

**Submission
No 36**

INQUIRY INTO THE OPERATION OF THE FREEDOM OF INFORMATION ACT 1982

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Child Welfare Records and Freedom of Information

Submission to the Inquiry into the operation of the Freedom of Information Act 1982

Summary and recommendations

The Find & Connect web resource welcomes the opportunity to provide a submission to the Inquiry into the operation of the Freedom of Information Act (FOI Act) 1982. This submission concerns parts 1, 2, 3 and 8 of the Terms of Reference as they relate to child welfare records held by Victorian government agencies.

We provide the following recommendations and comments about the effectiveness of the current FOI Act as a process for release of child welfare records, in line with the Committee's Terms of Reference. (TOR).

TOR 1: The effectiveness of the Acts' current policy model, which is based on formal request for information, and other options available, including options utilised in other jurisdictions

Response: The current FOI policy model is not effective or fit for purpose for the release of, and access to, child welfare records, and other mechanisms for release are better suited for these records.

Recommendations: That this Committee recommends that child welfare records (broadly defined) held by government agencies are released outside of the FOI Act using informal or administrative release processes.

That the Act is revised to clearly state that formal FOI processes should only be utilised following a failure of administrative and informal means of records access.

TOR 2: Mechanisms for proactive and informal release of information, including the effectiveness of information publication schemes

Response: In the case of child welfare records, the mechanisms and processes set out in the *Access to Records by Forgotten Australians and Former Child Migrants: Access Principles for Records Holders, Best Practice Guidelines in providing access to records document (Principles and Guidelines)* provide underlying principles, decision making guidance and a process for every step of a records access request to follow.

Recommendation: That the Committee recommends the Principles and Guidelines as a model for administrative release of child welfare records for Victorian government agencies.

TOR 3: Efficient and timely mechanisms for persons to access their own personal and health information

Response: The FOI Act does not provide efficient or timely mechanisms for Care Leavers to access some of the most personal information held about them. Instead, the process includes lengthy delays, removal of key information required by Care Leavers, and additional distress caused by the overly bureaucratic process they must follow.

Recommendations: That the importance of these records to Care Leavers is recognised through the implementation of more effective and appropriate informal or administrative records access processes.

That the right of reply to child welfare records is enacted in a broad sense, including through proactively publicising this right and having a flexible approach about what this right of reply may entail for individual Care Leavers.

TOR 8: The time and costs involved in providing access to information.

Response: The current time and costs involved in processing child welfare records for release under FOI are extensive. This is because of the considerable manual processing that must be done to redact exempted information before records can be released. This has led to backlogs which create additional distress for Care Leavers.

Recommendation: That the Committee recommends that more efficient records access processes be enabled by the use of informal or administrative records release, as detailed in the Principles and Guidelines.

Introduction

The Find & Connect web resource is funded by the Commonwealth Department of Social Services to document the history of child welfare in Australia. The resource assists people who grew up in out-of-home care, including Forgotten Australians, Former Child Migrants and members of the Stolen Generations (referred to in this submission as Care Leavers), to discover and access information and records about their time in care. It is managed by the Find & Connect web resource team, based at the University of Melbourne.¹

The impacts felt by Care Leavers as a result of the barriers and difficulties to accessing information about their childhoods have been well documented in reports from both state and national Inquiries, including *Betrayal of Trust* (Victoria, 2013), *Forgotten Australians* (Commonwealth, 2004), *Bringing Them Home* (Commonwealth, 1997), *Lost Innocents* (Commonwealth, 2001) and the Royal Commission into Institutional Responses to Child Sexual Abuse (Commonwealth, 2017).

In Victoria, key child welfare records are held by government agencies, most notably the Department of Families, Fairness and Housing, Department of Justice and the Department of Health. Child welfare records include ward of the state records, admission and discharge registers, Children's Court records, psychologist and social worker file notes, medical files, education files, adoption and fostering records, photographs (of children, staff and institutions), correspondence files and payment and child endowment records. Important records about the licensing, management and running of homes and institutions are also held.

¹ The Find & Connect web resource is part of the Department of Social Services Find & Connect program, made up of the web resource, support support services, and funding for key advocacy bodies. See more: <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/find-and-connect-services-and-projects> and www.findandconnect.gov.au.

