



## **NATIONAL ARCHIVES OF AUSTRALIA - SUBMISSION**

### **ALRC Discussion Paper 80**

### **SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA**

#### **Introduction**

The National Archives of Australia (the Archives) is pleased to provide the following submission to the Australian Law Reform Commission's (ALRC) Discussion Paper on *Serious Invasions of Privacy in the Digital Era, Discussion Paper 80 (Discussion Paper)*.

This submission focuses on the proposals in the *Discussion Paper* that are relevant to the Archives' role pursuant to the provisions of the *Archives Act 1983* (Cth) (Archives Act).

The Archives notes that one of the key proposals of the Discussion Paper is a new Commonwealth Act that would provide for a statutory cause of action for serious invasions of privacy. The Archives is very supportive of the ALRC's discussion on the importance of avoiding unnecessary overlap between legal regimes. The submission seeks to discuss some of the potential overlaps with the Archives Act further.

#### **Summary of Archives' submission**

The Archives makes the following key points in relation to its submission:

1. The Archives is seeking to support the ALRC with its aim of promoting consistency with other Australian laws.
2. The Archives suggests that an exemption for certain records and actions specified in the Archives Act is the clearest approach to avoid potential overlaps and inconsistencies between the proposed stand-alone Commonwealth Act (new Act) and the Archives Act. This is explored further in Part 2 of this Submission.
3. In the event that specific exemptions are not applied, the Archives has concerns in relation to some of the Proposals set out in the Discussion Paper. The Archives' comments in relation to specific proposals including their potential impact on the role of the Archives are set out further in Part 3 of this Submission.

This Submission is broken down into the following parts:

- Part 1: The Role of the National Archives
- Part 2: Request for Specific Exemptions
- Part 3: Response to Specific Proposals
- Part 4: Closing Comments

## **PART 1: The Role of the National Archives of Australia**

The objects of the Archives Act include preserving and making publicly available the archival resources of the Commonwealth.<sup>1</sup> The functions of the Archives include:

- to identify the archival resources of the Commonwealth;
- to ensure conservation and preservation of the existing and future archival resources of the Commonwealth;
- to encourage and foster the preservation of all other archival resources relating to Australia;
- to encourage, facilitate, publicise and sponsor the use of archival material;
- to make Commonwealth records available for public access; and
- to develop and foster the coordination of activities relating to the preservation and use of the archival resources of the Commonwealth and other archival resources relating to Australia.<sup>2</sup>

The archival resources of the Commonwealth consist of such Commonwealth records and other material that are of national significance or public interest and include records that relate to the history or government of Australia and the legal basis, origin, development, organisation or activities of the Commonwealth or of a Commonwealth institution. Archival resources can also include records created by a person who is, or has at any time been, associated with a Commonwealth institution.<sup>3</sup>

The following legislative responsibilities of the Archives under the Archives Act are of particular relevance to the proposals in the *Discussion Paper*:

- (a) subject to the provisions of the Archives Act, the Archives causes Commonwealth records in the open access period to be made available for public access (s 31);
- (b) the Archives considers whether the release of a record would involve the unreasonable disclosure of information relating to the personal affairs of any person (s 33(1)(g));
- (c) a person must not engage in conduct that results in the destruction or other disposal or damage to or alteration of a Commonwealth record without the permission of the Archives (s 24); and
- (d) certain Commonwealth records are required to be transferred to care of the Archives within a prescribed timeframe (s 27).

## **PART 2: Request for Specific Exemptions**

The Archives' submission to the *Issues Paper*<sup>4</sup> in 2013 discusses its relationship with the current legislative framework governing privacy. In summary:

- (a) The Archives uses and provides access to Commonwealth records, certain personal records and other material held in its collection. Commonwealth records in the open access period and certain personal records are generally exempted from most of the Australian Privacy Principles (APPs) under the *Privacy Act 1988* (Cth) (Privacy Act);<sup>5</sup>

<sup>1</sup> *Archives Act 1983* (Cth) s 2A.

<sup>2</sup> *Ibid* s 5.

<sup>3</sup> *Ibid* s 3(2).

<sup>4</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper 43 (2013).

