

Submission to the Review of the Family Law System Issues Paper

7 May 2018

# About the Initiative

The Setting the Record Straight for the Rights of the Child Initiative has been established to advocate for the recordkeeping rights of those who experience childhood out of home care.

It has been formed in partnership with key community advocacy organisations – Care Leavers Australasia Network (CLAN), the Child Migrants Trust, Connecting Home, and the CREATE Foundation – and allied research units – Federation University Australia’s Collaborative Research Centre in Australian History (CRCAH), Monash University’s Centre for Organisational and Social Informatics (COSI) and the University of Melbourne’s eScholarship Research Centre (ESRC).

It brings community partners together with recordkeeping researchers and practitioners to explore how to transform recordkeeping and archiving to better respect, represent and enact multiple rights in records.

The Initiative convened a National Summit at Federation Square in Melbourne on the 8-9 May 2017 to build a collaborative community and develop a ten year strategic plan for overcoming the systemic and enduring problems with recordkeeping and archiving that the Royal Commission into Institutional Responses to Child Sexual Abuse once again highlighted.

See <http://rights-records.it.monash.edu.au> for more information.

While the initiative is primarily concerned with matters relating to childhood out of home care, there is an obvious intersection of family law and such activity, and a mutual impact of one upon the other. Moreover, there are general principles of records and recordkeeping that apply across both of these jurisdictions.

# Submission

Thank you for the opportunity to provide feedback on the issues paper for the *Review of the Family Law System 2018.*

A succession of federal, state and inquiries into various aspects of childhood care has repeatedly articulated the crucial role that appropriate records and recordkeeping plays in establishing and maintaining the identity and memories of children and families along with the accountability of professionals and agencies involved in service provision.[[1]](#endnote-1) Importantly, such records are often needed long after their original transactional contexts – on, possibly, generational timescales – for use by a wide variety of stakeholders in the records, for a range of uses that may include identity validation, family reconnection, memory vindication, accountability, justice, and ‘setting the record straight’.[[2]](#endnote-2)

Stakeholders need to exercise agency in their records from creation, through the ongoing management across space and through time. The disenfranchisement of those who are denied such agency can lead to ongoing trauma that may compound and reinforce issues stemming from the original recorded events.[[3]](#endnote-3) Alternatively, *Participatory Recordkeeping* regimes explicitly recognise such stakeholders and facilitate their agency in records.[[4]](#endnote-4)

Much of this submission concerns the need to establish and promulgate participants’ rights in records as they relate to family law. Such rights would be facilitated through suitable participatory recordkeeping infrastructure that supports participants’ agency in records as well as interoperability between jurisdictions, organisations, practices, and systems such that children’s and family rights may be upheld, not only in the transactional timeframes of court proceedings, but on generational timescales as indicated in the various inquiry reports and other research.

# Objectives and Principles

We express our appreciation for the recognition that the questions in this section question give to the need for the family law system in Australia to better reflect and accommodate the diversification of family structures (paragraph 31), and our obligations under UN convention on rights of child (paragraph 32). It is also pleasing to see clear acknowledgement of the complex and intersecting social and service needs of many client families of the family law system (paragraph 33), and clear articulation of existing systemic problems (paragraph 35).

***Q 1: What should be the role and objectives of the modern family law system?***

We endorse the objectives/key functions as listed in paragraph 38, in particular:

* Advancing the safety, healthy development and economic support interests of children;
* Protecting adult rights to physical safety and equitable distribution of resources; and
* Regulating the processes for resolving post-separation problems to ensure they are affordable and cost effective.

And we would add to this list:

* *Promoting legal processes that respect the information rights of adults and children.*

We agree with the need identified here for cross jurisdictional collaboration between family law, child protection & family violence systems in Australia (paragraph 36). We would also add to this, a need for greater coordination/collaboration with youth justice systems and with housing and homelessness support services, as being integral to addressing child safety and wellbeing contingent to family law contexts. In the context of child protection, there is also a requirement for the family law system to pursue close collaboration with Aboriginal agencies who assume what has previously been the State’s role in taking legal responsibility for assessing children’s safety, stability and development via Aboriginal Guardianship provisions under Section 18 of the Victorian Children, Families and Youth Act.

We support the idea that an overarching set of principles should be developed.

