

**NSW Government Submission  
Royal Commission into Institutional  
Responses to Child Sexual Abuse  
Consultation Paper on Records and  
Recordkeeping Practices**

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# Introduction

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This submission presents the NSW Government's views on key issues raised in the Royal Commission into Institutional Responses to Child Sexual Abuse's *Consultation Paper: Records and Recordkeeping Practices*

As the Royal Commission has highlighted, the records of children and young people created and kept by institutions are instrumental in understanding the reasons why child sexual abuse can occur within institutions. This understanding helps strengthen efforts to prevent future abuse and enables the community to better appreciate the experiences of survivors of past abuse.

## ***History of the retention and preservation of records in NSW***

In the early part of the twentieth century there were no statutes governing the handling of NSW government records, and government agencies conducted their own records management and disposal to suit their respective purposes. From 1910 the newly-established Mitchell Library had some scope for retaining government records judged to be of historical value. The *State Archives Act 1960* established the Archives Authority of NSW, and introduced a mechanism for preserving government records of archival value and for allowing for the legal disposal of records of temporary value. Under this legislation, state records could be legally destroyed if the disposal had been authorised by the Archives Authority of NSW. However, decisions relating to the day-to-day creation, retention and maintenance of records remained the responsibility of individual agencies.

## ***Current legislative and regulatory frameworks***

The introduction of the *State Records Act 1998* (the Act) brought all NSW Government records under a consistent classifications scheme, whereby all decisions concerning the handling of records were required to be made in accordance with the Act. The Act is administered by the State Records Authority of NSW (State Records).

Key records management provisions of the Act require public offices to:

- make and keep records that fully and accurately document their operations and administration;
- establish and maintain a records management program in conformity with standards and codes of best practice approved by State Records;
- ensure that records are stored in conditions appropriate to their format and preservation requirements; and,
- ensure that records held in digital or other technology-dependent formats are accessible for as long as they are required.

State Records maintains a set of Functional Retention and Disposal Authorities. These are documents which identify the categories of records that each government agency holds, and specify how each category must be created and stored and how long the records must be retained. The Act and the associated Functional Retention and Disposal Authorities applicable to agencies working with children and young people compel all NSW government agencies, as well as certain non-government and private organisations, to create records about all decisions and incidents affecting child protection.

There are also other pieces of legislation governing particular aspects of government record-keeping practice. Of particular relevance for child protection purposes are the *Children and Young Persons (Care and Protection) Act 1998*, *Health Records and Information Privacy Act 2002*, *Privacy and Personal Information Protection Act 1998*, and *Government Information (Public*

*Access) Act 2009*. Recordkeeping requirements under these provisions are mandatory, measurable and include minimum compliance requirements, however, they are outcomes oriented, rather than prescriptive.

In addition, there is a requirement for all NSW Government agencies to classify their information in a manner consistent with Commonwealth standards. Whole-of-government policies and guidelines on classification and digital information security regulate how information is stored and who may have access to it.

Commonwealth and other State legislation can override the Act in certain instances. For example section 29, *Special Commissions of Inquiry Act 1983* (NSW) or section 6K *Royal Commission Act 1902* (Cth) prevent the destruction of records relating to such inquiries for the duration of the time that they remain of interest.

### ***Current holdings of child protection-related records***

The gradual development of records-handling practices in NSW has impacted directly on the personal records of people who as children and young people came into contact with institutions. The NSW Government acknowledges that for many people, and especially those who were abused as a child or young person in institutional settings up to the late twentieth century, the records that remain from their time with an institution are often unsatisfactory. Vital information may be missing or incomplete, and records are often written using inappropriate or insensitive language.

The NSW Government Records Repository (GRR), managed by State Records, holds a large and growing collection of records relating to the provision of child protection services. There is currently an index of records relating to some 2.8 million individuals who have received child protection services in NSW. A large proportion of this consists of records relating to individual children and young people placed in children's homes or juvenile justice facilities. In addition there are over 130,000 boxes (of approximately 1000 pages each) of un-indexed records from historical children's homes and juvenile justice facilities, which are being scanned and indexed.

The Department of Family and Community Services (FACS) Historic Records Project actively seeks to reclaim records relating to past institutional care which are mistakenly in the possession of other agencies. For example, FACS has recently accepted some 3,000 boxes of records from the 1960s to the 1980s which were allocated to of Juvenile Justice when it separated from the then Department of Community Services in 1991.