<sup>5</sup> See the definition of 'record' in the Privacy Act. The terms 'collects' and 'holds' are frequently used in the APPs and the definitions of each include the term 'record'.

- (b) In ALRC report no 85: *Australia's Federal Record: A Review of Archives Act 1983*, it was noted that the release of records under the Archives Act was deliberately excluded from the operations of the Privacy Act;<sup>6</sup>
- (c) The Archives Act has a test pursuant to s 33(1)(g) where the Archives is required to consider whether the release of a record would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person) and will exempt material accordingly if it meets the test of unreasonable disclosure;
- (d) The Archives has an extensive internal manual governing access examination and specific s 33(1)(g) considerations. The Archives is confident that the examination process captures material identified as sensitive and the decision-makers carefully apply provisions accordingly; and
- (e) The Archives Act also imposes records management obligations on Australian Government agencies. The Archives is empowered to promote the creation and management, including the disposal, of authentic, reliable and comprehensive records as evidence of government activity<sup>7</sup>.

Principle 7 of the Discussion Paper addresses the desire for consistency of Australian laws. The Archives is very supportive of the statement that *'any recommendation for a statutory cause of action for serious invasion of privacy (or other remedy) should promote coherence in the law and be consistent with other Australian laws or regulatory regimes.'*<sup>8</sup>

The Archives is seeking specific exemptions for certain records and practices for the following reasons:

- (a) Avoidance of unnecessary overlap between laws: The Archives is already required to consider information relating to the personal affairs of any person prior to the release of a record pursuant to the Archives Act;<sup>9</sup>
- (b) Administrative burden: To ensure that a dual privacy regime does not provide an unnecessary burden on the release of records to the public. The Archives has concerns that compliance with the privacy requirements of the Archives Act in addition to the requirements of the new Act could have a serious impact on the timely and efficient release of records pursuant to its statutory obligations under the Archives Act<sup>10</sup> and with public demand;
- (c) Consistency of Australian laws: The Privacy Act excludes Commonwealth records in the open access period and certain personal records from the operation of most APPs.<sup>11</sup> Further, APPs 4 and 11 specifically exempt all Commonwealth records from their application.<sup>12</sup> The Archives suggests that any proposed legislation should adopt a consistent approach to that of the current Privacy Act by specifically referring to the

<sup>6</sup> Australian Law Reform Commission, *Australia's Federal Record: A review of Archives Act 1983*, Report No 85, (1998) [15.56].

<sup>7</sup> *Archives Act 1983* (Cth) s 5.

<sup>8</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) 33 [2.26].

<sup>9</sup> *Archives Act 1983* (Cth) s 33(1)(g).

<sup>10</sup> *Archives Act 1983* (Cth) s 40(3).

<sup>11</sup> See the definition of 'record' in the Privacy Act. The terms 'collects' and 'holds' are frequently used in the APPs and the definitions of each include the term 'record'.

<sup>12</sup> Commonwealth record is defined in the Privacy Act as '*Commonwealth record has the same meaning as in the Archives Act 1983*'. See s 6 of the Privacy Act.

Archives Act and providing relevant exemptions for Commonwealth records and certain personal records; and

- (d) Avoidance of unnecessary overlap between roles: The Archives is already prescribed with the authority to authorise practices and procedures for the destruction of Commonwealth records<sup>13</sup>.

The Archives submits that provisions contained in the Archives Act should be exempted from the new Act to the extent that the Act would govern the use, release or disposal of the following records and practices already governed by the Archives Act:

- open period Commonwealth records under s 31, including the giving of access via the web;
- accelerated access or special access under s 56;
- disposal (in particular destruction or alteration) of all Commonwealth records s 24; and
- access to personal records collections (i.e. personal records of persons associated with the Commonwealth, for example, senior Ministers and public servants).

A specific exemption would seek to ensure that access to accurate historical archival records is not restricted by the Archives being required to consider two differing privacy regimes prior to the release of records. Given the provisions of the Archives Act that require the Archives to consider unreasonable disclosure of information relating to personal affairs, the Archives does not think it appropriate for the decision to release information under the Archives Act to also be subject to a statutory cause of action. Further, the Archives does not believe it is appropriate for the disposal of Commonwealth records to be subject to provisions under two separate legislative instruments. By centralising authority for the disposal of Australian government records, the Archives Act ensures government agencies can be accountable for their actions, that evidence of significant actions and decisions of the Australian government are preserved, and that citizens' rights and entitlements are protected.

