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Submission on *Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families discussion paper* July 2019.

About the Rights in Records by Design ARC Discovery Research Project

Recordkeeping and its governance is a significant issue for any child protection and family support system, with impacts on the social, emotional and psychological health and wellbeing of the children and young people caught up in these systems and the adults they become. The *Archives and the Rights of the Child Research Program* is a transdisciplinary research agenda to investigate how multiple and lifelong rights in records and recordkeeping can be recognised, respected and enacted in Care systems utilising digital and networking technologies (Evans, McKemmish & Rolan, 2017). It brings together researchers from a range of academic, community and organisational contexts, and from a variety of disciplinary perspectives to tackle this complex problem using participatory research and design methodologies (see <https://rights-records.it.monash.edu/research-development-agenda/>). It is an example of giving voice and agency to those with Care experiences in research to address their recordkeeping needs.

The program incorporates a range of interconnected and complementary research projects, including an Australian Research Council Future Fellowship, *Connecting the Disconnected: Co-Designing Integrated and Inclusive Recordkeeping and Archival Networks* (2015-2018), doctoral research on *Transforming Archival Systems Design for Interoperability* (2014-2017) and *Early Childhood Recordkeeping Literacy* (2014-2020), the Australian Research Council Discovery Project, *Rights in Records by Design: Transforming Recordkeeping Systems for Children in Out-of-home Care* (2017-2019), and *The Imagined Archive for Childhood Out-of-Home Care* (2017-2018). The research agenda embodied in these projects is linked to the 2017 *Setting the Record Straight for the Rights of the Child National Summit* that brought together stakeholder communities to develop a ten-year research, development and action agenda to transform recordkeeping and archiving for childhood Care around recognizing, respecting and enacting multiple rights in records (Setting the Record Straight Initiative, 2017).

In the *Rights in Record by Design Project* we are currently researching a world first Charter of Lifelong Recordkeeping Rights for Childhood Out-of-Home Care and its translation into a recordkeeping rights engine – a technical demonstrator of how recordkeeping rights in Care systems could be dynamically enacted, negotiated and monitored. This research is part of imagining future digital systems for Care capable of real-time, proactive and transparent accountability to the

principles of provision, protection and participation in the best interests of the child enshrined in the United Nations Convention on the Rights of the Child.

Introduction

The Rights in Records by Design Research Project welcomes the opportunity to comment on the *Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families discussion paper*.

We commend the Queensland government and community on the Supporting Families Changing Futures Reform Program and agree that ‘strong, contemporary and effective legislative framework’ is needed to underpin the reforms.

We particularly welcome the focus of the discussion paper on how human rights protections can be strengthened in the legislation. Our concern is with the strengthening of the recordkeeping rights that underpin human rights given the role that records and recordkeeping regimes play in identity, connection to family, community and culture, evidence, memory, transparency and accountability.

We applaud the recognition that the ‘main principle for administering the Act is that the safety, wellbeing and best interests of a child, both throughout childhood and for the rest of their life, are paramount’ (p. 9). In researching with older Care Leavers we have been made well aware of the life time impacts of Care experiences, and the role that poor recordkeeping has played in contributing to adverse, traumatic and negative impacts later in life.

We urge that legislative reform explicitly recognise recordkeeping rights in child protection and family support contexts, and addresses their particular needs with regards to participation, autonomy and self-determination.

1. Reinforce human rights in the legislative framework

Recordkeeping background

Human rights for children are articulated in international conventions and declarations, and Australian national and State laws, charters and instruments, including the *UN Convention of the Rights of the Child*, Australian child protection legislation, and *Charters of Rights for Children in Out of Home Care*.

In Australia a series of inquiries, including the Royal Commission on Institutional Responses to Child Sexual Abuse, and a suite of research projects have found that recordkeeping is an essential enabler of child rights. Quality recordkeeping and archiving systems provide the evidence base for decision making and action. In turn they create and maintain evidence of, and authoritative information about, people, events, actions and decisions. Yet none of the child rights instruments explicitly include recordkeeping rights to underpin their human rights – and rarely acknowledge the role that quality records and recordkeeping systems play in identity, connection to family, community and culture, providing an evidence-base for decision making, memory, transparency and accountability.

