



30 September 2020

Submission to the Special Rapporteur on the right to privacy examining the privacy rights of children and how this right interacts with the interests of other actors as the child develops the capacity for autonomy

With a focus on Alternate Care environments and issues:

- **Governmental or other structures including regulatory arrangements, established to advance the human rights of the child;**
- **Children in vulnerable situations such as unaccompanied migration, violence, sexual exploitation, poverty and other economic, social, familial or physical circumstances;**
- **Programs, mechanisms and strategies that aid the positive development of the child by addressing their privacy needs and expectations**

Privacy Rights in Alternative Care Systems

Much of the discussion about the rights of children in the digital environment in general, and privacy in particular, focuses on the *discretionary* use of digital systems by children and/or families. In this submission the emphasis is on the need to address the representation and enactment of children's rights in *non-discretionary systems* and the particular complexities around how systems set up to protect children from harm do not themselves cause harm. These are systems in which children and their families have little choice over participation and so it is vital that they embed and embody children's digital rights in their design and implementation. Central to this is ensuring that in acting in the best interests of the child, rights to privacy and the development of identity and connection to family, community and culture are also respected [1].

Children and young people in Alternative Care situations have little to no discretion around participation in the child protection and welfare systems that document the intimate, sensitive and personal details of their lives. A multitude of inquiries in Australia [2]–[7] and in other countries – Ireland, UK, Sweden, Canada, Norway, Iceland, Denmark, Germany, South Africa [8] have detailed the lifelong consequences of a lack of participation and agency in and over records of childhood Alternative Care experiences. A lack of agency in recordkeeping has been shown to deny children, young people and the adults they become their fundamental human rights to identity, memory, privacy and accountability [9], [10].

Many national standards for Alternative Care identify the rights of children and young people to have access to, and control over, a complete and accurate history of their time in Care, the plans for their future, their health, education and other important official records, their family and community connections, memories of key events, and other records which support and nurture their sense of

identity, security, and connectedness with the world. They also emphasise the need for children and young people to participate in the decision-making that impacts on their lives, as part of their healthy development, which therefore must include the formation and use of this increasingly digital archive. Despite increasingly extensive policy layers reflecting the emphasis in Alternative Care standards on child-centred approaches, there is also continuing evidence of barriers to their translation into practice. For example surveys of Care experienced children and young people by CREATE Foundation, Australia's national body representing the voices of children and young people with out-of-home care experiences, continue to show a lack of participation in case and cultural planning processes and access to information and records [11].

As Alternative Care systems move into the digital realm there is a real danger of encoding, enshrining and amplifying existing exclusions, biases and discrimination [12], without attending to the recordkeeping and information rights explicitly and implicitly embedded in children and other human rights charters [13]. Alternative 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' [14, p. 490]. This is despite recognition that active participation and proactive provision of rights are a protective factor [15].

In Alternative Care environments the increased surveillance capabilities of both discretionary and non-discretionary systems 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 [16], [17].

It is vital that mechanisms to efficiently and effectively identify, protect and monitor these rights for children is incorporated into non-discretionary digital systems [18]. In Australia, governments are ploughing ahead with technological systems to join up the personal data that they hold about children for child safety and wellbeing 'with significant privacy impacts' [19]. There is a real danger that existing social and economic disadvantage will be amplified without fulsome and holistic exploration of these privacy challenges.

The potential for digital and networking technologies to address, rather than exacerbate, the current power asymmetries in information and recordkeeping systems for Alternative Care in particular could herald a new paradigm of rights-based practice in the sector, and achieve better development outcomes for children. However, there is a need to explicitly design these affordances into the technology and have similarly digital enabled mechanisms for their governance and oversight with regards to children and young people's rights to privacy and knowledge about how their personal information is distributed and used.

Archives and the Rights of the Child Research Program

Recordkeeping and its governance is a significant issue for the Alternative Care sector, which affects the social, emotional and psychological health and wellbeing of Care experienced children, young people and adults. Those with Care experiences often speak of having to fight for their rights, or of having strong advocates making sure that their best interests are at the forefront of decision-making, in a fractured, fragmented and under-resourced system. Quality recordkeeping is one of the rights they should be accorded as a matter of course. It should also be part of making Alternative Care systems more efficient and effective in safeguarding children and young people.