The Department of Education has responsibility for the Aboriginal Affairs portfolio, and is therefore the successor agency to the Aborigines Protection Board and Aborigines Welfare Board (disbanded in 1969). The Department maintains records of those boards and makes them available to members of the Stolen Generations.

### ***NSW Government observations on the Royal Commission's proposed high-level principles for records creation and management***

The NSW Government recognises that good record-keeping is critical for preventing and responding to child abuse in institutional settings, and in holding institutions accountable if this does occur. The NSW Government also understands the profound impact poor institutional recordkeeping practices can have on victims and survivors of child sexual abuse.

The NSW Government supports the five principles for records creation and management proposed by the Royal Commission, which reflect and affirm the obligations and responsibilities currently set out in NSW legislation and associated policy, standards and procedures .

The differing roles of each government agency necessitate that within these legislative and other frameworks, agencies develop best records practice appropriate to their business. The comments below reflect NSW agencies' experiences in developing and implementing their record-keeping policies and practices and how they relate to each of the principles.

# Principle 1. Creating and keeping accurate records is in the best interests of children

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The NSW Government considers that good record-keeping practices are intrinsic to any program which seeks to work with children and young people. The reasons are set out below.

## 1. Accurate and comprehensive records are vital in coordinating a continuity of service, especially when different agencies or providers are involved

In the context of service delivery, record-keeping is an important tool for arranging individualised, child-centred case management.

FACS has found through its experience of providing child protection and out-of-home care (OOHC) services, that good casework practice needs to be supported by structured systems for recording information so that record-keeping can, to the greatest extent possible, occur simultaneously with the work that is being performed. Information about the background of children and young people in OOHC needs to be continually accessible to caseworkers so as to guide and develop future planning and decision-making. FACS' case management and recording systems are designed with this in mind.

This practice is reflected in the FACS guideline 'What Makes for an Effective Case Plan?'

*An effective case plan is much more than just a document that we use to manage an OOHC placement. It should be a clear window into the life of the child or young person, and a meaningful plan for how to move them forward towards a better future.*

*A good case plan is a living document; it grows out of quality conversations and relationships with the child or young person, and with their wider circle of family and care team members. Changes and progress in the child's situation should be recorded on the case plan.*

*If a child chooses to go back and review their file, they should find in their case plans a clear account of how their lives developed, how their strengths were promoted, how their needs were supported, and why decisions were made that shaped their lives.*

The NSW Police Force's Records and Information Policy statement directs all employees to create and maintain appropriate and complete records in the interest of not only children and young people, but victims in general, noting that many people who experience institutional abuse in childhood will not disclose until they are adults.

Within Juvenile Justice NSW, record-keeping is integral to the policies and procedures that staff apply and the training they receive. The importance of accurate and appropriate record-keeping forms part of the evidence base for Juvenile Justice case management policies and procedures, which are developed to ensure that each young person receives the services and support they require in order to maximise their capacity and opportunity to choose positive alternatives to offending behaviour.

## **2. Comprehensive records creation and review processes can build transparency into casework and institutional management, and allow investigators to forensically examine past events, decisions, and systematic issues**

Good record-keeping practices can contribute to the analysis of systematic factors affecting the performance of service systems. Reviews of representative samples of records can help to identify systematic issues present in case management decisions and can provide evidence for improvements in policy and practice. Such reviews can also identify instances where decisions have been made contrary to guidelines, or indicate where an agency's management needs to target specific interventions. As the Juvenile Justice Case Management Policy notes,

*Juvenile Justice will provide mechanisms for the recording of all interventions with or about young people. Recording casework information is a means of accountability to the young person and the division (p4, V2 2014).*

## **3. Records can be highly valuable in documenting the personal history of children and young people**

Many care leavers speak of the importance of their care records in documenting their personal histories, as these are often the only information remaining from their childhoods or their time in care.

In recent years, systems have been developed which recognise and respond to the importance of creating a continuous record of the time children and young people spend in state care. For example since 2004 FACS has included 'Life Story Work' in its work with these children and young people. Life Story Work is a method used to record the details about a child or young person's history and personal development. It is a record of a child or young person's life in words, pictures and photos, which they can keep with help from a trusted adult or other person who has a meaningful relationship with them.

