Submission No 8

INQUIRY INTO IDENTITY PROTECTIONS FOR PROCEEDINGS INVOLVING CHILDREN

Organisation: Aboriginal Legal Service (NSW/ACT)

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Aboriginal Legal Service (NSW/ACT) Limited

1 December 2025

The Director, Madeleine Foley
Portfolio Committee No. 5 – Justice and Communities
Parliament House, Macquarie Street
SYDNEY NSSW 2000
By email: portfoliocommittee5@parliament.nsw.gov.au

Re: Response to Inquiry into Identity Protections for Involving Children

Dear Director,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) regarding the Inquiry into identity protections for proceedings involving children, including proceedings conducted pursuant to the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCPA**).

The ALS is a proud Aboriginal Community-Controlled Organisation (**ACCO**) and the peak legal services provider for Aboriginal and Torres Strait Islander people in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people, families and communities.

More than 350 ALS staff members based at offices in 21 communities support Aboriginal and Torres Strait Islander adults and children through the provision of high quality and culturally safe legal assistance, including court representation in criminal law, children's care and protection law, and family law. We also deliver a variety of wrap-around programs including bail support, family violence prevention, and child and family advocacy and support. We provide a Visiting Legal Service for Aboriginal children in youth detention centres, represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, and deliver a variety of discrete civil law services including tenants' advocacy, assistance with fines and fine-related debt, and discrimination and employment law.

The ALS is the Justice Peak on the NSW Coalition of Aboriginal Peak Organisations and a key partner in Closing the Gap in NSW and the ACT. As an ACCO, we represent community interests in our advocacy for the reform and transformation of systems which impact the lives of Aboriginal and Torres Strait Islander people.

Existing Identity Protections for proceedings involving children

The ALS considers the identity protections found in s 15A of the CCPA and s 65 of the *Young Offenders Act 1997* (NSW) (**YOA**) to be important safeguards for children involved in criminal proceedings in the Children's Court of NSW.

We also note the existing identity protections found in s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**Care Act**), which prevent the publication or broadcast of the name of a child or young person who –

- appears, or is reasonably likely to appear, as a witness before the Children's Court in any proceedings;[1] or

[1] *Children and Young Person's (Care and Protection) Act 1998* (NSW), s 105(1)(a).

- with respect to whom proceedings before the Children's Court are brought or who is reasonably likely to be the subject of proceedings before the Children's Court.[2]

Within the Care Act, Children's Court is defined as proceedings before the Children's Court of New South Wales constituted by the *Children's Court Act 1987* (NSW). These provisions work in concert with the provisions within the *Children (Criminal Proceedings) Act* 1987 (NSW) to cover all proceedings before the NSW Children's Court.

These automatic statutory prohibitions on the publication of the identity of children and young people with proceedings before the Children's Court are appropriate. However, the ALS recommends the Committee give further consideration to the matters raised below.

Information 'tending to identify' child or young person

It is possible for children involved in criminal proceedings to be identified by piecing together information published by different sources, whilst those publications individually would not be prohibited under the CCPA. This is referred to as "jigsaw identification"[3] and particularly impacts Aboriginal and Torres Strait Islander young people who are over-represented in the criminal justice system.

Rather than the CCPA prohibiting the publication of the name of a child, and then defining name to include "a reference to any information, picture or other material that identifies the person or is likely to identify the person" as it currently does under s 15A(5), the CCPA could prohibit publication of "information tending to identify" the person.

Recommendation 3.3 of the NSW Law Reform Commission's 2022 *Open Justice* report[4] recommends that "information tending to identify" a person be statutorily defined and include a non-exhaustive list of categories of information which may tend to identify someone, such as a person's name, address, school or relationship to identified relatives. Recommendation 9.1 (1)(a) of that same report adopts that definition in recommending that term be used in the CCPA to bring uniformity in the prohibition on publishing the identity of a child involved in criminal proceedings.[5]

In their 2021 submission to the NSW Law Reform Commission's consultation paper, the Children's Court of NSW also indicated their support for such an amendment.

The ALS recommends an amendment to the CCPA prohibiting the publication of information tending to identify a child or young person involved in Children's Court proceedings consistent with the NSW Law Reform Commission's recommendations 3.3 and 9.1 (1)(a).

Exception where child is deceased

Section 15E of the CCPA permits publication or broadcasting of the name of a deceased child with the consent of a senior available next of kin of the child. In practice, however, this consent is not always sought.

The ALS has complained to a well-known media outlet about its reporting on the death of a client's 12-year-old son. One day after the child's death, an article naming him was published, accompanied

[2] Ibid s 105(1)(c).
[3] Newlands, L (2016) *Publishing Family Court judgements: problems and solutions*, Journal of Law, Information and Science 6, Found at: https://classic.austlii.edu.au/au/journals/JlLawInfoSci/2016/6.html ; Benton, A *Jigsaw Identification: Law, Risk, and the Power of Fragments* (22 September 2025)
[4] NSW Law Reform Commission, *Open Justice – Court and Tribunal Information: Access, Disclosure and Publication* (Report 149, May 2022)
[5] Ibid, p257.

by images taken from his social media profiles. At time of publication, the child's father had not been informed of his death. The publisher went on to publish three further articles. While they stopped using the child's name, they continued to use his social media images while blurring his face. In justifying the use of the images, the article stated, "some of the images are confronting but we chose to publish to alert parents to the severity of the problem." The identification of her son in the articles caused significant distress for our client and her family. Those articles remain accessible online.[6]

It is unacceptable that a 12-year-old Aboriginal boy was repeatedly denied the privacy in death that he would be legally entitled to had he survived the accident.

