Australian Law Reform Commission

Report No 85

AUSTRALIA'S FEDERAL RECORD: A review of *Archives Act 1983*

This Report reflects the law as at 29 May 1998

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Terms of reference

1. I, Daryl Williams, Attorney-General of Australia, HAVING REGARD TO:

   (a) the purposes of, and benefits intended to be conferred by the *Archives Act 1983* and the functions of the Australian Archives:
   - to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth
   - to promote, by providing advice and other assistance to Commonwealth institutions, the keeping of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth
   - to ascertain the material that constitutes the archival resources of the Commonwealth
   - to have the custody and management of Commonwealth records, other than current Commonwealth records, that —
     (i) are part of the archival resources of the Commonwealth;
     (ii) ought to be examined to ascertain whether they are part of those Archival resources;
     (iii) although they are not part of those archival resources, are required to be permanently or temporarily preserved
   - to encourage, facilitate, publicise and sponsor the use of archival material
   - to make Commonwealth records available for public access in accordance with the Act and to take part in arrangements for other access to Commonwealth records
   - 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

   (b) the Australian Law Reform Commission Report 77/Administrative Review Council Report 40 *Open Government: a review of the federal Freedom of Information Act 1982* (1995), and in particular its recommendations concerning the *Archives Act*

   (c) the principles and provisions of relevant State and overseas archival legislation

   REFER to the Law Reform Commission, for inquiry and report under the *Law Reform Commission Act* 1973, section 6, the following matters:

(a) to identify what the basic purposes and principles of national archival legislation should now be

(b) whether the *Archives Act* 1983 has achieved those purposes and principles or whether it requires amendment, having regard in particular to
   (i) the role of the Australian Archives in setting and auditing standards for the management of all Commonwealth records
   (ii) the need to ensure that records in electronic and other non paper formats are managed effectively
   (iii) the need to ensure the maximum possible consistency between the *Archives Act*, the *Freedom of Information Act*, the *Privacy Act*, and the *Public Service Act*
   (iv) the most appropriate public access regime for Commonwealth records of enduring value
   (v) the relationship between the Australian Archives and other Commonwealth agencies
   (vi) whether the structure and wording of the Act can be simplified to make it more easily understood by the public
   (vii) any related matter.

2. The Commission is to prepare and release an issues paper for public consultation by 30November 1996 and is to report by 31 December 1997.

Dated 15 August 1996

[Signed]
Daryl Williams
Attorney-General

Abbreviations

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977* (Cth)
AGPS	Australian Government Publishing Service
AIC	Australian Intelligence Community
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ARC	Administrative Review Council
Archives Act	*Archives Act 1983* (Cth)
ART	Administrative Review Tribunal
ASIO	Australian Security Intelligence Organization
AusGILS	Australian Government Information Locator System
AWM	Australian War Memorial
DRP 4	ALRC Draft Recommendations Paper 4 — *Review of the Archives Act 1983*
FOI Act	*Freedom of Information Act 1982* (Cth)
GDA	General Disposal Authority
IMSC	Information Management Steering Committee
IP 19	ALRC Issues Paper 19 — *Review of the Archives Act 1983*
NAA	National Archives of Australia
OGIT	Office of Government Information Technology
Privacy Act	*Privacy Act 1988* (Cth)
Royal Commissions Act	*Royal Commissions Act 1902* (Cth)

Part A

1. Introduction

Terms of reference

1.1 On 15 August 1996 the Attorney-General, the Hon. Daryl Williams AM, QC, MP, asked the Australian Law Reform Commission (the Commission) to review the *Archives Act 1983* (the Act). The terms of reference required the Commission to identify what the basic purposes and principles of national archival legislation should now be and to determine whether they have been achieved by the present Act. The full terms of reference are set out on page 3. In reviewing the Act the Commission has been required to have regard, in particular, to

- the role of the Australian Archives in setting and auditing standards for the management of all Commonwealth records
- the need to ensure that records in electronic and other non-paper formats are managed effectively
- the need to ensure the maximum possible consistency between the Archives Act, the Freedom of Information Act, the Privacy Act and the Public Service Act
- the most appropriate public access regime for Commonwealth records of enduring value
- the relationship between the Australian Archives and other Commonwealth agencies
- whether the structure and wording of the Act can be simplified to make it more easily understood by the public.

1.2 The Commission was initially required to complete its report on the Archives Act by 31 December 1997. However, the Attorney-General agreed on 12September 1997 that the reporting date should be extended to 31 March 1998. A further extension to 1 May 1998 was granted on 17 March 1998.

Issues paper

1.3 The Commission published Issues Paper 19 (IP 19) on the Act in January 1997. Some 2000 copies of the paper were distributed in Australia and overseas and the paper was also made available on the Commission's Internet site. IP 19 summarised the present provisions of the Act and presented them in their historical and administrative context. It raised issues concerning how the Act had operated and how it might be improved. It also suggested a series of principles on which new archival legislation might be based.

Submissions

1.4 The Commission received 102 written submissions in response to IP 19. Stakeholder groups were represented in those submissions as follows

Commonwealth Government agencies	42
State Governments and their agencies	3
Non-Commonwealth libraries and library organisations	2
Other organisations	3
Legal organisations and specialists	4
Professional groups representing archivists and records managers	3
Individual archivists and records managers	15
Professional groups representing historians and other users of archival records	20
Individual users of archival records	6
Other individuals	4

1.5 The Commission was impressed by the quality of many of the submissions. They presented a range of incisive views not only of the operation of the legislation but also of the current state and possible future direction of Commonwealth recordkeeping generally. While submissions came from a wide range of stakeholders, there was broad agreement regarding the nature of significant problems and the practical options available for their resolution.

Consultations

1.6 Between May and July 1997 the Commission held one general public meeting on the reference in each State and Territory capital city. The Commission also held a range of meetings with specific stakeholder groups in Canberra, Sydney, Darwin and Adelaide and made a presentation to the annual national conference of the Australian Society of Archivists in Adelaide. The various meetings gave the Commission direct contact with several hundred people and provided a good opportunity for amplification of issues raised in written submissions. The meetings confirmed the strength of stakeholder interest in Commonwealth recordkeeping and concern about how some aspects of it are currently managed.

Draft Recommendations Paper

1.7 The Commission published Draft Recommendations Paper 4 (DRP 4) on the Act in January 1998. Some 2000 copies of the paper were distributed in Australia and

overseas. The paper was also made available on the Commission's Internet site. DRP 4 followed the same general arrangement as this Report, but in abbreviated form.

1.8 The Commission received 46 written submissions in response to DRP 4. Submissions came predominantly from those who had also made submissions in response to IP 19. Approximately half of the submissions were from Commonwealth agencies, while the remainder came from a wide range of organisations, professional bodies and individuals. Submissions were generally supportive of the great majority of draft recommendations set out in DRP 4. However, significant differences of opinion emerged in a few areas, in particular the application of user charges, definitional issues relating to the term 'record', custodial arrangements for certain classes of records and the wording of the public access exemption provisions.

1.9 In some cases arguments put to the Commission in response to DRP 4 have caused it to revise its draft recommendations, or at least to amplify its reasons for making those recommendations. Significant modifications to draft recommendations are pointed out in the Report.

1.10 In view of the extensive response to the earlier round of public consultations, the Commission did not see a need to undertake further general public consultations. However, meetings with honorary consultants and specific stakeholder groups were held in Sydney, Canberra, Melbourne and Hobart. The Commission also consulted widely with individuals who had prepared submissions either on their own account or on behalf of organisations and with others who were able to provide specialist information and comment.

This report

1.11 ***Part A Introduction*** summarises the approach which the Commission adopted in its review of the Act.

1.12 ***Part B A new federal archival system*** outlines the history of recordkeeping and of the development of archival institutions in Australia and overseas. It examines the origins of the present Act and describes the reasons why change is needed. It then sets out an overview of the principal elements of a new Commonwealth archival system and suggests a series of major objectives which should be included in an objects clause in a new Archives and Records Act.

1.13 ***Part C The National Archives of Australia*** examines the functions and powers of the present Australian Archives and suggests a revised set of functions for a new statutory archival authority. It makes recommendations on the structure and governance of the new authority, which will have policy and standard setting responsibility for the new records management and archival regime set out in the remainder of the report. It also considers the financial basis of the present Australian Archives and how this might be adapted to meet the needs of the new authority.

1.14 ***Part D The federal record*** begins by considering how Commonwealth records should be defined in order to establish clear and comprehensive coverage for the legislation. It then traverses the continuum of the records management process from creation to appraisal, disposal, custodial arrangements and preservation. In relation to all of these activities, it stresses the importance of consistent and accountable standards being issued by the archival authority and of ensuring that the new legislation and the standards issued under it will deal effectively with records of all formats both now and in the future. It also considers provisions for the recovery of records removed from Commonwealth custody without authority.

1.15 ***Part E Australians' access to their records*** reviews the present public access regime for Commonwealth records based on the 30 year rule and recommends ways in which it might operate more effectively. It considers the relationship between the Archives Act and other legislation, in particular the FOI and Privacy Acts. It considers procedures and the allocation of responsibility for the handling of public access applications. It suggests ways in which a significantly enhanced approach might be taken to the discretionary release of Commonwealth records beyond the minimum statutory requirements and a new approach to the granting of privileged access to records not suitable for general public release. It also examines the services provided to the public by the national archival authority.