FACS is in the process of building significantly on this resource through the 'ChildStory' case management system, which is due to be introduced in stages across the State's child protection and OOHC sectors from the first half of 2017. ChildStory ensures that the child protection case management system reflects good casework practice, placing the child at the centre of the child protection and OOHC system, while building around them a collaborative network of family, carers, caseworkers and service providers.

ChildStory will enable everyone involved in a child's care to make their own contribution to the information recorded. Children, young people and families will have a level of access to their records in real time, as they are being written. Non-government providers of OOHC and other agencies working with children and young people and families will also have access to some of the ChildStory records and be able to contribute to these so that a more holistic view of work with the child is available.

## **4. Accessible information about known risks to children and young people is a vital component of efforts to prevent harm**

The Working With Children Check (WWCC) and the NSW Carers Register, both administered by the NSW Office of the 's Guardian (OCG), are examples of record-keeping mechanisms which contribute to the prevention of child sexual abuse and other offences or harm towards children and young people.

The WWCC system and the Carers Register provide a central repository of records of a person's past inappropriate behaviour towards children and young people, including criminal records and

allegations substantiated through organisation-level investigations. Those seeking to undertake child-related work as an employee, volunteer or carer are required to undergo background checks through these mechanisms, and can be prevented from performing such work if their record indicates they pose a risk to children and young people.

A more comprehensive description of the WWCC and Carers Register arrangements in NSW can be found in the OCG's submission to the Royal Commission's Consultation Paper on Preventing Child Sexual Abuse in Out-of-Home Care.

## **5. Further Considerations**

In addition to the above, there are a number of other issues related to record-keeping which are relevant to the best interests of children and young people.

### ***Privacy and confidentiality***

The recording of personal information carries with it the inherent risk that the information could be accessed inappropriately. Safeguarding the best interests of children and young people therefore requires that strict parameters are placed around how the information is stored and who has access to it. Public confidence in the ability of NSW agencies to collect and manage information effectively and in line with their obligations requires high standards in information security practices.

There are two NSW acts governing the privacy and confidentiality of personal information, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*. These apply to both government and non-government agencies. The Information and Privacy Commission NSW oversees the administration of these Acts, including by monitoring agencies' compliance and handling complaints.

NSW government agencies maintain information security policies to guide staff on legislative compliance and good practice in handling the particular types of information they hold. Information security policies typically include elements such as,

- mechanisms to ensure all staff are aware of their responsibilities in relation to information-handling, including good practice for recording, and delegated levels of access;
- information security measures appropriate to the form in which the information is stored and accessed;
- independent information security review mechanisms to ensure standards are being met and relevant legislation is being complied with;
- processes for management of breaches both internally and from external sources; and
- processes for handling exceptional circumstances.

The *Digital Information Security Policy*, introduced in mid-2015 as part of the NSW Information and Communication Technology Strategy, places requirements on all government agencies to ensure that their digital information is secure, while providing authorised users with timely and reliable access to information and services.

Consideration of the development of nationally consistent practice guidelines on the management and support of children accessing and using social media when in OOHC may be beneficial. Guidelines to direct practice on legal issues relating to privacy and safety when using social media and other technology would also be useful.

### ***Exchanging information***

An important distinction exists between recording and retaining information, and exchanging information between agencies. Provisions around exchanging information need to be appropriately limited in order to maintain the best interests of the people to whom they relate. Exchanging information naturally results in both agencies having copies, which must then be stored in duplicate, along with a record of the reasons why the exchange occurred.

In NSW, Chapter 16A of the *Child and Young Persons (Care and Protection) Act 1998* permits “prescribed bodies” - generally defined as government or non-government organisation responsible for the direct supervision or provision of health care, welfare, education, children’s services, residential services, or law enforcement services to children - to exchange information for the purposes of protection and/or care of a child or class of children and young people. In doing so, the principles of Chapter 16A are considered to override the protection of confidentiality or of an individual’s privacy.

