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Mr Laurie Glanfield AM
Director General
Attorney General's Department
GPO Box 6
SYDNEY NSW 2001

Dear Mr Glanfield,

Draft Children (Criminal Proceedings) Amendment (Naming of Children) Bill 2009

Thank you for the opportunity to comment on the draft *Children (Criminal Proceedings) Amendment (Naming of Children) Bill 2009* (Draft Bill). The Law Society's Juvenile Justice Committee (Committee) has reviewed the Draft Bill and provides the following comments for your consideration.

Recommendations 2 and 3

The Draft Bill implements 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*' (Report). The Report discussed at great length the problems with taking action on breaches of section 11. Recommendations 2 and 3 of the Report are about establishing a focal point in the NSW Police Force to investigate and prosecute breaches.

The Committee is of the view that in light of these strong recommendations, it would be of great benefit to mention both the police and the DPP as prosecuting bodies for the purposes of any breaches of proposed section 15A. Regardless that the provision is in a 'criminal' Act, there is a common misunderstanding that a breach is a 'civil' one.

The Committee is also interested to know whether the Office of the General Counsel within the NSW Police Force has taken the steps that the Government said would be implemented to investigate complaints relating to breaches of the legislation.

Recommendation 4

It is unfortunate that the Draft Bill does not incorporate Recommendation 4 of the Report. Recommendation 4 supported an extension of the prohibition to cover children 'who are reasonably likely to become involved in criminal proceedings'. The Committee does acknowledge that the Government response to the Report suggested that it could not argue for the extension of the protection recommended at the same time as arguing for uniform national laws on this point because the extended prohibition does not presently exist in any other Australian jurisdiction.

Section 15A(2)

The Committee is concerned that proposed section 15A(2) restricts the offence to circumstances where the publication is to the public or "a section of the public". The Committee is of the view that this section requires clarification.

The Committee agrees that it is the mass media that should be criminalised and not individuals who might "innocently" disclose details to a few other people. However, individuals now have access to 'mass communication' via the internet. The current technology available enables individuals to disseminate information electronically far and wide, with a domino effect that cannot be controlled. On-line social networking sites such as Facebook can start with an individual 'naming' a young person (arguably not caught by the section) but with access being so broadly available, would this action fall under 'public or a section of the public'? Is a breach judged by how many people an individual sends it to, or how many people read it? Is an email or Facebook entry to be judged as 'private', even though it is only a keystroke between what is 'private' online and what is 'public' online?

This section needs to be amended so that it is clear that even an individual comes under the section, especially in regard to electronic media. To ignore this aspect is to ignore the reality of modern communication.

Section 15C(4)

Proposed section 15C(4) 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. This is consistent with the 'other matters' raised in the Report and commented on in the Government's response.

The Committee is of the view that proposed section 15C(4) achieves a balance between maintaining a broad judicial discretion and providing some legislative guidance on the factors relevant to determining the interests of justice.

Section 15D(3)

The Draft Bill enables 16-18 years olds to give permission for the publication or broadcasting of their name if the consent is given either in the presence of an adult present with the consent of the child or a legal practitioner of the child's choosing.

The Committee suggests that the section should provide that the child can only give consent in the presence of a legal practitioner.

Children are often put under extreme pressure from those closest to them, especially family members. It can be very difficult for them to stand apart from this pressure. The independence of a legal practitioner is an important asset.

The involvement of family members in this decision can sometimes lead to detrimental effects. This is particularly so when there are circumstances where another family member is a 'victim' of the child's offence. There can be competing interests that compromise the decision process for the parent. There are also circumstances when the parent may want their child to be "named and shamed" because they perceive, rightly or wrongly, that that will serve as part of the 'lesson' or punishment.

The stigma to a child of being named can be a punishment, in and of itself, that is very difficult to quantify. In circumstances where the parent thinks it is a productive punishment the child could potentially be subjected to media cycles that are prolonged and ultimately very damaging. These consequences may not be initially anticipated by the parent. This applies to children in the city, but is particularly relevant to children in regional areas. The very fact that children are often dependant financially and emotionally on support of relatives and family members, and are more easily identifiable in regional areas, is a concern. Children are not necessarily able to move away and escape the stigma.

As outlined above, family members often do not have an understanding of the legal and other long term consequences that consenting to publication may have, and this advice can come best from a legal practitioner.

Section 15G

Proposed section 15G gives an exemption to court staff, but the exemption is far too wide. It is of course appropriate for court staff to be able to produce documents that 'publish' a young person's name, but only within the confines of the requirements of their office.

Court staff produce court lists for internal use, with the full names of the young people with matters listed on a particular day. Daily court lists are posted up on notice boards at court, and are now loaded onto the internet (often a day or so before the actual court date, usually on the Lawlink website). Court staff normally amend the version of the list that is displayed or loaded on-line, generally by changing the full name to initials. Unfortunately, this does not always occur. Court lists that are posted on the internet with the full names of young people are a major breach of the naming provisions, and the legislation should continue to make this an offence.

If the section is not amended then the legislation will create a situation where a newspaper cannot print a child's name but a government department can.

If the aim of the section is to avoid court staff from being prosecuted, then the section should at least be strengthened as follows:

> *'in the exercise of these official functions, staff will ensure that any publicly displayed documents have been amended so as to remove any identifying reference to a young person'.*

I trust these comments are of assistance.

Yours sincerely,

Michael Tidball
Chief Executive Officer