Submission
No 18

INQUIRY INTO INQUIRY INTO THE PROHIBITION ON THE PUBLICATION OF NAMES OF CHILDREN INVOLVED IN CRIMINAL PROCEEDINGS

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IDENTIFYING CHILDREN BEFORE THE CRIMINAL COURTS

SUBMISSION ON BEHALF OF
THE LEGAL AID COMMISSION OF NEW SOUTH WALES
TO THE
NSW LEGISLATIVE COUNCIL STANDING COMMITTEE
ON LAW AND JUSTICE

Identifying Children before the criminal courts

The Legal Aid Commission of New South Wales (Legal Aid NSW) is established under the *Legal Aid Commission Act* 1979 (NSW) and is an independent statutory body. It provides legal services to socially and economically disadvantaged people. Legal services include representing them in federal and state courts and tribunals. Legal Aid NSW also works in partnership with private lawyers in representing legally aided people. The large majority of cases for which Legal Aid NSW provides representation or funds are criminal matters. The Children's Legal Service specialises in representing children and young people who appear in the criminal jurisdiction of the Children's Court. Legal Aid NSW also represents a significant proportion of children committed to the District Court for serious indictable offences.

Legal Aid NSW welcomes the opportunity to comment on the operation of section 11 of the *Children (Criminal Proceedings) Act*. This submission makes some preliminary observations on the general principles in relation to non-publication then addresses the separate references to the Standing Committee in order.

Summary

In the view of Legal Aid NSW the objects of section 11 remain valid. The section has failed to prevent the identification of juvenile offenders in some instances or to impose subsequent sanctions. Nevertheless, it is considered that a penal provision should be retained and procedures put in place for more effective prosecution of breaches. Legal Aid NSW submits that a cautious approach be taken to extending the scope of section 11 to other classes of children, than those involved in proceedings, as this would blur the specific application of the section to court proceedings. Legal Aid NSW has reservations over the power given to a court to authorize the publication of details of a child convicted of a serious juvenile offence under section 11(4B) however we would not support any proposal to separate the exercise that must be gone through under subsections (4C) and (4D) from the sentencing process.

Arguments for a more open system

Secrecy provisions such as section 11 have recently come under criticism for being contrary to the principle of open and accountable justice. Concealing the identities of people who have been found guilty and sentenced undermines a principle function of the criminal justice system, to express social disapproval of those who have committed offences. A significant section of the public appears to expect courts to make an example of those who violate the law and cause damage or injury to others, or as it is frequently expressed, "naming and shaming" them.

It is also sometimes argued that excluding the public from knowing or commenting on what happens in cases involving children can create an environment of secrecy and unaccountable paternalism, in which the legal rights of children are too easily

disregarded. Some commentators in the United States have supported this argument with persuasive examples of the abuse of legal process that have only been uncovered through the intervention of journalists.

A third argument for open justice starts from the role of the media to sustain free speech and expression. Most people rely on the media for the knowledge they need to participate as citizens. This is particularly important in relation to the operation of the law. There is widespread public interest in criminal justice issues and the media have a responsibility to cater for this interest. Various restrictions on free communication of information, of which restrictions on court reporting is one constitute a significant threat to the right of the community to be informed.

The recent Report on Free Speech in Australia undertaken on behalf of media stakeholders commented on the lack of uniformity about rules relating to the identification of children, whether they are accused of crime, victims of crime or witnesses, as well as of naming of the accused in cases involving children, which could identify the child or children involved. (Moss 2007 page viii, pages 195-197). To the extent that there is a lack of uniformity as claimed it is more likely to expose children to publicity than to protect their identity.

Media advocates for freedom to report juvenile offences argue that restrictions on identifying offenders are unfair on them, because of the increasing number of people with access to other forms of communication that are not affected by the same restrictions. Prohibitions on publication or broadcast, rarely affect participants on Internet chat-lines and news groups or mobile phone users even though these forms of communication now support widespread dissemination of information. A person who is particularly interested in the identity of a child offender can usually find it out,

so, the argument runs, why should the mainstream media be prevented from telling them?