The Royal Commission's report and recommendations includes one volume devoted to recordkeeping (RC 2017b), which is indicative of the many recordkeeping issues raised in submissions, including those relating to rights in records for children in Care. The Commission developed five high level principles for recordkeeping in institutions engaged in child-related work (RC 2017c, Recommendation 8.4, 22-23). The report emphasised that:

Creating and keeping accurate records about children, and the care and services provided to them, promotes the best interests of the child by fostering accountability and transparency and recognising individuals' character and experience. Importantly, these records matter to individuals when they are adults – to satisfy their essential human needs in relation to identity and personal history and for practical reasons, including in relation to redress and civil or criminal proceedings (RC 2017c, 62).

Pointing to the significant, elemental role of comprehensive high quality records and recordkeeping in good governance, particularly for children in Care, it stated:

They help promote consistency of practice, retention of organisational memory and institutional accountability. They also help institutions to maintain descriptions of their processes, decisions, activities and responses to critical incidents, providing a level of transparency and evidence of practices that can be relied on in the future (RC 2017c, 38).

Rights instruments and standards relating to children at global and local level, including those specifically developed for children in Care, include references to rights relating to identity, memory and cultural, agency or a degree of participation in decision making, and access to information. In the Royal Commission's reports referenced earlier we see a rare example of explicit recordkeeping requirements to support the rights of the child and Child Safe Standards (RC 2017a). In most cases, recordkeeping rights and principles essential to the exercise of human rights, participation in decision making and access to information are not specified.

In the ARC-funded *Rights in Records by Design Project*, we have heard from many Care leavers advocating for the explicit linking of recordkeeping principles, and related rights in records. These include rights to participate in making decisions about recordkeeping itself, proactive disclosure and access rights, and the right to add to or annotate an existing record – “to set the record straight”. In spite of a shift to child-centred approaches to child wellbeing, safety and protection, our research findings provide evidence of significant failures in recordkeeping and archives systems that put the interests and needs of the organisation first. In our research into a world first *Charter of Lifelong*

Recordkeeping Rights in Childhood Out of Home Care to support the exercise of human rights; child wellbeing in Care linked to Child Safe Principles; cultural safety; self-determination linked to agency in recordkeeping; and historical justice for care leavers, significant considerations in developing an extensive suite of rights include:

- the requirement to have access to records that provide authoritative sources of information
- participate in decision making informed by records
- exercise age-appropriate autonomy and self determination
- the overwhelming evidence in testimonies and submissions to inquiries including the Royal Commission that lack of agency in recordkeeping and of control of personal, sensitive and traumatic records of childhood plays a major re-traumatising role for care leavers
- the complexities around privacy in the Care context which are not resolvable under generic privacy/RTI legislation designed around mutually exclusive personal/third party information, discretionary systems.

In its current stage of development, The *Charter of Lifelong Recordkeeping Rights in Childhood Out of Home Care* identifies the following lifelong recordkeeping rights for children in Care and Care Leavers (Setting the Record Straight Initiative, 2017):

Rights to participate in:

- Creating your own records, life history
- Deciding what is recorded about you
- Deciding who has access to your records
- Intervening in the record (right of reply/ reframing)
- Determining how long to keep records, and in what form

Access rights

- Lifelong access to records about your childhood
- Have a say in intergenerational access

Privacy and child safe recordkeeping rights to

- Privacy
- Not 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

Proactive disclosure rights to

- 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 extensive suite of rights identified by the Charter complements the Care Leavers of Australasia Network (CLAN) *Charter of Rights* developed by Frank Golding (<https://www.clan.org.au/wp-content/uploads/2019/01/3-a-charter-of-rights-to-childhood-records-6.pdf>).

Recordkeeping recommendations

There is an opportunity for Queensland to include ground breaking legislative reforms that reinforce human rights in legislative frameworks by explicitly recognising recordkeeping rights in child

protection and family support contexts, addressing the recordkeeping needs of the child and their family, and ensuring that ongoing rights to childhood records are established and maintained over life times.