If the ALRC does not support a specific exemption for the records discussed above, the Archives submits the following points in relation to a selection of the proposals and a possible amendment to the Archives Act.

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<sup>13</sup> *Archives Act 1983 (Cth) s 24.*

### PART 3: Response to Specific Proposals

**Proposal 8-2** The new Act should include the following non-exhaustive list of public interest matters which a court may consider:

- (a) freedom of expression, including political communication;
- (b) freedom of the media to investigate, and inform and comment on matters of public concern and importance;
- (c) the proper administration of government;
- (d) open justice;
- (e) public health and safety;
- (f) national security;
- (g) the prevention and detection of crime and fraud; and
- (h) the economic wellbeing of the country.

The Archives supports the guiding principles proposed in the *Discussion Paper*, in particular, balancing privacy with a range of other important values and interests, such as freedom of speech or expression, as well as freedom of access to historical records,<sup>14</sup> which is relevant to the Archives' core business of providing access to Commonwealth records under the Archives Act. The Archives recognises the need to balance both the public's right of access to information and the rights of individuals to have their reputation and privacy protected.

The Archives suggests the listing of 'the proper administration of government' have some parameters set around it or be re-worded. It seems that it could extend to the operations of the Archives pursuant to the Archives Act. However, the connection is not clear and may be subject to testing. A suggestion is 'the proper administration of government including administrative responsibilities pursuant to any laws'.

**Proposal 10-1** The new Act should provide a defence of lawful authority.

The Archives queries whether a defence of lawful authority could extend to the operations of the Archives pursuant to the Archives Act. It seems that this proposal is aimed at law enforcement agencies. If this is the case, the Archives submits that the new Act should provide a defence for actions required by law rather than just the lawful authority of law enforcement agencies. This defence could include the use and release of records pursuant to the provisions of the Archives Act.

**Proposal 10-5** The new Act should provide for a defence of publication of public documents.

The Archives does not 'publish' documents when it releases records pursuant to the Archives Act. The Archives is, however, interested in this proposal given that its mandate is to deal with public documents and it is also required to support a transparent and open government. Could further consideration be given to the role of the Archives when implementing this proposal?

### Section 57 of the Archives Act

Section 57 of the Archives Act provides protection against actions of defamation, breach of confidence and infringement of copyright where access is given to a Commonwealth record or a personal record.

<sup>14</sup> Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper 80 (2014) 31 [2.18].

Following is an extract from s 57:

**57 Protection against certain actions**

- (1) Where, in the ordinary course of the administration of this Act, access is given to a record as being a record required by this Part to be made available for public access:
  - (a) no action for defamation, breach of confidence or infringement of copyright lies, by reason of the authorizing or giving of the access, against the Commonwealth or any person concerned in the authorizing or giving of the access;
  - (b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of the access lies against the author of the record or any other person by reason of that author or other person having supplied the record to a Commonwealth institution; and
  - (c) a person concerned in the authorizing or giving of the access is not guilty of a criminal offence by reason only of the authorizing or giving of the access.

In essence, the intention was for protections against actions for defamation, breach of confidence and infringement of copyright and a defence in criminal proceedings for wrongful disclosure of information or matter contained in a record.<sup>15</sup> This protection applies in the ordinary course of the administration of the Archives Act where access to a record is required to be given under Division 3 of the Archives Act.

To avoid the potential for overlap between the proposed legislation and the Archives Act, the Archives requests that consideration be given to a recommendation in the your Report for an amendment to s 57 of the Archives Act to include protection against an action for breach of privacy.

In summary, the Archives suggests that in recognition and support of the role of the Archives, the statutory cause of action for serious invasion of privacy should not unnecessarily prohibit the statutory right of the public to access this information, including the access to the Archives' collection by any means. The Archives Act contains exemption categories which provide adequate protection for privacy.

