HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

PAUL BURTON
Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent

LOCAL COURT OF NEW SOUTH WALES
Second Respondent

ATTORNEY GENERAL OF NSW
Third Respondent

ANDREW KATELARIS
Fourth Respondent

APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant applies for special leave to appeal from the whole of the judgment of the Court of Appeal of New South Wales (Bell CJ, Leeming and Kirk JJA) given on 30 November 2022 in *Burton v Director of Public Prosecutions* [2022] NSWCA 242.

Part I: Proposed grounds of appeal and orders that will be sought

1. The proposed grounds of appeal are:
   (a) The Court of Appeal erred in its construction of s 105 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**the Care Act**).
   (b) The Court of Appeal erred in failing to determine that s 105 of the Care Act is invalid because it impermissibly burdens the implied freedom of communication on government and political matters contrary to the Commonwealth Constitution (**the implied freedom**).
2. The proposed orders are:
   (a) Appeal allowed with costs.

(b) Declare that s 105 of the Care Act is invalid on the ground that it infringes the implied freedom.

Part II: Special leave questions

3. First, what conditions are necessary or sufficient for a court to read additional words into a statute?
4. Second, where a judicial gloss is placed on a statutory provision, so that it is construed as if additional words appeared in it, is the burden imposed by that law on the implied freedom to be assessed by taking account of the meaning that its plain words would convey to a person seeking to abide by (or to administer) the law?
5. Third, does s 105 of the Care Act impermissibly burden the implied freedom?

Part III: Brief statement of argument

6. The applicant, Pastor Robert Burton (**Burton**), witnessed members of the Department of Family and Community Services and NSW Police remove a first nations child with disability from the care of his parents. Between May and July 2017, he published posts and videos on his Facebook page depicting the events and criticising the Department. On 21 December 2017, Burton was charged with four offences under s 105 of the Care Act in respect of those publications.
7. At all relevant times, s 105 of the Care Act provided as follows:

> (1) The name of a child or young person:
> (a) who appears, or is reasonably likely to appear, as a witness before the Children's Court in any proceedings, or
> (a1) who is involved, or is reasonably likely to be involved, in any capacity in any non-court proceedings, or
> (b) 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, or
> (c) who is, or is reasonably likely to be, mentioned or otherwise involved in any proceedings before the Children's Court or in any non-court proceedings, or
> (d) who is the subject of a report under section 24, 25, 27, 120, 121 or 122,
>
> must not be published or broadcast in any form that may be accessible by a person in New South Wales whether the publication or broadcast occurs before any proceedings have commenced, during the proceedings or after they are disposed of.
>
> …
>
> (1B) This section applies to the publication or broadcast of a child or young person's name to the public, or a section of the public, by publication in a newspaper or periodical publication, by radio or television broadcast or other electronic broadcast, by the internet, or by any other means of dissemination.
>
> …

> (2) A person who publishes or broadcasts the name of a child or young person in contravention of subsection (1) is guilty of an offence.
> Maximum penalty: 200 penalty units or imprisonment for a period not exceeding 2 years, or both, in the case of an individual or 2,000 penalty units in the case of a corporation.
>
> …
>
> (4) For the purposes of this section, a reference to the name of a child or young person includes a reference to any information, picture or other material:
> (a) that identifies the child or young person, or
> (b) that is likely to lead to the identification of the child or young person.
>
> (5) The offence created by this section is an offence of strict liability.

8. At his committal in the NSW Local Court, Burton submitted that s 105 was invalid because it infringed the implied freedom. The Magistrate rejected that submission. Burton sought judicial review in the NSW Supreme Court, which was refused at first instance and by the NSWCA. The applicant seeks special leave on the basis that the NSWCA: (a) erred in its construction of s 105; and (b) erred in holding that s 105 did not infringe the implied freedom. Both of these issues raise questions of law that are of public importance.

The proper approach to statutory construction

The NSWCA's construction of s 105

9. The plain meaning of s 105 (set out above at [7]) is that if a child falls within one of the categories in subparagraphs (1)(a)–(d), then the public dissemination of that child's name, in any context, is prohibited. The NSWCA at [30] held that "[t]here is no sensible reason that such a construction could have been intended by Parliament". On that basis, the court held that s 105(1) applies only "when there is some connection in the publication or broadcast between identification of the child or young person on the one hand, and[,] on the other[,] pending, contemplated or completed proceedings, non-court proceedings or a relevant report": [30]. In adopting that approach, the court purported to follow *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597 at [45]-[49] (***Smith***).