1.16 ***Part F Sensitive records — access and review*** considers what provision the legislation should make for records which justify exemption from public release beyond the age of 30 years. It reconsiders the approach to exemption provisions. It then examines particular issues relating to personal information in records. Finally, it considers mechanisms for the review of decisions to exempt records from public access and for other decisions made by the archival authority.

1.17 ***Part G Other significant matters*** deals with four areas in which submissions have raised issues about Commonwealth recordkeeping and archival services which relate to more than one of the preceding parts. These include arrangements for the records of the Parliament, the courts and royal commissions and a range of issues raised by Aboriginal and Torres Strait Islander people about the management and accessibility of records which relate to them. It also considers the implications for Commonwealth recordkeeping of the rapid growth in the contracting out of Commonwealth government functions and services. Finally it examines the leadership and custodial role of the national archival authority beyond the Commonwealth jurisdiction.

Part B

A new federal archival system

2. The development of archives in Australia

The origins of archives

2.1 Over the centuries people have sought to preserve information about themselves and their activities, not only to explain and protect the structures of the societies in which they live but also to give meaning to their own lives. Much of this information was, and still is, transmitted orally through song, rhyme and ritual to overcome the frailty and subjectivity of human memory. However, even the earliest societies found a need for some more permanent and reliable recording medium, progressing from cave paintings to clay tablets, papyrus sheets and materials derived from animal skins. The Chinese perfected paper in the second century BC, although it was not commonly used in Europe until the fourteenth century AD. Equally important to the development of recording materials was the development of symbols and scripts to convey the meaning of what was to be recorded. The Sumerians in southern Mesopotamia were using cuneiform markings on clay tablets by the fourth millennium BC and written records were also used in the Egyptian and Persian empires. The records documented a wide range of financial, administrative, property, genealogical and religious matters and both the Egyptian and Persian empires maintained repositories of records.

2.2 The Greeks and Romans used written records extensively in their administration, although few of them have survived. The Romans also contributed the word 'record', which comes from the Latin 'recordare' meaning literally 'to give back to the heart'. After the collapse of the ancient civilisations, written recordkeeping in Europe largely ceased as literacy declined and society fragmented. It was not until the later Middle Ages that increasing literacy, prosperity and political stability revived the keeping of substantial written records, mainly by governments and the church for financial and legal purposes. The invention of printing in the fifteenth century further stimulated recordkeeping and led in turn to the establishment of repositories where records could be held on a long term basis rather than be subject to the whim of individual monarchs. Royal archives were established in Spain in 1543, France in 1560 and Denmark in 1665, while the Vatican established an archives in 1612.

2.3 The French Revolution introduced the modern concept of an archives being managed for the benefit of all citizens and not just for government. The French *Archives Nationales* were established in 1794 with jurisdiction over the records of the national government, provinces, communes, churches, hospitals and universities. The archives were open to all citizens. Napoleon sought to transfer the records of territories he captured to Paris, but his vision of a continental archives was not achieved. However, national archives were established in many countries during the

nineteenth century. In England the Public Record Office Act of 1838 required the Master of the Rolls to bring together in a single location legal records to which the public had a right of access. The Public Record Office in Chancery Lane was opened in 1855 and gradually became also a repository for the administrative records of government, although there was no right of public access to them.

2.4 In the United States the need for an archives of federal government records was virtually ignored for a century and a half after the Declaration of Independence. Construction of a national archives building in Washington was authorised in 1926. The building was completed in 1934 and in the same year a National Archives Act established the position of National Archivist with responsibility for and powers over legislative, executive and judicial records. The huge growth of records during the Second World War necessitated the passage of a Federal Records Act in 1950 which authorised the National Archives to survey government records, investigate their management and disposal practices and establish federal records centres for the intermediate storage of government records. The role given to the US National Archives in the disposal and secondary storage of relatively recent records also influenced the development of the Archives Division of the National Library of Australia, the predecessor of the Australian Archives.

The development of State and Territory archives in Australia

2.5 The written record was central to the colonial administration of Australia from 1788 onwards. This reflected the fact that the development of the Australian colonies was planned and directed in great detail by government and that in early years much of this direction came from ministers and officials on the other side of the world. The colonial administrations were involved not only in the broad management of the colonies' politics, finances and development but also in many of the affairs of individual citizens. In particular, the convict system and the gradual subdivision of the continent into freehold and leasehold properties generated extensive records. In consequence, most aspects of colonial life were reported on in detail and large volumes of written records accumulated in both London and the colonial capitals.

2.6 The process by which accumulations of records in colonial administrative offices were gradually transformed into what are now the various State archives was a long and haphazard one. Some valuable records were lost through neglect or deliberate destruction, but Australians are fortunate that so much of a rich heritage of written records has survived. Some historical interest developed in the earliest and most significant records in the late nineteenth century, although the 'convict stain' and the tendency to regard history as a matter of kings and battles inhibited a full appreciation of their value. During the first half of the twentieth century, the State library authorities, in a variety of times and circumstances, attempted to preserve archival records and to ensure that government agencies adopted responsible disposal practices. During the second half of the century the archival cells which had begun their work within the library structures developed into substantial archival

institutions, although some retained links with the libraries. The various institutions developed as follows.

- ***New South Wales.*** The establishment of the Mitchell Library in 1910 provided a focus for the collection of historical records within the public library system. The Mitchell Library oversaw the disposal of official records and took custody of those worthy of retention until 1953 when this function was taken over by a new Archives Department (later Division) of the Library. The Archives Division became an independent Archives Authority in 1961.

- ***Victoria.*** An Archivist was appointed within the State Library in 1948–49 and a separate Archives Department was created in 1956. The *Public Records Act 1973* (Vic) established the Public Record Office as an independent body within the Chief Secretary's Department.

- ***Queensland.*** The *Libraries Act 1943* (Qld) included provisions for dealing with government records, but these provisions were not proclaimed until 1958. During the 1950s records began to be transferred from departments to the State Library and an Archivist was appointed within the Library structure in 1959.

- ***South Australia.*** An Archives Department was established in 1920 subject to the Library Board but separate from the State Library. An act was passed in 1925 to regulate the disposal of government records, but this was replaced by the *Libraries and Institutes Act 1939* (SA) which subordinated the Archives Department to a new Libraries Board. State Records South Australia was established as an independent organisation by the *State Records Act 1997* (SA).

- ***Western Australia.*** The State Library was authorised to accept official records in 1903 and later administered disposal policy. An Archives Department was established within the State Library in 1945 and the State Archives became part of the Library and Information Service of Western Australia in 1988.

- ***Tasmania.*** A Lady Indexer was appointed in 1921 to select records for publication in the *Historical Records of Australia* series and she became the *de facto* guide to State government records until the first Archives Officer was appointed to the State Library in 1949. The Archives Office of Tasmania was separated from the State Library in 1989.

- ***Northern Territory.*** The Northern Territory Archives Service was established in 1983 and since then has been located within various departments. Its holdings consist mainly of official records created since the Northern Territory attained self-government in 1978, but include records created during the earlier South Australian and Commonwealth administrations.

State archival legislation

2.7 Archival legislation in the six Australian States (as yet no Territory has legislation) reflects the gradual development of archival institutions within the State library systems. Parliaments did not cause archival institutions to suddenly appear as independent entities with a strong legislative base. Rather, legislation slowly and often inadequately followed the existence of archival activity, focusing initially on managing the disposal of records. Chris Hurley[i] has characterised what he calls 'first generation' archival legislation as dealing with

- the establishment of an authority to be responsible for public records
- the prohibition of destruction without the authority's approval
- empowering the archives authority to receive records withheld from destruction, and
- establishing a right of public access to records transferred to the archives unless the depositing agency wished otherwise.

2.8 The first legislation in Australia relating to records was the South Australian *Disposal of Public Records Act 1925* (SA), which was absorbed into the *Libraries and Institutes Act 1939* (SA). The first general archival legislation was the Tasmanian *Public Records Act 1943*, which was the pioneer of the first generation acts. It was followed by the NSW *Archives Act 1960*. The Tasmanian act was replaced by the present *Archives Act 1983* and the NSW act is in the process of being replaced by new legislation. Queensland and Western Australia still have basically first generation acts, although they all include provision for the archival authority to at least advise agencies on records management.

2.9 'Second generation' legislation as defined by Hurley added

- mandatory transfer of records to the archival authority, usually after 25 or 30 years
- some provision for the regulation or guidance of agency record management practices, and
- a public right of access to records after a specified period.

The Commonwealth and Tasmanian acts of 1983 are the two examples of second generation legislation, to which Hurley adds the Victorian legislation because of its provision for the Public Record Office to establish records management standards and the addition of a mandatory transfer provision in 1994.

