

AUSTRALIA'S RIGHT TO KNOW

Standing Committee of Attorneys-General

Dear Sirs

REFERRAL RE PROHIBITION ON NAMING OF CHILDREN INVOLVED IN CRIMINAL PROCEEDINGS

The Right to Know Coalition is writing to the committee about the referral to it by the NSW Attorney-General of a proposal to implement a consistent Australia-wide scheme relating to the prohibition of the identification of children involved in criminal proceedings.

This referral raises two issues which are of concern to the coalition: the flaws in the NSW legislation prohibiting the identification of children involved in criminal proceedings; and the need for uniformity in this area.

1. FLAWS IN THE s11 CHILDREN (CRIMINAL PROCEEDINGS) ACT [NSW]

- i. The Coalition will strongly oppose any suggestion that the flawed s11 of the Children (Criminal Proceedings) Act should be the template for any uniform legislation in this area.
- ii. Prior to 2004 s11 was broadly similar to the restrictions on the identification of children involved in child care or criminal proceedings that applied in the other states and territories¹. In 2004, without consulting the media, the party most affected by the amendment, the NSW Government amended s11 to extend the prohibition to the naming of dead children in criminal proceedings. Effectively the 2004 amendment prevented the naming of victims in child homicide cases. As child homicide victims are frequently killed by close relatives, the amended s11 often prevented the naming of the accused as well. In 2007, again without consultation with the media, s11 was amended again. This amendment was designed to ameliorate some of the more bizarre anomalies created

¹ 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.

by the 2004 amendment but succeeded only in making that amendment even more cumbersome.

- iii. The flaws in s11 are best understood by looking at an example of its operation. Shellay Ward, 7, died on November 3 2007, apparently malnourished and starved. The first newspaper stories about her death appeared on November 7. Her death provoked widespread public interest and became part of the ongoing public debate about the role of the NSW Department of Community Services in caring for at risk children. Her parents were charged in relation to her death on November 17. In the intervening period Shellay Ward's name and those of her parents had been widely and constantly published in newspapers and online and broadcast on television and radio. Once criminal proceedings were commenced against her parents, s11 came into operation prohibiting the further naming of Shellay Ward. The section also prevented the further naming of her parents, because to have done so would have identified their dead daughter. The prohibition on the names of the accused and victim in the case had the practical effect of greatly reducing the media coverage of the case². Under the cumbersome 2007 amendment, the media can ask a "senior available next of kin" for permission to name a dead child involved in criminal proceedings³. But under the definition of "senior available next of kin" in s11(7), because the girl had been in the care of her parents at the time of her death, her parents were her only "senior available next of kin". And because they had been charged in the criminal proceedings concerned, they were prevented by s11(4F) from either giving or withholding permission for the naming of the dead child⁴. So in this instance, there was nobody qualified under s11 to give permission for the naming of Shellay Ward. As a result her parents could not be named and there was very little coverage of the proceedings against them, thereby denying the NSW public information about the case. The absurdity of this

² It is a fact of life that the media tend not to cover stories when prevented from naming those involved. S121 of the Family Law Act, which prevents the identification of those involved in Family Court proceedings, has meant that Family Court cases are rarely covered in the media. From time to time this has been a matter of concern to the Family Court.

³ "S11(4) Subsection (1) does not prohibit:

(d) the publication or broadcasting of the name of a deceased child with the consent of a senior available next of kin of the child, but only if it appears to the senior available next of kin, after making such inquiries as are reasonable in the circumstances, that no other senior available next of kin objects to the publication or broadcasting of the name."

⁴ "S11(4F) A senior available next of kin who is charged with, or is convicted of, an offence to which the criminal proceedings concerned relate cannot give consent, or object, to the publication or broadcasting of the name of a deceased child as referred to in subsection (4) (d)."

situation is magnified when it is appreciated that s11 (4) (b) (i) would have allowed a court to consent to Shellay Ward's name being published had she still been alive. There is no matching provision allowing a court to consent to the naming of a dead child.

- iv. In February 2008 the NSW Parliament's Standing Committee on Law and Justice conducted an inquiry into s11. To the dismay of the media, which had made detailed submissions on the shortcomings of the 2004 and 2007 amendments, the committee effectively approved the amendments and recommended that the section be tightened even further.
- v. No comparable legislation in the other states or territories has anything approaching the prohibition on the naming of dead children involved in criminal proceedings enacted by the 2004 and 2007 amendments to s11. There is nothing like it in any other part of the common law world. The Committee should reject any suggestion from the NSW Attorney-General that s11 should be a template for a uniform national prohibition on the identification of dead children involved in criminal proceedings.

2. UNIFORMITY IN THIS AREA

- i. Should the Attorneys consider that uniformity across all States and Territories is preferable, it is essential such uniformity be based on the best and most workable model available. Given the deeply flawed nature of the NSW model, it would be preferable for the legislation to be inconsistent across the jurisdictions than based on the NSW provisions.

If you or any of your officers would like to discuss this issue please do not hesitate to contact myself or Richard Coleman at Fairfax Media.

Yours sincerely

Gail Hambly
Group General Counsel/Company Secretary