10. Accordingly, the NSWCA's "construction" (if that be the appropriate word for it) of s 105 has the consequence that the provision operates as if an additional paragraph were inserted, as underlined below (**the Smith/Burton Insertion**):

> (1) The name of a child or young person … must not be published or broadcast in any form that may be accessible by a person in New South Wales whether the publication or broadcast occurs before any proceedings are commenced, during the proceedings or after they are disposed of.

(1ZZ) The prohibition in subsection (1) applies only when there is some connection in the publication or broadcast between identification of the child or young person and pending, contemplated or completed proceedings, non-court proceedings or a relevant report (as the case may be).
…

11. As to the nature of the "connection" required by the Smith/Burton Insertion, the NSWCA has expressed it in at least three ways. *First*, in *Smith*, the court said the publication or broadcast needed merely to contain a "reference" to the proceedings or report: *Smith* at [49]. *Secondly*, elsewhere in *Smith*, the court held that what was required was "some nexus" between identification of the child and the proceedings or report: *Smith* at [46]. *Thirdly*, in the present case, the requirement was expressed as "some connection" ([30]) or "a connection" ([36]), without further elucidation.

Principles applicable to judicial insertion of words into a statute

12. The NSWCA's purported "construction" of s 105 squarely raises the question of the "propriety of implying words into the statutory text[,] an issue of longstanding controversy": *Lawson v Western Australia (No 3)* (2018) 85 MVR 160 at [75] (WASCA). Burton submits that this Court has not hitherto quelled this controversy, but should do so in the present matter.

13. It is first necessary briefly to describe the scope of this controversy. Historically, there have been two broad approaches to the question whether, and in what circumstances, courts may read additional words into a statute. A conservative approach was embraced by the NSWCA in *R v Young* (1999) 46 NSWLR 681 (***Young***). In that case, Spigelman CJ (Abadee and Barr JJ agreeing) held: "The proposition that a court can introduce words into an Act of Parliament offends a fundamental principle of our constitutional law. It is no part of the function of any judge to amend legislation": *Young* at [5]. For this reason, any "process by which words omitted by inadvertence on the part of the draftsperson may be supplied by the court, must remain capable of characterisation as a process of construction of the words actually used": *Young* at [8]. Chief Justice Spigelman referred at [9] to three conditions identified by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105, later reformulated by the House of Lords in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592, where it was held

that a court needed to be "abundantly sure" of three matters before implying additional words into statutory text:

> (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.

14. In *Young*, Spigelman CJ held that a court is not "entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute": *Young* at [12]. Rather, "in the absence of any one of the three conditions, the court cannot construe a statute with the effect that certain words appear in the statute": *Young* at [11].

15. In *DPP v Leys* (2012) 44 VR 1, on the other hand, the Victorian Court of Appeal held that the approach of Spigelman CJ was too narrow; words could be read into a statute even where doing so is not "capable of characterisation as a process of construction of the words actually used". The VCA thus took what might be described as a more liberal approach to implication of words in a statute. The court held at [92]:

> We do not consider it correct to characterise the process as one of construction of the words actually used. Where the literal meaning of a provision does not give effect to its purpose, the need to depart from the literal meaning and adopt a construction which will promote the purpose of the provision arises because the "purpose of the legislation may require a meaning to be placed on the words of a particular provision which, standing alone, they cannot reasonably bear". [Citation omitted.]

16. In *Leys*, the court held that additional words could be read into a statute so as to depart from its literal meaning when the three "Diplock conditions" identified above at [13] were satisfied, along with the further conditions that the additional words must be able to be implied "without giving to the provision an unnatural, incongruous or unreasonable construction, and the provision as modified must produce a construction that is in conformity with the statutory scheme": *Leys* at [109].

17. In this court, French CJ, Crennan and Bell JJ addressed the controversy in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 (***Taylor***), but did so in a way that has not resolved the correct approach (Gageler and Keane JJ dissented, without discussing *Young* or *Leys*). It is necessary to explain what was said in *Taylor*.

18. The NSWCA in *Taylor* (in a judgment written by McColl JA) had considered satisfaction of Lord Diplock's three conditions to be necessary in order for words to be read into a

statute, along with a fourth condition — namely, that the inserted text "must be consistent with the wording otherwise adopted by the draftsman" (*Taylor* at [25]).

