

ARTICLE



## Towards Transformative Practice in Out of Home Care: Chartering Rights in Recordkeeping

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### ABSTRACT

The *CLAN Rights Charter* asserts rights in records for Care leavers who were taken from their homes and families and communities, and placed in orphanages, children's Homes, foster Care and other forms of institutions. The Australian *Charter of Lifelong Rights in Childhood Recordkeeping in Out of Home Care* is a response to the critical, largely unmet recordkeeping and archival needs of both children and young people in Care today, and Care leavers, including Aboriginal and Torres Strait Islander children, young people and their families, and Stolen Generations. It focuses on their lifelong and diverse recordkeeping needs. The recordkeeping rights specified in both Charters are essential enablers for the exercise of human rights, including participatory, identity, memory and accountability rights. They provide a rights-based foundation for addressing the continuing recordkeeping failures, the major gaps in the archival record, and the weaponisation of data and records that plague the Care sector. In the paper, we discuss the research and advocacy contexts of the two interrelated Charters, and our mapping of the Charters aimed at cross-validation and identification of gaps. We then explore the challenge of translating the Charters into transformative practice, advocating for their adoption and developing guidelines for their implementation.

### KEYWORDS

Rights Charters in Childhood Recordkeeping; Out of Home Care Australia; participatory recordkeeping; children and young people in Care; Aboriginal and Torres Strait Islander children and young people in Care; Care leavers and Stolen Generations

## Introduction

Every child placed in the custody and control of a welfare agency should absolutely expect that the agency will keep full and accurate records about their experience in Care, and in a contemporary situation the child should participate in the process of making and keeping those records (CLAN Rights Charter, 2020)

The *Care Leavers Australasia Network (CLAN) Rights Charter* 2020 (see [Appendix 1](#)) embraces this axiomatic principle.<sup>1</sup> It also underpins the exposure draft of the *Charter of Lifelong Rights in Recordkeeping in Out of Home Care* 2021 (see [Appendix 2](#)).

The *CLAN Rights Charter* (the CLAN Charter) asserts rights in records for Care leavers who were placed in orphanages, children's Homes, foster Care and other forms

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of institutions that replaced their homes and families and isolated them from ordinary community life.<sup>2</sup> Many of these people left Care angry, ashamed, and confused about their identity, often not understanding the reasons for their being in Care, wanting to reconnect with their families and communities, if that were still possible, and carrying many unresolved burdens resulting from the physical, emotional and sexual abuse and neglect inflicted upon them. The fragmented and incomplete records that were made and archived in those circumstances may represent the only documented account of the person's time in such institutions.

The Australian *Charter of Lifelong Rights in Childhood Recordkeeping in Out of Home Care* (the Charter of Lifelong Rights) is a response to the critical, largely unmet record-keeping and archival needs of both children and young people in Care today, and Care leavers, including Aboriginal and Torres Strait Islander children, young people and their families, and Stolen Generations. The Charter of Lifelong Rights focuses on the critical, lifelong and diverse information and recordkeeping needs of Australian and Indigenous Australian children and adults who are experiencing, or have experienced Out of Home Care. Research on the Charter is part of the Australian Research Council-funded Rights in Records by Design Project.<sup>3</sup> Its development drew on testimonial and instrumental warrant including the *CLAN Charter of Rights* based on the visceral life-long experience of Care Leavers. The principles and values underpinning the Charter of Lifelong Rights relate to child wellbeing and safety, self-determination, linked to archival autonomy<sup>4</sup> and agency, First Nations Sovereignty and cultural safety.

The recordkeeping rights specified in both Charters are essential enablers for the exercise of human rights, including participatory, identity, memory and accountability rights. For children, young people and adults caught up in the Out of Home Care (OOHC) sector,<sup>5</sup> inability to control and access full, accurate, reliable and authentic records by or about themselves renders it impossible to actualise or assert other inalienable human rights acknowledged and guaranteed under the UN *Universal Declaration on Human Rights* 1948, the 1989 UN *Convention on the Rights of the Child*, and the 2007 UN *Declaration on the Rights of Indigenous Peoples*.<sup>6</sup>

In some recordkeeping and archival contexts, empathy and the ethics of care have been posited as more appropriate than rights-based approaches.<sup>7</sup> However, this is arguably a false binary when it is applied beyond communities and contexts where people are empowered to sectors where people are disempowered. In governmental, institutional and private service provider settings, reliance on ethics of care alone fails to address critical issues relating to imbalances of power, lack of agency, the need for transparency and accountability, and the history of records and archives being weaponised against marginalised communities. And 'it cannot enforce better behaviour by bad actors or deal with those who simply do not care'.<sup>8</sup> In the OOHC sector, and as mirrored in aged and disability care, successive inquiry reports – from the *Bringing Them Home* (1997) to the Australian Senate Community Affairs References Committee on Forgotten Australians (2004), and the Royal Commission on Institutional Responses to Child Sexual Abuse (2017), amongst many others – bear witness to devastating failures of duty of care, and the impact of poor, negligent or absent recordkeeping practices and lack of access to records in this context.<sup>9</sup>

Combined with ethics of care, rights-based frameworks are designed to be incorporated in legislation and policy development and offer an infrastructure to offset

imbalances of power. Transnational and national rights frameworks can play a significant role in influencing and rallying discourse and action across political and power spectrums, and they provide a language that is familiar to law and policy makers and regulatory authorities.<sup>10</sup> Given that records, particularly official, bureaucratic records, both represent and circumscribe people and their lived experience during and beyond their lives, it is vital that individuals whose lives are most affected have mandated avenues to become active participatory agents in recordkeeping and archives.<sup>11</sup>

In this article, we first discuss the research and advocacy contexts in which the CLAN Charter and the Charter of Lifelong Rights were developed, their purpose and animating principles. We discuss our mapping of the Charters which aimed to identify and cross-validate areas of overlap, and pinpoint possible omissions. We then explore the challenge of translating the Charters into transformative practice, advocating for their adoption and developing guidelines for their implementation.

