

IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

Australian Broadcasting Corporation

and

Department of Human Services & others

<u>JUDGE:</u>	Peter Couzens
<u>DATE OF HEARING:</u>	25 June 2014
<u>DATE OF DECISION:</u>	2 July 2014
<u>CASE MAY BE CITED AS:</u>	ABC and DHS & others
<u>MEDIUM NEUTRAL CITATION:</u>	[2014] VChC1

REASONS FOR DECISION

Catchwords: Media application – section 534 *Children, Youth and Families Act 2005* – restriction on publication of proceedings – application to publish pictures of parties to a proceeding in de-identified form – whether prohibition also applies to partial/pixilated/distorted pictures of a child or other party – best interests principles – whether public interest outweighs minimal risk of identification.

PARTY	COUNSEL
Australian Broadcasting Corporation	Mr Hassan
Department of Human Services	Mr Niall QC with Mr Kune
CM	Ms Comito on behalf of Ms Ardley (ICL for CM)
CM's mother	Ms Jefferson
CM's father	In person

The Australian Broadcasting Corporation (“the ABC”) has brought an application pursuant to section 534 of the *Children, Youth and Families Act* 2005 seeking my permission as President of the Children’s Court of Victoria to publish reports of proceedings in the Children’s Court.

The proceedings to which the applications relate concern two protection applications brought on behalf of the Secretary of the Department of Human Services (DHS) in connection with two children:

- (i) CM (7565/2012)
- (ii) LL (6480/2013)

The reports sought to be published by the ABC are contained in two DVDs one of which is marked “7.00pm News”, the other “Lateline” (“the reports”). The “Lateline” report is a more expansive version of the “7.00pm News” report but deals with the same issues.

The reports deal with allegations that whilst both CM and LL were in the care of DHS and residing in residential care units they and others were subjected to physical and sexual abuse by older boys who were resident in the same residential units.

The reports contain, *inter alia*, interviews with the fathers of CM and LL and brief footage of CM walking in the street with his father.

With regard to the fathers, both are interviewed in what is described as a silhouette form and both have their voices significantly altered.

With regard to the brief footage of CM walking with his father, neither has their face shown nor are there any identifiable features displayed.

In support of its application, the ABC relies on two affidavits by Daniel Michael Oakes, an ABC journalist working in the National Report Team at the ABC.

In his affidavits Mr Oakes explains that the motivation of the ABC in wishing to publish the reports is the public interest. The critical paragraphs in his first affidavit are contained in paragraphs 5-7 both inclusive, as well as paragraph 15.

5. “ I am aware of and have observed, certain custody hearings in the Family Division of the Court. My knowledge of the proceedings means that I am aware of evidence given in the proceedings:

(a) of sexual and physical abuse of minors located in particular residential care units (overseen by adult carers) in and around Victoria that are administered by the Department of Human Services (DHS); and

(b) that the perpetrators of the relevant sexual and physical abuse were other minors residing at the same residential care units as the victims of the abuse.

6. Having observed the proceedings referred to in paragraph 5 (above), I have formed the view that there are significant and legitimate matters of public concern about:

- (a) the safety of minors in residential care facilities administered by DHS (which is the Victorian government department charged with the responsibility for ensuring their welfare); and
- (b) any failure on the part of DHS to share information concerning acts and allegations of sexual abuse with Victoria Police.

7. I formed the view that these are important and newsworthy matters that ought to be reported in order to foster greater public awareness, scrutiny and debate over the treatment of minors who are placed in residential facilities administered by DHS.

14. As a consequence of the matters outlined above, the ABC wishes to broadcast a feature story (and follow up stories) on the ABC network (including but not limited to, ABC News, ABC online and Lateline) that focus on the matters set out in paragraph 5 (above) for the reasons identified in paragraphs 6 and 7 (above) and 15 (below).

15. I believe that there is a strong public interest in allowing the ABC to report on these matters because of:

- (a) the involvement of a state government department, namely DHS which is responsible for the welfare of highly vulnerable children in the community;
- (b) the fact that these matters raise serious questions about the quality of care and welfare of highly vulnerable children who are placed in residential care units administered by DHS; and
- (c) the significant public interest in exposing such conduct to encourage public debate and urgent remedial action to reveal further ongoing physical and sexual abuse being suffered by highly vulnerable children placed in the care of the state.”

The balance of Mr Oakes affidavits deal largely with his explanation of the steps taken to de-identify, for want of a better word, the parties involved, in particular CM and the fathers of CM and LL.

At the hearing of the ABC’s application on 25 June 2014, Mr Hassan appeared for the ABC, Mr Niall QC with Mr Kune for DHS, Ms Jefferson for the mother of CM, Ms Comito of Comito and Associates whose Ms Margaret Ardley is CM’s Independent Children’s Lawyer (“ICL”) and CM’s father who appeared in person.

Although I am satisfied that LL's father and step-mother were both served with a copy of the ABC's application and Mr Oakes' first affidavit, neither attended the hearing nor were they represented.

