DARWIN PRESS CLUB

Tuesday April 2, 2019

Submission to the Social Policy Scrutiny Committee inquiry into the *Youth Justice and Related Legislation Amendment Bill 2019*

The Darwin Press Club represents the overwhelming majority of journalists and media professionals working in the Northern Territory. Our members include reporters, editors, producers, photographers and camera operators at the *Australian Broadcasting Corporation*, the *NT News*, *Nine News*, *Australian Associated Press* and *Sky News*.

The Darwin Press Club's committee is vehemently opposed to the introduction of so-called reforms contained in the *Youth Justice and Related Legislation Amendment Bill 2019*. Specifically, our concerns relate to the proposed overhauls of sections 49 and 50 of the *Youth Justice Act*.

These sections of the Bill would see the Youth Justice Court held in closed court and would make it an offence to publish almost any story related to offences committed by young people. The Press Club's committee feels that the Bill in its present form represents a retrograde step in terms of transparency and the community's right to know about the Northern Territory's youth justice system.

The Bill before the committee enacts a recommendation of the The Royal Commission into the Detention and Protection of Children in the Northern Territory[1]. However, upon close inspection, the recommendation is based on a warped view of the evidence which was presented to the commission. Nevertheless, Minister Wakefield appears to have accepted the recommendation *holus bolus* while demonstrating little apparent understanding of the Bill she is responsible for.

In short the Press Club's committee's view is that the Bill, as it stands, appears ill-thought out and naïve to the interests of the Northern Territory community, including young people.

At the outset, the Press Club's committee thinks it important to note that the Royal Commission, from which this Bill's so-called reforms stem, was called immediately following the broadcast of an ABC *4 Corners* report.[2] Reports such as this would in all likelihood be an offence to publish or broadcast under the proposed overhaul of

[1] Recommendation 25.25
[2] 'Australia's Shame' *Four Corners* (Australian Broadcasting Corporation, 25 July 2016)

section 50 of the *Youth Justice Act*.[3] This alone should alarm members of the Scrutiny Committee and highlights the ill-considered nature of this Bill.

Put another way, the documentary which prompted the only significant structural reforms to the Northern Territory's youth justice system – reforms which governments of both political persuasions have failed to enact of their own accord – would never have made it to air had the Bill the committee is considering been legislated at the time.

The Press Club's committee, having considered the Bill, considers it to be broken beyond repair. The Press Club's committee urges the Scrutiny Committee to recommend to Parliament that the Bill be withdrawn and a re-drafted Bill, with an appropriate level of refinement, be presented afresh to Parliament and the Scrutiny Committee.

The purposes of this submission is to ventilate the Press Club's committee's views as to the key features which ought to be included in any future Bill and to outline the reasons why the committee opposes the Bill in its present form.

The principle of open justice – the Press Club's objection to so-called reforms to section 49 of the *Youth Justice Act*

The principle of open justice dates back more than a century[4] and has been repeatedly held to be a fundamental feature of the courts in Australia.[5] There are real concerns that if court proceedings are not held in public, the administration of justice may be corrupted.[6] The media is the link between the courts and the public.[7] It is the Press Club's committee's view that the Bill as presented improperly and unnecessarily severs that link and removes a crucial pillar of scrutiny from the youth justice sector at a time when such scrutiny is more needed than ever.

In all states (except for Tasmania), youth criminal cases are either held in courtrooms which are open to the public[8], or which are closed, with specific exemptions allowing access to members of the press, without any need for any application to be made to the court.[9] This reflects the longstanding principles noted above. Furthermore, it reflects that the public interest is being best served if the courts and their associated bureaucracies are subject to the scrutiny which naturally flows from regular publicity.

Examples abound of reports which detail the widespread ineptitude within the Northern Territory's youth justice system. In recent times, such reports include:

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[3] The 4 Corners report, although not a report of court proceedings, would be captured because it includes "information relating to" proceedings.