2.10 In recent years Queensland, New South Wales, South Australia and Western Australia have all been developing new archival legislation, reflecting a generally perceived need to align the legislation more closely with new technologies, administrative structures and community expectations. In Queensland and Western Australia additional pressure for new legislation has come from major inquiries into government administration, which have concluded that adequate recordkeeping is a

vital part of an efficient and accountable administration. The South Australian legislation has now been enacted as the *State Records Act 1997* and it is anticipated that the New South Wales legislation will be introduced into the State Parliament during 1998. While the structure and detail of the new generation of legislation varies between the four jurisdictions, there is a substantial similarity between many of the major provisions. These generally include

- an obligation for the archival authority to issue recordkeeping standards and for agencies to comply with them
- conferment on the archival authority of a right to inspect records in the custody of agencies
- a mandatory requirement for the archival authority to authorise the disposal of records
- empowerment of the archival authority to take action to recover official records which have passed into private hands
- conferment on the archival authority of an entitlement to custody of older records or to authorise some other arrangement for their custody, and
- conferment of a right of access to older records (the age at which they reach the open access period varies), with appeals against denials of access being handled through the Freedom of Information regimes.

The development of the Commonwealth of Australia's archives

2.11 The Commonwealth of Australia inherited some substantial functions and their records (notably the defence, customs and postal services) from the colonial governments in 1901. However, much of the administration of the country remained with the new State governments and the Commonwealth in its early years did not generate records on a very large scale. By the 1920s, the growth in the volume of records, and the effect of the First World War, which created an awareness of the historical value of some Commonwealth records, had combined to raise the need for a Commonwealth archival function. Prime Minister Hughes asked the Commonwealth National Library to regulate the destruction of records by Commonwealth agencies, although it was hindered by a lack of both space and powers to enforce its role. In 1927 the Parliamentary Library Committee submitted a draft Archives Bill to Cabinet but the Bill did not get as far as the Parliament. In addition to the work undertaken by the Commonwealth National Library, the Australian War Memorial had responsibility for the operational records of the armed services in the First World War.

2.12 The Second World War provided the final stimulus for the establishment of a Commonwealth archival function. Firstly, the war brought a very large increase in the range of Commonwealth activities and a commensurate increase in the volume of records. In consequence, the need for adequate storage and disposal procedures became urgent, as did the danger of valuable records being lost to the wartime salvage campaign. Secondly, the war, and particularly the war in the Pacific, drew

attention to the need to preserve records about diplomacy and strategy as well those recording the detail of military operations and service. A campaign led by the Commonwealth Parliamentary Librarian, Kenneth Binns, resulted, in June 1942, in Prime Minister Curtin approving the establishment of a group of Commonwealth officials which became known as the War Archives Committee. The Committee recommended that, as an interim measure, archival functions be shared between the Commonwealth National Library and the War Memorial, but foreshadowed the ultimate need for a Public Record Office. The appointment of Ian Maclean as Archives Officer at the Library on 30 October 1944 marked the formal beginning of what became the Archives Division of the Commonwealth National Library.

2.13 After the Second World War the Archives Division concentrated on the large backlog of departmental records requiring evaluation and in many cases destruction. It gradually established storage facilities in each State and mainland Territory, although the Hobart and Darwin offices did not open until the early 1970s. In 1952 the War Memorial's archival functions were formally confined to the records of the fighting services in war and warlike operations and in 1961 the Archives Division was removed from the Library and became the Commonwealth Archives Office (CAO) within the Prime Minister's Department. In 1966 the CAO introduced the Commonwealth Record Series system as the basis of a comprehensive system of intellectual control for Commonwealth records. In the same year the government agreed to the introduction of a 50 year public access rule for Commonwealth records, with an accelerated release of records up to 1922.

2.14 The early 1970s saw a number of important developments in the management of Commonwealth records. In 1970 the government affirmed that the CAO must authorise the disposal of Commonwealth records. It also introduced a 30 year public access rule for all except Cabinet records. In 1972 the 30 year rule was extended to Cabinet records and the accelerated release of records up to 1945 was approved. The immediate consequence of these changes was a large backlog of records awaiting examination to establish their suitability for release but, once this hurdle had been overcome, the CAO became for the first time an information resource available and relevant to a significant number of Australians.

2.15 In 1973 the former Dominion Archivist of Canada, Dr W Kaye Lamb, made a comprehensive report on the CAO, dealing in particular with a charter to be embodied in legislation, plans for a permanent headquarters building in Canberra and staffing requirements.[ii] In his report Lamb stressed the importance of enacting legislation as soon as possible to give the Archives a clear charter, particularly in relation to the management and disposal of Commonwealth records. He also envisaged the establishment of an access appeal tribunal chaired by a Federal Court judge to review decisions to withhold records from release. The government response to the Lamb report in March 1974 included commitments to proceed with the legislation, to rename the CAO the Australian Archives and to establish a new position of Director-General. The government saw the Archives having 'as its broad aim the development of a national archives system which, in co-operation with the

States and other organisations, will ensure the preservation of archival resources which document the history of the Australian nation and which are of national significance, research value or of general public interest'.[iii]

2.16 The CAO was renamed Australian Archives in 1974 and Emeritus Professor RG Neale was appointed as the organisation's first Director-General in 1975. The legislation, which is discussed in Chapter 3, was enacted in 1983 and proclaimed in 1984. Australian Archives was renamed the National Archives of Australia in February 1998. The establishment of a national headquarters building in central Canberra was finally accomplished when the National Archives of Australia took possession of East Block, adjacent to Old Parliament House, in March 1998.

2.17 The recent change of name of the Australian Archives to National Archives of Australia is however, of an administrative rather than legislative character. For that reason, and for ease of understanding, this report continues to refer to that organisation as the Australian Archives when referring to its history, its current powers and functions and performance, its views and the views of others expressed about it. Where the Commission refers to the national archival organisation in the sense of how it should or might be expected to operate in the future in accordance with recommendations of the Commission, the term National Archives of Australia (NAA) is used.

2.18 For reasons elaborated in Chapter 8, the term 'records of archival value' is used to describe the permanent records of Commonwealth activity that should be the centrepiece of the archival responsibilities of the national archival authority. Where the report refers collectively to the total body of such records, the expression 'federal record' is used.

ENDNOTES

3. Why change is needed

Introduction

3.1 Until 1984, the Commonwealth archival function was managed entirely by administrative decision. Most decisions about the management of older Commonwealth records were made by the Commonwealth Archives Office (from 1974 Australian Archives) itself or by its parent department. Occasionally, major decisions on policy issues such as public access to records were made by the Cabinet.

3.2 In many areas of the management of Commonwealth records, the Archives enjoyed a significant degree of independence, in part because it was seen to be performing a quite specialised and generally uncontroversial function for all Commonwealth agencies. In some areas, however, the Archives' operations were restricted by the lack of a legislative or administrative mandate. Areas from which the Archives was excluded, or in which its involvement was at most limited, included the management of current records and control over the custody and public accessibility of older records which carried the higher levels of national security classification.

3.3 Against the background of the historic development of the national archives legislation and the role that the Australian Archives has played in giving effect to that legislation, this chapter seeks to identify the key areas in which the experience of the last 14 years demonstrates the need for change.

The enactment of the Archives Act 1983

3.4 The Act was drafted during the same period as the 'package' of Commonwealth administrative law measures enacted during the 1970s and 1980s. The centrepiece of this package is the Administrative Appeals Tribunal, the establishment of which was recommended by the Commonwealth Administrative Review Committee in 1971 and established by the *Administrative Appeals Tribunal Act 1975*. Another key measure was the *Freedom of Information Act 1982*. The public access and appeal provisions of the Archives Act were influenced by the development of this administrative law package. But the failure of the Act to address adequately records management issues represented a missed opportunity to legislate for best practice in recordkeeping as a fundamental part of the package.[iv]

3.5 The first of numerous drafts of the Archives Bill appeared in 1974. For the greater part, the legislation was not controversial, although the role originally envisaged for the Archives in the management of current records aroused some

opposition from other agencies. The main causes of delay were competing legislative priorities and the fact that the Archives Bill had to proceed in tandem with the Freedom of Information (FOI) Bill because their public access provisions were intended to be complementary. Both Bills were tabled in the Senate on 9 June 1978 and were then considered by two Senate Committees.[v]

3.6 The Senate Standing Committee on Education and the Arts dealt mainly with the Archives' proposed power to acquire personal papers which might include Commonwealth records. This issue had aroused considerable opposition from librarians and academics, some of whom argued that the Archives would become an unwelcome competitor for personal records collections and might even seek to seize or restrict access to existing library holdings. The Committee accepted that the legislation did no more than permit the Archives to collect the personal records of former ministers and officials and that it did not give the Archives the power to compulsorily reacquire even former Commonwealth records.

3.7 The Senate Standing Committee on Constitutional and Legal Affairs (chaired by Senator Alan Missen) examined the public access provisions of the Archives Bill in conjunction with its examination of the FOI Bill. The Committee did not question the appropriateness of adopting a broadly similar access scheme for both bills, but it did question the need for a 30 year closed period in the Archives Bill. It finally accepted the 30year closed period as a matter of administrative convenience, partly because it believed that its significance would gradually diminish as more records were released under the FOI legislation and under the accelerated release provisions of the Archives legislation.

