



LITERATURE REVIEW

Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care

Monash University
Centre for Organisational and Social Informatics

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Rights in Records by Design

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Acknowledgement

Each 'care' experience is unique, and none trivial.

This document would not be credible without the insights of Care Leavers and care-involved individuals who have shared their personal stories.

In their recording, these testimonies keen and amplify.

To those whose voices have not been heard:

We pay equal respect to the experience of all who choose not to share their stories, who do not have the words or opportunity, or who did not survive to convey them.

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1.1 Introduction

The *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care* is a rights-based instrument to support information equity, agency, safety and justice for care-involved children and young people (defined as children and young people who are drawn into the remit of child protection systems resulting in removal from their immediate family), as well as Care Leavers of all ages (defined as any individual who has experienced, and exited, the contemporary out-of-home care system or any of its historical forms and institutions). It is intended to function as a mechanism in rebalancing power asymmetries expressed through recordkeeping systems; to instigate lifelong protections against damaging or discriminatory consequences of care-related recordkeeping; and to generate support for the genuine involvement of individuals and families in decision-making and documentation processes that impact their lives.

Care Leavers have specifically identified recordkeeping as one of the instruments through which institutions are able to wield power and withhold agency prior to, during, and after a child's placement in care (Wilson and Golding 2016; CLAN 2016), and recourse to rights based frameworks as a means to redress and reform is increasingly positioned as part of the activism and advocacy toolkit for care-experienced communities¹. In alliance with these objectives, this literature review brings together a knowledge base and source of warrant² for the *Charter of Lifelong Rights in Childhood Recordkeeping (OOHC)*. A discussion version of the Charter has been developed as a key outcome of the *Rights in Records by Design* research project, a joint enterprise between Monash University and Federation University Australia, funded under the Australian Research Council Discovery Grants Scheme³.

The need for systems that protect the rights of care-involved children, and corresponding tools to assist in preventing and ameliorating acute and chronic damages resulting from out-of-home care experience, is borne out by the sheer numbers of individuals affected. Over 45 000 Australian children were recorded as being in out-of-home care during 2017-18⁴. The total number of living Australians who have experienced out-of-home care during their youth or early childhood is undocumented. In addition to those who are in care at any given time this figure would include all living persons who have left or transitioned out of Care: recent generations of Care Leavers; individuals removed from family as part of the Stolen Generation (estimated by the *Bringing Them Home* report as potentially being as high as one in three Aboriginal children in the years between

¹ Examples include Care Leavers Australasia Network's *Charter of Rights in Recordkeeping*; and awareness and capacity building resources such as *Planet Right* and *Getting it Right*, developed by CREATE Foundation in collaboration with care-experienced young people.

² Warrant as used here is a modified form of Hulme's "literary warrant", a principle deriving from Library and Information Sciences whereby subject classification schema derive from occurrence (and frequency of use) of terms in existing literature. Literary warrant has been critiqued as perpetuating structural bias: authoritative literature and accompanying lexicon are historically created from positions of power; and so drawing on this discourse for the validation of terms further entrenches particular ideological dominances at the expense of other worldviews. Our project acknowledges and seeks to mitigate this methodological weakness by overtly expanding the domain of literary warrant to privilege sources of lived experience. It does not adhere to a 'traditional' form of literary warrant insofar as we seek requisite warrant for the proposed rights in community testimony. Testimonial warrant is supplemented by (and sometimes exists within) more usual forms of literary warrant: government reports, policy documents, and research publications.

³ Australian Research Council (ARC) Discovery Grant DP170100198.

⁴ Australian Institute of Health and Welfare, Child Protection Collection 2018, Table S64.

1910 and 1970)⁵; and the survivors of approximately 500 000 non-Indigenous children (later termed the Forgotten Australians and Lost Innocents)⁶ who were placed into institutional care over a similar period.

The term out-of-home care encompasses a variety of alternative accommodation arrangements for children and young people who are deemed unable to live with their parents due to a range of circumstances. Such arrangements include foster care, kinship care, residential and group homes, independent living arrangements, and other forms of placement (Bromfield et. al. 2005; SCARC 2005). Expanding into the historical context, out-of-home care also covers institutional care arrangements, including orphanages and children’s homes of the twentieth century. The Charter’s use of the term *out-of-home care* is intended to encompass both contemporary and legacy contexts. In doing so, we openly acknowledge that this term does not reflect the personal experience or preferred terminology of all persons with lived ‘Care’ experience. It is used as an imperfect descriptor in the absence of an alternative term to capture a set of rights extending to childhood circumstances which may be immediate or historical in nature.

Care-experienced communities’ records needs are complex and differ from those who have not experienced care for several key reasons. On a practical level, these needs include overcoming care-related barriers to obtaining or providing basic proof of identity documents necessary for civic participation – such as a Medicare card or passport⁷; as well as developing tactics to combat information asymmetries reflected through the disproportionate collection, scrutiny, and sharing of information. Mendes and Purtell (2017) speculate on the impact of these asymmetries in cases where child protection practitioners “have formal or informal access to care leaver’s personal records and health information in making assessments about their parenting abilities”, and whether this means that young parents in care or post-care are subject to greater levels of ‘supervision’ by authorities. Davis (2019) cites testimony from midwives, case workers, and young mothers with a care-experience of their own variously reporting experiences of confusion, frustration, disempowerment and trauma associated with removal of newborn infants based on parental histories rather than new protection reports. Similarly, a compounding record of ‘troublemaking’ can have serious and lifelong implications where criminal sanctions are incurred for behavioural issues that would not be criminalised in a different home context, such as smashing a mug, or throwing a sink plug (VLA 2016). The 2016 Victorian Legal Aid report *Care Not Custody* makes clear the escalation of police interventions for children in residential out-of-home care, demonstrating that “frequently children who may never have had a criminal charge prior to entering care, quickly accrue a lengthy criminal history due to a cycle of ‘acting out’ followed by police responses which develops in a residential unit” (ibid, p1).

As well, access to family memory⁸ and generational recordkeeping supported through largely unbroken family relationships and networks is compromised for children in care, and heavily reliant

⁵ On estimating the numbers of Stolen Generation children: *Bringing them Home* (HREOC 1997, pp 30-31).

⁶ These terms, as well as the figure attached, derive from two eponymous Australian Senate Inquiries regarding twentieth century child migration (*Lost Innocents*, SCARC 2001) and institutional ‘care’ (*Forgotten Australians*, SCARC 2004).

⁷ For specific examples, see findings and testimony under the heading *Documentation and identification* in the report of the Australian Senate Inquiry into Out-of-home care (SCARC 2015, pp 94-96).

⁸ Family memory is affected in immediate as well as generational proximities. Family history, and a clear sense of genealogical identity may be rendered inaccessible; so too are the relational and collaborative experience of

on the organisational recordkeeping of those providing care (Anderson, 2019). A core problem faced by Care Leavers is that such recordkeeping is composed primarily to meet the needs of the organisations administering care (O'Neill, Selakovic and Tropea 2012; Swain and Musgrove 2012) – although, paradoxically, not necessarily to meet the needs of workers within those organisations. Recordkeeping systems fail social workers⁹ as well as children, families, and carers¹⁰. Submissions to the 2008 Wood inquiry into Child Protection Services in NSW drew attention to the fact that the electronic case management system available to departmental case workers was rigid in application and did not support reflexive practice (Wood 2008, p28)¹¹. The *Better Systems, Better Chances* literature review is critical of systems that are disproportionately structured around organisational needs and priorities, finding that effective systems are instead “designed around the factors that promote the wellbeing of children and reflect the ways families work. They leverage trusted universal service platforms to promote the factors known to be important for child development and they respond early to emerging problems” (Fox et. al. 2015, p8).

More often, on the evidence of inquiry findings, recordkeeping systems are meeting neither organisational nor human needs. As one example, Ombudsman Victoria's 2009 *Own motion investigation into the Department of Human Services Child Protection Program* identified a raft of issues relating to the design, rollout, and functionality of the Department's newly implemented child protection information system, CRIS (Client Relationship Information System); ultimately finding that “the introduction of CRIS has not only failed to provide the child protection system with a more effective tool than its predecessor, it has also impaired the department's efficiency without providing adequate functionality” (Ombudsman Victoria 2009, p11).

Understanding the formal and cultural ways in which care records are constructed (and why), and appreciation of how these combined factors shape their long-term impact on human lives, is a crucial element in programs seeking to enact or ensure information justice (Hoyle et. al. 2018). If the purpose of recordkeeping in out-of-home care is situated primarily as an administrative necessity, there is a very real danger of neglecting recordkeeping's relational function in serving the identity

creating family stories, shared memories, idiosyncratic traditions, and a sense of belonging as part of developmental processes in which the child is situated as an active part of the family.

⁹ The Victorian Commission for Children and Young People notes: “Reforms which prioritise record keeping to demonstrate compliance have been found in the United Kingdom to contribute to workers' inability to prioritise spending time with children and young people. When interviewed by the Commission, both Child Protection and funded agency workers raised concerns about the amount of time taken up by administration and court. Workers reported that this impacted on their ability to do 'proper work' with children in out-of-home care” (CCYP VIC 2019b, p257). As one agency staff member explained to the Commission: “Well over 50 per cent of workers' time is spent on admin. And the pressure on those case managers... the case managers for the agency working on the ground are so admin heavy and then Child Protection ring them and ask why they haven't seen this kid for two weeks. It's the same on the agency side. I was just having a conversation this morning with a senior manager from an agency that the case managers are just feeling it so much in relation to documentation and admin 'cos then we are expecting them to go out and build rapport and engagement with these kids” (ibid, p258).

¹⁰ In evidence to the Mullighan inquiry, foster parents of a child with disability testified: “Nobody told us she had sexual problems. Nobody told us she was depressed. Nobody told us she couldn't use a knife or fork. Nobody told us she couldn't cross the road ... They didn't even know her background. We never ever had a case plan. To this day, we've never had a case plan or anything.” (Mullighan 2004, p404).

¹¹ This is not an isolated instance – there is repeated evidence from case workers that forms and data systems used to record information about children in care hinder the effective conduct of their role. In addition to the Wood inquiry see, inter alia, statements made to the investigation into compliance with the Aboriginal Child Placement Principle in Victoria (CCYP VIC 2015) and the NSW *Family is Culture* review (Davis 2019).

and development of the child and the formation of social bonds. Even where policy directives prescribe record creation overtly directed at meeting personal identity needs of the child (usually in the form of life history or life story books)¹² this is generally still framed by an assumption that the affective functions of recordkeeping can be neatly compartmentalised into a specific record type, and does not shift the way recordkeeping itself is constructed. The illogic of using flawed recordkeeping models as the basis for effecting change has been pointed out in a number of formal submissions responding to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Records and recordkeeping practices¹³.

Out-of-home care should be a place of safety¹⁴ and an option of last resort¹⁵. Too often, as numerous inquiries attest, this is not the case. It is a deep failure to protect children when the experience and continuing effects of out-of-home care bring additional trauma to already disrupted lives¹⁶. Trauma may be compounded by continuation of violence in new settings¹⁷, or exacerbated by a continual state of uncertainty and unknowing¹⁸. In this context, recordkeeping – something that is often dismissed as mundane, benign, or a purely administrative facet of care – becomes a product of significant psychosocial import: a “weapon of affect” with demonstrated capacity to generate trauma during care and throughout a lifetime (Wilson and Golding 2015; Rolan et. al. 2018). Where official records hold, or are perceived to hold, information that remains inaccessible to the people most affected by events and decisions those records document and inform, recordkeeping systems are further distancing vulnerable individuals from the exercise of power over their lives. A framework which explicitly identifies recordkeeping rights; and which clearly positions the reach of these rights as including but also extending beyond administrative domains, is one mechanism

¹² For example, the Australian National Standards for OOHC require that “Children ... have their life history recorded as they grow up” (Standard 10). The glossary to the Standards elaborates: “a life history (sometimes called a life story book) is a record of their life in words, pictures, photos and documents. Material used for a Life History record depends on a number of factors, including the child or young person’s wishes and if information is available. The way a child or young person’s history is recorded may vary because of their age and preferences and could be in the form of a scrapbook, photo album, treasure box, video or a computer-designed report” (Commonwealth of Australia 2011, p25). The value of life history/life story records is not in dispute; our concern is that here, as in other instances, focus remains on content of the record to the exclusion of relationships that animate it.

¹³ See, for example, Submissions 8, 18, 33, 36. These and other public submissions to the Commission are available online via <https://www.childabuseroyalcommission.gov.au/consultation-papers> (accessed 20 November 2019).

¹⁴ Principles 5, 6 and 12, United Nations *Guidelines for the Alternative Care of Children*.

¹⁵ Principle 14, United Nations *Guidelines for the Alternative Care of Children*.

¹⁶ In testimony to the 2015 Senate Inquiry into OOHC, Australian Children’s Commissioner Megan Mitchell explained: “The issue for the child protection system is that we have a piece of legislation that we have to abide by. That means removing children from unsafe situations. But that is not all about a child’s wellbeing. In fact that act in itself can cause trauma and distress, depending on the child’s circumstances and age. So there is a larger piece of work here to think about: what is the best long-term outcome from this for this child. We should be thinking about that right from the beginning, not delay and delay and delay that holistic thinking about a child’s needs.” Committee Hansard, 18 February 2015, pp 4–5; cited p74 of final report (SCARC 2015).

¹⁷ “If someone’s being taken out of someone’s care because there’s been violence, you don’t put them somewhere where there’s more violence – it causes more trauma.” Evelina, residential care, age 17; quoted in CCYP VIC 2019b, p28.

¹⁸ “It unsettled me more and more each time I moved.” Lead tenant, age 17; quoted in CCYP VIC 2019b, p136.

whereby damaging potentials of recordkeeping can be mitigated, and avenues for personal agency realised. As Carr and Pinkerton explain:

It is necessary to move beyond thinking about being in care as a discrete period in a young person’s life to be managed by social services staff with the aim of achieving a set of predetermined normative outcomes ... in-care experience needs to be thought of as part of an individually ‘lived life’ in a way that connects it to pre-care and after-care experiences and to a range of emotions and relationships past, present and future. (Carr and Pinkerton 2015).

The *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care* proposes Accountability Rights, Memory Rights, Identity Rights, and Participatory Rights as fundamental to the lifelong needs of children and young people who experience out-of-home care. The research also contends that recordkeeping rights, as a distinct category, are critical to enabling these framing rights. Specific classes of recordkeeping rights are identified in the Charter as: Participatory Recordkeeping rights¹⁹, Access and Disclosure rights (including the right to proactive disclosure), and rights to Privacy and Safe Recordkeeping. So, for example, recordkeeping participation rights extend the child’s right to be heard²⁰ into the right to share in how that voice is documented as a matter of record. This protects broader Participatory and Accountability Rights by ensuring that a child’s worldview of and on events, actions and decisions affecting their care trajectory (and, by extension, lifelong experience) are maintained alongside evidence, deliberations and judgements representing the views of adult and institutional actors.

A graphic representation of the Charter is shown below (Figure 1), and full page at Appendix 1.

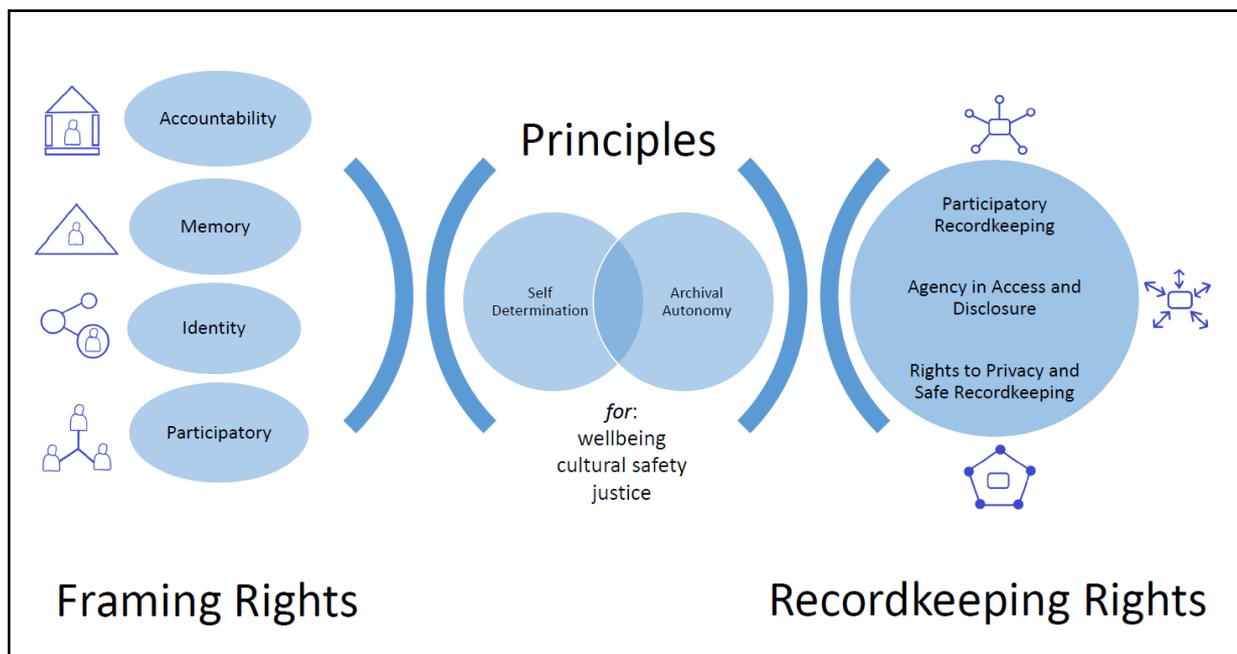


Figure 1: graphic representation of the Charter of Lifelong Rights in Childhood Recordkeeping (OOHC)

¹⁹ The Charter positions participatory rights as operating at different scales: as a broad framing right; and also with effect as a specific category of recordkeeping rights.

²⁰ Guaranteed by existing rights instruments including the UN *Convention on the Rights of the Child* (Article 12).

1.2 Scope of review

The domains of both recordkeeping rights and children's rights²¹ are much broader than out-of-home care experience, and care experience intersects with numerous other factors that affect the provision of rights. While acknowledging this context, the scope of this review is primarily focused on identifying literature of specific import to the recordkeeping rights of children experiencing out-of-home care, and their continuing rights on exiting care and through adulthood. As well, it largely – although not exclusively – focuses on the Australian context. Within that purview, the review pays particular attention to resources that:

- consider how the rights agenda intersects with recordkeeping;
- conceptualise or formalise the construct of recordkeeping rights;
- contest, explore, or expand common understandings of key terms; and
- provide evidentiary warrant for specific rights articulated in the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*.