We note that the NSW Law Reform Commission has recommended expanding the considerations relevant to granting an exception pursuant to s 15E of the CCPA. Recommendation 9.5 of the *Open Justice* report recommends that a court determining the exception to the prohibition must consider the views of the family members of the deceased child as well as the views of any other person whose identity is protected by the statutory prohibition and who may be identified because of the publication of the deceased child's identity.[7]

The ALS supports such an amendment.

Strengthening identity protections for children in out-of-home care

Given the significant overlap of Aboriginal and Torres Strait Islander children and young people involved in both the criminal legal system and the out-of-home care (**OOHC**) system, and their over-representation in both systems, we recommend that the Committee consider the identity protections in place for children in OOHC found in the Care Act.

The prohibition on identification of children involved in Court proceedings is intended to address stigmatisation of the young person.[8] Young people in OOHC often experience further stigmatisation.[9]

Section 105 also goes further to protect the identity of children and young people in OOHC beyond any court proceedings. Section 105(1AA) creates an express prohibition on publication of the name of a child or young person under the parental responsibility of the Minister or in OOHC. This provision includes the following legislative note –

> *Identifying the child or young person as being or having been a foster child or a ward of the State, or as being or having been in foster care or under the parental responsibility of the Minister, or in the care of an authorised carer, are all examples of identifying the child or young person as being or having been in out-of-home care.*

The 2019 independent Aboriginal-led *Family is Culture Review Report* (**FIC Report**) recommended that the NSW Government legislate a public interest defence to an offence under s 105(1AA).[10] The FIC Report found that existing exceptions were "insufficiently broad to cover a number of situations where

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[6] Out of respect for the family's wishes and in compliance with the identity protections, we have not included links to the articles.
[7] Op cit 4, p257–8.
[8] Op cit 4, at [xix].
[9] CREATE Foundation (2017) *Position Paper No. 10: Stigma in Out-of-Home Care* (2017). Found at: CREATEs-Position-on-Stigma.pdf; Also referenced in the commentary on Rule 8 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) which outlines a juveniles right to privacy being respected at all stages.
[10] Davis, M (2019), *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC*, Recommendation 15, Found at: Family is Culture Review Report 2019

it may be in the public interest to publish the fact that a child or young person is or has been under the parental responsibility of the Minister or in OOHC."[11]

The FIC Report made references to a number of examples which would be in contravention of s 105(1AA) (without the consent of the Secretary, the Children's Court or a young person over 16 years of age),[12] including the following:

- media reports that identify parents who allege that their children have been wrongfully removed;
- media reports and police media releases that state that a named missing child was in OOHC at the time of the child's disappearance;
- media reports about compensation provided to identified individuals under the age of 25 for harm suffered whilst under the parental responsibility of the Minister;
- social media posts by, or media interviews with, children about their experiences in OOHC (addressed further below);
- speeches at political rallies, conferences and other public forums by parents that refer to the fact that their children are in OOHC.

As noted in the FIC Report, vesting the power to consent to publication in the Secretary of the Department of Communities and Justice could give rise to a real or perceived conflict of interest where the material is critical of the Department. Professor Megan Davis' comments are relevant and topical, given the current scrutiny of the OOHC system –

> *Although consent can be granted for the publication of material that may breach s105(1AA) of the Care Act, it is undesirable that the power to grant such consent be vested in the Secretary of DCJ, who may consciously or unconsciously desire to minimise the political consequences of any perceived failure by DCJ. It also undermines public confidence in the accountability of the child protection system.*[13]

The ALS recommends that the NSW Parliament implement Recommendation 15 of the FIC Report and amend s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to include a public interest defence to an offence under s 105(1AA).

Exception where young person consents to publication of their name or identifying information

In our experience – particularly in the care jurisdiction – young people want the opportunity to talk about their experiences. For those children who are under the parental responsibility of the Minister, consent cannot be provided by them, and must be provided by the Secretary, and the publication must be considered to be of benefit to the child or young person.[14] This removes the autonomy of decision making for the young person in OOHC, afforded to their peers who are not in OOHC.[15]

For example, a 16-year-old who has absconded from their residential care placement, and who has been identified as a missing person by NSW Police on Facebook (along with their image), would be in breach of identity protections and could be subject to a term of imprisonment as a result if they were

[11] Ibid, p134.
[12] Ibid, pp134-135.
[13] Ibid, p135.
[14] Op cit 1, s 105(3)(b)(iii).
[15] Op cit 1, s 105(3)(b)(i) and s 105(3)(b)(ii).

to comment on the post by NSW Police saying that they were in OOHC and had run away from their placement because of abuse in that placement.

An exception is available under s 15D of the CCPA for a young person over the age of 16 to consent to the publication of their name,[16] where that consent is given in the presence of an Australian legal practitioner of the child's own choosing.[17] For children under the age of 16, that consent can be given by the Court concerned.[18]

Whilst this inquiry has a focus on the identification protections for children and young persons in criminal proceedings before the Children's Court, the ALS recommends that the NSW Parliament consider amending the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to expressly provide for young persons over the age of 16 who are in (or have exited OOHC) to also give consent to publication of their name and status as children in the care of the Minister, without requiring the Secretary's consent. This is in addition to the above recommendation regarding implementing Recommendation 15 of the FIC Report.

Thank you for the opportunity to provide a submission. Please contact if you would like to discuss this submission further.

Yours faithfully,

Aboriginal Legal Service (NSW/ACT) Limited

[16] *Children (Criminal Proceedings) Act 1987* (NSW), s 15D(1)(b)
[17] Ibid, s 15D(3).
[18] Ibid, s 15D(1)(a).