



29 November 2024

Submission to the Yoorrook Justice Commission

About us

We are researchers from Monash University working on various aspects of the Recordkeeping and Rights of the Child Research Program¹, a transdisciplinary research agenda investigating how multiple and lifelong rights in records and recordkeeping can be recognised, respected and enacted in child welfare and protection systems utilising digital and networking technologies. It brings together researchers from a range of academic, community and organisational contexts, and disciplinary perspectives to tackle this complex problem using participatory research and design methodologies. It also seeks to give voice and agency to Care Experienced people in research to better address their recordkeeping and archiving needs. Key projects are represented below and more details are available at <https://rights-records.it.monash.edu/research-development-agenda/>



Our research imagines future digital systems for the Care sector capable of real-time, proactive and transparent accountability to the principles of provision, protection and participation in the best interests of the child enshrined in the United Nations Convention on the Rights of the Child. We also situate this work in the context of the UN Declaration on the Rights of Indigenous People and the Victorian Charter of Rights and Responsibilities. These legal frameworks seek to centre the dignity of the person (particularly the young person) and are important standards in the recognition and protection of people's human rights.

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Our Submission

We support the recommendations of the *Yoorrook for Justice Report* (2023) for both urgent reforms (Recommendations 3-26) and comprehensive systems transformation (Recommendations 1-2) across Victoria's Child Protection System. We believe that a vital part of this is re-imagining and re-designing the data, information and recordkeeping infrastructure that underpins the current system. We will refer to this as Information Infrastructure for ease of expression in the rest of our submission.

At the moment, the Information Infrastructure of the Child Protection System is part of the problem, continuing the over-surveillance of First Nations families and children in Victoria, the over-representation of First Nations children in Out of Home Care and the perpetuation of intergenerational impacts of colonisation. Data, information and records in the system are by their very nature dealing with the most personal, sensitive and complex information about children, their families and their care. Drawn from a range of higher and lower risk services, they also tend to represent children and families from a deficit-focussed perspective as a collection of codified characteristics across poverty and homelessness, family violence, mental health, addiction, disability, educational disadvantage and unemployment, amongst others. As observed by the Productivity Commission's Review of the National Agreement on Closing the Gap (2024, p. iii):

Across the country, we have observed small tweaks or additional initiatives, or even layers of initiatives, as attempts to give effect to the [Closing the Gap] Agreement. However, real change does not mean multiplying or renaming business-as-usual actions. It means looking deeply to get to the heart of the way systems, departments and public servants work. Most critically, the Agreement requires government decision-makers to accept that they do not know what is best for Aboriginal and Torres Strait Islander people.

The Past

Submissions to Yoorrook by the Victorian Aboriginal Child and Community Agency (VACCA, 2022) and the Find and Connect Web Resource (Wright, 2024) eloquently describe the lifelong importance of child welfare and protection records to those with lived experience, along with the systemic and enduring issues around preservation, access, and their repatriation for ongoing stewardship by Aboriginal Controlled Organisations, as called for almost three decades ago in the *Bringing Them Home Report* (HREOC, 1997).

As VACCA have identified, there is no overarching mechanism by which those holding records relating to Stolen Generations are held to account for their ongoing management and monitored for the quality of access that they provide. We support VACCA's Recommendation 7 (2022, pp. 32–34) for minimal records management standards to be included in the Department of Families, Fairness and Housing (DFFH) Human Services Standards and/or Victorian Child Safe Organisations to cover both past and current clients. We note that this only covers those organisations that are continuing to provide child and family services.

The distributed and mixed legal status for Stolen Generations records means that there is no single authority able to establish and monitor an overarching, comprehensive and consistent governance framework. Hence, we call on those holding, and responsible for, these records

to come together as a community and establish appropriate standards and other mechanisms for stronger self-regulation. In particular this would be a powerful demonstration for those continuing to provide child and family services to Victoria's First Peoples of their commitment to addressing the ongoing and intergenerational impacts of forced removals, and of establishing a shared and robust framework to progress the repatriation of records and enactment of rights to self-determination.