We have deliberately prioritised inclusion of resources authored by, or sharing consenting testimony from, persons with lived experience of out-of-home care. Care-experienced individuals can speak with direct authority on the ways in which recordkeeping affects the exercise of their rights leading up to, during, and after care. This is critical for understanding the continuing implications of out-of-home care recordkeeping on wellbeing and life outcomes.

We have deliberately prioritised inclusion of resources produced by Indigenous organisations and authors as being the best expressions of knowledge regarding the rights and care experiences of Aboriginal and Torres Strait Islander children. These are critical sources for acknowledging structural failures to respect or uphold rights as contributing factors in the overrepresentation of Indigenous children entering into child protection and youth justice systems. As a benchmark in this respect, we draw particular attention to the 2019 *Family is Culture* review of the Indigenous child protection system in NSW²².

Complementary to the rights-based remit, and as a key testimonial source, the literature review incorporates findings of numerous Australian inquiry reports released over the past twenty-five years which focus on, or have major intersections with, out-of-home care. This bracket commences with the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report in 1997. Earlier inquiries of relevance are not considered here, but can be located through information platforms such as the *Find & Connect web resource*²³. Also beyond our scope are international inquiries; for discovery of post-1990 'care' inquiries in a global context, readers may find it useful to consult *The Age of Inquiry: a global mapping of institutional abuse inquiries*²⁴.

Warrant for the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care* deriving from lived experience testimony presented to these inquiries forms a large part of the basis for Section 2 of this review. Testimonial warrant for each of the rights expressed in the *Charter* is

²¹ There is a wealth of literature available on children's rights. For a recent sample of work in relation to monitoring and implementation of such rights, and how to make rights 'real' in children's lives, see the *International Journal of Human Rights* Special Issue (2019, volume 23:3).

²² Davis, M. (2019) *Family is Culture: Independent review into Aboriginal out-of-home care in NSW*.

²³ www.findandconnect.gov.au (accessed 7 November 2019).

²⁴ www.lib.latrobe.edu.au/research/ageofinquiry/index.html (accessed 7 November 2019).

provided from both historic and contemporary perspectives of care. As well, Section 2 documents how instrumental warrant for the *Charter* is conveyed through Conventions, Charters, Standards, and Recommendations produced by inquiry bodies, government agencies, and the UN.

In addition to formal inquiries, sources that have been consulted in compiling this review include advocacy reports; research publications; legislation and legislative review; and high-level policy frameworks and practice standards, including the Australian Commonwealth government's *National Framework for Protecting Australia's Children 2009–2020*; associated *National Standards for out-of-home care*; and Department of Social Services *Access to Records by Forgotten Australians and Former Child Migrants: Access Principles for Records Holders and Best Practice Guidelines*. As well, we have looked at Australian State- and Territory- based Charters of Rights for children and young people in out-of-home care; and at Codes of Conduct across a number professions where the views, participation, and rights of children are paramount.

We have deliberately chosen to omit the large volume of grey literature extant in the form of OOHC service provider guides and departmental practice manuals. Placing these practice documents outside the scope of the review should not be taken as minimising the role they play in the provision of care, and how it is experienced by children and young people. Rather, this decision has been made on the basis that the testimonial warrant of these documents is, overall, not as strongly pronounced as for other sources (an observation of itself worthy of deeper consideration). And, analysis of such practice guides is to some extent incorporated within the remit of formal inquiry processes, outcomes of which are considered here. We are also of the opinion that, despite their internal references to human rights frameworks and jurisdictional out-of-home care Charters of Rights, Australian child protection practice guides lag best practice as it is recognised and described in research and inquiry recommendations and in the UN Guidelines for the Alternative Care of Children²⁵ (and related UN Guides for Practice). Recent inquiry findings confirm anecdotal advice that Departmental practice handbooks often serve in effect as sources of mandatory minimums required for compliance, rather than as avenues for guiding best practice (Ombudsman Victoria 2009; Davis 2019).

These views are borne out by looking briefly at the example of the Victorian Child Protection Manual: specifically the directives for case recording, including a sub-section on 'considerations for good practice'; last updated in September 2018²⁶. Despite substantial published evidence of negative consequences attendant on children and young people not being involved in decision making about their lives in care, and repeated formal recommendations arising from inquiries in all jurisdictions of Australia to support such participation in decision making; this document supplies no guidance for – or even suggestion of – children or young people being directly involved in contributing to how their views and participation are represented on record. We are not alone in recognising this anomaly. The recent Victorian report *Lost, not forgotten: Inquiry into children who died by suicide and were known to Child Protection* recommends:

That the Department of Health and Human Services review and revise all foundational practice guidance, training and tools to embed children's participation in decision making during the investigation, protective intervention and protection order phases of Child Protection intervention. (CCYP VIC 2019a, Recommendation 3).

²⁵ UN General Assembly (2010) *Guidelines for the Alternative Care of Children*, Resolution adopted by the General Assembly: A/RES/64/142.

²⁶ <https://www.cpmanual.vic.gov.au/our-approach/roles-and-responsibilities/case-recording> (accessed 19 November 2019); identified online as Document ID number 3203, version 5, 27 September 2018.

1.3 Wider context

No survey of the literature in relation to child protection and out-of-home care can hope to be entirely comprehensive, as evidenced by the number of recent literature reviews addressing specific aspects of out-of-home care. These include:

- Office of the Guardian for Children and Young People (2013) *Literature Review: The impact and experience of moving while in care*
- Kelly et. al. (2014) *A Review of Literature on Disabled Care Leavers and Care Leavers with Mental Health Needs*
- Bullen et. al. (2015) *Literature review on supervised contact between children in out-of-home care and their parents*
- Fox et. al. (2015) *Better systems, better chances: A review of research and practice for prevention and early intervention*
- Albers et. al. (2017) *Out-of-Home Care: An Evidence and Gap Map*
- Department of Health and Human Services (2017) *Missing from care: a literature review*
- Godar and Holmes (2017) *Child protection: A review of the literature on current systems and practice*
- Walsh et. al. (2018) *Literature Review: Factors Influencing the Outcomes of Children and Young People in Out-of-Home Care*
- Kalinin, Gilroy and Pinckham (2018) *The Needs of Carers of Aboriginal and Torres Strait Islander Children and Young People in Foster Care in Australia: A Systematic Literature Review*
- Seth-Purdie (2019) *Review of Best Practice in Residential Out of Home Care*

Examples of literature surveys that attempt more blanket coverage also exist, including: Bromfield et. al. (2005) *Out-of-Home Care in Australia: Messages from Research*; Higgins et. al. (2005) *National Audit of Australian Child Protection Research 1995-2004*; and McDonald et. al. (2011) *Protecting Australia's Children Research Audit (1995-2010)* and *Protecting Australia's Children: Research and Evaluation Register (1995-2010)*. However, the expanding volume of research projects and publications concerned with out-of-home care, while a positive signifier of increased attention toward the rights of these children, makes a wide lens approach increasingly unfeasible. Illustrating this, the third dedicated audit of Australian child protection research (an initiative of the Commonwealth government) identifies that the number of Australian research projects focused on child protection increased by more than 77% in the five years from 2011 to 2015 compared with the previous five-year period²⁷. Examination of entries in the audit register suggests that while a rights agenda in itself is only infrequently a focal point of research, the use of frameworks in which children's rights are recognised and respected does inform the methods and terms of reference of many of these studies²⁸. Here, as in other domains, human rights play a significant role for offering common language and sets of normative criteria across an area of great complexity.

²⁷ *Protecting Australia's Children: Research and Evaluation Audit (2011-2015) – Overview of findings* <https://aifs.gov.au/cfca/protecting-australias-children-research-and-evaluation-register-2011-2015-overview-findings> (accessed 31 October 2019).

²⁸ A searchable database to the *Protecting Australia's Children: Research and Evaluation Register, 2011-2015* is available online at: <https://aifs.gov.au/cfca/pacra/discover> (accessed 27 February 2020).

Statutory reviews and government inquiries into child welfare, child protection, and the out-of-home care system proliferate. Among key Australian reports of the past two decades are:

- Forde, L. (1999) *Commission of Inquiry into Abuse of Children in Queensland Institutions*
- Senate Community Affairs Reference Committee (2001) *Lost Innocents: Righting the Record – Report on Child Migration*
- NSW Legislative Council Standing Committee on Social Issues (2002) *Care and Support: Final Report on Child Protection Services*
- Layton, R. for the Government of South Australia (2003) *Our best investment: A state plan to protect and advance the interests of children*
- Crime and Misconduct Commission, QLD (2003), *Protecting children: an inquiry into abuse of children in foster care*
- Mullighan, E.P. for the Government of South Australia (2004) *Children in State Care Commission of Inquiry – Allegations of Sexual Abuse and Death from Criminal Conduct*
- Vardon, C. for the ACT Commissioner for Public Administration (2004) *The Territory as parent: review of the safety of children in care in the ACT and of ACT child protection management*
- Senate Community Affairs Reference Committee (2004) *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*
- Senate Community Affairs Reference Committee (2005) *Protecting vulnerable children: A national challenge*
- Wood, J. (2008) *Report of the Special Commission of Inquiry into Child Protection Services in NSW*
- Senate Community Affairs Reference Committee (2009) *Lost Innocents and Forgotten Australians Revisited*
- Ombudsman Victoria (2009) *Own motion investigation into the Department of Human Services Child Protection Program*
- Cummins, P., Scott, D., and Scales, S. (2012) *Report of the Protecting Victoria’s Vulnerable Children Inquiry*
- Senate Community Affairs Reference Committee (2015) *Out of home care*
- Nyland, M. (2016) *The life they deserve: child protection systems Royal Commission report [SA]*
- Tune, D. (2016) *Independent Review of Out of Home Care in NSW*
- Commission for Children and Young People WA (2016) *Speaking Out About Raising Concerns in Care: The views of Western Australian children and young people with experience of out-of-home care*
- Commonwealth of Australia (2017a) *Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse*
- Commonwealth of Australia (2017b) *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*
- Commission for Children and Young People VIC (2019a) *Lost, not forgotten: Inquiry into children who died by suicide and were known to Child Protection*
- Commission for Children and Young People VIC (2019b) *‘In our own words’: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system*

There are many common threads running through these inquiries. The majority reference children’s rights in some way, and there is increasing focus on evidencing and improving the quality of

children's experience through participation. The benefits of participation may be difficult to quantify, however the risks of not involving children and young people in how care processes are decided and documented is clearly spotlighted by evidence. The *Lost, not forgotten* inquiry, in identifying a set of shared characteristics between those children who, despite repeated child protection reports, 'flew under the radar' prior to their deaths by suicide determined:

They were invisible in that there was little or no information recorded about these children, their perspectives or wishes by service providers. (CCYP VIC 2019a, p18).

Australia's record of inquiry reports, at state and national level, makes abundantly clear that out of home care is an intersectional issue. A key area of overlap is the juncture of child protection and youth justice systems, evidenced in a growing body of recent literature (VLA 2017; Schlumpp 2017; Commonwealth of Australia 2017b, Stewart 2019)²⁹. Many of these sources also address the vast overrepresentation of Indigenous children in both domains, and pay specific attention to the cultural and historical contexts that influence experiences of Australia's First Nations families in these encounters. Despite this attention, Albers et. al. identify the largest knowledge gap in out-of-home care research as being:

(T)he lack of studies examining interventions aiming to maintain and develop the cultural and spiritual identity of children and youth in OOHC. Given the overrepresentation of Aboriginal and Torres Strait Islander children in OOHC in Australia the lack of evidence on what works best and how Indigenous culture can be integrated into the design and delivery of services is concerning. (Albers et. al. 2017, p1).

This concern is echoed by the legal sector. The 2018 Australian Law Reform Commission *Pathways to Justice* Report into the incarceration rates for Indigenous Australians likewise draws attention to the need for sustained national attention:

Acknowledging the high rate of removal of Aboriginal and Torres Strait Islander children into out-of-home care and the recognised links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children. (ALRC 2018, Recommendation 15).

Within the scope of inquiries listed on the previous page, findings and recommendations specific to care experiences of Aboriginal and Torres Strait Islander children and communities are largely focused on cultural rights (encompassing cultural identity, cultural safety, and cultural connection) and the effects of intergenerational trauma³⁰. These do not stand as isolated issues, but impact on each other. Comparisons between the numbers and effects of Stolen Generation removals and the

²⁹ For example, in discussing the collection of personal stories, the Royal Commission into the Protection and Detention of Children in the Northern Territory final report notes: "of the 509 people who contributed to 386 personal stories, 218 spoke about detention and 445 spoke about care. Approximately 37% spoke on both issues" (Commonwealth of Australia 2017b, p88). For the period 2014-2016, Schlumpp (2017) puts the incidence of youth justice supervision amongst youth with care or protection involvement at 6.5%; but the incidence of concurrent care or protection experience among youth under some form of justice supervision as almost 40%.

³⁰ For a concise overview of the historical context relating to interactions between child welfare services and Aboriginal people in NSW from the late nineteenth century onward, see Davis 2019 (pp 3-8). For a longer treatment in relation to all Australian states and territories, see the *Bringing them Home* report (HREOC 1997).

contemporary removal of Aboriginal children by child welfare services are highlighted by many stakeholders, warning of the future toll on communities and individuals (Commonwealth of Australia 2017b; Lewis 2017; Davis 2019).

As well, investigations that focus exclusively on Australian Indigenous care experiences, include:

- Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*
- Gordon et.al. for the Government of Western Australia (2002) *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*
- Mullighan for the Government of South Australia (2008) *Children on APY Lands Commission of Inquiry*
- Commission for Children and Young People VIC (2015) *In The Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*
- Commission for Children and Young People VIC (2016) *Always Was Always Will Be Koori Children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*
- Koorie Youth Council (2018) *Ngaga Dji [Hear Me] - young voices creating change for justice*
- Australian Law Reform Commission (2018) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133)
- SNAICC (2016; 2017; 2018; 2019) *The Family Matters Report: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia*
- Davis, M. (2019) *Family is Culture: Independent review into Aboriginal out-of-home care in NSW*

To varying degrees, reports examining the experience of Indigenous Australians in contact with child protection system interrogate what enacting rights to culture can mean in terms of supporting not only children's individual rights, but also collective rights to Indigenous self-determination. Some, like the 2019 *Family Matters* Report, critique government interpretations of data collected on Aboriginal and Torres Strait Islander children, and overtly exercise Indigenous data sovereignty in making differing assessment of statistical sources (SNAICC 2019, p6)³¹. Other sources offer legal perspective on historical and contemporary constructs of Indigenous self-determination in the context of child welfare in Australia, and associated barriers to actualisation (see, for example, Libesman 2016).

Reviews and inquiries examining the situation of Indigenous children and young people in the Australian child protection and justice systems are unanimous in providing endorsement of cultural identity and cultural safety as necessary rights for the wellbeing of these individuals. Sadly, they also highlight continuing failures at practice level to realise protection of cultural rights provided for through instruments such as the Aboriginal Child Placement Principle (Libesman 2011; CCYP VIC 2015 and 2016; Davis 2019)³². As one participant in a focus group into cultural care observed: "They

³¹ On Australian Indigenous data sovereignty more broadly: Walter 2018; Kukutai and Taylor (Eds.) 2016.

³² Poor implementation of the ACPP was also specified by the UN Committee on Rights of the Child as being of particular concern for the rights of Aboriginal and Torres Strait Islander children in care. (United Nations

just want to put it in a box, put a boomerang on it and call it culture. Cultural care is more complex than this,” (cited in Libesman 2011, p11). Echoing comparable findings of a Victorian report produced four years earlier, Davis is unequivocal about the lack of cultural care and protection extant within the NSW child protection system: “It is very clear that the ACPP is not implemented” (Davis 2019, p xvi).

Change is possible to better uphold rights to cultural connection for Aboriginal children in care, and to do this in ways that build capacity for Indigenous self-determination. In Victoria, child protection legislation allows for the delegation of responsibility for Indigenous children in care to Aboriginal Community Controlled Organisations. Section 18 of the Children, Youth and Families Act (2005) enables the Secretary of the relevant Department to authorise the Aboriginal principal officer of an Aboriginal agency to undertake specified functions and powers in relation to a Children’s Court protection order for an Aboriginal child or young person. Operationalisation of Section 18 commenced in 2017 with a pilot program, Nugel, run by VACCA (Victorian Aboriginal Child Care Agency). Implementation of Aboriginal Guardianship under section 18 has since expanded to the Bendigo and District Aboriginal Co-operative, where the service is known as Mutjang Bupuwingarrak Mukman (Dja Dja Wurrung language translating to “keeping our kids safe”). Section 18 offers a key mechanism for supporting the principle of Aboriginal self-management and self-determination, although transition of appropriate resourcing alongside transfer of functions is an ongoing question.

The right to self-determination is not about the state working with our people, in partnership. It is about finding agreed ways that Aboriginal people and their communities can have control over their own lives and have a collective say in the future well being of their children and young people. (Davis, 2019)

Rights to autonomy and avenues for exercising personal control are also seen by care experienced individuals to be lacking from non-Indigenous experiences of out-of-home care, including in relation to recordkeeping and information sharing (Wilson and Golding 2016; CCYP VIC 2019b)³³. Obstructions to children and young people’s participation in care planning and documentation are acknowledged to be both localised and systemic in nature (Lewis 2017). There is no universal panacea: resolutions and actions toward breaking down these barriers need to be responsive to diverse and changing circumstances, which – for reasons variously ascribed to workloads, staff turnover, flawed technology and data protocol, and insufficient levels of cultural competency – are often not appropriately acknowledged or documented (Ombudsman Victoria 2009; Commonwealth of Australia 2017b).

In seeking to protect and uphold the rights of care-experienced individuals, it is necessary to recognise and take into consideration how intersectional factors and structural conditions may affect the experiences of children in care. Incidence and cause for high numbers of “crossover kids” moving into youth justice involvement from child protection systems, particularly residential care, is increasingly well articulated (VLA 2015; Ombudsman NSW 2019; Stewart 2019); so too are the complex structural and social interactions fusing a juncture between Indigeneity and out-of-home care (Commonwealth of Australia 2017b; Davis 2019). Studies centring the prevalence and dynamics of other factors influencing or affecting care experiences – and the exercise of children’s rights in

Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention, 28 August 2012; cited in CCYP VIC 2015, p40).

