

STATES OF JERSEY



YOUNG OFFENDERS: NAMING BY THE MEDIA (P.148/2009) – COMMENTS

**Presented to the States on 16th November 2009
by H.M. Attorney General**

STATES GREFFE

COMMENTS

1. It is unusual for the Law Officers to present a Report in relation to any Proposition in the States, but in the light of this Proposition and of the Amendment to it lodged by Senator Shenton, it seems that it would be useful for the Assembly to have some legal advice on the issue in advance so that the debate can take place against a background where members are informed about the domestic legislation, relevant United Kingdom legislation and international obligations.

Domestic legislation

2. The present arrangements are set out in Article 73 of the Children (Jersey) Law 2002, which is in these terms –

“73 Privacy for children involved in certain proceedings

- (1) *Without prejudice to any other rule-making power or power of the court to sit in private, Rules of Court may make provision for the court to sit in private in proceedings in which any powers under this Law may be exercised by the court with respect to any child.*
- (2) *Any person who publishes any material which is intended, or likely, to identify –*
 - (a) *any child as being concerned in any proceedings before any court either as being a child against or in respect of whom the proceedings are taken or as being a witness in those proceedings;*
or
 - (b) *an address or school as being that of a child involved in any such proceedings,*

except in so far (if at all) as the court hearing those proceedings, having regard to the interest of justice and the welfare of the child concerned, directs, shall be guilty of an offence and liable to a fine of level 3 on the standard scale.
- (3) *In any proceedings for an offence under this Article it shall be a defence for the accused to prove that he or she did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.*
- (4) *For the purposes of this Article –*
“publish” includes –
 - (a) *include within a programme service; or*
 - (b) *cause to be published; and*
“material” includes any picture or representation.”

3. Members will see that although paragraph (1) of Article 73 concerns Rules of Court in relation to proceedings under the Children (Jersey) Law 2002, paragraph (2) is widely drawn and covers any proceedings before any Court where the child is the subject of the proceedings or a witness in those proceedings.

4. It is also to be noted that the Court has a discretion, if it thinks fit, to order that, having regard to the interests of justice and the welfare of the child concerned, publication of material which identifies the child (or his or her address, or school) may take place.
5. These provisions are consistent with Article 2 of the 2002 Law which makes it plain that where the Court is determining any question with respect to the upbringing of a child (or the administration of a child's property); the child's welfare shall be the Court's paramount consideration. Article 2(5) is in these terms –

“Where the Court is considering whether or not to make one or more orders under this Law with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.”

United Kingdom legislation

6. The protection of children and young people in relation to criminal and summary proceedings in the United Kingdom has existed for quite some time. The Children and Young Persons Act, 1933 was an Act to consolidate certain enactments relating to persons under the age of 18 years. Section 49 of the said Act contains restrictions on reports of proceedings in which children or young persons are concerned, including proceedings in a youth court. The essence of the provision is that no report which might reveal the name, address or school of any child or young person concerned in proceedings, or includes any particulars likely to lead to the identification of any child or young person, nor any picture of such person shall be published, except in so far (if at all) as may be permitted by the direction of the Court. The Court may dispense to any extent with these requirements to avoid injustice to the child or young person, or for the purposes of apprehending a child or young person unlawfully at large where the child or young person had been charged with or convicted of a violent offence, a sexual offence or an offence punishable in the case of an adult with imprisonment for 14 years or more.
7. The provisions of the 1933 Act were extended by the Youth Justice and Criminal Evidence Act, 1999 to restrict the reporting of alleged offences involving persons under 18.
8. The United Kingdom position was changed by the Anti-Social Behaviour Act, 2003. In particular, Section 86 disapplied Section 49 of the Children and Young Persons Act, 1933, containing the reporting restrictions, where an order was made against a child or young person who was convicted of the offence of breaching an anti-social behaviour order (ASBO). This was further amended by Section 141 of the Serious Organised Crime and Police Act, 2005 which enabled publication of proceedings against a child or young person for an offence of breaching an ASBO. The effect of these changes has been that since 1st July 2005, the automatic press restrictions that existed in the Youth Court have ceased to apply when a youth is prosecuted for being in breach of an ASBO. The Court still maintains discretion to make an order restricting what may be published in individual cases, but there is a presumption in favour of publicity on the basis that publicity assists with the enforcement of

the order and allows the general public, especially in the local area, to be aware of the order and identity of the person against whom it had been made.

9. In February 2008 the Standing Committee for Youth Justice (SCYJ) unsuccessfully proposed amendments to the Criminal Justice and Immigration Bill at the House of Lords – Committee Stage, for the purpose of reinstating the 70-year safeguard of reporting restrictions for children. The intention was to make the said restrictions apply to ASBO proceedings at both the civil stage, and in the event of a breach which results in criminal proceedings. The SCYJ is a membership body which provides a forum for organisations working to promote the welfare of children who become engaged in the youth justice system. The UK Government’s argument that publicity is essential for ASBOs to work is not accepted by the SCYJ, whose view is that no child should be subject to this kind of exposure. The SCYJ noted that the policy of ‘naming and shaming’ vulnerable children has not yet been tested in the courts under the Human Rights Act, but their view is that there is the potential for breach of children’s article 6, 8 and 3 rights under the ECHR.

