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Mr Bob Debus
Attorney General NSW
Level 36, Governor Macquarie Tower
1 Farrah Place
SYDNEY NSW 2001

Dear Mr Debus

Amendment to s11 of the *Children's (Criminal Proceedings) Act 1987*

We are writing to you on behalf of the media entities listed at the end of this letter, to express our concern at the adverse practical effects of the recent amendment to S11 of the *Children's (Criminal Proceedings) Act 1987*.

In March 2004 section 11 of the *Children (Criminal Proceedings) Act 1987* was amended to extend the prohibition on identifying children involved in criminal proceedings to the identification of deceased children and the siblings of child victims.

The amendment has resulted in a significant restriction on the principle of open justice and has had a deleterious effect on court reporting in NSW. It is unlikely that this effect was foreseen by the legislators.

This letter is to draw your attention to the consequences of the 2004 amendment and to urge you to move to repeal the amendment.

History of Section 11

The media has been working within the restrictions imposed by section 11 for almost 20 years. Originally the section prevented the identification of children involved in criminal proceedings whether as the accused, the victim or witness. The section also prevented the identification of children who were merely mentioned in criminal proceedings. In 2002 the section was amended to make it clear that the prohibition applied even after the child had become an adult.

The reasoning behind the prohibitions was uncontentious and the media, with only occasional inadvertent lapses, has taken pains to comply with the section.

2004 Amendment

The 2004 amendment extended this prohibition to prevent the identification of a child involved or mentioned in criminal proceedings if the child is deceased at the time of publication.

It also prevents the identification of a sibling of a child victim of the offence to which the criminal proceedings relate, provided that the sibling and the victim were both children when the offence was committed.

Effect of amendment

Since the first publication in Australia in 1803 New South Wales law has permitted media to report the names of children in criminal proceedings if that child is deceased at the time of publication or broadcast. The 2004 amendment means that these names are now suppressed. It also means that the name of the accused in such proceedings will often have to be suppressed. That is because naming an accused who is related to the child victim would be likely to lead to the identification of the deceased child.

The far-reaching ramifications of the amendment tend towards the absurd, as can be seen from the following examples:

- Kathleen Folbigg was convicted in 2003 for the murder of three of her children and the manslaughter of her fourth. The proceedings against her received extensive coverage around Australia, with over 450 stories appearing in print alone and similar coverage in broadcast media, a large percentage of which named the dead children. Yet any future stories published or broadcast in NSW about the proceedings will not be able to name her children. Nor would they be able to name Mrs Folbigg, because to do so would be likely to lead to the identification of her dead children in breach of the amended section 11.
- Pieces on the notorious Graham Thorne kidnapping and murder in 1960 are still published or broadcast about regularly. Yet any future story which referred to the criminal proceedings against his kidnapper and murderer, Stephen Leslie Bradley, and which named Thorne would be in breach of the amended section 11 as Thorne was a child when murdered.
- There has been widespread coverage of the 1989 murder of 14-year-old Leigh Leigh at North Stockton by Matthew Webster. Recently there has been coverage of Webster's return to jail following assault charges brought against him. Future stories about criminal proceedings against Webster which name Leigh Leigh will be in breach of the amended section 11 as she was a child at the time of her murder.
- Samantha Knight's name was published and broadcast widely from the time of her disappearance as a nine-year-old in Bondi in 1986 up to the conviction of her killer, Michael Anthony Guider, in 2002. Yet any identification of Samantha Knight in future stories which refer to the proceedings against Guider would be in breach of the amended section 11.
- There was widespread coverage (including pictures) of the little girl, Rose, whose mother gave her methadone which killed her. The mother and her defacto were subsequently arrested and charged. As a result of section 11 the media were not permitted to identify Rose or to report that it was the accused mother's daughter who had died as a result of the alleged crime (this was due to indirect identification). The scant reporting which results is contrary to principles of open justice. Various media organisations sought to identify Rose which was granted, but the prohibition was subsequently reinstated. Media outlets are considering approaching the court again for permission.

Section 11 has particular application where a child goes missing. Often the investigation is given a high public profile by the police and the child's family in order that the child may be located or a member of the public with critical information may come forward. It is not uncommon for the public to take a strong interest in such an investigation, and to feel deeply about the result and possible criminal proceedings if the child has gone missing in suspicious circumstances.

While we accept that there is a need to protect the privacy of children affected by criminal proceedings, in a case where a child is deceased, and there has been a high profile investigation

into the circumstances surrounding their disappearance, it is anomalous that the child cannot be identified once criminal proceedings commence.

This problem is most acute if the discovery of a child's body coincides with the commencement of criminal proceedings. It can create a situation where the public is unaware of what has prompted the criminal proceedings, or where the public concludes that the police have been unsuccessful in their investigation because resulting criminal proceedings cannot be linked to the name of the child that disappeared. This situation has a negative impact on the community's confidence in the policing system, and may also lead to unnecessary public anxiety about the fate of a missing child or the threat of further attacks.

Anomalies

The amended section 11 creates a number of anomalies which will defeat its apparent purpose of protecting children from the publicity arising from the commission of a crime.

The amended section 11 will not prevent the naming of murdered children where no criminal proceedings are commenced. This situation arises not infrequently in murder-suicides within a family. When Sally Winter shot her husband and two young children in March 2005 her children were lawfully named. Had Mrs Winter not succeeded in killing herself and had she been charged, her children could not have been named and neither could she.