I was informed from the bar table that LL's mother had not been served and that her whereabouts are presently unknown.

The position taken by each of the parties at the hearing to the ABC's application can be summarised as follows.

DHS

Mr Niall informed me that DHS did not contend for a particular outcome on the application. His appearance was for the purpose of assisting me on certain aspects of the proceeding and with the relevant statutory provisions.

CM

Ms Comito informed me that Ms Margaret Ardley was unwell but had nevertheless sworn an affidavit, an unsworn copy of which was handed to me pending receipt of the sworn copy. The sworn affidavit has now been filed.

In her affidavit Ms Ardley deposes:

- (i) She was appointed CM's ICL in 2009.
- (ii) She continues to act in that role.
- (iii) She spoke with CM on 21 June 2014 who told her that he wants people to know what happened to him and other children in the

unit so long as no one knows it was him and that he has not told anyone about what had happened.

- (iv) It is her position that it is in CM's best interest that he not be identified in the reports.

CM's Mother

Ms Jefferson informed me that her client wants DHS to be held accountable for what happened to CM but is concerned that the publication of the report may lead to her son being identified which would be damaging to him psychologically and emotionally.

CM's Father

He told me that he wants people to know what happened to his son provided that CM is not identified.

The ABC's application gives rise to two fundamental questions:

1. Do the reports enliven the provisions of section 534 (1)(a)(i)-(iii), (b) or (c)?
2. If the answer is "yes" to any part of 1, should I grant the ABC permission to publish the reports?

- 1. Do the reports enliven the provisions of section 534 (1)(a)(i)-(iii), (b) or (c)?**

I shall deal with each sub-section separately.

Section 534(1)(a)(i)-(iii) provides, *inter alia*, that a person must not publish or cause to be published -

(a) except with the permission of the President, a report of a proceeding in the Court that contains any particulars likely to lead to the identification of:

- (i) the particular venue of the Children's Court in which the proceeding was heard; or
- (ii) a child or other party to the proceeding; or
- (iii) a witness in the proceeding.

In the course of his submissions on behalf of the ABC Mr Hassan conceded correctly that the reports are reports of proceedings in the court.

Having established that the reports in question are reports of proceedings in the court, the question that next has to be determined is whether the reports contain particulars likely to lead to the identification (i) venue or (ii) child or other party to the proceeding or (iii) a witness in the proceeding. That is a question of fact to be determined in the circumstances of the case (See: *Howe v Harvey* [2008] 20 VR 638 at 653.)

Counsel agree that 'likely' in the context of 'particulars likely to lead to the identification of' should be taken to mean 'a real possibility that cannot be sensibly ignored', as opposed to being 'more likely than not.' *In Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 538.

I sought Counsels' assistance in determining the range of persons from whom the identity of

- (ii) a child or other party to the proceeding; or
- (iii) a witness in proceeding

should not be disclosed.

Mr Niall referred me to the passage of the Court of Appeal in *Howe v Harvey* (2008) 20 VR 638 and 653 where it was stated:

“We are inclined to think that section 26 would be breached if the particulars which are published are sufficient to enable those who know a child (for example his or her school friends or neighbours) to identify him or her as the child who had been involved in court proceedings, even though a general reader would not do so.”

Although obiter the passage is clearly most persuasive and I propose to adopt it.

In his submissions on behalf of DHS Mr Niall conceded that it would be open for me to find that section 534(1)(a) is not offended against as the reports are not likely to lead to the identification of:

- (i) The particular venue of the Children's Court in which the proceedings were heard;
- (ii) A child or other party to the proceeding; or
- (iii) A witness in the proceeding.

Ms Jefferson who appeared for CM's mother made a similar concession.

The concessions made by Mr Niall and Ms Jefferson were in keeping with the submission made by Mr Hassan on behalf of the ABC.

Having viewed the reports both in court during the hearing of proceedings and in the privacy of my home, I am satisfied that the efforts made by the ABC's producers to de-identify CM and his and LL's fathers have been successful and that there is no real possibility of any of them, or any other child referred to in the reports, being identified.

As a matter of convenience I will turn to section 534(1)(c) before returning to section 534(1)(b).

Section 534(1)(c) provides, *inter alia*, that:

“A person must not publish or cause to be published –

(c) except with the permission of the President, any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.”

I am satisfied that the reports do not contain any particulars likely to lead to the identification of a child as being the subject of an order made by the court and that therefore section 534 (1)(c) is not offended against.

I now turn to section 534(1)(b) which provides, *inter alia*,

- “(1) A person must not publish or cause to be published –
 - (b) except with the permission of the President, a picture as being or including a picture of a child or other party to, or a witness in, a proceeding referred to in paragraph (a);”

Mr Hassan on behalf of the ABC concedes that the reports contain pictures of CM (a child) and CM’s father and LL’s father (both parties to proceedings) but submits that due to the steps taken to de-identify them there is no real possibility of any of them being identified.

