

**SUBMISSION ON FOI REFORMS**  
**FROM CARE LEAVERS OF AUSTRALIA NETWORK**

Privacy & FOI Policy Branch

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**About CLAN**

Care Leavers of Australia Network (CLAN) is a national support group for people who grew up in institutions or other forms of out-of-home care in the twentieth century. The Senate Committee's report, *Forgotten Australians* (2004), conservatively estimated the number of such Australians to be 500,000.

Many of these Australians as children lost all contact with their parents, siblings and other family members and have spent many years searching for their family in the hope of being reunited and connected again to their kith and kin. One of the crucial aids to this end is access to the case files and related records that were compiled and stored in government welfare departments and related agencies including churches and charities which were responsible for the institutions and the children in their care. The advent of FOI laws around the nation in the 1980s was seen as a godsend to many 'Forgotten Australians'. However, despite some clear benefits to some 'Forgotten Australians' in using FOI applications to gain access to their personal files (especially wards of state for whom a government carried legal responsibility), many thousands have been frustrated by the limitations of the legislation. We do not comment here on the already well-canvassed process issues such as lengthy delays; we focus more on the underlying principles. Our members' experience in using FOI legislation in various jurisdictions around Australia lead CLAN to conclude as we do in the body of our submission.

We understand that the FOI reforms currently under review at Commonwealth level have strictly limited application to care leavers in areas such as military records of family members. Nevertheless we believe that the Commonwealth FOI Act if amended in the right direction could establish a best-practice benchmark against which the States and Territories could further review their FOI regimes in respect of personal and family information.

## **1. Limited scope and application of FOI**

FOI laws apply only to government (or quasi-government agencies), statutory authorities, local councils, universities hospitals etc. It does not apply to the private sector: churches and charities are not bound by the provisions of the laws (although funding agreements may blur the Government/NGO distinction or be used by government departments as a lever to impose compliance with FOI-type rules). Practice therefore varies across the NGO sector from those who bend over backwards to adopt a liberal approach to access through to those who are anal-retentive. Often government welfare departments placed a state ward in a private or church-based facility. Often CLAN members were brought up in more than one institution and their siblings may have had a different placement. In these circumstances, people face the complex task of 'doing the rounds' of various agencies to gain access to parts of their story.

## **2. The entanglement with alleged privacy issues**

The use and abuse of privacy principles constrains FOI access and compounds the difficulties for the many thousands of former state wards and those brought up in out-of-home situations. These applicants are seeking not just information about their individual cases but also information that will enable them to reconnect with siblings and other family members. Their identity cannot be reduced to a narrow concept of the self as the be-all-and-end-all of the meaning associated with their time in institutions. In the authors' case, he has searched and found information on some 25 members of his family who were placed in 12 different institutions from 1865 to the 1970s. This process has taken 15 years and is not yet complete. The story of his relatives is his family story not 25 separate and disconnected stories.

The claims that FOI provides for the protection of privacy are dubious. In Victoria, for example, at present s 33(1) is the most troublesome part of the Act.

*A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).*

Essentially s33(1) is sometimes used by the Department of Human Services to block information about a third party even if that person is a close relative, such as a parent, and long dead. The words 'unreasonable disclosure' are commonly interpreted by FOI officers to mean 'any disclosure'. (The Victorian Ombudsman's review of FOI in 2006 made the same point.) We know of numerous examples where the very mention of a close family member who was instrumental in the act of institutionalising the child is sufficient to lead the FOI officer to censor a passage. In our view, that censorship is unreasonable because it makes it difficult to understand the content of the rest of the document and so frustrates the very purpose of seeking access to the records.