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 Alternative Care systems utilising digital and networking technologies [20]. It brings together researcher 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

- Australian Research Council (ARC) Future Fellowship, *Connecting the Disconnected: Co-Designing Integrated and Inclusive Recordkeeping and Archival Networks* (2015-2018),
- ARC Discovery Project, *Rights in Records by Design: Transforming Recordkeeping Systems for Children in Out-of-home Care* (2017-2020) and
- ARC Discovery Project, *Real-time Rights-based Recordkeeping Governance for Childhood Out-of-Home Care* (2021-2023).

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 Alternate Care around recognizing, respecting and enacting multiple rights in records [21], [22].

In the *Rights in Record by Design Project*, we are currently researching a world first Charter of Recordkeeping Rights for Childhood Alternative Care and its translation into a recordkeeping rights engine – a technical demonstrator of how recordkeeping rights in Alternative Care systems can be dynamically enacted, negotiated and monitored. This research is part of imagining future digital systems for Alternative 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 Convention on the Rights of the Child.

Working with a co-design team of young adults with Alternate Care experiences [23] we have built a prototype of a system in which they can manage their personal information – choosing what, when, how and who they share it with – as well as having access to, and potentially appropriate control over, their Care records [24]. While for these and other Care leavers the focus is about gaining retrospective control, particularly in transitioning out of the Care system into independent living, their involvement in this research is also motivated by a strong desire to see the systems for children and young people currently in Care designed to better respect rights to privacy in such complex situations. Whether that be having an appropriate say over who has access to their personal and sensitive information and/or mechanisms to detect and prevent inappropriate use, there is great potential in re-imagining through digital technologies how better enablement of privacy rights can support the development of their sense of self and worth.

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References

- [1] G. Rolan *et al.*, 'Weapons of affect: the imperative for transdisciplinary information systems design', in *Proceedings of the 81st Annual Meeting - Building & Sustaining An Ethical Future With Emerging Technology*, 2018, pp. 420–429.
- [2] Community Affairs References Committee, 'Commonwealth Contribution to Former Forced Adoption Policies and Practices', Commonwealth of Australia, Canberra, Feb. 2012. Accessed: Oct. 09, 2013. [Online]. Available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/commcontribformerforcedadoption/report/index.
- [3] Human Rights and Equal Opportunity Commission, 'Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', Human Rights and Equal Opportunity Commission, 1997. Accessed: Oct. 09, 2013. [Online]. Available: <http://www.humanrights.gov.au/publications/bringing-them-home-report-1997>.
- [4] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 8 Recordkeeping and information sharing*, vol. 8, 17 vols. Attorney-General's Department, Australian Government, 2017.
- [5] Senate Community Affairs References Committee, 'Lost Innocents: Righting the Record - Report on Child Migration', Commonwealth of Australia, Aug. 2001. Accessed: Apr. 04, 2013. [Online]. Available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/1999-02/child_migrat/report/index.
- [6] Senate Community Affairs References Committee, 'Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children', Commonwealth of Australia, Aug. 2004. Accessed: Oct. 12, 2013. [Online]. Available: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/inst_care/report/index.
- [7] Victorian Koorie Records Taskforce, 'Wilam Naling ... Knowing Who You Are...: Improving Access to Records of the Stolen Generations, A Report to the Victorian Government', Department for Victorian Communities, Melbourne, May 2006. [Online]. Available: <http://prov.vic.gov.au/wp-content/uploads/2011/05/WilamNalingReportJune2006.pdf>.
- [8] J. Sköld, E. Foberg, and J. Hedström, 'Conflicting or Complementing Narratives? Interviewees' Stories Compared to Their Documentary Records in the Swedish Commission to Inquire into Child Abuse and Neglect in Institutions and Foster Homes', *Archives and Manuscripts*, vol. 40, no. 1, pp. 15–28, 2012, doi: 10.1080/01576895.2012.668842.
- [9] J. Z. Wilson and F. Golding, 'Latent scrutiny: personal archives as perpetual mementos of the official gaze', *Archival Science*, vol. 16, no. 1, pp. 93–109, Mar. 2016, doi: 10.1007/s10502-015-9255-3.
- [10] P. Mendes, J. Z. Wilson, and F. Golding, 'Child Protection Hypothetical Case Studies for a Virtual Archive: Professional Perspectives Versus the Lived Experience and Expertise of Care Leavers in Victoria, Australia', *Br J Soc Work*, 2020, doi: 10.1093/bjsw/bcaa018.
- [11] J. J. McDowall, 'Out-of-Home Care in Australia: Children and Young People's Views After Five Years of National Standards', CREATE Foundation, Dec. 2018. [Online]. Available: <https://create.org.au/publications/2018-create-report/>.
- [12] V. Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*. New York, NY: St. Martin's Press, 2018.
- [13] A. Gilliland and S. McKemmish, 'The role of participatory archives in furthering human rights, reconciliation and recovery', *Atlanti: Review for Modern Archival Theory and Practice*, vol. 24, pp. 79–88, 2014.
- [14] E. Lievens, S. Livingstone, S. McLaughlin, B. O'Neill, and V. Verdoodt, 'Children's Rights and Digital Technologies', in *International Human Rights of Children*, U. Kil Kelly and T. Lief aard, Eds. Singapore: Springer Singapore, 2019, pp. 487–513.
- [15] EU-UNICEF, 'Module 3: Child Participation', in *Child Rights Toolkit: Integrating Child Rights in Development Cooperation*, United Nations Children's Fund, 2014.
- [16] J. Evans, S. McKemmish, E. Daniels, and G. McCarthy, 'Self-determination and archival autonomy: advocating activism', *Archival Science*, vol. 15, no. 4, pp. 337–368, 2015, doi: 10.1007/s10502-015-9244-6.