We specify below our recommendations relating to options 1C-E.

1C Introducing specific matters to be considered when determining what is in a child's best interests.

We recommend this include specifying how recordkeeping rights and principles, and quality recordkeeping systems reinforce the general principles for administering the Act and the role that records play in determining the best interests of the child or young person.

1D Embedding a rights focus throughout the legislation to ensure children and young people are aware of their rights and how to exercise them.

We recommend that recordkeeping rights are included in the promotion of rights throughout the legislation, including the right of children and young people to participate in recordkeeping itself.

1E: Revising the Charter of Rights for children in care

We recommend the inclusion of recordkeeping rights in the Charter:

1. Our research on Australian child protection legislative provisions for children in Care and Charters of Rights for children in Care in Australia found that most do not include explicit rights in records as a crucial foundation for exercising their human rights. The standout exception is the NSW legislation and *The Charter of Rights for Children in OoHC* which specifies rights to:

be told why you are in care and to keep a record of your time in care (#2);

ask for any information that is being kept about you, to read your file and to add any information to your file (#3).

The Queensland *Charter of Rights for Children in OoHC* would be strengthened by including rights to participate in recordkeeping, access records, annotate and add to the record, and pro-active disclosure as they **are a crucial enabler** of the exercise of existing rights in the Charter, particularly #4-6:

to be consulted about, and to take part in making, decisions affecting the child's life (having regard to the child's age or ability to understand), particularly decisions about where the child is living, contact with the child's family and the child's health and schooling

to be given information about decisions and plans concerning the child's future and personal history, having regard to the child's age or ability to understand

to privacy, including, for example, in relation to the child's personal information.

2. The Queensland legislation section 5 establishes participation as a legal right for children and young people. This section of the Act would be strengthened for children in Care if the Queensland Charter explicitly included participation in recordkeeping to support the existing rights relating to participation (see also recommendations relating to 2A and 2C).

2. Strengthen the voices of children and young people in decision making

Recordkeeping background

A multitude of inquiries in Australia and in other countries – Ireland, UK, Sweden, Canada, Norway, Iceland, Denmark, Germany, South Africa have detailed the lifelong consequences for children in Care caused by a lack of participation in decision making, linked to a lack of agency in and over records of childhood Care experiences.

In this part of our Submission we address the role of recordkeeping rights in strengthening the voices of children and young people in Care in decision making.

Although designed for development contexts, 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 as a free-standing right and one of the four guiding principles of the Convention on the Rights of the Child. This definition is equally applicable in the Care sector. The Kit also provides an excellent rationale for why child participation rights and principles result in better decision making, create safer environments for children where they feel able to speak up, and stronger accountability and transparency

Participation can be defined as an on- going process of children’s expression and active involvement in decision- making at different levels in matters that concern them. It requires information- sharing and dialogue between children and adults based on mutual respect, and requires that full consideration of their views is given, taking into account the child’s age and maturity (Module 3 p.5).

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 (p.6).

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 (p. 6).

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 (p.6).

Specifically in relation to children in Care, the *UN Guidelines for the Alternative Care of Children* (UN General Assembly, 2009) state that it is essential that ‘rigorous assessment, planning and review’ underpins decision-making on Alternative Care, and that ‘it should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians’. Furthermore ‘all concerned should be provided with the necessary information on which to base their opinion’. Here as in many child rights instruments, principles, standards and guidelines, whether generic or specific to children in Care, rights in records as key sources of information and an evidence base for decision making are implicit rather than explicit.

Research findings of the ARC-funded *Rights in Records by Design Project* provide strong evidence that recordkeeping plays a crucial role in supporting children to participate in decision-making affecting their lives in Care, and that these participation rights should extend to participating in recordkeeping itself, as well as the lifelong participation of Care Leavers in making decisions about

records of their time in Care. As discussed above in relation to reinforcing human rights in the legislative framework, the Royal Commission on Institutional Responses to Child Sexual Abuse specified quality recordkeeping requirements to support the rights of the child, Child Safe Standards, child-centred approaches, quality decision making, and support for accountability and transparency, highlighting the role of quality recordkeeping in the Care sector. The rationale for including recordkeeping rights, including the right to participate in recordkeeping itself, in legislative provisions for children in Care and Charters of Rights parallels the rationale in the *UNICEF Child Rights Took Kit* for participation rights more generally.

