'Naming and shaming' juvenile offenders in the Northern Territory

By Mark Hunter*

The principle of open justice is well established at common law in Australia, and for many good reasons. Only in the Northern Territory does the law fail to recognize an exception to this principle in respect of juvenile offenders.

In every other Australian jurisdiction the legislature has attempted to strike a balance between the public interest in open justice, the protection of children and the rehabilitation of child offenders. For decades in the Territory it has been open slather for the media in respect of 'naming and shaming' children who have been found guilty in court.

INTERNATIONAL LAW

The *Northern Territory News* ("*News*") has for years exploited the failure of successive Territory governments to give full legislative effect to the principle enshrined in Article 40 of the *United Nations Convention on the Rights of the Child* ("CROC"). Australia ratified CROC in December 1990. The standards contained in CROC are applicable at all levels of government in Australia.

Children have been pursued by photographers outside Territory courthouses. They have subsequently been identified by name and image in the *News* with inflammatory descriptions such as "bored thug".[1]

In 2003 the hearing of a single criminal charge laid against a child led to the *News* devoting almost half of page one to the juvenile offender's photograph – on two occasions.[2] The boy was identified in these articles by name and age; he was only 15 years old at the time of the commission of the offence. Everywhere else in Australia, this kind of disgraceful media conduct is curtailed by legislation. In every other Australian jurisdiction the publication of a juvenile offender's identity is either prohibited outright or permitted only with leave of the court.[3]

Article 16 of CROC protects children from arbitrary or unlawful interference with their privacy, and Article 40 states that children accused of a criminal offence must 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."

The Territory is also out-of-step with the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* ("the Beijing Rules") which provide:

> *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.*

The UN Committee on the Rights of the Child encourages State Parties *to implement their international obligations under CROC in light of the Beijing Rules*. Australia has publicly supported this approach,[4] but the Beijing Rules are not binding under international law.

YOUTH JUSTICE ACT (NT)

The *Youth Justice Act (NT)* commenced operation on 1 August 2006. The Juvenile Court has been renamed the Youth Justice Court. This Act's almost 100 pages seek to give effect to no less than 18 "youth justice" principles including:

> *s4 (n) punishment of a youth must be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise* ***to develop in beneficial and socially acceptable ways****; and*
>
> *(p) programs and services established under this Act for youth should... (iv) encourage attitudes and the development of skills that* ***will help them to develop their potential as members of society*** (emphasis added).

It is reasonable to assume that those who drafted

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the *Youth Justice Act* considered interstate legislation which outlaws 'naming and shaming' juvenile offenders, and the bad record of the *News*. Astonishingly, it was decided that preserving the status quo would better promote these so-called youth justice principles.

Given the legal position in every other Australian jurisdiction, it is remarkable that the Attorney-General, Peter Toyne, did not see fit to request a report on this issue from the Northern Territory Law Reform Committee.

In the Second Reading speech of the *Youth Justice Bill (No 2) 2005*, the Attorney-General described "a process of extensive consultation with stakeholders" by a working party, following the release in March 2004 of a discussion paper on a review of the *Juvenile Justice Act*.[5] He claimed that the new legislation's "guiding principles" are based on "national standards *and international conventions* relating to the treatment of young offenders" (emphasis added).

The Government's working party *did* receive submissions in support of restricting the identification of juvenile offenders. The Law Society Northern Territory supports this law reform proposal[6], but the Attorney-General has stated that permitting the identification of children appearing before the Youth Justice Court is an important way of ensuring that "...the court processes being engaged in are commensurate with the community expectations of justice."[7]

If the Attorney is correct, and community expectations on this issue are consistent throughout Australia, then all other state and territory governments have for years been out of touch with their electorates. The absence of clamour interstate in support of naming and shaming children suggests that it is the Territory Government which is out of touch, and on this issue is pursuing a policy which has nothing to do with youth justice.

The Territory Government appears to have ignored illustrative guidance to the implementation of CROC, as provided by Rule 8 of the Beijing Rules. It is contended that the *Youth Justice Act* only partially complies with Australia's obligations under international law.

LEGISLATIVE HISTORY

The Territory has not just fallen behind the rest of Australia on this issue; we have, inexplicably, actually gone backwards.

Prior to its repeal in 1983, the *Child Welfare Act* (NT) governed the operation of what was then known as the Children's Court. Section 29 created a presumption in favour of the Court being closed. Section 30 prohibited any publication of "...a report of proceedings or the result of proceedings before the Children's Court unless... sub-section (b)... the publishing is done by the person in the performance of his official duties under an Act."

MCT V MCKINNEY & ORS

In the recent case of *MCT v McKinney & Ors*[8], the Northern Territory Supreme Court heard the appeal of a 15-year-old Aboriginal boy who wanted to *develop in a beneficial and socially acceptable way*, and *develop his potential*, by securing a job in Tennant Creek.