Use of FOI to access personal information

Since the Act was passed in 1982, FOI has overwhelmingly been used by journalists and politicians in opposition. The objectives of FOI legislation similarly have largely been understood as making government accountable to public scrutiny and removing unnecessary secrecy around decision making processes, so that transparency is promoted and our democracy is strengthened.

However, this popular conceptualisation of FOI misses a fundamental objective of the legislation, and has very significant ramifications on the information needs of vulnerable Victorians.

In the 1995 review by the Australian Law Reform Commission of the Commonwealth *Freedom of Information Act 1982* one of the basic purposes of the legislation was set out: “... to enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is incorrect or misleading.” (ALRC Review, p5)²

We submit that the current FOI legislation, systems and policies do not achieve these purposes for Care Leavers. Child welfare records are qualitatively different from many other records that are commonly accessed via FOI, such as commercial contractual and tender documents. They are deeply personal and fundamental to the construction of identity in a way that other government documents are not.

As was acknowledged in the *Bringing Them Home* report of 1997, “The responsibility of government to provide this [family] information... goes far beyond the standard justifications for FOI legislation, namely openness and accountability of governments and the individual's right to privacy.” (*Bringing Them Home* report, p295).

It is also important to note that it is not a requirement that these records be released using FOI. They could currently be released using administrative or informal means,

² <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC77.pdf>

outside of the provisions of the FOI Act. However, FOI continues to be the default access mechanism for most records held by government. As was noted in *Bringing Them Home*: “Freedom of information legislation sets minimum rights of access. It is a back-up if access to documents cannot be obtained less formally. FOI legislation does not prevent access being provided informally” (p286). However, to date, this option has not been taken up in Victoria.

FOI has also been used at different times to hinder, rather than help, access to child welfare records. Recommendation 18 of the Senate’s 2004 *Forgotten Australians* report called on the Council of Australian Governments to review state and territory FOI regimes, “to ensure that they do not hinder access by Care Leavers to information about their childhoods and families”, and there are numerous examples of how this legislation functioned to restrict rather than enable access to crucial identity information for Care Leavers.

One of these restrictions is the current backlog of FOI requests which has led to delays in Care Leavers accessing their records. We acknowledge the work of the Care Leavers Records Service in advocating for more resourcing, and are heartened by the work currently being undertaken to now reduce the backlog. However, the practical effects of these delays have included Care Leavers not being able to begin the work of understanding their families or circumstances of their childhoods; only a set number of pages of a file being provided at one time leading to the requestor waiting months and sometimes even years to receive all their records; and continued uncertainty about when records may be received, and what information they may contain. As this cohort ages, the opportunities for them to meet living family members, or even access their own information prior to decline and death is limited.

When preparing records for release, the provision of the FOI Act with the most negative impacts for Care Leavers is section 33(1) which relates to third party information. In many cases, the third party information being exempted and redacted is the key information Care Leavers are seeking: names of parents, siblings and other family members. As the Care Leavers Australasia Network (CLAN) submission to OVIC’s investigation into proactive and informal release stated:

“Over many years, some agencies have used FOI and related privacy legislation perversely to prevent full access to personal records, often citing merely the

existence of the names of third parties in a person's record as sufficient reason to redact important information concerning, for example, parents, siblings, and childhood friends. Section 33.1 [of the FOI Act] has often been written in the margins of redacted pages of documents as a magical barrier beyond which nothing more shall pass (CLAN submission to OVIC)³."

In addition, the application of exemptions is often inconsistent and haphazard. Care Leavers who have requested access to their records more than once report being provided with different information and different exemptions applied each time. Care Leavers also reflect on the unfair power relations of a departmental official deciding what personal information they may access:

"The Department decides I cannot have certain information about MY parents. Why should the Department staff get to read the file about my parents and then relate it to me? How dare the Department decide that I cannot read about MY parents"

(VANISH submission to 2004 *Forgotten Australians* Inquiry, p7, Submission 167).

