14 December 2007

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The Hon Christine Robertson MLC
Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Robertson

Submission to inquiry into the prohibition on the publication of names of children involved in criminal proceedings

Thank you for extending us the invitation to make a submission to this Inquiry. As a specialist service working with children and young people, with an emphasis on criminal law, we believe we are in a good position to comment on this issue.

1 Introduction

1.1 The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993, the Shopfront is a joint project of Freehills, Mission Australia and the Salvation Army.

We represent and advise young people on a range of legal issues, particularly criminal law. Our solicitors, who include accredited specialists in criminal law and children's law, appear almost daily in the Children's, Local and District Courts. As well as acting for defendants in criminal matters, we also assist young people who are victims of crime.

1.2 The importance of the restriction on the disclosure of the identity of children involved in criminal proceedings

As the Inquiry terms of reference have identified, the policy objectives of the current legislation include the protection of young people (including victims) from the stigma associated with being involved in criminal proceedings, and the promotion of rehabilitation for young offenders.

In our view, these policy objectives are still valid and, for the most part, are being served by the current legislation ((*Children Criminal Proceedings) Act* 1987 section 11). We will make further comments about the form and content of section 11 in the conclusion of this submission.

The Shopfront Youth Legal Centre supports the retention (and even extension) of the protection afforded by section 11, for the following reasons:

- Children and young people are entitled to special legal protection, by reason of their state of dependency and immaturity, and in the interests of their rehabilitation.
- Public shaming and stigmatisation is not an effective deterrent to offending where young people are concerned.
- Publication of a young offender's identity can potentially compromise rehabilitation by acting as a further barrier towards employment and community integration.
- There is a risk that some young offenders will become victims of public vilification and possibly even vigilante-type action; young people are less able than adults to protect themselves from this.
- In some cases there is also a stigma associated with being a victim or witness in a criminal matter. Young people in this situation require and deserve protection; public exposure may discourage young people from reporting crimes or giving evidence.
- Protection of the identity of young people involved in criminal proceedings does not compromise the principle of open justice.

2 Legislative and treaty provisions supporting rehabilitation and privacy for young people in the juvenile justice system

2.1 Children (Criminal Proceedings) Act

The principle of rehabilitation is reflected in the New South Wales *Children (Criminal Proceedings) Act* 1987. The principles of the Act, set out in section 6, include:

> *(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;*

and

> *(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;*

2.2 United Nations Convention on the Rights of the Child

The general prohibition on the identification of children involved in criminal proceedings is supported by the United Nations Convention on the Rights of the Child[1], to which Australia is a signatory.

[1] The Convention and the UN Rules can be found at the website of the UN High Commissioner for Human Rights at http://www2.ohchr.org/english/law/crc.htm

The Preamble to the Convention includes:

> *The child, by reason of his [sic] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.*

Article 3.1 provides:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Article 40, concerning young people in the juvenile justice system, provides in part:

> 1. *States Parties recognise 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.'*

and

> *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.*

2.3 Beijing Rules

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[2] stress the importance of respecting a child's right to privacy. Rule 8 provides:

> *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.*

The commentary to this rule is as follows:

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

[2] http://www2.ohchr.org/english/law/beijingrules.htm

Rule 8 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. (The general contents of rule 8 are further specified in rule 2 1.)

3 The primacy of rehabilitation when sentencing young offenders

It is well-established that, when sentencing young offenders, rehabilitation is a primary consideration.

The case most often cited in support of the primacy of rehabilitation in New South Wales is *R v GDP* (1991) 53A Crim R 112. In this case, the Court of Criminal Appeal reiterated the importance of rehabilitation while holding that general deterrence should not be completely ignored.

The court adopted the approach taken in previous cases, such as *R v Wilcox* (unreported, Sup Ct NSW, 15 August 1979), where Yeldham J said:

> *In the case of a youthful offender ... considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed towards his [sic] rehabilitation.*

It has long been recognised that the interests in rehabilitating a young offender are usually closely aligned with public interest and the protection of the community. In the English case of *Smith* [1964] Crim L R 70, which has been cited with approval by New South Wales courts, it was said:

> *In the case of a young offender there can rarely be any conflict between his [sic] interest and the public's. The public have no greater interest than that he [sic] should become a good citizen.'*

A young offender's immaturity is also a factor that mitigates the severity of sentence and calls for a greater emphasis on rehabilitation (eg. *Kama* (2000) NSWCCA 23; *Hearne* (2001) NSWCCA 37).

