority for Children in the Legal Process*, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) recommended the development of national standards for juvenile justice that reflect Australia's international

1 I O'Connor, 'Models of Juvenile Justice' in A Borowski and I O'Connor (eds), *Juvenile Crime, Justice & Corrections* (1997) 229, 231.

2 Ibid, 237.

3 J Stubbs, *Restorative Justice, Domestic Violence and Family Violence—Issues Paper 9* (2004) Australian Domestic & Family Violence Clearinghouse, 2.

4 K Warner, 'Sentencing Juvenile Offenders' in A Borowski and I O'Connor (eds), *Juvenile Crime, Justice & Corrections* (1997) 307, 307.

5 Although courts can vary greatly in the weight they give to these various principles: see J Bargaen, 'Community-Based Programs' in A Borowski and I O'Connor (eds), *Juvenile Crime, Justice & Corrections* (1997) 372, 374.

6 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

7 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985).

commitments.⁸ The Beijing Rules do not prescribe a particular approach based on rehabilitation, punishment or just desert.⁹ However, the Rules do advocate that the reaction must always be in proportion to the circumstances and gravity of the offence, and also to the needs of the juvenile as well as the needs of society.¹⁰ In the *Seen and Heard* Report, the ALRC and HREOC recommended that the national standards contain a proper balance between rehabilitation, deterrence and due process, but that they should stress the importance of rehabilitating young offenders while acknowledging the importance of restitution to the victim and the community.¹¹

10. Rule 8 of the Beijing Rules deals specifically with the protection of privacy of the juvenile offender, and is to apply regardless of the basis underpinning the juvenile justice system.

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

11. The commentary to the Rule notes that young persons are particularly susceptible to stigmatisation, and that '[c]riminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal"'. The commentary further notes that the 'interest of the individual should be protected and upheld, at least in principle'.

12. The ALRC supported this approach to the protection of the privacy of juvenile offenders in its report *Same Crime, Same Time: The Sentencing of Federal Offenders* (ALRC 103, 2006). The ALRC recommended that federal sentencing legislation include a set of minimum standards to apply to the sentencing, administration and release of young federal offenders, regardless of the state or territory in which they are tried or held.¹² One of the standards to be included is that:

the publication of a report of proceedings involving a young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence should be prohibited where it identifies or is likely to lead to the identification of the young person.¹³

The *Same Crime, Same Time* report is currently under consideration by the Australian Government.

13. Privacy is not an absolute right, and must be balanced against other rights and important values in our community. This includes the desirability of an open justice system, and the free flow of information to the public through the media and other outlets. Issues around the protection of the privacy of juvenile offenders have been raised as part of the ALRC's current inquiry into Australian privacy laws. In the Discussion Paper *Review of Australian Privacy Law* (DP 72, 2007), the ALRC reiterated its support for the recommendation made in the

8 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 192, Ch 18.

9 The commentary to r 17 clarifies that no singular approach is prescribed: *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985).

10 See in particular *Ibid*, rr 5, 17.1(a).

11 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Recs 192, 198.

12 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 27-1.

13 *Ibid*, Rec 27-1(f). See also [27.62]–[27.66].

Same Crime, Same Time report.¹⁴ The ALRC noted that the privacy of children and young people inside the court room has attracted more judicial and legislative protection than the privacy of children in other circumstances.¹⁵ There are significant policy reasons for protecting the identity of children involved in criminal proceedings, including convicted offenders. The ALRC therefore supports the purpose-built provisions preventing naming of children and young people in relation to criminal proceedings in the specific legislation in each jurisdiction.

14. While clearly related to privacy issues, at this point the ALRC has not made any proposals about these provisions as part of its Privacy Inquiry. A final Report on the Privacy Inquiry is due to be completed in March 2008. The ALRC has, however, noted concerns raised in submissions to the Privacy Inquiry about legislation on this issue in the Northern Territory. That provision has as its starting point that there is no prohibition on publication, but gives the court a discretion to order that a report, information relating to proceedings or the results of proceedings, not be publicised.¹⁶ The ALRC does not consider that this type of provision—that reverses the position of the current NSW provision—is appropriate. It is sensible to incorporate judicial discretion as part of the provision, but this should be a discretion to allow publication. Consistent with the Beijing Rules, the starting point should be the protection of the privacy of the child or young person.

15. The ALRC also notes problems that arise where there are inconsistencies in state and territory laws that have the potential to impact across state and territory borders. Publication and broadcasting, particularly in the internet age, impacts across national borders as well as across Australia. The ALRC has often made recommendations that particular issues be considered by the Standing Committee of Attorneys-General with a view to developing harmonised laws.¹⁷ This may be another area where harmonised laws would ensure consistent application of the privacy protections across Australia.

Protection for other children involved in or affected by criminal proceedings

16. Debate in the community has suggested that some people do not support the policy reasons behind protecting the privacy of a child convicted of an offence. It is submitted that these concerns do not extend to the protection of the privacy of other children involved in or affected by criminal proceedings, including victims, witnesses and other named children.

17. Based on the fundamental rule that proceedings take place in open court, the common law has developed principles regarding a court's power to suppress publication of certain details of evidence before the court, balancing certain public interests against the interests of open justice. One such public interest includes protecting the interests of children.¹⁸ This is particularly the case in criminal proceedings where the involved child is often an innocent

14 Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), [60.195]–[60.196].

