PRIVACY COMMISSIONER

Naming children in court

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Position Paper

The Privacy Commissioner's position on

Child Offenders and Privacy

23 July 2002

Competing interests

The treatment of children[1] in the justice system involves balancing a number of competing public interests: an interest in open justice, an interest in the protection of children, and an interest in the rehabilitation of offenders.

A commitment to open justice is critical to the rule of law. Open justice protects us from the vagaries of secret courts, and enables us to know the law as it would be applied to each of us. It can reflect and publicise the community's standards by way of public disapproval of unethical, immoral or illegal behaviour.

However open justice need not conflict with a commitment to protecting the rights of children.

The United Nations Convention on the Rights of the Child, to which Australia is a signatory, recognises that children, "by reason of (their) physical and mental immaturity, (need) special safeguards and care, including appropriate legal protection". The Convention recognises that children have certain rights regarding the justice system, including an expectation that justice will be administered in a manner consistent with the child's human dignity.

Article 16 of the Convention protects children from arbitrary or unlawful interference with their privacy, while Article 40 states that children accused of a criminal offence must still be treated in a manner "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".

Balancing the interests

A number of laws in NSW seek to give effect to the principles of the Convention on the Rights of the Child, by balancing the public interest in open justice with the protection of children and the rehabilitation of child offenders. These include laws dealing with the operations of the Children's Court, the administration of sentences, and the time periods after which convictions as a juvenile may be disregarded, or 'spent'.

In particular, the NSW law [2] has since 1999 prohibited publication without consent of the names of children convicted of non-traffic offences, except in very limited circumstances. Publication is only allowed where:
· the Crown has sought publication,
· the child has been convicted of a "serious children's indictable offence" (homicide, aggravated sexual assault, or another crime punishable by imprisonment for life or for 25 years),
· the publication is "in the interests of justice", *and*
· the prejudice to the child, arising from the publication of their name, does not outweigh the 'interests of justice'.

Under the current law, each matter is determined on its merits by the sentencing judge.

Recent public debate about naming child offenders

Earlier this year, a number of young men in Sydney were convicted in relation to a series of sexual assaults by 'gangs'. A number of the offenders were under 18 years of age at the time of the offences, although they were adults by the time they were convicted.

Two of the six convicted men were named by the sentencing judge on 12 July 2002, while the other four have not yet been sentenced, and therefore cannot yet be named.

The fact that these young men were charged, convicted and, in the case of the first two already sentenced, sentenced to lengthy terms of imprisonment, reflects how strongly we as a society condemn their actions.

Whether or not the other four offenders are also publicly named is a matter for the sentencing judge to determine, at the time of sentencing, under the terms of section 11 of the Children (Criminal Proceedings) Act.

However the Premier has recently suggested that children convicted of sexual assault do not deserve the protection of privacy. The shadow Attorney General Mr Chris Hartcher has also claimed recently that the law ought to be amended, suggesting that any child convicted of a crime punishable by more than five years' imprisonment should be publicly named and shamed.

Privacy Commissioner's position on proposed changes to the law

In examining any proposal to amend the current law on publicly naming child offenders, the question for each of us must be whether an erosion of child offenders' privacy rights would further the interests of society as a whole.

The detrimental effect of naming child offenders is already recognised in the Children (Criminal Proceedings) Act. The general prohibition on naming is only lifted in certain circumstances, as outlined above. Parliament has therefore intended that child offenders should be protected against public naming in all but a few circumstances, and only then where a judge has determined the matter on its individual merits.

Allowing more 'naming and shaming' of child offenders than is currently allowed under the law might feed public curiosity, but what might interest the public at a particular point in time does not necessarily equate to the public interest.

It has long been accepted that children who commit crimes must be given the best possible chance of rehabilitation. Children deserve a second chance, and indeed the majority of people who offend as children never re-offend. Because the law has protected their privacy as juveniles, they can enter society as law-abiding adults, knowing that they can be free from the mistakes of their past.

A law such as that which Mr Hartcher has suggested would, for example, see the automatic naming of children convicted of such crimes as larceny, malicious property damage, or cultivating cannabis. To allow the public naming of children convicted of mid-level crimes will deprive children of their human dignity, and damage their chances of rehabilitation.

Publication of a child offender's name will effectively add to the sentence imposed by the court, doubly punishing child offenders with lifelong stigmatisation - a constant fear that one day a future employer, or neighbour, a friend or colleague will trawl the internet or newspaper archives and find out about the mistakes they made as a 15 year old. Their chances of rehabilitation will be substantially reduced as a result.

Removing the current judicial discretion would also not serve society as a whole. Judges, having heard all the evidence and submissions in a particular case, are in a better position than Members of Parliament to determine where the public interest rests. The possible repercussions of publication, not only for offenders but for innocent members of their families, their victims, and indeed for unrelated people with the same or similar names, must be subject to measured consideration, rather than quick, politicised reactions within the highly charged 'court of public opinion'.

For these reasons I would not support any change to the current laws, which already balance the competing public interests in open justice, rehabilitation, and children's privacy.

I would furthermore urge the Government to defer any proposal to amend the current laws until the NSW Law Reform Commission has finalised its reference on sentencing young offenders [3].

Privacy protection is not only in the interests of child offenders. The interests of justice, and of society as a whole, will not be served by further eroding the privacy rights of children.

Anna Johnston
ACTING PRIVACY COMMISSIONER
23 July 2002

Footnotes

1 By 'child' I mean anyone under the age of 18.
2 Section 11, Children (Criminal Proceedings) Act 1987 (NSW).
3 NSW Law Reform Commission, Issues Paper 19, *Sentencing: Young offenders*, 2001. Submissions closed on 30 September 2001.

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