19. In *Taylor* in this Court, French CJ, Crennan and Bell JJ held at [39] that McColl JA had been "right to consider that satisfaction of each" of Lord Diplock's three conditions

> *could* be treated as a prerequisite to reading [the provision in question in that case] as if it contained additional words *before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision*. However, it is *unnecessary to decide* whether Lord Diplock's three conditions are *always, or even usually, necessary and sufficient*. This is because the task remains the construction of the words the legislature has enacted. *In this respect* it *may not* be *sufficient* that "the modified construction is reasonably open having regard to the statutory scheme" because any modified meaning must be consistent with the language in fact used by the legislature. [Emphasis added, citation omitted.]

20. Primarily as a result of the italicised words, the majority's judgment raises large uncertainties of interpretation. It is very difficult to discern what their Honours intended to say in relation to the status of Lord Diplock's conditions — and of any additional conditions — in Australian law. Specifically, it is unclear whether Lord Diplock's three conditions are necessary, whether there are any additional necessary conditions (and what they may be), and whether there is a set of conditions that are sufficient.

21. This court's decision in *Taylor* has elicited at least eight different responses at the intermediate appellate court level. *First*, in NSW it has been said that as a result of *Taylor*, Lord Diplock's conditions "may be beside the point": *Nightingale v Blacktown CC* (2015) 91 NSWLR 556 at [107] (Simpson JA). *Second*, occasionally, as in *Smith* and the present matter, intermediate appellate courts make no reference whatsoever to the conditions discussed in *Taylor*. *Third*, again in NSW, it has been said that this Court in *Taylor* "accepted" Lord Diplock's "principles" with McColl JA's addition, without explanation of whether "acceptance" of these "principles" means that any particular condition or set of conditions is necessary or sufficient: *Hee v State Transit Authority of New South Wales* (2019) 100 NSWLR 274 at [110] (White JA). *Fourth*, in the ACT it has been held that Lord Diplock's conditions "ordinarily" need to be satisfied (along with McColl JA's fourth condition): *Director of Public Prosecutions (ACT) v Scheele* (2016) 12 ACTLR 1 at [32]–[33]. *Fifth*, in Victoria, *Taylor* has been interpreted as holding that Lord Diplock's conditions "will not be determinative": *Lowe v The Queen* (2015) 48 VR 351 at [29], [146]. *Sixth*, in South Australia, those conditions have been treated as

"prerequisites": *Elliott v Return to Work Corporation of South Australia* [2022] SASCA 40 at [86]. *Seventh*, also in South Australia, those three conditions (without any additions) have been treated as sufficient: *Department for Health and Ageing v Li* (2018) 130 SASR 578 [99], [104], [109]. *Eighth*, in the Full Federal Court, Lord Diplock's conditions appear to have been regarded as necessary: *Hart v Federal Commissioner of Taxation* (2019) 272 FCR 612 at [116]–[118].

22. Moreover, in this Court, the more conservative approach manifest in the judgment of Keane and Gageler JJ in *Taylor* has frequently been referred to in apparent preference to the majority's reasons: see, for example, *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208 at [63] (Kiefel CJ, Gageler, Steward and Gleeson JJ); *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56 at [88] (the Court); *R v A2* (2019) 269 CLR 507 at [125] (Bell and Gageler JJ); *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at [20] (Kiefel CJ, Bell and Nettle JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [38] (Gageler J).

23. In short, in Australia it is not clear what is the correct test for reading additional words into a statute. An issue so fundamental should not remain in such a state of pervasive uncertainty. Burton submits that this Court should now dispel this uncertainty. If leave is granted, Burton will submit that a more conservative approach ought to be embraced. That will require this Court to consider whether Spigelman CJ was correct in *Young*; what, if any, of the conditions formulated by Lord Diplock must be satisfied in order for words to be read into a statute; and what other conditions, if any, must be satisfied.

24. In that context, it will be necessary for this Court to consider at least two important factors. The *first* of these is the approach taken in other jurisdictions. As was recognised in *Taylor* itself, in Australia "the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution*": *Taylor* at [40]. Because of that factor, United States caselaw may be more influential in this Court than the views of Lord Diplock. In American law, it has been said that words can be implied into a statute only where "all mankind would, without hesitation, unite in rejecting" its

plain meaning and only in recognition that the draftsman has made a technical or ministerial error, rather than a substantive error arising from a failure to appreciate the effect of the provision: Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* at pp237–8 (2011). In Canada, an even stricter approach has been formulated by the Canadian Supreme Court: "clear and unequivocal language capable of only one meaning … must be enforced however harsh or absurd or contrary to common sense the result may be": *R v McIntosh* [1995] 1 SCR 686 at [34].