ASBOs are not used in this jurisdiction, and problems with them, such as being viewed as a “badge of honour”, are well known.

10. A distinction is made in the UK between a “child” and a “young person”. Under the relevant UK legislation (section 107 of the Children and Young Persons Act, 1933) a “child” is a person under the age of 14 years and a “young person” is a person under the age of 18 years.
11. No such distinction exists in Jersey. Under the Children (Jersey) Law 2002 a “child” is a person who has not yet attained the age of majority. Under Article 1 of the Age of Majority (Jersey) Law 1999, the age of majority is 18 years.

International Treaties

12. The States have agreed, as part of the Annual Business Plan, that policy and legislation initiatives will be undertaken to progress compliance with the United Nations Convention on the Rights of the Child (CRC).
13. The CRC equally makes no distinction between a “child” and a “young person”. Article 1 states that a “child” means every human being below the age of 18 years.
14. A review of the said Convention shows that there are a number of provisions which can be drawn to members’ attention.

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 4 provides:

“States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention . . . ”

Article 16 provides:

- “1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
- 2. The child has the right to the protection of the law against such interference or attacks.”*

Article 40 provides:

- “1. States parties recognize the right of every child alleged as, accused of, or recognized 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.”*

15. The UN Committee on the Rights of the Child has been established in accordance with Article 43 of CRC, which has the functions set out in the said provision. These functions include the obligation to receive reports from States Parties on the measures adopted to give effect to the Convention rights and on the progress made on the enjoyment of those rights, and indicating any factors and difficulties affecting the degree of fulfilment of the obligations under the Convention. The Committee is obliged to submit to the General Assembly of the United Nations, every 2 years, reports on its activities.

16. The UN Committee on the Rights of the Child published a general comment regarding ‘Children’s rights in juvenile justice’ dated 25th April 2007. The reason for the comment was to provide States Parties with more elaborate guidance and recommendations to establish an administration of juvenile

justice in compliance with the CRC. Paragraph 64 *et seq* of the comment are in these terms –

“The right of a child to have his/her privacy fully respected during all stages of the proceedings reflects the right to protection of privacy enshrined in Article 16 of CRC. “All stages of the proceedings” includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority or release from supervision, custody or deprivation of liberty. In this particular context, it is meant to avoid harm caused by undue publicity or by the process of labelling. No information shall be published that may lead to the identification of a child offender because of its effect of stigmatisation, and possible impact on his/her ability to have access to education, work, housing, or to be safe. It means that a public authority should be very reluctant with press releases related to offences allegedly committed by children and limit them to very exceptional cases. They must take measures to guarantee that children are not identifiable via these press releases. Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and where necessary (e.g. in case of recidivism) with penal law sanctions.

65. *In order to protect the privacy of the child, most States parties have as a rule – sometimes with the possibility of exceptions – that the court or other hearings of a child accused of an infringement of the penal law should take place behind closed doors. This rule allows for the presence of experts or other professionals with a special permission of the court. Public hearings in juvenile justice should only be possible in well-defined cases and at the written decision of the court. Such a decision should be open for appeal by the child.*
66. *The Committee recommends that all States parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law. The verdict/sentence should be pronounced in public at a court session in such a way that the identity of the child is not revealed. The right to privacy (art. 16) requires all professionals involved in the implementation of the measures taken by the court or another competent authority to keep all information that may result in the identification of the child confidential in all their external contacts. Furthermore the right to privacy also means that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case. With a view to avoiding stigmatisation and/or prejudgments, records of child offenders should not be used in adult proceedings in subsequent cases involving the same offender . . . or to enhance such future sentencing.”*

At paragraph 96, the Committee says this –

“Children who commit offences are often subject to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of these children and often of children in general. This negative presentation or criminalisation of child offenders is often based on misrepresentation and/or misunderstanding of the causes of juvenile delinquency, and results regularly in a call for a tougher approach (e.g. zero tolerance, three strikes and you are out, mandatory sentences, trial in adult courts and other primarily punitive measures). To create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights-based approach to this social problem, the States parties should conduct, promote and/or support educational and other campaigns to raise awareness of the need and the obligation to deal with children alleged of violating the penal law in accordance with the spirit and the letter of CRC. In this regard, the States parties should seek the active and positive involvement of members of parliament, NGOs and the media, and support their efforts in the improvement of the understanding of a rights-based approach to children who have been or are in conflict with the penal law. It is crucial for children, in particular those who have experience with the juvenile justice system, to be involved in these awareness-raising efforts.”

