

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

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19 December 2007

Ms Christine Robertson, Committee Chair
Standing Committee on Law and Justice
Parliament House
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Dear Ms Robertson

Inquiry into the Prohibition on the Publication of the Names of Children Involved in Criminal Proceedings

The National Children's and Youth Law Centre thanks the Standing Committee on Law and Justice for the opportunity to make contributions to its Inquiry.

Our comments on the terms of reference are attached.

Yours sincerely

James McDougall
Director

Comments on Terms of Reference

**Inquiry into the prohibition on the publication of names of
children involved in criminal proceedings**

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James McDougall, Director
National Children's and Youth Law Centre

1 National Children's and Youth Law Centre

- 1.1 The National Children's and Youth Law Centre ("**NCYLC**") is a national community legal centre working for and with children and young people. NCYLC promotes the rights and interests of Australian children and young people through advocacy, advice and information, strategy casework and policy development. Since its inception in 1993, NCYLC has made over 180 public submissions on law and policy affecting children and responded to over 150,000 inquiries.
- 1.2 NCYLC seeks to increase children's access to legal assistance, to improve the legal status of children and young people and to promote child rights in Australia.

2 Introduction: NCYLC opposes the proposal to "name and shame"

*"Privacy protection is not only in the interests of child offenders.
The interests of justice, and of society as a whole, will not be
served by further eroding the privacy rights of children"¹*

- 2.1 NCYLC welcomes the opportunity to comment on the terms of reference of the Standing Committee on Law and Justice's ("**Committee**") inquiry into the prohibition of names of children involved in criminal proceedings ("**Inquiry**").
- 2.2 The objectives of the prohibition on the publication and broadcasting of names of children involved in criminal proceedings ("**the prohibition**") under section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) ("**the Act**") reflect good public policy.² The prohibition ensures that the competing public interests in responding to crimes committed by children are appropriately balanced - that is, the interests of the child, the rehabilitation of the child, and the interests of society in open justice.
- 2.3 We would argue that open justice does not depend on the publication of material identifying the child appearing before the courts. The content of court decisions and the reasoning behind judgments will remain available for public scrutiny. The Court of Appeal of the Northern Territory recently adopted this argument to support its decision to issue a publication suppression order; stating that such an order "*does not in any way prevent the media from publishing the details of the offending and every other aspect of the offences*".³ Society can still be informed as to the operation of justice and how a case will be treated by a court. The publication of the name of the child involved in the proceedings does not add to this. It remains in the interests of society that the child is reintegrated and can contribute as a valued member of society.
- 2.4 There may be extraordinary circumstances where the public interest in publication outweighs the privacy interests of the child and the risk of damage to the rehabilitation prospects of the child. The prohibition as it currently operates allows publication in such circumstances.

¹ A Johnston, Acting Privacy Commissioner, Position Paper: The Privacy Commissioner's position on Child Offenders and Privacy (23 July 2002); <http://www.privacy.org.au/Papers/ChildOffenders2002.pdf> at 10 December 2007.

² Note: by "children", we mean a person under the age of 18 years, in accordance with the Act: s (1).

³ *MCT v McKinney & Ors* [2006] NTCA 10, at [32].

- 2.5 This allows for the issue to be determined by the sentencing judge, who is best placed to weigh the interests in the case at hand.

3 The policy objectives of the prohibition remain valid

- 3.1 Under the current prohibition, a court that sentences a young person convicted of a serious indictable offence may authorise publication or broadcasting of the young offender's name (without consent) if the prejudice to the young person arising from making such an order is outweighed by the interests of justice.⁴
- 3.2 The policy objectives of the prohibition on the publication and broadcasting of names under the Act remain valid.
- 3.3 The publication and broadcasting of names of children involved in criminal proceedings beyond that currently legislated under the Act is not justified. In NCYLC's view, a broader policy of "naming and shaming" should not be implemented because:
- (i) it is in breach of international and national child rights standards;
 - (ii) it increases the risk of damage from inappropriate media exposure; and
 - (iii) it fails to appropriately address underlying social issues.