Argument for restrictions on identifying children

While Legal Aid NSW would not dismiss the above arguments, there are equally strong principles that justify restrictions on identifying children in criminal proceedings. The restrictions under section 11 remain valid and appropriate. This conclusion is supported in two recent publications of the Australian Law Reform Commission (ALRC 2005, ALRC 2007). They are specifically endorsed by international conventions (United Nations 1985: Rule 8.2).

Section 11 is not a standalone provision, but part of an overall approach to juvenile justice that recognizes that the criminal legal process should be different from that which applies to adult offenders. The understanding that children are not simply little adults informed the creation of separate juvenile justice systems at the end of the Nineteenth Century. This understanding has been reinforced by accumulating evidence that the development of children's brains makes them less able to foresee the consequences of their actions.

During the 1980s and 1990s, starting in the United States, then the United Kingdom, there was a move away from this principle based on a perceived demand for public safety and a declining confidence in juvenile rehabilitation (Belair 1997). This approach appeared to express a faith in the ability of the judicial system to resolve social problems that increasingly placed the law at odds with those professionals working in the area of youth crime and with the increasing process of child offenders through diversionary alternatives (Bandalli 1999 pages 87-89).

More recently there are signs of a return to a more rehabilitative approach. The 2007 report of the US Federal Advisory Committee on Juvenile Justice captures this mood.

> One of the first questions that needs to be answered is, "What is the mission of the juvenile justice system? Should it focus on rehabilitation with a goal of reducing future criminal behavior in youth?" There are some who perceive the rehabilitative approach as too soft because it does not provide punitive consequences believed to reduce criminal behavior. However, research by criminologists over the past several years has shown that punitive consequences do not, in fact, reduce criminal behavior and in some cases actually increase it.
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> The National Institutes of Health (NIH) released an independent report in 2004 that concluded that "get tough" programs such as group detention homes and boot camps are not only ineffective but may actually exacerbate existing problems among delinquent youth (U.S. Department of Health and Human Services, National Institutes of Health, 2004). Similarly, the NIH study also concluded that scare tactics (such as the Scared Straight program) and initiatives that consist of adults lecturing to adolescents (such as the D.A.R.E. program) do not work either.
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> Rehabilitative approaches are the smart, not soft, method necessary to address both the present needs of juveniles and the potential for future criminal conduct. (US Federal Advisory Committee 2007)

The processes of sentencing under the *Children (Criminal Proceedings) Act* are affected by considerations of the welfare of juvenile offenders. Juvenile offenders are segregated from adult offenders. The Children's Court is closed to the public and the processes of establishing guilt and determining punishment are more explicitly rehabilitative.

Public naming of child offenders is a blunt instrument for achieving valid sentencing goals. Effective punishment does not necessarily exclude making the offender ashamed of their conduct. However Braithwaite's distinction between reintegrative shaming where the offender has to face the effects of their crime through contact with those it has affected and those who have a commitment to the offender's reintegration in society and stigmatic shaming, where their offence is paraded before an anonymous and uninvolved public is particularly relevant to children. (Braithwaite 1989, especially chapter 4; see also Chappell & Lincoln 2007 page 485).

Identifying child offenders is also inconsistent with the rehabilitative approach to sentencing, to the extent that public knowledge of their offence can make it more difficult for juveniles to reintegrate into school and community. The stigma of publicity affects employment and further educational opportunities. They are more likely to be exposed to harassment or threats of violence. This is particularly the case in smaller communities and may effectively force the child out of their familiar community.

Children who are already at risk of becoming career offenders may welcome the publicity as enhancing their reputation for toughness. Alternatively they may find it so difficult to accept the burden of shame that they are pressured into a coping strategy of treating adverse publicity as a badge ort honour.

Publicity that stigmatises a child may also unfairly expose the child's siblings and parents. Unlike adults, children are regarded less as fully autonomous individuals but as part of a family unit. Even if other family members are not exposed as victims by such publicity Some might argue that identifying a child offender is a good thing if it provides an incentive for parents to face up to their parental responsibilities. However, this argument depends on a rather blunt mechanism to achieve a dubious

good. It is difficult to maintain at the same time that naming a child is a way of making them responsible for their behaviour and that it is a mechanism for enforcing parental responsibility.