- [17] United Nations High Commissioner for Human Rights, 'The right to privacy in the digital age', UN General Assembly, Human Rights Council, A/HRC/39/29, Aug. 2018. Accessed: Dec. 16, 2018. [Online]. Available: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/239/58/PDF/G1823958.pdf?OpenElement>.
- [18] J. Evans, S. McKemmish, and G. Rolan, 'Participatory information governance: Transforming recordkeeping for childhood out-of-home Care', *Records Management Journal*, vol. 29, no. 1/2, pp. 178–193, 2019, doi: 10.1108/RMJ-09-2018-0041.
- [19] M. Henry, 'What does the Children Legislation Amendment (Information Sharing) Act 2018 mean for government bodies and regulators?', *Maddocks Legal Insights*, May 23, 2018. <https://www.maddocks.com.au/insights/children-legislation-amendment-information-sharing-act-2018-mean-government-bodies-regulators> (accessed Sep. 30, 2020).
- [20] J. Evans, S. McKemmish, and G. Rolan, 'Critical approaches to archiving and recordkeeping in the continuum', *Journal of Critical Library and Information Studies*, vol. 1, no. 2, 2017, Accessed: Aug. 16, 2017. [Online]. Available: <http://libraryjuicepress.com/journals/index.php/jclis/article/view/35>.
- [21] J. Evans, 'Setting the Record Straight for the Rights of the Child Summit', *Archives and Manuscripts*, vol. 45, no. 3, pp. 247–252, Sep. 2017, doi: 10.1080/01576895.2017.1373244.
- [22] Setting the Record Straight for the Rights of the Child Initiative, 'Setting the Record Straight for the Rights of the Child Strategic Plan', Setting the Record Straight for the Rights of the Child Initiative, Aug. 2017. Accessed: Sep. 30, 2018. [Online]. Available: http://rights-records.it.monash.edu/wp-content/uploads/2018/02/Strategic_Plan_Final_Amended.pdf.
- [23] G. Rolan *et al.*, 'Voice, agency, and equity: deep community collaboration in record-keeping research', *Information Research*, vol. 24, no. 3, Sep. 2019, Accessed: Dec. 15, 2019. [Online]. Available: <http://informationr.net/ir/24-3/raills/raills1803.html>.
- [24] G. Rolan, H. D. Phan, and J. Evans, 'Recordkeeping and Relationships: Designing for Lifelong Information Rights', in *Proceedings of the 2020 ACM Designing Interactive Systems Conference*, Eindhoven, Netherlands, Jul. 2020, pp. 205–218, doi: 10.1145/3357236.3395519.

Note the publication repository for the *Rights in Records by Design* project is available at <https://rightsinrecordsbydesign.github.io/publications/> with open access copies of research papers as allowed by publishers.