Submission re: Court Information Act, 2010

Children's Criminal Proceedings Act, 1987

Court Suppression and Non-publication Orders Act 2010

I refer to the current inquiry into the Court Information Act and other associated legislation which impacts on the identification of offenders.

If I might start with the Court Information Act and specifically to S11, which speaks to the entitlements of Parties to Proceedings, where there is an entitlement to information, subject to Suppression orders and Non-Publication Orders made by the relevant court.

This Section ignores the fact that Victims of Crime are never party to proceedings in the Criminal Jurisdiction, as the carriage of prosecution falls to either, the NSW Police, the ODPP or in some cases, relating to Continuing Detention Orders and Extended Supervision Orders, The NSW Crown Solicitor.

The nett result of this omission is that for some Victims of Crime, access to court Documents is not automatically derived. I believe that the Act should recognise the need for Victims to access court information.

I say this for the following reason. I often act for Victims in proceedings before the NSW State Parole Authority and the NSW Mental Health Review Tribunal.

In the former Jurisdiction, Victims who have a right to make submissions relating to the potential release of a perpetrator, are required to make reference to the Judges remarks on Sentencing (S135 Crimes (Administration of Sentences) Act) and therefore accessing Judgements is a necessary requirement to make cogent submissions. Currently less than 5% of District Court Judgements are published on Caselaw which means that when notice is provided that a prisoner is about to become eligible for release, I have some thirty days to provide a written submission, either supporting or opposing release. Currently it often takes at least 60 days to access the documents, which prevents me from providing probative submissions to the State Parole Authority.

I would add that Local Court matters are not an issue in relation to Parole, as sentences imposed by the Local Court are always less than three years, where release to parole is automatic, thus not requiring submissions from the Victim.

Similarly, for matters before the Mental Health Review Tribunal, it is necessary for registered Victims to confine their submissions relating to Forensic patients, to the care and treatment of that patient. In order to so do, it is necessary for Victims to be able to access court documents which deal with the diagnosis and expert opinion, that lead to such a diagnosis, to ensure that their submissions relate to matters of fact and not opinion, of the Victim. Currently access to such documents can be difficult because of the sensitive nature of psychiatric reports, and the fact that no right to access exists in the current legislation, as Victims are not party to the proceedings.

In relation to the Children's (Criminal Proceedings) Act, 1987 I wish to make the following comments and specifically I wish to address the issues relating to S15.

Section 15A is a blanket prohibition regarding the naming of Juveniles in Criminal Proceedings, the rationale for which is admirable and in the great majority of matters, appropriate. I am however of the view that the manner and placement of Section 15A as being the prime directive, imposes an impediment to the operation of the subsequent sections, all of which, relate to the exceptions to 15A.

Section 15C relates to those cases where the naming of a juvenile is "not prohibited", if the offence is a Serious Indictable offence, subject to assistance from Section 15C (3) which reads as follows;

(3) In determining whether to make such an order, a court is to have regard to the following matters:

(a) the level of seriousness of the offence concerned,

(b) the effect of the offence on any victim of the offence and (in the case of an offence that resulted in the death of the victim) the effect of the offence on the victim's family,

(c) the weight to be given to general deterrence,

(d) the subjective features of the offender,

(e) the offender's prospects of rehabilitation,

(f) such other matters as the court considers relevant having regard to the interests of justice.

In essence, it is my view, that those matters detailed above are of little assistance to a Judicial officer when making a determination as to whether to prohibit the naming of an offender. I say this as those matters raised in items (c) (d) and (e) are predominantly reasons not to name.

It is well known that General Deterrence when dealing with Juveniles is of little value as others of similar age are rarely aware of such Judgements and more importantly have such a small attention span, than such deterrence rarely has any effect.

The subjective features of offenders who commit serious indictable offences, are generally very complex and it is impossible to determine at the time of Judgement as to whether various forms of treatments will undo the harm already present.

Further, when offenders commit crimes as juveniles, it is also almost impossible to determine how they will respond to rehabilitation, if at all, so understandably Judges will err on the side of caution and decide against publication.

It is my view that provision should be made to re-assess an offender, after a period of rehabilitation, to make such a decision, although my preference would be that such assessment be made, once the offender attains the age of 21. I also contend that, having attained such an age, there should be a general presumption to name the offender for serious indictable offences, unless "special circumstances" can be

established. I would envisage that Special circumstances would include Cognitive disability and chronic Mental Health issues.

