

Submission to Inquiry into identity protections for proceedings involving children

28 November 2025

Justice and Equity Centre
ABN 77 002 773 524
www.jec.org.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone + 61 2 8898 6500
Email contact@jec.org.au



About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

Contact

Jonathan Hall Spence
Justice and Equity Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: +61 2 8898 6556
E: jhallspence@jec.org.au

Website: www.jec.org.au

The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

Contents

Recommendations	1
1. Introduction.....	2
2. Maintaining and harmonising existing protections for children in criminal and civil proceedings	2
2.1 Protections for children involved in criminal proceedings	2
2.2 Protections for children involved in civil proceedings	3
3. Amending identity protections for children in out-of-home care	4

Recommendations

Recommendation 1

The NSW Government should maintain the protections afforded to children by the Children's Criminal Proceedings Act 1987 (NSW).

Recommendation 2

The NSW Parliament should harmonise the existing protections under the Children's Criminal Proceedings Act 1987 (NSW) with the identity protections for children involved in civil proceedings, where those proceedings might disclose information falling within the terms of the Act.

Recommendation 3

The NSW Parliament should 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), in accordance with Recommendation 15 of the Family is Culture Review Report 2019.

1. Introduction

The Justice and Equity Centre (formerly the Public Interest Advocacy Centre) welcomes the opportunity to provide this submission to the NSW Legislative Council's Portfolio Committee No. 5 – Justice and Communities inquiry into identity protections for proceedings involving children.

This submission addresses two discrete areas with which we have experience:

- harmonising identity protections in place for children in criminal proceedings with those in civil proceedings – based on our experience acting for parents and young people in civil claims against NSW Police and Youth Justice NSW; and
- amending identity protections for children in out-of-home-care – based on our long-standing partnership with the Aboriginal Legal Service (NSW/ACT), AbSec – NSW Child, Family and Community Peak Aboriginal Corporation, and UTS Jumbunna Institute for Indigenous Education and Research, to reduce the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in NSW by implementing the recommendations of the landmark *Family is Culture Review Report 2019*.¹

2. Maintaining and harmonising existing protections for children in criminal and civil proceedings

2.1 Protections for children involved in criminal proceedings

The *Children's Criminal Proceedings Act 1987* (NSW) ('Criminal Proceedings Act') protects children from the stigma associated with a crime. Whether the child was a victim, witness or the accused, s 15A(1) prohibits the publication or broadcast of the child's name if it is done 'in a way that connects the person with criminal proceedings'.

This prohibition recognises the public interest in protecting children from shame, stigma and opprobrium arising from legal proceedings. It also affords children privacy in these sensitive matters and assists their rehabilitation and recovery. Each of these is a significant reason to maintain the existing protections in criminal proceedings. We do not consider there is any reason to depart from the longstanding commitment to these protections.

Recommendation 1

The NSW Government should maintain the protections afforded to children by the Children's Criminal Proceedings Act 1987 (NSW).

¹ Professor Megan Davis, *Family is Culture Review Report: Independent Review of Aboriginal Children and Young People in Out-of-Home Care* (October 2019) ('FIC Review'). Available here <https://dcj.nsw.gov.au/documents/children-and-families/family-is-culture/family-is-culture-review-report.pdf>.

2.2 Protections for children involved in civil proceedings

We consider that the Committee should have regard to how the protections within the Criminal Proceedings Act may be harmonised with the regime in civil proceedings. We are concerned to simplify and reduce the burden on applicants who wish to maintain these protections while seeking to vindicate their rights through civil proceedings.

No order of the Court is required to make the prohibition within s 15A operative in any particular case. It applies by virtue of the terms of the Criminal Proceedings Act. However, in our experience representing clients in the civil jurisdiction of NSW courts, ensuring the prohibition is adhered to where children's involvement in criminal proceedings is an issue in civil proceedings can be unclear and burdensome for an applicant who seeks to ensure the efficacy of protections through the use of pseudonyms or non-publication or suppression.

This issue was an issue for clients of the JEC recently, two mothers who have brought civil proceedings in the NSW Supreme Court in relation to their children's treatment by NSW Police while on bail. The names of the children, their ages, the offences with which they were charged, the grants of bail and subsequent bail variations are all matters which need to be on the record in these proceedings.

Unless the identities of the mothers and children were concealed, publishing those details would involve connecting the children with criminal proceedings, in contravention of the Criminal Proceedings Act. We made applications to the Court for the adoption of pseudonyms and limited suppression orders further to the *Court Suppression and Non-publication Orders Act 2010* (NSW) to protect the children's identities.

In relation to a similar application, the Court has previously made orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) to prevent the identification of children in relation to criminal and care proceedings – see, for example, the decision in [State of New South Wales v Tina Lee \(a pseudonym\) \[2023\] NSWSC 693](#).