MCT was just 15 years of age when, in January 2006, he was dealt with for the first time in the Juvenile Court. He was concerned that his employment prospects in Tennant might diminish or evaporate if media reports of his offending identified him by name or photograph. Every edition of the *News* is sold in Tennant Creek, unless the plane which transports the newspaper each night from Darwin happens to encounter difficulties. The *News* had by early 2006 already established a bad track record for 'naming and shaming' child offenders.

Justice Angel was called upon to determine in what circumstances the Juvenile Court may forbid the publication of the name of a party.

Before Chief Magistrate Bradley (as he then was), *MCT* pleaded guilty to a total of five assault and stealing charges, and one robbery charge. Mr Bradley imposed a mix of bonds and a suspended sentence. In response to a defence request for a non-identification order, his Worship said:

> *I am reluctant to make such orders and there is nothing which makes this young man a great deal different from anybody else, but MCT just stand up for a moment.*
>
> *Are you going to give this a real shot? Well, what I am going to do is this, and I want this to act as an extra incentive for you. I make an order that your name and image not be published in relation to the serious charge, that last charge, whilst you comply with the terms of the suspended sentence...*
>
> *... The other ones* (charges) *are nothing out of the ordinary, every kid who comes through here is in relation to the same thing. The last one is the one which might cause, in my view unreasoning (sic) and shall I say headline grabbing publications which don't do justice to the truth of the matter.* (emphasis added).

MCT appealed against the refusal of the Chief Magistrate to make a non-identification order in respect of the other charges pursuant to s 23(1) of the *Juvenile Justice Act (NT)*.

Before the Juvenile Court, defence counsel emphasized *MCT*'s age, lack of prior offences, his need for rehabilitation and the fact that the boy intended to seek employment in Tennant Creek. A journalist from the *News* was alleged to have been in the courtroom during *MCT*'s proceeding.

Defence counsel informed Bradley CSM that his client had already twice been named in the *News* in relation to the charges before the Court and that further identification "...will only have a detrimental impact, and that cannot be in the interests of justice or in the interests of rehabilitation."

Before Angel J, counsel for the Appellant, Mr L Carter, relied upon *Simmonds v Hill*[9] and *Waldron*[10] in submitting that rehabilitation is the dominant sentencing purpose for juveniles. Justice Angel declined to accept the Appellant's submission that in the Juvenile Court the principle of open justice is adequately covered by *the right to publicize the facts of a case and the sentencing disposition*. His Honour determined that non-publications orders, made pursuant to s 23(1) of the *Juvenile Justice Act (NT)*, could only address *this* part of a case, which constitutes "...information relating to proceedings in, or the result of proceedings against a juvenile...". Section 50(1) of the *Youth Justice Act* is in almost identical terms to the now repealed s 23(1).

Justice Angel felt constrained by the terms of s 57 of the *Evidence Act (NT)* which his Honour determined "covers the field" in relation to suppression orders in respect of the names of parties or witnesses in Territory courts. Identification may only be suppressed where "... *the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party...* s 57(1) (a)

Before both the Juvenile Court and Angel J, the Director of Public Prosecutions opposed any restriction on publication of the proceeding. Ms Armitage (ODPP) submitted in the Supreme Court that shame about wrongdoing and acknowledgment of guilt are factors ***conducive to the rehabilitation process*** but they do not justify an order forbidding publication of the name of a party to proceedings. Justice Angel accepted this submission and observed in relation to "incursion(s) into the notion of open justice" that:

> *Embarrassment, fear of exposure, feelings of shame in the face of family members, even damage by publicity of proceedings are not relevant considerations.*

Presumably the greater the shame caused by the *News* to an Aboriginal juvenile such as *MCT*, the greater will be that child's prospects for rehabilitation and reintegration into society.

Justice Angel's judgment contains no reference to CROC, the Beijing Rules or relevant expert opinion. In short, his Honour found that the Territory legislature has all but excluded the possibility of a non-identification order being made in respect of a juvenile offender.

RETRIBUTIVE JUSTICE

Naming and shaming various types of alleged offenders is popular with media organizations worldwide. This type of publicity often bears the hallmarks of a sales pitch and retributive justice. In June 2006, the UK Attorney-General, Lord Goldsmith, released the names of 200 judges in England and Wales whose sentences had been increased on appeal. *The Sun* newspaper promptly commenced to publish on its front page photographs of the bewigged "offenders" as the paper "...names and shames ten of the top judges guilty of being soft on killers, child sex beasts, rapists and other violent criminals".[11] *The News* and *The Sun* are both owned by News Corporation.

The reality is that most teenagers are not as thick-skinned as one might reasonably expect a middle-aged judicial officer to be.[12] Nevertheless, Justice Angel was in *MCT* satisfied that "the cathartic glare of publicity" should hold sway in respect of the identification of child offenders, unless the child or the proceeding is "exceptional".[13] It is contended that international law and common sense dictate that childhood status alone justifies exceptional treatment and, at the very least, a legal presumption against identification.