"Naming and shaming" breaches international child rights standards

- 3.4 The United Nations' Convention on the Rights of the Child ("CROC")⁵ provides a universally accepted rights-based framework that has been adopted and ratified by Australia.⁶ In particular, CROC includes protection for children from arbitrary or unlawful interference with their privacy.⁷
- 3.5 Article 40 of CROC provides that a child accused of a criminal offence must be treated in a manner that takes into account the child's age, the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- 3.6 The proposal to "name and shame" is in breach of a child's right to privacy in Article 16 of CROC. It is also in contravention of a child's right to be treated in the manner accorded by Article 40. It fails to take adequate account of a child's age and to promote reintegration into society. To "name and shame" weakens the CROC protections of children who "*by reason of their physical and mental immaturity [need] special safeguards and care, including appropriate legal protection*".⁸
- 3.7 The proposal is also contrary to the international standards set out in the United Nations Standard Rules for the Administration of Juvenile Justice (**"the Beijing**

⁴ Section 11(4B)-(4C) of the Act.

⁵ United Nations, *Convention on the Rights of the Child*, United Nations Treaty Series, vol. 1577, p. 3 (entry into force 2 Sep 1990).

⁶ On 17 December 1990.

⁷ Article 16.

⁸ D Chappell, R Lincoln, "Abandoning identity protection for juvenile offenders" (2007) 18(3) *Current Issues in Criminal Justice*.

Rules")⁹ and the United Nations Guidelines for the Prevention of Juvenile Delinquency ("the Riyadh Guidelines")¹⁰.

- 3.8 Australia's (and New South Wales's) young offender laws are generally consistent with these instruments of international law. As a result our laws and the youth justice system of this country and this state have been held in high regard internationally.
- 3.9 The Beijing Rules require Member States to implement social policy to promote juvenile welfare, with the aim of reducing juvenile crime and delinquency using positive social measures rather than punishment in the traditional sense; and in the process protect the welfare of juveniles and their families.¹¹
- 3.10 The Beijing Rules require the protection of the right of juveniles to privacy and the avoidance of the harm caused by "*undue publicity or by the process of labelling*".¹² The Rules further provide that "*[i]n principle, **no information** that may lead to the identification of a juvenile offender **shall be published***".¹³
- 3.11 The Rules recognise the particular susceptibility of juveniles to being stigmatised or labelled and the detrimental effects that identification has. Identification of a juvenile offender is inconsistent with the aim of the Rules to limit the impact of the ordinary criminal justice system and instead to divert young offenders back to the community.
- 3.12 Therefore the "name and shame" proposal is contrary to the explicit requirements of the Beijing Rules and to its general principles and spirit.
- 3.13 The Riyadh Guidelines aim to reduce juvenile delinquency. The Guidelines call for the adoption of positive social programs to integrate young people into society and to address the *causes* of delinquency, rather than focusing on punishment post-factum. The focus of any preventative program undertaken to implement the Guidelines should be the well-being of children and young people.¹⁴

"Naming and shaming" breaches national child rights standards

- 3.14 We argue the focus of measures that address offending behaviour should be on the shaming of the act itself and not the offender.¹⁵ The naming of the child, as a form of shaming, is counter-productive as it distances the child from society and acts against any process of reintegration.
- 3.15 This view is supported by the Privacy Commissioner who, in a position paper in 2002, stated that "*to allow the public naming of children convicted of mid-level crimes will deprive children of their human dignity, and damage their chances of rehabilitation*".¹⁶

⁹ UN General Assembly, *United Nations Standard Rules for the Administration of Juvenile Justice* (resolution adopted by the General Assembly, 29 Nov 1985), U.N. Doc. A/RES/40/33.

