



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: RBG584706

3 February 2012

The Hon. Greg Smith SC MP  
Attorney General and Minister for Justice  
Level 31  
Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Attorney General,

**Proposals to amend the Children (Criminal Proceedings) Act 1987**

Thank you for seeking the Law Society's view on proposals to amend the *Children (Criminal Proceedings) Act 1987* in relation to the prohibition on the publication or broadcasting of the name of children involved in criminal proceedings (the prohibition).

The Law Society's Juvenile Justice Committee (Committee) has reviewed the proposals in the very short time available, and its comments are set out below.

**The current position in NSW**

The prohibition contained in Division 3A of the *Children (Criminal Proceedings) Act 1987* reflects the differential treatment of children and young people in the criminal justice system which recognises their cognitive and emotional immaturity, and increased vulnerability and impulsivity, compared to adults.

The current position in NSW also reflects Australia's endorsement of various United Nations instruments including:

- the United Nations Declaration on the Rights of the Child 1959;
- the United Nations Convention on the Rights of the Child 1989;
- the United Nations International Covenant on Civil and Political Rights;
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules), and
- the United Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines).

Proposals 1 and 2 appear to contravene a number of the obligations and principles contained in these international obligations, for instance Rule 8 of the Beijing Rules which provides as follows:

*8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.*

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.<sup>1</sup>

### **Stigmatisation**

The Standing Committee on Law and Justice's report '*The prohibition on the Publication of Names of Children Involved in Criminal Proceedings*', 2008, (Report), concluded that the prohibition should not be relaxed. In fact the Report found that the weight of evidence warranted the extension of the prohibition to cover the period prior to the official commencement of criminal proceedings and the inclusion of any child with a reasonable likelihood of becoming involved in criminal proceedings.<sup>2</sup> Proposals 1 and 2 are contrary to this recommendation.

The policy objective behind the prohibition is to reduce the stigma associated with the child's association with crime, and to allow reintegration into the community with a view to full rehabilitation.

Stigmatisation has a negative impact on rehabilitation prospects and the chances of reducing recidivism. The impact of stigmatisation was given extensive consideration in the Report<sup>3</sup>. Stigmatisation can hinder a young person's reintegration into the community in the form of securing employment and accommodation, and involvement in community groups which is of vital importance in the rehabilitation of juvenile offenders.

Many young people who come into contact with the juvenile justice system are the most disadvantaged, vulnerable and marginalised in the community. Naming serves to further marginalise these young people and has a negative impact on their prospects for rehabilitation.

Proposals 1 and 2 are contrary to the policy objectives behind the prohibition which is to reduce stigmatisation, aid rehabilitation and reduce recidivism.

### **Proposal 1**

The Committee does not support the proposal to add an exception to the prohibition where the child absconds on bail, under supervision in the community or escapes from lawful custody.

The current legislation is adequate and no argument has been made or evidence presented as to why the proposed amendment is necessary.

Even with the safeguard that an application must be made to a Magistrate (and noting that the proposal does not specify that the Magistrate must be a specialist Children's Court Magistrate) the Committee sees no reason why the present position should not be maintained.

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<sup>1</sup> *Commentary to Rule 8:*

*Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".*

*Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle.*

<sup>2</sup> Standing Committee on Law and Justice's report, '*The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*', 2008, Recommendation 5.

<sup>3</sup> See Chapter 3 'The impact of naming on juvenile offenders', pp21-42.



The Committee is very concerned about the 'absconding on bail' proposal. The Committee notes that it is not uncommon for a young person, once they know police have done a curfew check and the young person was not at home, to 'avoid' police and court, knowing they will 'go in' once they are located. They have not 'absconded' in the adult sense. Over zealous bail compliance checks have had a significant impact on remand rates. This proposal would make a bad situation worse, because authorities would in effect be naming bail breachers.

If the Government decides to proceed with implementing this proposal, then the Committee submits that there ought to be a much higher threshold for the court to make an order, and a strict time limit upon the duration of the order.

## **Proposal 2**

The Committee does not support the proposal to lift the prohibition on naming a child offender, convicted of a serious children's indictable offence, unless the sentencing court orders otherwise. This would reverse the default position and an application would need to be made to the court for it to exercise discretion not to name the child.

Again, no explanation or argument has been provided to support this proposal. The Committee is not aware of any developments since the amendments to the legislation in 2009<sup>4</sup> that would necessitate the reversal of the default position.

The Committee is aware of the view of media organisations in relation to the prohibition. The Committee notes that the Report found that:

*"names are not essential details when reporting on criminal proceedings involving children and that the public can be adequately informed about a particular case and judicial processes in general without the inclusion of the names of juveniles involved"*<sup>5</sup>.

## **Factors set out in section 15C(3)**

The factors set out in section 15C(3) of the Act appear to be appropriate. Section 15C(3) incorporates the list of factors set out in *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386 that the court must have regard to in deciding whether to make an order authorising the publishing or broadcasting to the public of the name of a child who has been convicted of a serious children's indictable offence. The factors achieve a balance between maintaining a broad judicial discretion and providing some legislative guidance on the factors relevant to determining the interests of justice.

## **Proposal 3**

The Committee supports this proposal as a sensible way to ensure that disclosure of identifying information will be better regulated.

I trust these comments are of assistance.

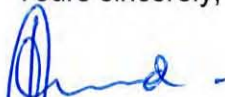
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<sup>4</sup> The amendments contained within the *Children (Criminal Proceedings) Amendment (Naming of Children) Act 2009* implemented several of the recommendations of the Standing Committee on Law and Justice's report '*The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*', 2008.

<sup>5</sup> Standing Committee on Law and Justice Report '*The Prohibition on the Publication of Names of Children Involved in Criminal Proceedings*', 2008, p xii.

Your officers may find it convenient to direct any queries in relation to the submission to the policy lawyer with responsibility for this matter, Rachel Geare, on 9926-0310 or at [rachel.geare@lawsociety.com.au](mailto:rachel.geare@lawsociety.com.au).

Yours sincerely,



Justin Dowd  
**President**