25. The *second* factor that the Court will need to consider is how to reconcile any test for the implication of words into a statute with other statements of principle by members of this Court. Three of these should be mentioned here. First, in *HFM043 v Republic of Nauru* (2018) 92 ALJR 817 at [24] Kiefel CJ, Gageler and Nettle JJ said: "The constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or *repair* it" (emphasis added). Second, in *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551 at [52], Kiefel CJ, Keane, Nettle and Edelman JJ said,

> The Court's ability to construe a statutory provision in a manner that departs from the natural and ordinary meaning of the terms of the provision in the context in which they appear is limited to construing the provision according to the meaning which, despite its terms, it is plain that Parliament intended it to have. It is not the Court's function to attempt to overcome unintended consequences of the intended operation of a provision by construing the provision as if it had a meaning that Parliament did not intend it to have. To do so would go beyond the judicial function of construing legislation according to established precepts of statutory construction and into the legislative realm of amending the Act by reference to what it may be supposed Parliament might have provided if it had considered the specific circumstances before the Court. [Citations omitted.]

26. Third, any test should accord with French CJ's admonition in *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319 (***IFT***) at [42] that courts "should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning". French CJ cautioned against adopting such an approach in part because:

> those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning.

27. That passage has repeatedly been cited in this Court. Justice Gordon has cited it for the proposition that "[w]hen approaching legislation whose constitutional validity is challenged, it is important to avoid the temptation to redraft it": *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219 at [194]. See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [77] (Gageler J); *Clubb v Edwards* (2019) 267 CLR 171 at [236] (Nettle J).

28. Lastly, if leave is granted, Burton will submit that even if a liberal test for the implication of words into a statute is adopted, the Smith/Burton Insertion would fail that test. That is for two reasons. *First*, the actual language of s 105 (that being "the surest guide to legislative intention": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]) evinces a legislative purpose to secure the anonymity of children in the circumstances to which the provision refers, even at the expense of prohibiting the naming of the child in some contexts that might sometimes be innocuous. Put another way, the language of the provision manifests a legislative preparedness to impose a prohibition that is as comprehensive as possible in the interests of the child's anonymity, even at the cost of prohibiting some conduct that might do the child no harm. In adopting that approach, the NSW Parliament may well have assumed that any such cost would be minimised by appropriate exercises of prosecutorial discretion. *Second*, as explained above at [11], the substance of the Smith/Burton Insertion is itself unclear. The nature of the requisite "connection" (see above at [10]) is uncertain. There are other possible glosses which involve a more specific and closer connection. On those alternatives, the prohibition would not necessarily cover a publication or broadcast with a mere "connection" of the (vague) kind required by the NSWCA.

Implied freedom

29. Burton makes three broad submissions in relation to the implied freedom. *First*, assuming that the analysis above at [23]–[28] is correct, then s 105 must be construed according to its plain meaning, despite what some judges might regard as undesirable consequences. *Second*, on that reading, s 105 impermissibly burdens the implied

freedom and is thus invalid. *Third*, even if the NSWCA's "construction" of s 105 is correct, the provision still impermissibly burdens the implied freedom and is thus invalid. The second and third of these submissions will now be addressed in turn.

Invalidity on the plain reading of s 105

30. The latest formulation of the implied freedom test is set out by the NSWCA at [16]. Section 105, on its natural and ordinary reading, impermissibly infringes the implied freedom because its purpose is not legitimate and because it fails the "structured proportionality" test.

31. In the NSWCA there was no dispute that s 105(1) burdens the implied freedom, and does so in relation to "an important [topic] for public scrutiny and debate": [41] and [45]. On its plain reading, the evident purpose of s 105 is as described above at [28]. That purpose is not compatible with the constitutionally prescribed system of representative government and hence not legitimate. The reason for this is that a single-minded focus on securing the anonymity of the children to which s 105 refers, even at the expense of political communication that may cause such children no harm, is not compatible with the constitutionally prescribed system of representative government. Alternatively, the provision on its plain reading fails the structured proportionality test either because it is not necessary or not adequate in its balance. An obvious alternative would have been to legislate either the Smith/Burton Insertion or some alternative gloss as posited above at [28]. And on a plain reading, the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on political discussion: *Comcare v Banerji* (2019) 267 CLR 373 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

Invalidity on the NSWCA's "construction"

32. Burton submits that the NSWCA at [47] was wrong, when assessing the impact of s 105 on the implied freedom, to ignore the practical effect of the wording of that provision remaining on the statute book, even if, on its proper construction, a gloss as articulated above at [9]–[10] must be applied. In other words, Burton will submit that in circumstances where courts read additional words into a statute, the assessment of the law's effect on the implied freedom must take account of what a plain reading of the statute would convey to a person who must abide by, or administer, that law.