15 Ibid, [60.188].

16 *Youth Justice Act 2005* (NT).

17 See eg, Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), Proposal 4–6 on harmonisation of privacy laws; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 2–1 on harmonisation of evidence laws.

18 *Johnston v Cameron* (2002) 124 FCR 160, 167. For an overview of the discussion that is ensuing in the United Kingdom, see: H Fenwick, 'Clashing Rights, the Welfare of the Child and the Human Rights Act' (2004) 67 *Modern Law Review* 889; I Cram, 'Minors' Privacy, Free Speech and the Courts' [1997] *Public Law* 410.

victim or bystander caught in a criminal matter, and there is a danger of associated stigma attaching to their involvement in the events. This could have not only immediate consequences, but a longer term impact on the person's adult life. These principles of protecting the interests of children are also applicable in other courts, such as the Family Court.

18. The ALRC supports a legislative provision that automatically protects other children involved in or affected by criminal proceedings. As currently exists, it is appropriate to have a mechanism that allows for publication of the identifying information either by consent of the young person aged 16 or over, or an appropriate family member, or in certain circumstances with approval of the court.

Extension of prohibition to other aspects of the criminal process

19. As indicated above, issues around the protection of privacy of participants in the criminal process have been raised as part of the current ALRC inquiry on Australian privacy laws. One matter raised for consideration in submissions to the inquiry is the public identification of children and young people during criminal investigations.¹⁹ At present, s 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) is limited to the conduct of criminal proceedings. However, the same policy reasons underpinning the protections in s 11 apply at all points of the criminal process, commencing with the criminal investigation prior to the official commencement of 'proceedings'. The Beijing Rules encompass the investigation processes of the juvenile justice system, applying to law enforcement agencies.

20. A particular example raised in submissions to the Privacy Inquiry is the public identification in the media, through publication of names and/or photographs, of young people allegedly involved in criminal behaviour following the Cronulla riots in December 2005. While the ALRC does not suggest that it is never appropriate publicly to identify a suspect or person wanted in connection with an investigation, the ALRC considers that the privacy of an individual in such circumstances should be given legislative protection. The protection should apply prior to the time at which court proceedings are officially commenced, either by the issue of a court attendance notice or by arrest and charge. Appropriate mechanisms can then be put in place to determine when it would be acceptable to make a public identification. The ALRC has not had an opportunity in its past or present work to give focused attention to the particular circumstances in which it would be appropriate to override the default protective provisions. However, any decision which considers the desirability of public identification must involve a balancing of priorities. Publication should only be permitted where the public interest in publication clearly outweighs the interests of protecting the privacy of the young person.

21. Similarly, it would be inconsistent to provide for privacy protection for other children involved in a criminal matter once court proceedings have commenced, but allow that child to be freely named in the media prior to commencement of proceedings. Again, mechanisms should be developed to prohibit public identification of children and young people in connection with possible criminal offences, except in specified circumstances. Such circumstances might include where an appropriate family member has consented, a person aged 16 or over has consented, or for other purposes such as to assist with a criminal investigation in appropriate circumstances.

19 Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), [60.193].

Application of the provision to the deceased

22. The ALRC supports the provisions in s 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) that extend the privacy protection to a deceased child. Although deceased individuals are provided with privacy protections in some jurisdictions, including in New South Wales privacy legislation,²⁰ it is not addressed in the *Privacy Act 1988* (Cth). In the Discussion Paper *Review of Australian Privacy Law* (DP 72, 2007), the ALRC has proposed that the privacy of deceased persons should be recognised and protected for 30 years after death.²¹ The ALRC is continuing to consult with the community on the most practical way to regulate the protection.

23. The ALRC does, however, consider that the protection of the privacy of a deceased child involved in a criminal matter—including a child victim—should be extended to cover the stage of criminal investigation prior to the commencement of proceedings. Public identification could still be provided for with consent of an appropriate family member or through another mechanism to assist with a criminal investigation in appropriate circumstances.

Derogation from the general principle of prohibition of publication

24. As indicated above, the ALRC supports the existing structure of s 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) which provides for automatic protection of the identity of a child involved in proceedings. A limited set of circumstances is provided for whereby publication can be authorised, including consent of the young person or family member, and a judicial decision to allow publication upon conviction for a serious children's indictable offence.

25. The ALRC is aware of arguments within the community supporting a provision that allows publication without judicial intervention for certain types of offences. The ALRC would not support such a provision. Instead, the ALRC considers that leaving the decision to the judicial officer involved in the case would be the most effective and appropriate way to deal with the issue. The judicial officer would be apprised of all of the facts and circumstances of the case, and be best placed to balance the competing interests in determining whether or not the child or young person should be named in public. As indicated above, a decision to allow publication should only be made where the public interest in publication clearly outweighs the interests of protecting the privacy of the young person. In relation to a convicted young offender, the impact on the young person's rehabilitation would be a crucial factor. The ALRC made similar recommendations which focused on retention of judicial discretion in determining whether to open or close proceedings in its report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004).²²

20 *Privacy and Personal Information Protection Act 1998* (NSW) s 4(3)(a); *Health Records and Information Privacy Act 2002* (NSW) s 5(3)(a).

21 Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), [3.216]–[3.243].

22 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [11.185]–[11.193].