I would also raise the issue detailed by the current S15C(3)(b) which details the effect on members of the family in the event of a death. This section is imperative but, in my view and the view of a great number of families that I represent, is too limiting. I believe that this should be extended to the community, as currently witnessed by the reaction of the community to the potential release of DL (see R v DL 2008 NSWSC1199 & DL v R 2017NSWCCA57)

The family of the deceased Tanya Burgess have raised a petition to ensure that the offender DL be officially named which to date has gathered in excess of 125,000 signatures see https://www.change.org/p/hon-david-elliott-mp-keep-our-daughters-safe .

It would be easy to attempt to dismiss this matter on the basis of over emotional parents seeking retribution against the offender, in their lobbying to have this Juvenile Offender named, following the death of their daughter, but in my view, such would be a facile argument.

The offender DL stabbed Tanya Burgess over 40 times, in what was described to the court as a “frenzied attack”, there being no other descriptor for this offence than “heinous” and yet he was not named. The offender continues to deny his involvement in the matter, as evidenced by the Appeal to NSW Court of Criminal Appeal, there being no remorse, responsibility nor rehabilitation.

It is a fundamental concept in Restorative Justice, that an offender take responsibility for their crimes and accept that, the consequences of criminal action extends far beyond the impact that it may have on the offender. When an offender can hide behind the veil of anonymity, the concept of responsibility is lost.

It is my view and that of the Victims I represent, that there should be a presumption to name Juvenile Offenders who commit serious Indictable Offences, with the capacity to find Special or Exceptional Circumstances to those Juveniles with Cognitive Impairment. I believe it is essential that some provision should be clearly stated to separate the difference between Serious Indictable Offences and other Indictable matters.

I now turn my attention to the Court Suppression and Non-publication Orders Act, 2010, which in general terms appears to operate well, although is clearly not designed, nor probably capable of being designed, to anticipate every possible circumstance presented to a court.

Section 8 of the Act, empowers courts to make orders either suppressing the identity of, or preventing publication of, the identity of certain persons and specifically in Section 8(1)(d) it states the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the *Crimes Act 1900*),

As previously stated, it should be borne in mind that Victims are not a party to a criminal prosecution and therefore are not necessarily protected by this provision especially in cases where the parent/s and or other family members of a victim may be disadvantaged when they are not called to provide evidence to the court and therefore, are not considered witnesses.

I also have great concern that an offender can be afforded the protection of the Section on the basis of embarrassment. I appreciate that under Section 8 (3) an offender is required to satisfy Exceptional Circumstances in order to seek such protection, but it belies logic that an offender can cite embarrassment as a reason not to publish their name.

All criminal offences have an element of embarrassment, but, if the purposes of Sentencing are truly meant to reflect community denunciation, hiding behind anonymity because of embarrassment, subverts the sentencing process, especially when the concept of rehabilitation is a fundamental precept of sentencing.

It would therefore be my submission that Section 8(1)(d) be amended to remove reference to “a party”. I would further contend that “family member of a witness”, be added to the Section.

I would also concede that perhaps some consideration should be given to adding, or at least recognising, the concept of Extra Curial punishment when considering the suppression of or non-publication of a party, but again, only in Exceptional Circumstances.

I would also comment that although courts do, in general principle, confer with the Crown as to the wishes of a Victim in relation to their name being suppressed or Not Published, there does not appear to be any such power directly given to the court. I raise this issue as many victims I represent, wish to be identified in matters of a sexual nature but have their identities suppressed, as a matter of process and no consultation has been sought.

I would also comment that currently we have seen an increase in the number of fraud matters before the courts where “electronic scams” have been perpetrated against vulnerable members of the community. Scams concerning online dating and the like have seen situations where victims of such scams have been severely embarrassed by their responses to such scams and no real provision has been made in the Three Acts currently being reviewed, to such Victims. I believe that the principles I have detailed in my submission equally apply to such Victims.

I do not wish to be seen as being “precious” in relation to this submission but would comment that the relevant legislation being reviewed, especially the Children’s Criminal Proceedings Act, 1987 were enacted at a time where Victims of Crime were not foremost in the minds of legislators and this may be the reason that the limitations of the various Acts are capable of criticism.

As a society however the rights and needs of Victims are far more relevant today than they once were. Victims of Crime are merely a reflection of the composition of todays society and the amendments that we seek are not purely sought to benefit us but all members of society. When one considers recidivism rates and the relatively poor rates of rehabilitation, the amendments we seek are made to ensure that the concepts of Restorative Justice are more closely aligned with community expectations.

I thank you for your consideration.

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Victims Advocate
[redacted]

24th May 2019.