17. The second treaty which may be of relevance to this issue is the European Convention on Human Rights (ECHR), and in particular Articles 3, 6 and 8. Members are already familiar with these Articles – Article 3 is the obligation imposed on State parties to avoid inhuman or degrading treatment, Article 8 is the right to respect for private and family life, and Article 6 is the right to a fair trial. These rights are given effect in domestic law by the Human Rights (Jersey) Law 2000. As mentioned, the ‘naming and shaming of children’ in relation to ASBOs has not been the subject of a judicial determination under the Human Rights Act in the United Kingdom, but, according to learned European comment, is thought to have the potential to breach those rights.

International comment on the United Kingdom position

18. In 2005, Mr. Alvaro Gil-Robles, the Commissioner for Human Rights, reported to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, on his visit to the United Kingdom.
19. The Commissioner considered the use of ASBOs and conceded that the serving of ASBOs should be made public, and that consequently reporting restrictions that apply to criminal convictions of juveniles need not be respected quite so strictly in respect of them. However, the Commissioner expressed his view that the aggressive publication of ASBOs may be disproportionate, and the impact of the family as a whole must also be considered.
20. The Equality and Human Rights Commission (Great Britain) published in July 2008 a ‘Shadow report on the combined third and fourth periodic reports of the United Kingdom to the United Nations Committee on the Rights of the Child’. The Commission is an independent statutory body established under

the Equality Act, 2006. At paragraph 8 of the Executive Summary, under the heading ‘ASBOs’ the Commission said this –

“The ‘naming and shaming’ of children who are prosecuted for breach of an ASBO is inconsistent with principles of the child’s best interests, welfare and rehabilitation and should cease.”

21. At paragraph 64 of the said Report reference is made to the following advice of the Judicial Studies Board –

“On each occasion the Court will need to balance the interests of the community with that of the child or young person while at the same time recognising that the child or young person has rights under Article 8 ECHR (respect for private and family life).”

22. The Commission comments that it is however difficult to reconcile publicity with the principles of rehabilitation, welfare and protection for children.

23. In its report published on 20th October 2008, the UN Committee on the Rights of the Child made some concluding observations in relation to the United Kingdom of Great Britain and Northern Ireland, the relevant parts of which are as follows –

“Best interests of the Child

26. *The Committee regrets that the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the area of juvenile justice, immigration and freedom of movement and peaceful assembly.*

27. *The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with Article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of criminal justice and immigration.*

....

36. *The Committee is concerned that:*

... ..

(b) *the State party has not taken sufficient measures to protect children, notably those subject to ASBOs, from negative media representation and public “naming and shaming”;*

... ..

37. *The Committee recommends that the State party:*
- (a) *Ensure, both in legislation and in practice, that children are protected against unlawful or arbitrary interference with their privacy, including by introducing stronger regulations for data protection;*
 - (b) *Intensify its efforts, in co-operation with the media, to respect the privacy of children in the media, especially by avoiding messages publicly exposing them to shame, which is against the best interests of the child;*
-”

Opinion

24. According to the research undertaken, the only departure from the general restriction on naming children in the media in the United Kingdom has been in relation to ASBOs, which are characterised as civil rather than criminal orders, albeit that breach of an ASBO will constitute a criminal offence. ASBOs are not part of the options available in this Island to address anti-social behaviour, whether by children or adults, and therefore the issues regarding the naming and shaming in that context are not directly analogous to what is being proposed. The criticism by bodies that monitor compliance of international obligations including the CRC, referred to above, does however help to inform the position.
25. Jersey courts already have the power to waive the general prohibition on reporting information that may identify a child, having regard to the interests of justice and the welfare of the child. If the court is asked to lift reporting restrictions in any particular case, according to judicial guidance of the equivalent provision in English law, the court must consider whether there are good reasons to name the defendant(s), and must balance the appropriate interests and considerations.
26. If the proposition is approved, Article 73 of the Children (Jersey) Law 2002, that provides the privacy for children in proceedings, would need to be amended. Such an amendment, in respect of any threshold age of a child, would be inconsistent with the principles contained in the CRC. Accordingly, if the Island is party to the CRC at the time that an amending law is submitted for Royal Assent, Royal Assent might well not be granted, because to do so may place the United Kingdom in breach of its international obligations as the State party to that convention. The Law Officers, as part of their duties, are obliged to draw any such risk to the attention of the United Kingdom in the report to the Privy Council which is prepared to accompany legislation submitted for Royal Assent.
27. If, however, such an amending Law is passed by the States prior to the Island requesting that the United Kingdom’s ratification of the CRC be extended to the Island, no such report would need to be made. However, when ratification of the CRC is subsequently sought in accordance with the policy adopted by the States, the United Kingdom would likely refuse to do so until any such legislation had been repealed.