Section 11 is consistent with other provisions on non-publication designed to protect children in care proceedings and family law. Relaxing the process for the purpose of punishment would increase the risk of journalists getting it wrong on these other matters.

Because the media is now an electronic resource, naming a child today, means that there will be a permanently accessible record of their offence. This conflicts with other legal provisions that aim to support rehabilitation.

The recent Media Free Speech report complained about inconsistency of laws on the identification of children before the courts in Australia (Moss 2007 pages 183, 195-7) The fact is that all Australian jurisdictions except the Northern Territory have restrictions on reporting child offenders. As noted below lawyers and youth workers have expressed serious concerns over the negative impact of the lack of such restrictions in the Northern Territory.

The Standing Committee's terms of reference refer to the following issues:

1. The extent to which the policy objectives of the prohibition remain valid

Legal Aid NSW practitioners who work with children believe that the policy of shielding children from having their offences publicised remains valid. The policy is further strengthened by a more balanced understanding of the function of shaming in a juvenile justice context, as reinforced by the expansion of diversionary programs for juvenile offenders.

The concerns recently expressed by lawyers and youth workers in the Northern Territory, where the main newspaper regularly reports the identity of child offenders, as permitted by Territory law, reinforce this view by highlighting negative consequences of publicity. (ABC Stateline 2006; ABC Law Report 2006;, Hunter 2006; NAAJA 2006). The stigmatising effect of publicity is often greater in smaller communities where there is a single source of news.

The Northern Territory Supreme Court case of *MCT v McKinney* ([2006] NTSC 35) suggests that if the protection of section 11 was lost, it could not be readily assumed that a court could make a valid suppression order where it considered this was in the best interests of the child. In that case the court overturned a decision by the Chief Magistrate of the Juvenile Court to suppress the name of a 15 year old in the interests of assisting in his rehabilitation. The Chief Magistrate expressed the view that publication could serve no useful purposes. Angel held that this order could not be said to be in the interests of justice as required by the general law on making suppression orders.

2 The extent to which section 11 is achieving these objects

Legal Aid NSW has concerns that a lack of vigour in enforcing section 11 has made the protection it is supposed to provide less effective. Legal aid practitioners representing children have experience of incidents where section 11 was breached either by publication of names or by photographs or film that indirectly identified an offender. In some instances there was no prosecution.

In a 2006 prosecution over the broadcast of details of a juvenile killed following a police pursuit in Macquarie Fields in 2005, the magistrate found that the broadcast amounted to a prima facie breach of section 11 but dismissed the case on the basis

that the wrong legal entity had been charged (PIAC 1996). A recent Internet search on the name of the juvenile concerned in that case, showed 298 entries, including some from main media outlets.

We support more active prosecution of breaches. At the same time prosecution alone is not the only measure by which the effectiveness of the section should be assessed. As a society we have become accustomed to the view that there are different ways of regulating activities that may cause harm, ranging from penalties through civil or administrative remedies, co-regulation under an independent watchdog to self-regulation. Media reporting has to navigate in an environment where all these processes operate to a greater or lesser extent. As well as prohibitions on publications and suppression orders in particular matters, there is the law of defamation, possible action for infringement of privacy if current law reform proposals by both the Australian and New South Wales Law Reform Commissions bear fruit, complaint investigation by ACMA and State and Commonwealth privacy commissioners, complaints to the Australian Press Council and journalistic and corporate codes of ethics. The legal prohibition on publication helps to set a standard, whereby these other remedies can be enforced.

The exemption for journalistic activities of the media under the *Privacy Act 1988* limits remedies currently available under the Act. For example news reporting is largely exempt from conduct which breaches National Privacy Principle 1 which requires organizations to collect personal information by lawful and fair means.

