

‘Children’s Rights and Media Wrongs’ in the Digital Age

Australian Youth Justice Contexts

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- 1 Sheila Brown, *Understanding Youth and Crime: Listening to Youth?* (Open University Press, 2nd ed, 2005) 50.
- 2 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (MacGibbon and Kee, 1972).
- 3 Bob Franklin, ‘Children’s Rights and Media Wrongs: Changing Representations of Children and the Developing Rights Agenda’ in Bob Franklin (ed), *The New Handbook of Children’s Rights: Comparative Policy and Practice* (Routledge, 2002) 15.
- 4 See Colin Hay, ‘Mobilization through Interpellation: James Bulger, Juvenile Crime and the Construction of a Moral Panic’ (1995) 4(2) *Social and Legal Studies* 197.
- 5 (European Court of Human Rights, Grand Chamber, Application No 24724/94, 16 December 1999).
- 6 [1999] IX Eur Court HR 111.
- 7 [2019] NSWSC 766 (‘Voller’).

I Introduction

‘Mass media, from their inception, have been closely associated with mass anxiety about young people’.¹

As Sheila Brown observes, for centuries young people have been the focus of ‘mass anxiety’ on the part of adults. Stanley Cohen’s theorisation of ‘folk devils’ and ‘moral panics’ demonstrates how this anxiety often fuels the creation of reactive policies and practices by police and other criminal justice agencies.² In 2002, Bob Franklin wrote an insightful chapter entitled: ‘Children’s Rights and Media Wrongs: Changing Representations of Children and the Developing Rights Agenda’.³ In this chapter, Franklin reflects on the punitive reactions directed towards children in the 1990s in the United Kingdom, particularly following the death of two-year-old James Bulger and the sentencing of two ten-year-old boys, Robert Thompson and Jon Venables, for his murder. This period represented a notable ‘punitive turn’ in reactions, policies, legislation and approaches directed towards young people.⁴ Notably, the unfair trial of Venables and Thompson was acknowledged on the international human rights stage by the European Court of Human Rights in *T v United Kingdom*⁵ and *V v United Kingdom*.⁶

In contemporary times, with the ongoing advancements in technology and use of social media platforms, concerns have been raised in relation to what has been described as online ‘risky behaviours’ on the part of young people, with great attention given to ‘sexting’ and ‘cyberbullying’. Yet, key questions exist in relation to the rights of children and young people in conflict with the law who are shamed and demonised in the online sphere and harmed by such processes. It seems apt to borrow the phrase ‘children’s rights and media wrongs’ for the first part of the title of this paper, which will consider key questions surrounding the negative impacts of the media’s reporting on children in youth justice contexts in Australia. This paper builds on Franklin’s work nearly two decades ago to explore ‘children’s rights’ and ‘media wrongs’ through the contemporary lens of the digital age, as youth justice systems now function in a world dominated by social media platforms. As my ongoing research is demonstrating, the digital age presents additional and quite specific challenges for young people, their advocates and judicial officers. This paper will refer to the media representations of children in youth justice systems in Australia and will specifically utilise the media’s representation of the Don Dale Youth Detention Centre in the Northern Territory (‘NT’). This paper considers the subsequent persistent targeting of one young person, Dylan Voller, on online mainstream media platforms and social media outlets. It argues that the recent judgment in *Voller v Nationwide News Pty Ltd* (‘Voller’)⁷ shines a light onto

the long-lasting consequences of digital shaming and defamation on young people in youth justice contexts in Australia and those who have returned to their community, facilitated by media outlets and social media platforms. The paper concludes by outlining the need for principled reform in this area, with the need for the law, policies and practices to keep up with advances in technology and its use. In addition, this paper identifies the need for accountability on the part of the community for their social media use, as well as a cultural shift away from punitiveness to valuing the benefits of community development and social justice approaches when young people come into conflict with the law.⁸

ii Youth Justice Contexts in Australia

Youth justice systems in Australia have been described as undergoing a series of ‘crises’. In July 2016, a significant investigatory report by the ABC’s Four Corners, titled ‘Australia’s Shame’, exposed the extent of the crisis in youth justice in the NT.⁹ It contained confronting footage and imagery of an Indigenous child, Dylan Voller, who was forcibly restrained, strapped to a restraint chair and hooded at the Don Dale Youth Detention Centre.¹⁰ This imagery, along with other evidence, recorded the extreme physical violence and psychological abuse directed towards children and young people in juvenile detention settings. The Royal Commission into the Protection and Detention of Children in the Northern Territory was set up to investigate such treatment and later published its findings confirming that, over the past decade, children detained in the NT had been under treatment and prison regimes which clearly breached Australia’s international human rights obligations and several domestic laws.¹¹