***Q2: What principles should guide any redevelopment of the family law system****?*

We endorse the matters listed in paragraph 43 and additional stakeholder principles supplied in paragraph 44. We would expand on this, by noting the role of participatory processes in promoting public understanding & confidence in the system.

We note that the issues paper only mentions the term ‘records’ once (paragraph 190, when referring to the misuse of therapeutic counselling records), ‘documents’ a handful of times, and ‘evidence’ in a narrow, procedural sense. However, we consider it crucially important to recognise the impact on, and repercussions for, individuals and families (immediate, extended, and intergenerational) specifically resulting from records that are created or revealed through and by the family law system.

We propose inclusion of a further principle to recognise the existence of multiple rights in records. Such a principle could be expressed as follows:

*The recognition of the multiple rights in records of a plurality of stakeholders – in particular, children and family members.*

While we recognise that the family court scrupulously maintains its records, we contend that the use of interoperable and participatory recordkeeping practices and systems needs to be explicitly articulated as an additional principle of the family law system.

Such a principle could be expressed as follows:

*The paramount importance of creating and maintaining recordkeeping policy, practices, and systems that afford all participants and, especially, children and families, agency in the creation, and ongoing management of and access to records through time.*

As discussed in the section on information sharing below, such recordkeeping infrastructure must be necessarily distributed and interoperable, so that both family law records and those that originate in other jurisdictions can be dealt with in a consistent manner.

# Access and Engagement

We stress the need to consider the perspectives of participants in the family law system – including children and young people as well as parents and other family members.

***Q 4: How might people with family law related needs be assisted to navigate the family law system?***

The design of initiatives to improve access to information about and navigation of the family law system, such as the proposed resource noted in paragraph 50, should be grounded in genuine, early, and meaningful engagement with people who have lived experience of the family law system, and take into account the preferred channels/platforms and existing information habits of the group(s) they are proposed to support.

***Q 10: What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?***

This question should be considered alongside matters raised in the issues paper under Q3 & Q4. In particular, any ‘unbundling’ of legal services (paragraph 108) should be considered in relation to people’s clear comprehension of the language and processes involved in each component, and how this affects their ability to make informed decisions about services with which they might engage. Continuity of service is also a potential issue here. Segmenting and multiplying the necessary points of contact with elements of the family law system for people who have complex needs (as highlighted in paragraph 33) and who are already dealing with high levels of stress is likely to have adverse outcomes if other support mechanisms are not also in place.

# Legal principles in relation to parenting and property

We agree that Part VII of the family Law Act should be amended to better reflect the diversity of families in Australia and support a consistent decision making approach for all children, regardless of their family structure.

***Q 16: What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?***

In particular, we endorse the notion that “for a significant number of Australian children, their family will include carers who are not their biological or legal parents”, for the reasons outlined in paragraphs 141 and 142. We also agree that the Act should be amended to better reflect the diversity of families in which children are cared for, and to better support decision making by the courts where children are living in non-traditional or non-nuclear family structures (paragraph 143).

# Resolution and adjudication processes

We agree with the need for improvements, and echo the advice already provided to ALRC regarding the potential for exacerbation of stresses, hardships, and danger posed by delays (paragraph 170).

***Q 20: What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?***

***&***

***Q 21: Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?***

With regard to the suggested reform strategies (paragraph 171), any limitation of affidavit lengths should be considered with caution. Such limitation carries risk that persons engaged in the family law system are not (or may perceive they are not) encouraged to have their story listened to and fully considered.

Similarly, we note as a general principle the need to ensure all parties understand transitions to mediation or other dispute resolution if orders are used to do so after the commencement of litigation.

We also caution that the diversion to FDR process could have implications with regard to the ability of children to participate in family law process, with no statutory obligation to consider the views of children in FDR (i.e. there is a need to consider any change of this type with regard to matters raised in Q37). Particular safeguards would be essential to ensure that if children were participants to an initial court process which was then subject to diversion, that their perspectives were still heard. This is to reduce the potential for putting children in a position of court-directed disempowerment.

***Q 22: How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?***

We note and endorse the ALRC’s implicit recognition of the power of access to records – and the implications of denial of this right on achieving fair process as suggested by the recommendations for “simplified procedural and evidentiary requirements” (paragraph 175).

