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5 December 2014

Children, Youth and Families Amendment Bill Exposure Draft
C/ Department of Justice
GPO Box 4356

By email: criminal.law@justice.vic.gov.au

Re: Children, Youth and Families (Disclosure of Youth Offending) Bill 2014

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Overview

1. None of the reforms proposed by the *Children, Youth and Families (Disclosure of Youth Offending) Bill 2014* are necessary. They reflect an erosion of the longstanding, important and internationally-recognised principle that children who offend must be protected from publicity in all but very rare circumstances.

2. Liberty Victoria stands against that erosion.

Legislation

3. It is rare for child offenders to be identified. Section 534(1) of the *Children, Youth and Families Act 2005* states:

> *(1) A person must not publish or cause to be published—*

(a) *except with the permission of the President, a report of a proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to the identification of—*

(i) *the particular venue of the Children's Court, other than the Koori Court (Criminal Division) or the Neighbourhood Justice Division, in which the proceeding was heard; or*

(ii) *a child or other party to the proceeding; or*

(iii) *a witness in the proceeding; or*

(b) *except with the permission of the President, a picture as being or including a picture of a child or other party to, or a witness in, a proceeding referred to in paragraph (a); or*

(c) *except with the permission of the President, or of the Secretary under subsection (3), any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.*

4. The reasons for shielding children from the public's eye are sound. Publicity is inconsistent with the therapeutic focus of the Children's Court. It impedes rehabilitation. It can lead to ostracism. It can, in its own way, be punitive. It can undermine the strong desire to help children to reform.

5. The policy of protecting a child offender's privacy is one that is universally recognised. Article 40 of the Convention on the Rights of the Child states (amongst other things):

1. States Parties recognize the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

…

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

…

(vii) To have his or her privacy fully respected at all stages of the proceedings.

6. Rule 8 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* states:

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.

7. The commentary accompanying that Rule observes:

> *Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatisation. 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 also 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…*

8. The *Children, Youth and Families (Disclosure of Youth Offending) Bill 2014* would, if passed:

   a. authorise any magistrate to exercise the powers providing for the publication of images and details which would identify a child involved in criminal proceedings, and

   b. facilitate the publication of details relating to serious offences committed by a child (where a sentence of imprisonment or detention is imposed) if that child commits a serious offence (and a sentence of imprisonment is imposed) in adulthood.

Extending the power to identify child offenders to all magistrates

9. In explaining the proposed changes, the Policy Overview provided with the exposure draft states:[1]

> *Currently, under section 534, the names, images and identifying details of any child in a Children's Court proceeding are automatically suppressed. Details that reveal the identity of a child involved in criminal proceedings in the court may only be published if the President of the Children's Court grants a publications order.*
>
> *This is to protect the identity of children involved in the criminal justice system in order to facilitate opportunities for them to turn away from crime. However, this process can cause difficulties in urgent situations – such as in the case of an escape from youth justice detention when the names and photographs of the young*

[1] Children, Youth and Families (Disclosure of Youth Offending) Bill 2014 - Exposure draft for comment, 28 October 2014.

offenders may need to be made public. As the President's power to authorise publication is non-delegable, applications may not be heard expeditiously and the publishing of details of young offenders may be delayed.

The draft Bill streamlines the process for publishing names and images by broadening the range of Magistrates who may hear applications for publication to all Magistrates of the Children's Court.

10. That reasoning is illusory and flawed.

11. Magistrate Peter Power, a very experienced magistrate who has presided over cases in the Children's Court of Victoria for many years, has observed that:[2]

> *It is rare for the President to give permission for identifying material to be published pursuant to ss.26(1)(a) or 26(1)(b) of the CYPA and it is likely to be equally rare under ss.534(1)(a), 534(1)(b) or 534(1)(c) of the CYFA. In the past 7 years, the only cases in which such permission has been given have involved:*
>
> - *abandoned children where details were permitted to be published in an attempt to locate a parent;*
> - *children who were missing or had absconded in an attempt to locate them; and*
> - *a case in which a TV channel was permitted to identify a child - with consent of child and family - in a program highlighting the success of the child's rehabilitation.*

12. No empirical evidence has been cited to support the proposition that there exists an inability to obtain an order in urgent cases. That proposition is not consistent with Magistrate Power's observations.

13. The proposed changes to section 534 are not necessary. Further, there are very good reasons for not changing the wording of that section. Those reasons relate to the deleterious impact that publicity can have upon juvenile offenders.

14. In *R v SJK & GAS*, Bongiorno J (as his Honour then was) made an order suppressing the identification of two children who pleaded guilty in a very serious case of manslaughter. In making that order (citation omitted):[3]

> *… His Honour referred to the Children's Act and the prohibition on naming children in criminal proceedings. If one traces the Acts of Parliament going back well in excess of 100 years, that has always been the rule in relation to minors. His Honour stated:*

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[2] Magistrate Peter Power, Research Materials, 2.8.1 (last updated on 1 May 2013). References to sections of the "CYPA" are references to sections of the *Children and Young Persons Act 1989.* That Act has been repealed and replaced by the *Children, Youth and Families Act 2005.*

[3] *R v SJK & GAS* [2006] VSC 335, [38].