However, in our clients' cases, Justice Faulkner held an order under the *Court Suppression and Non-publication Orders Act 2010* (NSW) was not 'necessary' (which is the threshold that legislation requires for such an order to be made) because the prohibition in s 15A of the Criminal Proceedings Act already applied on its own terms. With that said, His Honour determined our clients had demonstrated the appropriateness of the Court making directions for the adoption of pseudonyms for the mother and children, and that non-party access to the court file be limited. The reasons for His Honour's decision are published in:

- [MA v State of New South Wales \[2024\] NSWSC 1366](#); and
- [JA v State of New South Wales \[2024\] NSWSC 1367](#).

We suggest that the process for applicants in civil proceedings could be simplified, if there was legislative clarification of the application of s 15A in civil proceedings. This would reduce the burden on both the courts and applicants.

Recommendation 2

The NSW Parliament should harmonise the existing protections under the Children's Criminal Proceedings Act 1987 (NSW) with the identity protections for children involved in civil proceedings, where those proceedings might disclose information falling within the terms of the Act.

3. Amending identity protections for children in out-of-home care

We urge the Committee to consider identity protections in place for children in out-of-home care ('OOHC') as part of this inquiry, noting the significant overlap of children involved in both the criminal legal system and the OOHC system.

Section 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the 'Care Act') prohibits publication of the name of a child or young person who is or is likely to be a witness or otherwise involved in, or the subject of, any Children's Court or non-court proceedings.²

In 2018, s 105 was amended to include a new s 105(1AA), which created an express prohibition on publication of the name of a child or young person under the parental responsibility of the Minister or in OOHC. Section 105(1AA) provides:

The name of a child or young person who is or has been under the parental responsibility of the Minister or in out-of-home care must not be published or broadcast in any form that may be accessible by a person in New South Wales, in any way that identifies the child or young person as being or having been under the parental responsibility of the Minister or in out-of-home care (however expressed).

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 'name of a child or young person' is defined to include a reference to any information, picture or other material that identifies, or is likely to identify, a child or young person (Care Act, s 105(4)). The prohibition in s 105(1AA) applies until the child or young person reaches 25 years of age, or dies, whichever occurs first (s 105(1A)). A person who breaches s 105(1AA) is guilty of a

² Section 105 does not apply in relation to criminal proceedings (Care Act, s 105(6)).

criminal offence, and liable for a fine of up to \$22,000 or two years' imprisonment, or both, in the case of an individual, or a fine of up to \$220,000 in the case of a corporation (s 105(2)).

Exceptions to the prohibition on publication of OOHC status under s 105(1AA) are set out in s 105(3) of the Care Act. They include, for example, in the case of a child (aged 0 to 15), publication with the consent of the Children's Court, or in the case of a young person (aged 16 to 18), publication with the consent of the young person. The Secretary may also consent to publication if the child or young person is under the parental responsibility of the Minister and the Secretary is of the opinion that publication 'may be seen to be to the benefit of the child or young person' (s 105(3)(b)(iii)).

In 2019, the landmark, independent, Aboriginal-led *Family is Culture Review Report* ('FIC Review') recommended that the NSW Government legislate a public interest defence to an offence under s 105(1AA).³

In particular, the FIC Review found that existing exceptions to the s 105(1AA) offence provision were 'insufficiently broad to cover a number of situations where it may legitimately 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'.⁴

For example, the provision may prevent publication of the following (in the absence of the consent of the Children's Court, the Secretary, or a young person):⁵

- 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; and
- 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 Review, although consent can be granted for the publication of material that would otherwise be in breach of s 105(1AA), vesting that power 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, and the time and expense involved in obtaining consent from the Children's Court could also deter potential applicants.⁶

³ FIC Review, Recommendation 15.

⁴ Ibid, p. 134

⁵ See FIC Review, pp. 134-5 for further examples of circumstances in which publication may be prohibited under s 105(1AA).

⁶ FIC Review, p. 135.

While rarely enforced by the Department, we understand that the threat of criminal prosecution with significant maximum penalties is having a chilling effect on important disclosures about the NSW child protection system.

While s 105(1AA) has important work to do, ensuring that children are entitled to keep their OOH status private, this should not operate in such a way as to silence families and criminalise disclosure of information that could otherwise increase transparency and accountability of the NSW child protection system.

As noted in the FIC Review:⁷

It is in the public interest that the child protection system be openly scrutinised, analysed and discussed by those involved in or affected by the system, including children, as well as by academics, public interest groups and journalists...

A public interest defence would provide an adequate deterrent to sensationalist or unnecessary violations of a child's privacy, whilst maintaining a channel for transparency and accountability in relation to matters of legitimate public concern.

We consider that a public interest exception as recommended by the FIC Review, would appropriately balance interests in a child's privacy and system accountability.

Recommendation 3

The NSW Parliament should 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), in accordance with Recommendation 15 of the Family is Culture Review Report 2019.

⁷ Ibid.