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Family and Community Development Committee  
Parliament House, Spring Street  
EAST MELBOURNE VIC 3002

Monday, 17 September 2012

Dear Committee Members,

The Records and Information Management Professionals Association of Australasia (RIMPA) is pleased to provide a **public submission** to the Family and Community Development Committee.

In line with its remit to members, RIMPA would like to emphasise the following areas of concern in relation to terms of reference 15.1 of the Inquiry into Handling of Child Abuse by Religious and Other Non-Government Organisations:

### **15. DATA, PRIVACY AND PUBLIC INTEREST**

*15.1 Does the organisation maintain comprehensive records data on the incidence and prevalence of abuse against children in the organisation? If so, are such records publicly available?*

**Note:** Appendix 1 provides the definition of records data used as the basis of this submission.

#### **1. Poor records management in religious and non-government organisations**

Both the *Lost Innocents* (2001) and the *Forgotten Australians* (2004) reports<sup>1</sup> highlight extensively the dependency that Australian care leavers<sup>2</sup> and their legal representatives have on records for self identity, connecting with family, substantiating cases of abuse and claims for compensation. Records as documentary evidence in longitudinal (historical) cases become even more significant where witness testimony may not be readily available.

More specifically, care leavers in Victoria pursuing claims of abuse against religious and other non government organisations are required to provide evidence (records) of their institutionalisation. This information normally resided with the care organisations and they

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<sup>1</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2004, p.256

<sup>2</sup> Australians who as children were placed in institutional or out-of-home care

have had legal responsibility for the long term management of these documents /records as evidence. Care leavers would not have received their records during their institutionalisation.

Requests for information by care leavers concerning their period in care are normally enabled through Freedom of Information applications, Privacy applications or discovery orders. However, there is evidence to suggest that care organisations are not always forthcoming in searching for, identifying and making available these very documents critical to the substantiating of care leaver claims due to poor record keeping practices.

A historical perspective as documented in both the *Lost Innocents* (2001) and the *Forgotten Australians* (2004)<sup>3</sup> reports confirm that there has been a long term deprioritisation of records management. Long term maladministration, inadequate standards & guidance, competing financial priorities, a lack of legislative mandate, and the absence of legal penalties or recourse, means that poor records management practices have resulted in records been destroyed, rendered illegible, undecipherable or incapable of identification.

Consequently substantiating cases of abuse are incredibly difficult where the records may be unindexed or unavailable and consequently undiscoverable. Discoverability is further hampered by the impact of long term maladministration which compounds the cost of addressing record accessibility deficiencies. Organisations are less likely to invest in addressing historical record keeping practice because of perceived costs incurred to address discoverability deficiencies.

This is emphasised as follows:

*Many institutional records have been lost or destroyed by the institutions in question, or they were poorly maintained and only have a few dates of admission and discharge. We have had a number of situations where clients have been told by government agencies or institutions that they have no records but then the records have been located at a later date under a different name or birth date or by a different person searching the records.*<sup>4</sup>

Also in 2009 the Senate Committee reviewed progress on its 2004 recommendations and heard evidence from legal sources that the issue of record-keeping and access to records 'has been and continues to be a real issue' (*Lost Innocents and Forgotten Australians Revisited*, 2009: p. 110). Despite some progress, many of the problems in relation to care leaver records remain. One highly respected witness told the 2009 inquiry<sup>5</sup>

Although freedom of information legislation and a greater willingness of some organisations to make records available have improved access, problems still include the destruction and fragmentation of records, poor record-keeping and privacy restrictions.<sup>6</sup>

The Senate inquiry report *Children in Institutional Care Report No 1: Forgotten Australians highlights the consequences of the deprioritisation of records management:*

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<sup>3</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2004, p.256

<sup>4</sup> *How Can Care Leavers Achieve justice? Legal and Practical Issues*, Angela Sdrinis and Penny Savidis, Ryan Carlisle Thomas CLAN 10th Anniversary, 3 -4 July 2010

<sup>5</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2009, page 110

<sup>6</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2009, page 110

1. Former care leavers and their legal representatives cannot access records (evidence) because records have not been kept.

*Many care leavers provided the Committee with details of their attempts to find records about their childhoods. There may be no records left or the records are scattered amongst a number of agencies. It is often a process of perseverance and luck. One witness recounted that, because of the complete lack of records from a Salvation Army home, the only records establishing that they had actually been at the home were a junior soldier entry and the registration records at the local school.<sup>7</sup>*

2. Former care leavers and their legal representatives cannot get access to full records (evidence) because the records are incomplete as a result of multiple placements.