The media will be able to report in NSW the names of child murder victims in proceedings heard interstate where there are no similar prohibitions. Interstate media will be able to report the names of NSW child murder victims mentioned in criminal proceedings heard in NSW even though NSW media will be prevented from publishing such reports by the amended section 11.

Stories about murdered children which don't refer to ensuing criminal proceedings against the murderer will be able to name the dead children. For example, an article or story that named Kathleen Folbigg and her four dead children but which did not refer to the criminal proceedings brought against her would not be in breach of the amended section 11.

The name of a missing or murdered child might be extensively published or broadcast before criminal proceedings are commenced. This was the case with Samantha Knight. There were hundreds of pieces which named her in the 15 years between her disappearance and the charging of Guider. The public in that time became well aware of her identity. Yet had those proceedings been brought after the introduction of the amended section 11, there could have been no mention of any material in reports of those proceedings which would have identified her or been likely to identify her. The public would never have learnt how the criminal justice system had dealt with her killer.

Unintended and Unexplained Consequences

There is no indication from the brief debates in both houses that the legislators foresaw the consequences of the amended section 11 as it passed through the NSW Parliament. The Minister for Justice told the Legislative Council on 27 February 2004, that "*the amendments proposed by this legislation (Crimes Legislation Amendment Bill of 2004) are minor, tidy-up provisions*".

In fact, the amendments of section 11 are major and far-reaching in their effect on the reporting of criminal proceedings. They are a significant restriction on the principle that it is in the interests of justice that court proceedings should be open. The changes were made without consultation with the media.

The need for such an amendment was not explained during debate. The closest any speaker came was when the Member for Penrith told the Legislative Assembly that the amendment “*arose out of a case in which a media organisation applied to the court to publish the name of a deceased child victim, which could have led to the identification of the victim’s living child siblings*”.

This was probably a reference to the murder of a three-year-old girl at Point Clare in 2001 by a 13-year-old boy. The Member for Penrith gave the impression that the media was insensitive to the victim’s siblings. In fact, the opposite was the case. The girl’s name was widely published prior to the charges being laid against the boy and during part of the proceedings against the boy. Mr Justice Wood subsequently suppressed the girl’s name. Fairfax challenged this suppression order on the grounds that the judge did not have the power to make it. Such suppression orders have become increasingly common in recent years. Prior to the hearing of this challenge, Fairfax was sent copies of an affidavit from the girl’s family which pointed out that publication of the girl’s name had an upsetting effect on the girl’s family. On the basis of the affidavit Fairfax withdrew its challenge, even though it was strongly arguable that the suppression order had been made without power. Fairfax has not published the girl’s name since.

Comparison with other Common Law jurisdictions

The amendment to section 11 goes further than any comparable legislation in other Australian states and territories. All states and territories have enacted various restrictions on the identification of children involved in criminal proceedings and child care proceedings. However, only NSW has extended that prohibition to the identification of dead children or the identification of child siblings of child victims involved in criminal proceedings.

Although both New Zealand and the United Kingdom have legislated to prohibit the identification of children in criminal proceedings, neither has prohibited the identification of dead children or the siblings of child victims.

The legal issues raised by the amendment to section 11 were examined last October by the House of Lords in *In re S (FC) (a child)* [2004] UKHL 47. CS, an eight-year-old child, sought to have suppressed the identity of his mother, who was facing trial for the murder of another of her children. CS, who was not involved in the proceedings but would be identified in reports of the trial which named his dead sibling and his mother, sought to protect his privacy.

The House of Lords unanimously rejected the application and approved the previous decision of the Court of Appeal to deny CS an injunction. The House of Lords emphasised the central importance of the principle of open justice which should only be restricted in exceptional circumstances. It pointed out that the British Parliament had decided not to extend the right to restrain publicity to children not involved in a criminal trial, such as the siblings of a child who is involved. In rejecting CS’s application for an injunction to protect his privacy, Lord Steyn, with whom the other Lords agreed, said:

“A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.”

In amending section 11, the NSW Parliament went further than the Parliament of any other Australian state or territory and the British Parliament. It imposed unprecedented statutory

restrictions on the right of open justice which are contrary to the strong and unanimous views of the House of Lords delivered only a few months ago.

Conclusion

The media group is firmly of the view that the 2004 amendments to section 11 should be repealed. At the very least, and as an initial step, the 2004 amendments should be referred to a legislative review committee so that the issues raised in this submission can be properly considered.

Earlier this year members of the Media Group were able to work with the NSW Government on proposed changes to the Criminal Procedure Further Amendment (Evidence) Bill 2005 (NSW) to ensure an outcome which recognised concern for the welfare of victims and the importance of open justice. We look forward to reaching a similar outcome in this instance.

We would like to meet with you to discuss the media group's concerns with section 11. Please contact Alina Bain on 02 8968 7100 in this regard.

Yours sincerely



JULIE FLYNN

For and on behalf of the media entities listed below

Australian Broadcasting Corporation
Australian Associated Press Pty Ltd (AAP)
Australian Consolidated Press Limited
APN News & Media Limited
Australian Subscription Television Association
Free TV Australia
Community Broadcasting Association of Australia
John Fairfax Holdings Limited
News Limited
Nine Network Australia Pty Limited
Network Ten Pty Limited

Prime Television
Regional Broadcasting Australia
Reuters Australia Pty Ltd
Seven Network (Operations) Limited
Southern Cross Broadcasting
Special Broadcasting Service Corporation
West Australian Newspapers
WIN Television Pty Limited
XYZnetworks