A response on the extent to which section 11 is achieving its objects can hardly avoid reference to the effect of subsection (4B) on the discretion to name juveniles who are convicted of a serious children's indictable offence. Particular attention has

focussed on the way the provision was interpreted in *John Fairfax Publications re MSK, MAK, MMK and MRK* ([2006] NSWCCA 386). In that case the Court of Criminal Appeal declined to consider whether it could override the decision of the sentencing judge not to make an order allowing publication, on the grounds that the Legislature had evidently intended that this power should be exercised by the sentencing judge as part of the sentencing process. The Court also upheld orders covering the identification of the co-accused brothers who were not juveniles in order to give effect to the protection under section 11.

While there are concerns in relation to the way the exception under section 11(4B) is expressed, the principles recognised by the Court remain valid. A decision that a particular offence is serious enough to justify going the extra step to remove the protection afforded by the section is one best made by the sentencing judge taking into account all the other matters that have to be considered as part of the sentencing process. The principle serves well for the majority of cases and should not be watered down because of public disapproval of the offenders in one exceptional case. The maintenance of pseudonymity orders against adult offenders as a means of safeguarding the principle in section 11 in relation to siblings follows on from the principle.

The general reservation we have referred to about the way subsection (4B) is expressed concerns the requirement that an order has to be "in the interests of justice". This assumes that the interest in protecting an offender from the effect of publicity can be opposed to or balanced against the interests of justice. It can be argued that the interests of justice where juvenile offenders are concerned supports

the prohibition on identification, and that an exception that requires proof to the contrary is confusing and contradictory.

3. Whether the prohibition in section 11 should cover

(a) children who are arrested and not charged

(b) other children who are reasonably likely to be involved in the proceedings

(c) any other circumstances

This question raises two competing issues. On the one hand the approach to protecting the identities of children should be consistent. The protection offered by section 11 could be seen to be frustrated if the media were free to publish details of children who are identified as suspects or arrested before they were charged or appeared in court. The ease with which news items can be retrieved from on-line news archives and discussed on-line means that it can no longer be assumed that names will be forgotten between the original arrest and the trial.

On the other hand there is a case for separating the provisions for children involved in court proceedings from provisions relating to investigative or diversionary processes. There will be times when it is unreasonable to prohibit disclosure of the identity of a child or young person who is suspected of committing an offence or who has been arrested but not charged. The law needs to be able to retain a degree of flexibility in such cases, relying on the discretion of police as to whether disclosure is appropriate or not. Police in New South Wales may not be fully accountable for how they exercise this discretion, as the *Privacy and Personal Information Protection Act 1998* gives them a blanket exemption except for administrative and educative functions. However, the exemption in other jurisdictions is not so broad, and the Australian Law Reform Commission has made proposals for greater uniformity of

such laws (ALRC 2007 page 25). Privacy laws generally exclude the judicial functions of the courts, hence the need for court specific legislation.

There is also merit in retaining the separate provisions to protect the identity of children in diversionary programs such as section 65 of the *Young Offenders Act 1997* and similar provisions in other jurisdictions.

4 Any other relevant matters involving the publication and broadcasting of names including prohibitions under the Young Offenders Act and the Crimes Act 1900

Publication of details of children would have consequential effects on the use of information about child offenders generally. For example the ability to search on media databases for the names of children who have appeared before the courts would be contrary to polices designed to minimise the effect of child offending on criminal records.

Section 38 of the *Children (Criminal Proceedings) Act* requires the destruction of fingerprints and photographs of children who have been found not guilty, or found guilty and had charges dismissed, as well as discretionary orders for destruction where an order is made against a child. The section is primarily intended to prevent a child from obtaining a criminal record. Section 8 of the *Criminal Records Act* 1991 provides that an order of the Children's Court dismissing a charge and administering a caution is spent as soon as it is made. Section 10 reduces the crime free period before which a conviction is spent to three years in the case of Children's Court orders. The *Courts and Other Legislation Amendment Bill 2007* clarifies requirements for destruction of fingerprints and photographs for children who receive a police warning once they turn 21. None of these provisions prevent Police from

retaining a record of the incident for which the child was originally proceeded against for operational purposes.

CONCLUSION

The Legal Aid NSW is grateful both for the opportunity to make submissions on the Standing Committee's reference on Identifying Children before the Criminal Courts, and for the extension provided to enable this submission to be made.

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