*Piecing together family histories from very incomplete records in multiple possible placements often from only slender leads is a challenging task, even for experienced professional researchers.<sup>8</sup>*

3. Former care leavers and their legal representatives cannot get access to records (evidence) because they have been destroyed.

*The Committee received much evidence about the record retention practices of different departments, agencies and individual institutions, ranging from almost total loss or destruction to well kept and fulsome records.<sup>9</sup>*

4. Former care leavers and their legal representatives cannot get access to records (evidence) because records are not indexed, unidentifiable and consequently undiscoverable.

*While it is important that care leavers can identify where their records may be stored, for records to be easily accessed they must be indexed and preserved. Indexing the records of an institution can be complex. Some records are in very old registers which are difficult to read and fragile to handle while others have been stored haphazardly and must be carefully scrutinised to ensure that accurate indexes can be made.<sup>10</sup>*

5. Former care leavers and their legal representatives cannot get access to records (evidence) because they are dispersed over multiple institutions and difficult to consolidate.

*Records that could provide care leavers with details of their childhoods are often scattered across a number of agencies and stored in a variety of locations. These might range from State child welfare departments, courts, homes and non-government agencies. Some records have also been moved to state archives and libraries. This makes the task of accessing the relevant records especially difficult. These might range from State child welfare departments, courts, homes and non-government agencies. Some records have also been moved to state archives and libraries. This makes the task of accessing the relevant records especially difficult.<sup>11</sup>*

*It is not just a matter of overcoming psychological barriers to telling the story. It is also about finding the raw material. In my case (and it is not unusual) I had to locate resources in up to a dozen different locations and persevere with government agencies in the face of what, to put the kindest interpretation on it, could be described as passive compliance*

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<sup>7</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2004, p.256

<sup>8</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2004, p.256

<sup>9</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2004, p.259

<sup>10</sup> *ibid*

<sup>11</sup> Senate Inquiry : Children In Institutional Care Report No 1 : Forgotten Australians 2004, p.259

with FOI laws. In recent years NSW, Queensland and the Catholic authorities have made significant progress in making data more accessible but other states lag well behind.<sup>12</sup>

## **2. Privacy, FOI and poor records management**

The establishment of Victorian privacy and Freedom of Information legislation as enabling legislation should have signalled a period of openness and disclosure. However, the legislation is frustrating in its limitations when records are in an unindexed, inaccessible and unidentifiable state due to poor records management practices hence, undiscoverable. It is not unusual in such circumstances for care organisations to argue that making the records searchable and accessible would incur a prohibitive cost, place an unreasonable financial burden on the organisation and divert significant resources away from its core business. As such, even under discovery orders, the records may not be made available to care leavers.

## **3. The relationship between religious, non-government, government organisations and evidence of abuse**

In the context of the history of child protection services in Victoria it is impossible to ignore the unique *interrelationship* between both religious, non government and government organisations such as the Department of Human Services (DHS) and its impact on evidence (documents and records) collection.

Since the Children's Welfare Act 1954,<sup>13</sup> the Department of Human Services<sup>14</sup> has had inspectorial responsibility of religious organisations. This is particularly so for the placement of state wards. It was common practice of the time though for the department to capture information on multiple clients (both wards and voluntary placement) in one inspection or incident report (per visit). Consequently even though religious and non government agencies may not have records, important evidence relating to these organisations may be located in the DHS record collection. As stated in the previously mentioned Senate Inquiry:<sup>1</sup>

*In a study of state wards in Victoria, Kate Gaffney has noted that in order to receive state wards and those children committed to government care, an institution needed to meet government standards and consent to annual inspections. Institutions that met these standards were 'approved' and received funding on a per capita basis for state wards in their care. However, such institutions were not restricted to accepting only state wards and thus state wards could be and were, mixed with children who had been admitted to private care perhaps by a parent who had voluntarily placed the child in return for a small fee paid to the institution.<sup>15</sup>*

Records pertaining to non government institutions are also currently stored at the Department of Human Services. These have potentially been 'received' under the provisions of the *Public Records Act 1973*, rendering them public records. As stated by a recent ombudsman's investigation into the Department of Human Services:

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<sup>12</sup> *ibid.* p256

<sup>13</sup> <http://www.findandconnect.gov.au/vic/biogs/E000174b.htm#related>

<sup>14</sup> and its predecessor departments

<sup>15</sup> *ibid.* P.258

*In the course of my investigation my officers also established that a collection of former ward records had recently been discovered amongst a number of records marked for destruction by the department. The collection relates to the Tally Ho Boys Training Farm, an institution that closed in 1986. The 'Who Am I?' project team have noted that Wesley Mission Victoria (who ran Tally Ho) have 'next to no information' about this institution.<sup>16</sup>*

Recent research has also identified that inspection reports with combined clients (wards and voluntary placement) are also publicly available in the State Library of Victoria.

