

AFA's response to Royal Commission's Consultation paper on Records and Access

Opening comment

AFA's response to the Consultation paper assumes that the purpose of record keeping for a child placed in out of home care is qualitatively different from a record that is kept for the purpose of monitoring a child's attendance at a sporting activity or their progress through a series of competencies.

AFA's comments relate to record keeping about children while they are away from the care of their parents. Children placed into such circumstances are vulnerable. The record that is kept must provide content that covers the following areas:

- Reason(s) for being placed in care
- Details of 'care' situation placed in and why
- Details of 'care' situation must include details of care facility and carers.
- Daily care record in including health, wellbeing, education, extra curricula activity
- Actions undertaken to assist with health and wellbeing issues
- Contact with family members. Reasons for why contact may be limited.
- Purpose of placement: interim, long term, permanent and actions that are being taken to reunite child with family (including extended family).
- Documents relating to care of child eg court records, reports, notes from meetings, minutes from meetings.
- Documents relating to the "life" of the child, eg. official documents (birth certificate) as well as photos, cards etc.,

The child, when later (as an adult), reading back on their time in 'care' ought to be able to create a picture and an understanding of what happened to them and why.

The Consultation Paper summarizes the inadequacy of historical records for children placed in out of home care. It notes the impact this has had on pursuing claims of sexual abuse. The paper also acknowledges that a childhood reduced to a few pages of official admission and discharge notes leaves many feeling that *their childhoods were meaningless and insignificant* and like the Indigenous survivors of removal, Forgotten Australians too feel that the absence of discussion about family, *personal development, friendships and experiences has been deeply hurtful and disappointing* (p.14).

AFA welcomes this recognition of the dismal inadequacies of historical records.

This response will deal with the extraordinary hoops that these adults (then children) need to leap through today to get access to their records; inadequate and dismal though they may be.

The questions that the response will discuss are as follows:

1. **Ownership of the record (including redaction practices)**
2. **Amendments to existing records**
3. **Current practice in relation to record release and support**

Reference will be made to the particular number of the question posed by the Consultation paper. Each section is concluded by a recommendation(s).

Ownership of record

AFA notes the Consultation Paper argues that access to the record should be given “unless contrary to law” (p.44).

AFA is aware that the Victorian Support Service for Forgotten Australians, Open Place, asserts that “moral ownership” of the record belongs to the person the record is about. AFA supports this position. The lens of “moral ownership” provides an entirely different view about the management of the record and access of an individual to this record. AFA points out that access to medical and other health records is not restricted, neither is access to historic defence force records. All is made available; both the beautiful and the ugly.

Why are childhood records treated any differently?

AFA argues that the once this position is accepted then all decisions about the future management and location and restrictions of access to the record sit clearly with the owner of the record; the person whose life is contained in this record.

If this lens is applied then the major assumption underlying record release practice would begin with the position that everything in the file should be released. Only the specific allocation of the “privacy” provisions would exclude material from release. For example material erroneously included in the file about another client that is not connected at all with the client in question would be removed.

This view of file ownership carries with it the assumption that the record seeker is not a passive recipient of information presented to them by their former “caring” agency. The record seeker is an active participant in their search for their history able, sometimes with support, to navigate their way through some confronting material and to reach a resolution, again with support if requested, about their childhood experiences.

AFA notes that this ownership status also allows the owner of the record to decide who is to have access to the record on the death of the record holder or even to destroy the record.

Please refer to submission from Open Place for further discussion of the “moral ownership’ position. Please also see section 3 of this submission which provides an overview of the practice of a number of Australian states and territories record release practices which although carrying the badge of “lawful” continue to provide a major disservice to record seekers.

Recommendation

That the Royal Commission, in lieu of an immediate recognition of the Forgotten Australian 'moral ownership' rights to and of their records, strongly encourage States and Territories to ensure that the practice of record release (including redaction) reflects this assumption of "moral ownership". This may mean that the privacy acts in States and Territories are amended to reflect this intent.