The application of s33(1) sits uneasily alongside s16 of the Victorian Act:

*(1) Ministers and agencies shall administer this Act with a view to making the maximum amount of government information promptly and inexpensively available to the public.*

*(2) Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.*

Section 33(3) of the Victorian Act states:

*(3) Where a request by a person other than a person referred to in subsection (2) is made to an agency or Minister for access to a document containing information relating to the personal affairs of any person (including a deceased person) and the agency or Minister decides to grant access to the document, the agency or Minister (as the case may be) shall if practicable notify the person who is the subject of that information (or in the case of a deceased person, that person's next-of-kin) of the decision and of the right of appeal against the decision provided by section 50(2)(e) to the person or, in the case of a deceased person, to the person's next-of-kin.*

In other words, a government department may grant access to an applicant, and if it does so, it has a duty where possible to notify the named third party of the decision to release the information. In our many years of dealing with FOI requests, we have seen very few examples of s33(3) being used by FOI officers in relation to granting access to former care leavers. We interpret that to mean that FOI officers take the easy way out and timidly comply with s33(1) as standard practice without regard for their obligation to interpret the meaning of 'unreasonable'. The personal information exemption in the FOI Act should be moderated by a test of unreasonableness such as a requirement to consider whether disclosure, on balance, would be contrary to the public interest.

In the nearly 90 nations that have an FOI law, a common principle in the legislation is that the onus of proof that a detriment would occur if information were released lies with the holder of the information – not with the person making the request. At very least, all the information held should be released if the person can show a proper personal or public interest in that release. The key principle of release is the right - and the need - to know.

When the right of one person to know appears to conflict with the privacy of another person there are some tests that could be readily applied:

- What is the presumed detriment that is said to exist if information is released?
- Has that presumed detriment been tested in discussion with the person(s) concerned?

- Is the presumed detriment outweighed by the presumed benefit to the inquirer?
- Is there a public benefit to be gained by the release of the information?
- Having regard for all the circumstances, would 'a reasonable person' assent to the request?

Assertions that FOI reform would lead to a weakening of privacy protection are often knee-jerk reactions by people who see privacy and access to information as competing claims. The use of the word 'privacy' as an impediment to the right to know is sometimes a mere none-too-subtle excuse.

### **3. Blocking access to historic welfare records raises important ethical questions**

When a former ward or otherwise institutionalised or fostered child is refused full or any access to records which may contain vital information about their childhood, you have to ask what was the point of having collated those records in the first place, and kept them in storage all those years?

If information was thought proper to place on your file, surely it must be germane to your story? Whose information is it in the last resort? If it is in your file but not to be released to you, what is to become of that item of information? Who else is using your file (if anybody), or is it just taking up space in a repository? Is not the refusal to release documents pertaining to your childhood in 'care' another detriment in the life of that person? Is that a breach of a duty of care (another meaning of the word)?

### **4. FOI is the wrong vehicle for access to welfare records**

The FOI regime in Australia was conceived primarily in the context of calls for open government in largely commercial areas of decision-making. It works best in relation to bureaucratic planning, contracts, public administration, legal disputation and the like. The approach to access to personal and family information in the welfare field through FOI is misconceived and in many cases futile. Child welfare records were and are not compiled for the same sorts of reasons that commercial or administrative dossiers are compiled. Most importantly, child welfare records take on a different significance once the objects of the files grow up and begin as adults to seek to make meaning of their childhood experience and to reconnect with their fractured family. Child welfare records are quite unlike any other public records in that it is impossible to say with any certainty when they will become optimally valuable to the persons about whom the files have been collected and stored. The very act of making an application to a body which may have been responsible for your childhood without parents is traumatic and can lead a person, again, through a damaging process.

Our conclusion is that the FOI pathway is the wrong road for access to welfare records and that a new legislative approach is needed. We note that, in Victoria at

least, a separate *Adoption Act* makes provision for all parties to exercise their rights to know vital information about their birth and the circumstances of their adoption.

Failing a separate Act for state wards and other children raised out-of-home - or pending that - a set of protocols agreed among former and current service providers, relevant government departments and care leaver organisations would be a step in the right direction. Chapter 9 and Recommendations 12-18 of the Senate's *Forgotten Australians* report would serve as a starting point. Maybe the current Senate Committee Review of the recommendations of its 2004 report will provide some further guidance.

We trust that you find this submission on behalf of the scores of thousands of former care leavers useful in your deliberations of FOI reform.

Frank Golding