Recordkeeping recommendations

[2A: Ensuring the relevant principles and provisions encourage and empower children and young people to meaningfully participate in decisions that affect them](#)

Specifically in relation to children in Care, **we recommend:**

1. Ensuring recordkeeping and archiving principles, policies and processes are child-centric and support children and young people to understand and participate in organisational and personal recordkeeping processes in age-appropriate ways
2. Proactive disclosure of information **and the existence of records** relevant to the child or young person's circumstances and effective participation in decision making in age-appropriate ways, and support to ensure they understand the information and records.

[2C: Including additional requirements to strengthen procedural fairness in the decision making provisions](#)

Specifically in relation to children in Care, **we recommend:**

1. Providing children and young people with information about how their views will be recorded and used
2. Introducing policy and processes relating to obtaining a child or young person's formal consent to sharing their information, and disclosing to them who accesses their information
3. Strengthening their voices through their participation in recordkeeping and providing rights relating to annotations and additions to the organizational record
4. Giving children and young people the opportunity to respond to proposed decisions, allowing them to raise any concerns for consideration prior to a final decision being made, and to record their concerns
5. Supporting children and young people to access, annotate and add to the records of decision making.

3. Reshape the regulation of care

Recordkeeping background

A key finding of the Royal Commission into Institutional Responses to Child Sexual Abuse is the importance of good recordkeeping in enabling institutions to be child safe and for realising the rights of children.

Good records and recordkeeping practices are integral to the realisation of many of the rights of children enshrined in the United Nations Convention on the Rights of the Child (UNCROC), to which Australia is a signatory. In particular, the creation and management of accurate and detailed records is fundamental to children’s rights to identity, nationality, name and family relations. The rights of children to be protected from all forms of physical, mental and sexual abuse are promoted by good records and recordkeeping (Royal Commission into Institutional Responses to Child Sexual Abuse 2017, p. 44).

Recommendation 8.4 articulates five high level principles for recordkeeping in institutions engaged in child-related work (RC 2017c, Recommendation 8.4, 22-23) to support the implementation and realisation of their Child Safe Standards, with direct linkage to Standard 1 and the embedding of child safety and wellbeing in institutional leadership, governance and culture (see Figure 1).