## The CLAN Rights Charter

### *Background*

From colonial times in Australia, large numbers of working class non-Aboriginal children were removed from their families. In the period 1929 to 1980 alone, it is conservatively estimated that some 500,000 Australian children were raised in institutions,<sup>12</sup> constructed ideologically around a class-based, disempowering nexus between the welfare and justice systems, an ideology that persists in the culture of OOH into the present day.<sup>13</sup> Poor children experienced the kind of large-scale coercive confinement exercised in Ireland and elsewhere.<sup>14</sup> At times punitive policies, disguised in the language of rescue, salvation and reform, masqueraded as benevolence. The process of marginalising poor children and their parents was advanced by classifying and labelling: the neglected and criminal, the deserving and undeserving. Sometimes the categories were conflated by lawmakers and practitioners alike.<sup>15</sup>

Historian Shurlee Swain has catalogued 238 separate laws related to ‘child protection’ enacted in Australia between 1826 and 2009.<sup>16</sup> Many of these laws were aimed at removing children from their family because they were deemed to be ‘exposed to moral danger’ (predominantly in the case of girls) or ‘lapsing or likely to lapse into a life of vice or crime’ (predominantly in the case of boys). The discourse was of moral dirt – if children were not already tainted, they should be removed to prevent them becoming tainted by associating with inadequate parents or the evils lurking in the slums of the burgeoning cities. However, fewer than half of these 238 laws could be construed as having an explicit purpose of protecting or rescuing a child from significant neglect or harm. In many cases, these laws actually criminalised the child by deeming them status offenders – they had committed no actual offence but were victims of circumstances over which they had no control.<sup>17</sup> Some laws were implicitly or explicitly aimed at controlling children deemed to be a danger to society by their wayward behaviour, for example, committing an offence, truanting and inhabiting the streets, or being deemed by their parents as uncontrollable. Other laws were premised on the belief that many parents were unwilling to care for their children and were ‘foisting’ them on the state.<sup>18</sup>

The convoluted legal framework betrayed a continuing confusion in the underlying rationale of child welfare policies. Legislation often unravelled even up to and beyond the era of deinstitutionalisation, from around the 1970s. In Victoria, for example, the *Children and Young Person's Act* 1989 was amended 43 times between 1997 and 2005 when it was replaced by the current *Children Youth and Families Act* 2005 which, in turn, was amended more than a dozen times up to 2014.<sup>19</sup>

Once committed to OOHC, siblings were separated by age and gender within large, barrack-like facilities, or even assigned to separate institutions – sometimes parted forever. Likewise, parents' rights were considered to have been abrogated and parents were discouraged from maintaining contact with their children. Families that tried to visit their children were obstructed: parents or relatives were turned away at the door, and letters were not passed on. In many cases, Care leavers were lied to about their parents and many have trekked through life believing what they were told – that their parents were derelict, deserters or dead – only to discover as they reached older age that their parents had struggled to retain or regain contact. Sadly, in some cases, the passage of time now makes it impossible for them to establish contact.<sup>20</sup>

The notion of re-making or re-forming (or reforming) tainted children in institutions was reinforced by limiting their schooling and training and controlling their destination when they aged out (usually at the minimal school leaving age). Where schooling was offered, provision was usually limited to elementary levels. Girls were almost invariably also trained in household skills to fit them for later work as private domestic servants and boys were given a limited training in manual or farm work and were sent to service as farm labourers.<sup>21</sup> Expectations were set very low and very few children were able to show their true capabilities.<sup>22</sup>

### ***The development of the CLAN Charter***

The *CLAN Charter* arose out of widespread frustration among Care leavers who were deeply dissatisfied with responses of record holder agencies to their requests for their childhood records. In a context where a rights movement had produced Freedom of Information laws around the nation, many Care leavers thought of the archives as a repository of hope. They had applied for their 'file' (as many termed the totality of records made about them) expecting to find detailed, accurate records about their time in 'care' and therein answers to lingering questions about their childhood.<sup>23</sup>

Many were profoundly disappointed, even shocked and sometimes re-traumatised by what they found. Some discovered that their records were incomplete: there were large gaps across time and startling omissions of key documents such as birth certificates, parents' last-known address, and reports of incidents that stood out in their memory as critical to their wellbeing or to their detriment. Many complained that their records contained inaccurate or misleading statements. Instead of finding milestones and achievements as they grew older, many found their personal records were almost entirely negative. What was recorded highlighted them as problems rather than children with needs and abilities. Many were appalled to find insulting, demeaning, or downright hostile comments about them or their parents. Some found letters from their parents that were not passed on to them. Others found that their parents had tried to visit or to retrieve them from Care but the children were never told about these

events. Perhaps the most disappointed were those who were told that records had not been kept or could not be found. The most frustrated were those who experienced long delays in gaining access to their records or had to go to many different agencies to get the complete set of records. The angriest were those who found that many of the documents made available to them were heavily redacted – ostensibly because record holders said they were obliged to protect the privacy of ‘third parties’, although in many cases it turned out that those third parties were close family members. CLAN presented testimony about these matters to various inquiries including the Royal Commission into Institutional Responses to Child Sexual Abuse. The Commission supported a rights-based approach in a volume of its final report dedicated to record-keeping and information sharing.<sup>24</sup>

The CLAN Charter is intended to be a political document as much as an educational tool. In essence, it is underpinned by three assumptions about rights. First, rights do not exist if people do not know they have them, and so Care leavers have to know that records exist and their rights in the matter. Second, those who hold power over records are not always willing to share that power without a struggle. For Care leavers, one key message of the Charter is that if you want to have rights in or to records you have to assert them, not to give up if rebuffed but to use the Charter as a tool. Third, rights in and to personal records are not only rights *per se*, they also enable those who were disempowered as children to actualise and attain other inalienable human rights such as those relating to children’s rights to identity, maintenance of family, and protection from sexual exploitation and other forms of cruel, inhuman or degrading treatment or punishment. Where rights were not honoured and children were maltreated, records also underpin rights to justice through redress and compensatory services.