[4] Scott v Scott [1913] AC 417

[5] R v Tait (1979) 24 ALR 473 at 487; Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47 at 58; Russell v Russell (1976) 134 CLR 495

[6] *Re Applications by Chief Commissioner of Police* [2004] VSCA 3, [25]

[7] *The Herald & Weekly Times v Magistrates Court of Victoria* [1999] VSC 136, [51], cited with approval on appeal: *The Herald & Weekly Times v Magistrates Court of Victoria* [2000] VSCA 242, [42]

[8] For Victoria, see: *Children Youth and Families Act 2005* (Vic) s 523. For Western Australia, see: *Children's Court of Western Australia Act 1998* (WA) s 31

[9] For Queensland, see: *Children's Court Act 1992* (Qld) s 20(3)(c)(i) . For South Australia see: *Youth Court Act 1993* section 24(f)(ii). For New South Wales, see: *Children Criminal Proceedings Act* 1987 (NSW) s 10(1)(c). For the Australian Capital Territory, see: *Court Procedures Act 2004* (ACT) s 72(1)(i)

- An Alice Springs Youth Court Judge conducting an "insensitive and unnecessary" courtroom "mini-appraisal" of the parenting skills of a teenage rape victim.[10]
- The same judge being found to have committed 17 instances of unprofessional or improper professional conduct.[11]
- The same judge accusing a 13-year-old boy of "taking advantage" of the lack of parental control he had by committing property offences. The boy's father had murdered his mother.[12]
- NT Police officers improperly tasering two children.[13]
- NT Police DNA testing children without consent, in contravention of the Youth Justice Act.[14]
- Territory Families lacking the staff to be able to properly manage Don Dale detention centre.[15]
- Territory Families bureaucrats failing to report a teenager for breaches of his suspended sentence until after he allegedly crashed a car, killing a passenger.[16]
- A Darwin Youth Justice Court judge wrongly acquitting a teenager of sex offences, in part, because his victim did not struggle violently enough to get the message across that what he was doing was "morally wrong".[17]
- A Supreme Court Judge criticizing Territory Families for failing to properly supervise a teenage armed robber in their care.[18]
- The inability of Territory Families to provide a safe environment for detainees at Don Dale, where there have been repeated, disturbances.[19]
- Unreasonable delays in court proceedings as a result of the conduct of police and prosecutors.[20]

These are matters which would largely have been impossible (or unlawful) to report had the Bill been legislated at the time. Such reports properly ventilate shortcomings in the youth justice system, be they judicial or bureaucratic.

The Press Club's committee is therefore of the view that the proposed section 49 should be amended to keep youth court open to the public, or, in the alternative, section 49(2) should be amended to expressly permit news reporters to remain in a

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[10] Craig Dunlop 'Judge Blasted Rape Victim' *NT News* (Darwin, 26, January, 2018) 13
[11] Craig Dunlop 'Judge Dread' *NT News* (Darwin, 22 January 2018) 1-2
[12] Tom Maddocks, 'NT Judge's "disgraceful" comments to be referred to Royal Commission' *ABC News* (online at 17 June 2017) < https://www.abc.net.au/news/2017-06-17/nt-judge-made-disgraceful-comments-about-teen-offender/8627282> ; Christopher Walsh and Hayley Sorensen 'Judge rants at teenage criminal' *NT News* (Darwin, 18 June 2017) 7; *R v Baden Flash* (Northern Territory Supreme Court, 21703735, sentencing commenced 18 July 2018)
[13] Lucy Marks "Tasering of 12yo was 'improper', Darwin Children's Court Finds" *ABC News* (online 9 February 2017) < https://www.abc.net.au/news/2017-02-09/tasering-of-12yo-was-improper-court-finds/8256962>; *Police v KP and DL* [2017] NTLC 6 (9 February 2017)
[14] Craig Dunlop 'Outrage as cops in DNA scandal' *NT News* (Darwin, 17 January 2017) 3; *The Queen v DA* [2017] NTSC 2; Craig Dunlop 'Cops bollocked over DNA flub' *NT News* (Darwin, 24 June 2018) 2; *The Queen v TA* [2017] NTSC 46
[15] Craig Dunlop 'Broken Territory justice comes to a grinding halt' *NT News* (Darwin, 27 July 2018) 4; Elias Clure 'Don Dale Detention Youth Detention Centre "not fit for purpose", judge says, releasing young offender on bail' *ABC News* (online 26 July 2018) < https://www.abc.net.au/news/2018-07-26/don-dale-youth-detention-not-fit-for-purpose-nt-judge-says/10039708>
[16] Craig Dunlop 'Outrage at long leash given to teen criminal' *NT News* (Darwin, 28 February 2019) 9
[17] Craig Dunlop 'Rough Justice' *NT News*, (Darwin, 4 October 2018) 1
[18] Craig Dunlop 'Department's Court Lashing' *NT News* (Darwin, 14 September 2018) 1
[19] Jason Walls 'Boys guilty in Don Dale riot' *NT News* (Darwin, 21 March 2019) 11
[20] *Nine News Darwin* (Channel Nine Darwin, 3 April 2019)

court at all times. This would keep the Northern Territory in line with every other jurisdiction, other than Tasmania.