In recent years there has been some modification to the principle that rehabilitation is paramount, where children commit "grave adult offences" calling for a strong element of general deterrence (eg. *R v Pham and Ly* (1991) 55 A Crim R 128; *R v Huynh and Phung* [2001] NSWSC 357).

However, even for very serious and violent offences, the courts have held that the rehabilitation of a young offender is still of the utmost importance (eg. *R v Whitfield* [2001] NSWSC 876; *R v SK; R v OZ* [2001] NSWCCA 492; *R v GS* [2006] NSWCCA 410).

4 The impact of public naming of juvenile offenders

4.1 Public "naming and shaming" has little deterrent effect

As pointed out by Chappell and Lincoln in a recent article on identity protection for juvenile offenders:

> *…those who advocate public naming imply that such 'outing' is an essential step in accepting culpability and thereby achieving rehabilitative ends.*[3]

However:

> *Available research suggests that shaming that stigmatises is likely to have negative rather than positive rehabilitating outcomes (Sherman 1993; Strang 2002). Moreover, research indicates that victims of crime prefer a reintegrative approach, even in sexual assault cases (Strang 2002; Daly 2006).*[4]

Leading criminologist John Braithwaite, who is well-known for his work on restorative justice and "re-integrative shaming" states:

> *Shaming that is stigmatising…makes criminal subcultures more attractive because these are in some sense subcultures that reject the rejectors. Thus, when shaming is allowed to become stigmatisation for want of reintegrative gestures or ceremonies which decertify deviance, the deviant is both attracted to criminal subcultures and cut off from other interdependencies (with family, neighbours, church, etc).*[5]

Our experience, and our understanding of the relevant criminological literature, suggests that specific and general deterrence do not operate well in relation to children. The causes of juvenile offending are complex and are often related to factors beyond the young person's control such as abuse, neglect and family dysfunction. Most young people are unlikely to be deterred from offending by being publicly "named and shamed" (specific deterrence) or by learning about sentences passed on other young people (general deterrence).

A 2005 article by Kaplan, commenting on psychological research and on the USA Supreme Court decision of *Roper v Simmons*[6], makes an important point about children's comparative lack of maturity and control over their environments:

> *In [a] study [conducted by Cauffman and Steinberg, 2000] of more than 1000 adolescents and adults (ages 12 to 48), researchers found that psychosocial maturity is incomplete until age 19, at which point it plateaus…Adolescents…had more difficulty seeing things in long-term perspective, were less likely to look at things from the perspective of others and had more difficulty restraining their aggressive impulses.*[7]

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[3] Chappell, D. and Lincoln, R., 'Abandoning Identity Protection for Juvenile Offenders' (2007) 18(3) *Journal of the Institute of Criminology* 481.

[4] Ibid, citing Sherman, L (1993) "Defiance, Deterrence and Irrelevance: A theory of the Criminal Sanction", *Journal of Research in Crime and Delinquency*, Vol 30, pp445-473; Strang, H (2002) *Repair or Revenge* Clarendon Press, Oxford; Daly, K (2006) 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases', *British Journal of Criminology*, vol 46, pp 334-356

[5] Braithwaite, J., *Crime, Shame and Reintegration* (1989), 102.

[6] 543 US 551 (2005) 112 S. W. 3d 397

[7] Kaplan, A., 'When is it 'Cruel and Unusual Punishment'? Supreme Court Bans Juvenile Death Penalty' (2005) 22(6) *Psychiatric Times* available at http://www.psychiatric times.com/showArticle.jhtml?articleId=164303063.

...childhood is more than a chronological fact, [Justice Anthony Kennedy] wrote [in his judgment in Roper v Simmons]. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Juveniles' own vulnerability and comparative lack of freedom to extricate themselves from a criminogenic setting means they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.[8]

4.2 Stigma or shame as a barrier to rehabilitation

Public exposure of an offender's identity carries a significant stigma which can act as a barrier to rehabilitation.

