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Senator Guy Barnett
Committee Chair
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT

9 June 2007

Dear Senator Barnett

Estimates Questions from Senator Heffernan

Attached are the relevant parts of the transcript of what I said to the magistrate. In no way can my submissions be read as asserting the offence was "victimless". Quite the contrary. But like all criminal offences, circumstances point to different grades of criminality.

Senator Heffernan told the Committee he was reading from the Sunday Telegraph of 6 May 2007. He could not have been. He apparently seeks to justify his comments by recourse to an ambiguous assertion by Miranda Devine and an entirely inaccurate statement by Tracy Ong.

Senator Heffernan could have made some rudimentary enquiries about the truth of the matter before attacking me, but chose not to. He made a strident public criticism of me based on a false premise.

All I am asking is that the falsehood be corrected by publication of my response.

Yours sincerely

Ian Barker

His Honour:	Now the matter of Power
Rapke:	An agreed statement of facts has been prepared and I tender it.
His Honour:	You have copies of those Mr Barker.
Barker:	Yes I have thank you – an agreed document.
Rapke:	Does the court record indicate that the defendant has previously entered a plea in this matter, your honour?
His Honour:	A plea of guilty has formally entered before me on 25 January this year
Rapke:	Your honour, I understand it is not the practice to require that document to be read in open court and I am prepared to do so from _____
His Honour:	No, it's not unless the parties want me to do so.
His Honour:	Nothing further you wish to add at this stage your honour.
Rapke:	Not at this stage your honour.
His Honour:	Mr Barker
Barker:	<p>Your Honour – I burden you with a number of documents which I tender.</p> <p>I will describe them for the record: Reports from Associate Professor Mitchell, Associate Professor Phillips and Dr Yeo. A letter from Dr Power to the DPP dated 25 January 2007. A letter from the Department of Corrective Services dated 20 April 2007 and two pages of statistics from the NSW Judicial Commission concerning this type of offence. Three newspaper articles. One from the Weekend Australian, 8 and 9 July 2006, Sydney Morning Herald of the same date and the Daily Telegraph of 10 July 2006. (I am losing neurons as fast as I am losing hair). Then, your honour there are a large number of references and the schedule of them is next to the last newspaper article tendered and there are 59 references as to Dr Power's character and reputation generally and 17 references as to his qualities as a Crown Prosecutor and views of his fellow barristers as to his capacity and integrity. Now, there is quite a lot of reading in all that your honour and in my address to you I will need to refer to the references in particular and to the medical evidence. My</p>

	suggestion, I make respectfully that your honour retire to read the material before we embark on our submissions.
His Honour:	I have no difficulty accommodating that. It seems sensible Mr Barker. We might do that and resume when I am ready. The Court is adjourned.

His Honour:	If we are waiting Mr Barker's return Mr Rapke the pre-sentence report was ordered on the last occasion. Have you been provided with a copy?
Rapke:	I have just seen it now your Honour.
His Honour:	Have you spoken to your client?
Barker::	Can we have a few seconds?
His Honour:	For the record. I have read the agreed statement of facts. I note for the record that none of the images involved in this prosecution have been presented to the court Mr Rapke. Any particular reason for that?
Rapke:	Well, your Honour I had assumed that a brief of evidence would have been filed with the court.
His Honour:	Yes, it has but colloquially described as thumbnail imprints and other material have been blacked out.
Rapke:	Your Honour, we can provide copies to the court. There is quite a quantity of material to _____.
Barker:	Copies of what?
Rapke:	His Honour is inquiring about the material which is subject to prosecution.
His Honour:	I will return to what I was just saying. Statement of agreed facts I have read. I have read the brief, the folder containing the items enumerated by Mr Barker, senior counsel on behalf of the accused and I await your submissions Mr Barker.
Barker::	I am reminded your Honour there is a probation of parole service pre-sentence report.
His Honour:	Yes, there is. I have read that.
Barker::	Perhaps I could formally tender it.

Barker:

