



YOUTH JUSTICE AND RELATED LEGISLATION AMENDMENT BILL 2019

16 APRIL 2019

This submission is provided by Australia's Right to Know, a coalition of media companies comprising AAP, ABC, Australian Subscription Television and Radio Association (ASTRA), Bauer Media, Commercial Radio Australia (CRA) – representing Australia's commercial radio broadcasters, Community Broadcasting Association of Australia (CBAA) – representing community radio and TV, Free TV – representing all of Australia's commercial free-to-air TV networks, Guardian Australia, HT&E, Media Entertainment and Arts Alliance (MEAA), News Corp Australia, Nine Entertainment Co, SBS and The West Australian.

We welcome the opportunity to make a submission to the Legislative Assembly of the Northern Territory's Social Policy Scrutiny Committee (the Committee) regarding the *Youth Justice and Related Legislation Amendment Bill 2019* (the Bill).

The following comments pertain to item 33 of the Bill. We make no comment on the balance of that document.

CURRENT POSITION IN THE NORTHERN TERRITORY

We accept that the Northern Territory is currently an outlier amongst Australian jurisdictions in that it does not have legislation which prohibits the identification of children involved in criminal proceedings. That said, section 50(1) of the *Youth Justice Act 2005* currently provides a non-publication order making power which is put to frequent and effective use.

For example, News Corp Australia has received notice of the following numbers of youth justice orders made during last three years:

- 2017 – 16 orders in relation to the accused's name and/or identity, the names and/or identities of child complainants, the outcome of the matter or any report of the proceedings;
- 2018 – 29 orders in relation to the accused's name and/or identity, the names and/or identities of child victims, identification of the family of the accused or complainant, the accused's antecedents and mental health and/or cognitive status, the history of abuse suffered by an accused or complainants or any report of the proceedings; and

- 2019 (to 30 March 2019) – 15 orders in relation to the accused’s name and/or identity, the names and/or identities of child complainants, cooperation an accused had given to police or any report of the proceedings.

To ARTK’s knowledge, there has been no suggestion that any of these orders were inappropriate or that they were breached by a media publisher. Consequently, we submit that the current system is working, is appropriately adapted to protect the interests of children appearing in the Youth Justice Court and that no principled case for legislative change has been made.

‘CORRECTION’ OF OUTLIER STATUS

ARTK also recognises it is likely that as a result of the Committee’s review the NT government will seek to bring the Youth Justice Act into line with the other Australian jurisdictions. **Annexed** to this submission is a table setting out the equivalent legislation in each other jurisdiction for ease of reference, and ARTK makes the following additional points:

- **Open Justice**

Any statutory restraint on publication or broadcasting of proceedings in any court is a departure from the open administration of justice. This fundamental principle is one of the cornerstones of the Australian judicial system which, while not absolute, 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”*¹:

It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public...is an essential quality of an Australian court of justice...

It is also well established that the exceptions to the principle of open justice are few and strictly defined. It is now accepted that the courts will not add to the list of exceptions but, of course, Parliament can do so, subject to any Constitutional constraints...

The principle of a fair trial has been characterised in numerous High Court judgments in the most forceful of terms. It has been described as "the central thesis of the administration of criminal justice" ...; as "the central prescript of our criminal law" ...; as a "fundamental element" or a "fundamental prescript" ...; and as an "overriding requirement".²

ARTK does not suggest that the amendments to the Youth Justice Act contemplated by item 33 are unconstitutional. Rather, we submit that amendments should be limited to what it necessary to provide a statutory scheme which *“has the least adverse impact upon the open justice principal and common law freedom of speech”* consistent with the principle of legality³.

- **Closed Proceedings (proposed new section 49, Youth Justice Act)**

Item 33 repeals the current section 49 of the Youth Justice Act and replaces it with a provision which closes the court for proceedings against a youth except to the parties, court staff and a small list of other people. Notably, that list does not include an employee of a media entity who is attending the court for the purposes of preparing a report of the day. Subsection 49(3) provides that any other person may seek the leave of the court to attend the proceedings.