Unlike some other communities adversely affected by past policies, Care Leavers do not have legislation that was specifically created to meet their information access needs. The most direct comparison is adoption information, which is released under the provisions of part VI of the *Adoption Act* (Vic). S87 of the *Adoption Act* recognises that accessing adoption records may cause distress, and that support (of the applicant's choosing) may be needed.

The records that Care Leavers request are very similar to the records of adoptions, particularly historical records of adoptions. They contain similarly personal and childhood information. The recognition that FOI is not a suitable access mechanism for adoption records has not been extended to Care Leaver records.

It is important to note here that the information Care Leavers are seeking about their own childhoods is information freely available to all of us who grew up in the family home. For Care Leavers to be left ignorant of their relatives and their own circumstances

³ <https://ovic.vic.gov.au/about-us/documents-and-publications-we-produce/research-and-reports/proactive-and-informal-release-of-information-in-the-victorian-public-sector-discussion-paper/#providing-a-submission>

and history is an inequity forced upon them by the barriers presented by the current FOI legislation, and its implementation.

Informal release of child welfare records

The Find & Connect web resource strongly supports informal or administrative release of child welfare records, outside of FOI processes. Informal release goes some way to ensuring that those accessing records about their family and their lives can do so in a way that reduces the trauma associated with records release, and through a less damaging process.

Informal release allows for interaction between the records requestor and the agency to establish the reasons why the applicant is seeking information, what information would be most useful, and reduces the time spent copying vast swathes of information that is of no interest or relevance to the requestor. A more tailored and efficient service can be delivered, empowering staff to make sensible, compassionate access decisions without causing needless distress.

There are many benefits to releasing child welfare records through an informal release process, including:

- Enabling a more flexible and individualised response to records access requests, ensuring the priorities of the requestor are understood and form part of the response.
- The ability to provide records with minimal or no redactions, particularly around third party information of key importance to records requestors.
- The ability to enact Care Leavers' right of reply to correct or respond to the records in more flexible ways (see below).
- More records could be provided in a timely manner, so the current FOI backlogs and delays with receiving records would no longer be an issue.
- Proactive release of administrative and other non personal records, and release of information about what the records hold will help manage expectations and therefore refine what people request.

There are already models of informal records access and release which can be followed in regard to child welfare records. We commend the Committee's attention to the *Principles and Guidelines* published by the Department of Social Services (DSS).⁴

This document sets out principles and guidelines for providing access to child welfare records, including the important fundamental principle of maximum access: "Records Holders will enable maximum information to be available to Forgotten Australians and Former Child Migrants about themselves, their family, identity and connection; circumstances surrounding placement in care; and details of time in care."

The document provides guidance through all aspects of a records access request: from initial receipt and acknowledgement, through to considerations of privacy and redaction, to discussion of how and when to provide records to the requestor. It provides practical guidance on balancing Care Leaver access and third party privacy, which would help to avoid unnecessarily strict and risk-averse interpretation of section 33(1).

In particular, the *Principles and Guidelines* have thoughtful guidance about the definition of "personal information" and what constitutes a "third party" which we commend to the Committee's attention.

In NSW, the *Principles and Guidelines* have been used as part of the Information and Privacy Commission NSW *Information Access Guideline 8 - Care Leavers' access to their Out-of-Home Care Records*.⁵ This Guideline also provides a list of considerations in favour of disclosure of third party information to Care Leavers, which are relevant in the Victorian context.

Therefore, we submit that when considering alternative access processes for child welfare records, there is already an established model and process to be followed, rather than needing to start from scratch. Utilising the *Principles and Guidelines* as the basis for releasing child welfare records also enables consistency between jurisdictions, and consistency between public and private record holders. This is of particular concern for

⁴ <https://www.dss.gov.au/families-and-children/programmes-services/family-relationships/find-and-connect-services-and-projects/access-to-records-by-forgotten-australians-and-former-child-migrants-access-principles-for-records-holders-best-practice-guidelines-in-providing-access>

⁵ <https://www.ipc.nsw.gov.au/information-access-guideline-8>

Care Leavers who were moved between states, and/or between institutions, and therefore must approach multiple organisations to gain access to all records of their childhood.

