

## DRAFT ANSWERS

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

1.1 Section 11 provides that the names of children and those who were children at the time of the relevant criminal proceedings must not be published or broadcast in a way that connects them with those proceedings.

1.2 The Crimes Legislation Amendment Act 2004 (No 11) amended the *Children (Criminal Proceedings) Act 1987*.

The 2004 amendment extended the class of persons (whose names are not to be published or broadcast in criminal proceedings involving a child) to

- ❖ Deceased child victims and
- ❖ Child siblings of child victims.

This intent was achieved by

i) Inserting a new section 11(1)(d), so the section now reads:

“The name of any of the following persons must not be published or broadcast in a way that connects the person with the criminal proceedings concerned:

...

(d) any person who is a brother or sister of a victim of the offence to which the proceedings relate, where that person and the victim were both children when the offence was committed.”

And,

ii) The underlined words were inserted into section 11(1A)(b) to read:

“The prohibition in subsection (1) applies to the publication or broadcast of the name of a person:

- (a) whether the publication or broadcast occurs before or after the proceedings concerned are disposed of, and
- (b) even if the person is not longer a child, or is deceased, at the time of the publication or broadcast.”

...

1.3 A new Part was inserted in Schedule 2 (Savings and Transitional Provisions) providing that the amended section 11 extends to proceedings commenced before the commencement of the amendments – and to provide that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of the amending Act.

- 1.4 According to the second reading speech the amendment closed a gap to cover situations where the victim of the offence is a deceased child, and extends that protection to include the siblings of child victims, including deceased child victims, in order to minimise the trauma to the family of the deceased.

- 1.5 **The Children (Criminal Proceedings) Amendment (Publication of Names) Act 2007 No 30** further amended the **Children (Criminal Proceedings) Act 1987**.

The 2007 amendment was to enable the parents of a deceased child, or other “senior available next of kin,” to consent to the publication or broadcast of the deceased child’s name and to provide that the prohibition does not apply to the publication or broadcast of names that had previously been published or broadcast before the clarifying amendments commenced in 2001 and 2004 (see below at 1.7).

- 1.6 Section 11(4) provides certain exceptions to the prohibition. The 2007 amendment provided a further exception by the addition of a new subsection 11(4)(d):

“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 inquiries as are reasonable in the circumstances, that no other senior available next of kin objects to the publication or broadcasting of the name.”

Qualifications are placed on the senior available next of kin by inserting new subsections 11(4F) and 11(4G)

“(4F) A senior available next of kin who is charged with, or 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 11(4)(d).

(4G) In considering whether to give consent to the publication or broadcasting of the name of the deceased child as referred to in subsection 4(d) 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 prohibited under subsection (1)(d):

- (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.”

A definition of "senior available next of kin" was provided in a new section 11(7):

"In this section, senior available next of kin of a deceased child means:

- (a) a parent of the child or
- (b) if the parents of the child are dead, cannot be found, or for some 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."

1.7 Schedule 2 was amended by the insertion of Part 13 which provides for transitional provisions. The amended section 11 thus applies to proceedings whether commenced before or after the commencement of the 2007 amending legislation but does not apply to the publication or broadcast of the names of the following persons in connection with criminal proceedings:

- (a) the name of a person that had been published or broadcast before 21/12/01 (the date on which the section was amended – 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 24/3/04 (the date on which the section was amended – being a person who was deceased at the time of the publication or broadcast

1.8 The object of the legislation was to enable parents of a deceased child or other senior available next of kin to consent to the publication or broadcast of the deceased child's name and to provide the prohibition did not apply as per a) and b) above.

Parents or senior available next of kin may therefore consent to the publication or broadcast of their deceased child's name provided they are not exempt ss4F and they comply with ss4G.

1.9 The second reading speech states the aim of the Act was to enable certain family members other than the defendant of deceased children to waive the right to non publication. Also the section is not to operate retrospectively. It gives parents an active role in the decision making process.

2.0 I am unaware of any specific concern with the legislation that led to these two amendments. (I speculate the amendment occurred after some highly publicised case involving a deceased child). The amendments appear to take the legislation further (ie more robust) than elsewhere in Australia. The 2004

amendment provided a further prohibition on publication. The 2007 amendment attempts to ameliorate the 2004 prohibition to some extent by permitting a suitable person to consent to the publication of the name of a deceased child. It appears the legislation is trying to strike a correct balance between the prohibitions and the necessity to recognise the rights of a deceased child's parents and also to be allowed to publish in the public interest. The impact of the changes is that more care is required to ensure all prohibitions are understood and adhered to. The impact of the 2007 amendment may be that parents or senior available next of kin may be hounded by the media to obtain consent to name a deceased child. From the perspective of the prosecutor proving a breach of the 2007 amendment may be more difficult as it would mean the police would have to also interview the relevant persons to ensure consent was legitimately given.