¹ Jason Bosland and Ashleigh Bagnall, [‘An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12’](#) (2013) 35 *Sydney Law Review* 674

² [John Fairfax Publications Pty Ltd & v District Court of NSW & Ors](#) [2004] NSWCA 324 at [18] to [22]

³ *Rinehart v Welker* [2001] NSWCA 403at [26] citing *Hogan v Hinch* [2011] HCA 4 at [5] and [27] per French

There is no uniformity as to how the rest of Australia deals with childrens court proceedings as there are four approaches:

- a) No closed court provisions of any kind (Commonwealth and South Australia);
- b) Open court with the ability to make orders either closing the court or excluding particular people from the hearing (Northern Territory as it currently stands, Victoria and Western Australia);
- c) A prescribed list of people may be present for childrens court proceedings including a reporter (Australian Capital Territory and New South Wales⁴); or
- d) A prescribed list of people may be present for court proceedings, not including a reporter, with capacity for the media to apply to be present (Queensland and Tasmania⁵).

If the Northern Territory were to adopt the section 49 set out at item 33 it would again become an outlier, but at the other end of the scale. ARTK submits the proposed section has the most adverse impact upon open justice and is inhibitive of freedom of speech. We are of the view that the current section 49 should be adapted to allow for the interests of open justice and public interest news reporting to be accommodated, as well as safeguarding the interests of youths involved in criminal proceedings.

It is onerous for representatives of the media to have to make an application on each occasion to be permitted to be present in children's court proceedings. With the introduction of an identification restriction such as that proposed in the new section 50, the media's right to report on children's court proceedings would not be unconstrained. Media representatives are well aware of what they are prohibited from publishing by virtue of statutory restrictions on publication, which would provide sufficient protection for youths involved in criminal proceedings.

Accordingly, ARTK's preference would be for either:

- a) the status quo in the Northern Territory to be maintained in respect of open courts for children's court proceedings; or
- b) the approach taken in the Australian Capital Territory and New South Wales to be adopted in that there would be an entitlement for a reporter to be present in children's court proceedings,

each of which would be subject to an identification restriction.

– **Identification Restriction (proposed new section 50, Youth Justice Act)**

It appears that the proposed section 50 set out at item 33 of the Bill has been based on the Victorian *Children, Youth and Families Act 2005* because Victoria is the only jurisdiction which prohibits the identification of the particular venue of the court, the other party to the proceedings, and witnesses (whether children or adults).

In relation to prohibiting identification of the particular venue of the Court in which the proceedings was heard, given the NT does not have a district court, the proceedings could only be held in a Local or Supreme Court venue. Those buildings are well-known to those in the community, particularly in regional communities. In the circumstances, a publication ban of this nature won't achieve the intention. For these reasons, we submit the proposed subsection 50(1)(a) is unnecessary.

Regarding the proposed change in NT to mirror the Victorian Provisions regarding identifying particulars (proposed section 50) we note that Victoria is currently proposing amending their s534(4)

⁴ Except for prescribed sexual offence cases where a heightened privacy regime applies to both adults and children

⁵ Although ARTK is not aware of any such applications having been brought in Tasmania

provision under the *Open Courts and Other Acts Amendment Bill 2019*⁶ as part of an overhaul of the legislation.⁷ We note here that Victoria is proposing to reduce the existing list of ‘identifying particulars’ which NT currently proposed to introduce.

