Tabled by Jane Summerhayes 20/2/08

QUESTIONS FOR MEDIA GROUPS AND AUSTRALIAN PRESS COUNCIL

Can you please explain the significance and impact of the 2004 and 2007 changes to the *Children (Criminal Proceedings) Act 1987*?

2004 Changes

The 2004 amendments extended the existing reporting restrictions to prevent the identification of a child involved or mentioned in criminal proceedings who was deceased at the time of publication. The section was introduced without consultation with the media. Not all families want the identity of their child protected. The parents of a child victim of a hit-and-run accident, or other serious crimes, for example, frequently want their story told and an image of their child published. The public rightly has an expectation that the media will provide the fullest possible account of crimes that affect the community. The way in which we treat and care for our children is seen by the public as one of the ultimate moral tests of any society. To exclude or airbrush child victims out of coverage of tragedies does society a disservice as it neutralises the emotional impact of such events. From the media's perspective it is difficult to see what impact the naming or identification of any dead person will have on them at all. And given that all of these children had lives ahead of them, and had their own talents, interests, and years of potential, the media often finds itself in a position where loving family and friends of the deceased are co-operating enthusiastically with stories to record their lives, only to be told that under the law the story cannot properly be told.

Infant deaths also serve to illuminate other significant subjects of public interest including road and vehicle safety, the mental health system, the welfare of indigenous Australians and the administration by DOCS of children in care or otherwise in need of supervision, to name just a few. If example is needed, look no further than the injuries sustained by Sophie Delezio in the Round House Child Care Centre, the tragic deaths of Dean Shillingsworth (see page 5 of the joint Submission on s11 Children (Criminal Proceedings) Act ('**the Media Submission**')) and Rose Villanueva-Austin. If the child is unable to be identified, then it becomes almost impossible, even with the best reporting possible, to narrate and illustrate the report and to follow developments in the case. Therefore, as a result of 2004 amendment, the public interest

in reporting and stimulating debate in the houses of parliament and in the wider community were unable to be met in a number of cases.

For example:

1) The nine-month-old baby girl killed by having her throat slit as she slept in her Campsie home. Her alleged killer was a house guest who had recently released from a psychiatric hospital (December 2006).

2) The five-year-old boy murdered by his mother, who also suffered from mental illness, in Gosford by drowning him in a bathtub (August 2006).

3) The seven-week-old baby girl suffocated by her father in July 2006 because she would not stop crying.

4) The three-year-old boy sexually assaulted and electrocuted by a male assailant in about September 2003. Although he was never removed from his families care, the boy had a lengthy DOCS file which was tragically closed the day before he died. Details of the boy's death were revealed for the first time in an Ombudsman's Report debated in Parliament in March 2005.

5) A recent Victorian case involves the criminal charges in Mildura over the hit-run crash which claimed the lives of six teenagers who were innocently driving home from a party when they were killed. Had that case happened in NSW the identities of the six dead youths could not have been revealed meaning that the community's sense of devastation over the loss of these youngsters could never have been chronicled by the press.

Even more confusing were cases such as that of three year old Chanel Bisignani, alleged stabbed and bashed to death by her step-father in October 2005, or Rose Villanueva-Austin, who died of a methadone overdose alleged administered by her mother in September 2005. In both of these cases, it was possible to identifying each deceased for some time after her death because a person was not charged until the conclusion of the police investigation and following the results of an autopsy. The prohibition on identification commenced only once the respective parents were

charged and to the reading public it must have seemed as though these dead girls had been forgotten.

The media was similarly frustrated when it came to reporting of two appeals by child-killer Kathleen Folbigg in February 2005 and again in December 2006. The Folbigg case is so notorious that, in the interests of protecting the identities of her deceased children, the media was unable to include her name in reports about her successful appeal against the severity of her sentence in February 2005 and her later attempted to appeal against her conviction on the basis that a juror acted improperly during her trial (December 2006 and throughout 2007). In summary, the 2004 amendment prevented the proper reporting of these cases and, consequently, impaired the public interest in open justice.

In many recent DOCS cases the public has rightly argued for change to the way in which cases of child neglect are managed by government. To exclude the child victims from the coverage of such important cases not only means that the full story is never told. It also means it is less likely that governments will be under pressure to reform child protection services as the impact of the coverage will, wrongly, be lessened through its censorship.

The law also prevents the media from doing its job in recording major events in our nation's history, however harrowing they may be. Taken to its logical extent the law as it stands would have prevented the Australian public from ever seeing an image of Azaria Chamberlin, the 1961 kidnapping of Graham Thorne whose parents won the Opera House Lottery, the child victims of Adelaide's family killings, many of the Port Arthur victims, and so on, had those events occurred in NSW.

<u>2007 Changes</u>

The 2007 amendments now provide for permission to identify a dead child to be obtained from a parent or other senior available next of kin ('**SANOK**'). However, the drafting which achieved this change is creates further uncertainty:

1. Subsection 11(7) defines SANOK 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.

However, the words of (b) and (i) are inherently contradictory. If a child was in the care of his or her parents "immediately before the death of the child" it is only the parents who would have "parental responsibility" for the child. So in cases where both parents die either in the same criminal incident as the child or at some time after the child's death (but before permission to name the child can be obtained), there is potentially no SANOK who can consent to the child being identified. In the case of Dean Shillingsworth, permission was obtained from his grandmother, who had care of the child at the relevant time, to continue identifying Dean after his mother was charged with his murder.