### ***Ten rights in records***

The CLAN Charter articulates 10 rights under three headings: participatory rights in recordkeeping; agency in access and disclosure; privacy and safe recordkeeping rights (see [Appendix 1](#)). As referenced at the beginning of the paper, the Charter’s axiomatic principle is that every child placed in the custody and control of a welfare agency should absolutely expect that the agency will keep full and accurate records about their experience in Care, and in a contemporary situation the child should participate in the process of making and keeping those records. The CLAN Charter cites examples of key documents that are essential and should not be regarded as optional. These include but are not limited to primary identity documents and records about family; any court orders or documents related to the reasons for the person’s placement and transfers; all medical and educational reports; and reports of all incidents, responses and decisions affecting child safety, wellbeing and development.

It might be thought that it is too late to assert rights to participation when we are dealing with historic records made in many cases decades ago. However, the Charter takes the view that it is never too late to claim a right to challenge and correct inaccurate childhood records or complete inadequate records. Care leavers should be told about this right and supported to exercise it if they want to. Nor is it too late to insist that a person who was in Care as a child should have full and unredacted access to any records made about them or their family and to insist that the person who is the subject of historic

records should have the right to exercise control over who gets to see and use their records. Persons who are the subject of childhood records also have the right to a safe, secure, and trusted infrastructure for managing, preserving, certifying, and transmitting their records and no records should be destroyed or otherwise disposed of except in accordance with the law.

The Charter was produced in 2015 in draft form, and after consultation with Care leavers and other interested parties was published in 2016. In the light of subsequent experience and parallel movements among those supporting the rights of children and young people in contemporary Care, the Charter was reworked during 2019–20, taking into account the findings of the National Summit on Setting the Record Straight for the Rights of the Child<sup>25</sup> and mapping against the *Charter of Lifelong Rights in Childhood Recordkeeping in Out of Home Care*.

Many of the inadequacies in historical records have their origins in their being written for administrative purposes and the short-term needs of the system, and not for the needs of the children or the adults they would become. The CLAN Charter arose from understanding the consequences of a recurring failure to respect the rights of children to contribute to the making of their records. Children were not informed of their right to have a say in what was recorded, nor to contribute to the development of their record. The agencies making records never thought to help children to create a personal collection of items such as photographs of people, events and places that were central to their time in Care. These are glaring gaps in historical records and these cause much frustration and disappointment. The CLAN Charter, and the experiences and the research that gave rise to it, serves as a timely reminder that past mistakes have profound consequences that might have been avoided had records makers had the vision to adopt a participatory rights approach. However, the opportunity now exists for the rights of children and young people in contemporary Out of Home Care settings to be respected through a new approach.

## **The Charter of Lifelong Rights in Recordkeeping in Out of Home Care**

### ***Background***

In Australia in 2019, nearly one in every 100 children were in OOHC. For Aboriginal and Torres Strait Islander children, the figure is one in every 16.6 children.<sup>26</sup> They are almost ten times more likely than their non-Indigenous counterparts to be in Care relative to their numbers in the general population. Their removal from their families was and is part of a larger ongoing colonial project of dispossession and denial of sovereignty.<sup>27</sup>

The Charter of Lifelong Rights recognises that there are unique human rights issues associated with Aboriginal and Torres Strait Islander children. Historically racially based policies and legislation empowered government to remove Aboriginal children creating the Stolen Generations. The colonial legacy, institutional racism and transgenerational trauma continue to impact the numbers in Care. Today community-controlled organisations are working in a culturally based, trauma-informed therapeutic way to support Aboriginal and Torres Strait Islander children and families guided by the Aboriginal and Torres Strait Islander Child Placement Principle. The National Agreement for Closing



the Gap has committed to reducing the rate of over-representation of Aboriginal and Torres Strait Islander children in OOHC by 45% by 2031.<sup>28</sup>

Action relating to children caught up in the Aboriginal and Torres Strait Islander child welfare sector today is part of a larger movement for acknowledgement of ‘the first sovereign Nations of the Australian Continent’. The *Uluru Statement from the Heart 2017*<sup>29</sup> states that they have ‘possessed it under our own laws and customs’ for over 60,000 years, and that this ancient sovereignty has never been ceded or extinguished. The Statement puts forward three pillars, enshrining a First Nations Voice in the Constitution, treaty making and truth telling, and points to the imperative for constitutional and structural reform. In this context, Indigenous Data Sovereignty refers to the right of First Nations peoples to exercise ownership and governance over Indigenous Data, broadly defined as ‘information or knowledge, in any format or medium, which is about and may affect Indigenous peoples both collectively and individually’.<sup>30</sup>

For over 30 years, Care leavers, their allies and community organisations like CREATE (which focuses on the needs of children in Care today), and CLAN have advocated for transformational changes in the OOHC sector, and highlighted the recordkeeping failures, major gaps in the record, and weaponisation of data and records. Their rights-based activism is underpinned by the construct of a child as a human being with rights and agency in the United Nations Convention on the Rights of the Child 1989. Findings of the numerous inquiries support their call for full, accurate, reliable and authentic records, which include the voice of the child. The Royal Commission into Institutional Responses to Child Sexual Abuse found that such records are essential to the best interests of the child, the realisation of other child rights, and the quality of care. In the 2004 Senate inquiry, records were consistently in the top two issues – accuracy and ownership of records came up every time.

The communities’ lived experience and testimony provide compelling evidence of the failure of the child welfare system to care for the most vulnerable children in society, and chronicled a history of neglect, mistreatment and abuse, compounded by failures in recordkeeping. The rights of children in Care are now referenced in national standards, state legislation, charters of rights, and other local instruments in all Australian states and territories. While there are some exemplary care services providers and the construct of the child as a human being with rights and agency is slowly gaining traction, the transformational changes needed to achieve a child-centred sector are a work-in-progress. Rights-based, child-centred recordkeeping frameworks and systems are critical to this endeavour.

Truth telling about the past, structural reform, and cultural change driven by ethics of care principles are critical complementary components to a rights-based approach. Thus, the Charter derives testimonial warrant from the lived experience, inquiry testimony and advocacy of Care leavers and members of the Stolen Generations; the voices of children in Care represented in reports of CREATE, State Child Commissioners and Guardians, Indigenous service and advocacy organisations, and research findings. A growing source is works authored or performed by children and young people in Care, Care leavers and the Stolen Generation, including histories, memoirs, truth telling and artwork. Sources of instrumental warrant included UN instruments, Australian federal and state legislation, standards, charters, policies and guidelines.<sup>31</sup>

## The Charter of Lifelong Recordkeeping Rights

The Charter is a key component of the National Framework for Recordkeeping for Childhood Out of Home Care, a major outcome of the 2017 Setting the Record Straight for the Rights of the Child Summit. Participants imagined a transformational shift away from organisation-centric records of control and surveillance towards child- and Care leaver-centred recordkeeping frameworks, policies and systems. Figure 1 is a graphic representation of the shift.