Significant concerns about the state of children’s rights in Australia have also been highlighted in a national NGO report to the United Nations Committee on the Rights of the Child (‘UN Committee’) published by the Australian Child Rights Taskforce in November 2018.¹² The report drew significant attention to Australia’s serious violations of children’s rights in detention.¹³ Similar serious concerns were noted in the latest report of the UN Committee, following their examination of Australia’s children’s rights record in September 2019.¹⁴ It is evident that Australia’s lack of national strategy to ensure the implementation of appropriate protections of children’s rights, coupled with a lack of political will to see much-needed change,¹⁵ is having a damaging effect on the lives of children and young people and impacting upon their ability to fully enjoy and engage with their rights under the United Nations *Convention on the Rights of the Child* (‘CRC’).¹⁶

iii Children’s Rights in the Digital Age

Protections for children and young people exist within the international children’s rights legal framework, which outlines clear requirements for states parties to ensure the protection of children and young people from stigmatisation and further harm from media reporting and the criminal justice system itself. The *CRC* states that ‘[e]very child alleged as or accused of having infringed the penal law has at least the following guarantees: ... To have his or her privacy fully respected at all stages of the proceedings’.¹⁷

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (‘*The Beijing Rules*’) outline the need for a child’s ‘right to privacy’ to be ‘respected at all stages’ of the criminal justice process, ‘in order to avoid harm being caused ... by undue publicity or by the process of labelling’ and provide that ‘no information that may lead to the identification of a juvenile offender shall be published’.¹⁸

Social media is explicitly referred to in the recently published UN Committee’s *General Comment No 24 (2019) on Children’s Rights in the Child Justice System*.¹⁹ It reinforced that ‘[t]he Committee encourages the use of non-stigmatizing language relating to children alleged as, accused of or recognized as having infringed criminal law’²⁰ and called for ‘lifelong protection from publication regarding crimes committed by children’.²¹ The UN Committee stated that ‘[t]he rationale for the non-publication rule ... is that publication causes ongoing stigmatization’, noting the long term consequences including the likelihood of ‘a negative impact on access to education, work, housing or safety’, which ‘impedes the child’s reintegration and assumption of a constructive role in society’.²² Further, the UN Committee called

- 8 See Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) ch 3.
- 9 See ‘Australia’s Shame’, *Four Corners* (Australian Broadcasting Corporation, 2016) <<https://www.abc.net.au/4corners/australias-shame-promo/7649462>>.
- 10 *Ibid*.
- 11 *Royal Commission into the Protection and Detention of Children in the Northern Territory: Findings and Recommendations* (Report, 17 November 2017).
- 12 See Australian Child Rights Taskforce, *The Children’s Report: Australia’s NGO Coalition Report to the United Nations Committee on the Rights of the Child* (Report, November 2018).
- 13 *Ibid* ch 9.
- 14 Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5–6 (1 November 2019).
- 15 One such recent example is the debate surrounding raising the minimum age of criminal responsibility in Australia to 14.
- 16 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘*CRC*’). For further discussion, see Faith Gordon and Noam Peleg, “‘The Australian Government is Not Listening’: How our Country is Failing to Protect Its Children”, *The Conversation* (online, 8 October 2019) <<https://theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779>>.
- 17 *CRC* (n 16) art 40(2)(b). Article 16 also provides that ‘[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation’ and that ‘[t]he child has the right to the protection of the law against such interference or attacks’.
- 18 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, UN Doc A/Res/40/33 (29 November 1985) r 8 (‘*The Beijing Rules*’).
- 19 Committee on the Rights of the Child, *General Comment No 24 (2019) on Children’s Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) [70] (‘*General Comment No 24*’).
- 20 *Ibid* [7].
- 21 *Ibid* [70].
- 22 *Ibid*.