¹⁰ UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency* (resolution adopted by the General Assembly, 14 Dec 1990), U.N. Doc. A/RES/45/112.

¹¹ Above n 9, Part One: General Principles.

¹² Above n 9, Rule 8.1.

¹³ Above n 9, Rule 8.2 (emphasis added).

¹⁴ Above n 10, Fundamental Principle 4.

¹⁵ Above n 8.

¹⁶ Above n 1.

- 3.16 The Privacy Commissioner concluded that *"I would not support any change to the current laws, which already balance the competing public interests in open justice, rehabilitation, and children's privacy"*.¹⁷ NCYLC supports this view.
- 3.17 Similarly, in 2005 the NSW Law Reform Commission, following an extensive inquiry into young offenders, recommended that the current prohibitions not be relaxed.¹⁸
- 3.18 Finally NCYLC refers the Committee to the Australian Law Reform Commission ("ALRC")'s Review of Australian Privacy Law currently underway.¹⁹
- 3.19 The Review includes consideration of the application of privacy laws to children and young people.²⁰ In its Discussion Paper the ALRC proposes preserving State and Territory laws which prohibit identifying young people in criminal investigations and criminal proceedings.²¹ It notes that the Northern Territory allows the publication of the names and photographs of children unless there is a specific direction by the Youth Justice Court otherwise.²² This is in contravention of CROC. The ALRC expresses its concern with the serious deficit in the protection of young people involved in criminal proceedings in the Northern Territory, and has recommended the introduction of a prohibition of publication of a report of criminal proceedings that identifies, or is likely to lead to identification of, a child or young person.²³
- 3.20 The importance and appropriateness of a prohibition is supported by the Privacy Commission, the Australian Law Reform Commission and the NSW Law Reform Commission as outlined above.

Risk of abuse by media

- 3.21 As the Privacy Commissioner stated in the Position Paper mentioned at [3.15] above, *"what might interest the public at a particular point in time does not necessarily equate to the public interest"*.²⁴
- 3.22 Encouragement of "naming and shaming" increases the risk of abuse by the media. The impact of careful sentencing comments can be destroyed by unbalanced reporting.
- 3.23 The claimed moral authority of upholding the interests of victims is misplaced. How society meets the needs of victims is a separate public policy question. The grief, anger and loss experienced by victims all deserve better redress.
- 3.24 Too often the experience of victims is misappropriated by the media and rather than raising the important issue of appropriate redress is redirected as 'moral outrage' towards offenders (or suspected offenders) - and sometimes also the criminal courts.

¹⁷ Above n 1.

¹⁸ NSW Law Reform Commission, *Report 104: Young Offenders* (2005) at [8.32].

¹⁹ ALRC, *Review of Australian Privacy Law*, DP 72, September 2007.

²⁰ Chapters 59 and 60.

²¹ See: ACT – *Children & Young People Act 1999* (ACT) s 61A; SA – *Young Offenders Act 1993* (SA) s 13; Victoria – *Children and Young Persons Act 1989* (Vic) s 26; WA – *Children's Court of Western Australia Act 1988* (WA) s 35; Tasmania – *Youth Justice Act 1997* (Tas) s 22.

²² *Youth Justice Act 2005* (NT) s 50.

²³ Above, n 19, [60-192] – [60-195]; see recommendation of the ALRC in ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 27-1.

²⁴ Above n 1.

Victims' interests and their place within the broader justice system require more careful public policy consideration.

- 3.25 Sadly, rather than engage in this debate, some sections of the media will often resolve an issue with a campaign that seeks to polarise opinion rather than inform. The interests of justice, of victims and of child offenders are not served by this approach.
- 3.26 Legislative provision for the publication of names of children will give tacit endorsement to such campaigns and provide no encouragement for responsible reporting.