The protection of youths' identities – the Press Club's committee's objection to amendments to section 50 of the *Youth Justice Act*

The Northern Territory currently stands alone as a jurisdiction which by default allows the publication of a young person's identity. The Press Club's committee broadly welcomes any proposal for the Northern Territory to fall in line with all other jurisdictions in Australia in prohibiting the publication of information which objectively identifies youth offenders.

Despite supporting a statutory non-publication regime on youth offenders, the Press Club's committee is concerned by details of the proposed amendments to section 50 of the *Youth Justice Act*. These proposed amendments smack of being ill-considered and poorly drafted.

The rationale for the Press Club's committee's general support of a non-publication regime being introduced is that it should largely eliminate the need for the Youth Justice Court to be closed when an offender is in care. Such a provision would, counter-intuitively, allow for improved transparency around the circumstances of offending youth in care, whose departmental carers are in sore need of greater public scrutiny.[21]

To this end, the Press Club's committee recommends that the Bill be amended to clarify sections 97 and 301 of the *Care and Protection of Children's Act 2007* (NT) to expressly state that courts need not be closed when dealing with a criminal matter in which the offender is in care.

One major concern with the Bill in its present form is it would affect the fair, accurate and complete reporting of adult court proceedings, where prior offences committed as a youth are frequently referred to in open court during sentencing proceedings and are frequently relevant to the sentencing exercise.

Therefore, the Press Club's committee proposes that any statutory non-publication provisions on a child's identity should apply only to a "person who is a child"[22]. This would allow for fair, accurate and complete reports of sentencing exercises involving adult offenders who have relevant youth criminal histories.

The Press Club's committee is also of the view that, on rare occasions, the public interest in knowing an offender's identity outweighs any reasons which would justify prohibiting an offender's identity. For this reason, the committee recommends that any non-publication regime not apply where an offender is committed to the Supreme Court on charges related to offending which has resulted in the death of another person.[23] The Supreme Court ought to also be given the discretionary power to allow for the publication of an offender's identity in any circumstances it sees fit.

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[21] Darwin Local Court *Practice Direction*: *Child in need of protection – restriction on publication of childrens' names – procedure to be adopted,* 24 November 2008

[22] This is the case with the statutory non-publication provisions in section 301 of the *Care and Protection of Children Act*

[23] Including but not limited to murder, attempted murder, conspiracy to commit murder, manslaughter, violent act causing death, dangerous driving causing death

The Press Club's committee also has concerns with the proposed section 50(2)(b), which allows a young person to waive the non-publication regime. It is unclear how this provision would operate in practice, and what the legislature's precise intent is. For example, if an offender self-publicises his or her offending on social media, would this to be taken as an implied waiver of the non-publication regime? Would this provision allow a young person to negotiate with a reporter to allow publication on certain conditions, potentially compromising the integrity of any resultant story? Furthermore, the proposed section 50(2)(b) provides for no supervisory role for the courts to consider whether the youth offender is capable of giving informed consent to any publication of his or her offending.[24] This would place any reporter wanting to seek a young person's consent to report on his or her offending in an invidious ethical position.

It is entirely unclear under what circumstances a court would exercise its discretion to allow publication under the proposed section 50(3) and (4). The explanatory memorandum gives neither the public nor the courts any assistance in determining what might constitute an "emergency". Insofar as the media is a crucial link between the authorities and the public at times when public safety is at risk, the Press Club's committee has concerns about the unhelpfully vague wording contained in this provision.

Similarly, the Press Club's committee takes issue with the so-called reforms contained within the proposed section 50(5) and (6). This provision gives the CEO of Territory Families the power to authorise publication in the event of an escape from a detention centre, and to authorise the extent to which that publication is permitted.

The Press Club's committee is of the view that such a regime for the bureaucratic authorisation of any form of publicity is Kafkaesque and has no place in democratic society.

In the event of an escape from a detention centre, the proposed section 50(5) and (6) would require the CEO to consider the risk to public safety and whether publicising the escapee's identity might assist with his or her apprehension. This is despite the CEO having no expertise regarding public safety, nor any general role in ensuring public safety. The CEO also has no expertise in apprehending escaped prisoners, nor any role in affecting those apprehensions.

The Bill is also so shoddily drafted that it does not appear to allow for the publication of an escapee's identity if he or she escapes from lawful custody from a place other than a detention centre, for example, from police custody, the custody of a court or while being transported.