### ***Classification of information***

NSW has recently introduced the *Information Classification Labelling and Handling Guidelines*. These guidelines require all NSW government agencies to classify their documents in accordance with the national *Protective Security Policy Framework* which provides controls for effectively managing security risks to government information. The NSW guidelines specify a set of standard security classifications and markers, which determine how a document (including electronic documents, images and audio visual files) may be handled, stored and transferred. The guidelines stipulate that sensitive information about individuals, for example records about children in OOHC, be afforded a level of security which prevents its release to people not authorised to access it.

## Principle 2. Accurate records must be created about all decisions and incidents affecting child protection

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### *Creating Good Quality Records*

One of the central principles informing the development of government record-keeping practices worldwide, including in NSW, is that officers must retain all information leading to a decision or relating to the management of a program or service, so that it can be reviewed if necessary.

This is reflected in current Juvenile Justice NSW procedures and policies. An example is the Client Wellbeing and Protection and Incident Reporting policies and procedures which embed requirements for record keeping into practice. These policies cover who should make the record, the details that must be recorded, and the handling of reporting for specialised functions such as incidents or allegations. These structured recording processes provide records that are sufficient as evidence to support or argue against an allegation for example. The Employment Relations and Professional Conduct Unit records the receipt of the allegations or other information and the steps taken in response.

Another example can be seen in FACS' 'Care and Protection Practice Standards'. Practice Standard 10, *Documentation in casework*, promotes clear and respectful records so that children and young people and their families understand why decisions were made and what measures were put in place as a result. The *Key Expectations* of the Standard provide the foundations for documentation and record keeping, which include:

- use respectful, straightforward language that is sensitive to the child/young person and family;
- take care when choosing words to describe a person and their behaviour and always be honest;
- record in an ethical, non-biased and fair manner;
- write succinctly and only include relevant information;
- use professional judgement to determine what needs to be recorded in the context of that case;
- read the family history so families don't have to retell their story unnecessarily;
- clearly articulate the rationale for decisions and actions;
- write concise, analytical and child focussed assessment narrative;
- record information accurately. Clearly identify the source and the status e.g. fact, hearsay, opinion - professional or otherwise;
- ensure strengths and positive experiences are adequately captured; and
- ensure accurate recording of cultural identity and Aboriginality.

### ***Record-Keeping in the Out of Home Care (OOHC) System***

Providers of OOHC in NSW are required to demonstrate ongoing compliance with the Children's Guardian NSW Child Safe Standards for Permanent Care ('the standards') in order to maintain accreditation as a 'designated agency' authorised to provide OOHC services. The standards reflect the requirements of the *Children and Young Persons (Care and Protection) Act 1998* and its regulations regarding documentation and record-keeping.

Many of the standards have implications for record-keeping practices. Three in particular relate directly to the discussion in the Royal Commission's consultation paper:

- *Standard 4: Identity*, requires designated agencies to record children and young people's family details and personal histories to assist them in developing an understanding of their family and cultural origins;
- *Standard 7: Confidentiality and Privacy*, requires designated agencies to maintain records in a secure manner and to protect confidential information regarding children and young people and their families from unintentional release; and
- *Standard 17: Documentation and Record-keeping*, requires designated agencies to maintain a permanent record of children and young people's history in out-of-home care. The standard requires agencies to retain records regarding the social and medical history, development and identity of children and young people as well as information relating to the safety, welfare and wellbeing of children and young people. The standard requires agencies to support children and young people to access their care records and ensure that children and young people are provided with original identity documents, life story material and other relevant documentation, upon leaving care.

The Standards do not prescribe the manner in which designated agencies must document their work, however the OCG expects that records provide an accurate account of children and young people's experiences in care, decision making processes and sufficient information to support appropriate case planning decisions. The OCG monitors designated OOHC agencies' compliance with the requirements of the standards, including an assessment of agencies' records in relation to children and young people, authorised carers and staff and volunteers. The OCG regularly provides feedback to designated agencies regarding the quality of documentation and record-keeping practices.

### ***Health records***

Records generated by public and private health services in NSW must be managed in accordance with the *Health Records and Information Privacy Act 2002*. Health records may document medical and forensic examinations of adult and child sexual assault victims. The NSW Ministry of Health's *Privacy Manual for Health Information, March 2015* specifies that records of personal health information must be accurate, complete and up-to-date; clients have rights to access their own records and request amendments to correct any inaccuracies. The Manual's guidance on the retention, security and disposal of personal health information is cross-referenced to the Act and the relevant Functional Retention and Disposal Authority.