- 23 Ibid [8].
- 24 See also Faith Gordon, *Children, Young People and the Press in a Transitioning Society: Representations, Reactions and Criminalisation* (Palgrave Macmillan, 2018) ('*Children, Young People and the Press in a Transitioning Society*').
- 25 Faith Gordon, 'Preserving Lifelong Anonymity Orders into Adulthood: New Challenges for the Courts in the Age of Social Media' (2019) 41(4) *Journal of Social Welfare and Family Law* 491.
- 26 Ibid 493.
- 27 See Faith Gordon, 'Pre-Charge Identification of a Minor and Article 14 of the ECHR: Judgment In the Matter of an Application by JKL (A Minor)' (2020) 71(3) *Northern Ireland Legal Quarterly* (advance).
- 28 *Voller* (n 7) [190].
- 29 Gordon, *Children, Young People and the Press in a Transitioning Society* (n 24) 144.
- 30 See *General Comment No 24*, UN Doc CRC/C/GC/24 (n 19).

for lifelong protections from identification by the mainstream media and on social media platforms.²³

iv Media Wrongs in the Digital Age

As the opening quotation of this paper highlights, 'media wrongs', such as the demonisation of children and young people by mainstream media outlets, have long been a present feature in western societies.²⁴ With technological advancements, new issues now exist in the digital age, with 'below the line' commentary, content and information being shared, occasionally in contravention of suppression orders/life-long anonymity orders.²⁵ This poses the question as to whether such orders are an outdated and ineffective means in the digital age of protecting the identities of those accused or those who are victims.²⁶ Further, the permanency of imagery and details which have been screenshotted and reposted can pose considerable issues and social media companies have been reported as slow to act to remove content.²⁷

The impact of such commentary is evident in the experience of Dylan Voller, now 22 years old, who draws on his own experiences to advocate on behalf of other children currently imprisoned in the Don Dale Youth Detention Centre. Dylan Voller became the target of bullying and false commentary online, which included defamatory, unfounded accusations that he had attacked a Salvation Army officer who visited him while in detention. To address these issues, legal proceedings were commenced by Dylan Voller against three media organisations for defamation—Nationwide News Pty Ltd, Fairfax Media Publications Pty Ltd and Australia News Channel Pty Ltd—relating to comments and unfounded allegations made by members of the public on the media organisations' public Facebook platforms. In a landmark decision handed down on 24 June 2019, the Supreme Court of New South Wales held that in relation to defamation liability, media companies are the publishers of comments posted by members of the public on their public Facebook pages.²⁸ Rothman J's decision in this case highlights the need for organisations to review their use of community rules and how they monitor comments created by third parties. However, moderation practices and discretion appear to vary considerably from platform to platform.

Interviews I have conducted with editors and journalists have routinely demonstrated that they describe 'mak[ing] a judgement call', ensuring that content 'plays to the galleries'.²⁹ Decision-making powers on whether to report and publish, and also on how much detail and imagery to present, often rest in the hands of a journalist and/or editor to consider on an individual case-by-case basis. As a direct result, children's and young people's privacy and welfare are often overlooked or not given due weight. Dylan Voller's case has further shone a direct light onto one significant, unaddressed issue by policymakers—the discretion that rests at the hands of those creating online content and moderating social media platforms. On one hand, while freedom of expression should not be curtailed, if what is being expressed or discussed is harmful or incites hatred or violence towards others, it needs to be removed from public platforms as its presence has the potential to negatively impact a child or young person's 'access to education, work, housing or safety'.³⁰

v Calls for Rights-Based Reforms

Like many other aspects of technological advancement, the law clearly lags behind the growth in relation to social media platforms and their usage, which can, as it did in the case of *Voller*, have very long-lasting and damaging consequences. There has long been the need for urgent principled reform to address 'media wrongs' and ensure that children's rights are promoted, protected and upheld. As outlined, the posting of imagery and information online and reposting of screenshot imagery has facilitated the digital permanency of images and identities of children and young people in conflict with the law, which further perpetuates harm in many instances over a period of many years. Thus, the digital age presents additional challenges with multiple layers of concern surrounding the privacy rights, safety and reputations of children and young people in the digital age.

Such online harms were not originally envisaged in 1989 when the *CRC* was drafted. The UN Committee's current focus on children's rights in the digital age