3.8 The Committee argued strongly that there were too many grounds for exemption in the Archives Bill. It opposed all blanket exemptions (that is the exclusion of whole classes of records from the mandatory provisions of the legislation), which in the Bill as then drafted included Cabinet and Executive Council records, records of Governors-General, records in the possession of the Courts and the Parliament and records protected by a Commonwealth secrecy provision. It also recommended that the exemption categories covering foreign government information, Commonwealth-State relations, legal proceedings involving the Commonwealth and breach of confidence should be deleted and that ministerial conclusive certificates should be fully reviewable by the Administrative Appeals Tribunal.

3.9 Not all the Missen Committee's recommendations were accepted, but in the final version of the Bill blanket exemptions were confined to the personal records of the Governor-General, although records in the possession of the Parliament and the Courts could be brought into the disposal and access provisions only by regulation. The Archives Act completed its passage through the Parliament in October 1983 and was proclaimed on 6June 1984.

3.10 The legislation combined three distinct but related legislative objectives. The first was to establish the administrative entities known as the Australian Archives and the Advisory Council on Australian Archives and to confer on them a range of powers and responsibilities. The second was to establish some elements of a management regime for Commonwealth records, and in particular older records, and to assign administrative responsibility for their implementation. This responsibility resides only in part with Australian Archives. The third was to establish a public access regime for Commonwealth records more than 30 years old modelled closely on the *Freedom of Information Act 1982* (Cth).

The role of Australian Archives under the Archives Act 1983

3.11 The powers and functions of Australian Archives set out in the Act reflect the role and objectives of the Archives as it existed in the 1970s. They focus on the disposal, preservation and storage functions and on the Archives' role in gathering information about records and facilitating access to them. Although Australian Archives has significantly modified its priorities and strategies in some areas since the legislation was drafted, the most significant functions set out in the legislation are described in sufficiently general terms to remain relevant today. The most notable exceptions are the custodial provisions, which are now too prescriptive, and the records management advisory function, which is expressed too narrowly. Some of the more specialised powers and functions are now of only marginal relevance.

3.12 Notwithstanding the limitations of the Act and, in particular, its failure to provide a comprehensive and effective regime for records management from creation to archiving and beyond, Australian Archives has managed, in a thorough, professional and credible way, to build and maintain an archival regime that will provide a sound foundation on which to erect the new and much needed regime proposed by this report.

3.13 While giving express statutory recognition for the first time to Australian Archives, the 1983 Act did little to enhance the standing and authority of the organisation. In particular, the Archives continued to be an unincorporated element within a departmental structure and to be subject under the legislation to wide powers of ministerial direction consistent with those ordinarily applying to a Department of State.

3.14 Although the Archives has continued, nevertheless, to enjoy a relatively high level of independence, this seems to the Commission more likely to reflect the low priority given to Commonwealth recordkeeping than any conscious assessment of the degree of independence that it should enjoy. This sense is reinforced by the weight of those submissions to the Commission which argued that the conferment of separate corporate personality and clear responsibility for recordkeeping across the full spectrum of Commonwealth activity is essential to the much needed raising of awareness and standards in that area.

3.15 These same considerations seem also to the Commission to have contributed to the low key perception that Australian Archives has appeared to have, and still has, about itself. It is certainly not the perception that one would expect of an organisation that sees itself at the centre of an activity that is accorded significant priority by Government. Rather, it is the perception of an organisation that has had little encouragement to believe that successive governments have placed its role or functions high on the public policy agenda. The commissioning of this inquiry by the current government is widely seen as a first important step to redressing that perception.

3.16 These matters notwithstanding, the Commission has identified substantial strengths in the present Australian Archives which will be crucial in the successful establishment of the new organisation. One of these is the high regard which other archival institutions, both in Australia and overseas, clearly hold for the professional expertise of the Archives' staff. This regard is evident both in submissions and in the professional literature, in particular in areas such as records control systems and the management of electronic records. This professionalism will be further challenged in the leadership and policy making role which the Commission envisages for the new organisation.

3.17 A second strength is the good opinion of the public client base, although this is still a relatively small one. Commonwealth officials can at times present a quite forbidding appearance to members of the public, especially when they are unsure of which agency they should approach. While submissions from those who use the Archives raised a range of concerns about the operation of the Commonwealth archival system, they generally noted their appreciation of the competence and approachability of the Archives' information services staff and of their essential role in assisting people to navigate the maze of Commonwealth agencies and recordkeeping systems.

3.18 A third strength is the substantial effort Australian Archives has made in recent years to present and interpret the material which it holds to a much wider audience than those who actually make use of records on the Archives' premises. This has produced a range of publications and travelling exhibitions, often in collaboration with other organisations, which have brought some of the Archives' most significant records directly to tens of thousands of people. This has begun the conversion of the organisation from a reactive repository, which potential users must seek out themselves, to a proactive interpreter of the nation's history.

Managing current Commonwealth records

3.19 Without doubt, the major weakness of the present Act is its failure to treat recordkeeping as a single continuum that needs to be managed in an integrated way from the creation of records to the point of disposal or archiving and beyond. The

resultant parlous state of recordkeeping in many Commonwealth agencies bears ample testimony to the shortcomings of the present Act in focusing on the management of older records. This focus relies on the assumption that creating agencies will systematically and effectively manage their records until they cease to be regularly required for the discharge of the agency's business. That this assumption has long been entirely misplaced in the context of Commonwealth recordkeeping has been resoundingly demonstrated to the Commission in this inquiry.

3.20 The need for urgent legislative reform to provide an integrated policy and regulatory framework for Commonwealth records management across the board is nowhere better demonstrated than in the area of electronic recordkeeping. It is becoming increasingly apparent that, unless electronic recordkeeping systems are planned and managed adequately, there can be no guarantee that records, whatever their long term value, will be systematically created and maintained to a standard appropriate to their future use, including accessibility to future generations.

3.21 Evidence to the Commission stressed that the archival regime can no longer be based on an initial phase of quite unregulated recordkeeping, with a statutory management regime commencing when records reach middle age. For nearly a century, Commonwealth agencies have created records as they saw fit without any reference to general standards and often without any consistent approach to recordkeeping even within the agencies themselves. The current state of Commonwealth recordkeeping suggests that this inadequate *laissez faire* approach is continuing. There is no Commonwealth legislation providing a comprehensive framework for the management of Commonwealth records, although, as already observed, the Act provides some elements of such a framework. The reasons for the Act's failure to address the 'front end' of Commonwealth recordkeeping go back to territorial disputes[vi] which are now a matter of history.

3.22 Despite the lack of a clear legislative mandate, Australian Archives has provided some advice to Commonwealth agencies about the management of current records. Much of this has been on an *ad hoc* basis to resolve specific problems, but in recent years the Archives has also issued general guidelines on records management issues, particularly in relation to electronic records.

3.23 Many submissions expressed concern that, amidst the welter of new technologies, new administrative strategies, devolution of management, outsourcing and privatisation, it was easy to lose sight of the fundamental objectives of recordkeeping and to assume that, with so much electronic equipment in every office, records could be relied upon to look after themselves. The remedy was seen to be the articulation of comprehensive standards for recordkeeping predicated on the basic purposes for which records are created and maintained. The standards would be supported by more detailed implementation guidelines and by appropriate specialist advice, provided by the public or private sectors.

3.24 To establish and maintain these standards, the archival authority will need to draw on the expertise of the professional groups involved in the various aspects of records management and to approach recordkeeping as a unified continuum from creation to archiving or disposal. The identification and preservation of that small proportion of the totality of records which merits indefinite retention will thus become an integral part of the records creation process.

3.25 Archival authorities are the most logical organisations, in terms of their core responsibilities and expertise, to issue recordkeeping standards, especially in jurisdictions such as the Commonwealth where there has traditionally been no effectively coordinated policy maker for current records. Archival authorities are thus presented with an opportunity and a challenge — an opportunity to become central, at a policy level, to the entire continuum of recordkeeping and a challenge to develop the skills and breadth of vision necessary to undertake this responsibility effectively. Archivists emphasised the importance of this issue in their submissions.

> Setting of central standards is becoming increasingly important with the changes in the record creating environment. The growth in the use of computerised means to undertake government business and the electronic records produced means that control of records is much more decentralised and often *ad hoc*. There is a danger of loss to these records without proper management. Similarly the increasing commercialism and privatisation of government agencies means that they are operating outside some of the general government parameters. In these situations it is important that the agencies have principles to which they can refer and expertise which can be called on. Central setting of standards and monitoring of those standards in applications means that the government has ready access to its own records/archives in order to carry out its business. There are legal implications if records are not kept or destroyed in a proper way. A central set of standards and regulating body is the most assured way for government to keep and maintain records efficiently and effectively.[vii]

Electronic record keeping systems

3.26 The single issue raised most consistently with the Commission in submissions and consultations was the rapid development of electronic technologies for the management of information and recordkeeping systems. In no other area has the environment in which the legislation operates changed so fundamentally in the 14 years since it was enacted. While the present legislation contains some recognition of the existence of electronic records, inevitably it did not envisage all the technical and administrative consequences for recordkeeping which have flowed from the development of increasingly powerful and sophisticated electronic systems. This development is important also in the context of the overarching superstructure of a unified electronic access system for all government information.