³³ For some useful framing on children’s right to autonomy see Freeman (1992) and Lowy (1992). On autonomy and human rights more broadly: Gumbis et. al. (2008).

such contexts – remain less well represented in the literature, in part due to the paucity of measures in place for recording many of these indicators (Nyland 2016). Areas where significant evidence gaps exist include:

- Patterns of intergenerational care experience³⁴
- Culturally and linguistically diverse (CALD)³⁵, migrant, and refugee³⁶ experiences
- Children and young people experiencing disability³⁷

³⁴ According to a briefing note published by the NSW Department of Family and Community Services (FACS 2017), almost one-third of children and young people involved with the NSW child protection system in 2014–15 had at least one parent who had either been reported to child protection or removed into OOHC when they were a child. The intergenerational link was strongest for children and young people in OOHC placements, with almost one-half having a parent who had either been reported or were in OOHC when they were a child. Similar figures emerge when examining data from the opposite direction. Looking at former clients of the child protection system (who were the subject of a report and/or were in OOHC during the period from 1 July 1987 to 30 June 1990), FACS found around 16% of children and young people who were reported during this time have a child who has since been reported to FACS or been in OOHC. Of those individuals who spent time living in OOHC as children, almost 30% have a child who is known to FACS. The role of structural and systemic drivers in perpetuating this pattern of intergenerational care-involvement is highlighted by the *Family is Culture* report, which calls for deletion of the provision in the NSW Care and Protection act whereby prior removal of a child to OOHC must be admitted in evidence and there considered prima facie evidence that the child or young person who is the subject of the care application is in need of care and protection, placing burden of proof on the parent to satisfy the court that circumstances leading to prior removal no longer exist (Davis 2019, Recommendation 48).

³⁵ The NSW longitudinal study *Pathways of Care* (Walsh et.al. 2018) reports 8.7% of children in the Wave 1 interview cohort were identified by caregivers as being culturally and linguistically diverse (this figure does not include Aboriginal and Torres Strait Islander children, who were reported separately as 36.5% of the cohort). In South Australia, a 2016 Royal Commission found insufficient data to confidently report the prevalence of childhood abuse and neglect in CALD communities. The Commission report noted that: “C3MS, Families SA’s electronic case management system, does include a CALD field for practitioners to complete at intake. However, it is not mandatory and even if a practitioner does complete it, they are not required to record any further information about the culture with which the child identifies, such as the child’s or parent’s birth country or the language spoken in the home” (Nyland 2016, p525). Similarly, in Victoria, the *Protecting Vulnerable Children* Inquiry noted a “lack of record-keeping and therefore available data on the cultural and religious background of children in the out-of-home care system” and the absence of any “policy or practice framework to facilitate the observation of cultural rights for culturally and linguistically diverse children and families within the system for protecting children” (Cummins et. al. 2012, p101). At a National level, Recommendation 2 of the 2015 Senate Inquiry into Out-of-home care (SCARC 2015) highlights the need for all jurisdictions to address data gaps relating to, inter alia, children and young people from culturally and linguistically diverse backgrounds in care.

³⁶ In Australia, under the Commonwealth Immigration Guardianship of Children Act (1946), the Department of Immigration and Border Protection has responsibility for determining whether or not an unaccompanied humanitarian minor falls under their legal guardianship. Unaccompanied humanitarian minors who do fall under the guardianship of the Minister of Immigration and Border Protection are regarded as wards. The Minister delegates this function as guardian of wards to officers in the Department of Immigration and Border Protection and relevant child welfare authorities in each state and territory.

³⁷ Prevalence in the out of home care system of children with disabilities, whether defined by medical or social models, is generally accepted to be disproportionately high compared to the general population. As is the case for representation of CALD communities, relatively little data collection exists to quantify the situation across Australia; although 26.7% of respondents to the 2017-2018 CREATE National Survey self-reported as being part of one or more disability communities (McDowall, 2018). Departmental data is harder to come by: while reporting extensively on issues around disability and out of home care, the South Australian Royal Commission was unable to state the prevalence of children in care with disability, finding that while the Families SA electronic case management system “C3MS requires that children in care be identified if they have a ‘disability or health condition’. No distinction is drawn in the applicable recording field between a child who has a health condition such as diabetes, which does not manifest as a disability, and a child with a profound intellectual

- Children and young people and carer/family experiences of mental illness
- Children and young people with LGBTQI+ identities

Although a lack of quantitative data hinders the ability to report statistically on these areas – and hampers accountability for (and better understanding of) the experience of these cohorts as it might be derived through targeted file reviews – qualitative research studies do provide some insights. LGBTQI+ experience has been an area of growing focus internationally, with published findings highlighting that while child welfare service referrals for many LGBTQI+ youth are superficially unrelated to sexual orientation, upon closer examination these referrals often have much to do with a child's sexual orientation or gender identity (McCormick et. al. 2017). Young people may enter into the out-of-home care system as a result of claiming LGBTQI+ identity: having been rejected, neglected, or abused by their families in consequence of this identification (Wilber et. al. 2006). In some cases, this may also intersect with cultural identities and community beliefs. Sexual and gender identities can also have implications for the stability and safety of care placements once a person enters the child protection system. For example, transgender youth in residential group homes report facing additional challenges to their emotional and physical safety, particularly in circumstances where biological sex rather than preferred gender has been the indicator used to record a person's identity or determine suitability of housing arrangements (ibid).

Upholding the rights of care-involved individuals means recognising and taking steps to counter potential negative effects of complex intersectional factors affecting how young people and their families experience the circumstances leading up to, during, and after care. As the observations and recommendations of relevant inquiries across Australia make clear, this requires better identification and documentation at individual level, and well-considered use of resulting data at system level to effectively and ethically direct resourcing necessary to establish and maintain environments of cultural safety, and to build capability for all children's participation. Equally, in designing processes and systems to collect and manage this type of information, oversight is needed to ensure that documentation and use of data does not exacerbate the disproportionate surveillance and loss of agency experienced by care-involved individuals.

disability. A child with a health condition may not have a disability, but this difference is not recognised in a systematic way in Families SA's data management." (Nyland 2016, p512). This is despite an earlier South Australian inquiry having already produced a recommendation "that both individual and systemic advocacy is provided for children with disabilities in care" (Mullighan 2004, Recommendation 11). Recommendation 2 of the 2015 Senate Inquiry into Out-of-home care similarly points to the need for all Australian States and Territories to address data gaps relating to, inter alia, children and young people with disability in care (SCARC 2015).

1.4 Why rights?

Formalising recordkeeping rights can offer scaffolding for embedding principles of justice and a lifelong ethics of care in and through human-centred information systems and participatory practice (Ross, McKemmish and Faulkhead 2006; Rolan et. al. 2019; Gilliland and Carbone 2019). Within child welfare services, case files and data records often represent the composite picture of how a young person – and their best interests – is viewed for the purposes of making protection or placement decisions and other care assessments. Given the propensity for the record to stand in for the person, it is vital that individuals at the heart of these living documents have avenues to shape, inform, and make amendments to the official record as a way of exercising ‘archival autonomy’ (Evans et. al. 2015), manifesting dignity of risk, and claiming agency over the first impressions and lingering perceptions cast by official records.

In addition to providing general indicators of a cultural shift towards recognising and popularising the rights of children in care, the extensive body of care-related literature offers clues toward why rights identified in the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care* are important in and of themselves; and also supplies evidence of the link between rights breaches and heightened consequences of risk to children. Participation rights figure strongly in this regard, as Godar and Holmes emphasise:

Understanding the child’s wishes and experiences is a crucial component of any assessment of risk of harm. Lessons from serious case reviews frequently highlight the lack of the child’s voice in assessments and decision-making as a crucial component for failure to protect them. (Godar and Holmes 2017, p37).

Similarly evidencing damaging consequences where rights to participation are not upheld, the failure to listen to children has been a recurring theme emerging from inquiries investigating abuses and system shortfalls relating to children in care (Moore et. al. 2007; CCYP VIC 2019a and 2019b). One expression of this failure is refusal of care-givers or authorities to believe or appropriately respond to children who report abuse or mistreatment³⁸; however it also manifests as a failure to provide suitable avenues for disclosure and participation. The 2019 Victorian Commission for Children and Young People investigation *In Our Own Words* found “an extremely low number of children and young people raise complaints using the department’s complaints mechanism,” with three key reasons identified: these processes are not child friendly or informed by issues affecting children in care; they are not known; and they are not trusted (CCYP 2019b, Finding 13). Importantly, a witness to the Mullighan inquiry (2004) emphasises that child-centred participation does not mean putting all the onus to participate onto children and young people: “We need to keep thinking further about how to develop the skills of listening to children”³⁹.

³⁸ “Most of the houses I’ve been at, we’ve just ripped those [complaint] forms up. Pointless. Don’t think anyone will listen to us... I think it’s just ‘cos in the past with other stuff nothing had been done... I don’t think it will go anywhere. Personally, I wouldn’t want to [make a complaint] (Tabitha, residential care, 16)”. Quoted in CCYP VIC 2019b, p24.

³⁹ Witness representing Relationships Australia; cited in Mullighan 2004, p397.

Children are sensitive to repercussions of participation, particularly where their choice to participate may be intertwined with shame, stigma, or negative connotations⁴⁰. Effective participation rights must secure the right to participate from the child's own worldview and be capable of validating the emotional complexity, conflicted responses, and changing opinions that children are likely to be experiencing. Contemporary research on trauma-informed practice approaches with young people in care suggests that respecting the right of children to participate safely can assist them in cultivating agency over emotional response (Richardson et. al. 2012)⁴¹. Conversely, "a child welfare system that is not trauma informed likely misunderstands the child's experience from the child's view of the world. Instead, it involves treatment of the child from an adult perspective" (ibid). This is also a clear message from the *In Our Own Words* report, which makes explicit recommendations for increased funding and implementation of trauma informed practice and therapeutic care pathways (CCYP 2019b, Recommendations 15 and 16). Similar findings are reflected at national level in Recommendations 7 and 8 of the 2015 Senate inquiry into Out-of-home care (SCARC 2015).

Rights frameworks are instituted to offer guarantee against imbalances of power, but they are neither a failsafe nor unproblematic. Libesman (2016) effectively summarizes some of the limitations and critiques of human rights conceptualised as universal moral rights, and offers an alternative conceptualisation in which:

Human rights are not static standards, but rather a political space within which the meaning of rights and distribution of political power (ie, aspects of self-determination) are contested and created. (Libesman 2016, pp 48-49).

Elsewhere, Todres (1998) provides a succinct overview of limitations of the UN Convention on Rights of the Child based on early case law. More in depth analysis of the Convention – and its limitations – can be found in *A Commentary on the United Nations Convention on the Rights of the Child*, an article by article series of commentaries authored by a roster of human rights scholars and sponsored by the Belgian Federal Science Policy Office (Alen et. al. (Eds) 2007). Others critique the unintended consequences of an emphasis on child rights. For Parton (2011), the shift toward child-centred policy in the UK under New Labour followed a direction superficially led by the impetus to

⁴⁰ Advice provided to the Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) by the Australian Psychological Society includes their recommendation that best practice principles regarding disclosure of child sexual abuse should not use the word 'complaint': "Wording with fewer negative connotations is required in order to address the stigma that has historically contributed to the reluctance to report... A focus on a 'child rights' perspective within child safety and wellbeing policy and procedures frameworks would be more appropriate" (Roufeil and Robinson 2016, pp23-24). On the dynamics involved in reporting abuse, and needs beyond mandatory reporting protocols; see, inter alia, Recommendations 15 and 17 of the Mullighan inquiry in South Australia (Mullighan 2004). And, for a capsule view of how young people in care in Western Australia perceive barriers to speaking up about concerns relating to their care experience; reasons why they choose not to participate in disclosing information; and strategies they employ for being heard, see CCYP WA 2016.

⁴¹ Recognition of the high rates of trauma manifest in the child protection system is not of itself a novel insight, however attempts toward widespread application of therapeutic care services and system approaches to trauma is a relatively new phenomenon (Kletzka and Seigfried 2008; Richardson et. al. 2012). For contextual material on complex and collective trauma, and therapeutic services, see the RCIRCSA final report, *Volume 9 – Advocacy, support and therapeutic treatment services*. For recent assessments regarding scope and delivery of therapeutic services as part of care provision in Australia see (among others): SCARC 2015; Stewart 2019; Seth-Purdie 2019. For a caution against importing therapeutic models without considering local context: Davis 2019.

uphold children's rights, but one that was ultimately steered by other ideological considerations that created increased surveillance regimes and directly contributed to disaggregation of the family.

One heavily critiqued concept in children's rights is the indeterminate 'best interests of the child' principle (Freeman 2007). This principle is a central tenet of the contemporary Australian child welfare system and features in the majority of modern children's rights discourse globally; most visibly through its status as a core principle (Article 3) of the United Nations Convention on the Rights of the Child, from which many other instruments take their lead. The principle has come under scrutiny for its ambiguity, paternalism, and incomplete recognition of lifelong effects. Where a life continuum is considered, as Freeman illustrates, distinctions between 'current' and 'future-oriented' interpretations of best interests for a child may vary considerably – and thereby present conflicting courses of action.

Locally, Bamblett and Lewis (2007) have shown how actions purportedly guided by the 'best interests of the child' are capable of rendering rights null. Deconstructing the principle from an Indigenous Australian perspective, they cite human rights expert Philip Lynch in arguing for a more collectivist view of best interests, positing that the current conception inherently privileges a particular worldview in which the best interests of Aboriginal children continue to be abstracted from their constitutive familial, cultural, and racial contexts. To address this, Bamblett and Lewis suggest, "meeting the best interests of both the child and the community may be better achieved through the incorporation of a 'community's best interests' analysis into the 'child's best interests' analysis". Referencing the Stolen Generation, the authors draw attention to racist ideology (expressed through the equation of Aboriginality with child neglect) being a feature of the political and institutional regime charged with supposing and supporting children's best interests, and demonstrate that application of this principle became a de facto part of the social method serving that ideology. The 'best interests' qualification, rather than protecting the rights of Aboriginal children, functioned as a key part of a colonising culture's pattern of behaviour in making palatable the removal of children, fracturing of family, and dispossession of community; undertaken as a deliberate policy of racial erasure.

Evidence of the use of a 'best interests' principle being systemically applied in ways such that its actual effect is to severely compromise the rights and wellbeing of children is not limited to Indigenous dispossession. Wilson and Golding (2015; 2016) speak to their own life experiences in identifying how twentieth century social and economic ideology undermined the rights of non-Indigenous children whose removal from family homes and placement into care was facilitated through the accrual of state-constructed records based on blinkered vision, 'friendly visits' and assumptions of deserving and undeserving poor – all part of the conditionality inherent within the language of 'best interests'.

As history demonstrates, the arbitrary assessment of best interests has functioned in practice as a means to creating a vast child welfare industrial complex; enabled networks of predatory abusers⁴²; and further failed to uphold the rights of children to lay claim to their own identity by withholding

⁴² For confirmation of the existence of networks of abusers perpetrating abuse on children in 'care' (and how institutional recordkeeping has been complicit in enabling them) see, for example, findings of the Irish Historical Institutional Abuse Inquiry (2017); and the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2017).

communications sent by family members⁴³, changing children's names⁴⁴ or religious affiliation⁴⁵, and offering restricted or redacted access to records of their childhood in later life – or providing no record at all (HREOC 1997, SCARC 2004). The suppression of identity rights is not only a matter of historic practice: Care Leavers continue to testify how the contemporary actions of record holders curtail ability to obtain evidence of their childhood, including access to material sought to substantiate redress or compensation claims in relation to acts of State or private caregivers⁴⁶. Likewise, the correlation between financially poor parents and assumptions of poor parenting still continues into the present (Einboden 2019). As one parent explained to a University of Newcastle research project in 2017:

*They look at [government housing residence] as a slum. They look that we live around drug addicts. They look at it we live around domestic violence and that's not good when you go to court. Even I know that. But at the end of the day some people can't afford to go private.*⁴⁷

Reflecting on children's rights and best interests in a public consultation paper relating to review of the Adoption Act, the Victorian Law Reform Commission summarised key criticisms of the 'best interests of the child' principle as being that it is: "indeterminate and subject to the values and views of the decision maker; paternalistic and paying insufficient attention to the rights of children as human beings with agency and views of their own; and susceptible to being used as a vehicle for political or ideological views" (VLRC 2016)⁴⁸. Despite this, the VLRC review of the Adoption Act subsequently recommended that the terminology of 'best interests of the child' should be retained in the Act, and become the preferred term throughout legislation as a matter of consistency. It did so while also acknowledging that the phrase "fails to account for the lifelong effects and take a sufficiently lifelong view" (VLRC 2017), an opinion that was overtly expressed in at least three formal submissions to the review. The report directly quotes a public submission from childhood adoptee Sharyn White to this effect:

*...what needs to be taken into account is that the person adopted does not remain a child. The wording has been aimed at children, not acknowledging that adoption does not end. It affects the person over their whole lifespan, and beyond, as the adopted person's children are also attached to a false 'family' tree*⁴⁹.

Differences between the situations of adoptive children and children in care are not only legislative, although in most jurisdictions it is the legislative distinction that matters most regarding a person's ability and avenues to access to records about their childhood (Kirton et. al., 2011). For example, whereas Australian adoption laws in most jurisdictions make specific provision for records documenting a person's adoption history to be released to them, no such provisions exist for Care Leavers. Instead, access is under the discretionary control of the same organisations who previously

⁴³ SCARC 2004, p88.

⁴⁴ Ibid pp 93-94; CLAN 2016.

⁴⁵ SCARC 2004, pp 94.

⁴⁶ Care Leaver and academic Jacqueline Wilson tells: "After the royal commission I encouraged my friend to apply for her file to find out why she was in a psychiatric institution with her mother when she was seven-years-old. She got her file which was 17 pages. 16 pages were blacked out. She is left without the hope of substantial compensation because she does not know the contents of her file" (quoted by Kirkham 2018). For a more detailed discussion of the difficulties and complications surrounding attempts to locate records to substantiate dates and locations of historic institutional care experience, see Mullighan 2004, pp13-15.

⁴⁷ Cited in Ross et. al. 2017, p35.

⁴⁸ Further references to each of these criticisms are included in the VLRC consultation paper.