It is NSW Health policy to ensure that high standards for documentation and management of health care records are maintained across public health organisations (PHOs) in the NSW public health system, consistent with common law, legislative, ethical and current best practice requirements. NSW Health staff are required to comply with this policy as part of their patient/client care responsibilities. Chief Executives of PHOs are responsible for monitoring compliance by ensuring health care records are audited and results are reported within the PHO.

### ***Recording Investigations into misconduct***

Creating and keeping accurate records about decisions is especially important in relation to misconduct. In NSW, the reporting and investigation of harm to children and young people in institutions is captured under the NSW Ombudsman's Reportable Conduct scheme (Part 3A, *Ombudsman Act 1974*). The Ombudsman requires public and private organisations delivering service to children to keep records that demonstrate how they have responded to a reportable allegation or conviction against an employee. The Ombudsman will refer to those records when assessing or auditing the quality of an organisation's investigations.

The NSW Ombudsman has a suite of tools to assist designated agencies in the conduct and documentation of investigations of misconduct. The OCG regularly refers designated agencies to these resources.

FACS Reportable Conduct Unit (RCU) staff are provided with the *Managing Allegations of Reportable Conduct Against Authorised Carers 2014* procedures. These procedures include recording requirements within the Reportable Conduct scheme. They also provide guidance with respect to the management of sensitive information including when information should be secured on the electronic system and the management of paper files. RCU staff document all decisions and incidents relating to allegations of reportable conduct in a dedicated case management system. Investigation workflow prompts are built into the system to ensure that decisions are recorded and that a record is kept on who made the decision and when it was made.

It is important that specialised record-keeping functions such as recording of investigations are performed by staff with expertise in the relevant area. For example, investigators trained in techniques for interviewing children and young people should be those to record details relating to the investigation of sexual abuse.

### ***Resourcing and time-management considerations***

Creating and managing records about all decisions and incidents affecting child protection is resource-intensive, and processes need to be carefully designed so as to balance record-keeping requirements with the need to maximise the ability of staff to provide high quality services to children and young people.

FACS' *Practice First* initiative to expand child protection caseworkers' skills-development, collaborative relationship-based practice and mentorship opportunities, was developed partly in response to concerns that caseworkers' roles had come to be dominated by administrative tasks, and relied too heavily on procedures and tools. This situation prevented caseworkers from maximising the time they spent with families, building productive relationships and engaging fully with factors affecting children and young people's safety.

ChildStory's enhanced efficiency and recording capabilities will contribute further to reducing administrative burden and enabling caseworkers to interact more closely with children and young people.

## **Principle 3. Records relevant to child sexual abuse must be appropriately maintained**

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### ***Legacy of historical record-keeping practices***

As the NSW Government noted in its response to the Royal Commission's Issues Paper 4, "the challenges posed by the tendency for child sexual abuse to be reported many years after it occurred highlights the importance of accurate, thorough and contemporaneous record keeping". One difficult aspect of the absence of a historical focus on accurate record-keeping is that it can hamper the efforts of people who were abused as children and young people to seek justice and redress. Equally this can be a source of distress for people who obtain their personal records, as it is too often found that in instances where there has been a record made of the abuse, it is glossed over, or the victim is disparaged or even blamed.

NSW Victims Services and Support provides counselling and financial compensation to victims of crime, including people who were abused as children or young people in institutions. This agency has found that despite claimants' being able to provide extensive oral evidence of abuse, many institutional records dating from last century up to the early 1990s either cannot be found, or are so scant in detail that they do not contribute towards proving that violence occurred against them.

The challenge of, and resource requirements for maintaining sensitive records such as those relating to child sexual abuse in technology or paper based systems over a lengthy period of time should not be underestimated. Within the last 40 years, archives or records within the NSW education sector for example have been retained in the form of paper files, micro-fiche, film, video, tape recordings, floppy discs, compact discs, USB drives and in centralised "cloud" computing. It can be a significant challenge to maintain reverse compatibility of technology, and to ensure methods of storage designed for current use do not permit data to be corrupted over time.