They envisaged participatory recordkeeping systems that would document their lives, support the development of their sense of identity and belonging, keep them connected with family and community, and address their questions about who they are, where they come from, and why they are in Care. Aboriginal and Torres Strait Island participants also emphasised the important role recordkeeping could play in truth-telling and connecting to their rich heritage and country.<sup>32</sup>

The Charter (see Appendix 2) is designed to apply while a child or young person is in Care and throughout the duration of their life, supporting child safety principles,<sup>33</sup> the wellbeing of children and young people in Care, the cultural safety of Aboriginal and Torres Strait Islander children in Care, and meeting the lifelong information needs of Care leavers, including historical justice and redress. The Charter includes Framing

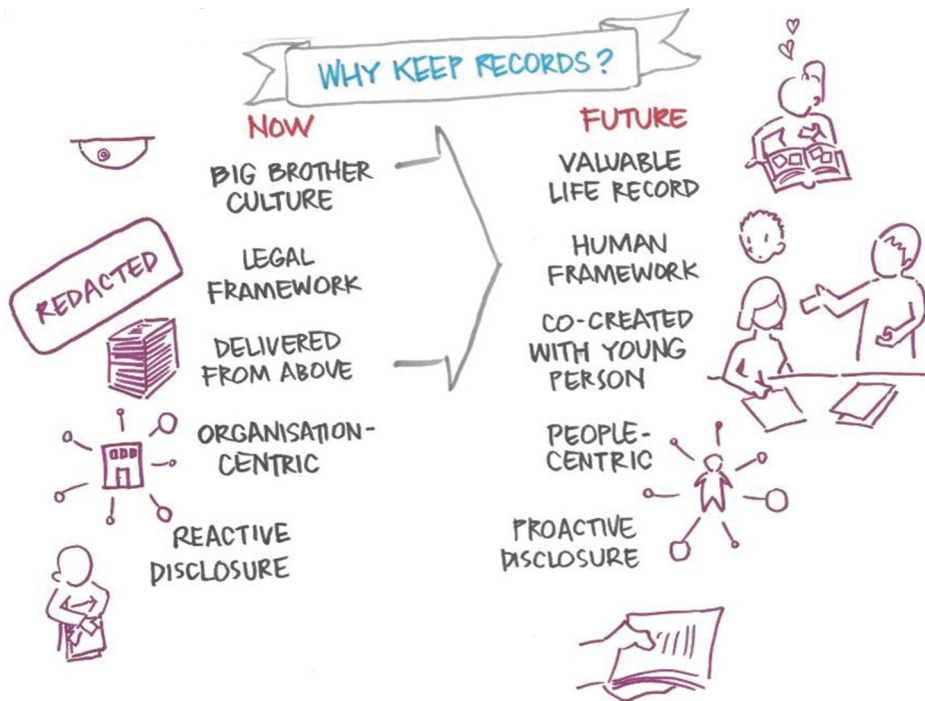
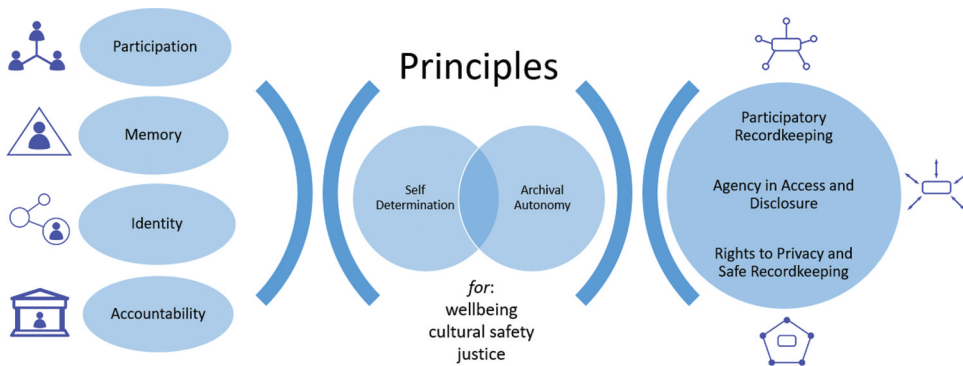


Figure 1. The summit's vision for recordkeeping in the Out of Home Care sector.





## Framing Rights

## Recordkeeping Rights

**Figure 2.** Graphic representation of the Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-Home Care designed by Antonina Lewis.

Rights and specific Recordkeeping Rights (see Figure 2). The Framing Rights derive from human and cultural rights relating to having a voice in all matters that affect you, remembering and forgetting (noting that the latter is a contested area), identity, truth-telling and accountability:

- Participatory rights in developing frameworks, legislation, policies and processes that impact you and in related decision-making;
- Memory rights, including the right to be forgotten;
- Identity rights to cultural, family and self-identity; to know who you are, where you belong and to practice your culture; and
- Accountability rights to hold society, governments and service providers to account for their actions.

There are interdependencies between the framing rights, e.g. participation is central to a process of building accountability and promoting good governance.

There are three sets of specific recordkeeping rights identified in the Charter. Together they enable the exercise of the framing rights:

- Participatory rights in recordkeeping
- Disclosure and access rights in records
- Privacy and safe recordkeeping rights.

The right to participation in all matters that affect you, enshrined in the UN Convention on the Rights of the Child, by definition should include participation in recordkeeping itself – including records creation, decision-making about access, use, and records retention or destruction, and setting the record straight/truth-telling.

Age appropriate participation in recordkeeping supports:

- Better decision-making generally
- Better quality records as participation involves recording of children and young people's input to decision-making about meeting their recordkeeping needs in the short and long term.
- Greater transparency and accountability
- The protection of children – passive, silenced children denied information are more vulnerable to abuse.