Now your Honour this is an extremely sad case. We have a good man of personal integrity who is recognised by his friends and relatives and peers as a person of integrity who is ruined by his own conduct which was contributed to very substantially by matters beyond his control. In that regard I refer to the medical evidence which I will take your Honour to. Your Honour, we do not down play the seriousness of the offence with which Dr Power is charged. As your Honour is well aware of the community's distaste of such conduct involving images of children. I do not retreat from the proposition that the offence is serious and as your Honour knows in this court carries a maximum penalty of 2 years. Our primary submission, however, is this. That in all the circumstances having regard to the circumstances of the offence and to the evidence attesting to Dr Power's integrity and his outstanding contribution to society over a long period an appropriate disposition of the case would be his release on a good behaviour bond pursuant to s.9 of the *Crimes Sentencing Procedure Act*. The many references tendered and the medical evidence are of particular significance in this case your Honour having regard particularly to s.21A(3) of the *Crimes Sentencing Procedure Act* which I will come to. I have no doubt that Mr Rapke will properly put to your Honour that this is not a victimless crime, that if people did not look at child pornography children generally would be better protected from sexual exploitation and I accept the force of that argument. But it would have considerably more force if contrary to this case Dr Power had been a participant in the production of the images or had paid to see them or had distributed or published the images to others or was closer to the provenance of the material or had encouraged its dissemination or had viewed it in company. But as the Crown conceded the case is nothing like that. There is no evidence of any distribution which is acknowledged in the statement of facts and whilst he should not have downloaded the material, the images of course were freely available to the whole world on the internet and I suppose that is one of the

disadvantages of the technological age. One cannot stop the dissemination of this sort of material if someone puts it on the system. But if the submission is put that Dr Power by his conduct has encouraged the exploitation of children. In my respectful submission it should have but limited acceptance. As to s.21A(3) of the *Crimes Sentencing Procedure Act* we rely on clauses (b) – the offence was not part of a plan or organised criminal activity, (e) – the defendant does not have any record of previous convictions, (f) – the defendant is a person of good character, (g) – the offender is unlikely to re-offend, (h) – the offender has good prospects of rehabilitation whether by reason of the offender's age or otherwise, (i) – the offender has shown remorse for the offence by making reparation or in any other manner and (k) – a plea of guilty as provided by s.22. Of course, as your Honour knows it is something which must be taken into account in the final result.

The material before you, I respectfully submit, shows you that you are dealing with a man regarded as an honourable person of integrity and many many of the witness statements attest to that fact and perhaps very importantly in this case, a man who has always acted with complete propriety towards children. Now there are some 35 people attest to that in those references. They are happy to have him associate with their children. Some say he has helped their children considerably over the years. Some refer to his position as a godfather to children. I suppose it would be profitless for me to take you through this in detail because your Honour has already read them. But it is an important part of the evidence that he is not a paedophile nor anything like it. He is a man who has generously given long and valuable unstinting service to the community over many years and in particular to young people both here and New Zealand. As your Honour knows he contributed significantly to the enlighten *Young Offenders Act* of 1997 and served as a chairperson of the Youth Justice Advisory Committee established by s.70 of the Act from 1998 until he was charged in July 2006 when he resigned. The evidence

	<p>tells your Honour that he was closely involved in the mentoring programme established by the Big Sister Big Brother programme and witness after witness has attested to his reputation, his remorse and his considerable distress at resigning from the Crown Prosecutor service after all these years. Other lawyers tell your Honour of his impeccable record as a Crown prosecutor. His honesty, fairness and compassion and some of those senior barristers who have given references from time to time appeared against him in defendant cases. They say that he was a skilled, good and fair opponent. One cannot ask any more of a Crown prosecutor.</p> <p>The evidence concerning the stresses to which he was subject in recent years and his depressive illness is of particular importance because it gives you some insight into his problems and enables a conclusion to be drawn that there was a reason for his conduct beyond mere lude salaciousness. In that regard I first refer particularly to Professor Mitchell's report about episodes of major depression since the late 1980's and to Associate Professor Phillips' report prepared for this hearing. Your Honour, in my submission, the whole of Dr Phillips' report is important but for present purposes I take you to the second last paragraph on p.3.</p>
His Honour	1998 or 1999?
Barker:	<p>Yes, your Honour. Because from that point on Professor Phillips points to the psychiatric problems which led to what he termed internet addiction. His conclusions are on pp.11, 12 and 13. I won't read it all to you but he says: "The overriding unusual behaviour of Dr Power unloading extremely large quantities of pornographic images is of psychological interest". I will come back to that your Honour but it is a feature of this case that the overwhelming majority of the material retrieved from the internet did not involve children. He said: "Simply</p>

