SUBMISSION ON S11 CHILDREN (CRIMINAL PROCEEDINGS) ACT

This submission is on behalf of ABC, Commercial Radio Australia, Fairfax Media, FreeTV Australia, News and SBS ("Media Groups").

The Media Groups welcome the opportunity to make this submission to the Standing Committee on Law and Justice to assist its inquiry into the prohibition on the publication of names of children involved in criminal proceedings.

Together the Media Groups represent all of the major newspaper publishers and radio and TV broadcasters in Australia including the public broadcasters.

We thank the Standing Committee of Law and Justice for consulting with the media on these issues, particularly given that consultation did not occur prior to amendment of section 11 in 2004 and 2007.

Summary

The Media Groups agree with the committee chair, the Hon Christine Robertson MLC, that a sensitive balance needs to be struck between the long-established principles of open justice on one hand and the need to protect the vulnerable young from the effects of adverse publicity on the other. We believe this sensitive balance existed under s11 of the Children (Criminal Proceedings) Act as it was prior to the 2004 amendment, except that then, as now, s11(1)(b) prevented identification of children who were merely mentioned in proceedings. Apart from that additional restriction, section 11 prior to 2004 was broadly in line with similar enactments now in force in the other states and territories of Australia and in other parts of the common law world.

However the 2004 amendment to s11, together with the further amendment this year, has dramatically upset this sensitive balance. NSW has moved away from other jurisdictions and imposed an unnecessary and cumbersome court reporting prohibition which creates anomalies, confusion and most importantly suppresses information that should be in the public domain. It is vital that as much as possible, the workings of our judicial system are transparent and open.

The Media Groups calls for the repeal of the 2004 and 2007 amendments of s11 so that in the reporting of criminal proceedings involving children the principles of open justice prevail in NSW no less than they do in every other state and territory in Australia and throughout the common law world.

We also consider that s11(1)(b) should be repealed, as this prevents identification of children who are mentioned in any criminal proceedings, no matter how insignificant or fleeting the mention is. In lieu thereof, the court could be granted a separate power to make an order prohibiting identification of any person mentioned in any criminal proceedings in relation to something that occurred when the person was a child.

The Media Groups believe that the naming of children convicted of serious indictable children's offences is adequately covered by the discretion given to the court in s11(4B). In addition, the section should be amended to allow that any application to the court to exercise its discretion should not be restricted to the time of sentencing but should such an application be permitted at any time after conviction.

History of Section 11

Prior to the 2004 amendment, the media had been working within the restrictions imposed by section 11 for many years. Before 2004 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 uncontroversially 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 took pains to comply with the section.

2004 Amendment

The 2004 amendment, made without consultation with the media, extended this prohibition to also prevent the identification of a child involved or mentioned in criminal proceedings who was dead at the time of publication.

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

2007 Amendment

The 2007 amendment, also made without consultation with the media, allowed the naming of a dead child involved in criminal proceedings if a "senior available next of kin" gave permission. The amendment imposed an obligation on the "senior available next of kin" to be satisfied, before giving permission, that no other "senior available next of kin" objected to the publication. A "senior available next of kin" is a parent or, if the parents are dead or cannot be found, a person who had parental responsibility for the child at the time of its death, or the Director-General of DOCS if the child was in the care of DOCS at the time of his or her death.

A "senior available next of kin" who is an accused in the criminal proceedings concerned or has been convicted in those proceedings cannot either give or

withhold permission for publication of the dead child's name. If the dead child has child siblings, the amendment imposed a further obligation on the "senior available next of kin" to make reasonable inquiries about the views of the siblings about the naming and to take those views into account before giving permission.

Effect of amendments

The 2004 amendment meant that the name of a dead child involved in criminal proceedings, usually as the victim, was now suppressed. It also meant, because of the broad definition of name in s11(5), that the name of the accused in such proceedings would often have to be suppressed. That is because naming an accused who is related to the child victim, which is often the case, would be likely to lead to the identification of the dead child. The effect of this amendment is an oppressive restriction on the principle of open justice.

The killing of children invariably provokes intense public interest. The names of such victims are widely broadcast and telecast. Under the 2004 amendment those names cannot be published again once charges are laid. The result is that the public, which was able to follow the progress of the police investigation up to the point of a suspect being charged, is thereafter effectively denied information about the ensuing criminal prosecution. Any coverage given to the subsequent trial, because it is denied essential information such as the name of the victim and often of the accused, will have a much reduced prominence and impact. In time, this imposed secrecy could well have a deleterious effect on the public's confidence in the working of the criminal legal system.

