



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Madeleine Foley  
The Director, Portfolio Committee No. 5 – Justice and Communities  
Parliament House  
SYDNEY NSW 2000

By email: [portfoliocommittee5@parliament.nsw.gov.au](mailto:portfoliocommittee5@parliament.nsw.gov.au)

Dear Ms Foley

## **INQUIRY INTO IDENTITY PROTECTIONS FOR PROCEEDINGS INVOLVING CHILDREN**

The Law Society of NSW welcomes the opportunity to provide a submission to the inquiry into identity protections for proceedings involving children, conducted by the Portfolio Committee No. 5 – Justice and Communities of the NSW Parliament. This submission, informed by comments from the Law Society's Children's Legal Issues and Criminal Law Committees, addresses the inquiry's terms of reference.

### Existing identity protections for proceedings involving children

#### *Scope of the protections*

The Law Society considers the existing identity protections under section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**) and section 65 of the *Young Offenders Act 1997* (NSW) (**YOA**) important safeguards for children involved in criminal proceedings. As recognised by the NSW Law Reform Commission, publicising details of a child's involvement in criminal proceedings, either as a defendant, witness or victim, may contribute to the child's stigmatisation and psychological distress, impair their prospects of rehabilitation, and would be inconsistent with Australia's international obligations.<sup>1</sup>

The CCPA broadly protects the identity of children involved in criminal proceedings. The YOA protects the identity of children "dealt with" under that Act. In our view, the broad scope and categories of children who receive the benefit of an automatic statutory prohibition on publication of their identity is appropriate. It would be highly inappropriate and onerous for children involved in criminal proceedings to have to apply for an order to prevent publication of their identity, when the harm which may be caused to children by publication is well-recognised.<sup>2</sup>

#### *Jigsaw identification*

Our members note that the existing identity protections for children involved in criminal proceedings can be undermined by "jigsaw identification", where the child may be identified by piecing together information

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<sup>1</sup> NSW Law Reform Commission, *Open Justice: court and tribunal information – access, disclosure and publication* (Report 149) (May 2022) [9.6] (**LRC Report**).

<sup>2</sup> See: LRC Report, [9.25].

published by different sources. Members report this remains an issue in proceedings involving children and young people, especially with the rise of social media.

We suggest that the NSW Law Reform's recommendation in relation to this issue be considered, in particular, rather than the CCPA prohibiting the publication of the name of the child (and then defining "name" to include "a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person"),<sup>3</sup> simply prohibiting publication of "information tending to identify" the person.<sup>4</sup>

The NSW Law Reform Commission suggests "information tending to identify" a person be statutorily defined and include a non-exhaustive list of categories of information which may tend to identify someone, such as a person's name, school or employment.<sup>5</sup> In our view, the NSW Law Reform Commission's recommendation would provide greater clarity about the types of information which may result in the identification of a child involved in criminal proceedings and go some way to remedying the risk of "jigsaw identification".

#### *Exception where child deceased*

The exception to the prohibition on publication, as set out in section 15E of the CCPA, properly recognises that while some families may prefer privacy, other families may value public acknowledgement of the death of their child and should be able to apply for an exception to the prohibition to enable publication of the deceased child's name. Our members report, however, that in some instances the publication of a deceased child's name can undermine the statutory protection afforded to the identities of other children involved in the proceedings.

Accordingly, we support consideration of Recommendation 9.5 by the NSW Law Reform Commission, which suggests that a court determining the exception to the prohibition must consider the views of the family members of the deceased child as well as the views of any other person whose identity is protected by the statutory prohibition and who may be identified because of the publication of the deceased child's identity.<sup>6</sup> In our view, this amendment would appropriately ensure the court considers and balances all relevant views in making its decision.

#### *Duration of the prohibition on publication*

The Law Society strongly suggests that the legislation be amended to extend the prohibition against publication to the criminal investigation stage and prior to the commencement of formal proceedings, as proposed by Recommendation 9.5 by the NSW Law Reform Commission.<sup>7</sup> This should include protections for children under criminal investigation who are deceased, or who pass away during the alleged offending. Presently, no protection exists to prohibit the naming of a deceased child for whom criminal proceedings were never commenced as a result of their passing away.

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<sup>3</sup> *Children (Criminal Proceedings) Act 1987* (NSW), s 15A(5).

<sup>4</sup> LRC Report, p 257-258.