33. This submission proceeds in two steps. *First*, as the plurality recognised in *Brown v Tasmania* (2017) 261 CLR 328 at [70], the "practical effect" of a law must in some circumstances be assessed by reference to the impact that it has without taking into account judicial "interpretation". Thus, in *Brown* the plurality held that "protests will be stifled when they should not be", and it is "not to the point that a court might resolve the bounds of the physical area to which the Protesters Act applies in a given case, a question of mixed fact and law. … [A]t this point the burden has already been effected, the protest quelled and future protests deterred": *Brown* at [150].
34. *Second*, the recognition by French CJ in *IFT* of the "real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning" (see above at [26]) cannot be reconciled with an approach to the implied freedom that simply closes its eyes to that risk. As stated above at [27], that passage by French CJ has been repeatedly cited by members of this Court.
35. In the present matter, even if the Smith/Burton Insertion is the correct "construction" of s 105, the inescapable reality is that there is a "real risk" of the provision being understood in the more draconian sense in a way that deters political speech. Thus, an ordinary person (construing s 105 as a non-lawyer) may well be deterred from criticising the removal or treatment of a child by the executive or from engaging in discussion of the out-of-home-care system.
36. The High Court has not yet considered how to characterise the burden imposed by a law where there is such a disjunct between its supposed "construction" (which reads the provision as if additional words were inserted) and its plain meaning. The Court in this matter should squarely address that question. This would not involve any reliance upon any "void for vagueness" doctrine from the United States.
37. Lastly, in the alternative, Burton will submit that on the NSWCA's construction of s 105, it is invalid because it fails the "necessity" step of structured proportionality analysis. It fails that step because there are obvious and compelling alternatives that are equally practicable and at the same time are less restrictive of the freedom: *LibertyWorks v Cth* (2021) 95 ALJR 490 at [78]; see [28] above.

Part IV: Costs orders

38. There are no reasons why an order for costs should not be made in favour of the respondents if the application is refused.

Part V: List of authorities

39. *Brown v Tasmania* (2017) 261 CLR 328; [2017] HCA 43 at [70] and [150].
40. *DPP v Leys* (2012) 44 VR 1; [2012] VSCA 304 at [83]-[111].
41. *R v Young* (1999) 46 NSWLR 681; [1999] NSWCCA 166 at [14].
42. *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597; [2017] NSWCA 206 at [45]-[49].
43. *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 at [22]-[24] and [39].

Part VI: Relevant statutes

44. *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 8, 9 and 105.

Dated 3 January 2023

....	....	....
G. O'L. Reynolds	**R Size**	**D. A. Ward**
Counsel for the applicant	Counsel for the applicant	Counsel for the applicant

To: The Respondents
First Respondent – Office of the Director Public Prosecutions
Second Respondent – The Director, Local Courts and Tribunal Services
Third Respondent – Crown Solicitor's Office (NSW)
Fourth Respondent – Fourth Respondent is self-represented

TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance and serve a copy on the applicant.

The applicant is represented by Zali Burrows at Law

NSW legislation

Children and Young Persons (Care and Protection) Act 1998 No 157

Historical version for 25 October 2016 to 6 July 2017 (accessed 29 December 2022 at 11:07)

9 Principles for administration of Act

(1) This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

(2) Subject to subsection (1), the other principles to be applied in the administration of this Act are as follows:

(a) Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.

(b) In all actions and decisions made under this Act (whether by legal or administrative process) that significantly affect a child or young person, account must be taken of the culture, disability, language, religion and sexuality of the child or young person and, if relevant, those with parental responsibility for the child or young person.

(c) In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child's or young person's development.

(d) If a child or young person is temporarily or permanently deprived of his or her family environment, or cannot be allowed to remain in that environment in his or her own best interests, the child or young person is entitled to special protection and assistance from the State, and his or her name, identity, language, cultural and religious ties should, as far as possible, be preserved.

(e) If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement.

(f) If a child or young person is placed in out-of-home care, the child or young person is entitled to a safe, nurturing, stable and secure environment. Unless it is contrary to his or her best interests, and taking into account the wishes of the child or young person, this will include the retention by the child or young person of relationships with people significant to the child or young person, including birth or adoptive parents, siblings, extended family, peers, family friends and community.