It is essential to include the voices of children and young people in the creation and management of records. Without their voices and lived experience recordkeeping will continue to be organisation-centric, and records will continue to be incomplete, inaccurate, unreliable and lacking in authenticity. Moreover, child-sensitive recordkeeping in which children and young people have a voice is critical to improving the quality and accountability of recordkeeping and addressing the many failures of recordkeeping to fulfil its role in the Care sector. The second set of rights relate to Disclosure and Access. If you don't know where your records are located, then you cannot access them – disclosure rights are essential enablers of access rights, and indeed of all other recordkeeping rights. Rights regarding access to records expertise and advocacy are also essential enablers. The third set of rights relate to privacy and safe recordkeeping. The right to privacy raises complex issues – e.g. of competing rights and its relationship to protocols relating to information sharing. In the Care sector it would seem that information sharing without consent can go well beyond the use of records for their original purpose.

For individual children and young people there is a critical link between participation in recordkeeping, access to their records, rights of privacy and safe recordkeeping on the one hand and empowerment, voice and agency as they age and grow into adults on the other. In adulthood, exercising these rights will ensure their information, evidence, memory and accountability needs are met.<sup>34</sup>

## Mapping the Charters

Additional rights were added to both the *CLAN Charter of Records Rights* and the *Charter of Lifelong Rights in Recordkeeping in Out of Home Care* as a result of the findings of two comparative research studies that mapped the *Charter of Lifelong Rights in Recordkeeping in Out of Home Care* and the *Refugee Rights Framework* developed by Professor Anne Gilliland and Dr Kathy Carbone (University of California Los Angeles),<sup>35</sup> and the *Charter of Lifelong Rights in Recordkeeping in Out of Home Care* and the *CLAN Rights Charter 2020*.

The mappings and reverse mappings identified convergences and divergences, provided a form of cross-validation and discovered gaps in the suites of rights. For example, as a result the CLAN Charter and the Charter of Lifelong Rights were revised and aligned. In reworking the CLAN Charter, the four framing rights of the Charter of Lifelong Rights (Participation, Memory, Identity and Accountability) were adopted to provide consistency and continuity between historic and contemporary recordkeeping rights. The Charter of Lifelong Rights was revised to include Rights to have a Record Created. The CLAN Charter cites examples of key documents that are essential and, from the findings

of the Rights in Records by Design project, of equal value for children and young people in Care. These include but are not limited to primary identity documents and records about family; any court orders or documents related to the reasons for the person's placement; all medical and educational reports; and reports of all incidents, responses and decisions affecting child safety and wellbeing. The Charter of Lifelong Rights also adopted Rights regarding Records Expertise. The rationale for inclusion in the CLAN Charter of Rights regarding Records Expertise derives from acknowledgement that many people who grew up in Care were given very little education and learned to be wary of authorities. Persons seeking personal records have the right to be provided with a records advocate or other expert in locating, understanding and challenging records. This is not just a matter of assistance to find all the relevant records which might be held in several different places, but also to support the person in interpreting documents that need to be read in their historical context, including terminology which is unfamiliar or potentially confronting or distressing. The *Refugee Rights Framework* includes a similar right. Consideration of the needs of children and young people currently in Care confirms that support for recordkeeping literacy and advocacy is essential.

A point of difference with the CLAN Charter is the inclusion in the Charter of Lifelong Rights of both individual and collective recordkeeping and archives rights. The UN Declaration on the Rights of Indigenous Peoples 2007 specifies both. This, and consideration of the possible relevance of collective rights to communities of non-Indigenous children and young people in Care and Care leavers, resulted in their inclusion in the Charter of Lifelong Rights.

## Advocacy

The path to significant transformative change to child-centred recordkeeping is long and challenging. Resistance to techno-solutions in resource-starved organisations, reliance on data without parallel reliance on good recordkeeping to underpin that data, and addressing the still unacknowledged and continuing problems with recordkeeping are parts of a complex problem. The continuing lack of attention to basic recordkeeping reinforces the challenges involved in addressing this 'wicked' problem. The Charter of Lifelong Rights locates intervention at a strategic level, with implementation implications. To boost uptake, a multi-pronged advocacy strategy on the Charter is underway. This involves presenting the Charter to Commissioners for Children and Young People and Human Rights bodies; to recordkeeping regulators; and to service providers, as well as to advocacy organisations supporting children in Care.

Commissioners for Children and Young People, including Aboriginal and Torres Strait Islander Children and Young People, are variously positioned within State and Territory-based jurisdictions. With differing remits, many have oversight responsibility for the management of children broadly, but also for that population that is in OOHC. Many Commissioners have issued charters of rights for children. The advocacy strategy is focused on incorporating recordkeeping rights into these Charters, at least at a high level, supported by strong guidance. Similarly, where opportunity arises, submissions are being made to UN bodies who are instrumental in creating top down pressure on jurisdictional practices supporting children.

Recordkeeping regulators, the state and territory archival authorities, have responsibility for issuing standards and guidelines for current recordkeeping. In the wake of the powerful Royal Commission on Institutional Responses to Child Sexual Abuse's volume on recordkeeping, there is opportunity to issue guidance on improved and/or reoriented person/children-centric recordkeeping. Advocating for the adoption and endorsement of the Charter in Lifelong Records is a mechanism for regulators to proactively and strategically address problems in practice. At present, recordkeeping regulators tend to be looking internally, at their own practices for providing access to records, rather than embracing potential to contribute to systemic change in the Care sector.

Service providers are known to be struggling with the day to day provision of services to children in OOHC. Revealed starkly in submissions to multiple enquiries, the systemic problems faced by service providers include lack of resourcing, high staff turnover and staff burn out. The systemic nature of the problems looks insuperable when addressed at a process level. The Charter of Lifelong Rights is a key component of an aspirational way of changing the discourse of Care – underpinning the changes essential to shifting from systems designed for organisations to child-centred systems.

Partnering with other advocacy bodies, such as CLAN, CREATE and Connecting Home (which provides services to the Stolen Generations), to achieve endorsement and promotion of the Charter of Lifelong Rights commences the work to enable those in Care to be empowered to know and be encouraged to assert their rights.