⁴⁹ VLRC 2017, p77. The full submission is available as Submission 19 to the Review of the Adoption Act. See <https://www.lawreform.vic.gov.au/projects/adoption-act/submissions/adoption-act-submissions-received>

controlled their childhood (SCARC 2004, Wilson and Golding 2016), or limited to the remit of ill-suited Freedom of Information/Right to Information legislation⁵⁰. Yet, despite disparities, testimony confirms that similar lifelong and intergenerational impacts exist across both cohorts. In her submission to the *Forgotten Australians* Inquiry, Care Leaver and advocate Leonie Sheedy explained:

*Being a parentless person is a most difficult thing. I feel like a second class member of the community. I feel different, I have no sense of belonging to a long line of extended relatives, no parents, brothers, sisters, aunts, uncles, cousins, second cousins. My loss is also my children's loss as they have no extended relatives on their mother's side either*⁵¹.

For some care-experienced individuals, opportunities to state or lay claim to their rights through formal testimony given through the mediums of inquiries, research, legal, and reform processes is a key part of reclaiming their experience and shaping trauma to purpose: not only to seek restorative justice for abuse of their own rights, but also to protect the rights of children now and into the future⁵². Such participation may also – sometimes for the same individuals – be a hollow and harrowing experience offering little sense of closure and conflicted, if any, recompense. In these testimonial processes, and the outcomes arising from them, human rights frameworks offer security for claiming self-worth and practicing self-determination, and standpoints for seeking redress; although these securities are not always straightforward in interpretation or application; nor are they necessarily legally enforceable (Webb, 2012).

Despite acknowledged shortfalls, rights frameworks play a significant role in influencing and rallying discourse and action across political and power spectrums. They provide a language that is familiar to policy makers, and which is capable of crossing jurisdictional boundaries. As such they are an effective mechanism to build and maintain momentum for change at governance levels, to create real and sustained effects at global, societal, and individual intensities. Importantly for the success of rights based initiatives in care contexts, rights frameworks have also been openly supported by Care Leavers (Golding 2020) and Indigenous advocates (Gooda 2012; Bamblett and Lewis, 2007) as an effective, albeit imperfect, means of translating between community concerns and political discourse.

⁵⁰ That FOI is not, as it stands, a fit for purpose mechanism for persons seeking access to records of their time in care has been argued by Care Leavers (SCARC 2004), reiterated by Commissions of inquiry (ibid, Recommendation 18), and acknowledged by individual government agents charged with administering the system (Lewis 2017).

⁵¹ SCARC 2004 (Submission 33); cited in Swain and Musgrove 2012.

⁵² Forde 1999, Appendix 12: *Witness responses to the question 'What would you like to see come out of the Inquiry?'*

1.5 Care experience, human rights, and recordkeeping rights in law

*When one re-envision archival activities, including description, from a human rights framework, it becomes impossible to separate the record from the politics of its origins, as well as from its consequences, affects, or most importantly, the human life to which it is related.*⁵³

Although there are exceptions, most children’s rights discourse in Australia explicitly aligns itself with the United Nations Convention on the Rights of the Child (UN CROC). This is unsurprising: as a signatory to the Convention it is expedient for Australia to frame its legislative and policy protections in ways that facilitate reporting on compliance with UN CROC mandated responsibilities to protect children; provide the services necessary for children to achieve positive outcomes; and enable them to participate in community and cultural life.

Accordingly, key documents including the Aboriginal and Torres Strait Islander Child Placement Principle; State- and Territory- based Rights Charters for children in out-of-home care; and the Commonwealth Government’s *National Standards for out-of-home care* are often framed in relation to UN CROC as an authority instrument. In the case of the *National Standards*, this relationship is explicitly embedded as the first overarching principle: “Children and young people in out-of-home care have their rights respected and are treated in accordance with the United Nations Convention on the Rights of the Child” (Commonwealth of Australia 2011, p6).

UN CROC is clear on the added responsibilities of the State toward children in care: Article 20.1 states that *a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State*. Following on from this, Article 20.2 obligates States to ensure alternate care, according to their national laws; and Article 20.3 outlines examples of the forms alternate care might take. The flexibility of interpretation this high-level instrument allows regarding how far State responsibility for special protection and assistance within alternative care extends is visible in how the Australian Federal government interprets Article 20 for its Public Sector guidance sheet on *Rights of parents and children* (publicly available on the Attorney-General’s Department [AGD] website)⁵⁴.

Under the heading ‘Separation of Children’ the AGD advice conflates UN CROC articles 20.1 with 20.2 and 20.3, seemingly indicating that making provision for alternate care is, of itself, fulfilment of the obligation for special protection and assistance. Which – as many would argue *prima facie*; and as is more clearly spelled out in the corresponding UN guidelines⁵⁵ – is not true to the intent of Article 20. Certainly it is disingenuous advice in the face of ample, if not overwhelming, evidence accumulated by Australian inquiries into out-of-home care (across jurisdictions, timeframes, and contexts) that clearly shows the mere existence of alternative care stops well short of ensuring special protection and assistance for children placed into such arrangements. Notably, the AGD’s guidance sheet offers a disclaimer that it “is provided to persons who have a role in Commonwealth

⁵³ Wood et. al. 2012.

⁵⁴ <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Rightsofparentsandchildren.aspx> (accessed 25 February 2020).

⁵⁵ UN General Assembly (2010) *Guidelines for the Alternative Care of Children*.

legislation, policy and programs as general guidance only and is not to be relied upon as legal advice”.

Within Australia, responsibility for administering child protection sits at the State government level. Accordingly, discrepancies exist between legal frameworks and service obligations operating within each jurisdiction. This is far from ideal, resulting in situations where children who cross territorial borders during or after their time in care are confronted with different administrative and governance regimes in relation to their rights, and right of access to records. Each of the eight state and territory jurisdictions has developed its own Rights Charter for children in out-of-home care, with existence of these Rights Charters (as well as the provision of information contained therein to children who enter into out-of-home care)⁵⁶ mandated by the relevant child protection legislation in six of eight jurisdictions⁵⁷. Their integration into law thus far has been spurred on by the indisputable volume of evidence testifying rights abuses in out-of-home care that has been heard or uncovered by inquiries across the country. For example, the 2004 South Australian Commission of Inquiry into Children in State Care investigated allegations of sexual abuse and deaths by criminal conduct; advising as a formal recommendation – “That the *Charter of Rights for children and young people in State Care* be the subject of legislation in South Australia” (Mullighan 2004, Recommendation 7).

At the national level, a 2010 Australian Law Reform Commission report into children in the legal process⁵⁸ included a section dedicated to *Children in the care and protection system*. The recommendations of this report include that a Charter for children in care should be developed and enacted into legislation at Federal, State and Territory levels to “create a legally enforceable obligation on the part of the relevant State or Territory family services department” to provide each child in care with a set of minimum guarantees. Among the list of assurances proposed by the ALRC to be enshrined by such a Charter, the only one specifically framed as a right is “the right to be consulted and to have the child’s views given due weight (in accordance with age and maturity) in the decision-making process, particularly when decisions are made about residence, family contact, schooling and health”. Adoption of the ALRC recommendation has been partial and, on the evidence of recent inquiries, has not yet resulted in substantially greater protection of the rights of children in care. In the main, although there is a legal requirement for Charters to exist, the specific articles of such documents are not legally enforceable. Queensland is a unique case in having their full Charter included as a Schedule to the relevant Act, whereas other states and territories have taken different approaches to compliance. In South Australia, for example, a formal mechanism is in place for organisations to endorse the Charter, and many service agreements made with the government in that State include endorsement of the Charter as a contractual requirement.

The intrinsic value that recordkeeping rights supply in building appetite and capabilities for the exercise of rights more broadly has been elaborated by Gilliland and Carbone (2019), who apply their work relating to refugee rights and recordkeeping to argue that “actualisation of human and personal rights articulated in internationally recognised policy instruments is significantly impeded without similar recognition of individual rights in and to records”. In the context of children’s rights,

⁵⁶ More needs to be done to build awareness of the Charters: an Australia-wide survey of children in out-of-home care carried out by CREATE Foundation in 2018 indicated that only 32% were aware of the existence of the relevant Charter of Rights (McDowall 2018, p98). This is however an improvement on 2013 figures, at which time only 18% of children surveyed indicated awareness of such a Charter (McDowall 2013, pp 72-73).

⁵⁷ At the date of writing, Tasmania and ACT lack legislative mandate for their Charters.

⁵⁸ *Seen and heard: priority for children in the legal process* (ALRC Report 84), Australian Law Reform Commission 2010.

UN CROC does not explicitly provision recordkeeping rights (although some such requirements are set out in the corresponding UN *Guidelines for Alternative Care of Children*); however the higher standard of obligation required toward ensuring protection and assistance for children removed from family can be logically inferred as including recordkeeping obligations that would normally be performed within the family context.

It follows, therefore, that recordkeeping rights – and associated state obligations for ensuring their provisioning within out-of-home or alternate care contexts – are not simply a matter of administrative protocol, but also represent a core component in social and relational aspects of human development. It is not only records that provide (equally crucial) evidence of medical, educational, custodial, and recreational spheres that children have a right to. The family stories and stores of knowledge that we hold about ourselves, our kin, and our relationships to the world are also a vital record, ‘evidence of me’ and ‘evidence of us’ (McKemmish 1996): a repository from which to construe, internalise, and enact our learned sense of inclusion and exclusion.

Case Study: *Gaskin v. UK*

Internationally, legal precedent exists for appeal on human rights grounds to successfully challenge the denial of access to an individual to records of their time in care. The landmark case for this is *Gaskin v. UK*, heard by the European Court of Human Rights in 1989; where Article 8 of the European Convention on Human Rights⁵⁹ was successfully used to challenge Liverpool City Council’s refusal to provide Graham Gaskin with full access to records of his time in foster care (ECHR, *Gaskin v. UK*, 1989). However, it is important to note that the Court judged Gaskin’s rights under Article 8 had been violated *not* because access had been refused, but on the more technical grounds that this was unlawful because there was no procedure available for Gaskin to appeal an independent authority regarding the refusal to release information from contributing parties from whom consent could not be obtained – Gaskin’s only avenue of domestic appeal was to proceed through UK courts of law. It was not a unanimous finding, with six of the seventeen judges dissenting in support of the UK’s claim that Gaskin’s human rights were not infringed. Nor was it a rapid resolution.

Graham Gaskin, then aged 18, first requested to see his case file in October 1978, less than a year after exiting the ‘care’ system. At this time, Gaskin was given supervised access to the file. The judgement in the ECHR decision documents that at this point in time he removed the records in question from Liverpool Council’s custody without permission, retaining the documents for a period of three days before returning them to Council. In 1979 Gaskin again sought access to his records, this time in an application for discovery made with the intent of bringing proceedings against the local authority for negligence. The application was initially refused by the local authority, a decision upheld by the UK High Court in February 1980, and by the Court of Appeal in June of the same year. In 1983, Gaskin took his case to the European Human Rights Commission. It was subsequently

⁵⁹ The European Convention on Human Rights came into force in 1953 as the first instrument to give effect to certain of the rights set out in the UN Declaration of Human Rights and make them binding. Article 8 concerns the *Right to respect for private and family life*: (8.1) “Everyone has the right to respect for his private and family life, his home and his correspondence”; and (8.2) “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. These protections are comparable to Article 16 of the UN Convention on the Rights of the Child, wherein: “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.”

referred to the Court of Human Rights in 1988; and received hearing and decision in 1989. In all, the process took ten years and, while the case was nominally 'won' by Gaskin, the financial compensation awarded was a token fraction of requested costs and damages.

In making the case for Gaskin, the European Human Rights Commission report argued that "the file provided a substitute record for the memories and experience of the parents of the child who is not in care". The judgement of the court did not extend this far in its decision, but agreed that the institutional record "no doubt contained information concerning highly personal aspects of the applicant's childhood, development and history and thus could constitute his principal source of information about his past and formative years" (Gaskin v. UK, 36), and that "persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development" (Gaskin v. UK, 49).

Ultimately, although the case does represent a precedent for Care Leavers successfully exercising rights in records, the victory is qualified. In making their finding in favour of Gaskin contingent on a matter of due process, the Court elided making a judgement for his precedence as a rights holder to the record. By placing equal weight on the *potential implications* of the State's (valid) assertion that "confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons" (Gaskin v. UK, 49) and the *actual significance* that records of childhood kept by the State have for Care Leavers whose childhood treatment (and equivalent family memory) is documented therein; the Court chose not to privilege lifelong protections for those whose corporate parent is the State above safeguards claimed by the more powerful entities claiming to protect them.

SECTION 2:

Testimonial and Instrumental warrant for rights articulated in the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*

This section of the literature review provides two summary tables listing key sources of public warrant for the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, and illustrating which of the Charter's constitutive rights are warranted by each of these sources. Instrumental warrant is shown in Table 1 and Testimonial warrant in Table 2.

The remainder of Section 2 sets out a brief overview of rights articulated by the *Charter*. It supplies representative testimonial examples to demonstrate each of the rights being warranted by lived experience, in the form of statements made by Care Leavers in formal documentary contexts. It also provides examples of where these rights are warranted by existing instruments of governance, law and policy.

Discussion of each right follows the following format:

- Selection of quotes from persons who have directly experienced historic or contemporary out-of-home care, situating human context and demonstrating the existence of testimonial warrant for the right
- Brief definition of the theme of the right, and why it is necessary to fulfil individual and collective needs
- Expansion of the definition to position how this right is construed within the framework of the *Charter*
- Summary explanation of why this right is of particular significance to persons who are separated from family during childhood and placed into alternative care arrangements, and identification of evidence gaps
- Examples of Australian sources containing testimonial warrant for the right
- Examples of sources that provide instrumental warrant for the right, primarily focusing on:
a) international human rights instruments; and b) Australian governance frameworks.

TABLE 1: INSTRUMENTAL WARRANT

 Accountability	 Memory	 Identity	 Participatory	 Participatory Recordkeeping	 Recordkeeping Access and Disclosure	 Recordkeeping Safety and Privacy
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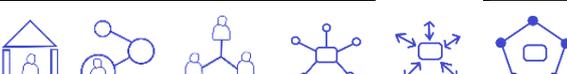
Instrument of Warrant	Jurisdiction	Rights warranted by this instrument
UN UDHR <i>Universal Declaration of Human Rights</i>	Global	  
UN DRIP <i>Declaration on the Rights of Indigenous Peoples</i>	Global	  
UN CROC <i>Convention on the Rights of the Child</i>	Global	   
UN GACC <i>Guidelines for the Alternative Care of Children</i>	Global	     
<i>National Standards OOHC</i>	Australia	   
<i>OOHC Charters of Rights</i> [per each State or Territory jurisdiction]	Australia	     
Aboriginal Child Placement Principle	Australia	  
CLAN Charter of Rights in Recordkeeping	Australia	    
<i>Access to Records by Forgotten Australians and Former Child Migrants</i>	Australia	     
<i>Bringing Them Home Senate Inquiry</i> (1997)	Australia	      
<i>Forgotten Australians Senate Inquiry</i> (2004)	Australia	    
<i>OOHC Senate Inquiry</i> (2015)	Australia	  
RCISRCSA <i>Royal Commission into Institutional Responses to Child Sexual Abuse</i> (2017)	Australia	     
RCCPYDNT <i>Royal Commission into Child Protection and Youth Detention in the Northern Territory</i> (2017)	Australia	   
GDPR <i>General Data Protection Regulation</i>	Europe (EU)	     

TABLE 2: TESTIMONIAL WARRANT

 Accountability	 Memory	 Identity	 Participatory	 Participatory Recordkeeping	 Recordkeeping Access and Disclosure	 Recordkeeping Safety and Privacy
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Explanatory notes:

- i) The purpose of this table is to illustrate representative sources of existing testimonial warrant for rights articulated in the Charter.
- ii) The table presents a selection of Australian investigations (conducted by or for a range of government, statutory and NGO organisations) where published reports include quoted statements from the testimony of care-experienced individuals.
- iii) Additionally, we have indicated the example of *Lost Innocents and Forgotten Australians Revisited (LIFAR)*, for which testimony provided by care-experienced persons in the form of public submissions (as distinct from private hearings) is available to freely access, although not directly cited in the final report.
- iv) We note that publicly available submissions for sources other than LIFAR may similarly expand the remit of their testimonial warrant.
- v) We clarify that investigations listed in this table may warrant additional rights to those assigned here through their findings and recommendations, and restate the purpose of this table is limited to illustrating testimonial warrant for the Charter.
- vi) In taking this approach we are not suggesting that investigations omitted from this list did not seek or take into account substantial testimonial warrant in the formation of analysis and recommendations. Rather, we have attempted to present here a selection of sources where direct testimonial warrant exists as part of a public evidence base.

Warrant	Jurisdiction	Rights warranted by testimony published in this document
<i>Bringing Them Home</i> report, 1997 HREOC	Australia	
Forde report, 1999	QLD	
<i>Protecting Children</i> report, 2003 Crime and Misconduct Commission	QLD	
<i>Children in State Care</i> report, 2004 [Mullighan report]	SA	
<i>Forgotten Australians</i> report, 2005 Senate Inquiry	Australia	
<i>Lost Innocents and Forgotten Australians Revisited</i> [public submissions], 2009	Australia	
<i>Speaking Out About Raising Concerns</i> report, 2016 CCYP WA	WA	
RCIRCSA (2017) Royal Commission [report]	Australia	
RCIRCSA (2017) Royal Commission [public submissions]	Australia	
RCPDCNT (2017) Royal Commission	NT	
<i>In Our Own Words</i> report, 2019 CCYP VIC	VIC	
Create report cards (2013 and 2018)	Australia	

2.1 Accountability rights

*No one can find any records about me. Our lives were changed forever by this action and I have never been given or it seems now that I will never have any context for this life changing action. Why is this? Why have I never been told as an adult why the government came and took us?*⁶⁰

*They have no records of me, and apparently no records of those people ever being foster parents.*⁶¹

*The reason we have suffered this lack of programs and effort is that the agencies responsible for creating our problems in the first place have sought to hide that fact. They have done that by denying our experiences as children and our existence as adults.*⁶²

*In some ways I feel like wasted potential, I feel that because I was full of potential as a child and if I'd had a different childhood I could have done anything and been anyone I wanted but instead I was lumbered with a childhood where I had no rights and the government "carers" did whatever they felt like doing to me.*⁶³

*I had no idea about the capacity to make a complaint.*⁶⁴

Accountability is the quality of being answerable and responsible for what is done. It carries the expectation of agents and individuals being able to give account for their role in events; to provide motives and evidence on which decisions and actions were taken; and to atone for mistakes. In the absence of accountability, the basis for establishing communal bonds (including political goodwill, personal forgiveness, and social trust) is compromised.