The effect of the disclosure of an offender's identity can be compared with the impact of a criminal record. There are sound policy reasons why the law in New South Wales treats juveniles differently from adults in relation to criminal records[9].

Research has shown that a criminal record is a significant stigma and a barrier to employment. As Naylor (2005) explains:

> *Key factors in reducing most types of recidivism are accommodation and employment. Employment brings income and structure, but also a connection to society, self-esteem, and a community of peers reinforcing 'legitimate' norms and values.*
>
> *Metcalfe et al found that employers tended to reject people with a criminal record for a number of reasons, including that 'people with a criminal record are seen, generally, as 'undesirable', outside the employers' experience and alien'.*[10]

For similar reasons, the public identification of a young person could be highly detrimental to their prospects of employment and community integration, and their rehabilitation in general. We agree with the following comments made by the Acting NSW Privacy Commissioner in 2002:

> *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. Publication of a child offender's name will effectively add to the sentence imposed by the court, doubly punishing child offenders with lifelong stigmatisation – a constant fear that one day a future employer, or neighbour, a friend or colleague will trawl the internet or newspaper*

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[8] Ibid. (Kaplan)

[9] Section 14 of the *Children (Criminal Proceedings) Act* provides the courts with a wide discretion not to record a conviction against a child, and prohibits a Children's Court from recording a conviction against a child aged under 16. Section 10 of the *Criminal Records Act* provides the a conviction imposed by the Children's Court is spent after 3 crime-free years (as opposed to 10 years for other convictions).

[10] Naylor, B., 'Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia' (2005) 30(4) *Alternative Law Journal* 174, pp 174-5, citing Metcalfe, Anderson and Rolfe, Department for Work and Pensions (UK), *Barriers to Employment for Offenders and Ex-Offenders*, Research Report No 155 (2001)

archives and find out about the mistakes they made as a 15 year old. Their chances of rehabilitation will be substantially reduced as a result.[11]

Similar comments have been made by the Human Rights and Equal Opportunity Commission:

The impact of a criminal record on job prospects and professional opportunities is of a particular concern for juveniles with a criminal record. Acquiring a criminal record at a young age can affect a person throughout their entire working life.[12]

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.[13]

All Australian jurisdictions, with the exception of the Northern Territory, have recognised these important principles and have enacted legislation which restricts (at least to some extent) the publication of identifying information about a juvenile offender.

In the Northern Territory, the onus is on the defendant to seek a suppression order. In the recent case of *MCT v McKinney*[14], the Court of Appeal overturned the decision of the sentencing magistrate (and of a single judge in the Supreme Court) and granted a suppression order. The Court, in a unanimous judgment, referred to the detrimental effects of publicising a young offender's name in circumstances where his future prospects of rehabilitation in a small town would have been threatened. The Court remarked:

The Legislature has chosen not to suppress automatically the identity of children who appear before the court and, recognising "the legitimate interest of the public" in knowing the identities of offenders, good reason must be demonstrated to justify suppressing the identity of a child offender. However, 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

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[11] Johnston, A., 'The Privacy Commissioner's position on Child Offenders and Privacy', Position Paper , 23 July 2002, available at http://www.privacy.org.au/Papers/ChildOffenders2002.pdf as at 12 October 2007.

[12] HREOC, 'Discrimination in Employment on the Basis of Criminal Record', *Discussion Paper* (2004), p9, http://www.hreoc.gov.au/human_rights/criminalrecord/discussion.html

[13] HREOC (von Doussa, J.), 'An update on the work of the Human Rights and Equal Opportunity Commission (HREOC) (2006) 31 *Northern Territory Anti-Discrimination Commission,* http://www.hreoc.gov.au/about/media/speeches/speeches_president/2206/20061031_darwin.html

[14] [2006] NTCA 10 (Unreported, Northern Territory Court of Appeal, Martin CJ, Mildren J, Thomas J, 20 October 2006)

usually psychologically harmful to the adolescents involved and acts negatively towards their rehabilitation.[15]

5 The "lynch mob" mentality

There is a danger that public naming of offenders can lead to a "lynch mob" mentality taking hold. In New South Wales, in recent years, we have seen public vilification and vigilante-type action against sex offenders in particular.