The advocacy work has invited participation from as many organisations and individuals as possible in the above categories. A strategy of ongoing involvement seeks to prioritise and work proactively with those who are receptive to the Charter of Lifelong Rights and interested in pursuing change.

## **Implementing the Charters**

The Charter of Lifelong Rights and the CLAN Charter contribute to a reframing of the problems and issues faced by children in OOHC and their future selves. There is a great deal to be done to work with service providers in implementing the changes needed to operationalise the Charters. Actually, making change is difficult. To that end we are developing an Implementation Toolkit to commence the transformative journey to better recordkeeping to support the Charter of Lifelong Rights. With high aims and ideals, the Toolkit is in three parts: outlining a strategic, organisational reorientation; addressing implementation opportunities in the current workplace; and addressing problem practices relating to historical records.

The intention is to trial the Implementation Toolkit with partner organisations, creating a community of engaged practitioners and organisations. The Toolkit takes a pragmatic stance, attempting to shift practice in organisations iteratively, working from what we know of the state of current practice. The trial will test its practicality and enable further development.

Ideally, the Implementation Toolkit can be developed to become part of both a strategic framework and a monitoring program implemented by service providers and regulators respectively, thereby embedding better practice on a continuing basis. This strategy is being brought forward into a further Australian Research Council-funded Discovery project, led by Associate Professor Joanne Evans, 'Real-time rights-based

governance for childhood out-of-home Care'. Implementing change is no short-term endeavour, and our strategies are aimed at facilitating transformative change in achievable steps for the long term.

Although they are aimed at different target groups, there is much to be gained by seeing the two Charters as complementary in principle. The CLAN Charter reflects an attempt to rectify or mitigate the mistakes of the past and the Charter of Lifelong Rights is designed to avoid making the same old mistakes. Those implementing the CLAN Charter acknowledge they are working with documents written in another era where records served other purposes, hopefully long gone. This is not to say that historical records are not useful; they are, if only to support older Care leavers to better understand their childhood experiences and to connect to families that were fragmented in the OOHC system. Further, the older records and the thinking that underpinned them now show us that there are better, more inclusive participatory ways of creating contemporary records and making them more readily accessible to those in whose interests they are made and kept.

### **Conclusion: what can you do?**

Through the findings of the plethora of government enquiries that show little improvement in recordkeeping and service to affected communities, the evidence from a number of projects undertaken over the past decade, and the tireless and always compelling advocacy of the Care Leaver and First Nations communities, Australian archivists and records managers have been made aware of deficiencies in practice. Managers must now take centre place when considering how to transform how organisations operate. Knowing and accepting the scale and scope of problems is an important initial step.

The next challenge is how to translate these altered understandings into transformative practice. This is not easy. As well as embracing new frameworks and the need for cultural change, regulators and organisations will need to create opportunities for multiple smaller interventions to introduce practice change at the coalface. These will range from a greater willingness to implement administrative release for an individual's records rather than relying on legislative proscriptions, minimising redaction, normalising requests for access to and annotation of records, to including children's and young peoples' voices in the records as they are being made, articulating and operationalising the data/records nexus, and ensuring systems are designed to enable life-long rights to be actualised.

Adopting or endorsing the *Charter of Lifelong Rights in Childhood Recordkeeping in Out of Home Care* is a small step in a much longer process of change, but one that signals clearly an organisation's intent to improve practice for the benefit of the child and the future adult they will become.

### **Notes**

1. CLAN was set up by Care leavers in 2000 to support and advocate for people who have grown up in orphanages, children's Homes, missions and foster Care in Australia, or whose parents or other family members had this experience.
2. CLAN, Care Leavers Australasia Network, 'CLAN Charter of Rights to Childhood Records', 2020, available at <<https://clan.org.au/wp-content/uploads/2021/04/CLAN-Charter-Rights-Records-Rev-update.pdf>>, accessed 29 April 2021.

3. More detail on the project are available at <<https://rights-records.it.monash.edu/research-development-agenda/rights-in-records-by-design/>>, accessed 1 May 2021.
4. Defined as the ability for individuals and communities to participate in societal memory, to find their own voice, and to become participatory agents in recordkeeping and archiving for identity, memory and accountability purposes (Joanne Evans, Sue McKemmish, Elizabeth Daniels and Gavin McCarthy, 'Self-determination and Archival Autonomy: Advocating Activism', *Archival Science*, vol. 15, 2015, p. 337).
5. We acknowledge that this term is not the preferred terminology of all persons with lived Care experience. We use the capitalised term Care 'to denote the ironic connotations of manifestly uncaring treatment, without continually enclosing the word in quotation marks' (Jacqueline Wilson and Frank Golding, 'Latent Scrutiny: Personal Archives as Perpetual Mementos of the Official Gaze', *Archival Science*, vol. 16, 2016, p. 93). In 2019, a nationally consistent definition for contemporary Out-of-Home Care (OOHC) was agreed upon and implemented in all jurisdictions in Australia as follows: 'Out-of-home care is overnight care for children aged under 18 who are unable to live with their families due to child safety concerns. This includes placements approved by the department responsible for child protection for which there is ongoing case management and financial payment (including where a financial payment has been offered but has been declined by the carer). Out-of-home care includes legal (court-ordered) and voluntary placements, as well as placements made for the purpose of providing respite for parents and/or carers' (Australian Institute of Health and Welfare 2020. Child Protection Australia 2018–19. Child welfare series no. 72. Cat. no. CWS 74. Canberra: AIHW). We use the term OOHC to encompass a variety of alternative accommodation arrangements currently including foster care, kinship care, residential and group homes largely run by the private and not-for-profit sector, independent living arrangements, and other forms of placement. Historically the term covers institutional Care including orphanages and children's homes run by states, churches and other charitable bodies.
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## Notes on contributors

*Frank Golding* is an Honorary Research Fellow at Federation University Australia where he has just completed a PhD entitled *Care Leavers Recovering Voice and Agency through Counter-Narrative*, and a Life Member of CLAN, the national Care leaver advocacy body. A social historian, Frank has contributed to formal inquiries dealing with the institutionalisation of children and to projects with the National Museum, the National Library of Australia, and the National Summit on Rights in Records. He has written more than a dozen books, as well as book chapters and refereed journal articles and has presented papers on child welfare in the UK and several European countries.