(g) If a child or young person is placed in out-of-home care, the permanent placement principles are to guide all actions and decisions made under this Act (whether by legal or administrative process) regarding permanent placement of the child or young person.

Children and Young Persons (Care and Protection) Act 1998 No 157

Historical version for 25 October 2016 to 6 July 2017 (accessed 29 December 2022 at 11:07)

Chapter 2 > Part 1 > Section 10

10 The principle of participation

(1) To ensure that a child or young person is able to participate in decisions made under or pursuant to this Act that have a significant impact on his or her life, the Secretary is responsible for providing the child or young person with the following:

(a) adequate information, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision-making and any relevant complaint mechanisms,

(b) the opportunity to express his or her views freely, according to his or her abilities,

(c) any assistance that is necessary for the child or young person to express those views,

(d) information as to how his or her views will be recorded and taken into account,

(e) information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision,

(f) an opportunity to respond to a decision made under this Act concerning the child or young person.

(2) In the application of this principle, due regard must be had to the age and developmental capacity of the child or young person.

(3) Decisions that are likely to have a significant impact on the life of a child or young person include, but are not limited to, the following:

(a) plans for emergency or ongoing care, including placement,

(b) the development of care plans concerning the child or young person,

(c) Children's Court applications concerning the child or young person,

(d) reviews of care plans concerning the child or young person,

(e) provision of counselling or treatment services,

(f) contact with family or others connected with the child or young person.

Children and Young Persons (Care and Protection) Act 1998 No 157

Historical version for 25 October 2016 to 6 July 2017 (accessed 29 December 2022 at 11:37)

105 Publication of names and identifying information

(1) The name of a child or young person:

(a) who appears, or is reasonably likely to appear, as a witness before the Children's Court in any proceedings, or

(a1) who is involved, or is reasonably likely to be involved, in any capacity in any non-court proceedings, or

(b) 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, or

(c) who is, or is reasonably likely to be, mentioned or otherwise involved in any proceedings before the Children's Court or in any non-court proceedings, or

(d) who is the subject of a report under section 24, 25, 27, 120, 121 or 122,

must not be published or broadcast in any form that may be accessible by a person in New South Wales whether the publication or broadcast occurs before any proceedings have commenced, during the proceedings or after they are disposed of.

(1A) The prohibition in subsection (1) applies to the publication or broadcast of the name of the child or young person concerned until:

(a) the child or young person attains the age of 25 years, or

(b) the child or young person dies,

whichever occurs first.

(1B) This section applies to the publication or broadcast of a child or young person's name to the public, or a section of the public, by publication in a newspaper or periodical publication, by radio or television broadcast or other electronic broadcast, by the internet, or by any other means of dissemination.

(1C) The publication of information to a website that provides the opportunity for, or facilitates or enables, dissemination of information to the public or a section of the public (whether or not the particular publication results in the dissemination of information to the public or a section of the public) constitutes the publication of information to the public or a section of the public for the purposes of this section.

(2) A person who publishes or broadcasts the name of a child or young person in contravention of subsection (1) is guilty of an offence.

Maximum penalty: 200 penalty units or imprisonment for a period not exceeding 2 years, or both, in the case of an individual or 2,000 penalty units in the case of a corporation.

Note. An offence against subsection (2) committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation—see section 258.

(3) Subsection (1) does not prohibit:

(a) the publication or broadcasting of an official report of the proceedings of the Children's Court that includes the name of a child or young person the publication or broadcasting of which would otherwise be prohibited by subsection (1), or

(b) the publication or broadcasting of the name of a child or young person:

(i) in the case of a child—with the consent of the Children's Court, or

(ii) in the case of a young person—with the consent of the young person, or

(iii) in the case of a child or young person who is under the parental responsibility of the Minister—with the consent of the Secretary if the Secretary is of the opinion that the publication or broadcasting may be seen to be to the benefit of the child or young person, or

(iv) in any case—if the child or young person has died.

(4) For the purposes of this section, a reference to the name of a child or young person includes a reference to any information, picture or other material:

(a) that identifies the child or young person, or

(b) that is likely to lead to the identification of the child or young person.

(5) The offence created by this section is an offence of strict liability.

(6) This section does not apply in relation to criminal proceedings.

Note. See section 15A of the *Children (Criminal Proceedings) Act 1987*.