**Proposal 11-10** The new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasions of privacy.

**Proposal 11-11** The new Act should provide that courts may make a correction order, in an action for serious invasion of privacy.

A Commonwealth record is defined as a document or object in any format that is the property of the Australian government which has been kept by virtue of the information or evidence that can be obtained from it. Any information created, kept or received in the course of Australian government business is likely to be a Commonwealth record. This includes broadcasts (for example by the ABC or SBS) and all government websites.

The destruction and alteration of Commonwealth records is governed by s 24 of the Archives Act. While these provisions can be overridden by related provisions in other legislation, the Archives would like the ALRC to note the provisions and intent of the Archives Act and requests that the ALRC give serious consideration prior to any such provisions being drafted in the new Act. The Archives Act ensures that government agencies can be accountable for their actions, that evidence of

<sup>15</sup> Explanatory Memorandum, Archives Bill 1983 (Cth), House of Representatives 33.

significant actions and decisions of the Australian government are preserved, and that citizens' rights and entitlements are protected. The provisions of the Archives Act for the protection and preservation of valuable government information must be considered in the drafting of any legislation which may affect these provisions.

Proposals 11.10 and 11.11 provide for a court to order the destruction of material, or to make a correction order. In the case of Commonwealth records, destruction and alteration can generally only be governed by the Archives Act. Commonwealth records are also specifically excluded from the destruction and alteration provisions of the APPs under the Privacy Act.

Correction which involves retention of the original information and addition of a clarifying statement does not in general contravene the provisions of the Archives Act.

The Archives requests that the exclusion of Commonwealth records be provided for in any new legislation arising from the current review, and in particular Proposal 11.

**Proposal 15-2** A new Australian Privacy Principle should be inserted into the *Privacy Act 1988* (Cth) that would:

- (a) require an APP entity to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual; and
- (b) require an APP entity to take reasonable steps in a reasonable time, to comply with such a request, subject to suitable exceptions, or provide the individual with reasons for its non-compliance.

Proposal 15.2 relates to the creation of a new APP to provide for individuals to request the destruction or correction of private information that an entity hold about them. This is very similar to the current APP13 which provides for an individual to request the correction (but not destruction) of information an entity holds about them that is inaccurate, out-of-date, incomplete, irrelevant or misleading.

The current APPs provide for the exclusion of Commonwealth records from any provisions relating to destruction or alteration (including correction). This relates specifically to APPs 4, 11 and 13. Commonwealth records are excluded from the destruction and alteration provisions of these APPs because these actions are governed by the Archives Act.

Should a further APP be inserted in the Privacy Act, the Archives requests that as with the other APPs, the destruction or alteration of information contained in a Commonwealth record be excluded from the relevant provisions of the APPs.

**Question 15-1** Should the new APP proposed in Proposal 15–2 also require an APP entity to take steps with regard to third parties with which it has shared the personal information? If so, what steps should be taken?

APP13 also provides for the correction of information provided to a third party. Should a new APP be inserted to provide for the destruction of personal information at the request of an individual, this provision should be extended to information provided to third parties. Again, any information provided to a third party that forms part of a Commonwealth record should be excluded from this provision.

#### **PART 4: Closing Comments**

The Archives has a very important role in the privacy regime pursuant to s 33(1)(g) of its legislation to consider the unreasonable disclosure of information relating to personal affairs of any person. The Archives has discussed the recognition of this role as it currently exists in the Privacy Act where several of the APPs exempt Commonwealth records in the open access period and certain personal records and APPs 4 and 11 refer to disposal of Commonwealth records directly. The Archives is very keen to continue its important roles of considering privacy interests when releasing records and governing the destruction and alteration of Commonwealth records. The Archives has identified that the provisions of the new Act could impact on its role and result in overlaps and inconsistency between the two pieces of legislation.

The Archives requests specific recognition in the new Act consistent with the specific exemptions currently found in the Privacy Act. It is proposed that this could be an exemption for the following records and actions as specified in the Archives Act:

- open period Commonwealth records (s 31);
- accelerated access or special access of Commonwealth records (s 56);
- destruction or alteration of all Commonwealth records; and
- personal records collections (s 6(2)).