3.27 The purposes and properties of a record remain the same regardless of the medium in which the record is housed. For this reason, the Commission has in general dealt with issues relating to the management of electronic records in the course of its consideration of issues relating to records in other formats. However, the Commission has been very aware of the profound changes that electronic

technologies are making to Commonwealth recordkeeping and of the need to ensure that its recommendations are relevant to these technologies.

3.28 The present position is complicated by the fact that there are wide variations in the extent to which Commonwealth agencies have adopted electronic recordkeeping technologies. Most Commonwealth records are now created electronically, but in many cases this merely means that they are created on a personal computer networked within a work group or agency. The record may be transmitted electronically and become part of an accumulation of electronic records. Yet the 'recordkeeping system' to which it belongs is often no more than a server filled with an unstructured mass of records which are difficult to locate and subject to intermittent purges. In such cases reliable and enduring recordkeeping still depends on record creators printing all records of more than transient value and ensuring that they are incorporated into a structured paper based recordkeeping system.

3.29 Some agencies are developing true electronic recordkeeping systems which not only create records but also manage and preserve them reliably. These have been focused initially on areas which generate large volumes of records within relatively standardised transaction formats, in particular records which deal with the interaction between Commonwealth agencies and individual citizens. Few of these records are of archival value. During the next decade the scope and sophistication of electronic recordkeeping systems is likely to increase rapidly. However, paper and electronically based systems will continue to exist side by side in many Commonwealth agencies for a long time to come. This means that the legislation and the authority responsible for its implementation must not only cope with a range of technologies but must also do all it can to encourage the adoption of the most effective technologies.

3.30 The Commonwealth Government has already taken some general initiatives in the area of electronic records management. In June 1997 the Office of Government Information Technology (OGIT) announced that five solution providers with eight core products for records management systems had been accredited by the Commonwealth and placed on a Shared Systems Suite.[viii] This means that any Commonwealth agency wishing to implement a new records management system must use one of these products through the approved provider and in accordance with standard contracts. In drawing the attention of Commonwealth agencies to the suite of records management systems, OGIT has emphasised that they provide the technologies and support needed to create an effective information management environment based on the principle that 'the official record is the electronic record'.[ix]

3.31 While the standardisation of records management systems is an important innovation, it is only a step on the road to ensuring that the Commonwealth establishes effective electronic recordkeeping systems. It is essential that the Commonwealth agencies responsible for major initiatives such as the outsourcing of information technology services take appropriate action to safeguard and enhance the capacity to create and maintain records to a satisfactory standard. One of the

crucial weaknesses of the present Act is its failure to require that consistent recordkeeping standards are issued and implemented. This failure has cost the Commonwealth dearly in the era of paper records and unless adequate measures are taken to address it, the same failure will be repeated in the electronic era.

The appraisal and disposal of Commonwealth records

3.32 Under the present legislation Australian Archives' policy role in the management of Commonwealth records begins at the disposal stage. The archival authority has always regarded regulation of the disposal of Commonwealth records as one of its crucial functions, not only to ensure that valuable records survive but also to provide a general 'housekeeping' service to Commonwealth agencies. It has, therefore, developed comprehensive criteria for appraising the value of Commonwealth records and strategies for their implementation. The great bulk of Commonwealth records are now subject to records disposal authorities issued by the Archives.

3.33 Submissions recognised both the size and importance of the disposal regulation function and predominantly supported the continuation of Australian Archives' policy making and authorising roles. However, there were some important concerns about the way in which the present system operates. In particular, both submissions and consultations exposed as a major deficiency the failure of the Archives Act to deal adequately with the key interactive relationship between appraisal, sentencing and disposal.

3.34 Although the Act requires that the approval of the Australian Archives be obtained for all disposals of records, it is silent on the issues of appraisal and sentencing. The effect has been to deprive the archival authority of the much needed capacity to ensure that appraisal is addressed at the earliest practical time in the life cycle of a record and that sentencing takes place correspondingly in a timely way. As a result Australian Archives has for much of the period since 1984 continued to devote significant time, energy and resources to the warehousing of unappraised and unsentenced records transferred to its custody. Large numbers of these records have been temporary records that should no longer come within the custodial responsibility of the Archives. Although, as discussed in this Report, Australian Archives has, in recent years, succeeded in substantially reducing its holdings of such records and resisted the transfer to it of unsentenced records, there is plainly a need to include in the legislation an appropriate suite of powers to ensure that an effective, coordinated and disciplined approach can be taken to appraisal, sentencing and disposal.

Custodial arrangements for Commonwealth records

3.35 The Act gave Australian Archives a central role in the custody of Commonwealth records by requiring that nearly all records be transferred to its custody once they are no longer regularly needed for current administrative purposes and, in any case, by the age of 25years. As with the disposal provisions, this reflected a well established administrative regime.

3.36 In Australia, as in countries such as Canada, the United Kingdom and the United States, the national archival authority had traditionally devoted substantial resources to the storage and servicing of records retained purely for administrative purposes. This was seen as a general service to all government agencies in the jurisdiction and one which could be delivered most conveniently by the national archival authority. Most of those records were destined for destruction when they ceased to be required for administrative purposes, but their sheer bulk caused them to have a significant influence on the structure and to some extent the priorities of the national archival institutions.

3.37 In the case of Australian Archives, the absence from the Act of a coordinated appraisal and sentencing regime meant that many more records were transferred to, and retained by, Australian Archives than would have been necessary if sentencing and disposal had taken place in a timely manner. The requirement to store large volumes of administrative records led to the establishment of at least one Australian Archives repository in each State and Territory. One beneficial consequence of this was that the existence of these repositories enabled the Archives to provide public reference and research facilities in each State and Territory capital city. If its record holdings had always been confined to records which justified indefinite retention, as now proposed by the Commission, its operations would probably have been confined principally to Canberra and perhaps Melbourne.

3.38 In recent years, Australian Archives has substantially modified its custodial polices. Records which are required to be retained for less than 30 years after they were created are now stored by the agency which created them or by private contractors on behalf of agencies. Records in this category in the Archives' custody at the time of the policy change have remained there, but their volume will gradually diminish as they are destroyed and not replaced.

3.39 The above changes have been driven by resource constraints and the trend towards outsourcing functions, which have encouraged Australian Archives to concentrate on its core function of managing records of archival value. Current custodial arrangements have thus moved away from the scheme envisaged by the legislation. Submissions generally accepted the logic of this move, but it clearly calls for revision of the custodial provisions of the legislation.

3.40 Another significant issue is the custody of electronic records. As electronic recordkeeping systems develop, there will be an increasing number of cases in which the accessibility and physical integrity of electronic records of archival value can best be protected by maintaining the records in the system of the agency which created

them, rather than by transferring them to systems managed by the Archives. Submissions to the Commission indicate that there is a range of opinion on how widely such a strategy, generally known as distributed custody, needs to be adopted and on how it should be managed. The legislation will need to ensure that records which, for technical reasons, can best be maintained by the originator are protected adequately.

Access rights to Commonwealth records

3.41 The application of a freedom of information type statutory access regime to Commonwealth archival records in 1984 was, by comparison with most other jurisdictions in Australia and overseas, a quite radical innovation. Many archival jurisdictions then operated an essentially discretionary access regime, which combined a general undertaking that records would become available to the public at a certain age with a range of exceptions intended to protect specific sensitivities. In most cases, these exceptions were unappealable. The Commonwealth jurisdiction was relatively well prepared for the new regime because it had been subject to a 30 year public access rule since 1970 and detailed guidelines had been developed by Australian Archives to identify records considered unsuitable for release. Although the categories of exemption in the Act were expressed quite differently from those previously used, the old system was grafted onto the new and the management of access to Commonwealth records continued along broadly similar lines.

3.42 The most significant change brought to the access process by the Act was the establishment of a statutory appeal system. This had two main consequences. Firstly, it brought into the process important groups of records, particularly those relating to security issues, which had not previously even been considered for public release. Many of these records were, at least initially, claimed to be exempt from release.

3.43 The operation of the appeal process has gradually enforced a more open release policy for such records to the extent that they are now an important research resource. In doing this the appeal provisions also have achieved the second consequence of drawing attention generally to the need to comply with the Act. Appeals under the Act have related predominantly to security and intelligence records, but the very existence of the appeal provisions, and the requirement to provide written statements of reasons in support of exemption claims, have had a beneficial effect on the operation of the entire access system.

3.44 In some areas, the access system has displayed weaknesses. The underlying intention of the Act was that the Commonwealth should release records once they reach the age of 30 years, with the formal access application and appeal system acting as a fallback to resolve disputes and discourage tardy decision making. In practice, however, very few groups of records, with the notable exception of Cabinet records, are subjected to complete access examination before they reach the open period. For a large volume of records, access examination still only occurs when a formal

application is made under the access provisions of the Act. This failure to allocate priority and provide the resources necessary to guarantee access to the vast majority of records not later than their entering the open period underscores, in the Commission's view, the pressing need to address major shortcomings in the present legislation. These include, amongst others, the earlier discussed need for a single comprehensive recordkeeping regime and the need, discussed immediately below, for discretionary early release programs supported by standards and guidelines. The implementation of the Commission's recommendations in relation to these, and other related issues, will ensure that, after a period of transition, access examination in respect of all records of archival value meets the Cabinet records benchmark of access examination prior to the open period.