Within the framework of the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, Accountability Rights apply to events and consequences that may occur in private or public spheres, and are relevant across individual and systemic practices. They encompass a person's lifelong rights to obtain accountability for what they experience directly as a child in care, and as an attributable consequence of that experience. This is articulated in the charter as the rights to:

- Hold accountable
- Call to account.

⁶⁰ Testimony of Care Leaver, *Forgotten Australians Report* (SCARC 2004, Submission 57).

⁶¹ Testimony of Care Leaver placed in State care during the 1990s, cited in Mullighan 2004, p541.

⁶² Senate Committee Hansard 4.2.04 (Positive Justice Centre), cited in SCARC 2004, p31.

⁶³ Testimony of Care Leaver, SCARC 2004 (Submission 246), cited p1.

⁶⁴ Testimony of Care Leaver, age 18, previously in foster care, cited in CCYP VIC 2019 *In Our Own Words*, p24.

Children and young people who experience out-of-home care are a vulnerable population in terms of being dislocated by degrees from familial and social structures where trust and accountability are centred. This is compounded by breakdowns of placements and turnover of case workers, with higher levels of exclusion and risk generally seen as having a correlation with ongoing instability and volatility of care arrangements. Facing high occurrence of significant life events enacted outside the family, care-involved children and young people should be able to expect higher standards of accountability from agents and decision makers involved in those events. However, in practice, separation from trusted sources of accountability, combined with a lack of situational consistency adequate to enable meaningful formation of new supports, leaves children and young people without belief in, or appropriate avenues to, accountability.

Our review of the literature suggests that while accountability rights are clearly articulated in existing rights frameworks and child protection policies, there is still a vast gap between what is claimed for, and what is provided for, children (and their adult selves) with regard to accountability for out-of-home care experience. A number of stakeholders have proposed that this gap will not be bridged without the enforcement of commensurate – and public – penalty for government breaches of accountability. In her independent Review of Indigenous child protection in NSW, *Family is Culture*, Megan Davis observes: “The need for more accountability—and in particular, the need for there to be consequences or sanctions when [staff of the government department responsible for child protection] do not comply with legislation and policy—emerged as a major theme in submissions to the Review” (Davis 2019, p163).

Shortfalls in current recordkeeping practices as an effective tool for supporting accountability rights within out of home care (and the child protection sector more broadly) are clearly documented in the sources and inquiries considered in this literature review. At the level of data to inform policy and evaluate services, the lack of indicators to collect and/or differentiate data that might be disaggregated to better understand prevalence and trajectories of children in care who identify (or who are identified) as having a disability, or belonging to culturally and linguistically diverse communities has been repeatedly highlighted⁶⁵. At the level of government accountability toward the individual children whose care they have assumed responsibility for; the glaring omissions and continued biases⁶⁶ evident in case files analysed as part of detailed file reviews undertaken for independent inquiries including *Always Was Always Will be Koori Children*; *Family is Culture*; and *Lost but not Forgotten* demonstrate an urgent need to reform how records are created and used if they are to best serve children’s accountability rights. As one example among many, a detailed Royal Commission case study relating to the experience of vulnerable witness ‘DG’ within the Northern Territory child protection system⁶⁷ illustrates the failure of recordkeeping processes to substantiate evidence of appropriate care; to demonstrate the involvement of DG in significant decisions about her life; or to properly document significant decisions relating to medical procedures. Distressingly, the records do provide a measure of accountability insofar as they include explicit acknowledgement by the Department of its failures to properly care for DG.⁶⁸

⁶⁵ Among others: Nyland 2016; Cummins et. al. 2012; and SCARC 2015.

⁶⁶ Being judgemental about parenting practices “is repeatedly common in the reviewed file notes” (Davis 2019, p21).

⁶⁷ DG’s story is one of the Case Studies comprising Chapter 29 of the *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*. (Commonwealth of Australia 2017b, Volume 3A, pp 8-27).

⁶⁸ A first internal review of DG’s case noted that “file records suggest that the Department may have not followed up on all the recommendations [made by external professionals] or if this was intentional, no

Testimonial warrant for accountability rights is present in submissions and testimony documented in the Forde Inquiry report (1999), the Mullighan Inquiry report (2004), the Forgotten Australians report (2004), the Western Australian Commission for Children and Young People report *Speaking Out About Raising Concerns in Care: The views of Western Australian children and young people with experience of out-of-home care* (2016) and the Victorian Commission for Children and Young People report *In Our Own Words* (2019b). These examples are representative, and should not be presumed to be an exhaustive list of relevant sources of testimony. There is no shortage of either historic or contemporary accounts of Care Leavers and young people in care testifying a desire to see their accountability rights upheld.

Instrumental warrant for accountability rights is similarly well documented. Accountability is a core element of the UN Convention on Rights of the Child, with children's rights to accountability implicit to Articles 4, 8.2, 9.1, 19, 20, 27 and 39.

Locally, findings of the 2015 Australian Senate Inquiry into OOHC (expressed as Recommendations 1, 6, and 26) pinpoint the need for nationally consistent accountability measures to be implemented in relation to child protection and out-of-home care (SCARC 2015). The 1997 Australian Human Rights and Equal Opportunity Commission's *Bringing Them Home* report similarly outlines a collection of recommendations, almost all of which can be seen as being framed with specific regard to the acknowledgement, reparation, and future prevention of breaches of accountability in relation to historic and contemporary OOHC. Additionally, the *Bringing Them Home* recommendations clearly position recognition of Indigenous self-determination and models for wellbeing as part of the matrix of accountability necessary for the welfare of Indigenous children, families, and young people.

documentation to explain why the recommendations were not pursued [...] poor recordkeeping and subsequent lack of follow-up to address DG's needs identified in the first review persisted. The second review noted that DG was provided the contraceptive device Implanon while placed with [the longer term carer]. DCF records do not indicate when the Implanon was inserted and what involvement DCF had in the decision" (Commonwealth of Australia 2017b, pp18-19). The pattern continued for the duration of DG's care: "The second DCF review found that two months before DG left care there were *no concrete arrangements regarding [DG's] accommodation, education/training, employment, health services and counselling post leaving care [...]* One DCF staffer reflected that *after I left yesterday I realised that we did not consider [DG]'s wishes at all"* (ibid, p21).

2.2 Memory rights

One of the largest conflicts you have [as a Care Leaver] is your memory. Because what actually happens, and what is recorded, and what you remember – is like a little triangle you just keep bouncing around in.⁶⁹

I haven't got anything to say I've been to Beagle Bay. It's only memories and people that I was there with. I don't exist in this world. I haven't got anything, nothing to say who I am.⁷⁰

On request for information about myself while in St Brigid's [from 4 to 16 years of age] I was sent one sheet of paper giving me a date of entry. I think that sums it up correctly, these institutions hold no memory, no photos, no medical, school reports nothing, and yet somehow we are meant to become model citizens, HOW?⁷¹

What past? There ain't none. There is more or less the past that they wanted me to have, not what I wanted, what I'd like to have.⁷²

Lies hurt and shame us. We need to stand tall and tell our stories.⁷³

Memory is the encoding, storing, and retrieving of data and information, experience and knowledge. It facilitates retention of information over time for the purpose of influencing future action. Without the capacity for memory, we would be unable develop language, relationships, or personal identity. Although sociocultural constructs affect the relative value placed on different types of memory (Wang 2008), memory functions of all kinds play a part in enabling us to situate ourselves in the world. Memory is relational, negotiated, and often interpersonal in process: “We know who we are – whether as individuals, groups or communities – because our memories provide a database of evidence for events we have experienced and what they mean to us” (Barnier and Van Bergen 2014).

Within the framework of the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, Memory Rights are assumed to have application for both individual and collective contexts and are articulated as encompassing rights to:

- remember and be remembered
- forget and be forgotten.

⁶⁹ Testimony of Care Leaver, cited in *Records and rights of the child: report of focus discussions* (Lewis 2017).

⁷⁰ Testimony of Stolen Generation, cited in *Bringing them Home* Report (HREOC 1997, p353). Carol testifies that she has tried to document her stay at Beagle Bay but has been told there is no record she was ever there.

⁷¹ Testimony of Care Leaver, cited in *Forgotten Australians* Report (SCARC 2004, Submission 314).

⁷² Testimony of Stolen Generation, cited in *Bringing them Home* Report (HREOC 1997, p272).

⁷³ Testimony of Care Leaver, cited in final report of the Forde inquiry (Forde 1999, p159).

For children in care, memory is at greater practical risk than for the general population. Deprivation of consistent, sensitive caregiving and proximate responsiveness in infancy and early childhood impedes the fullest development of cognitive capabilities and social competence (Fox et. al. 2011; McLaughlin et. al. 2017); and at least one longitudinal study indicates institutional care having a detrimental impact on the development of memory functions in early childhood, with the persistence of these experiences also affecting development of memory, learning, and executive functioning processes into preadolescence (Bick et. al. 2017).

Our literature review suggests that memory rights are currently under-articulated in children's rights frameworks, and that their inclusion in the *Charter* is a necessary step in recognising and protecting the cognitive and experiential rights of all children to develop memories and memory functions to their fullest ability.

Testimonial warrant for memory rights is present in submissions and testimony documented in the *Bringing them Home* report (HREOC 1997), the Forde Inquiry report (Forde 1999), the Mullighan Inquiry report (Mullighan 2004), and the *Forgotten Australians* report (SCARC 2004). This is a partial list, and should not be presumed to be exhaustive. Older Care Leavers and members of the Stolen Generation have spoken at length and in a variety of forums (not all of which are documented or publicly available) about the ways in which childhood experiences shape their ability to own memory, as well as the repercussions of trauma memory associated with care placements and removals from family.

An evidence gap exists in terms of testimonial warrant for memory rights in the context of present day 'care'. This may be because children and young people with current or recent care experience have more immediate concerns relating to their living situation and are recognising and articulating rights in relation to those issues, with reflection on memory rights coming later in life. There is also likely to be a degree of influence arising from instances where the questions asked of children and young people are posed by interviewers whose investigations of contemporary out-of-home care may be similarly shaped by acute concerns rather than lifelong projections.

Instrumental warrant for memory rights is most commonly expressed at a collective level, enacted in memory laws⁷⁴; public gestures (such as the Australian National Apologies made to the Stolen Generation and to Forgotten Australians and Former Child Migrants); and through artistic or historic interpretations of objects or sites of memorialisation within the public sphere⁷⁵. The right to collective memory is also provided for under Principle 3 of the UN Joinet Orentlicher principles

⁷⁴ "Memory laws" is the common term for legal provisions that enshrine state-approved interpretations of historical events. For an introductory overview, see the factsheet on Memory Laws produced by the Council of Europe: <https://rm.coe.int/factsheet-on-memory-laws-july2018-docx/16808c1690> (accessed 15 January 2020).

⁷⁵ See, for example, the work of *Parramatta Female Factory Precinct Memory Project*: <https://www.pffpmemory.org.au/> (accessed 24 February 2020). This project works from the physical site occupied between 1821-2012 by six historic institutions that together encapsulate the history of Australian institutional welfare system for women and children from convict times to the modern era. It "moves beyond the limitations of traditional heritage practice in centering focus on the human experience and human rights issues associated with institutionalisation" and is a member of the International Coalition of Sites of Conscience (ICSOC), a global network connecting past struggles to today's human rights movements.

(Orentlicher 2005); and acts of collective and/or public memorialisation are the specific subject of Recommendations 34-36 of the *Forgotten Australians* report (SCARC 2004) and recommendation 17.6 of the *Royal Commission into Institutional Responses to Child Sexual Abuse* (Commonwealth of Australia 2017a).

In contrast, the first recommendation of the *Bringing Them Home* report (HREOC 1997) positions the right to remember, testify and memorialise within the personal rather than public sphere, while still establishing the collective rights of Indigenous peoples with regard to deciding and administering processes of recording, preserving and granting access to memory records. *Bringing Them Home* also provides for public memorialisation through processes of acknowledgement, apology, and education (ibid, Recommendations 5-9).

At the level of individual memory rights, instrumental warrant is more often implicit rather than explicit. If one accepts memory as an integral part of cognitive and psychosocial development (Fivush et al 2006; Wang 2006) then individual memory rights are, by extension, embedded as fundamental elements in core rights instruments. This would include coverage under Article 6.2 of the UN Convention on Rights of the Child, which provides for “the survival and development of the child”; and Standard 5 of the Australian National Standards for OOHC (Commonwealth of Australia 2011), under which “Children and young people have their physical, *developmental, psychosocial* and mental health needs assessed and attended to in a timely way” (emphasis added).

2.3 Identity rights

I think they should be getting everyone's records together and handing it back to them, so that at least we know our own identity. A lot of it's still lost and I don't know if I'll ever find it.⁷⁶

You were just a number on the book, or somebody's name on their books. But as far as a person goes, I could have been some dog that wandered in off the street.⁷⁷

They've got a story on my life. I, I didn't know my own life. So I got these papers and worked out from the dates how old I was. That is my life and I had no right to records. What a load of crap.⁷⁸

To have to change my ways and start speaking a different language, eating different food, doing different things was totally new for me and it took me time to get used to it. I'm not really used to it yet but you know I'm trying to adjust and trying to live in this environment, which wouldn't be easy for anyone.⁷⁹

It took nearly a year for [me to get a copy of my] birth certificate and 6 years for passport.⁸⁰

My dad has explained a bit that we are from a tribe and from the stolen generation but there is no information about and I am really frustrated because I don't know where I am from. I gave up at one point because I had nothing to start off with and no sources or leads. It's been really difficult to find out about it. I have always asked services for help but they have never been able to help much.⁸¹

For me, I think the best way for me to have had the best records that I could have had was for me to have a voice in my records . . . I just would have liked to have had some input in a story that's going to be written about me.⁸²

Identity is the sense of self which we assume or construct in relation to our emotional and social worlds. Identity is not fixed, and may change dramatically throughout the course of a lifetime. Although individuals are able to control some elements of their identity, the perceptions and actions

⁷⁶ Testimony of Stolen Generation, cited in *Bringing Them Home* report (HREOC 1997, p306).

⁷⁷ Testimony of Care Leaver, cited in Forde report (Forde 1999, p78).

⁷⁸ Testimony of Care Leaver, cited in Mullighan report (Mullighan 2004, p537).

⁷⁹ Testimony of young person in care, age 15, cited in CCYP WA 2016, p47.

⁸⁰ Testimony of young person in care, age 17, cited in McDowall 2018, p51.

⁸¹ Testimony of young person previously in care, age 16, cited in CCYP VIC 2019b, p83.

⁸² Testimony of Care Leaver participating in the *Who Am I?* project, cited by Kettesz and Humphreys (2016) in Submission 17 to the RCIRCSA Consultation paper on Records and Recordkeeping. Available via <https://www.childabuseroyalcommission.gov.au/consultation-papers> (accessed 13 November 2019).

of others also have the power to influence or disrupt a person's identity. Lack of a coherent sense of identity may impede a sense of belonging and self-worth, leading to detrimental effects on personal wellbeing and emotional and physical health.

Within the framework of the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, Identity Rights have application for both individual and collective rights. They include individual rights to explore and assert personal identity as it changes through time; and to claim (or reclaim) aspects of their identity that others may seek to suppress; as well as the right not to be stigmatised by having a care-experienced identity. Identity rights also encompass the intersection of individual identity with cultural and community identity. While not exclusive to Indigenous identity, this is particularly relevant for Aboriginal children: "a culturally-appropriate and non-discriminatory approach to Indigenous child protection necessitates that the best interests of the Indigenous child must take into account the Indigenous child's relationship to their culture and their community, particularly as it informs the child's sense of identity" (Bamblett and Lewis, 2007).

Identity rights are articulated in the *Charter* as rights to:

- Know who you are
- Say who you are
- Know where you belong, your family, your community, your country
- Express or practice your culture, religion, language.

These rights are of particular importance to people who experience out of home care because of the added layers of complexity – both emotional and administrative – that removal from family and local community entails with regard to the formation, documentation, and expression of identity and a coherent sense of self.⁸³

Testimonial warrant for identity rights is one of the strongest claims made evident where submissions and testimony are documented in formal reports. Statements illustrating historic and contemporary instances where identity has been (and continues to be) suppressed, compromised, and/or used as a basis for discrimination range across jurisdictions, administrations, and time periods. The following sources contain relevant instances of direct testimony of care-experiences, but are not intended to represent an exhaustive list: *Bringing them Home* Report (HREOC 1997); the Forde Inquiry report (Forde 1999); the Mullighan Inquiry report (Mullighan 2004); the *Forgotten Australians* report (SCARC 2004); CREATE Foundation Report Cards (McDowall 2013 and 2018); the Western Australian Commission for Children and Young People report *Speaking Out About Raising Concerns in Care: The views of Western Australian children and young people with experience of out-of-home care* (CCYP WA 2016); and the Victorian Commission for Children and Young People report *In Our Own Words* (CCYP VIC 2019b).

Systemic and damaging impacts of contemporary out of home care specific to Aboriginal identity and culture are voiced by young people and their families in some of the above sources. This also appears as a strong theme of many of the 'Personal Stories' included as testimonial evidence in

⁸³ The lifelong implications of denial of identity rights for care-experienced individuals, and the role played by archiving and recordkeeping practices in the construction of identity for people who experienced out of home 'care' as children, have been extensively studied by the *Who Am I?* Project. This was an Australian Research Council funded project (2008-2012), led by the University of Melbourne in conjunction with a range of community and academic organisations, undertaken with direct participation by Care Leavers.

Chapter 2 of the *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b), as well as the child protection Case Studies in Chapter 29 of the same report.

Instrumental warrant for identity rights is similarly well documented. The UN Convention on the Rights of the Child provides explicit warrant under Articles 8.1 and 8.2, respectively: the “right of the child to preserve his or her identity, including nationality, name and family relations”; and, the guarantee that “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.” Under the same Convention, identity rights are implicit in Articles 14 (providing for children’s freedom of thought, conscience, and religion); 20.3 (cultural continuity for children placed in care); 29.1c (education about cultural identity); 30 (providing specific protection of cultural, linguistic and religious rights for children belonging to minority communities, including Indigenous children) and 31 (cultural life). Specific warrant for the exercise of rights relating to Indigenous identity are guaranteed under Article 2 of the UN Declaration on the Rights of Indigenous Peoples.