The 2007 amendment attempted, but failed, to remedy some of the obvious defects of the 2004 amendment. The result of this amendment is that once charges are laid over the killing of a child, any "senior available next of kin",

usually a parent, is bound to be deluged with requests from the media for permission to name the dead child. Such a parent is likely to be in a fragile state which will inevitably make such intrusion difficult. Where both parents are charged over the killing or where one parent was killed with the child by the other parent, (scenarios that are not uncommon - see the second example below), there will be nobody available to give the requested permission to name the dead child. The 2007 amendment imposes obligations on the "senior available next of kin" to consult with other "senior available next of kin" or siblings about the naming of the dead child, an obligation that would be difficult to police and which could easily give rise to family disputes at a time of grief and distress.

The following are two recent examples which show the shortcomings of the 2004 and 2007 amendments:

- Dean Shillingsworth's body was found in a suitcase floating in a duck pond in Ambarvale on Wednesday October 17. The discovery provoked widespread public concern and interest and subsequent political debate about the role of DOCS in his short life. The boy's name was first published in The Sun-Herald on Sunday October 21. He was able to be named then because that story was printed on Saturday night, before the two-year-old's mother was charged that night over his death. The effect of the charging meant that criminal proceedings had been commenced and the 2004 amendment came into operation requiring no mention being made of the names of the dead boy or of his family, thus depriving the public of important details of the court proceedings.

  The 2007 amendment initially appeared to be of no help to the media because it seemed that the two "senior available next of kin", the boy's mother and father, were not able to give permission for the boy to be named. That is because his mother had been charged over his death

and was therefore excluded under s11(4F) from either approving or objecting to the naming and his father was in jail and uncontactable.

However on the Sunday a Daily Telegraph reporter discovered that the boy's paternal grandmother had previously been appointed his primary carer which meant that she also was a "senior available next of kin" under s11(7)(b)(i) and, under the 2007 amendment, was therefore able to give permission for him to be named. The grandmother did give permission which meant that his parents could also be named. The result was that only those sections of the media which had discovered the grandmother's role were able to name the boy in reports published the following day. The rest of the media, which was complying with the 2004 amendment, had to wait a day to catch up.

- Shellay Ward, 7, died on November 3 apparently malnourished and starved. The first newspaper story about her death appeared on Wednesday November 7. Her death again provoked widespread public interest and political debate about the role of DOCS. She was of course named along with her parents because no charges had been laid and therefore s11 had not come into operation. The parents were not charged over her death until Saturday November 17. In the intervening period her name and those of her parents had been constantly published in newspapers and online and broadcast on television and radio. Under s11, once the charges were laid and the proceedings therefore commenced, no further mention could be made of her name nor the names of her parents.

  This has the effect again of denying the public essential details about the case. Because of the 2007 amendments, there was nobody from whom permission to publish her name could be sought. The girl had been in the care of her mother and father who were therefore her only "senior available next of kin". Under s11(4F) a "senior available next of

kin" who is charged with an offence in the criminal proceedings cannot either give or withhold permission for the naming of the dead child.

The absurdity of the situation is magnified when it is appreciated that s11(4)(b)(i) would have allowed a Court (presumably, the Court before which her parents were charged) to consent to Shellay Ward's name being published, if she were still alive. There is no matching provision, dealing with a child who is deceased. In the Shellay Ward situation, there is literally no-one who may give consent. The policy considerations, if any, as may be thought to render desirable such an anomalous result (in which the notional privacy interests of a deceased child are valued more highly than those of a child who is still alive) remain elusive[1].

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.

[1] Compare, for example, Children (Care and Protection) Act 1998 (NSW) section 105, which prohibits a wide range of conduct having the potential to identify a child or young person the subject of a report to DOCS, or who is likely to be involved or mentioned in any capacity in Childrens' Court proceedings or non-court proceedings. Under s105(1A)(b), the prohibition ceases to apply when the child or young person dies.

- 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 because of the 2004 amendment.

- Stories about murdered children which do not refer to ensuing criminal proceedings against the murderer will be able to name the dead children. For example, an article that named Shellay Ward but did not refer to the criminal proceedings brought against her parents would not be in breach of the 2004 amendment.

- The name of a murdered child might be extensively published before criminal proceedings are commenced as shown in both examples above. In such instances, once charges have been laid, the suppression of the dead child's name under the 2004 amendment provokes incredulity and frustration in newsrooms throughout NSW.

