



NATIONAL
JUDICIAL
COLLEGE
of Australia



THE AUSTRALIAN NATIONAL UNIVERSITY

Sentencing Conference 2010
Canberra 6 & 7 February 2010

Sentencing Indigenous Offenders
The Aftermath of Sentencing: Naming and Shaming of Indigenous Youth in the Northern Territory

Assistant Professor Robyn Lincoln, Bond University QLD, and Professor Duncan Chappell, University of Sydney

The paper was delivered by Duncan Chappell

About four years ago I was asked to appear as an expert witness in a case, *John Fairfax Publishing*, an application against MSK, MAK, MMK and MRK. The case involved a series of very aggravated rapes in Sydney which caused, amongst other things, the writing of a very good book by Paul Sheehan, called *Girls like You*, which describes the events. But amongst other things, as you will gather from the title of the case, none of the defendants was actually named and instead are referred to by acronym. The application by Fairfax sought to remove the prohibition that had been made on the publication of these names and to allow these individuals to be identified.

I was asked by the defence to act as an expert. One of my friends and colleagues at the University of Sydney as well was asked by the applicant, so it looked like it was going to be a joust of experts from the same Faculty but fortunately, the matter did not reach that far.

Under the provisions of the *New South Wales Children's Criminal Proceedings Act 1987*, where a child is appearing before a court in criminal matters their name must not be published or broadcast in any way that connects them with that criminal proceeding. But there is an overriding discretion for the court, where the matter is a serious one, to order at the time of sentencing that publication of the name of that child should occur. In fact, the criteria that must be applied by the court is that the publication must be in the interests of justice and that the prejudice to the person named should not outweigh those interests. I have to add that that is not a picture of a New South Wales Juvenile Court, unfortunately. It is from Victoria, which seems always to be ahead of us here in New South Wales, including having fewer people in prison and certainly fewer children in detention.

The case came before Chief Justice Spigelman and colleagues on the Court of Criminal Appeal and they decided to resolve the issue on a standing matter first, rather than dealing with the substance of the case. I should add that the pictures here of the Chief Justice and other political figures are all taken from their public websites but I thought, if we're talking about naming and shaming, it was important that they should get an equal hearing, and lest I be accused of shaming the Chief Justice I would just

like, in fact, to do the reverse and praise him since he was one of the best students I have ever had in my criminal law class, back in the 1960s!

When the matter did come before the court, the Chief Justice said that he felt that this was in fact a case where the heinous nature of the systematic course of predatory conduct was one where the additional element of public shaming could fulfil the function of retribution and general deterrence. He indicated, I think, that if it had been a matter of substance the court would probably decide to remove the prohibition on the naming of the juveniles, but in fact they ruled that there was no standing for Fairfax in this issue because the order for publication had to be made at the time of sentencing, which it clearly had not. There was therefore no way in which it could be brought at this late stage in the proceedings. So, the case is really a precedent for little other than to indicate that there are some situations in New South Wales where children can be named; indeed one such case is another rape where a gang of brothers, were involved and at the time one or more of them were juveniles. At the time of sentencing the Court determined that they would reveal their names. Pictures were shown on network news and not just, given the notoriety of this case, in New South Wales but nationally.

Robyn and I subsequently decided, having gone through this experience, that we would publish something on it. The issue is covered in more detail in *Current Issues in Criminal Justice*.

~~Today, our agenda is to talk about the following matters and I have to confess that it probably bears a little less relationship to the title than we would have hoped because the final aspect of the agenda is to talk about our research in the Northern Territory but at this stage, unfortunately, we have not got into the field so we have little to tell you about the research and rather more about what leads us to the research, and also some of the issues that we think are important in this area, in what is becoming a highly charged and political debate in this country. So,~~

We want to discuss the human rights principles involved and the way we have responded to them here in this country. We will be looking at some of the contemporary political developments including a New South Wales Legislative Council Select Committee that has looked at this in considerable depth. Finally we explain a bit about what we hope to do in the Northern Territory and about some of our very much preliminary findings.

As far as the human rights issue is concerned with naming and shaming, the *Convention on the Rights of the Child*, which is one of the most endorsed human rights treaties in the world, ratified as you can see by all but two countries and adopted by the United Nations General Assembly in November of 1989, defines a child as every human being below the age of eighteen years. This core convention, to which Australia is a ratified party, includes among other things that state parties who recognise the rights of every child involved in the criminal justice process, ensure the child is treated in a manner that is consistent with the promotion of the child's sense of dignity and worth. This includes situations where they are accused of a crime, their privacy should be fully respected at all stages of the proceedings.