Amendments to existing records

AFA accepts that in the current legal context 'moral ownership' and the benefits that flow from this position to record seekers is an aspiration. While this continues to be pursued there are significant steps that can be taken to amend and correct the story of a child's life that is contained in the historic record. AFA also supports the position that allows for the record to be flagged with the note that states "viewing of this file is contrary to the wishes of the file owner".

AFA supports the proposition that individuals have a right to seek amendments to a record that is inaccurate or misleading or where there are omissions. This is a right acknowledged in *Principles of Access*. It is however a right that is neither widely promoted nor widely supported in practice (Question 26).

Amendments to files are a tangible way the record seeker can claim an expert knowledge as the legitimate interpreter of their own history.

Amending or annotating a file is a gruelling task. Coming face to face with the reality of an institutional version of childhood is confronting and challenging. Many Forgotten Australians are simply not equipped with the emotional or literacy skills to undertake this task unsupported. AFA knows of no past provider of care who offers a service that can support a Forgotten Australian to amend and recreate their own history as an attachment to the official file. This task needs to be resourced by each past provider of care (Question 24)

Recommendation

That the Royal Commission recommends to past care providers that Forgotten Australians have a right to annotate and amend their file, that this right is promoted on their web sites and brochures relating to the agency's heritage work and that the agency provide support for this task if requested.

Current practice in relation to record release and support

The Consultation Paper states that *individuals' right to access and amend records about them can only be restricted in accordance with the law* (p.44). The Paper notes that existing laws are State and Territory based, are complex and confusing and inconsistent across state and territory boundaries.

AFA agrees with this statement. AFA also notes the performance of record holders across Australia in record release practice continues to be poor. This is despite the considerable attention generated by the Royal Commission's public hearings which have

examined systems and processes relevant to better records access. As Caroline Carroll stated in Case Study 25: *Accessibility and transparency of record access remains, at best, patchy across Australia. Some states do it better than others, but we are still struggling to get a consistent and transparent response from all the jurisdictions. To roadblock record access perpetuates system abuse.*

Examples from two different States illustrate this:

Queensland

The Department of Communities, Child Safety and Disability Services in Queensland does not have a dedicated care leaver records service; such as is being developed in Victoria or that exists in NSW. Therefore all applications for a person's personal information/records of their time in State care are dealt with by the Right to Information (RTI) unit which works under an Information Privacy Act.

The RTI unit deal with all sorts of requests for information not just from care leavers but also politicians, journalists and others in the media. It appears that RTI assess the applications for childhood records from Forgotten Australians in the same manner as any other type of RTI request for information; suspicion and exclusion appear to be the predominant mindset that is brought to assessing a record for release.

A recent example demonstrates an appalling lack of sensitivity and understanding for an adult wanting to access information about his time in care as a child.

The client was in State care in Queensland and NSW and has previously received fairly comprehensive records of his time in care from both States. However, as a result of personal circumstances, including homelessness, the client no longer has a complete copy of the record that he was originally provided with. The Find and Connect service informed RTI in Queensland of this and requested that the client be provided with another copy of his records.

Following this request and some months later he was presented with six pages of heavily redacted information. So much detail had been redacted it was impossible to make sense of the remaining content. The redaction included the names of the client's deceased parents and all their details.

The material, as presented, was insulting and utterly disrespectful. The irony is that the material he received some years earlier had provided this information and had allowed the client to make some sense of the time he spent in care as a child

Advice from the Find and Connect service suggests that:

- The RTI unit understand and interpret the Information Privacy Act of 2009 literally; any information that is "shared" is not released.
- The example above is not uncommon. Other examples include a record that was released that not only redacted the parents' names but those of the client's siblings!
- There is the example of a record containing a child's birth certificate that had the mother's name redacted on the grounds that this is "shared" information.
- It is almost impossible to find out the reason for being admitted to a "home" because it may mean providing information about a parent eg. Alcoholism. This would be redacted as it is the parent's information.

