
Sydney Law School

Research Centre for Children and Families, School of Education and Social Work

Professor Judy Cashmore AO

Email: [REDACTED]

Assoc Professor Amy Conley Wright

Email: [REDACTED]

Meredith McLaine PhD candidate and
Lecturer, Law University of Wollongong

Email: [REDACTED]

Professor Rita Shackel
Sydney Law School

Email: [REDACTED]

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

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By email

Dear Commissioner,

Submission to the Open Justice Review – Court and tribunal information: access,
disclosure and publication

Thank you for the opportunity to make this late submission. We write from our perspective as academic researchers in the field of children and the law, with particular interest and expertise in the care and protection jurisdiction of the Children’s Court of NSW. Our submission is primarily concerned with part 11 of the Consultation Paper: *Researcher access to information*, with overlapping relevance to parts 6: *Access to information* and 7: *Children and Young People*.

The privacy, safety and wellbeing of children and young people must remain the paramount consideration in relation to public and researcher access to Children’s Court materials. In this regard we concur with the submissions of the Children’s Court¹ and Legal Aid NSW.² While we support, as a general principle, the desirability of simplified and streamlined processes for researcher access to NSW court information, we also

¹ Submission no. 28, 9 March 2021.

² Submission no. 24, March 2021.

recognise the importance of discretion in the special context of cases concerning children and other vulnerable groups. In our experience, the President and executive staff of the Children’s Court have been responsive and accommodating in exercising their discretion to allow access to documents for meritorious, ethically-approved research projects.

However, we echo other submissions to the Review that have drawn attention to systemic barriers to research using court data — namely, the limited availability of published judgments in courts of summary jurisdiction, the cost of transcripts, and other practical obstacles to obtaining transcripts.³

The vast majority of Children’s Court decisions in care matters are not published, and indeed in most instances do not exist in written form — being typically delivered orally on an *ex tempore* basis. The absence of a readily accessible body of case law in the care jurisdiction presents significant challenges to research into this important, and relatively ‘hidden’, area of the legal system. Magistrates hearing care and protection cases are making vital determinations about children’s welfare and the manner and extent of state intrusion into family life, with research into this area of decision-making having important implications for policy development. The submission by the Children’s Court mentions the publication of a selected sample of cases in the *Children’s Law News* bulletin,⁴ and we acknowledge the highly valuable contribution of this resource for both legal practitioners and researchers. However, the number of judgments available through the *Children’s Law News*, together with those published on Caselaw NSW, remains relatively small and is not representative of the overall number or type of matters that are dealt with by the Court. Rigorous research needs to be able to have open (unbiased) access so that different methodologies and sampling can be used to generate reliable findings. For example, in a current research study exploring judicial decision-making in restoration hearings (cases in which a child’s return to family of origin is contested), the available body of published case law is limited to approximately 20 decisions over a period of some 12 years. This sample is not reflective of the volume and diversity of restoration cases heard on a routine basis in Children’s Court sittings throughout NSW. Similarly, for adoption matters, only 9 of the 88 matters in which children were adopted from out-of-home care in 2017 had a reported judgment in the Supreme Court, and these were nearly all contested adoptions and those with significant legal issues.

³ See, eg, Dr Jason Chin, Submission no. 1, 20 January 2021; Faculty of Law, UTS, Preliminary Submission no. 25, 31 May 2019; Dr Luke McNamara and Dr Julia Quilter, Preliminary Submission no. 14, 28 May 2019.

⁴ Submission no. 28, at 8–9.

The recent *Family is Culture* Report, a comprehensive review of the contemporary removal into care of Aboriginal children, expressed concern about the low number of Children’s Court judgments accessible to researchers and to the public. The review commented ‘it is impossible to adequately review anecdotal concerns about the operation of the Children’s Court without further evidence or data about its operations.’⁵ In the interests of a ‘transparent’ system, the report recommended that all decisions in final hearings be published.⁶ We note that Legal Aid’s submission to the current review expresses support for this recommendation, contingent upon adequate resourcing for the Children’s Court.⁷ The Court’s submission, however, raises practical and reasonable concerns as to the feasibility of producing formal written judgments in the context of a busy summary court.⁸ Accordingly, given the unlikelihood of a comprehensive body of published case law reflecting the routine work of the Children’s Court, the issue of researcher access to transcripts — or other records of court proceedings — is all the more significant.

As various other submissions have observed, researcher access to the written transcripts of court hearings often involves a complex, lengthy and expensive process. An alternative option is access to the original, un-transcribed audio recordings of the hearings. Additionally, paper documents contained within the court’s case files may provide supplementary understanding of the context of a hearing. However, as noted in at least one other submission,⁹ it can be difficult to **identify** the specific cases, relevant to a particular research focus, within a court’s data record systems. This has certainly been our experience to some extent — that is, despite the good will of the Children’s Court in supporting research endeavours, existing resource constraints can create considerable complexity and delay in tracing records in order to pinpoint pertinent cases and their audio recordings.

International examples highlight the value of research access to court data to explore important issues and inform systems improvements. The Nuffield Foundation Family Justice Observatory¹⁰ in the UK aims to improve decision-making for children in public and private law by improving access to and use of data and research evidence. Through case file research, they have explored issues such as mental health status of mothers whose children were assumed into care at birth, identifying policy and practice

⁵ Independent Review of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in New South Wales, *Family Is Culture* (Review Report, 2019) 123.

⁶ Ibid 131–3.

⁷ Submission no. 24, at 18.

⁸ Submission no. 28, at 8.

⁹ Dr Luke McNamara and Dr Julia Quilter, Preliminary Submission no. 14, at 4.

¹⁰ <https://www.nuffieldfjo.org.uk>

implications for supporting vulnerable mothers. Case reviews can be particularly illuminating about current practice in child welfare, and can be used to enhance practice and professional education.¹¹

In conclusion, we strongly agree with the proposition in the Consultation Paper that research access to court information is ‘essential to open justice’.¹² Empirical studies of the law in action — in the daily operation and decisions of the courts — are essential to scrutiny of the law’s effectiveness. In the care and protection jurisdiction, children’s rights and vulnerability warrant a cautious approach to the release of information, which in the research context can be accommodated via exercise of discretion and application of ethical standards governing privacy and de-identification of children and other parties. Within these parameters, access to research material is hampered by resource constraints affecting the accessibility of Children’s Court data, publication of judgments, the cost of transcripts, and identification of relevant case files and audio recordings. We support development of reforms, directed at any of these practical problems, to enable research in the field of child protection law to be carried out to inform policy and practice in an area in which life-changing decisions are being made concerning children and their families.

Yours sincerely,

Meredith McLaine
PhD candidate, Sydney Law School, University of Sydney
Lecturer, School of Law, University of Wollongong

Professor Judith Cashmore
Sydney Law School,
Research Centre for Children and Families
University of Sydney

Associate Professor Amy Conley Wright
Director, Research Centre for Children and Families
University of Sydney

Professor Rita Shackel
Sydney Law School
University of Sydney

¹¹ Henry, C., Carnochan, S., & Austin, M. J. (2014). Using Qualitative Data-Mining for Practice Research in Child Welfare. *Child Welfare*, 93(6).

¹² NSW Law Reform Commission, Consultation Paper 22, at 248.