3.45 A second weakness of the access system is that the provisions of the Act permitting, but not requiring, the release of records less than 30 years old have achieved little. The intention that the 30 year rule should merely establish a minimum standard of public accessibility has been replaced by a view in some quarters that even the 30 year rule places an unreasonable burden on agencies. The Commission sees a need to reaffirm the basic objectives and benefits of an effective public access scheme. In particular, the legislation needs to be amended to ensure that the discretionary early release of records is systematically undertaken by all agencies as a matter of priority.

3.46 When the access to information provisions of the FOI and Archives legislation were under consideration in the 1970s and early 1980s, there was substantial Parliamentary, media and public discussion of, and support for, the principles which they embodied. There was also some opposition to, and uneasiness about, access to information legislation, particularly from within the bureaucracy. As a consequence of that uneasiness, the FOI legislation as originally enacted in 1982[x] was not retrospective, except in the case of documents relating to the personal affairs of applicants. The general coverage of the FOI Act was extended retrospectively to 1 December 1977 in 1983[xi] but this still left a gap of almost 25 years between the statutory public access regimes of the FOI Act and Archives Acts. This gap has narrowed with the passage of time, but under the present legislation it will not be eliminated until 2008. In their 1995 report on the FOI Act, the Commission and the Administrative Review Council recommended that the 'access gap' between the two acts be closed by extending the coverage of the FOI Act to all records less than 30 years old.[xii] The Commission has repeated that recommendation in the present report.[xiii]

3.47 In a considerable number of jurisdictions, within Australia and overseas, access to information legislation extends to all government records regardless of age. The effectiveness of such legislation may be tempered in practice by factors such as exemption provisions and access and appeal costs, but in principle there is a universal scheme for statutory access rights in place. In the Commonwealth jurisdiction, the FOI and Archives Acts established two distinct age based access regimes separated by a substantial gap. In addition, each regime has a different focus,

a development probably not foreseen fully by the proponents of the original legislation.

3.48 The FOI Act has been utilised predominantly by individuals seeking information relating to their own affairs. The legislation has also been used to some extent by academics, the media and special interest groups investigating specific issues. On occasions these investigations have been significantly assisted by information obtained under the legislation. However, it could not be said that the FOI legislation has achieved the level of interaction between government and the people originally envisaged. One likely reason for this is the unpredictable and potentially substantial charges which FOI applications are liable to attract.

3.49 The use of the access provisions of the Archives Act is somewhat different. Here too, only a small proportion of the Australian population makes direct use of Commonwealth archival records. However, the research undertaken by those who do use the records often flows on to a much wider audience through published works, films and exhibitions. This research is often extensive in nature and opportunities to undertake it would almost certainly be substantially diminished if it became subject to the sort of charging and workload regimes now applied under the FOI Act. The inclusion of charging and workload provisions in the Archives Act, in whole or in part, was supported by a number of Commonwealth agencies in submissions to the Commission.

3.50 The position of statutory access rights to Commonwealth records is, therefore, more fragmented and less secure than might at first sight appear to be the case. The Commission does not suggest that there is an intention on the part of any organisation or interest group to remove or substantially diminish such rights. However, rights can be diminished by neglect and attrition as well as by deliberate action. Piecemeal amendments to the access scheme to serve the interests of specific stakeholders, or to meet specific financial objectives, can be harmful if their effect on the basic intentions of the scheme is not assessed adequately.

3.51 In the Commission's view one of the main challenges for Commonwealth recordkeeping in the coming decade will be to maintain, and if possible enhance, the FOI and Archives access regimes in a way that makes information available effectively and economically unless there are justifiable grounds for withholding it.

Networked electronic access to Commonwealth records

3.52 The further development of access regimes will be assisted significantly by the almost unlimited potential for the networking of electronic records. The technology already exists for Australians to access many Commonwealth records from their homes via the Internet. What is still needed is a more coordinated approach to determining which records can be easily and simply opened to the public in this way.

3.53 In providing such networked access to resources, the archival authority should not neglect its less accessible records. Some of the most significant published research based on Commonwealth archival material has utilised records which have been difficult to find and which the relevant controlling agencies have been reluctant to release. These are not records which are likely to be available electronically for a long time. The emphasis should remain, as now, on providing effective access to those records which are of most interest to members of the public, regardless of their format.

Gathering information about records

3.54 The ultimate purpose of a national archival authority is to ensure that records of archival value are preserved and made accessible. Accessibility requires a right of public access established by statute and the arrangement, indexing and description of records to enable people to use them effectively. The latter consideration is particularly important in government archival jurisdictions where records are created by many different agencies using complex control and indexing systems based on a wide variety of principles.

3.55 Australian Archives has always given a high priority to developing adequate descriptive standards for records. In particular its development of the Commonwealth Record Series concept, which establishes archival control over records and documents their links with the organisations which created them, has attracted considerable interest in the international archival community.

3.56 During the past decade, the Archives has incorporated much of the information it holds about record series and individual record items into computer databases which are available to members of the public at the Archives' offices and in some cases via the Internet. It has also produced a range of guides and fact sheets intended to make specific groups of records and subject areas more accessible. Submissions were generally appreciative of the work done by the Archives in developing finding aids for records. They stressed the crucial importance of continuing to improve accessibility through a central and readily accessible body of knowledge about Commonwealth records which will become even more essential as distributed custody strategies are developed for electronic records.

3.57 Improved accessibility will require the replacement of the outdated and unduly prescriptive information gathering obligations in the Act with new more flexible provisions.

Australian Archives and the wider world

3.58 In the 14 years which have passed since the proclamation of the Act, public use of Australian Archives has increased substantially. The number of reference

inquiries received by the Archives rose from 3446 in 1983–84 to 44045 in 1996–97. Over the same period the number of visits by members of the public to the Archives' search rooms rose from 3930 to 15335. The number of record items used by members of the public rose from 27205 to 49419.

3.59 Even with these increases in usage, only a small proportion of the Australian population has had direct contact with the Archives. This situation is to some extent characteristic of all archival institutions and reflects the fact that historical research is undertaken by relatively few people who make their findings available to a wider audience through books, films, press articles and other forms of publication.

3.60 In recent years, Australian Archives has carried out a wide ranging program of exhibitions and publications intended to open up and interpret its records and images to a much wider audience. During 1996–97 the Archives mounted exhibitions in Melbourne, Canberra, Liverpool, Cobar, Newcastle, Townsville and Cairns, on the removal of Indigenous children from their parents, early Canberra, John Curtin as Prime Minister, the Australian theatre and post Second World War immigration. The Archives has permanent display space in Old Parliament House in Canberra. The transfer of its national headquarters to the adjacent East Block in March 1998 has facilitated the display of historically important material at a site readily accessible to visitors to the national capital.

3.61 While recognising the greatly increased emphasis given to public outreach by Australian Archives in more recent years, the Commission is concerned that much more can and should be done to raise public awareness of what is available to Australians in their national archives and to encourage increased public resort to access rights. To this end, the Act needs to strongly reinforce the public outreach obligations of the archival authority. Such enhanced obligations are seen by the Commission as being an essential complement to the much needed discretionary early release obligations foreshadowed earlier in this chapter.

ENDNOTES

4. The new federal archival system — an overview

Introduction

4.1 Australians must, by the end of the first century of their federation, be able to access a full and accurate record of the achievements of the Australian government over that 100 years. The federal record as an archival collection complements, among others, the holdings of the National Library of Australia, the National Gallery of Australia, the Australian War Memorial, the National Film and Sound Archive and the Museum of Australia in assisting Australians to see who they are and where and how they have come from their colonial past to being a middle sized international power of significant standing in the world in such a short time.

4.2 In Chapter 3, the Commission reviewed the operation of the present Act since 1984 and identified areas in which it had been deficient. In the present chapter, the Commission provides an overview of a new system which is intended to address the present deficiencies and to lead Commonwealth recordkeeping and archiving into the 21st century.

4.3 In essence, the Commission believes that a new Archives and Records Act is needed to incorporate the National Archives of Australia (NAA) and to provide for its functions as the keeper of the federal record and the national professional leader in archival and recordkeeping practice.

4.4 The new legislation should also put beyond doubt that, in the open period, the NAA is to have available for access by all Australians, as a right, a professionally curated federal record. Such access should be facilitated through a professional staff whose qualifications and experience make them highly knowledgeable, principally in the fields of Australian political, economic, scientific and social history. Combining this background with their archival skills, and employing the latest proven technology, the staff of the NAA should not only have readily available whatever parts of the federal record are sought by Australians but also progressively be further contributing to our knowledge of Australian government through secondary publications and advanced finding aids to the collection.

The National Archives of Australia

4.5 In the course of reviewing the Act, the Commission has gained an insight into the history and operation of the organisation which until February 1998 was known as Australian Archives and which is now known as the National Archives of Australia. Against the background of a detailed picture of the strengths, weaknesses

and priorities of the present organisation, the Commission has formed a vision for a new national archival authority which would retain the name National Archives of Australia, but which would in some ways be a very different organisation in structure and focus.