***Q 23: How can parties who have experienced family violence or abuse be better supported at court?***

***&***

***Q 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?***

We agree with the comments here regarding the need to improve and embed trauma-informed practice in the family law system, noting the potential for re-traumatisation through adversarial court processes (and flow-on adverse effects on parenting capacity and impact on children’s welfare), as well as the need for greater support within the family law system for parties who have experienced family violence (paragraphs 177 to 183).

We endorse recommendations for embedding specialist family violence workers in the family courts (paragraph 184), in conjunction with recommendations for expanded legally-assisted FDR processes (paragraphs 185 to 187).

The degree that agency in records may be exercised is closely linked to the prevention of their misuse.

***Q25: How should the family law system address misuse of process as a form of abuse in family law matters?***

This question gets to the heart of the issue of evidence and the ability to produce and manipulate it falling within the domain of recordkeeping and information rights. As identified in paragraph 190, there exists the potential for records and recordkeeping to be misused as a form of abuse. We note that such abuse can take many forms; indeed the denial of agency on one’s records (i.e. creation, access, and/or use of records without participant knowledge or consent) can be considered one form of such abuse.

Mechanisms for the mitigation of such abuses include:

* Involvement of all participants, especially children and families, in the creation of records where appropriate;
* Proactive disclosure to all participants regarding the existence, access, and use of records;
* Control of access to records by participants where appropriate; and
* Annotation or tagging of records to highlight potential conflicts of interest, alternative narratives, or particular sensitivity from a participant perspective.

An interoperable framework could provide such mechanisms within and across jurisdictions as described in the following section.

***Q 28: Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?***

We note the necessity of engaging with both the expertise of recordkeeping profession as well as those with lived experience of the system when designing such tools and mechanisms.

***Q 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?***

We draw attention to the need for child-focused process and judicial direction in cases where the family courts are dealing with children’s matters, including in relation to “determining the evidence to be called” (paragraph 215). Again we emphasise the necessity of engaging with both the expertise of recordkeeping profession as well as those with lived experience of the system when designing such tools and mechanisms.

# Integration and Information Sharing

From a recordkeeping perspective, the integration of services and the sharing of information are closely linked.

***Q 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?***

***Q 32: What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?***

***&***

***Q 33: How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?***

The points described in paragraphs 229 and 230 articulate the siloed nature of service provision, lack of information sharing between agencies, and problem of fragmented character of the wider justice system while acknowledging the frustration, likelihood of re-traumatisation, and risk of disengagement when children and families need to engage with multiple, disparate organisations, services, and systems.

Part of the need for this continual re-engagement is the lack of a consistent recordkeeping framework in which records may be created, controlled, and referenced, from multiple contexts and perspectives.

Note that transmitting copies of documents between jurisdictions does not solve this problem. While it may initially make more information available; the existence of multiple, uncontrolled copies of records means that the ability to manage such records is lost. The potential for information to become out-of-date, to be misplaced, or to be misused is increased. And, of course, participant agency is diminished with respect to records that are circulated in this manner.

Note too, that we are not advocating a central repository of records or centralised recordkeeping system. Such an approach is subject to security, jurisdictional, and political issues. Rather, we envisage a federated information framework, comprising jurisdictional recordkeeping systems that interoperate to provide access and control of records in a consistent manner.[[5]](#endnote-5)

Regardless of architecture, full system records of access to case records in any database should be kept (and regularly audited) and procedures established to flag and investigate any unusual access.

It is also vital that there is full disclosure provided of such information sharing, robust mechanisms for informed consent to be freely given in any instance where personal testimony is being shared, and the opportunity for the person to review that testimony and choose to provide fresh testimony should they wish to do so. It is important that persons involved in family law proceedings have their information rights respected and are able to maintain a sense of control over information sharing of personal testimony. Initial consent might cover a specific time period and set of agencies/jurisdictional contexts, but after this immediate context has elapsed (even if the same legal matter is ongoing) consent should not be assumed but resought.

Paragraph 241 raises intersections and crossovers between family violence, child protection, and children’s court - and also draws attention to there being lacuna in data so that the full extent of crossover is unknown; possibly due, at least in part, to difficulties mapping data across geographic jurisdictions .