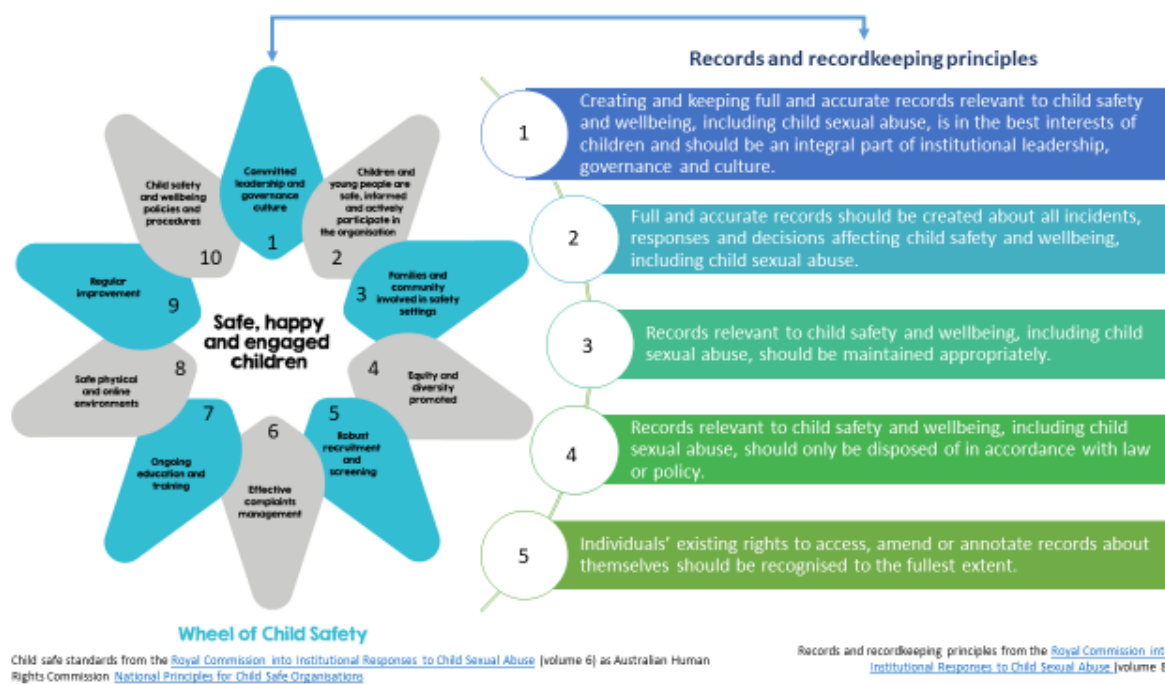


Figure 1: Recordkeeping Principles for Child Safe Organisations (use of the Wheel of Child Safety under a Creative Commons License (CC BY 4.0) from the National Principles for Child Safe Organisations document developed by the Australian Human Rights Commission. The Australian Human Rights Commission is acknowledged as the copyright holder of the work. <https://www.humanrights.gov.au/national-principles-child-safe-organisations>)

The Royal Commission has explicitly recognised the significant, elemental role of comprehensive high quality records and recordkeeping systems in good governance, transparency and accountability, particularly in out-of-home Care, noting that:

They help promote consistency of practice, retention of organisational memory and institutional accountability. They also help institutions to maintain descriptions of their processes, decisions, activities and responses to critical incidents, providing a level of

transparency and evidence of practices that can be relied on in the future (Royal Commission into Institutional Responses to Child Sexual Abuse 2017, p. 38).

This aligns with decades of records continuum scholarship on quality recordkeeping (encompassing archiving) being instrumental in governance frameworks as mechanisms by which actions and decisions are evidenced, maintained and made accessible so as to play their role in individual, group, corporate, and collective memory as authoritative sources of information in and through time (McKemmish, 2001). At the same time, it is essential that recordkeeping governance frameworks and systems are themselves accountable and transparent.

The Royal Commission found many instances of poor or absent recordkeeping frameworks and practices in Care institutions, and emphasised the need for oversight and governance.

State and territory governments should require all institutions that care for or provide services to children to comply with the five principles for records and recordkeeping (Royal Commission into Institutional Responses to Child Sexual Abuse 2017, p. 10).

Recordkeeping, and its governance, has a crucial role to play in the governance of Care systems, in particular ensuring that complex corporate parenting responsibilities are met (Evans, McKemmish & Roland, 2019). When governance is viewed holistically as the 'structures and processes that are designed to ensure accountability, transparency, responsiveness, rule of law, stability, equity and inclusiveness, empowerment, and broad-based participation' (UNESCO, 2018) there is a need not just to accept existing governance frameworks, but also to critically examine their ability to deliver equity and justice outcomes. The mutually recursive (or symbiotic) relationship between recordkeeping and governance systems means that they must both be capable of reflecting, championing and meeting the rights of children in Care. This requires establishment of accountable and transparent recordkeeping governance frameworks to effectively monitor recordkeeping in Care systems, their governance and their role in governance frameworks.

Recordkeeping recommendations

- 1. Which options do you support or oppose? Why?*
- 2. Do any of the options have potential unintended consequences?*
- 3. What do you think are the challenges with the current system for approving carers and licensing care service providers?*

Reliable, accurate, efficient and effective recordkeeping is a key challenge in existing systems and is essential to all of the proposed options (3A, 3B, 3C, 3D, 3E) in this section. Regulatory reform must be accompanied by recordkeeping reform aimed at decreasing rather than increasing bureaucratic burdens, without compromising evidence and accountability. Clarity around information sharing across agencies when it comes to carer assessment and approvals is vital to address issues raised by the Royal Commission for institutional abuse. Regulations should reflect the use of recordkeeping for effective governance and oversight, as well as mechanisms for oversight and governance of recordkeeping. Licensing should encompass assessment of an organisation's capacity to meet recordkeeping and recordkeeping governance obligations.