Most Juvenile Justice clients with a date of birth from early 1970 onwards are recorded in internal electronic databases. Clients born before 1970 may have had their records created by the predecessors of what is now FACS. These records are now held by Juvenile Justice in the GRR. If the client is born before 1970 and no record is found, the requestor is referred to FACS. Juvenile Justice Client Records can assist with identifying other record sources. Records are sourced by client name. Access to client records is restricted to Juvenile Justice personnel who have a WWCC clearance.

### ***Maintaining records from contracted service providers***

Section 8, *State Records Act 1998* extends the Act's reach to the records of organisations carrying out the functions of the state, where these functions are outsourced by government agencies to non-government organisations. Records made and kept in carrying out the outsourced functions are considered state records under the Act.

In these circumstances, the obligations and responsibilities for state records that apply to government under the Act also apply to the funded organisation in relation to those records. Contracts and service provision guidelines with non-government service providers should set out those obligations and any other business requirements required in relation to record keeping.

### **OOHC records**

In addition to obligations under the Act, there are other legislative provisions and frameworks which seek to protect the records of children and young people in care.

As above, under the OCG's *NSW Child Safe Standards for Permanent Care* all agencies providing OOHC services must have adequate processes for creating and storing records relevant to children and young people in their care, including information about case planning decisions and the services children and young people are provided.

Section 170, *Children and Young Persons (Care and Protection) Act 1998* requires designated agencies to hand over their client records to FACS seven years after a client leaves care and/or if an agency ceases to provide OOHC. In accordance with a Memorandum of Understanding between FACS and the GRR, designated agencies may send their records direct to the GRR, or to FACS, which will then transfer them to the GRR for storage.

The obligations on designated agencies under *Children and Young Persons (Care and Protection) Act 1998* and the OCG's *Child Safe Standards for Permanent Care* are absolutely critical for care leavers, particularly where they may have experienced a number of placements, across a number of providers, during their time in care. Together the legislation and Standards ensure that regardless of the number of placements, or providers that supervise a child or young person's time in care, all of the child or young person's records will be delivered to the GRR and preserved.

Similarly, providers engaged by Juvenile Justice to deliver services must transfer client records to Juvenile Justice at the completion of the contract or when the client leaves the service. The record will then be maintained according to the requirements in the *State Records Act 1998*.

It is noted that there have been concerns raised in the past around the records-handling practices of both government and non-government historical providers of institutional OOHC, and that records from these institutions can be difficult for care leavers to access.

Given the recent transition of a large proportion of the NSW Government's OOHC functions to the non-government sector, it is important that non-government OOHC designated agencies have a sound understanding of the legislation, policy and procedures in relation to record-keeping for the children and young people whose placements these agencies supervise.

FACs recognises that the department plays an important role in supporting non-government OOHC partners to be aware of and fulfil their obligations under the relevant legislative, policy and procedural frameworks.

### **Appropriate storage of sensitive records**

In addition to the need to comply with privacy and information security provisions, consideration is required as to which agencies should store certain types of records relating to child sexual abuse. For example in the case of schools, it may not be appropriate for allegations of intra-familial abuse about which a school becomes aware to be retained on a standard student record or a counselling file. There is a need for clarity about what should be retained or recorded by the school as opposed to the investigating agency.

In recognition of the nature of information contained in NSW Health's holdings of sexual assault and child protection/wellbeing-related records, there are specific requirements in that department's *Health Care Records - Documentation and Management* policy for these records to be maintained separately from the principal health care record and kept secure at all times.

The recently-revised NSW Health Policy Directive *Child Related Allegations, Charges and Convictions against NSW Health Staff* includes a requirement that NSW Health records on child-related matters, even where allegations are not proven, be kept in a secure central location for a

minimum of 100 years in accordance with the requirements of the State Records' General retention and disposal authority: administrative records (GA28). The policy makes clear that these records may be subject to audit by the NSW Ombudsman.

## Principle 4. Records relevant to child sexual abuse must only be disposed of subject to law or policy

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The NSW Government recognises that laws and policies are required which govern the appropriate disposal of records relevant to child sexual abuse. Documentary evidence plays a key role in facilitating victims' claims for compensation whether through individual litigation or through current or future government or institutional programs. Such records may also be important for victims as part of their recovery. Criminal justice responses and preventative mechanisms such as the WWCC can benefit from access to documentary evidence.