> *"So far as the principle that criminal justice should be administered openly, it is clear from the legislation to which I have referred that that principle must give way in certain circumstances to the necessity to place the interests of the person accused, or indeed convicted, ahead of the community's right to know who that person is. That this is itself in the public interest in appropriate circumstances is clear."*

15. Gillard J succinctly summarised the rationale and importance of that principle when considering the order made by Bongiorno J (citations omitted):[4]

> *The principle protecting a young person from being identified in a criminal proceeding is well established, and applies throughout the common law world. The principle was eloquently summarised in a case referred to by Mr Carter, Smith v Daily May Publishing Company, which was a decision of the Supreme Court of the United States. In that case, Mr Justice Rehnquist, while noting that freedom of speech was important, went on to observe:*
>
> > *"While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favour of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."*
>
> *Justice Rehnquist further observed:*
>
> > *"It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity."*
>
> *His Honour then went on to observe the importance of rehabilitation, and stated:*
>
> > *"Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public."*
>
> *His Honour then summarised the effect of the balancing of the public interest and the interests of the youthful offender, by observing:*
>
> > *"By contrast, a prohibition against publication of the names of youthful offenders represents only a minimal interference with freedom of the press."*
>
> *In my respectful opinion, his Honour's observations apply with equal force in this State.*

[4] *R v SJK & GAS* [2006] VSC 335, [39]-[44].

It was with those principles in mind that Bongiorno J made the order. He sentenced the youths with the knowledge that the order was in place, and no doubt it played its part on the question of rehabilitation.

16. In its detailed report, "The prohibition on the publication of names of children involved in criminal proceedings",[5] the Standing Committee on Law and Justice of the New South Wales Legislative Council considered the impacts that naming child offenders can have, including:

    a. the general effect on rehabilitation; and

    b. the impact of stigmatisation, including stigmatisation leading to prejudice from other people, stigmatisation leading to negative self-identity, stigmatisation in smaller communities, including Aboriginal communities, further marginalising already marginalised juveniles, naming leading to a focus on individual rather environmental factors and stigmatisation of other groups.

17. The detrimental impact of naming child offenders can be profound.

18. There is no good reason to depart from the current practice of requiring that all applications pursuant to section 534(1) be determined by the President (or the Secretary). The judicial powers provided for within that section are special. It is appropriate that they be reserved for the President.

<u>Detailing the serious crimes committed by children if they commit serious crimes in adulthood</u>

19. Offenders who commit serious offences in both adulthood and childhood are not common. Unless a suppression order is made pursuant to the *Open Courts Act 2013*, the details of serious offences committed by adults can be largely reported upon. Limiting reporting to those offences - without permitting additional reporting of serious offences that adult might have committed in childhood - does little to usurp the principle of open justice.

20. Offences committed by children can inflame public curiosity. A number of infamous cases - such as, for example, the murder of James Bulger in the United Kingdom - prove that to be true. Children can commit brutal crimes. Identifying children who commit serious offences if they later commit serious offences as adults has the real potential to expose them to the risk of public shaming or - in extreme cases - violence for the offences committed when children.[6] That outcome would not be in the public interest.

21. Further, as Redlich JA observed in *Azzopardi v R* (citations omitted):[7]

[5] Report 35, April 2008.
[6] See, for example, the circumstances discussed in *Venables v News Group Newspapers Ltd and Others* [2001] 1 All ER 908.
[7] (2011) 35 VR 43, 53.

…young offenders being immature are therefore "more prone to ill-considered or rash decisions". They "may lack the degree of insight, judgment and self-control that is possessed by an adult". They may not fully appreciate the nature, seriousness and consequences of their criminal conduct.

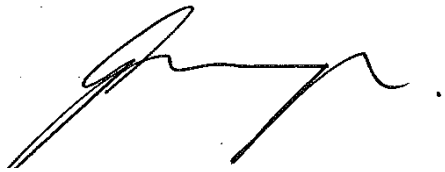
22. At present, those wishing to publish the type of information provided for by proposed section 534A could make an application to the President pursuant to section 534. It is not at all clear what problem the proposed amendments seek to remedy, given that anecdotally it would seem that few - if any - applications of such a kind have been made to the President in recent years. The proposed amendments seek to remove that judicial oversight in the cases in which section 534A would apply. That is irrespective of any subjective circumstances that may exist to justify a continued prohibition on publication. There is no justification for removing that judicial oversight.

Submission

23. Liberty Victoria opposes these proposed amendments.

Should you wish to discuss any aspect of this submission further please contact George Georgiou SC or Paul Smallwood by emailing info@libertyvictoria.org.au.

Yours sincerely



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