That convention had been preceded by another set of rules or minimum standards set by the United Nations on the administration of juvenile justice, something that we

tend to call *The Beijing Rules*. These reflect the same principles and say that no information that could be likely to lead to the identification of a juvenile offender shall be published. Therefore, there are strong normative international standards here that indicate that this is the approach that should be adopted in dealing with young people who are being prosecuted and dealt with in the courts for crime.

In fact, with one exception, the New South Wales legislation which I referred to briefly before, and that of all other jurisdictions of this country, have, in fact, incorporated that within their legal principles, basically banning the publication of any information naming any child involved in a criminal proceeding, with exceptions like the one I described to you a moment ago. The noted exception is, I am afraid, the Northern Territory which rather than prohibiting publication in fact allows publication of proceedings involving the Youth Court but with a power for the Court to order that the name of a young person not be published if there are grounds for so doing, the complete converse of the situation applying in the rest of the country and, not surprisingly, out of accord totally with the human rights principles set out above.

It is important to remember that we are talking now about a provision that applies to all young people before all courts in this country but, as is so regrettable, it is indigenous young people who come in such overwhelming numbers before the court; the latest figures from the Australian Institute of Health and Welfare remind us that only 5% of young Australians are Aboriginal or Torres Strait Islanders but 40% of those under supervision on an average day were from this particular group of citizens. Their over-representation is particularly prominent in detention, over half of those in detention in an average day, and 60% of those who are unsentenced are, in fact, aboriginal or Torres Strait Islanders.

Indigenous young people aged between ten and seventeen years are sixteen times as likely as a non-indigenous young person of the same age to be under supervision, and thirty times as likely to be in detention. So when we refer to the naming and shaming of young people we are referring more to indigenous young people than other non-indigenous people.

If that were not enough the Northern Territory opposition has indicated in the past that they were very much in favour of adding to this naming and shaming. The opposition spokesperson at the time said that they would make people, among other things, wear bright orange t-shirts with the words 'name' and 'shame' on them, if they were able to achieve government. The Human Rights Commission, not surprisingly, said this was not to be promoted and pointed to the human rights issues already set out.

However it did not stop debate, and indeed Queensland's Chief Justice at the time is reported to have suggested that there should be a power for the courts to name juveniles who repeatedly broke into homes, stole cars or sprayed graffiti. He said that while many people would not agree with this it was his job to encourage debate. Well, he did not really need to encourage that debate very much because the politicians were very much on the bandwagon at that point. In Queensland especially, at the election in 2008, the opposition said that they would, if elected have juvenile offenders age fourteen or over who have committed serious crimes named and shamed. The government as it was then and is now, led by Premier Bligh, was opposed to that idea at the time of the election but since then I understand they have changed their mind, and have now said that 'tough love' is going to prevail in

Queensland and they will now be naming and shaming the worst of their juvenile offenders.

In Western Australia, the Attorney-General has indicated that the government is about to introduce naming and shaming draft legislation. This is based on legislation which has been operating in the United Kingdom for the best part of a decade, involving the issuing of what are known as 'antisocial behaviour orders' or ASBO's. The Aboriginal Legal Service of Western Australia said that this was an extraordinarily bad idea and one that was, undoubtedly, again going to sweep into the net of naming and shaming principally indigenous young people. While I have not seen the draft, it appears the legislation was introduced into the Western Australian parliament just before Christmas. According to the report in the Western Australian press the legislation provides that a young person convicted of an offence that could limit someone's enjoyment of public or private property would be eligible for a 'prohibitive behaviour order'; the order would limit where they can go and with whom they associate. A breach of the order could incur a gaol term of up to two years or a six-thousand dollar fine.

These are regulatory matters, regulatory offences, civil in that sense, without the protections that would normally be found even in the criminal process but it seems that they are now not just a glint in the eye of the Western Australian government but are established and underway in the legislative process. The Attorney-General, explaining that it was based on the British idea, said also that this "is the single biggest shift in the way in which Western Australia goes about policing and preventing antisocial behaviour".

In the United Kingdom the courts have had this power for a considerable time, and it has had a number of results of which an example follows: in one area of England a leaflet appeared through the letterboxes of various residents which they thought was advertising but when they looked more closely realised that it was a unique experiment in which seven local youths, the youngest of whom was just fifteen, were named and shamed in the leaflet as members of a gang that had been terrorising the neighbourhood. It was the first mass-antisocial order in Britain. All seven were banned from the streets in the area where they were said to have waged the campaign of harassment and their names and photographs were printed along with a map indicating the areas from which they were to be excluded. If you are not one of those who is unfortunate enough to be caught in the provisions of ASBO's in the United Kingdom you can always buy a t-shirt which indicates your willingness to join the group. Those that can afford to buy the t-shirts are probably not those who are subject to the orders, but it is a great gift as a stocking-stuffer at Christmas.