Consequently it is imperative that government records management practices should be considered. This has been a recent highlight in the Ombudsman's report into the Department of Human Services and the management of Ward records where it was uncovered that records were actually not being managed and were largely undiscoverable. This is of great significance. As stated in the report:

*70. My investigators viewed a sample of these records during a site visit to the Bourke Street repository in December 2011. Amongst these records were documents relating to the investigation of sexual assault allegations made against a staff member of a former home. The documents contained details of the allegations, police statements of the wards involved, and the response of the relevant home and authorities.*

*71. Given the state of the records and the references to numerous individuals, it had taken the archivist nearly four months to scan and catalogue the contents of just six of the 48 boxes in the collection. My investigation was told that 2,744 references to individual wards and seven documents relating to the alleged abuse of wards had been identified in just those six boxes.*

*72. My investigators also identified critical incident reports (sexual abuse) from other homes amongst another recently discovered collection of former ward records.<sup>17</sup>*

This contradicts the Department of Human Service's response to the Senate Enquiry where the records were deemed to be in professional archival control (see page 11):<sup>18</sup>

Poor records management in Victorian religious institutions, non government and government organisations results in the inability to discover records as documentary evidence. This prevents former care leavers from accessing their history, including relevant medical records. It also compromises their ability to exercise any legal rights they have arising out of the circumstances of their care.

#### **4. Currently**

Changes to Evidence Law contained in the *Evidence Act 2008* (Vic), document unavailability provisions (section 89A) of the *Evidence Miscellaneous Act 1958* and criminal penalties where evidence has become unavailable through neglect, omission or deliberate acts of commission in the latter case, via the *Crimes (Document Destruction) Act 2006* mark a significant turning point in the admissibility and reliability of documents/records as documentary evidence presented before Victorian Courts for both civil and criminal proceedings.

Records management is becoming increasingly electronic as such, insufficient integration of data and inadequate future planning means that electronic records as evidence of lives - and, in some cases, records integral to litigation arising from abuses and negligence - may not be managed to ensure discoverability.

<sup>16</sup> Investigation into the storage and management of ward records by the Department of Human Services, March 2012, p.14.

<sup>17</sup> Investigation into the storage and management of ward records by the Department of Human Services, March 2012, p.14.

<sup>18</sup> <http://www.clan.org.au/images/Victorian-Government-response-to-the-Forgotten-Australians.pdf>

Currently the Department of Human Services (DHS) outsources services for child protection through funding agreements with not for profits and uses the CRIS (Client Relationship Information System) and CRISP systems to manage client information in both electronic and hardcopy form. Religious and non government organisations would also be producing electronic records / documents. Careful future planning should be put in place to ensure that these records are made available in the future and not subject to technological obsolesces. The records and their management system ie CRIS and CRISP must comply with standards that ensure electronic records have full integrity, are reliable and authentic and consequently compliant and admissible as evidence.

Records management provides the foundation for sound governance and the maintenance of the rule of law. It promotes accountability and enables transparency of decision making. The adoption of standards as a code of practice to guide religious institutions, non government and government organisations in determining consistent levels of performance and reliability are essential.

## **5. Concerns on records management have been raised previously**

RIMPA has also previously raised records management concerns with government (Hon Premier Baillieu, The Hon Robert Clark MLA, The Hon. Daniel Andrews, MP, The Hon. Martin Pakula, MLC George Brower, the Victorian Ombudsman, Des Pearson, the Victorian Auditor General) on the 23 August 2011.<sup>19</sup> With the exception of the Victorian Ombudsman's Office and Victorian Auditor General's Office RIMPA has to this date received no response.

## **6. Recommendations**

RIMPA strongly encourages the Family and Community Development Committee to make the following recommendations:

1. That Victorian government instigate, communicate and enforce a formal legal disposal freeze enforced by religious and non-government organisations immediately resulting in the ceasing of destruction of all records relating to those who have been in care. That the term 'destruction' be seen to incorporate the definition of the Crimes Document Destruction Act 2006 to encompass documents that are 'destroyed, rendered illegible, undecipherable or incapable of identification'<sup>20</sup>
2. That the Public Records Office Victoria instigate, communicate and enforce a legal disposal freeze on government records relating to state care in line with the disposal freeze enforced by the South Australian Government, through the South Australian Records Office in January 2011.<sup>21</sup>
3. That a record keeping assessment framework be developed prescribing mandatory standards, compliant with AS ISO 15489, AS ISO 30300 and AS ISO 16175 and PROV standards applicable to religious organisations, non government and government