In our view, there is already a disproportionate amount of media coverage, and associated "moral panic", about juvenile crime. In general, juvenile offenders seem to be demonised to a greater degree than adult offenders (sex offenders aside).

Cunneen and White, in their book *Juvenile Justice - Youth and Crime in Australia,* have commented:

> *For many years there has been concern about the way the media present images of youth, particularly in relation to crime and social disorder. For most people, their knowledge concerning crime does not come from the direct experience of victimisation, offending, or detection by authorities; nor does it come from academic studies or policy documents. Rather, knowledge about juvenile offending and juvenile offenders is partly mediated and partly constructed through the stories circulated in the news broadcasts and cop shows, the daily tabloids and talkback commentaries. What we have are constructed simulations dealing in images of youth and crime.*[16]

A collection of essays on *Youth, Crime and the Media*, published in 2007, highlights the problem of irresponsible media reporting about youth crime. Many of the authors refer to studies which show that media reporting generally portrays young people in an overly negative light[17], and comment on the negative social consequences which often ensue from "moral panic" created by sensationalised media reporting[18].

Examples of the persistent but over-emphasised concerns about juvenile offending are discussed by Hogg and Brown in their book *Rethinking Law and Order* [19]. As Hogg and Brown point out, the persistence of these types of reports in the Australian media for over a century shows that such concerns are certainly not new and that society has survived so-called "juvenile crime waves" before.

Against this backdrop, we hold serious concerns that the publication of names (or other identifying details) of juvenile offenders may lead to public vilification and

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[15] [2006] NTCA 10 at para 20

[16] Cunneen C. and White, R., *Juvenile Justice – Youth and Crime in Australia* (2002)**,** 89.

[17] See in particular Simpson, *Youth Crime, the Media and Moral Panic*, in *Youth, Crime and the Media*, Sercombe, *Youth crime and the economy of news production*, Rendell, *Youth and crime in television news bulletins*, Bessant, J and Hill, R (Eds), Australian Clearinghouse for Youth Studies (1997), p12

[18] See in particular Simpson, ibid.

[19] Hogg, R. and Brown, D., *Rethinking Law and Order* (1998), 20.

even violence. This potentially places young offenders' safety and their rehabilitation at risk.

We suggest that children are less able than adult offenders to stand up for themselves in the face of public exposure or vilification. Adults are also more likely to be able to move away from communities where they are known, to new environments where they are able to start afresh.

An extreme example of the "lynch mob" mentality is found in the UK case involving Jon Venables and Robert Thompson, who were convicted of the murder of the young child James Bulger. Although Venables and Thompson's names were initially disclosed, they were subsequently provided with new identities. In 2001, when the offenders were being housed in secure custodial units, a court granted an injunction prohibiting publication of any details as to their identities or whereabouts[20].

Her Honour Dame Elizabeth Butler-Sloss LJ stated:

> ***[58]*** *If the identity and present whereabouts of the claimants were disclosed it would affect the units, which are not entirely secure. Each unit has public access and is easy to observe from outside. It would be possible for strangers to come within the perimeter of each unit. That, in turn, would affect movements within the units. There is a greater risk of the claimants being bullied or victimised by other inmates if further restrictions are placed on all of them by reason of press or others visiting the units. A major concern is the possibility of intrusive publicity identifying either of the claimants. It would also affect the rights of mobility of all inmates including the claimants. The units are working towards the reintegration of the claimants into the community and it is in the public interest that this aim is achieved.*

Her Honour then commented on the media coverage of the case:

> ***[98]*** *The evidence, which I have set out above, demonstrates to me the huge and intense media interest in this case, to an almost unparalleled extent, not only over the time of the murder, during the trial and subsequent litigation, but also that media attention remains intense seven years later. Not only is the media interest intense, it also demonstrates continued hostility towards the claimants.*

He Honour concluded:

> ***[105]*** *These uniquely notorious young men are and will, on release, be in a most exceptional situation and the risks to them of identification are real and substantial. It is therefore necessary, in the exceptional circumstances of this case, to place the right to confidence above the right of the media to publish freely information about the claimants. Although the crime of these two young men was especially heinous, they did not thereby forfeit their rights under English law and under the Convention on Human rights. They have served their tariff period and when they are released, they have the right of all citizens to the protection of the law. In order to give them the*

[20] Jon Venables and Robert Thompson v. News Group Newspapers Limited, Newspapers Limited, MGM Limited [2001] 2 W.L.R. 1038

protection they need and are entitled to receive, I am compelled to grant injunctions.

