

A new exception to the principle open justice?

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The Chief Justice of New South Wales, the Honourable J.J. Spigelman AC, has described the principle of open justice as "one of the most pervasive axioms of the administration of common law systems"ⁱⁱ, citing Jeremy Bentham's aphorism that "Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial."ⁱⁱⁱ

The principle was recently committed to statute in NSW by section 6 of the *Court Suppression and Non-Publication Orders Act 2010*.

Nowhere is the principle of open justice more keenly observed than in criminal trials where, according to Lord Steyne in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at 607,

"The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. ... Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law."

The exceptions to the principle are therefore few and strictly defined, and it is accepted that Parliament alone, not Courts, may expand the list: *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 per Spigelman CJ at [19].

Family Law Amendment (Family Violence) Bill 2010

In November 2010 the Federal Attorney-General, the Hon. Robert McLelland MP, released for public comment an Exposure Draft of the *Family Law Amendment (Family Violence) Bill 2010* (Cth).

According to the Consultation Paper accompanying the release of the Exposure Draft, the purpose of the Bill is "to strengthen the role of family courts, advisers and parents in preventing harm to children while continuing to support the concept of shared parental responsibility and shared care where these are safe", and thereby to "prioritise the safety of children to ensure the best interests of children are met."

Of the many amendments to the *Family Law Act 1975* (Cth) proposed by the Bill, Item 13 would insert the following subsection into section 60B of the *Family Law Act*:

"An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989."

United Nations Convention on the Rights of the Child

The UN Convention on the Rights Of the Child (UNCROC) was adopted by the UN General Assembly on 20 November 1989, and was ratified by the Australian Government in 1990.

According to UNICEF, "[UNCROC] protects children's rights by setting standards in health care; education; and *legal*, civil and social services."^{iv}

According to the incumbent Attorney-General, "In ratifying [UNCROC], the Australian Government agreed to develop and undertake all actions and policies to promote the best interests of the child."^v Passage of the Bill will therefore give domestic effect to Australia's obligations under UNCROC.

What exceptions to the principle of open justice currently exist to protect children?

Children involved or implicated in criminal proceedings in NSW are currently protected by section 15A *Children (Criminal Proceedings)* Act 1987, which prohibits the publication or broadcast of the name of any person if to do so would connect that person with proceedings - whether as victim, witness or fraternal or sororal relative, or whether mentioned or otherwise involved in the proceedings - and the offence was committed when the person was a child.

Similar protections exist in relation to children who appear or are involved, or who are reasonably likely to appear or to be involved in Children's Court and non-Court proceedings: section 105 *Children and Young Persons (Care and Protection)* Act 1998 (NSW).

It can be seen, however, that these prohibitions do not currently extend to protecting the names and identities of children or young people who are *not* involved or implicated in proceedings, such as the children of persons convicted of an offence.

Effect of UNCROC on the Principle of Open Justice

Article 2(2) UNCROC provides that:

"States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

If passed in its current form, therefore, the *Family Law Amendment (Family Violence)* Bill will have the effect of extending existing protection of children, by prohibiting discrimination or punishment brought about by the activities of their parents, including - arguably - by prohibiting the publication of their names.

As such, the Bill would create a new exception to the principle of open justice.

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ⁱⁱ The Honourable J.J. Spigelman AC, "The Principle of Open Justice: a comparative perspective" (Speech delivered at the Media Law Resource Centre Conference, London, 20 September 2005).

ⁱⁱⁱ John Bowling (ed), *Works of Jeremy Bentham* (1843) Vol. 4 at 316-317.

^{iv} <http://www.unicef.org/crc/> (italics added).

^v Consultation Paper, Exposure Draft Family Law Amendment (Family Violence) Bill 2010 2010 (Cth).