- The letter that accompanies the file is written in legalistic language and doesn't state in simple terms what and why information has been redacted.
- An appeal process exists but to the knowledge of the service no appeals from Forgotten Australians have been successful
- The records information is provided only on a CD. This may pose an access issue to a printer or a computer for some.

South Australia

The Find and Connect service reports that in South Australia the waiting period for gaining records has blown out to three years (although now improving). This has led to FOI asking record seekers to be quite specific about what they are seeking in their records. There is a view that this will reduce the delay in receiving something. However many Forgotten Australians may not have a specific request simply wanting to see their whole file. The FOI unit has quoted the legislation to Forgotten Australians who, when asking for their entire file, are told that *the agency may refuse to deal with an application if it appears to the agency that the nature of the application is such and the work involved..... would substantially and unreasonably divert the agency's resources.*

South Australia also report that the presentation of records to the Forgotten Australia recipient needs to be improved. Currently files come in large white folders with elastic bands and many loose pages.

Records of childhood are fundamentally important and need to be presented in a respectful manner that demonstrates that the record holder (agency) understands the importance of the information contained in the record.

The States that manage record release better appear to be the States that have the following characteristics:

- History of collaboration between Forgotten Australians and record holding agencies that recognises the importance of records for identity and knowledge of family background.
- Collaboration that extends to formal meetings between record holding agencies (including the State unit) and the local Find and Connect service.
- This collaboration can lead to awareness of the need for consistency in redaction practices, awareness of the need for support when records are released, sharing of knowledge about the use of other historical material (photos) and improvements in the presentation of records.
- A "Care leavers/Forgotten Australian" unit that is distinct from the more generic FOI requests and processes. The case examples above, in which the approach to the release of out of home care records has been completely subsumed by other political and administrative priorities, demonstrate the devastating impact on Forgotten Australians of poor and unimaginative record release practice.
- An active and engaged support service for Forgotten Australians that can both act as a conduit and as an advocate for records access and release. (Question 31)

AFA's scan of States and Territories services is that Victoria and NSW have more of these system characteristics.

Comments on specific questions contained in the Consultation Paper (relevant to Forgotten Australians.

Access Principles for Record Holders and Best Practice Guidelines in providing access to records (Question 19, 20 & 25) is an excellent document but it has persuasive power only. The Royal Commission would do well to recommend that States and Territories revisit and sign up to the principles and guidelines contained in the document. It is not clear what the take up of its principles and guidelines by individual record holding agencies across Australia has been. Part of the implementation problem of these guidelines is the vastly different regard record holding agencies have of the importance of records for Forgotten Australians. Some put considerable time and funding into the process. Others rely on an administrative assistant to redact and release records; unfair to both the administrative assistant and the receiver of the records. Redaction practices are characterised by inconsistency; it is not uncommon for a document held by one agency to be redacted and the same document held by another to be released in full.

Third party privacy (Question 22)

Consistency of interpretation and of application of state and Territory privacy provisions bedevil the records access process for Forgotten Australians.

All privacy legislation would benefit from a provision that specifically recognises the importance of historical out of home care records and nominates specific principles (using the lens of moral ownership) to guide release.

There appears to be a general acceptance now across the out of home care sector that fees for "care" records are not charged (Question 23). Some State and Territory Births, Deaths and Marriages registers still charge for both basic documents and a basic search (the search may be over a number of years/decades) that can assist with establishing identity and family connections (birth certificates and death certificates). Forgotten Australians access to information about immediate family members needs legislative review. Re-connecting with family requires access to birth, marriage and death certificates. Currently there are significant blocks to enable this access to occur. Costs for these certificates also need to be waived.

Recommendation

That the Royal Commission recommends that each State and Territory apply the *Access Principles and Guidelines* to their own and their funded agencies record release practices.

That the Royal Commission recommends that each State and Territory establish a unit for processing records for care leavers/ Forgotten Australians that is separate from the generic FOI function and process.

That the Royal Commission recommends that these units operate under specific provisions of the FOI/Privacy Acts to enable them to provide a service that honours the Forgotten Australians "moral ownership" of records.