"Naming and shaming" does not address underlying social issues

- 3.27 There remains little evidence that the naming of young offenders furthers the interests of society as a whole. On the contrary, it is widely accepted that "naming and shaming" is detrimental to rehabilitation prospects. Even in the Northern Territory, where there is a presumption in favour of publication and identification,²⁵ the Court of Appeal recently stated that:

"...when a court is asked to exercise its discretion, it is important to weigh in the balance the fact **now almost universally acknowledged** by international conventions, State legislatures and **experts in child psychiatry, psychology and criminology**, that the publication of a child offender's identity **often serves no legitimate criminal justice objective**, is usually psychologically harmful to the adolescents involved and **acts negatively towards their rehabilitation**."²⁶

- 3.28 Support for a focus on rehabilitation comes not only from the Courts and from internationally recognised principles as outlined above.²⁷ The Australian Law Reform Commission, in two separate reports,²⁸ has noted the public policy justifications for a prohibition on identifying young offenders and has particularly noted "*the rehabilitative aims of the juvenile justice system*"²⁹.
- 3.29 The circulation of the names of juvenile offenders does little more than provide the community with a semblance of security whilst stimulating the "*labelling, stigmatization and ostracism of the offenders*".³⁰ In doing so it does not adequately address the prospects of rehabilitation and needs of the offender and hence "*loses sight of the original intention of the juvenile justice system*".³¹
- 3.30 This is reinforced by consideration of the principles of child and adolescent development. This leads back to the rationale for the development of a distinct set of internationally recognised principles for dealing with young offenders, which focus on rehabilitation (as outlined above from paragraph 3.4 to 3.13). In large measure Australian and NSW law reflect these principles.

²⁵ See discussion above at [3.19].

²⁶ *MCT v McKinney & Ors* [2006] NTCA 10, per Martin (BR) CJ, Mildren and Thomas JJ at [20] (emphasis added).

²⁷ For example, the Human Rights and Equal Opportunity Commission and the NSW Commission for Children and Young People, as referred to at [3.30] and [3.31] below, respectively; and the .

²⁸ Above n 19, [60.195]; and *Same Crime, Same Time*, above n 23, [27.62] – [27.66].

²⁹ Above n 19, [60.195].

³⁰ See, in relation to sex offender registries, S W Craun, P D Kernsmith, "Juvenile Offenders and Sex Offender Registries: Examining the Data Behind the Debate" (2006) 70(3) *Federal Probation*.

³¹ *Ibid*.

- 3.31 There is no evidence to demonstrate that publicly identifying children will help their rehabilitation or suitably deal with the cause of the crime itself. To "name and shame" a child will, potentially irreparably, damage a child's chances of rehabilitation. The naming will stigmatise the child personally. It may also adversely affect future prospects for study, training, employment or general living arrangements. This is a view supported by the Human Rights and Equal Opportunity Commission, which, in calling for a change to the Northern Territory laws outlined above, argued that "naming and shaming" is an ineffective and inappropriate form of punishment:

"In practice, the consequences of 'naming and shaming' juvenile offenders are often far worse than the punishment imposed by the court. Naming young offenders can jeopardise their prospects of future employment, inflict psychological damage, and lead to verbal or physical abuse. In short, 'naming and shaming' juvenile offenders can **deal a knock-out blow to the prospect of rehabilitation.**"³²

- 3.32 It is also a view supported by the NSW Commission for Children and Young People, which has strongly asserted the importance of focusing on rehabilitating young offenders and the regressive effect that "naming and shaming" has on rehabilitation.³³