- 31 Committee on the Rights of the Child, *Draft General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (13 August 2020).
- 32 See Faith Gordon, 'Media Regulation: Strategies to Mitigate the Violence Perpetrated against Children who are Publically "Named and Shamed"' in Wendy O'Brien and Cedric Foussard (eds), *Violence Against Children in the Criminal Justice System: Global Perspectives on Prevention* (Routledge, 2020) 38.
- 33 See Brigit Morris and Máire M Davies, 'Can Children's Privacy Rights be Adequately Protected through Press Regulation? What Press Regulation Can Learn from the Courts' (2018) 10(1) *Journal of Media Law* 92.
- 34 See 'Are Social Media Companies Doing Enough to Protect Children?', *CBBC Newsround* (online, 2 February 2019) <<https://www.bbc.co.uk/newsround/47072623>>.
- 35 Faith Gordon, 'Social Media Companies Have a Duty to Protect Children', *Huffington Post* (Blog Post, 9 May 2017) <http://www.huffingtonpost.co.uk/faith-gordon/social-media-companies-ha_b_16485240.html>.
- 36 International case law involving young people in conflict with the law, such as *R v William Cornick* [2014] EWHC 3623 (QB), indicates that there are continuous tensions existing between what is in the 'public interest' and what is in the best interests of children and young people.
- 37 Faith Gordon, 'Landmark Decision Defamation Case in Australia Holds Media Companies Liable for Facebook Comments', *Information Law and Policy Centre* (Blog Post, 18 September 2019) <<https://info-lawcentre.blogs.sas.ac.uk/2019/09/18/landmark-decision-defamation-case-in-australia-holds-media-companies-liable-for-facebook-comments-dr-faith-gordon/>>.
- 38 See Gordon, *Children, Young People and the Press in a Transitioning Society* (n 24).

does provide an opportunity for civil society and policymakers to consider what issues exist and what reforms are needed in providing the impetus internationally for children's rights-based reforms in the digital age.³¹ Concerns about this incomplete protection offered by the regulatory frameworks and the law have consistently emerged as themes in the empirical research I have conducted over the past decade.³² Traditionally, the regulation of the mainstream media and enforcement of regulatory guidelines have lagged behind developments in law,³³ as well as new and emerging forms of abuse and harm. Further to this, children and young people have little means to challenge such wrongdoing and discriminatory practices in the digital sphere and are often unable to seek redress.

As outlined, while the public identification of children and young people in conflict with the law expressly contravenes international children's rights law, part of the challenge in safeguarding children and young people from such breaches, wrongs and harm, is the lack of national legal and regulatory guidelines within Australia and internationally to regulate the mainstream media and social media platforms. Current debates and discussions in relation to accountability have largely focused on calls for social media companies to take more responsibility for protecting children from disturbing content.³⁴ However, the experiences of children and young people in conflict with the law appear marginalised or excluded within these current debates. Social media companies have a duty to protect all children and young people, recognising the particular circumstances and contexts of their lives and how these may position them in uniquely vulnerable circumstances.³⁵

It is clear that there is much work that needs to be done to design and implement appropriate regulatory frameworks that will uphold and protect children's rights. The legal protections for children and young people are also incomplete, as evident in the many cases in which children's rights have been trumped by judicial discretion regarding public identification 'in the public interest'.³⁶ An often key element omitted in discussions is the impact of community forums on social media and 'below the line' commentary on mainstream media platforms online. As the case of *Voller* demonstrates, for legal decision-makers it is challenging to apply the current laws in Australia to new technologies, such as the usage of social media platforms in the digital age. Further, redress sought after harm has occurred, through, for example, complaints processes via existing regulatory bodies or the courts, may do little to address the consequences and impacts of such harm.

vi Conclusion

In the digital age, legal proceedings and youth justice systems now function in a world dominated by social media platforms. This paper has built on Franklin's work nearly two decades ago to explore the themes of 'children's rights' and 'media wrongs' through the contemporary lens of the digital age. Media portrayals of young people in youth justice systems in Australia, with specific reference to the Don Dale Youth Detention Centre and the sustained persistent targeting of one young man, Dylan Voller, shine a light onto the long-lasting consequences for the well-being and future prospects of young people who become the victims of 'media wrongs'.³⁷ As the case of *Voller* demonstrates, community reactions posted on social media platforms in the form of shaming, threats and unfounded allegations, can have extremely damaging consequences,³⁸ yet policy interventions fail to prevent such harms or to provide appropriate redress when harm does occur.

As this paper has illuminated, the digital age presents additional and quite specific challenges for young people in conflict with the law, their advocates, as well as for policymakers and judicial officers navigating new terrain. There is a clear need for principled reform in this area of online harm and shaming, with calls for the law, policies and practices to keep up with the ever-evolving advances in technology, particularly when there are new ways utilised to target, shame and harm young people. However, it is only when such reforms are coupled with a collective community change that shifts in the emphasis away from calls for punitive reactions to more community development and social justice responses can occur. It is not until we see these actions taken collectively that we may achieve more adherence to the spirit of the principles of the international children's rights framework which have long noted the extensive harms and damage caused by the processes of labelling.