Records correction and right of reply

Access to child welfare records can be a fraught, bureaucratic, and difficult process even before the contents of the records are considered. It is important to be aware that the records themselves, once received, can also cause distress and hurt to Care Leavers. The records - never written with the thought that the child, now adult, would ever access them - often contain incorrect information, in some cases fundamental information like children's names and birth dates. The language used in the records is often highly distressing, with judgmental and demeaning language about the Care Leaver, their family, and the situation of their childhood.

While part V of the FOI Act contains provisions to request corrections or amendments of personal information "where it is inaccurate, incomplete, out of date, or where it would give a misleading impression", this is rarely, if ever, utilised by Care Leavers. This is due to a range of reasons, including that Care Leavers are unaware they have the right to request a correction or amendment as this is not brought to their attention as part of the records release process.

We recommend that the provisions relating to correcting and/or annotating incorrect or misleading information in government records be more proactively promoted by departments. This will assist Care Leavers to exercise the moral and legal rights and responsibilities they hold to records that are about them and their families, that are held in government archives.

Using an informal or administrative release process for child welfare records means agencies can be more flexible and proactive about enabling the right of reply. The *Principles and Guidelines* are again a good starting point for establishing a process to enable annotations, corrections or additions to records Care Leavers may wish to make.

It is important to recognise that a right of reply may be broader than the provisions to “correct or amend” records in the current Act, and may involve the Care Leaver wishing to add their side of the story or their experiences to supplement official records, or to create new records which sit separately from the official records.

We draw to the Committee’s attention the CLAN *Charter of Rights in Records*⁶, and the Indigenous Archives Collective’s *Position Statement on the right of reply to Indigenous knowledges and information held in archives*⁷, which both articulate the need for a right of reply and how it may occur.

Other issues

We wish to draw to the Committee’s attention some additional issues which may impact on the effectiveness of government agencies to provide access to child welfare records in a sensitive and suitable way.

First, the records created about young people in out-of-home care today differ vastly from those about people who were in the system before the phase out of institutional care by 1990. Young people in out-of-home care are likely to have voluminous records, paper based and digital, created about them. In an informal and proactive release model, consideration must be given to how to best release these records, balancing the need to show that nothing is being held back or withheld, without overwhelming the requestor with the sheer volume of records.

Secondly, training for staff is of vital importance. Training needs to be more than a one-off induction, due to staff turnover and the dynamic nature of this area of policy. Training needs to not only cover records access issues and processes but also the context of Care Leaver records access requests and information about the history of child welfare in Victoria.

⁶ <https://clan.org.au/wp-content/uploads/2021/04/CLAN-Charter-Rights-Records-Rev-update.pdf>

⁷ <https://indigenousarchives.net/indigenous-archives-collective-position-statement-on-the-right-of-reply-to-indigenous-knowledges-and-information-held-in-archives/>

We are aware that staff working with child welfare records have benefited from training sessions featuring presentations from people with lived experience of institutional care and the experience of receiving their personal records. This must continue to be an integral part of ongoing training provided to staff working to release child welfare records, whatever the access mechanism utilised.

Conclusion

There were around 500,000 children in out-of-home care in Australia from 1920 to the 1990s. They generally have only scant details of their childhood, may not know who their parents and family are, have few or no photos from their childhood, and rely on institutional records and archives to fill the blanks of their childhood. The records that many people take for granted - school reports, medical histories, even the name of their parents and siblings - are only accessible to Care Leavers through institutional records accessed via records request processes.

Care Leavers may request records for the purposes of constructing their personal and family identities; for mental well-being and recovery from adverse childhood experiences; to undertake family tracing and family reunions where possible; and to be able to pursue legal actions and compensation for historical abuse and be included in redress schemes such as the upcoming Victorian Historical Forced Adoptions and Historical Care Leavers Redress Schemes.

Using FOI as the sole means of access to records held by government departments enforces a two-tier system whereby vulnerable Victorians are kept from knowing information about themselves, their lives and their families that is mundane to many of us - the name of our mother, whether we have siblings, our medical history.

Addressing the issues apparent in the current system by reinforcing that administrative and informal means of records access become priority, and following the recommendations of the *Principles and Guidelines* document for records access will be an important way of achieving parity for this community, reducing trauma to an already traumatised group of people, and building efficiencies into a system that is needlessly backlogged.