Case studies

- 3.33 An example of the adverse effects that naming a young person may have is the case of a young male aged 15 who had a number of aggravated assault charges brought against him in the Northern Territory in 2003. The daily newspaper of the Northern Territory printed the name of the boy, along with a large photograph encompassing almost half a page, on page one of that newspaper beneath a heading describing the boy as a "*bored thug*". Such a publication went to print on two occasions.³⁴
- 3.34 In an interview with ABC Radio National, the father of the named boy described the severe detrimental effects the naming had on his son, even some three years later. The boy was approached by people on the street following his court appearance with taunts of "[y]ou're the little punk that was on the pages".³⁵
- 3.35 The naming also affected the boy's family, causing significant stress and concern. Further, the boy's prospects of reintegrating into society by means of gainful employment have been severely diminished as a result. As his father stated, the effect of naming a young offender is that "[t]hey can't get jobs, decent jobs, anyhow. And with him, we're six years down the line now, and **he still can't get a job.**"³⁶

³² President John von Doussa, Human Rights and Equal Opportunity Commission, "An Update on the Work of the Human Rights and Equal Opportunity Commission: 'Naming and shaming' juvenile offenders", presented at the Northern Territory Anti-Discrimination Commission on 31 October 2006 (emphasis added); <http://www.hreoc.gov.au/about/media/speeches/speeches_president/2006/20061031_darwin.html#fnB9> viewed 12 December 2007.

³³ NSW Commission for Children and Young People, "Naming juvenile offenders is a bad move", news release, 5 October 2007; <<http://www.kids.nsw.gov.au/director/resources/news.cfm?itemID=6E3280F5E36BE423EB48CE4983BC7658>> viewed 12 December 2007.

³⁴ See ABC Radio National, "Naming and Shaming Juvenile Offenders", broadcast on The Law Report, 3 October 2006; <<http://www.abc.net.au/rn/lawreport/stories/2006/1752189.htm>> viewed 12 December 2007.

³⁵ Above n 34.

³⁶ Above n 34 (emphasis added).

- 3.36 A youth worker was involved in that same radio program discussion, and provided further anecdotal evidence of the detrimental effect on rehabilitation that naming a young offender has. In that case, a 14 year old girl and her 13 year old brother were charged with a shoplifting offence. The names and photos of both of the children were published in a one page article in the Northern Territory News. This was at a pre-trial stage, before any conviction was established.
- 3.37 The youth worker reported that, three years later, the girl is still discriminated against. As for the boy, *"the message that was given to him is that he's bad, he's an offender, and his life has pretty much gone down that track of reoffending"*.³⁷

Name and shaming contributes to recidivism

- 3.38 As can be seen from that case in particular, to "name and shame" is likely to contribute to and increase recidivism. Studies have shown that violent long term re-offending is inextricably linked to anxiety-ridden juvenile offenders who have demonstrated poor social skills; suffering primarily from difficulties in emotional attachment.³⁸
- 3.39 Recidivism is also a result of the stigmatisation that ultimately results from the labelling process of "naming and shaming". The risk of recidivism is apparent when one considers the theory of labelling, which leading Australian criminologist Chris Cunneen has described as inherently *"tied up with the idea of the self-fulfilling prophecy"*.³⁹ That is, the stigma becomes the master of the young person, influencing the community's perception of that young person and the self-perception of that young person such that the young person will *"live up to the dictates of the label"*.⁴⁰ That is, the young person will become a repeat offender in accordance with the label imposed on them in the process of naming.
- 3.40 This is a view supported by other criminologists and civil liberties advocates.⁴¹ Naming young offenders is particularly disturbing given the impressionable nature of young people and the long-term effect likely to result from stigmatising a person in their formative years.
- 3.41 Recidivism is also fuelled by the absence of employment opportunities. As discussed above, "naming and shaming" can adversely affect a youth's chances of obtaining employment. Given the inverse relationship between employment and crime, to stigmatise a young person and jeopardise their employment prospects increases the probability that that young person will be driven to a path of re-offending.⁴²

³⁷ Above n 34.

³⁸ B Wileman, E Gullone and S Moss, "The Juvenile Persistent Offender, Primary Group Deficiency and Persistent Offending Into Adulthood: A Prospective Study (1980-2002)" (2007) 14(1) *Psychiatry, Psychology and the Law* 66.

³⁹ C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2007, 3rd ed), 39.