As noted above, ARTK accepts that some form of restriction on the publication of particulars which is likely to lead to the identification of the youth in the proceeding may be appropriate. ARTK also accepts that a provision which prohibits the identification of the other party to proceedings and witnesses to the proceedings if they too are children is difficult to argue with. However, only Victoria has enacted such legislation which does not discriminate between adult parties/witnesses and child parties/witnesses. In joining Victoria, the Northern Territory would again be an outlier but of the most restrictive kind. ARTK submits the proposed section 50(1) also has the most adverse impact upon the open justice and is inhibitive of freedom of speech and suggests the following form of words:

50 Restriction of publication

- (1) Subject to this section, a person who publishes a report of, or information relating to, proceedings in the Court or proceedings in any other court any other court arising out of proceeding in the Court that contains any particulars likely to lead to the identification of the following is guilty of an offence:
- (a) the youth;
 - (b) any party to or witness in the proceedings who is also a youth.
- Maximum penalty: 200 penalty units or imprisonment for 12 months.

ARTK also submits that the “particulars likely to lead to the identification” of a person set out in the proposed section 50(7) are too prescriptive and may prevent publication of information which would not be objectively likely to lead to the identification of a person. ARTK submits that the proposed section 50(7) should be omitted, and the approach taken in New South Wales of not listing such particulars should instead be adopted.

We hope the Northern Territory can strike a balance between the interests of open justice, public interest news reporting and youths involved in criminal proceedings.

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http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/86c7a55a66119237ca2583a6007d0f48!OpenDocument

⁷ <https://www.premier.vic.gov.au/first-stage-of-suppression-order-overhaul-begins/>

ANNEXURE

JURISDICTION	LEGISLATION	EFFECT
Australian Capital Territory	Criminal Code 2002, s. 712A ; Court Procedures Act 2004, s. 72	<p>Definitions</p> <ul style="list-style-type: none"> • A child means a person under 12 years of age (applying the definition in s. 11 of the Children and Young People Act 2008). • Childrens proceedings include a range of court proceedings which could include a child or young person, most relevantly including at s.712A(5) of the Criminal Code 2002: <ul style="list-style-type: none"> (g) the child or young person is or was the subject of a criminal proceeding; or (h) the child or young person is or was the subject of a proceeding under the Bail Act 1992; or (i) the child or young person is or was the subject of a proceeding under the Family Violence Act 2016 or Personal Violence Act 2016; or • Publish means communicate or disseminate information in a way or to an extent that makes it available to, or likely to come to the notice of, the public or a section of the public or anyone else not lawfully entitled to the information. • A young person means a person who is 12 or older but not yet an adult (applying the definition in s. 12 of the Children and Young People Act 2008). • An adult means a person who is at least 18 years old (applying the definition in the Legislation Act 2001). <p>Identification It is an offence to publish information that identifies someone as a person who is, or was, a child or young person the subject of a childrens proceeding: Criminal Code, s 712A.</p> <p>Court Proceedings If a child or young person is the subject of court proceedings, only a prescribed list of people may be present during hearings. In relation to criminal proceedings, that list includes a person who attends the proceeding to prepare a news report who is authorised to attend for that purpose by the person's employer: Court Procedures Act 2004, s. 72(1)(i).</p>
Commonwealth	Crimes Act 1914 , ss. 23WA and 15YR	<p>A child means a person who is at least 10 years old but under 18 years of age: s. 23WA.</p> <p>Identification It is an offence to publish matter which identifies a child complainant or child witness: s. 15YR.</p> <p>Court Proceedings No relevant provisions.</p>
New South Wales	Children (Criminal Proceedings) Act 1987 , ss. 3, 10 and 15A	<p>A child means a person under 18 years of age: s. 3.</p> <p>Identification</p>