- The name of a living child whose parents have been charged with grievous criminal conduct towards him or her may be published where a court believes it is in the interest of justice to do so. However, on a narrow interpretation of section 11 (4) (b) if the child subsequently dies of injuries thus sustained, his or her name may no longer be published, even though the Court may continue to be of the view that publication is in the interests of justice, because section 11(4)(d) specifically provides that in these circumstances consent is a matter for a "senior available next of kin" In addition, given that the Court cannot order the identification of a child over the age of 16 without consent of the child, clearly if the child is dead, the consent cannot be obtained.

Comparison with other Common Law jurisdictions

The amendment to section 11 goes further than any comparable legislation in the other states and territories. All states and territories have enacted differing restrictions on the identification of children involved in child care or other proceedings.[2] Only NSW has suppressed the identification of dead children or the identification of child siblings of child victims involved in criminal proceedings.

In England there is no prohibition on the identifying of dead children in criminal proceedings. The situation there is covered by ss 39 and 49 of the Children and Young Persons Act 1933. The effect is a ban on publishing identifying details of a child who is a defendant, victim or witness in proceedings before a Youth Court. The court can lift this ban in certain circumstances, including after conviction, if it is in the public interest to do so. Most criminal charges concerning children are heard in the Youth Court although, if the charges are serious, an accused child can be sent to the Crown Court for trial. There is no automatic ban on identifying children in proceedings in the Crown Court although there is a power to make such an order. Orders banning identification of a child no longer apply once the child turns 18.

In New Zealand there is no prohibition on the identifying of dead children in criminal proceedings. There is a prohibition on identifying a witness in criminal proceedings who is under 17 and other restrictions on the publication of children's names in sexual assault cases.[3]

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[2] For example in Victoria s534 Children, Youth and Families Act 2005; in Queensland s193 Child Protection Act 1999; in the ACT s61A Children and Young People Act 1999; in Western Australia s36 Childrens Court of Western Australia Act 1988 and s190 Young Offenders Act 1994; in South Australia s13 and s63C Young Offenders Act 1993 and s71A(4) Evidence Act 1929

[3] see s139 and s139A Criminal Justice Act 1985

The legal issues raised by the amendments to section 11 were examined recently by the House of Lords.[4] This decision gives a very useful summation of the recent thinking of the most senior courts in England on the very issue being considered by the committee in its current inquiry.

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."

[4] *In re S (FC) (a child)* [2004] UKHL 47

In amending section 11 in 2004, 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 out of step with the strong and unanimous views of the House of Lords delivered only a few years ago.

Young offenders charged with serious crimes

Section 11(4B) gives the court a discretion to authorise the naming of a child convicted for a serious children's indictable offence. Under that section the discretion can be exercised only at the time of sentencing. In exercising its discretion to authorise the naming, the court has to be satisfied that the order is in the interests of justice and that the consequent prejudice to the person named does not outweigh those interests.

The Media Groups believe that in broad terms this discretion is adequate and that no expanding of the discretion is necessary. However restricting the exercise of the discretion to the time of sentencing has caused difficulty for those seeking authorisation to name children convicted of serious offences. In the notorious sexual assault cases involving the brothers MSK, MAK, MMK and MRK Fairfax failed in its attempt to seek authorisation to name the brothers. Although the Court of Criminal Appeal thought there might well be a strong case for the naming of the brothers, including two who were children at the time of the offences, it denied Fairfax's application because it had not been made at the time of sentencing.[5] The reason why it had not was because of the complexity of the K brothers' trials, retrials and appeals. The Media Groups believe that s11(4B) should be amended to remove the restriction that the court's discretion can be exercised only at the time of sentencing. We also believe that the discretion should be exercisable at any time after conviction.

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

Conclusion

The Media Groups believe that the 2004 and 2007 amendments to section 11 should be repealed. The protection afforded by s11 prior to 2004 provided protection to children caught up in criminal proceedings, in whatever capacity, that achieved an appropriate balance between the principles of open justice and the need to protect the young from the effects of adverse publicity. Apart from the restriction on identifying children merely mentioned in proceedings, it was comparable to or better than the protection afforded in other states and territories and in other common law jurisdictions. Such a repeal would have the effect of bringing this small but significant provision of NSW legislation back from the limb on which it has been perched since 2004. The additional repeal of s11(1)(b), and its replacement with a court power to order that there be no identification of children mentioned in criminal proceedings, would further help to achieve the balance required and to align the protection with that afforded in other states and territories.

The Media Groups believe that the naming of children convicted of serious indictable children's offences is adequately covered by the discretion given to the court in s11(4B), but believes that any application to the court to exercise its discretion should not be restricted to the time of sentencing but should be allowable at any time after conviction.