In 2007 the NSW Attorney-General said that the whole idea of naming and shaming was going to be given to a Legislative Council Select Committee. In doing so he mentioned the case which I started with, the case in which the names of the Pakistani brothers had in fact not been revealed to the media. The committee did, an excellent job. It had extensive hearings. It did very extensive research. It published a report in 2008 about the remit that they had and they were unanimously of the view – and it was a bipartisan committee – that the protections that existed in NSW should not only be retained but those protections should be extended to the investigative stage of criminal proceedings- at the moment these are not covered by that protection. That means that if the police are investigating a matter and before any charges are laid it is

possible and it does occur that the names of young people can be publicised in the media. The Committee also recommended that this was a matter of sufficient importance and gravity that it should be referred to the Standing Committee of Attorneys General (SCAG). The committee took the view that there ought to be uniform laws on this, rather than each jurisdiction being allowed to have its own procedures.

To his credit the Attorney-General, who must have been a little shocked by the outcome, accepted seven of the recommendations, the eighth being that of extending the protection. He thought that was not appropriate, and he also indicated that he considered giving guidelines to the courts as to how they should exercise their discretion in deciding when to publish names of young people. Those guidelines, to my knowledge, have not yet appeared.

So, does shaming work? We have a significant history in the criminal law of trying to use shaming but it has proven to be singularly unsuccessful. Shaming may work if it is a form of re-integrative shaming. In fact we have substantial evidence from the type of juvenile conferencing, and other factors that now are quite commonplace in most jurisdictions in this country, that if it is re-integrative and done in a very careful and controlled and measured way it may have good outcomes. However, we also know now from a good deal of research that dis-integrative shaming, which is analogous to putting people in the stocks and deriding them, that this not only may be labelling and stigmatising but it may actually have a reverse effect, and make people more, rather than less, likely to offend.

Some of the evidence of this can be found from some of the experience in the United Kingdom, with the ASBOs that I referred to. There was a very interesting series of photo-essays done by the Guardian newspaper recently, and I have drawn on these to illustrate the negative effect that ASBOs can have. One of the pictures showed three young people with their mum and sister. Two of the boys, Bobby and Craig, received ASBOs and Craig's face was on the front page of the local paper. Leaflets were put through all of the doors in the neighbourhood, and now he finds himself on the receiving end of threats and abuse by adult people in the street.

Another photo of a young man appears on the back of a bus. His name is Adam Rooney. He had only had two minor charges against him before he and his twin brother were both given ASBO's. Liam, the other twin, is in prison for breach of an ASBO and Adam's picture is on the back of buses on three local bus routes. He finds it impossible to get a job, and when the reporter and photographer tried to meet up with him subsequently he found he too was back in custody, having breached the order that was made against him.

Another picture was of a number of fourteen-year-olds who were the subject of an ASBO, being a group of girls whose crimes included singing and shouting in the street, knocking on people's doors and running away. They were singled out and put into the local paper and their names distributed in leaflets about them which caused a lot of the members of the community to ostracise them. They are, importantly, not allowed to whistle or sing in the streets. This could be what is awaiting Western Australia

The research that we hope to conduct in the Northern Territory relates to the impact of the current law there which allows the naming and, we can presume, shaming of the young people who appear in the Children's- or Youth Court, and which has given great cause for concern. It is a matter which has certainly received attention from, among others, the National Australian Aboriginal Justice Agency, or NAAJA, in the Northern Territory, which we are working with on this project. We are being funded by the Australian Institute of Aboriginal and Torres Strait Islander Studies to look at this issue. Our methodology will be to look at the media and what the media portrays, how often they do publicise the names of young people and in what format, to do interviews with key people, including local lawyers, magistrates, judges, the media and others, and also to look at some case studies, to look in more detail to what has happened to young people who have actually experienced this type of behaviour order.

We have only now done a little of the media survey. We are going into the field in the near future. At first impression there are three points to make. First, we think that there is great inconsistency in the way in which this allowing publicity of names of young people is applied. It seems that applications for a bar on the publication of names is made on a relatively ad hoc basis, and certainly it is also found that in certain matters the application is made at the point where a conviction occurs. In the earlier proceedings no application had been made and the name of the child was already emblazoned across the paper, so it came a little late in the proceedings.

Secondly, there is the issue of the insidiousness of the publicity. Howard Sercombe who did work for the Royal Commission into Aboriginal Deaths in Custody pointed out some time ago that the media portrayal of crime is that the face of the youthful offender is an indigenous one; this certainly seems to be the case in the media that we have looked at in the Northern Territory.

The third matter is that the most of the publicity that is given in the media to these events is at the initiation stage of proceedings where the police are involved and where the journalists usually just rely on police reports, without any comment or addition. Basically, it is a bit of lazy journalism.

I hope that in a year or more, we will be able to tell you our results and findings but meanwhile I recommend we watch the issue of naming and shaming.

Thank you.