Paragraph 242 raises (again) the scenario of potential for (re)traumatisation as a result of having to recount traumatic experiences in multiple courts. With regard to the qualifiers given above, perhaps procedures could be developed to enable introduction of testimony provided in one court to be used in another, with examination of that statement being mediated outside the courtroom through a judicial officer, which may remove at least some adversarial cross examination

We endorse the paragraph 246 recommendation for a national child and family protection system as part of the solution set for problems facing families with multiple legal needs. This could ameliorate some of the difficulties noted above in reporting/analysing data where people are intersecting with services and courts across state/territory borders.

Paragraph 246 also raises suggestion to develop digital hearing processes to reduce the need for families to physically attend court hearings in different locations. We note the value of bringing recordkeeping expertise into such a design protocol to enable and maintain integrity and security of associated transmissions and/or recordings.

We also emphasise the need to take into account lived experience of people who have been through child protection and family court systems when looking to find the balance between “extent of redaction of child protection files in some jurisdictions” and “potential impact of information-sharing regimes on client privacy” as discussed in paragraph 252.

# Children’s experiences and perspectives

The aforementioned enquiries and research have identified the need for policy, practice and systems to address the agency of children and families in recordkeeping.

***Q 34: How can children’s experiences of participation in court processes be improved?***

***Q 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?***

***Q 36: What mechanisms are best adapted to ensure children’s views are heard in court proceedings?***

***Q 37: How can children be supported to participate in family dispute resolution processes?***

Family law and related recordkeeping systems are needed to establish and maintain accurate records that serve purposes beyond the efficient running of the organisation — in particular, records that take into account young persons’ points of view and ongoing needs beyond the organisational record-making contexts. This involves an obligation to implement recordkeeping regimes that support the needs of children across space (as they, their families, or people working with children move around) and through time (for example, the Royal Commission into Institutional Responses to Child Sexual Abuse found that the average delay in reporting abuse was approximately 22 years).

We note that children’s “experiences of participation in court processes” also means a responsibility to facilitate their participation in child-oriented recordkeeping. In particular, this means that beyond children’s involvement in testimony, conferences, and proceedings, adequate records are made of decisions and made available when children will need them. Such need for access will vary as children mature, even into adulthood, as will the requirement for other aspects of agency such as those described above.

The concerns noted by AIFS over children’s expressed dissatisfaction with experiences of having representation by Independent Children’s Lawyers are significant and should be a priority to be addressed in the family law reform process. We endorse the further exploration of mechanisms suggested in paragraphs 260 and 261, in particular:

* The appointment of a children’s advocate ;
* The adoption of a multidisciplinary team approach to child representation; and
* The Ability for children to provide direct testimony – in principle, an “in their own words” mechanism would be very desirable.

Respect for equity and diversity means that child-oriented recordkeeping systems need to take into account the varied needs of children. Recordkeeping systems should meet the needs of children with a variety of backgrounds, cultures, and cognitive and physical abilities.

While the safety of children and reporters is paramount, it is worth noting that privacy obligations and processes are often misunderstood, with the inappropriate withholding or redaction of records leading to additional trauma to those recorded.[[6]](#endnote-6) We recommend that equitable, rather than risk adverse approaches, to disclosure be taken.

Whilst we recognise the immutability of court records, we recommend that provision be made for all participants in records – in particular children – to have their voices heard.[[7]](#endnote-7) The post-hoc annotation or tagging of records described above can take place while maintaining the integrity of the court processes. Indeed, from a participant’s perspective, “records are always in a process of becoming”.[[8]](#endnote-8)

***Q 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?***

***Q 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?***

In addition to the articulated risks of child participation in decision-making or dispute resolution processes, there is the potential risk to mental health or wellbeing arising from children’s sense of guilt or responsibility over outcomes arising from court processes in which they have been involved or for which they have provided information, such as imprisonment or other penalty for a parent.

The difficulty of balancing the positive benefits (long term as well as immediate) of facilitating children’s agency through involving them in decision-making and dispute resolution against the risks of retribution, intimidation and self-recrimination is very real, but should not prevent such processes being a key principle of the family law system. Children are undeniably a key component of the families they are part of: although they are not equal contributors to family in financial terms they hold an equal share in constituting their families in emotional terms.

***Q 40: How can efforts to improve children’s experiences in the family law system best learn from children and young people who have experience of its processes?***

We support the views expressed in paragraphs 276 and 277 regarding need for young people’s lived experience to inform needs analysis and policy direction. We also suggest seeking input from young people involved in existing advocacy groups such as CREATE and Victoria Legal Aid’s recently established Young Person’s Advisory Forum.