4.6 The new NAA would no longer have a substantial role in the warehousing of records which are not of archival value. This role influences significantly resource allocations within the present organisation and even the number and location of the sites at which the Archives maintains public facilities. More important still is its influence on the culture of the organisation, which, in the view of the Commission, is still poised uncertainly between that of a major cultural organisation and that of a traditional government internal service provision agency. It should in future be unequivocally a major cultural institution responsible for the federal record.

4.7 The service agency legacy may also be responsible for the Archives' somewhat low key perception of itself and of its profile in the Commonwealth administration and the community generally. As already discussed, this problem is compounded by the Archives' lack of a specific mandate to involve itself at a policy level in the creation and management of current records. Under the present legislation the Archives does not become directly involved with the mainstream of Commonwealth recordkeeping until the appraisal and disposal process, which too many agencies still regard as an annoying housekeeping process rather than an essential task to identify the archival record of the Commonwealth. The new NAA should be recognised both within and outside the Australian public sector as responsible for records management policy. No longer should there be any uncertainty among other Commonwealth agencies as to what they can expect the Archives to do for them.

The federal record

4.8 The Commission sees two principal roles for the new NAA, the statutory corporation which the Commission recommends be established to manage the archival record of the Commonwealth. The Commission notes, however, that many elements of these roles can be established by administrative means even in advance of the enactment of new legislation and that some of them are already on the agenda of the present organisation.

4.9 The first role is that of a high profile and nationally recognised focus for access to records of archival value, regardless of whether such records are housed physically by the NAA or by some other institution. This role would allow the NAA to take its rightful place alongside the other major Commonwealth cultural institutions such as the National Library of Australia and the National Gallery of Australia. To some who use the Archives regularly this may not seem a radical change, but, as the Commission has noted above, the present organisation still has a very low profile in the community as a whole. If the present organisation is known at all, it tends to be associated with records storage warehouses in remote industrial

suburbs. Those who actively seek it out are clearly often impressed with the service which they receive and with the information which they discover. The recent establishment of a national headquarters for the Archives in central Canberra is of crucial importance in moving the organisation forward towards the achievement of its full potential. But the NAA must continue to build on this foundation to make accessible, and to actively present to the nation, the many treasures of which it is the custodian.

4.10 One of the keys to achieving greater accessibility will be the use of electronic technologies to the maximum extent possible to access records and information about records. The Archives is close to completing the provision of Internet access to its main databases of information about Commonwealth records. This will enable people to access from their homes information about many of the individual record items held by the Archives. But there is still much more to be done to bridge effectively the gap between Australians and the record of their national government. The NAA will need to give a high priority to making information about archival records an integral and easily accessible part of the government information access network.

4.11 The NAA will face a particular challenge because an increasing number of records of archival value will be held in electronic systems operated by the agency which created them rather than by the authority itself. If the NAA is to maintain its pivotal role in the accessibility regime, it will need to ensure that it can identify and signpost such records adequately and negotiate the best possible access arrangements for them. Unless the NAA can maintain its relevance even after it ceases to be the predominant custodian of records of archival value, it will gradually become marginalised.

4.12 The great bulk of the NAA's present holdings are available only in paper format and in a single location. In a country the size of Australia this is a significant barrier to effective accessibility, so that a relatively small group of researchers becomes responsible for much of the interpretation of the records and for presenting them to a wider audience through various channels of publication. The Commission acknowledges that this process has produced many excellent publications. However, it is desirable in principle that as many people as possible should have effective access to the records themselves. To achieve this, the NAA will need to develop electronic systems that will lead directly to images of at least the most significant records which it holds.

4.13 In focusing its attention more effectively on records of archival value, the NAA will need to accelerate its disengagement from the warehousing of records which are not of archival value. The NAA will continue to have a policy role in the management of such records, and in certain circumstances it might have the physical custody of them, but it should no longer have the power generally to require that they should be transferred to its custody. This will achieve two objectives. Firstly, it will ensure that custodial arrangements for records which are required to be retained

for administrative purposes only are based on full cost recovery and contestability principles. Secondly, it will encourage the NAA to take a more proactive role in making accessible the records of archival value which it holds, once such records are no longer overshadowed by the storage and servicing requirements of a very large volume of records which are not of archival value.

Records management policy and standards

4.14 The second role of the NAA will be to provide a policy framework, supported by technical guidance, for the continuum of Commonwealth recordkeeping. Even in the age of paper records, the present regime, in which records of archival value are identified at middle age among the mass of records created by Commonwealth agencies, is an uncertain and probably needlessly costly process. In the age of electronic records, there can be no assumption that such records will even be created, let alone survive to some point in their later life when they can be identified as being of archival value. The identification of records of archival value must, therefore, become an integral part of the recordkeeping process from system design stage. To achieve this, it is essential that there should be clear policy guidance to enable all Commonwealth agencies to establish and maintain reliable and comprehensive recordkeeping systems.

4.15 The Commission has recommended, therefore, that the NAA should have the power to issue mandatory standards for the management of Commonwealth records and that chief executive officers of Commonwealth agencies should be required to ensure that these standards are implemented within their agencies. The Commission does not intend that the NAA should exercise detailed control over individual recordkeeping systems, but rather that it should articulate the broad objectives of good recordkeeping and the strategies necessary to achieve them. The NAA would provide the framework within which individual agencies could determine how best to meet the overall objectives. It would thus have a pivotal role in providing the Commonwealth, for the first time, with a consistent and clearly articulated strategy for the management of its records. This would not only safeguard the archival record, but also ensure that all aspects of the Commonwealth administration were documented adequately.

4.16 If the NAA is to undertake its standard setting role effectively, it will need to give high priority to maintaining its technical expertise. This expertise will be essential to the detailed guidelines which will be required to underpin the standards. The NAA must be at the leading edge of recordkeeping theory and technology and it must be adept at forming strategic alliances with other organisations in order to devise and implement new strategies. The NAA must also develop its training and advisory skills so that it can successfully tread the sometimes fine line between, on the one hand, providing leadership and guidance to other agencies and, on the other hand, becoming over committed to giving detailed support to agencies which are not prepared to resource their recordkeeping obligations adequately.

The Archives and Records Act

4.17 The Archives Act essentially deals with the management of Commonwealth records from middle age onwards. No single piece of legislation deals comprehensively with the continuum of recordkeeping from creation to disposal or archiving. It is important that the new legislation should fill the gap left by the former Public Service Board, which argued successfully when the Archives Bill was being drafted that current records management policy should remain its own preserve. It failed comprehensively to discharge that responsibility and has since been abolished, leaving no standards or systems to speak of.

4.18 The Commission recommends that the Archives Act be replaced by new legislation which might be titled the Archives and Records Act. The overarching objective of the new legislation will be to establish a comprehensive standard setting regime for the creation, management and preservation of all Commonwealth records so that the identified records of archival value forming the federal record will be accessed as a right by all Australians.

An objects clause

4.19 The present Act does not include an objects clause. It does set out the powers and functions of the administrative entity known as Australian Archives. It also sets out a range of procedures and responsibilities for the management and accessibility of Commonwealth records. Read together, the various provisions constitute a quite comprehensive scheme. However, the legislation would be more transparent and forceful if it was prefaced by a clear statement of its major objectives. This is particularly important because the archival authority is only one of the organisations with administrative responsibility for achieving the various objectives of the Act. The present scheme, under which the legislation is in effect introduced by a statement of the powers and functions of Australian Archives, does not make it clear that adequate recordkeeping should be fundamental to the operation of all Commonwealth agencies.

4.20 The Commission suggested in DRP 4 that the legislation should commence with a statement of its major objectives. This suggestion was generally supported in responses to DRP 4. The major objectives include

- to establish an accountable framework for the creation, management, preservation and disposal of Commonwealth records
- to ensure that records in the open access period are made available to all Australians unless there are compelling and appealable grounds for justifying their non-disclosure

- to encourage the provision of access to records beyond minimum statutory obligations
- to encourage the greatest possible public use of Commonwealth records as a vital element in documenting the history of the nation
- to establish an authority to ensure that the objectives of the Act are achieved.

4.21 The Commission also recommends that the objects clause should be elaborated by the inclusion in the Explanatory Memorandum and in other legislative material of an outline of the objectives and principal elements of a new national archival system as set out in this chapter.

Simplifying the structure of the Archives and Records Act

4.22 The Commission's terms of reference include a requirement to have regard to whether the structure and wording of the present Act can be simplified to make it more easily understood by the public. Under the Commission's recommendations, the new legislation will not only provide a framework for the accountable management of all Commonwealth records but also establish and enumerate the functions and powers of a new national archival authority. This will inevitably require a substantial range of legislative provisions. In reviewing the Act, the Commission has recommended the deletion of unnecessary provisions and has formulated its recommendations for new or revised provisions in terms designed to facilitate their being incorporated in legislation as concisely and clearly as possible.