STIGMATIZATION

A body of academic literature supports the proposition that the labelling of a child as a criminal increases the risk of the child coming to view him or herself as deviant, and behaving accordingly.[14] Instead of being conducive to rehabilitation, as the Crown argued in *MCT*, public shaming of child offenders has a disintegrative and stigmatizing effect, tending to create a class of outcasts, particularly within already marginalized sectors of the young population.

The identity of child offenders is for many citizens *interesting*. Further satisfying what is often just prurient interest, by publishing this information, constitutes a failure to serve the *public interest*.

It is inappropriate for a court to hold out a non-publication order as a 'carrot' to a child, and specify that the order's continued operation will be conditional upon the juvenile complying with a good behaviour

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bond. Such an order either is or is not warranted as a matter of law. At least the former chief magistrate correctly recognized that the identification of MCT would be a 'stick', and Mr Bradley adverted to the real risk that the *News* would report the court proceeding in an inflammatory and unfair manner. Reference to this problem in the Territory does not appear in Justice Angel's judgment.

REFORMING THE LAW

The law should give greater power to the courts to restrict publication which is harmful to individuals. In *Nationwide News v District Court of New South Wales* his Honour Justice Mahoney suggested that the law should be based upon an analysis of the harm to the individual by the publicity (the price paid) and whether this outweighs the public interest in the information (the benefit).[15] As an alternative reform, Mahoney J suggested an exception to the open justice principle based on "the harm, hurt and distress that may be caused."

Sentencing remarks in 2001 by (the late) Justice Stephen Bailey indicate that his Honour favoured law reform on this issue. In *R v H*[16], his Honour deemed it appropriate to make an order prohibiting publication of a child offender's name, the name of his school or "...anything else which could lead to his identification in any media reports of these proceedings." Unfortunately a national newspaper had already identified *H* when reporting his appearance in the Magistrates Court.

Justice Bailey justified the Court's non-publication order: "Further publication of the offender's name, in my view, would only damage his prospects for future rehabilitation." *H* was 17 years of age when he committed the subject armed robbery in Katherine.

CONCLUSION

Shaming should be directed at the act, not the juvenile offender. The Northern Territory Government should promptly rectify this glaring deficiency in the law, and provide child offenders in the Territory the same legal protection which benefits their interstate counterparts.

ENDNOTES

1. Watt R. "Bored thug walks free" *NT News* 28 May 2003, p1-2.
2. Smith C. "Gang of 30 bashes 3 teens" *NT News* 16 April 2003, p1-2.
3. *Children (Criminal Proceedings) Act 1987* (NSW), s 11; *Children and Young People Act 1999* (ACT), s 61A; *Children and Young Persons Act 1989* (Vic), s 26; *Magistrates Court (Children's Division) Act 1998* (Tas), s 12; *Young offenders Act 1993* (SA), s 13; *Children's Court of Western Australia Act 1988* (WA), s 35; *Childrens Court Act 1992* (Qld), s 20.
4. See generally – Senate Legal and Constitutional Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, paras 5.47-5.49 http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/mandatory/report/contents.htm
5. NT Hansard, 30 June 2005.
6. "Youth Media – Naming and Shaming" *Stateline NT*, ABC TV 4 August 2006. http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/stateline/nt/content/2006/s1706846.htm (viewed 5/8/06).
7. Toyne P., letter to S. Payne (Dir. NAALAS) dated 6 December 2005.
8. Unreported [2006] NTSC 35, 3 May 2006.
9. (1986) 38 NTR 31 at 33.
10. (1988) 56 NTR 1 at [19].
11. "We put judges on trial" by G. Pascoe-Watson. *The Sun* online, 16 June 2006, www.thesun.co.uk/article/0,,2006270085,00.html viewed 16/6/06.
12. *The Sun*'s judicial name and shame campaign continued. Judges admitted to feeling "low" and "dispirited" as a result. For example, see Gibb F. "Chief Justice hits back in row over 'soft sentencing'" *TimesOnline* 19 June 2006. www.timesonline.co.uk/article/0,,29389-2231934,00.html viewed 16/7/06.
13. *MCT v McKinney* (supra) at p16.
14. See generally Braithwaite J. *Crime, Shame and Reintegration* (1989), Cambridge University Press, Melbourne. Also Botchkovar V. and Tittle C. "Crime, shame and reintegration in Russia" (2005) Vol. 9 No.4 *Theoretical Criminology*, SAGE Publications.
15. (1996) 40 NSWLR 486, at 494-495.
16. Unrep. NTSC, 9 October 2001.

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smaller practices. For instance, larger practices that have had the "managing the retainer" component of phase 3 could undertake the "managing critical dates" component and vice versa. Reviews could otherwise include a general audit of compliance with improvements made including a "spot review" of files with a focus on issues previously raised. It has also been a suggestion there be an overall focus in all practices on matters raised in claims or notifications relating to practices generally.

Following on from Stephen Mason's successful CPD on the risks stemming from the recent developments in technology, some of which have not really been addressed by the legal profession, it is acknowledged they represent one of the major risks to firms which needs to be addressed either by special CPDs or as part of the QPR process.