### ***Laws Compelling Retention of Records***

As mentioned above, s.170, *Children and Young Persons (Care and Protection) Act 1998* requires designated agencies to keep records relating to a child or young person in OOHC for a period of seven years after the placement ceases, following which the records must be delivered to FACS for ongoing management as state records. OOHC care records must also be transferred when an agency ceases to provide OOHC services. Under the legislation, relinquished agency records held by the GRR can be accessed by FACS, as well as by the agency that previously supervised the child or young person's OOHC placement. Processes for accessing records are detailed in the section below.

All FACS and relinquished designated agency records relating to care leavers are retained permanently by the GRR as State Archives, under Functional Retention and Disposal Authority: FA318 4.1.1. The Royal Commission notes that permanent retention of such records has caused some care leavers concern. State Records NSW is however of the view that permanent retention of these records, while respecting a mutually negotiated period of closed access, is for the greater good. State Records has robust and established procedures, in the form of Access Directions, which are designed ensure that information which could cause embarrassment to individuals is not released during their lifetime.

Records relating to sexual assault generated by the public health sector in NSW are not permanently retained. This includes records generated by the NSW Health Child Protection Counselling Services (formerly PANOC). Under General Retention and Disposal Authority: GDA17 1.8.1, these records must be kept for a minimum of 30 years after action is completed, or the individual attains the age of 18 years, whichever is longer. GDA17 is currently under review and State Records NSW will be guided by the advice of the Ministry of Health, the public health sector and other interested parties should these retention periods be insufficient.

The record keeping and retention of records held by the NSW Police Force is governed by the *Police Act 1900* and the *Criminal Procedures Act 1986*. The effect of these in combination is that records relating to sexual assault matters reported to the Police must be retained for 99 years.

The Department of Education is the NSW Regulator for the *Education and Care Services National Law*. The National Law provides standards of record keeping in relation to incidents, illness, injury or trauma suffered by a child in an education and care service. While not specific to child sexual abuse matters, the department considers these requirements are framed broadly enough to capture such matters. Under clause 183, Education and Care Services National Regulations, records must be kept until the child is aged 25. There is therefore an inconsistency between the length for which such records must be retained under this law, and the longer retention requirements relating to other government records.

The Department of Education notes however that interest continues to exist for personal education records dating back to the 1940s. As such it would recommend a uniform policy under the Regulation requiring retention of records for at least 70 years after the last action.

## **Principle 5. Individuals' rights to access and amend records about them can only be restricted in accordance with law**

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### ***Access to records***

Under section 168, *Children and Young Persons (Care and Protection) Act 1998*, care leavers must be given access to their personal information from records about their time in care, free of charge. Care leavers can obtain their information via an application to FACS, whose Care Leavers Records Access Unit searches for and provides any available records. Non-government providers of OOHC must also provide personal information on application. Care leavers can request a support service, doctor or counsellor to prepare an application on their behalf.

It can be a confronting experience for care leavers to read their records for the first time. If the care leaver wishes, FACS is required under legislation to provide a support person such as a counsellor or an experienced caseworker to be present while the care leaver receives their information so that they can discuss any questions or concerns. Care leavers are also encouraged to have a friend, family member or other support person present.

As noted above, until 1991 the child protection and juvenile justice functions of the NSW Government were administered by a single authority. As the two functions became separate, separate record-keeping measures were put in place. Under Section 14, *Privacy and Personal Information Protection Act 1998* current and former clients may access their own records where the information does not infringe the right to privacy of others. Application of the legislation governing access to personal information of present and former clients of Juvenile Justice is set out in that agency's *Client Information Access Policy*.

As also noted above, the Department of Education manages records from the former Aborigines Welfare Board. No fees or charges apply for a request to access personal records held. A review is currently underway of Aboriginal Affairs administration of access to these records through the Family Record Service. This will examine what support arrangements (including referral to counselling support) should be in place to support people accessing their records, noting the records' sensitive content.

Assistance with access to government records can be obtained from the Information and Privacy Commission NSW (IPC). The IPC promotes and protects privacy and information access rights in NSW and provides information, advice, assistance and training for agencies and individuals on privacy and access matters.

The IPC reviews the performance and decisions of agencies and investigates and conciliates complaints relating to public sector agencies, health service providers (both public and private) and some large organisations that deal with health information. The IPC also provides feedback about the legislation and relevant developments in the law and technology.