<sup>19</sup> <http://www.rimpa.com.au/assets/2012/03/RecordkeepingVictorianGovernment.pdf>

<sup>20</sup> Public Records Office Victoria Advice to Agencies: Crimes (Document Destruction) Act 2006 and Recordkeeping, page 13

<sup>21</sup> The South Australian disposal freeze involved a freeze on records required for legal proceedings relating to alleged abuse of former children whilst in state care through the implementation of General Disposal Schedule No. 27 -[http://www.archives.sa.gov.au/files/management\\_GDS27.pdf](http://www.archives.sa.gov.au/files/management_GDS27.pdf)

organisations. This framework should be used as the basis to determine and report on the status of the record keeping and record discoverability.

4. That independent annual auditing and reporting occur of the status of the record keeping and record discoverability within religious, non government and government organisations subject to oversight by the Victorian Ombudsman and the new FOI Ombudsman where applicable.
5. That relevant agencies and institutions be held accountable to these standards and report annually on progress and compliance in their annual reports.
6. That through its COAG alliance, the Victorian Government works with the newly created federal regulator - the Australian Charities and Not-for-profits Commission to take a lead role in service performance monitoring of Charities and Not-for-profits. Service performance reporting by these organisations must include adherence to record keeping frameworks that are inclusive of accessibility to records (evidence). Penalties for non adherence may include loss of not-for-profit, tax exempt status.
7. That DHS (as lead agency) adhere to the legislated PROV requirement strategic management specification, 2.4 Outsourced Activities & Privatisation Contracts: agreements or legislative instruments for outsourcing or privatisation must specify records management and monitoring practices that meet government and legislative records management requirements.<sup>22</sup> Record keeping requirements be implemented through the incorporating records management contractual clauses in the funding agreements of not for profits.
8. That DHS continue to action and fund as a matter of priority the record keeping recommendations documented in Victorian Ombudsman's report: Investigation into the storage and management of ward records.<sup>23</sup>
9. A review of the current legislative framework is instigated as a matter of priority aimed at assessing the gap between current record keeping practice, Evidence Law, Administrative Law (Public Records Act 1973, FOI and Privacy) requirements within the context of longitudinal hardcopy and electronic records to ensure that maladministration of evidence is not replicated for current care leavers.

RIM Professionals Australasia has the professional expertise to provide advice and assistance should the committee require it.

Regards



Kate Walker

**Chief Executive Officer**

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<sup>22</sup> PROS 10/10: Specification 1: Strategic Management page 11

<sup>23</sup> Investigation into the storage and management of ward records by the Department of Human Services, March 2012, p.14.

## Appendix 1

### Legal Definitions

For the purpose of this submission we take the definition of 'records data' from the following sources:

Legal definition of “**document**”:

A document is any record of information, and includes (as defined in the *Evidence Act 1995* (Cth)):

- anything on which there is writing;
- anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- a map, plan, drawing or photograph.

Material data or information stored or recorded by mechanical or electronic means, including files recorded on electronic or optical media, constitute documents as well as the medium itself.<sup>ii</sup> This is also known as Electronically Stored Information or ESI where the medium itself may also be considered a document<sup>iii</sup>. The definition also extends to any part, copy, reproduction or duplicate of a document.<sup>iv</sup>

A document is defined 'not to be available' if and only if: it cannot be found after reasonable inquiry and search; it was destroyed (by or on behalf of the party otherwise than in bad faith); it would be impractical to produce it; its production could render a person liable to conviction; it is not in the party's possession or control and (i) it cannot be obtained by any judicial procedure of the court; or (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding.<sup>v</sup>

### Legal Definition of **Business Records**

A business record is defined as a document that is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business.<sup>vi</sup>

### Legal Definition of **Electronic Communication**

Electronic communication means a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.<sup>vii</sup>

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ii *Evidence Act 1995* (Cth)

iii *Sony Music Entertainment (Australia) Ltd v University of Tasmania* [2003] FCA 532, 48

iv *Evidence (Miscellaneous Provisions) Act 1958* (Vic) Sect 3 and *Evidence Act 1995*(Cth) Dictionary Clause 8, Pt 2

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- v Uniform Evidence Law, Australian Law Reform Commission Report 102, Section 6, footnote 15
- vi *Evidence Act 2008* (Vic) s 69
- vii *Electronic Transactions Victoria Act 2000*