The UK is a society not unlike our own, with a similar legal system. Although the Australian media do not generally sink to the depths of the British tabloid press, we believe there is still a real danger of irresponsible media reporting, and inappropriate behaviour by members of the public.

6 Young people as victims

Young people also encounter the criminal justice system as victims. In fact, children are over-represented as victims in most categories of crimes, especially personal and sexual assaults. Cunneen and White have commented:

> *...surveys of crime victims do not adequately deal with juvenile victimisation. However, Australian surveys do show that those in the 15-19-year-old age group are more likely to be victims of personal crime such as assault, sexual assault, and robbery than are older age groups.*[21]

Unfortunately there is a considerable stigma attached to being a victim of certain types crime, especially sexual assault. Young people are likely to feel this stigma more strongly than adults and to be less able to cope with it.

Many young people who give evidence for the prosecution in criminal matters (whether as victims or witnesses) are extremely nervous about giving evidence, and may be fearful of reprisals. While a prohibition on public naming of victims and witnesses does not afford complete protection (as their identity will usually already be known to the alleged offender), it is desirable that victims and witnesses be provided with as much protection as possible. In some cases, fear of public exposure may discourage young people from reporting crimes or giving evidence.

It is also worth noting that victims and offenders are not mutually exclusive groups. Our experience, which is supported by evidence, shows that large numbers of young people in the juvenile justice system have been victims of crimes including sexual and physical assaults, as well as lesser forms of abuse and neglect[22].

7 The principle of open justice

The authors of a recent article on this topic have commented:

> *While it is a fundamental principle of the rule of law that justice should be administered in an open and transparent way, exceptions to this principle can occur when public policy demands it, as in the case of children. There is a clear public interest in the primacy of rehabilitation for young people*

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[21] Cunneen C. and White, R., above, p94.

[22] See, for example, Community Services Commission, *Just Solutions – wards and juvenile justice*, 1999; Community Services Commission, *The drift of children in care into the juvenile justice system,* 1996; *NSW Young People in Custody Health Survey*, Department of Juvenile Justice, 2003; *NSW Young People on Community Orders Health Survey*, Department of Juvenile Justice, 2006, www.djj.nsw.gov.au/publications.htm#research

and in ensuring that this is not compromised through the publication or broadcasting of information about criminal proceedings which involve their participation.[23]

The principle of open justice was discussed in a 2005 speech by the Chief Justice of NSW, The Hon J J Spigelman AC[24]. In this context His Honour referred to the well-known aphorism that "justice must not only be done, but must be seen to be done".

In our view, the protection currently afforded by section 11 does not compromise the principle of open justice to any significant extent. Proceedings in the NSW Children's Court (or other courts dealing with children's criminal proceedings) are sufficiently transparent for justice to be seen to be done.

The Children's Court is not a secretive, Star Chamber-type body. Children in criminal proceedings are invariably represented by members of a robust and independent legal profession. There is an appeal process (easily accessible to both prosecution and defence) to ensure that Children's Court magistrates remain accountable for their decisions.

Importantly, members of the media are generally allowed in the court room and are permitted to report on the proceedings, as long as they do not unlawfully disclose the names of children involved.

In the Northern Territory case of *MCT v McKinney,* the Court pointed out[25]:

> *Such an order [prohibiting publication of an offender's name] does not in any way prevent the media from publishing the details of the offending and every other aspect of the offences. This is sufficient to balance the very important requirements that Court proceedings be open to the scrutiny of the public and that justice is not administered behind closed doors with the public interest to protect the privacy of children.*

Allowing the public to have unfettered access to court proceedings, and to information about the identity of parties involved, is not always in the public interest and may do little to further the aim of open justice. Just because some members of the public may be *interested* in such information does not necessarily mean that its disclosure is in the public interest:

> *The identity of child offenders is for many citizens interesting. Further satisfying what is often just prurient interest, by publishing this information, constitutes a failure to serve the public interest.*[26]
>
> *Allowing more 'naming and shaming' of child offenders than is currently allowed under the law might feed public curiosity, but what might interest the public at a particular point in time does not equate to the public interest.*[27]

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[23] Chappell, D. and Lincoln, R., above, 483.