The Press Club's committee therefore recommends that the proposed section (50)(5) be amended such that if a young person either (a) escapes from any form of lawful custody or, (b) is reasonably suspected to have committed a violent offence, or (c) is reasonably considered to be a risk to the public, that a police officer at the rank of Superintendent or above may publish the young person's identity, and that the further publication of that person's identity be deemed to be permitted unless and until otherwise so ordered by a court.

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[24] The courts have a supervisory role under section 8 of the *Sexual Offences Evidence and Procedure Act*.

The Press Club's committee is of the view that section 50(7) of the Bill is unnecessarily proscriptive and inherently vague. For example, a report detailing "the physical description of the style of dress of the person" would be prohibited, but this provision does not specify whether it would be an offence to describe a specific item of clothing a person was wearing, whether at the time of an offence or at any other time. All this is despite a person's style of dress not typically being objectively capable of identifying that person. Section 50(7) would also prohibit detailing a person's recreational interests and philosophical beliefs, details which would seldom objectively identify any person, but might be in the public interest, for example if a young person had a lawful recreational interest in firearms and went on to use a firearm in the commission of an offence.

The Press Club's committee is of the view that a phrase such as "any particular likely to lead to the identification of the young person"[25] would provide a preferable objective standard against which a court could judge any alleged breach of a statutory non-publication regime. Such a phrase would allow the media to report in a factually accurate manner while also protecting the anonymity of young offenders.

Further issues

The Press Club's committee would also like to take this opportunity to note a number of disingenuous comments made by Minister Wakefield in relation to this Bill.

In the Minister's explanatory statement she states:

> The new section 49(1) requires that all proceedings involving a youth will be in a closed court to avoid the potential stigmatisation and detrimental effects of labelling young people as criminal or delinquent and 'naming and shaming' of young people.

The Minister has not publicly detailed any instances of any "naming and shaming" of young people which she considers improper, which, if they had occurred, would be prevented by the passage of this Bill.

The Press Club's committee would like to take this opportunity to note that outlets in the Northern Territory typically exercise their discretion to not publish details of young people who appear in court, whether as a defendant or not, even when permitted to do so, except in exceptional circumstances. This has long been the case.[26] Our members are acutely aware of the sensitivities involved in reporting on the criminal justice system, especially when it comes to young people. Our members are typically subject to the Media Arts and Entertainment Alliance *Code of Conduct* as well as our respective employers' codes of conduct. These include the Australian Broadcasting Corporation *Code of Practice*, the News Corp Australia editorial *Code of Conduct* and the Australian Associated Press *Code of Practice*.

In Minister Wakefield's explanatory statement, she also states:

> The Royal Commission heard that media reporting identifying young offenders can affect their prospects of rehabilitation, their sense of identify and their connection to the community.

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[25] A similar phrase is used, successfully, in section 6 of the *Sexual Offences Evidence and Procedure Act* to protect the identity of alleged victims of sex offences.

[26] Duncan Chappell and Robyn Lincoln 'Naming and Shaming of Indigenous Youth in the Justice System: An Exploratory Study of the Impact in the Northern Territory' (Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies) 21 May 2012, *passim*, especially pp 11 and 70

With respect, this is misrepresents the evidence the Royal Commission heard.

The Press Club's committee has reviewed the publicly available transcript and every publicly available witness statement to the Royal Commission. This review located a single statement in which a young person detailed his or her offending as having been reported on by the media.[27] Other statements detailing purported media coverage of offenders are vague and riddled with hearsay.[28]

The statement relevantly says:

> When I was [redacted] years old, my name was published in the [redacted]. This made me feel like everybody knew that I was a criminal and not a person. When I am out of jail, I have always felt like I was being judged all the time. It feels like the public can see right through me, and see that I am a criminal. **I started to feel like this before the [redacted] story**. I began to feel like a lost cause. I did not listen to my parents; I ran away from school, I felt like I was a disappointment to my family for being in jail. **[emphasis added]**

The statement details that the young person felt stigmatised *before* his name was published in connection to his offences. At no point does he state that his identification in the media resulted in the stigmatisation he felt.

The statement goes on to detail a number of matters which are of significant public interest, such as the lack of effective rehabilitation programs at Don Dale, mistreatment by court staff, the presence of drugs in approved rehabilitation programs and there being "not much difference between Don Dale and [redacted] prison, except that at Don Dale we used to get more food". These are all the sorts of matters which are ventilated in open court proceedings, which the public has a healthy interest in, which the media ought to be privy to and which the Bill, as it stands, would see kept from the public.

Any submission to the Royal Commission or to this committee that the rehabilitation of young offenders in the Northern Territory has been affected by the publication of their identities therefore appears to lack any evidentiary foundation.