Such elicitation should focus on providing an engagement where young people are respected, safe, and supported in being present (for example, through consideration of factors that impact whether or not they can participate; including logistics of location, transport, childcare, etc). An engagement team should include a facilitator to whom young people are able to relate as having shared similar experience. Trust is very important and is very difficult to establish in FIFO style encounters.

# Professional skills and wellbeing

We support the views noted in paragraph 284 that appointments to the family courts should be contingent on appointees already having family law and family violence expertise or having completed related training in trauma informed practice and cultural competency.

Additionally, an awareness of the impact of recordkeeping over generational timeframes and the issues relating to participatory recordkeeping should be instilled throughout the sector.

***Q 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?***

***Q 42: What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?***

***Q 43: How should concerns about professional practices that exacerbate conflict be addressed?***

The introduction of a participatory recordkeeping framework is not a trivial undertaking. Along with changes to policy, practice, system implementation, professionals and judicial officers working within the family law system will need to be equipped with the knowledge, skills and awareness to address the recordkeeping needs of children and young people through information, ongoing education, and training. New professions that may be introduced to the family law system (such as ‘navigators’ and ‘advocates’) should have competencies in information and recordkeeping literacies among their skill set.

We draw attention to the future implications (beyond the family law court decision) of some of the areas of professional practice identified in paragraphs 280 to 284, specifically with regard to the effects future access to records of proceedings may have on children and young people later in life when they encounter material/opinions that are in contest with how they remember case and events, and/or which lack understanding of impacts of trauma or cultural specificities.

In order to address the serious harm that is caused by insufficient or cursory recordkeeping and/or the use of inappropriate language in records, we recommend that professionals and judicial officers working within the family law system receive training that covers the recordkeeping rights of children and young people, as well as the possible uses and audiences for records that may be created.

We also recommend that organisations should create and maintain training records relating to recordkeeping policy, practice and systems, and which are made accessible as required.

***Q 44: What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?***

The wellbeing of practitioners within the family law system is crucial to its fair and effective operation. Measures to identify and manage vicarious trauma should be embedded at all levels of the family law system. Moreover, measures introduced as a result of reform must be appropriately resourced.

# Governance and accountability

***Q 45: Should s 121 of the Family Law Act be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?***

***&***

***Q 46: What other changes should be made to enhance the transparency of the family law system?***

We support an amendment that would allow parties to family law proceedings to publish information about their experiences of the proceedings, on the grounds expressed by National Association of Community Legal Centres and others in paragraph 299.

Note that proposals in paragraph 302 while potentially extending rights to press and adults do \*not\* grant any further allowance or agency for children to publish their experience of the family law system (or make clear if they can do so at any point). We would suggest that children need this agency as well, even if it requires additional safeguards around safety and privacy.

We also note the limited exemptions to current section 121 prohibitions: “communications with child welfare authorities, legal aid bodies, legal professional regulators, and where court authorises publication” (paragraph 297). While we understand the need for the protection of privacy, this is an example of an external authority asserting control over people’s power to speak of their experience, and in particular prescribing the parameters in which children are allowed to discuss their experience.

***Q 47: What changes should be made to the family law system’s governance and regulatory processes to improve public confidence in the family law system?***

As framed in the issues paper, this question is almost solely limited to complaints processes. We recommend that good recordkeeping be highlighted as an aspect of system/process transparency and good governance, for improved public confidence.

Nonetheless, we support views articulated in paragraphs 307 and 308 regarding complaint and dispute resolution processes, as well as the creation of a body to conduct independent investigations of complaints of judicial misconduct as discussed in paragraph 313.

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At the moment recordkeeping is not playing the role it should in protecting and supporting Australia’s children. It should be a quality, reliable, consistent, coherent infrastructure that supports those working to protect and care for children in the most efficient and effective ways possible. Like any good infrastructure it should be something that is taking for granted rather than being an administrative roadblock. This will only be possible if the current shortcomings are acknowledged and adequately addressed through imagining new participatory and rights based frameworks, processes and systems.

We would be happy for further discussion in order to provide more detail or clarification of any of the points raised in this submission.

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