The Present

As found by the 2012-2017 Royal Commission into Institutional Responses to Child Sexual Abuse "problems with records and recordkeeping are not confined to the past" particularly for "agencies providing out-of-home care" (RCIRCSA, 2017, p. 9). Our reading of the reform recommendations in the *Yoorrook for Justice Report* (2023) is to see where they highlight:

- deficiencies in the adequacy and accuracy of data, information and records whether for nurturing and developing a child's sense of identity and connection to family, culture and community, or administering involvement with the Child Protection System
- records (in both their absence and presence) evidencing a gap between the policy rhetoric and practice, but with limited capacity to be a tool for proactive monitoring and oversight and enable real-time transparency and accountability, and
- a lack of voice and agency of First Nations children and young people and their families in the recordkeeping that is part of the decision-making that impacts on their lives.

Our research into the ways in which rights to records and recordkeeping are represented in Australia's eight distinct child protection systems was to find virtually every possible permutation and combination, all with different strengths and limitations as a consequence of the lack of explicit attention to the Information Infrastructure needed to better support rights and responsibilities regarding identity, memory and accountability (Evans et al., 2024). Our table of Recordkeeping Rights Provisions in Australia's Current Legislative Frameworks from this paper is provided as an attachment to this submission.

In Victoria the *Children, Youth and Families Act 2005* has requirements for copies of some documents – protective report (S556), disposition report (S559), care plan (S168), therapeutic treatment plan (S169B) – to be provided to a child, along with Aboriginal children requiring a cultural plan (S176). General provisions are made that implicitly require recordkeeping include giving due weight to children's wishes and views under the Best Interests Principle (S10), equal access to sufficient information for fair and transparent decision-making (S11) and the Secretary being required to "make provision for the physical, intellectual, emotional and spiritual development of the child in the same way as a good parent would" (S174). Victoria relies on privacy and freedom of information legislation to provide rights of access to child protection records (i.e., as personal and health information). The recent Inquiry into FOI by the Integrity and Oversight Committee of the Victorian Parliament, has noted the need for legislative reform in this area, including considering "the additional regulatory powers needed to ensure that the system functions as it should" (Integrity and Oversight Committee, 2024, pp. 157–232) as well as for embedding Indigenous Data Sovereignty and Indigenous Data Governance principles (pp. 142-3). We also note our colleague, Professor Moira Patterson's, evidence to the hearings of this inquiry

that Victoria in its Public Records Act has some of the lowest penalties for “removing, damaging or destroying a public record” (p. 143).

With outsourced placement services, much recordkeeping relating to out-of-home care is taking place across a number of Community Services Organisations (CSOs) to which the Victoria FOI, Privacy and Public Records legislation murkily applies. Victoria’s Auditor General in a 2017 performance audit of public sector records management noted the virtual absence of processes for examining CSOs’ compliance with records management provisions and it is difficult to establish how this has been followed up on. Hence as indicated above we support VACCA’s call for enforceable records management standards for outsourced Care service providers, inclusive of regular and transparent reporting, independent auditing, and a greater commitment by CSOs to the development of effective and transparent self-regulation mechanisms.

What also seemed palpable in our legislative analysis across the jurisdictions was an incommensurable clash between the investigative and Care functions of child protection leading to recordkeeping systems not open to participation and scrutiny, nor “as a good parent would” conducive to supporting the role childhood records and recordkeeping play in nurturing ones sense of self and belonging to family, culture and community, and of being able to sympathetically negotiate the complex privacy, security and safety issues in family and Care recordkeeping. This connects with the submission from the Victorian Aboriginal Legal Service (Victorian Aboriginal Legal Service, 2022) noting the conflicts of interest in the Department of Families, Fairness and Housing being “responsible for developing legislation, operationalising it, and litigating it” (p. 63) and how that feeds into fear, scepticism and distrust, and is an inherently poor governance arrangement.

The Future

Hence, we strongly support Recommendation 1 c) for the development of new legislation, designed by First Peoples, for the safety, wellbeing and protection of First People’s children and young people as necessary for transformative change to break the current cycles of incremental and circumscribed reforms and tackle the systemic and enduring barriers to a more caring Care recordkeeping system.

Actively designing it to support and nurture relationships between children, families and multi-faceted support workers and services by embedding participatory recordkeeping rights at its heart to nurture, develop and support childhood identity, memory and accountability, along with embodying and enacting Indigenous Data Sovereignty principles is necessary (Prehn & Walter, 2023).