2. Further to 1 above, subsection 11(4F) provides that a SANOK who is charged with, or convicted of, an offence to which the criminal proceedings concerned relate cannot give consent to the identification of a deceased child. In some cases, such as that of

(see page 6 of the Media Submission) both parents are charged in relation to the child's death in circumstances where both parents had parental responsibility immediately before the death of the child. Again, more often that not, there is no other person from whom permission to identify the child can be obtained.

3. Subsection 11(1)(d) prohibits the identification of any person who is a brother or sister or the victim of an offence to which proceedings relate if that sibling was also a child when the offence was committed. Identifying a deceased child would undoubtedly identify any sibling caught by subsection 11(1)(d). Yet rather than stating that it is not an

infringement of that subsection if a sibling is identified in circumstances where a SANOK has given permission for a deceased child to be identified instead, section 11 sets up an odd regime (at subsection 11(4G) whereby the SANOK must take the living child's views into account before giving permission for the deceased child to be identified. Consequently, even if the media has permission of a SANOK to identify a deceased child, if that child had siblings who were also children at the time of the relevant offence, identification of the deceased child must infringe subsection 11(1)(d).

In summary, following the 2004 and 2007 amendments, section 11 by no means produces a certain outcome and does not address the wider public interests discussed below.

Currently, who, other than the prosecuting authority, can make a submission to the court to publish a child's name? How are such submissions made?

To the media's knowledge, only the media have ever made such an application. However, anyone with appropriate standing should be able to make such an application (and it is trite that the media have standing in such cases). Media applications are made infrequently made due to the general lack of success (for example, the order obtained in September 2005 permitting the media to identify Rose Villanueva-Austin was promptly overturned during her mother's bail hearing in October 2005) and significant expense (estimated at $5,000 to $20,000 per application). If an application is to be made the pressures of the news cycle apply and the media will seek to bring the application on as quickly as possible.

In the Media Groups submission (Sub 13, page 2) it is stated that the 2004 and 2007 amendments have 'dramatically' upset the balance between open justice and the need to protect the vulnerable young from adverse publicity. Can you explain in more detail why?

In *John Fairfax Publications P/L v District Court of NSW* (2004) 61 NSWLR 334 at 352 - 353, Spiegleman CJ stated:

> It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public including, relevantly, the taking of verdicts after a criminal trial, is an essential quality of an Australian court of justice. There is no inherent power of the Court to exclude the public. (See *Scott v Scott* [1913] AC 417 at 473; *Dickason v Dickason [1913] HCA 77;* (1913) 17 CLR 50 at 51; *Daubney v Cooper* (1829) 109 ER 438 at 440; *Russell v Russell [1976] HCA 23;* (1976) 134 CLR 495 esp at 507 and 520-521, 532.) The taking of a verdict is something which occurs in the ordinary course of criminal proceedings. (See, e.g. *Coulter v The Queen [1988] HCA 3;* (1988) 164 CLR 350 at 356, 357 and cf 359-360, 362.) It is also well established that the exceptions to the principle of open justice are few and strictly defined. (See, e.g. *McPherson v McPherson [1926] UKPC 1;* [1936] AC 177 at 200; *R v Tate* (1979) 46 FLR 386 at 402.)

There is nothing more that the law can do for a deceased child other than to obtain open justice for his or her death. As noted in the answer to question 1 (above), both the 2004 and 2007 amendments defeat that aim by inhibiting the reporting of criminal proceedings. It also prevents the reporting, analysis and criticism of the subjects of public interest such as road and vehicle safety, the mental health system, the welfare of indigenous Australians and the administration by DOCS of children in care or otherwise in need of supervision.

There is a legitimate public interest in comprehensive media coverage of these subjects of public interest. There is a legitimate public interest in initiating campaigns (on p-plate drives for example) advocating legislative change, exposing systemic failure in the administration of the mental heath regime or government administered programs such as DOCS or indigenous welfare. These matters of public interest can only be effectively and powerfully conveyed when illuminated by real reports of identified children.

The Media Groups submission (Sub 13) argues that there is a public interest associated with following cases involving the deaths of children. Why is it in the public interest for the victim's name to be published rather than details of the case published without the victim's name?

The media notes that for the purposes of section 11, it is not just the child's name which is suppressed. Rather, subsection 11(5) provides that a reference to the victim's name includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person. If a newspaper is unable to report any of this material, the report is likely to state nothing more than a child died and the circumstances of the child's death. With such limited information, it is difficult for the media to report and the reading public to follow the case and see that justice is done or follow the campaign, debate or agitation for political intervention or legislative change in the wide array of subjects of public interest, defeating the purpose of the principle of open justice.

Other submissions have suggested that in the Northern Territory, the publication of juvenile offenders' names and images in the media has in some cases lead to harassment of the juvenile and their family. Could you comment?

The Media Submission does not submit that the law should be amended to permit juvenile offender's to be named without a court order. Rather, it submits that the ability of the court to make orders permitting juvenile's to be named should not be limited to the time of sentencing only.