Locally, identity rights for children who experience out of home care are warranted at high level by the National Standards for Out of Home Care (Commonwealth of Australia 2011, Standards 9 and 10) and by the State/Territory-based Charters of Rights for OOHC, all of which support identity rights in some way⁸⁴. Specific rights to Indigenous identity are also warranted by these OOHC Charters; by the Aboriginal and Torres Strait Islander Placement Principle; and by recommendations arising from findings of the *Aboriginal Deaths in Custody; Bringing them Home; Always was, always will be Koori children*; and *Family is Culture* reports, among others. The urgency of securing identity rights for Indigenous children in out-of-home care is crystallised by the 2015 Australian Human Rights Commission Social Justice and Native Title Report: “The overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system is one of the most pressing human rights challenges facing Australia today” (AHRC 2015, p138).

⁸⁴ All Australian OOHC Rights Charters endorse statements that fall under the broad umbrella of ‘identity rights’, however the terminology used and specific aspects comprising identity that are being guaranteed by right in these instruments vary considerably between jurisdictions.

2.4 Participatory Rights (including rights to Participatory Recordkeeping)

One time I had ten minutes notice [that my placement was changing]. They just came to school and told me you are moving ... I had been there for four and a half months ... [Child Protection] did not say why I was moving. I always thought I was doing something wrong. No one told me, so I blamed myself.⁸⁵

I felt like I was hitting a brick wall continuously. Because nobody wanted to listen, I would always write up letters, I would continuously tell my carers and my case workers whenever they came but it's very difficult to tell them because they're not really here. I asked to have a meeting with the management at the office because there was some stuff that was going on that wasn't acceptable in my opinion but they just didn't want to see me and didn't want to know. That was a real slap in the face, really rude!⁸⁶

We should be able to make our own decisions instead of everyone making it for us. We should be able to go to a friend's house without asking [government child protection agency] first. We should also have a bit of freedom and learn how to take care of ourselves without people panicking.⁸⁷

[What might help improve the care system for children and young people?] ... Not going from one counsellor to another, keep in touch with my main counsellor; get to speak to someone higher up (with more power); don't like to have to retell my case history over and over again; I don't know who to ring.⁸⁸

I didn't have an opportunity to have my voice heard. You know, I understand that some people do speak up but I didn't speak up. That's something I regret. I regret that I didn't give a voice to it, that I allowed all this silence, that I didn't speak up about how I felt and what it was that I needed and what I wanted.⁸⁹

Participation is being involved, including people's involvement in decisions that affect their lives. It exists on a spectrum, ranging from more incidental forms of engagement through to those that are empowering and transformative. At the transformative end of the spectrum, participation builds agency to develop strategies for action, and creates solidarity to effect change. This is the sense in which the Charter uses and intends the term "Participatory Rights", making a deliberate distinction from broader 'participation' rights which do not always make provision for a people's agency in the same way. Participatory recordkeeping is dependent on people being willing and able to take part in processes affecting them. This may be compromised where people feel intimidated or excluded; in

⁸⁵ Testimony of young person previously in care (returned home), age 16, cited in CCYP VIC 2019b, p22.

⁸⁶ Testimony of young person in care, age 15, cited in CCYP WA 2016, p24.

⁸⁷ Testimony of young person in care, age 14, cited in McDowall 2013, Appendix 3.

⁸⁸ Testimony of young person in care, age 10, cited in McDowall 2013, Appendix 3.

⁸⁹ Testimony of Care Leaver, cited in Mullighan 2004, p375.

circumstances where there are asymmetries in types of knowledge or pieces of information held by parties to a process; or in situations where people do not share relevant language or concepts to understand each other.

Within the framework of the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, Participatory Rights have application as both framing rights and specific recordkeeping rights, and presume the rights both of individuals (children in care, and their adult selves) and collectives (such as family groups, or Indigenous communities) to participate in immediate and strategic care planning and review. The *Charter* supports a transformative approach to participation, in which individuals who experience out-of-home care are meaningfully involved in how decisions about that care are made and documented through time. The *Charter* also supports the rights of individuals to exercise control over records that represent significant events in their lives, in particular the right to informed consent regarding how information contained in those records is disclosed to others.

Participatory rights are articulated in the *Charter* as the right to:

- Create your own records, life history
- Decide or consent to what is recorded about you in organisational systems
- Decide or consent to who has access to your records
- Intervene in the record (right of reply/setting the record straight)
- Determine how long to keep records, and in what form
- Be involved in framework setting, policy making, decision making, legal and administrative processes that impact your life, including recordkeeping.

These rights are especially pertinent within the out of home care sector; not least for combating the structural disenfranchisement of young people and families who come into contact with child protection services. They have a significant role to play in mitigating the documented marginalisation and social exclusion experienced by individuals, as well as the ongoing effects of fragmentation of family groups. Active participation by children, young people, and families in determining relevant programs through mechanisms that are appropriate to context (cultural or otherwise), and better documentation to evidence of their awareness of and involvement in processes (such as considering available providers and potential timeframes for referrals or admission to specific services), as well as consistent recording of both the requirements for *and responses to* identified needs has been indicated as necessary improvements to existing systems.

Systemic failures regarding participation have been consistently identified over two decades. Government and independent reviews of child welfare from Forde (1999) to Davis (2019) have explicitly made clear: families and individuals who are subject to protection systems cannot adequately address their own behaviours and wellbeing if they are denied the opportunity for input into creating realistic, beneficial, and achievable life plans.

Testimonial warrant for participatory rights differs according to whether participation is being considered specifically in the recordkeeping context, or more broadly. A stronger testimonial warrant for participatory recordkeeping rights exists in the retrospective or historical justice care space than is provided by present or recent Care Leavers. Conversely, participatory rights more broadly (in particular, involvement in decision making around care) are more heavily warranted by the testimony of individuals with contemporary care experience. As with Memory Rights, it is likely

that this distinction is an artificial one, arising from the particular intent and emphasis of the investigations and published sources in which testimony is documented.

For participatory recordkeeping rights, examples of testimonial warrant can be found in the final report of the Commonwealth of Australia Royal Commission into Institutional Responses to Child Sexual Abuse (Commonwealth of Australia 2017a), the Mullighan report (Mullighan 2004), and the *Bringing them Home* report (HREOC 1997). Among other things, these sources testify to the often crushing impact on Care Leavers of being confronted in adulthood with records of their childhood that contain a distorted or biased picture of events, which does not include their voice or represent either their past or current perspectives.

Participatory rights more broadly find clear testimonial warrant in the comments of care-experienced young people. Among recent sources of example are reports produced with extensive input of care-involved and care-experienced individuals by the Commissions for Children Young People in Victoria (CCYP VIC 2019b) and West Australia (CCYP WA 2016), and by the NSW Office of the Advocate for Children and Young People (ACYP 2018). The first two of these in particular include a range of statements from children and young people regarding their experiences of participation in case planning (mostly negative, but sometimes positive), and their ability to take action when they have safety issues or other concerns in relation to their care situation. The CREATE Foundation's annual report cards on the performance of the out-of-home care sector also offer a significant source of testimonial warrant for participatory rights, representative of children across all Australian States and Territories (McDowall 2013 and 2018).

For families, the effects of information asymmetry and barriers to participation based on not being able to understand language or procedures of the child protection authorities, or not being assisted with locating family support services as an early intervention are a common theme in the many 'Personal Stories' documented as testimonial evidence in Chapter 2 of the *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b).

Instrumental warrant for participatory rights is extensive at the framing level, and is also supported to lesser extent at the recordkeeping level. This warrant is most often positioned as aligning with the United Nations Convention on the Rights of the Child, where participation is both a free-standing right (Articles 12 and 13) and identified in the surrounding literature as one of four core principles for the Convention.

Specifically in relation to children in care, the United Nations *Guidelines for the Alternative Care of Children* (UN General Assembly, 2009) warrant participation rights, stating that the assessment, planning and review underpinning decision-making on Care "should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians," with all parties concerned to be provided with the necessary information on which to base their opinion. The UN *Guidelines for Alternative Care* also make explicit provisions regarding recordkeeping practice by providers of care (Articles 109 and 110), as well as a limited degree of warrant for participatory rights in recordkeeping (Article 100, participation in life story work; and Article 111, making records available to children and guardians as key sources of information and an evidence base for decision making). As well, participatory rights are also warranted in Article 99 of this instrument, which calls for young people with previous care experience to be involved in the design of feedback and complaints mechanisms.

At the local level, instrumental warrant for participatory rights within Australia is clearly enshrined in Standard 2 of the National Standards for Out-of-home care: *Children and young people participate in decisions that have an impact on their lives*; as part of the Aboriginal And Torres Strait Islander Child Placement Principle: *Aboriginal and Torres Strait Islander children, parents and family members are entitled to participate in all child protection decisions affecting them regarding intervention, placement and care, including judicial decisions*; and in the State and Territory based Charters of Rights for children and young people in out-of-home care. Participative rights of children, young people, and families are also warranted by a swathe of inquiry recommendations, including (but not limited to): Recommendation 53 of the *Protecting Victoria's Vulnerable Children Inquiry* (Cummins et. al. 2012); Recommendations 5 and 25 of the Senate Inquiry into *Out-of-home Care* (SCARC 2015); and Recommendations 6.5.2 and 6.14b of the *Royal Commission into Institutional responses to Child Sexual Abuse* (Commonwealth of Australia 2017a). Outside government, the Victorian Koori Youth Council report *Ngaga Dji* (Hear Me) establishes "Youth Participation" as principle 2; and the CCYP VIC report *In Our Own Words* covers participation in Findings 6-14 & 28, leading to Recommendation 4: *Listening and responding to the voice of children and young people*. The detail of this recommendation also provides for recordkeeping participation, calling for the development of tools including "paper-based and digital resources that can be used by practitioners during home visits to promote the inclusion of children and young people's views in decision making" and to "include ways to record [children and young people's] views effectively and include them in practitioners' assessment of planning decisions".

Whereas high-level rights statements cannot, for the sake of brevity, delve into the depth or implications of participatory rights, explanatory documentation to these instruments may interpret nuances of participation (and potential conflicts of rights between participatory agents) in more detail. One such example is the Australian *Charter of Children's and Young People's Rights in Healthcare Services* (initiated in 2010 and finalised in 2011), which provides substantial coverage of what participation means in this context. Similarly, the Participation Module in the UNICEF *Child Rights Toolkit: Integrating Child Rights in Development Cooperation* (EU-UNICEF 2014) has an extensive best practice definition of participation. Although prepared primarily for healthcare and development contexts, these definitions and interpretive guides are at least partially transferable to the out-of-home care sector.

At a general level, the UNICEF Child Rights Toolkit also provides rationale for why participation (and participatory rights and principles) result in better decision making; create safer environments for children; and strengthen accountability and transparency:

- Participation leads to better decision-making and outcomes: Adults do not always have sufficient insight into children's lives to be able to make informed and effective decisions when designing legislation, policies and programmes for children;
- Participation serves to protect children: Children who are silenced and passive can be abused by adults with relative impunity. Providing them with information, encouraging them to articulate their concerns and introducing safe and accessible mechanisms for challenging violence and abuse are key strategies for providing effective protection;
- Participation strengthens accountability: Participation is central to a process of building accountability and promoting good governance. It is a means through which governments and other duty bearers can be held to account. Investment in building children's capacities for and commitment to active participation will contribute towards the creation of more transparent and open government (EU-UNICEF 2014, p6).

Rights to participation are often glossed as the right to be heard; or the right to have a say and have that opinion considered. The extension of *participation* rights into *participatory* rights through which children have greater agency in *how* their views are heard is sometimes lost in the final translation to rights statements. This is regrettable, as the intent of such frameworks should be to enable movement “from passive and powerless subjects, to active participatory agents” (Gooda, 2012). Accordingly, it is not only the ability to express views and have them considered that is important, but also the right to exercise choice or control over the methods by which such views are expressed, recorded, preserved, and utilised. The *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care* champions participatory recordkeeping, and emphasises that rights to participate in recordkeeping should not fall short of the right to participate in recordkeeping systems. Gilliland and McKemmish (2014) expand on what this means for archival and recordkeeping professionals:

Participatory archives serving human rights agendas need to embed rights of self-determination and facilitation of the exercise of cultural rights as human rights, underpinned by the principle of prior, free and informed consent, in their archival practice.

The principle of negotiation emerges as a key element in participatory recordkeeping rights, contingent on the collective and contestable nature of record composition and the pluralities of function and meaning present for different stakeholders in the record. Participatory rights call for reform of present systems, where the demands of those who exercise administrative control over records of care often take exclusive precedence, despite being acknowledged as sitting in tension with ethical demands to respect and privilege the rights of people who may otherwise be denied agency in how they are documented and recollecting on record.

2.5 Recordkeeping access and disclosure rights

Why have they got records on us? I'm not a criminal. I never have been a criminal and I object to the government holding records on me. I didn't do anything wrong and I want those records to be – if they don't want to hand them over to me, then destroy them in front of me. I don't see why I should have that humiliation.⁹⁰

One thing I didn't know was that the clinic was telling Welfare things about [the older child's] health ... I think it would have been better if the clinic had have told me that they were going to let Welfare know what was going on with [his] health because then I would have at least known that Welfare might want to see me about it and I could have known that this was something they thought was something that was wrong with my caring for [him].⁹¹

I speak to my case worker, it's good. She's understanding and gets things done without swapping my information ... I've always had trouble when people have shared all my information and not got things done.⁹²

I just don't really like talking with [government child protection agency], cos I don't really trust... sometimes when I used to talk to them but they would tell other people, which I didn't really like.⁹³

[I want] Information that concerns me to be given to me.⁹⁴

Recordkeeping access and disclosure refers to the capacity to view or obtain records and the information they contain, including being made aware of the existence of those records; as well as the capacity to moderate how access is granted to others. Recordkeeping access and disclosure rights are enabling rights that support wider memory, identity, accountability and participation rights.

In the absence of access and disclosure rights, individuals may be prevented from obtaining information or documentation necessary for participation in societal norms and systems, including knowledge and connection with their family and cultural context. Denial of recordkeeping access and disclosure rights also allows information about an individual to be disclosed without their consent and/or knowledge, exacerbating power imbalances against vulnerable individuals and heightening the potential for unfair discrimination or insufficiently supported judgements. This risk is

⁹⁰ Testimony of Stolen Generation, cited in *Bringing Them Home* report (HREOC 1997, p306).

⁹¹ Testimony of parent of child in care, cited in *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b, cited p79 of Volume 3a).

⁹² Testimony of young person in independent living arrangement (previously in Care), age 17, cited in CCYP WA 2016, p39.

⁹³ Testimony of young person in Family Care, age 13, cited *ibid*, p23.

⁹⁴ Testimony of young person in Family Care, age 14, cited in CCYP VIC 2019b, p107.

not new, having long been present in circumstances of human release, but now increasingly extends to system-level information sharing and data-based assessments whereby decisions (or decision triggers) are being effected by automated systems.

Within the framework of the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, Recordkeeping Access and Disclosure Rights are focused on enabling information justice, redressing the power imbalances and information asymmetries from which governments and organisations providing care have historically benefited. They also acknowledge the potential for conflicts of rights at intra- and inter-generational contexts⁹⁵ and as such are intended to have a role as a mechanism to promote negotiation regarding how such tensions may be reconciled.

Recordkeeping Access and Proactive Disclosure Rights are articulated in the *Charter* as the rights to:

- Lifelong access to records about your childhood
- Have a say in intergenerational access
- Know where records about you are held
- Understand the type(s) of information held about you
- Be informed of when and why others are given access to your records
- Consent to use of your records by others
- Know when and why records about you are destroyed

The importance of these rights for individuals who experience childhood out of home care is contingent to the level of scrutiny that persons who come into contact with child protection (and other intersecting services) are faced with in comparison to individuals whose life experience does not include this contact, and also to the withholding of information from care-involved and care-experienced individuals (which may be deliberately or incidentally symptomatic of care systems)⁹⁶. The existence of both data deficits and data surveillance as a consequence of care-experience is very real; as is the potential for ongoing social and bureaucratic discrimination, and lifelong emotional impacts, arising from associated recordkeeping practices. Documented evidence of how policies and systems codify risk factors and ‘red flags’ without recourse to “proper, skilled, culturally competent examination of the particular circumstances”⁹⁷, speak to the need to prioritise awareness and protection of these recordkeeping rights.

⁹⁵ As simplified examples: two siblings who were in care together, and are now estranged, both claim right of ownership to the only original photograph depicting them as children with their mother, taken on an access visit and now held on a government file. Or, an individual wants to destroy (or prevent access to) the historic case record of their time in care, despite knowing that their child is seeking access to that information as a means to build family memory and context for their own care experience.

⁹⁶ For contradictions in how information is handled, and systemic failures indicated by how the case records of children in Care are constructed and used, see: *Always was always will be Koori children* report (CCYP VIC 2016), *Lost, not forgotten* and *In Our words* reports (CCYP VIC 2019a and 2019b); *Family is Culture* report (Davis 2019) and the case studies included as chapter 29 of the *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b).

⁹⁷ Submission to *Family Is Culture* inquiry, cited in Davis 2019, p22.

Testimonial warrant for recordkeeping access and disclosure rights is well provided for within the historical justice and healing space – see, in particular, Chapters 6 and 9 of the *Forgotten Australians* Senate report (SCARC 2004) and Section 16 of the *Bringing Them Home* report (HREOC 1997). In the context of contemporary out of home care and system reform, these rights are further warranted by numerous statements testifying the concerns held by children and families regarding not knowing what information about themselves is documented, how long it is kept, or who it is shared with. Representative instances of such statements can be found in CCYP WA 2016; CCYP VIC 2019b; and in the final report of the *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b). The same sources – most notably the Royal Commission report – also testify to extremes of anger, frustration, and sadness caused by the apparent readiness of services to share information to justify removal of children, while at the same time neglecting to engage in supportive information sharing with families in ways that could help maintain or restore family unification.

Instrumental warrant for recordkeeping access and disclosure rights is extant within the sphere of international human rights instruments. Principle 15 of the United Nations’ Joint Orentlicher principles⁹⁸ stipulates that: *Access to archives shall be facilitated in order to enable victims and their relatives to claim their rights* (with archives here defined as “collections of documents pertaining to violations of human rights and humanitarian law”), which supports Principle 4 of the same instrument: *The victim’s right to know* (Orentlicher 2005). As well, in the specific sphere of children’s rights and out-of-home care, Article 111 of the UN Guidelines on the Alternative Care of Children suggests – although does not demand – that children be provided access to the documentary records of their time in care.