This requires both the social work (Prehn & Walter, 2023) and archives and recordkeeping professions (International Council on Archives Expert Matters Indigenous Group, 2019) to confront the inherent racism in their frameworks, processes, and systems and to work for and with First Peoples to decolonise and Indigenise child protection data, information and recordkeeping systems so that a better Information Infrastructure is part of a transformative solution.

In support of Recommendation 1 we would like to suggest that instead of having separate conversations around data, information and records, there is a need to envision a holistic Information Infrastructure for the safe making, keeping and stewarding of the continuum of

recorded information that would underpin a First People's designed and led child safety, wellbeing and protection system.

A comprehensive blueprint for this new Information Infrastructure does not yet exist, but a range of research and practice initiatives are working on envisioning and developing potential components. A few to note include:

- VACCA's partnership with technology provider, CSnet, to embed Aboriginal culture and practice in a new digital case management system over a two stage, four year strategy (CSnet, 2022).
- Research from the Rights in Records by Design Project that has seen the development of a *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-Home Care*² (Golding et al., 2021) and the prototyping of a Care-experienced child, young person, or adults own recordkeeping system and "living archive" (Evans & Abeling, 2024; Rolan et al., 2020).
- Our Real-time Rights-based Recordkeeping Governance project is exploring governance frameworks for proactively respecting and enacting recordkeeping rights. Working with Care experienced co-researchers it has identified participatory mechanisms for monitoring and oversight that respond to the complexity of often conflicting rights of participation and protection. Participatory care planning, multi-perspective incident reporting, normative and strengths-based language all contribute to records co-creation in support of memory, identity and accountability needs. Procedural and deficit-focussed recordkeeping practices were identified as 'othering' practices that make children and young people in care feel unheard, misunderstood and uncared. Phd student, Mya Ballin (2024), is also exploring a conceptualisation of the corporate parent as a way in which to re-imagine child-centred, participatory recordkeeping processes and systems.
- The recommendations about the modernising of the Access to Information Scheme in the Victorian Law Reform Commission's 2017 *Review of the Victorian Adoption Act* so that it better 'incorporates contemporary standards of transparency, accountability and fairness in the management of personal information by Victorian government agencies' (Victorian Law Reform Commission, 2017)
- Dr Kirsten Thorpe's doctoral research into a transformative model for Indigenous Living Archives on Country "to reframe the archives as an act of rebalancing power, and restoring dignity to Aboriginal and Torres Strait Islander people, caring for people's information and archiving needs today, and for future generations" (Thorpe, 2022)
- Conclusions from Dr Rose Barrowcliffe's doctoral research that "combatting symbolic annihilation [in records and archives] requires Indigenous worldviews be applied throughout the record life." (Barrowcliffe, 2023)

We note that a dedicated child protection system for First People's children and young people will involve some interactions with non-Aboriginal Controlled Organisations. Hence it is vital that all government and CSOs involved in child protection begin to develop the capacity to incorporate Indigenous Data Sovereignty principles and practices into their data,

² <https://www.monash.edu/it/clrc>

information and recordkeeping systems, adequately report on these requirements and open themselves up to working in partnership with First Peoples to address the deficiencies. As VACCA (2022, p. 34) states “If Aboriginal people’s records are not safe [then] Aboriginal people are not safe’.

For those of us involved in recordkeeping and Information Technology professional education, this means that we must also advocate for a better awareness of Indigenous Data Sovereignty and other outcomes from the Yoorrook Justice Commission to be reflected in the curriculum. It is vital that the next generations of recordkeeping and IT professionals are equipped to responsibly work with First Peoples to ensure that the digital transformation of information infrastructures adequately reflects the rights of First Peoples, addressing current failings rather than amplifying them.