<sup>5</sup> *Ibid*, p 44-45.

<sup>6</sup> *Ibid*, p 265-266.

<sup>7</sup> *Ibid*, p 258.

Currently, the CCPA prohibits publication of a child's name "before or after the proceedings concerned are disposed of"<sup>8</sup> and does not appear to prohibit publication during the criminal investigation and pre-charge stage. In our view, the policy rationale for the statutory prohibition – that is, to reduce stigmatisation and facilitate rehabilitation – applies equally to the period when a child is under investigation for an alleged offence as it does if or when proceedings are formally commenced. Examples of how this gap in protection has led to the public identification of children involved, or suspected of being involved, in criminal proceedings is explored further below.

#### Reporting mechanisms and sanctions for breaches of identity protections

Under both the CCPA and YOA, it is an offence to publish or broadcast the name of any person which is prohibited by section 15A or section 65, respectively. Both offences carry a maximum penalty of a \$55,000 fine for a corporation, or a \$5,500 fine and/or 12 months imprisonment for an individual.<sup>9</sup>

While we consider these penalties appropriate and proportionate, our members report limited enforcement action, particularly in relation to comments on social media identifying children whose identities are statutorily protected.

#### Any examples in the previous two years where proceedings conducted pursuant to the *Children (Criminal Proceedings) Act 1987* have been made public, and the adequacy of existing reporting mechanisms and sanctions on these occasions

As noted above, section 15A of the CCPA does not explicitly protect a child's identity during the investigative stage prior to proceedings having formally commenced. Our members emphasise that this legal lacuna has enabled the media and police, at times, to broadcast images or information relating to children who are involved, or suspected of being involved, in criminal conduct or possible criminal proceedings, resulting in social media comments by members of the public identifying the child.

We suggest this outcome is contrary to the intention of the statutory protections contained in the CCPA and YOA, that is, to protect against the stigmatisation of children involved in criminal proceedings and to promote their long-term rehabilitation and reintegration into the community. An anonymised example is set out below:

#### **MW**

MW has some history with police, including having photos on the COPS system. Police are aware of very distinct tattoos on MW's arm and neck, as well as various piercings. She also has a very distinct haircut. A number of screenshots from CCTV were posted on the main NSW Police Facebook page which included a person with the same distinct tattoos and haircut as MW as well as a description of someone who matched the appearance of MW. The post also included details of a very serious allegation and strongly implied the person in the screenshots was seriously involved in, or the primary party wanted for, the alleged offending. MW's family were tagged in the post by multiple people and multiple people named MW as the wanted party. MW presented to police. She was not charged with the allegations. The post was removed within hours of MW presenting to police.

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<sup>8</sup> *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(4)(a).

<sup>9</sup> *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(7); *Young Offenders Act 1997* (NSW), s 2.



Our members also report receiving complaints from young people about their images or identifying information having been posted on NSW Police-operated social media pages, *after* commencement of legal proceedings against them, and often in relation to outstanding warrants. These reports appear to be in breach of the CCPA's statutory prohibition of the identification of children involved in criminal proceedings. An anonymised example is set out below:

**AJ**

AJ did not attend court and, as such, the Children's Court issued arrest warrants to bring him before the court. Within two days, the local Police Area Command's Facebook page had the mugshot of AJ up on their Facebook page with details of the date he did not attend court, as well as what offences the warrants were issued for. Multiple members of the community tagged AJ in the post. There were also multiple comments which used AJ's full name in the comments. AJ was arrested three days later. After AJ's lawyer contacted the local Police Area Command, the post was removed from their page.

In both examples, no enforcement action was taken despite the breach being notified to the local Police Area Command. We suggest these examples highlight the difficulty of enforcing the statutory identity protections for children involved in criminal proceedings where breaches occur on social media, especially social media operated by law enforcement agencies. In our view, these examples demonstrate an urgent need for further police training and education about appropriate use of social media in criminal investigations involving children, and appropriate enforcement action where breaches of statutory identity protections occur online.

Thank you for providing the Law Society with an opportunity to further consider this complex issue. Should you have any questions, inquiries at first instance may be directed to Jade Fodera, Policy Lawyer, on (02) 9926 0218 or [Jade.Fodera@lawsociety.com.au](mailto:Jade.Fodera@lawsociety.com.au).

Yours sincerely,

**Jennifer Ball**

President