### ***Records retrieval and processing***

As noted in the NSW Government's response to the Royal Commission's consultation paper *Preventing Child Sexual Abuse in Out-of-Home Care*, the Government understands that delays in accessing care records can be distressing and frustrating for people who have left care. The NSW Government acknowledges that in the past many care leavers have had to wait extended periods to access their information. As part of its response to the Royal Commission, in 2014 the government doubled the resources allocated to the processing of care leavers' applications for

their care records. This has resulted in applications being processed within an average time of less than one month in 2015/16, compared to over six months in some cases prior to 2014. Also in 2015/15 there has been a 78 per cent increase in the number of applications for care leavers' records on the previous year, which can largely be attributed to publicity associated with the Royal Commission.

The NSW Government acknowledges that organisations providing support services for care leavers have expressed concerns to the Royal Commission over continuing difficulties in accessing records, including that the extent of redactions of personal information can appear excessive. In processing an application, specialist FACS staff perform an archives search to find all the relevant records and read them carefully to release as much information as possible to the care leaver, while protecting the privacy of other people mentioned in the file. Applications are processed in compliance with relevant legislative and other legal requirements including:

- *Privacy and Personal Information Protection Act 1998*
- *Children and Young Persons (Care and Protection) Act 1998*
- legal professional privilege; and
- *Copyright Act 1968*

These requirements in combination have the effect of necessitating that sensitive third party personal information be redacted from the records. When a child is in care, FACS works with the child but also with other members of the child's family. This means that out of home care records often contain sensitive personal information which belongs to other people, including parents, siblings, foster carers, or other children and young people in OOHHC, which cannot be included in information released to care leavers. Information is also redacted if it could lead to the identification of any person who has made a report about risk of harm to a child, or if it relates to information received in confidence during a resultant child protection investigation.

In view of care leavers' concerns around redacting of third party information, NSW would support jurisdictions working towards the development of nationally consistent standards for the redaction and release of documents created by institutions about children where those documents discuss third parties. Noting the differences in jurisdictions' privacy and freedom of information laws and policies, and the different policies and standards that apply to government and non-government/private institutions, NSW considers that uniformity in this area would be beneficial.

### ***Amendments to Records***

NSW is mindful of care leavers' interest in being able to add to or amend their personal records. This might be because they consider the information is incorrect, incomplete, out-of-date, misleading, or not relevant to the purpose for which it was collected. It is noted that both CLAN and the Child Migrants Trusts' submissions to the Royal Commission's hearing on Redress and Civil Litigation argue that care leavers should be given the opportunity to have a written record of their own version or account of their childhoods included in the records about their time in care, in order to counterbalance material originating from the institutions or "right the record".

Both the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* give people the right to ask to have their personal information held in government records amended. Anyone wishing to do this can approach the relevant agency. In the case of care leavers' records, FACS permits care leavers to add any material that they wish to the record about their time in care.

***Improvements in record keeping and future access***

As noted above, there have been significant improvements made in recent years to both the quality of records relating to children and young people's time in care, and to the extent to which children and young people and their families are able to contribute to, access, and make use of out of home care records. These improvements will also serve to improve both the level of access people have to their personal information in the future, as well as the quality of the information.

## **Principle 6. Should a sixth principle directed at enforcing the initial five principles be required?**

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The NSW Government would be supportive of the five principles outlined being put forward as overarching principles to be used by organisations to inform and improve their own record-keeping practices, as well as guide future policy and legislative frameworks.

Legislation and policy currently in place in NSW has the effect of mandating that these principles be upheld by NSW government agencies, as well as the many non-government organisations working with children and young people, including providers of OOHC and health services.

Several sources of advocacy exist to support access to personal information held by government and non-government agencies in NSW. The Wattle Place support service provides support for people who have experienced institutional care. CLAN also performs valuable work in NSW to assist care leavers to access their records. Link-Up (NSW) Aboriginal Corporation is available to assist all Aboriginal people who had been directly affected by past government policies, including by assisting with access to records. As above, the Information and Privacy Commission can assist individuals on information and privacy-related matters, and provides oversight of institutional practices in this regard.

NSW agencies are committed to continually improving their processes for providing care leavers and victims of institutional child sexual abuse access to their records, by listening to their concerns and to those of advocacy bodies.