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Table: Recordkeeping rights provisions in Australia's current legislative frameworks

Legislation	Participation in records creation	Access to Records whilst in care	Access after leaving Care	Additional
Children and Young People Act 2008 (ACT)	Given reasonable opportunity to express views in relation to decisions (S352)	Discretionary access to protected information or personal items (S529)	Information access provisions (S529L, S529M) and for supported, free of charge access (S529N). Placement agency records returned to the department after 2 years (S528) Entitlement to personal items held by department, carers and placement providers (S529N)	
Children and Young Persons (Care and Protection) Act 1998 (NSW)	Principle of participation in decision making including being provided with adequate information, opportunity to express views, assistance, informed of how views recorded, explanation of outcomes (S10)	Specific records access provision (S160) to OOHC records relating to development, history and identity Specific records access provision for Aboriginals and Torres Strait Islander children (S14)	Specific records access provision (S168) including support person and covering records of other organisations delivered back to the department after 7 years (S170(2A)). Entitlement to personal documents (i.e. birth certificate, school reports, medical reports, and personal photographs) on leaving Care (S169)	
Care and Protection of Children Act 2007 (NT)	Child participation - Able to express their wishes in decisions (S11) Participation in care planning encouraged and facilitated (S72A)	Care plan given to child (S73)	Provision for being given possession of personal items on leaving care (S86). Access to other records via NT's Freedom of Information legislation.	
Child Protection Act 1999 (Qld)	Principles for participation of children – extensive and includes records of view in own words (5E) Charter of Rights – take part in decision making (Schedule 1)	Access to information about decisions and plans concerning the child's future and personal history in Charter of Rights (Schedule 1 (I)) Specific care plan access and explanation (S51T)	Administrative Release under Right to Information Act 2009 has led to the establishment of the Time in Care Information Access Service (https://www.dcscs.qld.gov.au/about-us/our-department/right-information#time-care-information-access-service-ticias-3.3).	Charter of Rights includes 'm) to keep, and have a safe space to store, personal belongings; o) to privacy, including, for example, in relation to the child's personal information' Third party privacy provision - S188C Chief executive may give information about third parties - when information about a relevant person and also about someone else
Children and Young People (Safety) Act 2017 (SA)	Able to express views and given due weight in decisions (S10 Principles of intervention)	Record of decisions at family group conferences provided to all participants (S24)	Care leaver access to documents and information held by the department (S153) - 'implements a recommendation of the 2016 Child Protection Systems Royal Commission report ... enabling care leavers to access, free of charge, original and copy documents relating to them, instead of having to apply to apply for access under the FOI Act.'	Provision of information about carer to child prior to placement (S80)

Legislation	Participation in records creation	Access to Records whilst in care	Access after leaving Care	Additional
Children, Young Persons and Their Families Act 1997 (Tas).	Decisions made with informed participation of child (10D Treating child with respect) Provided with the opportunity to express his or her views freely (10F Child participation)	Adequate information and explanation about a decision provided (10F Child participation)	Application of Access to information under Right to Information Act 2009 (111A) and Application of Personal Information Protection Act 2004 (111B)	
Children, Youth and Families Act 2005 (Vic.)	Child's wishes and view given due weight (S10 Best interests Principle) Fair and transparent decision making requiring equal access to sufficient information (S11 Decision-making principles)	Copy of protective report provided to a child prior to court proceedings (S556) Copy of disposition report provided to a child prior to court proceedings (S559) Copies of case plan (S168), therapeutic treatment plan (S169B), Cultural support for Aboriginal child (S176) provided to child Secretary 'must make provision for the physical, intellectual, emotional and spiritual development of the child in the same way as a good parent would' (S174)	DFFH Care Leavers Access to Records Policy, February 2021 'As the records of Care Leavers are in the possession of the Department of Families, Fairness and Housing, the department uses the Freedom of Information legislation to provide access. ... The Act must not be applied as a legal barrier preventing a Care Leaver to access their records. This policy and the principles underlying it must be applied consistently with statutory obligations. However, this policy requires that staff do not apply a restrictive interpretation of the Act and seeks to encourage a pro-release approach in a way that is consistent with the Act. Staff must assess each request on its own merits, striking a balance between the need to comply with privacy provisions and the Care Leaver's right to maximum access to their records.'	
Children and Community Services Act 2004 (WA)	Participation in decisions with adequate and understandable information (S10 Principle of child participation)	Copy of care plans provided to child (S89) Provisions to include Cultural support plan (S89A) and Leaving care plan (S89B) in Care plans when applicable	Possession of personal material 'held by the Department or by any person who has provided care for the child' on leaving care, free of charge (S97 Child's entitlement to personal material) Access is via FOI otherwise as per https://www.wa.gov.au/system/files/2022-04/Access-to-Information-Flowchart.pdf	