In his submissions Mr Niall posed the question as to whether a pixilated/ distorted/ partial picture of a child who in the accompanying narrative is identified as the child the subject of a proceeding is a picture for the purpose of section 534 (1)(b).

Unlike section 534(1)(a) and (c), 534(1)(b) does not include the words “...likely to lead to the identification of ...”. Nevertheless Mr Niall submitted, in effect, that the sub-section should be read as if these words were included for to do otherwise would be to prevent the publication of a picture that is, by reason of incompleteness, pixilation or distortion, incapable of identifying the child.

If Mr Niall's suggested interpretation of section 534(1)(b) is accepted it would mean that a picture which is pixilated/distorted or partial to the extent that the subject of the picture cannot be identified would, if published, not enliven section 534(1) and its publication would not require the President's permission.

With respect to Mr Niall I do not accept the interpretation of section 534(1)(b) which he submits as being the appropriate one.

Rather, in my view, the proper interpretation is a far more narrow one than the interpretation preferred by Mr Niall. The more narrow and preferable interpretation would prohibit, except with the permission of the President, a picture of a child or other party, or witness in a proceeding in the Court, whether or not that the picture is likely to lead to the identification of the child, party or witness.

In my view if the legislature had intended to limit the prohibition to only pictures that were likely to lead to the identification of a child, other party or witness, it would have been expected to include those words as it did with 1(a) and (c).

The harm against which section 534(1) is intended to protect is 'the stigmatisation and interference with the privacy of the child and his or her family caused by identifying them as participants in court proceedings.' (*Howe v Harvey* (2008) 20 VR 38 at 651.

If the prohibition against publication of pictures only applied to pictures that were likely to lead to the identification of a child, or other party or witness to a proceeding it would give carte blanche to the media to take photos of children and their family, for example, leaving the court at the end of proceedings, and publishing them in a partial, pixilated or distorted form. Although the extent of pixilation or distortion might prevent the identification of those people it would amount to a fundamental interference with the privacy of child and family.

In the light of my interpretation of section 534(1)(b) the reports which contain a partial picture of CM and distorted pictures of CM's father and LL's father do enliven section 534(1)(b) and must not be published without my permission.

2. Should I grant the ABC's application and permit the publication of the reports?

When determining whether or not to grant permission to publish under section 534(1), I must have regard to the principles set out in part 1.2 of the Act, where relevant when making my decision - section 8(1).

In particular I am required to be mindful that the best interests of the child must be paramount - section 10(1).

Further when determining whether a decision to grant permission to publish is in the best interests of the child, I must consider the matters set out in section 10(2) as well as those matters set out in section 10(3)(a)-(r) where they are relevant to my decision including:

“(d) the child’s views and wishes if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances.”

In addition to observing “the best interest principles” contained in section 10, I must also, as far as practicable, observe the procedural guidelines set out in section 522 including:

- (d) considering any wishes expressed by the child; and
- (f) minimising the stigma to the child and his or her family.

The reports sought to be published by the ABC contain alarming allegations of physical and sexual abuse perpetrated on young children in the care of DHS whilst living in residential care units, the perpetrators of the alleged abuse being older children living in the same units whilst also in the care of DHS.

The matters reported are clearly matters of public interest about which the public has a right to know.

Although it is conceded by Mr Niall for DHS that I am entitled to consider the public interest when considering the ABC’s application to publish he contended, correctly in my view, that the best interests of the child must be paramount.

Had the reports contained particulars and/ or pictures of CM, CM's father and LL's father or any other particulars which would likely lead to the identification of CM or LL, the significant public interest in the contents of the reports would not overcome, in my view, the paramount interests of the children.

However, as is clear from what I have said earlier, that is not the case as the reports do not contain pictures or particulars, which would lead to the identification of either CM, LL or their fathers, or any other children referred to in the report.

As noted earlier CM has told his ICL, Ms Ardley, that he wants people to know what happened to himself and others provided he is not identified. He has said the same to his father.

Given that I have found that there is no real possibility of CM being identified, his wish to let people know what happened to him and others should be respected. Furthermore, I consider that I should also take into account the express wish of CM's father that the public should be able learn about what he says happened to his son whilst in the care of DHS.

The same applies to LL's father who through his willingness to be interviewed by the ABC can be assumed to have a similar view to CM's father regarding publication.

Ultimately, the question of whether or not to grant the ABC's application is a balancing exercise between the paramount interests of the children who are the subject of the report and the public's right to know about what is reported to have happened to the children whilst in the care of DHS.

Where, as in this case, I am satisfied that the risk of the children being identified is at best minimal, the public's interest in knowing what is said to have happened to these highly vulnerable children in the care of the State weighs the balance firmly in favour of publication.

Consequently, pursuant to section 534(1) of the *Children, Youth and Families Act 2005*, I grant the ABC's application and permit the publication of the reports.

JUDGE PETER COUZENS

2 July 2014