



Children (Criminal Proceedings) Amendment (Publication of Names) Bill 2007

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Extract from NSW Legislative Council Hansard and Papers Thursday 28 June 2007.

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [4.37 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Children (Criminal Proceedings) Amendment (Publication of Names) Bill, which proposes two amendments to section 11 of the Children (Criminal Proceedings) Act. The first is to allow certain family members, other than the defendant, of deceased children to waive the right to non-publication. The second is to clarify that the section was not intended to operate retrospectively. Section 11 of the Children (Criminal Proceedings) Act 1987 provides that the name of certain persons—namely, children and persons who were children at the relevant time—must not be published or broadcast in a way that connects them with specified criminal proceedings.

For example, the prohibition relates to the following persons: first, a person who was a child when a witness to, or victim of, an offence; secondly, a person who is or was mentioned in criminal proceedings in relation to something that occurred when the person was a child; thirdly, a person who was involved in criminal proceedings when a child; and, fourthly, a brother or sister of a victim of an offence, where that brother or sister and the victim were both children when the offence was committed.

The prohibition applies into the future even after the proceedings have been finalised and the person concerned becomes an adult. The material covered by these provisions includes the name and any other information—for instance a picture—that may lead to the identification of the child. There are some exceptions to the prohibition. For instance, a name can be broadcast or published with the consent of the person if they are over 16 years.

In 2001 section 11 was amended to make it clear that the prohibition applied even if the person concerned was no longer a child at the time of the publication or broadcast. The section was again amended in 2004 to make it clear that the prohibition also extended to children who were deceased. Since those amendments it has become apparent that in order to continue to balance the rights of victims and their families and the principle of open justice, a number of further amendments need to be made. The first amendment will allow a parent or a senior available next of kin to consent to the name of the deceased child being published or broadcast. The giving of consent is, however, subject to a number of conditions.

For instance, a senior available next of kin may not give the consent or object to the giving of consent if that person is charged with, or is convicted of, an offence in the criminal proceedings that gave rise to the prohibition. For example, a parent

charged with his or her child's murder would not be able to give consent. Nor can a senior available next of kin give such a consent to the publication or broadcasting of the name of a deceased child if it appears, after making such inquiries as are reasonable in the circumstances, that another senior available next of kin objects to the publication or broadcasting of the name. For example, if one parent objects, the other parent cannot give consent.

When a parent or senior available next of kin is considering whether to give consent to the publication or broadcasting of the name of a deceased child, reasonable efforts must be made to obtain and take into account the views of the deceased child's siblings and what impact it might have on them where those children are also protected by the Act. The aim of this amendment is to give a sense of empowerment to the victim's family. They will be able to make a decision about whether they wish the name of their child to be released in the media rather than having to go through the process of making an application to the court.

The second amendment is in regard to retrospective application and will make it clear that the prohibition on the publication or broadcasting of persons' names does not apply if that child's name had been lawfully broadcast or published in the past. When initially enacted in 1987 the section was ambiguous and was interpreted as protecting children only up to the time when they became adults, after which time they could be named. This meant that a child could be publicly named upon reaching adulthood. In 2001 the Government introduced an amendment to section 11 clarifying that the protection continued even when the child became an adult. In 2004 another amendment was made to clarify that the section applied also to deceased children. It was ambiguous as to whether these amendments were intended to have retrospective effect. A consequence of the amendments meant that the name of a child, which had been in the public domain for years, could technically not be lawfully published or broadcast. The proposed amendments will clarify that there is no breach for subsequently publishing the names of children connected to criminal proceedings when those names have already been published lawfully.

I turn now to the detail of the bill. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act. Clause 3 is a formal provision that gives effect to the amendments to the Children (Criminal Proceedings) Act 1987 as set out in Schedule 1. Schedule 1 [2] to [4] to the bill amend section 11 of the Act to provide that the prohibition on publication and broadcasting does not apply to the publication or broadcasting of the name of a deceased child when a senior available next of kin of the child has given consent to the publication or broadcasting.

Schedule 1 [2] to the bill provides that a senior available next of kin cannot give such a consent to the publication or broadcasting of the name of a deceased child if it appears, after making such inquiries as are reasonable in the circumstances, that another senior available next of kin objects to the publication or broadcasting of the name. For example, if one parent objects, the other parent cannot give consent.

Schedule 1 [3] to the bill provides that 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. For example, a parent charged with his or her child's murder could not give consent, or object to the child's other parent giving consent, to the publication or broadcasting of the name of the murdered child.

At present, section 11 (1) (d) of the Act provides that the name of a brother or sister

of a victim of an offence to which criminal proceedings relate—when the brother or sister and the victim were both children when the offence was committed—must not be published or broadcast in a way that connects the brother or sister with the criminal proceedings concerned. Schedule 1 [3] to the bill inserts proposed section 11 (4G) into the Act. That subsection provides that, when considering whether to give consent to the publication or broadcasting of the name of a deceased child, a senior available next of kin must, if the publication or broadcasting of the name of a brother or sister of the deceased child is also prohibited:

(a) make such inquiries as are reasonable in the circumstances to obtain the views of that brother or sister regarding the publication or broadcasting of the name of the deceased child, and

(b) take into account the impact of such a publication or broadcasting on that brother or sister.

Schedule 1 [4] to the bill defines "senior available next of kin of a deceased child" as:

(a) a parent of the child, or

(b) if the parents of the child are dead, cannot be found, or for some other reason cannot exercise their parental responsibilities to the child:

(i) a person who, immediately before the death of the child, had parental responsibility (within the meaning of the Children and Young Persons (Care and Protection) Act 1998) for the child, or

(ii) in the case of a child who was in the care of the Director General of the Department of Community Services immediately before his or her death—the Director-General.

In the past, a person having parental responsibility for a child would have been described as the child's guardian or the person who has custody of the child. This terminology is no longer commonly used in family law. Schedule 1 [6] to the bill inserts clause 18 into Schedule 2 (Savings and transitional provisions) to the Act to provide that section 11 does not apply to the publication or broadcasting of the following names in connection with criminal proceedings:

(a) the name of a person that had been published or broadcast before 21 December 2001 (the date of commencement of the Criminal Legislation Amendment Act 2001), being a person who was not a child at the time of the publication or broadcast,

(b) the name of a person that had been published or broadcast before 24 March 2004 (the date of commencement of the Crimes Legislation Amendment Act 2004), being a person who was deceased at the time of the publication or broadcast.

Schedule 1 [6] to the bill also amends Schedule 2 to the Act to enact a savings and transitional provision as a consequence of the enactment of the proposed Act. The amendment provides that section 11, as amended by the proposed Act, applies in relation to proceedings whether commenced before or after the commencement of the proposed Act.

Schedule 2 makes a consequential amendment to section 105 of the Children and Young Persons (Care and Protection) Act 1998 to make it clear that that section

does not apply in relation to criminal proceedings. The amendment inserts an editorial note to direct the reader to section 11 of the Act, which does apply to criminal proceedings. The bill maintains a balance between the rights of victims and the principle of open justice. It provides for a parent or a senior next of kin to allow for the name of their deceased child to be published, but retains several safeguards to ensure that the protection that children ordinarily enjoy is not waived without proper consideration being given to the relevant issues. The amendments are important in order to provide certainty to both families and media organisations. I commend the bill to the House.