put your client would never have had the opportunity to work his way through the very high number of images". For example, your Honour, and it says so in the statement of facts. There were some 29,000 images in one segment of which a little of over 1 percent involved children. I think the number was 400 and something out of 29,000. Professor Phillips then draws attention to Dr Power's stresses and personal grief and pressure that he was under for various reasons. He expresses the opinion that there was a shift in the last few years in the context of depression spectrum syndromes. Dr Power's compulsive activity in downloading pornographic materials became increasingly frenetic. Then he went on to talk about the dysprismic disorder as a middle intensity but chronic depression spectrum order. On p.12 he expresses the view that Dr Power has unfortunately come to experience internet addiction. The praise reflects an obsession or preoccupation on the internet secondary to the psychopathology of the depressed spectrum disorder with compulsive use of the internet. The most common expression is through internet gambling, the seeking of pornographic images texted on the internet is a world recognised phenomena. Finally, he concludes that: "Your client is not a paedophile; he has never sought sexual contact or gratification of men less than 16 years of age. He suffered an evasive group of depression spectrum symptoms in the context of personal loneliness and multiple stressors over a number of years. He experienced internet addiction. He compulsively downloaded huge quantities of material overwhelmingly adult pornography and he is extremely unlikely to offend again. He remains deeply concerned by his recent actions. He has full comprehension of the illegality of his actions. He is contrite and he has a strong desire to get on with his life". The conclusion is on p.13. He first of all talks about difficulties which would accompany a custodial sentence. "He is not a psychopath or criminal by disposition. He is not a paedophile. The child pornographic images and text found on his home computer will be explained as a consequence of internet addiction with

this occurring as part of a chronic depression spectrum disorder. With the deepest respect I believe focus needs to be kept on your client's treatment needs".

Your Honour, this report is significant for two main reasons. One is that it explains how his depression in his personal circumstances and his internet addiction contributed to the offence for which he stands charged. Secondly, it diminishes the significance of s.3A(b) of the *Crimes Sentencing Procedure Act* which is the one that talks about terrorists.

s.3A The purposes for which a court may impose a sentence on an offender are as follows:

....

(b) to prevent crime by deterring the offender and other persons from committing similar offences.

There are a number of cases dealing with that as your Honour knows. I think the seminal case was *Scognamiglio* which is found in (1991) 56 A Crim R p.81. I think I would content myself with saying that what the case holds and what has since been followed is in the case of an offender suffering from a mental disorder of abnormality. General deterrence is a factor which should often be given very little weight. For the obvious reason that the disorder or abnormality had a causal connection with the offence which was not committed merely in the spirit of criminality.

An important factor in this case is for Dr Power enormously humiliating, public humiliation which he has suffered. That is why we tendered the newspaper reports. I wont read them to you your Honour, your Honour will be aware that a person in his position subject to such enormously adverse publicity which even suggested that he had probably misapplied facts or law in a series of cases which suggested that there had to be an

investigation into his conduct as a Crown prosecutor. All that was completely shattering and that will continue. One only has to look at the number of press in court at the moment to see that this case is not going to be dealt with very quietly and he will continue to suffer public humiliation. As you will see from some of the references he has in fact almost entirely withdrawn from society because of the shame, depression and humiliation to which he has been subject. His career as a Crown prosecutor, of course, is finished. He resigned. His prospects of judicial appointment, of course, therefore are reduced to nil. His future as a barrister or solicitor is under a cloud. Speculation about what view the Bar Association or the Law Society might take now or in the future is profitless and what we do know is that he is lost forever the pursuit of his chosen vocation and his future as a lawyer either at the Bar or as a solicitor is very much under a cloud. One cannot say anymore than that. We don't know what the future will hold.

Your Honour as I said earlier I don't retreat from the community distaste in the display of pornographic images of young people but as we all know it is not generally an offence for an adult to watch adults engaging in consensual sexual activity. At least in the privacy of one's home. This is a point made by Professor Phillips that as he understood the case, the overwhelming proportion of the material did not involve people under 16. Going back to that statement of facts – if I could just take you to p.11, about the middle of the page, also located on the hard drive is a data base containing 28,981 fun male images the vast majority of which were homosexual pornographic pornography. Of the approximately 29,000 images, 433 were of child pornography and that comes down to about, I think, about 1.4 percent of the total material in that segment of the case.

Your Honour, a further, if subsidiary, but still important reason for not sending Dr Power to prison is to be found in the letter from the

	<p>Department of Corrective Services and the pre-sentence report. I think I need only say to your Honour that the danger to him is quite obvious. And what if I may put it rhetorically, what in the end would be the point of sending this man to gaol. The sentencing statistics point the other way. His viewings were private. There is no evidence that he ever did anything to demote, distribute or publish the images. His conduct is largely explained psychiatrically. His condition makes deterrence, personal or general of diminished importance. He has over many years acquired by his selfless work and generosity a treasury of credit. In once sense the community is indebted to him. He is now entitled to call in the debt. It is highly likely that he would re-offend and his loss in all this is so great that he has already been adequately punished. Your Honour, the loss he has suffered and will continue to suffer is a continuing tragedy for this man and I respectfully submit that he should not be punished further by a gaol sentence. I am indebted to you your Honour.</p>
His Honour	Thank you Mr Barker. Mr Rapke.