*Sue McKemmish*, joining Monash in 1990, Sue McKemmish's research focused on Records Continuum theory and conceptual modelling, and recordkeeping metadata. Her Records Continuum theory-building and modelling work has continued throughout her career. More recently, she has focused on community-centred, participatory recordkeeping and archiving research relating to rights in records, complemented by ethics of care, in response to advocacy by those with lived experience of Out-of-Home Care, and First Nations peoples in Australia.

Developing inclusive, reflexive research design and practice in partnership with communities has been a critical to part of this research.

*Barbara Reed* is currently working as a part time Research Fellow on the Rights in Records projects of Monash University. As an independent archives and records consultant she has worked with a range of government, non-government, private and non-profit organisations, in Australia and internationally. Much of her work has been focused on developing recordkeeping practices and competencies, transforming recordkeeping into digital practice, and working with a range of stakeholders to create strategic interventions through standards and best practice guidelines. She has taught archives and records subjects at a number of Australian Universities.

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## Appendices

### Appendix 1. A Charter of Rights to Childhood Records



(Revised 19 October 2020)

CLAN's Charter is consistent with the four Framing Rights of the proposed National Charter of Lifelong Rights

- - Participation
- - Memory
- - Identity and
- - Accountability

The Charter is an ethical extension of the rights of the child to the adult the child has become, and a response to the current needs of people who were institutionalised as children. Rights are warranted on the contemporary rationale for retaining historic personal records in archives, namely to help the person the record is about to exercise their right to:

- Make meaning of the circumstances of their childhood
- Connect, if still possible, with family and community
- Seek redress and other remedial action for abuse or neglect and
- Regain control over the records made about them in their childhood.

The CLAN Charter includes 10 rights grouped under three headings:

- - Participatory rights
- - Access and disclosure rights and
- - Privacy and safe recordkeeping rights.

### **Participatory Rights in Recordkeeping**

#### **Right 1: The right to a comprehensive and authentic record**

- Personal records should have contained key documents including—but not limited to—the person’s birth certificate, the names and last-known addresses of members of the person’s family, any court orders or documents related to the reasons for the person’s placement, all medical and educational histories, the names of all people who visited the child during their time in custody, all documents related to transfers to other institutions including foster families and reports of all incidents, responses and decisions affecting child safety and wellbeing. Where there are gaps in the record, the agency has a duty to try to rectify the situation.

#### **Right 2: The right to additional support where historic records have been lost, are incomplete, or inadequate.**

- Archivists and other support personnel have a duty to search for and identify other archived records that may be relevant to the person’s childhood experience to assist in providing a more complete narrative.

#### **Right 3: The right to contribute to the record**

- Children placed in the custody of institutions and agencies should have been informed of their right to contribute to their record, and to be helped to create a personal collection of items such as relevant photographs of people, events and places that were central to their time in ‘care’. This right was usually not respected.

#### **Right 4: The right to challenge, correct or complete childhood records**

- When a record is incomplete, inaccurate or misleading, contains gratuitous personal judgments or opinions and uses language that is offensive, the person the record is about has the right to challenge, amend, add to, or complete the record, and archivists and records holders should inform them of this right and encourage and support them to exercise this right.

#### **Right 5: The right to control the use of personal records**

- Given that historical childhood records were made without the consent and knowledge of children in ‘care’, the person the record is about has the right to refuse to have those records released to others if there is a credible fear that doing so will compromise their human rights or those of others.
- The person the record is about has the right to make their wishes known as to intergenerational access to their records. This right should be respected but should not nullify the competing right of others with a valid claim to access the record into the future.

### **Agency in Access and Disclosure**

#### **Right 6: The right to know what records have been made and archived.**

- Agencies holding records should be proactive in disclosing what records they hold.

#### **Right 7: The right to full access**

- Full access must be given unless contrary to law. Where a record is withheld or redacted, the decision-maker should give specific explanations and the person requesting the record has the right to appeal such decisions.

- No request for records should be influenced by consideration of any real or perceived conflict of interest or administrative difficulties.
- Originals of personal documents such as family letters and photographs should be provided to the person, and copies kept in archival collections.

**Right 8: The right to timely access through informal or administrative processes.**

- Archivists, record-holders and support workers must expedite all requests for access to personal records using the maximum flexibility available under the law. Special consideration should be given to the frail, elderly, and those involved in litigation or redress claims.
- Legacy systems that operate with inefficient and outmoded finding, indexing, digitising, and cross-referencing tools should be resourced to remedy their deficiencies.

**Right 9: The right to support in accessing, interpreting and understanding personal records**

- Persons seeking personal records should be assisted to interpret the record with issues like historical context and unfamiliar or technical terminology.
- Persons seeking personal records have the right to request and be provided with a records advocate or other expert in locating, understanding and challenging records

**Privacy and Safe Recordkeeping Rights**

**Right 10: The right to privacy and to safe and secure storage and handling of personal records**

- Personal records should only be used for the purposes set out in the Framing Rights (above) except where the subject of the records gives their informed consent for other uses.
- Persons seeking personal records have the right to a safe, secure, and trusted infrastructure for managing, preserving, certifying, and transmitting their records
- No records should be destroyed or otherwise disposed of except in accordance with the law.

## Appendix 2. Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-Home Care



### Exposure Draft 22042021

Specification of Framing Rights and Rights in Recordkeeping and Archives in Charter of Lifelong Rights in Recordkeeping in Out of Home Care

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**Framing Rights:** Human Rights, Self-determination and Archival Autonomy

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Participatory Rights	<p>Individual right to</p> <ul style="list-style-type: none"> <li>● participate in decision making/have a voice in all matters that impact you</li> </ul> <p>Collective right to</p> <ul style="list-style-type: none"> <li>● participate in developing frameworks, legislation, policies and processes that impact the collective</li> </ul>
Memory Rights	<p>Individual and collective memory rights<sup>1</sup> to:</p> <ul style="list-style-type: none"> <li>● remember/forget</li> <li>● be remembered/be forgotten</li> </ul>
Identity Rights	<p>Individual and collective rights to:</p> <ul style="list-style-type: none"> <li>● cultural, family and self-identity</li> <li>● know who you are, where you belong</li> <li>● practice your culture</li> <li>● have one's cultural or community recordkeeping practices recognised in legal, bureaucratic and other processes that involve records creation</li> <li>● have one's self-identity acknowledged in records about oneself, including, but not limited to name, gender, and ethnicity.<sup>2</sup></li> </ul>