4. Are there any other changes to the legislation you believe need to be considered for reshaping the regulation of Care?

There is an opportunity for the Qld government in reshaping the regulation of Care to be at the forefront of reform to better enshrine and enact these recordkeeping principles in Care systems. For records and recordkeeping to play their vital role in a robust, safe and transparent framework for child safety and wellbeing, then this must incorporate an appropriate recordkeeping governance framework. We would argue that principles of participation (as a key protective factor as discussed in relation to Option 2) and independent oversight should inform the design of such a framework.

For independent oversight, we urge the consideration of the full use of public sector accountability frameworks and advocate for examining the ways in which the role that the state recordkeeping authority, the Queensland State Archives, could play in independent oversight. We point to the Public Records (Scotland) Act 2011 as an example of recordkeeping reform in the light of the Shaw Report into the abuse of children in Care institutions. Authorities named in the Act are required to prepare and submit Records Management Plan for approval by the Keeper of the Records of Scotland, and to be held to account for their implementation (Ellis 2013).

To address issues of ensuring the accessibility of Care records in fragmented and distributed service environments, we point to provisions in NSW legislation to ensure that a child's Care records are returned to the Secretary after 7 years (Section 170 of Children and Young Persons (Care and Protection) Act 1998 (NSW)).

We urge the Queensland government to consider legislative reform that encompasses lifelong accessibility of Care records and clear up many of the uncertainties with current distributions of these vital childhood records, and the varied capacities of non-government agencies to adequately manage these records and respond to access, control, security, preservation, annotation and amendment requirements.

Clarity around recordkeeping issues is particularly pressing as Care systems move into the digital realm where there is a real danger of encoding, enshrining and amplifying existing exclusions, biases and discrimination (Eubanks, 2018), without attending to the recordkeeping and information rights sometimes explicitly but mostly implicitly embedded in children and other human rights charters (Gilliland & McKemmish, 2014). Care recordkeeping systems can exemplify the 'problematic tendency of existing frameworks to prioritize protection over participation, rather than finding better ways of resolving ... [the] conflicts among rights ... [that] inevitably arise' (Lievens, Livingstone, McLaughlin, O'Neill & Verdoodt, 2019 p. 490). This is despite recognition that active participation and proactive provision of rights are a protective factor (EU-UNICEF, 2014).

In Care environments the increased surveillance capabilities of both discretionary and non-discretionary systems¹ have the potential to be utilised both for and against the best interests of the child. While increased abilities to monitor online activities and capacities for seamless sharing of digital data and information might help to identify risks to children and young people, they may also infringe on rights to privacy and confidentiality with consequent impacts on the development of self-identity, and connection to family and community. The ability to establish identity as an individual human being, as well as having agency and control over personal and sensitive information, goes to the core of fundamental human rights to autonomy and self-determination (Evans, McKemmish, Daniels & McCarthy, 2015; United Nations High Commissioner for Human Rights 2018).

Existing reactive governance mechanisms – retrospective file audits and inquiries by Children's Commissioners/Guardians or other oversight bodies in response to complaints, catastrophic failings or other systemic concerns – often fall short of ensuring those rights. It is therefore vital that mechanisms to identify, protect and monitor these rights be designed and equipped to efficiently and effectively operate in digital environments (Evans, McKemmish & Rolan, 2019). The potential for digital and networking technologies to address the current power asymmetries in information and recordkeeping in Care systems could herald a new paradigm of rights-based practice in the sector. There is the opportunity for Qld legislative reform to be a spur for innovative digital enablement of the mechanisms for monitoring and regulation children's rights in both discretionary and non-discretionary digital environments.

¹ We use the term non-discretionary to refer to systems in which children and their families have little choice over participation and so it is vital that they also embed and embody children's digital rights in their design and implementation.

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