[24] http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman200905

[25] [2006] NTCA 10 at para 32

[26] Hunter, M., *Naming and shaming juvenile offenders in the Northern Territory* (2006) 4 *Balance* (Journal of the Northern Territory Law Society) , p7

[27] Johnston, A., above.

8 Conclusion and recommendations

8.1 Comments on current legislation

As stated in the introduction to this submission, we believe the relevant policy objectives are being served by the current legislation.

Although section 11 could benefit from being more clearly drafted (it lacks clarity, probably because it has been amended in a piecemeal fashion since it was originally enacted), we believe its substance is sound and that it strikes the right balance between competing interests.

It is important to note that section 11 does not impose a complete ban on publication. Identifying details of children involved in criminal proceedings may be published with the consent of the child (if the child over 16), or with the consent of the court and the concurrence of the child (if the child in under 16).

Further, children convicted of serious children's indictable offences may have their identifying details published without their consent, by order of the sentencing court. We agree with Spigelman CJ's comments in a recent case (involving the widely-publicised gang rapes committed by a group of brothers) that the court, at the time of sentencing, is in the best position to make such a decision:

> *It is at the time of sentence that the Court reviews the objective gravity of the offence, considers the impact on victims, assesses the weight to be given to general deterrence, acquires the full range of evidence about the subjective features of the offender and assesses the prospects of rehabilitation*[28].

The only substantive amendment we would recommend is that the ambit of section 11 should be expanded by making it applicable to children who are reasonably likely to be involved in criminal proceedings (eg suspects who have not yet been charged; potential witnesses).

8.2 The need for caution before making significant changes

We share the view expressed by the Acting NSW Privacy Commissioner in 2002 that:

> *The possible repercussions of publication, not only for offenders but for innocent members of their families, their victims, and indeed for unrelated people with the same or similar names, must be subject to measured consideration, rather than the quick, politicised reactions within the highly charged 'court of public opinion.*[29]

If it is decided that section 11 should be amended to give courts a wider discretion to allow publication of children's names, we strongly submit that the presumption should remain *against* such publication, and not in favour of publication as in the Northern Territory.

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[28] *Application by John Fairfax Publications Pty Ltd re MSK, MAK, MMK and MRK* [2006] NSWCCA 386, at para 16

[29] Johnston, A., above.

8.3 Application of protection to children arrested but not yet charged

We note that the Inquiry terms of reference calls for comments on the possible extension of section 11 to protect children have been "arrested" but have not been charged.

We would support this, but submit that it should not be confined to situations where the young person has actually been arrested. Criminal matters can be investigated, and proceedings commenced, without the necessity for arrest. Indeed it is clear from the relevant legislation that arrest is intended to be a measure of last resort[30]. We support the application of section 11 to children who are suspects (eg children who have been arrested, spoken to by police or named as being wanted for questioning in relation to a particular offence).

It would undermine the objective of section 11 if a child's identity could be protected once formal charges have been laid, but not during the preliminary stages.

8.4 Application of protection to other children likely to be involved in criminal proceedings

For similar reasons, we support the extension of the protection of section 11 to other children likely to become involved in criminal proceedings, for example, victims and potential witnesses.

We would be happy to discuss any matters arising from this submission, and to give oral evidence at the Inquiry. Please do not hesitate to contact Jane Sanders on 9322 4808 or by email at jane.sanders@freehills.com

Yours faithfully

Jane Sanders
Principal Solicitor

This submission was prepared with the assistance of David Coleman and Tina Stivactas (Practical Legal Training placement students).

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[30] *Law Enforcement (Powers and Responsibilities) Act* s99(3), *Children (Criminal Proceedings) Act* s8