The specificity to recordkeeping provided for by these instruments is somewhat uncommon, with the more usual provision being for a right to information. Offering the right to information in place of more specific rights to records is a double edged sword: one might claim that records are information and thus subject to a right of access; and one might be also be denied access to records if the information sought is considered to be adequately provided elsewhere, or if the request is not suitably articulated. Within Australian jurisdictions, many (if not the majority of) Care Leaver requests for records about their time in care fall under the remit of Freedom of Information / Right to Information laws, presenting a classic Catch 22: applicants are required to specify the information they require in terms of the documents or data being requested, without prior access to facilitating knowledge of the records and systems this information might exist in. Warrant for proactive disclosure of records – ie, advising the existence of relevant records and/or information to care-experienced individuals (whether or not they are in the process of actively seeking information about their time in care) – is established as part of the non-binding access principles and best practice guidelines set out in *Access to Records by Forgotten Australians and Former Child Migrants*, released by the Commonwealth Government in 2015 as part of the ongoing government response to recommendations of the *Forgotten Australians* report. These access principles also warrant the rights of Care Leavers to add to or annotate records, and to be given full ownership of the originals of personal papers held on file, such as letters that were addressed to them while in care (Commonwealth of Australia 2015). Notably, and continuing the warrant for recordkeeping access, as well as for participatory recordkeeping, of the five recordkeeping principles proposed in the

⁹⁸ Orentlicher (2005) *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, United Nations Economic and Social Council.

RCIRCSA final report (Commonwealth of Australia 2017a, Volume 8), only one explicitly links rights and records: *Individuals' existing rights to access, amend or annotate records about themselves should be recognised to the fullest extent.*

Strong warrant for recordkeeping access and disclosure rights is also present in the *Bringing Them Home* report (HREOC 1997). Although this warrant is specific to Indigenous Australians, the minimum access standards set out in Recommendation 25 of *Bringing Them Home* (informed by Section 16 of the report) show parallels, up to a point, with the practical needs and lived experience of non-Indigenous Care Leavers. This does not deny or diminish the specific experiences, massive cultural repercussions, and human rights abuses endured by Indigenous Australians under the mantle of 'child protection'. The scale and intent animating child removal policy as it affects members of the Stolen Generation and their descendants differs materially to the dogmas and extent of cultural separation affecting the experience of non-Indigenous Care Leavers. However, the needs of individuals to be able to understand what happened to them in childhood and the deeply rooted desire for actual and/or informational reconnection with family are shared commonalities, as are many of the practical difficulties encountered in attempts to access historic records documenting childhood experience in out of home care institutions. These zones of shared impact (and also the delimitations of difference) are made visible when reading the *Bringing them Home* report alongside the *Forgotten Australians* report.

Overlap between data and records, and associated warrant for Indigenous data sovereignty in relation to out of home care recordkeeping is established in the *Family is Culture* report (2019). As warrant and primer for Indigenous data sovereignty more broadly, see the ANU publication *Indigenous data sovereignty: toward an agenda* (Kukutai and Taylor (Eds.) 2016).

2.6 Recordkeeping rights to privacy and safe recordkeeping

A nursing sister used to sit outside and every five minutes she'd have to note what you were doing. And, like, you were a specimen in a cage.⁹⁹

As if a child can neglect itself and was a criminal, even today I feel that I have to declare that I have been charged when documents ask for criminal records.¹⁰⁰

It is very bad that all the time when a child is going in and out of care, they are always getting brand new caseworkers, and they then have to build a new relationship with him or her, which I do not agree on doing, due to your having to then share all your own private and confidential information, with a stranger!¹⁰¹

When our kids were put into our cousin-sister care, I had a police officer come up with file and they said you have to get a lawyer. That was it, then they drove off. The police didn't explain. I don't read. I couldn't read that file and understand. I looked at the paper and said this is too much for me. I need to get a lawyer and what would the lawyer even be for? I don't know how to get a lawyer.¹⁰²

All they read is bad history about me, but they didn't want to know me.¹⁰³

Privacy and safe recordkeeping refers to the capacity for parties and/or stakeholders in records to have trust in recordkeepers and recordkeeping systems. Recordkeeping privacy and safety rights are particularly important for enabling accountability and participation rights. Safe recordkeeping promotes both the safety of the record (for accountability), and the safety of the person/s whose life is documented therein (for participation). Recordkeeping privacy is the ability of individuals or collectives to establish boundaries around the capture and release of information about themselves – and to have these boundaries respected. These are essential rights for establishing human-centred recordkeeping systems. In the absence of recordkeeping privacy and safety there are no assurances of common purpose, and no basis for negotiated trust in the evidence records purport to convey, or the outcomes they claim to support.

Within the framework of the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care*, Recordkeeping Privacy and Safety Rights are focused on enabling trust in participatory

⁹⁹ Testimony of Care Leaver, cited in final report of the Forde inquiry (Forde 1999, p157).

¹⁰⁰ Testimony of Care Leaver (Submission 352), cited in *Forgotten Australians* (SCARC 2004, p71).

¹⁰¹ Testimony of child in care, age 13, cited in McDowall 2018, p24.

¹⁰² Testimony of parent of child in care, cited in *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b, p93 of Volume 1).

¹⁰³ Testimony of young person formerly in care, cited in *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (ibid, p17 of Volume 3A).

recordkeeping, and facilitating self-determination through archival autonomy. They are articulated in the *Charter* as the rights to:

- Privacy
- Not to have records of childhood used for other than their original purpose without consent
- Safe and secure recordkeeping processes and systems
- Safe and secure keeping places for archival records

A key significance of recordkeeping safety for persons who experience out-of-home care is the supporting role it holds for creating environments where children can know and believe they are cared for; and that information about who they are and what happens to them is respected and being held in trust to support their needs. As well, a right to recordkeeping safety means this trust extends past the cessation of care and lasts throughout a lifetime. If recordkeeping safety rights are largely about rebuilding (or, better, not breaking) the trust of vulnerable children and families; recordkeeping privacy rights can play a more active role in enabling Care Leavers and care-involved individuals to reclaim agency in their lives. Recordkeeping privacy rights serve as a basis for giving individuals greater control over what other parties might know about them (as revealed through records stored as case files or data elements in larger systems). As long as records of out-of-home care are being created largely as non-discretionary surveillance accounts, with an emphasis on capturing traumatic and conflicted events (and, particularly given this crisis-centric documentation is also occurring through developmental and experimental life periods in childhood and adolescence), the right to recordkeeping privacy is critical for enabling young people to grow into independence, and proceed through life, with sufficient measures of control over records that may be used in ways that limit their choices or freedoms.

Testimonial warrant for rights to privacy and safety in recordkeeping is present in submissions and testimony documented in the Forde Inquiry report (Forde 1999), the *Forgotten Australians* report (SCARC 2004), the *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Commonwealth of Australia 2017b), and in the words of care-experienced young people included in CREATE Foundation report cards on the out-of-home care sector (for example, McDowall 2013 and 2018).

Additional needs for cultural safety in recordkeeping relating to Australia's Indigenous communities are further warranted by testimony shared with *Bringing them Home* (HREOC 1997) and subsequent reports into the Indigenous experience of child removal and out of home care discussed throughout this document. Cultural safety, Indigenous knowledge practices, community keeping places, and trusted recordkeeping systems are also explored in interviews informing the Australian Research Council funded *Trust and Technology* project, as cited in the final report of that project¹⁰⁴.

Instrumental warrant

Although the context is not specific to recordkeeping, the UN Convention on the Rights of the Child provides for children's rights to safety (Article 3.3) and Privacy (Article 16.1). Within Australia, these

¹⁰⁴ The final report of this project is available online at <https://www.monash.edu/it/research/research-centres-and-labs/cosi/projects/completed-projects/trust/final-report> (accessed 24 February 2020).

rights flow through to the State/Territory-based Rights Charters for children and young people in out-of-home care. As well, Recommendation 6.14b of the *Royal Commission into Institutional Responses to Child Sexual Abuse* (Commonwealth of Australia 2017a) posits that the Australian Government should coordinate the direct input of children and young people into the evaluation and continuous improvement of the Child Safe Standards, of which recordkeeping forms a part. While this Recommendation also speaks to participation and accountability rights, the Child Safe Standards are clearly directed at the broader need to create environments in which children feel – and are – safe.

CONCLUSION

Outside literature produced by the recordkeeping profession, the capacity of records to support children's rights during and after out-of-home care is under-examined: this review has found relatively little acknowledgement within child protection literature of the significance, value or standing of recordkeeping in out-of-home care beyond how it functions as an administrative tool. Where recordkeeping has been identified as having a role to play in rights or reform mechanisms, this is usually tied to format or activity bound conceptualisations of records and accordingly constrained to suggesting how specific fixes to these elements might create gains, without looking in parallel towards how reconfiguring recordkeeping concepts that inform practice might create bigger gains in the system. Inter alia, inquiries have commented on: records as planning tool (family mapping and genograms; case plans; cultural plans); records as information sharing mechanism (Essential Information Record; case file; Carer Registers); records as evaluation instrument (database content and reporting; capacity for disaggregation of data by particular status or indicators); and/or records as an evidentiary component in risk and compliance assessments and corresponding availability of evidence for accountability purposes and legal claims. Yet, most continue to suggest piecemeal fixes rather than reconsidering recordkeeping as a whole, and as part of a holistic care system.

Despite a number of key reports identifying immediate and lifelong repercussions and psychosocial impacts that recordkeeping practices generate for care-experienced individuals¹⁰⁵, there is rarely extension of this discussion to what records and recordkeeping might mean to children as they are experiencing out-of-home care, and little dedicated inquiry into the ways in which children in care understand or participate in recordkeeping. Reluctance to fully admit the possibility of recordkeeping as an important part of social processes as well as administrative ones remains an imaginative failing in efforts to radically overhaul the child protection system. While discrete recordkeeping forms and practices are sometimes considered in social contexts – for example: the *Children Safe, Family Together* recommendation that family mapping tools and processes should be co-designed by Territory Families and ACCOs (Tangentyere Council 2019); or the common counsel that children's identity should be supported through life story books – such recommendations stop short of the deeper extrapolation that recordkeeping itself (wherever it occurs in the out-of-home care system) might be a right rather than a duty, and a communal enterprise with lifelong psychosocial import.

To date, there are few sources directed toward (or coming from within) the out of home care sector that ask policy makers and service providers to consider recordkeeping as a holistic system; to position recordkeeping as an element in how a child constructs their worldview and social bonds¹⁰⁶; or to continuously reflect on how – and how easily – recordkeeping can be manipulated as a tool for empowerment or for disempowerment. Individual submissions to commissions of inquiry sometimes

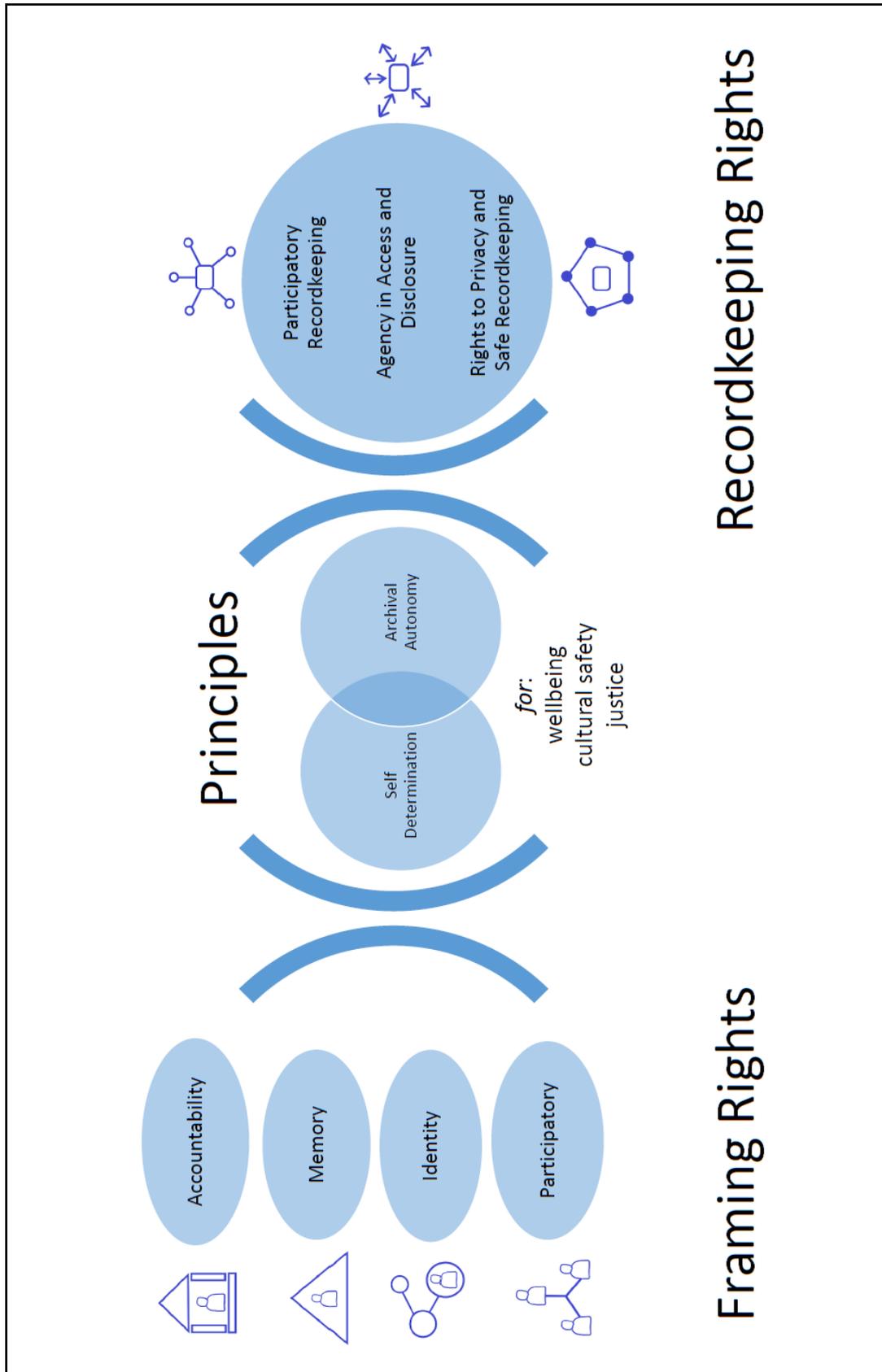
¹⁰⁵ For example, RCIRCSA vol8, p9 and p30 (on general recordkeeping significance/observations): "Inadequate records and recordkeeping have contributed to delays in or failures to identify and respond to risks and incidents of child sexual abuse and have exacerbated distress and trauma for many survivors. Obstructive and unresponsive processes for accessing records have created further difficulties for survivors seeking information about their lives while in the care of institutions." For further discussion of these impacts, see also the *Bringing them Home* and *Forgotten Australians* reports.

¹⁰⁶ Lifestory has potential to do this, but is more usually framed as being beneficial in regard to being a 'product' rather than 'process' of recordkeeping.

contain this type of material, however the failure of radical recordkeeping concepts to translate into recommendations and practice suggests they are not being formulated in ways amenable to inclusion in policy reform. Our intent for the *Charter of Lifelong Rights in Childhood Recordkeeping in Out-of-home Care* is that a human rights based approach will assist with this translation by providing a clear recordkeeping rights framework deriving warrant from existing instruments and from the evidence of living testimony.

Appendix 1:

Graphic representation of the Charter of Lifelong Rights in Childhood Recordkeeping (OOHC)



Appendix 2:

List of cited references

- Advocate for Children and Young People [ACYP] (2018) *Report on consultations with socially excluded children and young people*, NSW: Office of the Advocate for Children and Young People
- Albers, B., Shlonsky, A., Pattuwage, L., Rinaldis, S., Talor, D. (2017) *Out-of-Home Care: An Evidence and Gap Map*, Sydney: NSW Department of Family and Community Services
- Alen, A., Vande Lanotte, J., Verhellen, E., Ang, F., Berghmans, E., and Verheyde, M. (Eds) (2007) *A Commentary on the United Nations Convention on the Rights of the Child*, Leiden: Martinus Nijhoff Publishers.
- Anderson, C. (2019) *Care Experienced Information Rights and Organisational Practice*, Scottish Journal of Residential Child Care, 18(3), 134–145.
- AHRC (2015) *Social Justice and Native Title Report 2015*, Sydney: Australian Human Rights Commission
- Australian Institute of Family Studies (nd) *Protecting Australia's Children: Research and Evaluation Register, 1995-2010*
- Australian Institute of Family Studies (nd) *Protecting Australia's Children: Research and Evaluation Register, 2011-2015*
- Australian Institute of Health and Welfare (2018) *Child Protection Collection [data tables]*
<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2017-18/data>
- Australian Law Reform Commission [ALRC] (2010) *Seen and heard: priority for children in the legal process* (ALRC Report 84), Canberra: Commonwealth of Australia
- Australian Law Reform Commission [ALRC] (2018) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), Canberra: Commonwealth of Australia
- Bamblett, M. and Lewis, P. (2007) *Detoxifying the child and family welfare system for Australian Indigenous peoples: Self-determination, rights and culture as the critical tools*, The First Peoples Child & Family Review, 3(3): 43–56.
- Bick, J., Zeanah, C., Fox, N. and Nelson, C. (2017) *Memory and Executive Functioning in 12-Year-Old Children with Histories of Institutional Rearing*, Child Development, 89(2): 495-508.
- Brandon M., Sidebotham P., Bailey S., Belderson P., Hawley C., Ellis, C. and Megson, M. (2012) *New learning from serious case reviews: a two year report for 2009-2011*, UK: Department for Education
- Bromfield, L., Higgins, D., Osborn, A., Panozzo, S. and Richardson, N. (2005) *Out-of-Home Care in Australia: Messages from Research*, Melbourne: Australian Institute of Family Studies; Commonwealth of Australia
- Bullen, T., Taplin, S., Kertesz, M., Humphreys, C., and McArthur, M. (2015) *Literature review on supervised contact between children in out-of-home care and their parents*, Canberra: Institute of Child Protection Studies, ACU.