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		<p>Section 15A provides that the name of a person must not be published or broadcast in a way that connects them with criminal proceedings if:</p> <ul style="list-style-type: none"> (a) the proceedings relate to the person who was a child when the relevant offence was committed; (b) the person appears as a witness and was a child when the offence to which the proceedings relate was committed (even if he or she is now an adult); (c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child; (d) the person is otherwise involved in the proceedings and was a child when so involved; or (e) the person is a sibling of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed. <p>The name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.</p> <p>Court Proceedings</p> <p>For all proceedings that do not involve a prescribed sexual offence, any person not directly interested in the proceeding is excluded from the hearing except that “any person who is engaged in preparing a report on the proceedings for dissemination through a public news medium is, unless the court otherwise directs, entitled to enter or remain in the place where the proceedings are being heard”: s. 10(1).</p> <p>In relation to sexual offences, the enhanced privacy regime applicable to both children and adults set out in ss. 291 to 291C of the Criminal Procedure Act 1986 applies. Section 291C allows the media to apply for alternate access to the proceedings if they are not able to attend an in camera hearing.</p>
Queensland	Child Protection Act 1999 , ss. 189(2), 193; Youth Justice Act 1992, s. 301 ; Childrens Court Act 1992, s. 20	<p>A child means an individual who is under 18: Acts Interpretation Act 1954, Schedule 1.</p> <p>Identification</p> <p>Section 301 of the Youth Justice Act provides that a person must not publish identifying information about a child.</p> <p>Identifying information about a child means information that identifies the child, or is likely to lead to the identification of the child, as a child who is being, or has been, dealt with under this Act: s. 4 of the Youth Justice Act. Examples may include:</p> <ul style="list-style-type: none"> (a) the child’s name, address, school or place of employment; (b) a photograph, picture, videotape or other visual representation of the child or someone else. <p>The following provisions of the Child Protection Act 1999 also prohibit the identification of children involved in, or potentially involved in, criminal proceedings:</p>

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		<p>(a) s. 189(2) provides that it is an offence to identify a child living in Queensland who has been harmed, or allegedly harmed, by a parent, step-parent or other family member or is, or allegedly is, at risk of harm being caused by such a relative;</p> <p>(b) s. 193 provides that it is an offence to identify a child who is a witness, or is reasonably likely to be a witness, in cases involving an offence of a sexual nature or a serious violence offence, or publish the name of an authorised officer or police officer in the proceeding, unless the court orders otherwise; and</p> <p>(c) s. 194(1) provides it is an offence to publish identifying information about a child victim of crime where identifying information includes the person's name address, school or place of employment and photograph or film of the person or someone else likely to lead to the person being identified (ss. 194(4)). Subsection 194(2) provides that a person who is now an adult can consent to being identified if he or she chooses to do so.</p> <p>Court Proceedings For indictable offences, there is no restraint on attendance during Childrens Court hearings (ss. 20(5)(b), Childrens Court Act). For non-indictable offences, s. 20 of the Childrens Court prescribes who can attend the proceedings, subsection (3)(c) of which states that the court may permit a representative of the mass media to be present in the courtroom if the person's presence would not be prejudicial to the interests of the child.</p>
South Australia	Youth Offenders Act 1996, s. 63C	<p>Identification Pursuant to s. 63C of the Youth Offenders Act, it is an offence to publish or broadcast a report of proceedings in which a child or youth is alleged to have committed an offence if the report identifies, or tends to identify, either the child or youth to whom the proceedings relate or who is a witness in the proceedings. Publication or broadcast of the child or youth's name, address, school or any other particulars that may identify including any picture or film are expressly prohibited. The court is also empowered to make non-publication orders in youth justice proceedings and to make orders permitting the publication of particulars which are otherwise prohibited by ss. 63C: ss. 63C(1)(a) and 63C(2).</p> <p>Court Proceedings No relevant provisions.</p>
Tasmania	Youth Justice Act 1997 , ss. 30, 31 and 108	<p>Identification Section 31 of the Youth Justice Act prohibits the publication of any information from proceedings in the Magistrates Court (Youth Justice Division) which identifies, or may lead to the identification of, a youth who is the subject of, or a witness in, the proceedings. However, the court can order that such identifying particulars may be published. Section 31 also applies to youth proceeding in the Supreme Court or a court of summary jurisdiction other than the Magistrates Court (Youth Justice Division) (s. 108, Youth Justice Act).</p>