(Continued)

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<sup>1</sup>Implementing this right involves the development of principles and protocols that address issues relating to:

- the right to be forgotten by others as far as it affects accountability or the rights of others in the short or long term
- balancing the right of the individual to forget and the rights of others to remember/be remembered
- the need to ensure transparency relating to participative appraisal decision making involving a range of individual and collective stakeholders, while acknowledging the rights of and individual in their personal record
- ensuring the individual has access to expert advice on the potential consequences of destroying a record, e.g. redress schemes are often launched many decades after abuse occurs, so decisions made by an individual to destroy a record at the time of the abuse may affect rights of redress in years to come.

<sup>2</sup>As a result of the findings of a comparative research study and mappings of the *Charter* and the *Refugee Rights Framework* developed by Professor Anne Gilliland and Dr Kathy Carbone, rights relating to recognition of cultural and community recordkeeping practices, and acknowledgement of self-identity in records have been included in the AJ Gilliland and K. Carbone, 'An analysis of warrant for rights in records for refugees', *International Journal of Human Rights*, vol. 4, no. 4, 2020, pp. 483–508.



(Continued).

Accountability Rights	<p>Individual and collective right to:</p> <ul style="list-style-type: none"> <li>• hold society, governments and service providers to account for actions that impact on you as an individual or community</li> <li>• governance frameworks and accountable systems that support transparent decision making based on accurate, complete and reliable evidence</li> </ul>
Recordkeeping and Archival Autonomy/ Sovereignty as a Human Right	<p>Individual and collective Right to Autonomy<sup>3</sup> in relation to Recordkeeping and Archives that concern you or may impact you individually or as part of a collective</p> <p>Truth-Telling and Speaking Back Rights</p> <p>To actualise these rights would need supporting rights:</p> <ul style="list-style-type: none"> <li>• Disclosure rights relating to institutional recordkeeping and archives that concern you or may impact you individually or as part of a collective</li> <li>• Rights to repatriation of records from organisations and institutions—collective and individual rights</li> <li>• Right to have records held in trust by archival institutions in accordance with your terms and conditions</li> <li>• Rights to have links between your records and records about you held elsewhere</li> <li>• Right to have records held in trust by archival institutions in accordance with your terms and conditions</li> <li>• Collective right to share in allocation of national and state archival resources</li> </ul>
<p><b>Recordkeeping and Archives Rights:</b> Rights in institutional Recordkeeping and Archives in any form, media or format which relates to you or may affect you individually or as part of a collective</p>	
Participatory Rights and Records Creation Rights	<p>Rights to participate in decision-making about:</p> <ul style="list-style-type: none"> <li>• Setting recordkeeping and archival frameworks (metadata, classification, categorisation, description), making policies (appraisal, access, disclosure, keeping places), decision making about legal and administrative processes (NOTE: a collective right for community member organisations)</li> <li>• Deciding how your records are used and who has access to your records</li> <li>• Determining how long to keep records, and in what form</li> <li>• Deciding to delete records about you</li> </ul> <p>Records creation rights<sup>4</sup> to:</p> <ul style="list-style-type: none"> <li>• Participate in decisions about what types of records should be created about you in organisational record-keeping systems</li> <li>• create your own personal records in organisational settings</li> <li>• Intervene in/challenge the record (truth telling/right of reply)</li> <li>• refuse to participate in the creation of a record about you if there is a credible fear that doing so will compromise one's human rights or those of others.<sup>5</sup></li> </ul>

(Continued)

<sup>3</sup>Defined as the ability for individuals and communities to participate in societal memory, to find their own voice, and to become participatory agents in recordkeeping and archiving for identity, memory and accountability purposes: J Evans, S McKemish, E Daniels and G McCarthy, 'Self-determination and Archival Autonomy: Advocating Activism', *Archival Science*, vol. 15, no. 4, 2015, p. 337

<sup>4</sup>As a result of the findings of a comparative research study and mappings of the *Charter and the Care Leavers Australasia Network (CLAN) Rights Charter (revised 2020)* Records Creation Rights have been included in the Charter

<sup>5</sup>Examples will be provided in the Implementation Kit for the Charter currently under development. It will be essential for expert advice to be available to anyone wishing to refuse to participate given the potential unforeseen risk of harm, e.g. because evidence not available for redress.

(Continued).

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Rights in Disclosure, Access and Records Expertise in  
Records and Archives

Disclosure rights relating to:

- Knowing and being informed of where your records are held, including restricted files
- Being informed about the type(s) of records held about you;
- Being informed of when and why others are given access to your records;
- Knowing when and why records about you are destroyed.

Access rights<sup>6</sup> relating to:

- Lifelong access to your records
- Receive copies, timely and low-cost access
- Special accelerated access where circumstances require it
- Having a say in intergenerational access
- Consenting to access and use of your records by others

Rights regarding records expertise<sup>7</sup>:

- The right to be provided, and at no cost, with the index terms or other metadata necessary for locating and retrieving records about oneself
- The right to request and be provided with a records advocate or other expert in locating, introducing and challenging records
- The right to have a records expert testify regarding the historical and bureaucratic circumstances surrounding the creation, management, reproduction, translation and reliability of records about oneself

Privacy and Safe Recordkeeping Rights

Privacy Rights

- Individual and collective privacy as understood in your culture and worldviews
- Not to have your records used for other than their original agreed purpose without consent

Safe Recordkeeping Rights

- Safe and secure recordkeeping infrastructure, processes and systems
  - Safe and secure keeping places for records
  - Accountable recordkeeping systems that provide accurate, complete and reliable evidence of actions that impact on you as an individual or community
- 

<sup>6</sup>Note: implementing access rights may involve balancing competing rights in a participatory process.

<sup>7</sup>As a result of the findings of a comparative research study and mappings of the Charter and the *Refugee Rights Framework*, rights regarding records expertise have been included in the Charter.