Carr, N. and Pinkerton, J. (2015) *Coming into view? The experiences of LGBT young people in the care system in Northern Ireland* in Fish, J. and Karban, K. *Lesbian, Gay, Bisexual and Trans Health Inequalities: international perspectives in social work*, Bristol: Policy Press (pp 99-112)

Cerreto, A. (2018) *Ngaga Dji [Hear Me] - young voices creating change for justice*, Melbourne: Koorie Youth Council

CLAN (2016) *I know more about Captain Cook than I know about my own father: Care Leavers Australasia Network submission on Records and Record Keeping to the Royal Commission*, Submission No 13 to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Records and recordkeeping practices

Commission for Children and Young People [VIC] (2015) *In the Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, Melbourne: Commission for Children and Young People

Commission for Children and Young People [VIC] (2016) *Always Was Always Will Be Koori Children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Melbourne: Commission for Children and Young People

Commission for Children and Young People [VIC] (2019a) *Lost, not forgotten: Inquiry into children who died by suicide and were known to Child Protection*, Melbourne: Commission for Children and Young People

Commission for Children and Young People [VIC] (2019b) *'In our own words': Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system*, Melbourne: Commission for Children and Young People

Commission for Children and Young People [WA] (2016) *Speaking Out About Raising Concerns in Care: The views of Western Australian children and young people with experience of out-of-home care*, Perth: Commissioner for Children and Young People WA

Commonwealth of Australia (2011), *An outline of National Standards for Out-of-home Care*, Canberra: Department of Families, Housing, Community Services and Indigenous Affairs together with the National Framework Implementation Working Group

Commonwealth of Australia (2015) *Access to Records by Forgotten Australians and Former Child Migrants*, Canberra: Commonwealth of Australia Department of Social Services

Commonwealth of Australia (2017a) Royal Commission into Institutional Responses to Child Sexual Abuse [RCIRCSA], *Final Report (Volume 8 – Recordkeeping and Information Sharing; Volume 9 – Advocacy, support and therapeutic treatment services; Volume 11 – Historical Residential Institutions; and Volume 12 – Contemporary out-of-home care)*, Canberra: Commonwealth of Australia.

Commonwealth of Australia (2017b) *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Canberra: Australia

Council of Europe (2018) 'Memory Laws' and Freedom of Expression Thematic Factsheet [updated 2018] <https://rm.coe.int/factsheet-on-memory-laws-july2018-docx/16808c1690>

CREATE Foundation (2018) Youth Justice Report: Consultation with young people in out-of-home care about their experiences with police, courts and detention

- Crime and Misconduct Commission (2003) *Protecting children: an inquiry into abuse of children in foster care*, Brisbane: Queensland Government
- Cummins, P., Scott, D., and Scales, S. (2012) *Report of the Protecting Victoria's Vulnerable Children Inquiry*, Melbourne: Department of Premier and Cabinet
- Davis, M. (2019) *Family is Culture: Independent review into Aboriginal out-of-home care in NSW*, Department of Health and Human Services (2017) *Missing from care: a literature review* Mildura: State of Victoria
- Einboden, R. (2019) *The problem with child protection isn't the money, it's the system itself*, The Conversation, 19 November 2019
- European Court of Human Rights *European Convention on Human Rights [Amended]* (2010) Council of Europe: Strasbourg
- European Court of Human Rights (1989) *Judgement in the Case of Gaskin v. The United Kingdom (Application no. 10454/83)*
- EU-UNICEF (2014) *Module 3: Child Participation*. In *Child Rights Toolkit: Integrating Child Rights in Development Cooperation*
- Evans, J., McKemmish, S., Daniels, E. and McCathy, G. (2015) *Self-determination and archival autonomy: advocating activism* *Archival Science* 15(4): 337–368.
- FACS (2017) *The prevalence of intergenerational links in child protection and out-of-home care in NSW – FACS Analysis and Research Brief*, NSW: Department of Family and Community Services
- Find & Connect web resource (2016) *Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Records and recordkeeping practices: submission from the Find & Connect web resource* Submission No 18 to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper on Records and recordkeeping practices
- Fivush, R., Haden, C. and Reese, E. (2006) *Elaborating on Elaborations: Role of Maternal Reminiscing Style in Cognitive and Socioemotional Development*, *Child Development*, 77(6): 1568-1588
- Forde, L. (1999) *Commission of Inquiry into Abuse of Children in Queensland Institutions*, Brisbane: Queensland Government
- Fox, N., Almas, A., Degnan, K., Nelson, C. and Zeanah, C. (2011) *The Effects of Severe Psychosocial Deprivation and Foster Care Intervention on Cognitive Development at 8 Years of Age: Findings from the Bucharest Early Intervention Project*, *The Journal of Child Psychology and Psychiatry*, 52(9): 919-928.
- Fox, S., Southwell, A., Stafford, N., Goodhue, R., Jackson, D. and Smith, C. (2015) *Better systems, better chances: A review of research and practice for prevention and early intervention* Canberra: Australian Research Alliance for Children and Youth
- Freeman, M. (1992) *Taking Children's Rights More Seriously* *International journal of law, policy and the family*, 6(1): 52-71.
- Freeman, M. (2007) *Article 3. The Best Interests of the Child* in Alen et.al. (Eds) *A Commentary on the United Nations Convention on the Rights of the Child*, Leiden: Martinus Nijhoff Publishers.

- Gilliland, A. & Carbone, K. (2019) *An analysis of warrant for rights in records for refugees*, International Journal of Human Rights, DOI: 10.1080/13642987.2019.1651295
- Gilliland, A., & McKemmish, S. (2014) *The role of participatory archives in furthering human rights, reconciliation and recovery*, *Atlanti: Review for Modern Archival Theory and Practice*, 24: 78–88
- Godar, R. and Holmes, D. (2017) *Child protection: A review of the literature on current systems and practice*, UK: Early Intervention Foundation and Local Government Association
- Golding, F. (2020) *“Problems with records and recordkeeping practices are not confined to the past”: a challenge from the Royal Commission into Institutional Responses to Child Sexual Abuse* *Archival Science*, 20: 1-19
- Gooda, M. (2012) *The practical power of human rights: how international human rights standards can inform archival and record keeping practices* *Archival Science*, 12: 141–150
- Gordon, S., Hallahan, K, and Henry, D (2002) *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, Western Australia: Department of Premier and Cabinet
- Gumbis, J., Bacianskaite, V. and Randakeviciute, J. (2008) *Do Human Rights Guarantee Autonomy?* *Cuadernos constitucionales de la Cátedra Fadrique Furió Ceriol*, 62/63: 77-93
- Higgins, D., Adams, R., Bromfield, L., Richardson, N. and Aldana, M. (2005) *National Audit of Australian Child Protection Research 1995-2004*, Melbourne: Australian Institute of Family Studies; Commonwealth of Australia
- Hoyle, V., Shepherd, E., Flinn, A., and Lomas, E. *Child Social-Care Recording and the Information Rights of Care-Experienced People: A Recordkeeping Perspective*. *The British Journal of Social Work* 49(7): 1856–1874
- Human Rights and Equal Opportunity Commission (1997) *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Sydney: Commonwealth of Australia
- Kalinin, D., Gilroy, J. and Pinckham, S. (2018) *The needs of carers of Aboriginal and Torres Strait Islander children and young people in foster care in Australia: A systematic literature review*, Sydney: Macquarie University and The University of Sydney
- Kelly, B., McShane, T., Davidson, G. and Pinkerton, J. (2014) *A Review of Literature on Disabled Care Leavers and Care Leavers with Mental Health Needs*, Belfast: Queen’s University Belfast
- Kirkham, R. (2018) *Care leavers advocate for rights of the child in recordkeeping*, *Ballarat Courier*, December 16, 2018.
- Kirton, D., Feast, J. and Goddard, J. (2011) *The Use of Discretion in a ‘Cinderella’ Service: Data Protection and Access to Child-Care Files for Post-Care Adults*, *British Journal of Social Work*, 41: 912-930
- Kletzka, N. and Seigfried, C. (2008) *Helping Children in the Child Welfare Systems Heal from Trauma: A Systems Integration Approach*, *Juvenile and Family Court Journal* 59(4): 7-20
- Kukutai, T. and Taylor, J. [Eds] (2016) *Indigenous data sovereignty: toward an agenda*, Canberra: Centre for Aboriginal Economic Policy Research / ANU Press.

- Law Council of Australia (2017) *The Justice Project Consultation Paper – Children and Young People*
- Law Council of Australia (2018) *The Justice Project Final Report: Part 1 – Children and Young People*
- Layton, R. (2003) *Our best investment: A state plan to protect and advance the interests of children*, Adelaide: Government of South Australia
- Lewis, A. (2017) *Records and rights of the child: report of focus discussions*, Melbourne: University of Melbourne.
- Libesman, T. (2011) *Cultural care for Aboriginal and Torres Strait Islander children in out of home care*, North Fitzroy: Secretariat of National Aboriginal and Islander Child Care
- Libesman, T. (2016) *Indigenous Child Welfare Post Bringing Them Home: From Aspirations for Self-Determination to Neoliberal Assimilation*, Australian Indigenous Law Review 19(1): 46-61
- Lowy, C. (1992) *Autonomy and the Appropriate Projects of Children: A Comment on Freeman*, International journal of law, policy and the family 6(1): 72-75.
- McCormick, A., Schmidt, K., and Terrazas, S. (2017) LGBTQ Youth in the Child Welfare System: An Overview of Research, Practice, and Policy, Journal of Public Child Welfare, 11(1): 27-39
- McDonald, M., Higgins, D., Valentine, K. and Lamont, A. (2011) *Protecting Australia's Children Research Audit (1995-2010)* Melbourne: Australian Institute for Family Studies; Commonwealth of Australia Department of Families, Housing, Community Services and Indigenous Affairs
- McDowall, J. J. (2013) *Experiencing Out-of-home care in Australia: The views of children and young people (CREATE Report Card 2013)*, Sydney: CREATE Foundation
- McDowall, J. J. (2018) *Out-of-home care in Australia: Children and young people's views after five years of National Standards*, Sydney: CREATE Foundation
- McKemmish, S. (1996) *Evidence of Me...* Archives and Manuscripts, 24(1): 28-45.
- McLaughlin, K., Sheridan, M. and Nelson, C. (2017) *Neglect as a Violation of Species-Expectant Experience: Neurodevelopmental Consequences*, Biological Psychiatry, 82(7): 462–471
- Mendes, P. and Purtell, J. (2017) *Submission by Philip Mendes and Jade Purtell (Department of Social Work, Monash University) to National Children's Commissioner Roundtable on "Young Parents and Their Children" with a particular focus on young people transitioning from out-of-home care who become early parents (i.e. where the State Parent becomes the state Grandparent)* Submission No 4 to the Australian Human Rights Commission, National Children's Commissioner's Investigation into Young Parents and their Children
- Moore, T., Bennett, B., and McArthur, M. (2007) *"They've gotta listen" Aboriginal and Torres Strait Islander Young People in Out of Home Care*, Canberra: ACU Institute of Child Protection Studies; ACT Department of Disability, Housing and Community Services
- Mullighan, E.P. (2004) *Children in State Care Commission of Inquiry – Allegations of Sexual Abuse and Death from Criminal Conduct*, Adelaide: Government of South Australia
- Mullighan, E.P. (2008) *Children on APY Lands Commission of Inquiry (2008)*, Adelaide: Government of South Australia
- New South Wales Legislative Council Standing Committee on Social Issues (2002) *Care and Support: Final Report on Child Protection Services*, Sydney: Parliament of NSW

- Nyland, M. (2016) *The life they deserve: Child Protection Systems Royal Commission Report*, Adelaide: Government of South Australia
- O'Donnell, M., Taplin, S., Marriott, C., Lima, F., and Stanley, F. (2019) *Infant removals: The need to address the over-representation of Aboriginal infants and community concerns of another 'stolen generation'*, *The International Journal of Child Abuse and Neglect* Vol. 90: 88-98.
- O'Neill, C., Selakovic, V. and Tropea, R. (2012) *Access to records for people who were in out-of-home care: moving beyond 'third dimension' archival practice*, *Archives and Manuscripts* 40(1): 29-41
- Office of the Advocate for Children and Young People (2018) *Report on consultations with socially excluded children and young people* NSW: ACYP.
- Office of the Guardian for Children and Young People (2013) *Literature Review: The impact and experience of moving while in care*, Adelaide: Government of South of Australia
- Ombudsman New South Wales (2019) *Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system [revised edition]*, Sydney: NSW Government
- Ombudsman Victoria (2009) *Own motion investigation into the Department of Human Services Child Protection Program*, Melbourne: Parliament of Victoria.
- Orentlicher, Diane (2004) *Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity*, United Nations Economic and Social Council
- Orentlicher, Diane (2005) *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, United Nations Economic and Social Council
- Parton, N. (2011) *Child Protection and Safeguarding in England: Changing and Competing Conceptions of Risk and their Implications for Social Work*, *British Journal of Social Work*, 41(5): 854-875.
- Richardson, M., Coryn, C., Henry, J., Black-Pond, C., and Unrau, Y. (2012) *Development and Evaluation of the Trauma-Informed System Change Instrument: Factorial Validity and Implications for Use*, *Child and Adolescent Social Work Journal*, 29(3):167–184
- Rolan, G., Evans, J., Bone, J., Lewis, A., Golding, F., Wilson, J., McKemmish, S., Mendes, P., and Reeves, K. (2018) *Weapons of affect: The imperative for transdisciplinary information systems design* Proceedings of the Association for Information Science and Technology
- Ross, F., McKemmish, S. and Faulkhead, (2006) *Indigenous Knowledge and the Archives: Designing Trusted Archival Systems for Koorie Communities*, *Archives and Manuscripts*, 34(2):112-151
- Ross, N., Cocks, J., Johnston, L., Stoker, L. (2017) *'No voice, no opinion, nothing': Parent experiences when children are removed and placed in care*, NSW: University of Newcastle
- Roufeil, L. and Robinson, S. (2016) *Response to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper: Best practice principles in responding to complaints of child sexual abuse in institutional contexts*, Melbourne: Australian Psychological Society.
- Rudd, K. (2009) *Transcript of address at the apology to the Forgotten Australians and former child migrants*, National Apology made at Parliament House, Canberra on 16 November 2009

- SNAICC (2019) *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*
- Senate Community Affairs Reference Committee (2004) *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*, Canberra: Commonwealth of Australia
- Senate Community Affairs Reference Committee (2005) *Protecting vulnerable children: A national challenge*, Canberra: Commonwealth of Australia
- Senate Community Affairs Reference Committee (2009) *Lost Innocents and Forgotten Australian Revisited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports*, Canberra: Commonwealth of Australia
- Senate Community Affairs Reference Committee (2015) *Out of home care*, Canberra: Commonwealth of Australia
- Sentencing Advisory Council (2019) *'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court*, Melbourne: Sentencing Advisory Council.
- Schlumpp, A. (2017) *Young people in child protection and under youth justice supervision 2015–16* Data linkage series no. 23, Canberra: Australian Institute of Health and Welfare
- Schmied, V., Brownhill, S. and Walsh, P. (2006) *Models of service delivery and interventions for children and young people with high needs*, Ashfield: NSW Department of Community Services
- Secker, E. (2009) *Expanding the concept of participatory rights*, International Journal of Human Rights, 13(5): 697-715
- Seth-Purdie, R. (2019) *Review of Best Practice in Residential Out of Home Care*, ACT: Uniting Care
- Stewart, F. (2019) *'Crossover Kids': Vulnerable Children in the Youth Justice System (Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court)*, Melbourne: State of Victoria, Sentencing Advisory Council
- Swain, S. and Musgrove, N. (2012) *We are the stories we tell about ourselves: child welfare records and the construction of identity among Australians who, as children, experienced out-of-home 'care'*, Archives and Manuscripts 40(1): 4-14
- Tangentyere Council (2019) *Children Safe, Family Together: A Model and Implementation Guide for Aboriginal Family and Kin Care Services in the Northern Territory*, NT: Tangentyere Council
- Todres, J. (1998) *Emerging Limitations on the Rights of the Child: the U.N. Convention on the Rights of the Child and Its Early Case Law*, Columbia Human Rights Law Review 159.
- Tune, D. (2016) *Independent Review of Out of Home Care in NSW* Sydney.
- UN General Assembly (1989) *Convention on the Rights of the Child*, United Nations Treaty Series, vol. 1577
- UN General Assembly (2007) *United Nations Declaration on the Rights of Indigenous Peoples* A/61/L.67

- UN General Assembly (2010) *Guidelines for the Alternative Care of Children*, Resolution adopted by the General Assembly: A/RES/64/142
- VAGO (2013) *The State of Victoria's Children: Performance Reporting*, Victorian Auditor-General's Report 2012-13:30, Melbourne: Victorian Auditor-General
- Vardon, C. (2004) *The Territory as parent: review of the safety of children in care in the ACT and of ACT child protection management*, Canberra: Commissioner for Public Administration
- Victoria Legal Aid [VLA] (2016) *Care not custody: A new approach to keep kids in residential care out of the criminal justice system*, Melbourne: Victoria Legal Aid
- VLRC (2016) *Review of The Adoption Act 1984: Consultation Paper*, Melbourne: Victorian Law Reform Commission
- VLRC (2017) *Review of the Adoption Act 1984: Report*, Melbourne: Victorian Law Reform Commission; Report 36.
- Walsh, P., McHugh, M., Blunden, H. and Katz, I. (2018) *Literature Review: Factors Influencing the Outcomes of Children and Young People in Out-of-Home Care*. Pathways of Care Longitudinal Study: Research Report Number 6, Sydney: NSW Department of Family and Community Services
- Walter, M. (2018) *The voice of Indigenous data: Beyond the markers of disadvantage*, Griffith Review 60.
- Wang, Q. (2006) *Relations of Maternal Style and Child Self-Concept to Autobiographical Memories in Chinese, Chinese Immigrant, and European American 3-Year-Olds*, *Child Development*, 77(6): 1794-1809.
- Wang, Q. (2008) *Where Does Our Past Begin? A Sociocultural Perspective on the Phenomenon of Childhood Amnesia*, American Psychological Association: Psychological Science Agenda, March 2008
- Webb, J. (2012) *Indigenous Peoples and the Right to Self Determination*, *Journal of Indigenous Policy* 13:75-102.
- Wilber, S., Reyes, C., and Marksamer, J. (2006) *The Model Standards Project: Creating Inclusive Systems for LGBT Youth in Out-of-Home Care*, *Child Welfare*, 85(2):133-49
- Wilson, J.Z. and Golding, F. (2015) *Contested memories: Caring about the past—or past caring?* in: Swain, S. and Skold, J. (Eds) *Apologies and the legacy of abuse of children in 'care': international perspectives*, London: Palgrave Macmillan
- Wilson, J.Z. and Golding, F. (2016) *Latent scrutiny: personal archives as perpetual mementos of the official gaze*, *Archival Science*, 16:93–109
- Wood, J. (2008) *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Sydney: State of New South Wales
- Wood, S., Carbone, K., Cifor, M., Gilliland, A. and Punzalan, R. (2012) *Mobilizing records: re-framing archival description to support human rights*, *Archival Science*, 14(3-4): 397-419