⁴⁰ Cunneen and White, above n 39, 39.

⁴¹ See the arguments in favour of a prohibition against naming in N Dixon, *Naming Juvenile Offenders: Juvenile Justice Amendment Bill 2002 (Qld)*, Research Brief No 2002/22, Queensland Parliamentary Library, at [3.3.1]. Proponents included: Dr Kathryn Cronin, member of the ALRC assisting the *Seen and Heard Report: Priority for Children in the Legal Process*, ALRC Report No 84 (1997); Paul Wilson, criminologist (then at Bond University); Paul Spooner, then Director of the Youth Advocacy Centre; and Terry O'Gorman, then of Queensland Civil Liberties Council.

⁴² See discussion on the importance of youth employment and the relationship of unemployment and crime in Cunneen and White, above n 39, 35.

- 3.42 Effective crime prevention is more likely to be supported by the implementation of programs which promote social cohesion and positive environments, *not* the stigmatisation and ostracism of the most vulnerable members of our community through a policy of “naming and shaming”.
- 3.43 Negative effects on rehabilitation aside, respected criminologist John Braithwaite has argued that “naming and shaming” is unlikely to even have its direct intended effect – that is, to shame the offender not to commit the offence again. Braithwaite has argued that this type of shaming may in fact make an offender feel *less* ashamed, and it is in fact through restorative practices that an offender will feel remorse.⁴³

Reintegrative shaming vs naming and shaming

- 3.44 Restorative practices, such as conferencing, act as a form of “*reintegrative shaming*”.⁴⁴ It is for this reason that Youth Justice Conferencing is such an effective means of dealing with a young offender. The technique of confronting the young person with the direct effect of their offence, and “shaming” them in front of those they respect such as their parents, is a much more effective means of reducing recidivism than the “shaming” that is brought upon a young person by the media, police and the public generally in the process of naming.⁴⁵ It is more likely to induce the young offender to feel ashamed of their actions and remorse, and thereby less likely to offend again.
- 3.45 Indeed, it is argued that being labelled in the process of “naming and shaming” may have the effect of making an offender *proud* of their offence, particularly if there is media coverage and the young offender is offending as a way of “*acting out*” and attracting attention within his or her particular peers or associates.⁴⁶
- 3.46 The possible ramifications of publication of the identity of a young offender, not only for the young offender in question but also for their family members and their victims, must be subject to measured consideration. The present system in NSW allows for this consideration and ought not to be discarded or changed.

4 Pre-sentencing disclosure is unjustified

- 4.1 The current prohibition grants a sentencing judge the discretion to publish the name of the child at the sentencing stage of proceedings.
- 4.2 A priori NCYLC submits that there should be no ability to publish a child’s name at any earlier stage of proceedings. It is a fundamental rule of law that all people are entitled to a presumption of innocence. It is particularly inappropriate to allow a child that may be innocent to be exposed to public scrutiny.

⁴³ J Braithwaite, “Zero Tolerance, Naming and Shaming: is there a case for it with crimes of the powerful?”, presented at the Australian and New Zealand Society of Criminology Conference, Perth, 30 September 1999, 2; <<http://www.anzsoc.org/conferences/1999/braithwaite.pdf>> viewed 17 December 2007.

⁴⁴ Braithwaite, above n 39; see also J Braithwaite, *Crime, Shame and Reintegration* (1989).

⁴⁵ See Braithwaite, above n 39 at 7, referring to “restorative justice conferences”.

⁴⁶ NSW Law Reform Commission, above n 17, at [8.29] – [8.30].

- 4.3 It is only at the sentencing stage, when all the facts have been placed before an impartial court, that competing interests may be properly weighed for the appropriate outcome. The importance of rehabilitation, as canvassed above, is too high to jeopardise by allowing the publication of a child's name before proper consideration of all the issues and interests at hand.

National Children's and Youth Law Centre