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		<p>Court Proceedings Section 30 of the Youth Justice Act prescribes the limited list of people who may attend a sitting of the Magistrates Court (Youth Justice Division). A media representative could apply to be present on the basis of being “<i>any other person if the Court considers that the interests of justice require that person's presence</i>” although has not previously done so to our knowledge.</p>
Victoria	<p>Children, Youth and Families Act 2005, ss. 523, 534 and 534A</p>	<p>For the purpose of sections 523, 534 and 534A, a child is:</p> <p>(a) if that person is alleged to have committed an offence, a person who was at least 10 years of age but under 18 years of age at the time the alleged offence was committed excluding any person who is of or above 19 years of age when the proceeding of the offence is commenced in the Childrens Court; or</p> <p>(b) in any other case, a person under 17 years of age: s. 3, Children, Youth and Families Act.</p> <p>Identification It is an offence to publish particulars likely to lead to the identification of:</p> <p>(a) the venue of the Childrens Court in which the proceeding was heard, other than the Koori Court (Criminal Division) or the Neighbourhood Justice Division;</p> <p>(b) a child or other party to the proceeding; or</p> <p>(c) a witness in the proceeding (Children, Youth and Families Act, ss. 534(1)(a)).</p> <p>Absent permission of the President or a magistrate, it is also an offence to publish a picture as being or including a child, other party to or witness in a Childrens Court proceeding or any particulars likely to lead to the identification of a child as being the subject of an order made by the Court (Children, Youth and Families Act, ss. 523(1)(b) and (c)).</p> <p>Each of the following is a particular likely to lead to the identification of a person:</p> <p>(a) the name, title, pseudonym or alias of the person;</p> <p>(b) the address of any premises at which the person resides or works, or the locality in which those premises are situated;</p> <p>(c) the address of a school attended by the person or the locality in which the school is situated;</p> <p>(d) the physical description or the style of dress of the person;</p> <p>(e) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;</p> <p>(f) the relationship of the person to identified <u>relatives</u> of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;</p> <p>(g) the recreational interests or the political, philosophical or religious beliefs or interests of the person;</p>

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		<p>(h) any real or personal property in which the person has an interest or with which the person is otherwise associated ((Children, Youth and Families Act, ss. 534(4)).</p> <p>The offences do not apply if the person identified is the victim or alleged victim, that person is over 18 years of age and identifying that person does not tend to identify another person to whom s. 534 applies: s. 534A, Children, Youth and Families.</p> <p>Court Proceedings Childrens Court of Victoria proceedings are heard in open court unless the court orders otherwise: s. 523, Children, Youth and Families Act.</p>
Western Australia	Children’s Court of Western Australia Act 1988 , ss. 3, 19(2), 20(3)(b), 31, 35, 36 and 36A	<p>A child is a boy or girl who is, or appears to be, under 18 years of age or who is alleged to have committed an offence before attaining the age of 18 years: ss. 3, 19(2) and 20(3)(b).</p> <p>Identification It is an offence to publish material likely to identify a child concerned in Childrens Court proceedings as a:</p> <ul style="list-style-type: none"> (a) person against whom the proceedings are taken; (b) person in respect of whom the proceedings are taken; (c) witness; or (d) person against or in respect of whom an offence has or is alleged to have been committed: s. 35(1). <p>The restraint does not apply to proceedings in the District, Supreme or appellate courts, each of which have a non-publication order making power: s. 35(2).</p> <p>Where a charge against a child is dismissed by the Court or the child is convicted/found guilty of an offence by the Court, no person other than the child shall disclose the fact of the dismissal or conviction in a manner that identifies, or is likely to identify, the child: s. 36. The Supreme Court may permit publication of matters referred to in sections 35 and 36: s. 36A.</p> <p>Court Proceedings Childrens Court proceedings are open subject to a power to order any person to be excluded from the courtroom or place of hearing who prejudicially affects the interests of a child: s. 31.</p>