Minister Wakefield has also repeatedly stated to our members that the Bill accords with the guidelines contained within the *Beijing Rules*, to which Australia is a signatory.[29] Minister Wakefield's statement is inaccurate. The *Beijing Rules* are silent on whether courts dealing with young offenders should be open to the public or not.

The Beijing Rules do however stipulate that young people be dealt with "according to the principles of a fair and just trial".[30] Insofar as open justice is a fundamental aspect of a fair trial[31], the Bill seems to run contrary to the *Beijing Rules*.

The Press Club's committee further notes the Northern Australia Aboriginal Justice Agency's submission to the Royal Commission that "[t]he Commission has heard that

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[27] Royal Commission into the Detention and Protection of Children in the Northern Territory, 'Statement of AQ' (14 February 2017)

[28] Royal Commission into the Detention and Protection of Children in the Northern Territory 'Statement of AB' (1 March 2017)

[29] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") especially cl 8

[30] ibid. cl 14

[31] Open justice is 'a fundamental aspect of the common law and the administration of justice and is seen as concomitant with the right to a fair trial': Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 674

research shows people are less punitive when properly informed"[32]. The Press Club's committee agrees, and is of the view that the Bill as it stands would inevitably result in uninformed speculation among the community regarding the youth justice system, and in turn, an increase in unhelpfully punitive views.

The Press Club's committee also notes that the Northern Australia Aboriginal Justice Agency at no time submitted to the Royal Commission that youth courts ought to be closed, only that there be a prohibition on the identification of offenders.[33]

While the Royal Commission did recommend that the courts be closed, a close inspection of the Commission's conclusion on this point reveals the "stigmatisation" which the Commissioners hoped to eliminate by closing the courts was not, in fact, the stigmatisation of specific offenders by the media. Rather, the stigmatisation to which they referred was of troubled young people, generally by politicians.[34] The Bill, as it stands does not prohibit such commentary, and as noted above, the proposal to close the courts to the public and the media may indeed result in an increase in the kind of uninformed commentary prevent which the Royal Commission complained of.

A 2012 study focusing on newspaper coverage of youth crime in the Northern Territory located 49 articles naming youth offenders published in the *NT News* between 2000 and 2009. Although this report is shoddily researched in parts, and inaccurate in aspects, it relevantly noted "there were very few articles where youth were named".[35] Interviewees "highlighted the scenario that there was indeed very little 'naming and shaming' of Indigenous youthful offenders taking place in the Northern Territory".[36] It is the Press Club's committee's view that the purported "naming and shaming" of youth offenders which, Minister Wakefield is so keen to prevent, is an imaginary phenomenon which occurs only the minds of certain self-styled advocates.

Conclusion

As stated above, it is the Press Club's committee's view the Bill in the form it is presented to the Scrutiny Committee is beyond repair. The Scrutiny Committee ought to recommend to Parliament that the Bill in be withdrawn, and a re-drafted Bill with an appropriate level of refinement be introduced afresh to Parliament and referred to the Scrutiny Committee.

The key features of a revised Bill should be:

1. A statutory non-publication regime on the names of youth offenders, or anything that would objectively tend to identify them.
2. The statutory non-publication regime not apply when the accused is committed to the Supreme Court on charges of murder, attempted murder, conspiracy to commit murder manslaughter, violent act causing death or dangerous driving causing death.
3. The Supreme Court should be given the power to revoke the statutory non-publication regime in any circumstances it is considers it appropriate to do so.

[32] NAAJA Submissions to the Royal Commission into the Detention and Protection of Children in the Northern Territory, p.94, citing 'Statement of Jared Sharp' (24 April 2017)
[33] ibid. p.96
[34] Oral evidence of Russell Goldflam, 14 December 2016
[35] Op Cit, p.67
[36] ibid. p.75

4. The statutory non-publication regime should only apply to a "person who is a child".
5. A police officer with the rank of Superintendent of above should have the power to publicly identify a young offender, or alleged young offender, in the event the young offender has escaped from any form of lawful custody, or if he or she reasonably believes the young person has committed a violent offence, or if he or she reasonably believes the young person presents a risk to the public.
6. The Youth Justice Court should be open to the general public, or that there be express provisions giving the news media the right to be in court.
7. Sections 97 and 301 of the *Care and Protection of Children Act 2007* (NT) should be clarified to note that courts need not be closed for criminal proceedings where an offender is in care.

The Press Club's committee appreciates this opportunity to address the Scrutiny Committee. A representative will be available to address the Scrutiny Committee orally at any public hearing.

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