4.23 The Commission has also recommended that the NAA should have the power, within the framework of the basic provisions of the legislation, to issue recordkeeping standards as legislative instruments. This will give the authority greater flexibility to meet changed technological and administrative circumstances and reduce the number of detailed provisions which need to be included in the legislation.

4.24 The Commission has not seen it as its task, therefore, to suggest a detailed provision by provision scheme for the new legislation. However, the Commission does stress that, having regard to the large and diverse range of stakeholders in Commonwealth recordkeeping, the more readily intelligible the major provisions of the legislation are the more likely they are to achieve their objectives.

Principal elements of a federal archival system

4.25 The Commission suggested in IP 19 that there were ten principles on which an effective federal archival system should be based. Submissions in response to IP 19 generally supported these principles and offered a range of suggestions for their improvement, which the Commission took into account in reformulating the

principal elements in DRP 4. Submissions in response to DRP 4 were supportive of these principal elements and did not suggest any substantial changes to them.

4.26 The Commission is of the view that seven of the principal elements should be recognised specifically in the new legislation, while the remaining three are administrative objectives to be achieved within the framework of the functions and powers recommended for the NAA.

Elements to be legislated

4.27 The seven elements to be legislated are as follows.

1. There should be a requirement for Commonwealth departments and agencies to create, maintain and make accessible full and accurate records through reliable systems appropriate to the nature and retention period of the records concerned.

- The Commission is of the view that recordkeeping is of a poor standard in many parts of Commonwealth administration and that it is generally accorded too low a priority. The importance of recordkeeping is discussed in Chapter 9.

2. Commonwealth records should be managed as an integrated continuum through a regime clearly defining objectives and responsibilities and in which a 'single mind' approach is adopted.

- The existing fragmentation of policy responsibility for the management of Commonwealth records has contributed to the low standard of recordkeeping identified by the Commission. Effective management requires both a clear legislative framework and a coordinated approach to the development of policy and standards. Responsibility for recordkeeping is discussed in Chapter 9.

3. Clearly articulated mandatory standards are needed to ensure the creation, management and preservation of accurate and reliable records for as long as they are required for archival or administrative purposes.

- At present there are no uniform recordkeeping standards applying to Commonwealth records. The Commission is of the view that mandatory recordkeeping standards are essential to the maintenance and preservation of the federal record and to provide guidance to staff in departments and agencies. Such guidance is particularly needed to overcome a culture of indifference which has developed over the last 30 years or so. Recordkeeping standards are discussed in Chapter 9.

4. The legislation should have sufficient flexibility to accommodate changes in technology and management practices relating to the creation, custody and accessibility of records.

- The present Act, drafted to reflect the procedures used to manage paper records in the 1970s, requires revision to accommodate the electronic recordkeeping systems of the 1990s. However, it is important that the new legislation should not be bound to specific technologies or current management practices. The need for flexibility in the new legislation is addressed in Chapters 10, 12, 14 and 15.

5. An effective appraisal and disposal regime is essential to the management of Commonwealth records in order to identify records of archival and continuing administrative value and to facilitate the timely disposal of other records.

- The Commission supports the existing legislative framework for a disposal regime, but considers that further legislative and administrative measures should be taken to improve its efficiency and effectiveness. In particular, a fully integrated approach needs to be taken to the processes of appraisal and sentencing. These issues are discussed in Chapter 10.

6. There should be an enforceable right of public access (subject only to clearly defined and appealable exemptions) to all Commonwealth records which have reached the age of 30 years.

- Since the commencement of the Act there has been an enforceable right of public access to Commonwealth records in the open period. While supporting the continuation of the 30 year rule, the Commission has made a number of recommendations to enhance access to records both before and after they reach the open period. The public access regime is discussed in Chapters 15–18 and 21. The extent of exemptions, and how decisions to exempt can be reviewed, are discussed in Chapters 20 and 22 respectively.

7. The legislative scheme should provide for the establishment of national consultative mechanisms in which the principle stakeholders may put forward their views and be consulted on major policy issues.

- The archival authority has responsibilities to a wide range of stakeholders in the Commonwealth administration and the community. The Commission is of the view that the archival authority's obligations to stakeholders should be recognised in the legislation. The participation of stakeholders in both formal and informal consultative forums is discussed in Chapter 6.

Elements for administrative implementation

4.28 The Commission has also identified three other principal elements of an effective Commonwealth archival system which can be implemented by administrative action. They are as follows.

8. Statutory rights of public access should be supported by effective information and service delivery procedures.

- Australian Archives has implemented a number of information and service delivery procedures which have supported the legislative right of access. These procedures, and options for their enhancement, are discussed in Chapter 19.

9. Commonwealth recordkeeping systems should be seen as an integral part of a unified Commonwealth information network.

- The rapid development of electronic access to information about Commonwealth government functions through the Internet has profound implications for Commonwealth recordkeeping. Opportunities for the further use of the Internet and associated technology are discussed in Chapter 19.

10. The archival authority should exercise a national leadership role.

- The Commonwealth archival authority, as the largest single archival institution in the country, should maintain a general professional leadership role to assist the further development of archival institutions, large and small. There may also be instances in which it would be appropriate for the authority to accept custody of non-Commonwealth records. The role of the archival authority beyond the Commonwealth jurisdiction is discussed in Chapter 26.

Recommendation 1. The legislation should include an objects clause specifying that its major objectives are to

- ensure that the Commonwealth administration creates records sufficient to
  - manage current Commonwealth functions efficiently and accountably
  - record and safeguard the rights, entitlements and obligations of individual citizens
  - document the history of the Commonwealth and the nation by maintaining a record of significant events, policies, movements and people
- establish an accountable framework for the evaluation of Commonwealth records
- ensure that records are preserved, and are functionally accessible, for as long as they are of value to the Commonwealth administration or to the people

- ensure that records in the open access period are made available unless there are compelling and appealable grounds for justifying their non-disclosure
- encourage the provision of access to records beyond minimum statutory obligations
- encourage the greatest possible public use of Commonwealth records as a vital element in the history of the nation
- establish an authority to ensure that the objectives of the Act are achieved.

Recommendation 2. The Explanatory Memorandum and other legislative material for the new archives legislation should elaborate the interpretation of the objects clause by referring in detail to the objectives and principal elements on which the legislation is based.

Part C

The National Archives of Australia

5. Functions and powers

Introduction

5.1 In Chapter 4 the Commission recommended the establishment of a new archival authority as an integral component of an effective archival system with two major roles. The first, and primary, role would be the protection of all Commonwealth records of archival value. The second role, arising from the first, would be a supervisory role in relation to government wide recordkeeping, with emphasis on the recordkeeping continuum and the promulgation of standards and guidelines to ensure the creation, maintenance and proper disposal of all records.

5.2 The existing archival authority, Australian Archives, is not currently able to pursue this second role in the way that the Commission considers necessary for a fully effective archival system. Neither does any other body within the Commonwealth carry out effective oversight of recordkeeping. Without guarantees on the quality of recordkeeping at all stages of the continuum, the completeness and health of archival records cannot be assured. Consistent with the need for a 'single mind' approach, and having regard to the existing location of professional recordkeeping expertise within Australian Archives, the Commission considers that the new archival authority should be empowered to take on this second role to complement its primary role relating specifically to records of archival value.[xiv]

5.3 The Commission envisages that the Archives would be absorbed within a new archival authority established under the new archives legislation. While there would be some continuity with the existing organisation, the new role required for the archival authority as recommended by the Commission would require a number of changes to the functions and powers already exercised by the Archives. A number of functions and powers associated with the existing role relating to archival records should also be enhanced to assist the archival authority to meet the challenges it will face in the new millennium.

Functions of the archival authority

5.4 The functions of the archival authority need to be specified with sufficient breadth to ensure that the earlier stated objectives of the legislation can be met but, at the same time, have sufficient specificity to ensure that the archival authority and those with whom it deals have a clear sense of its intended role.

5.5 Taking as its starting point the objectives suggested in Chapter 4, and guided by the functions of Australian Archives as specified in section 5(2) of the Archives Act, the Commission in DRP 4 proposed ten functional responsibilities for inclusion in the archives legislation. These functions were generally supported.

5.6 While a number of recommendations in this report have been modified from the draft recommendations in DRP 4, these changes have not pointed to the need to depart in any substantial way from the basic ten functions articulated in DRP 4. In several instances, however, the wording has been restructured for greater clarity and consistency.

5.7 The proposed functions are to

1. Facilitate and promote the effective and efficient discharge by CEOs of Commonwealth departments and agencies of their proposed statutory obligations to create, maintain and preserve to an appropriate standard such records in relation to the discharge of their functions as are necessary

- for the efficient and accountable management of those functions
- to record relevant rights, entitlements and obligations of persons under Commonwealth law
- to document the history of the Commonwealth.

This function would give expression to the Commission's recommendations that, in order to establish and maintain a vital and efficient recordkeeping continuum, there should be statutory obligations on departments and agencies relating to recordkeeping and that the archival authority should have overall responsibility for implementing a single, whole-of-government approach to records creation, maintenance and preservation.[xv]

2. Establish and maintain a general appraisal and disposal regime to

- ensure the identification of those Commonwealth records that are of archival value; and
- ensure that records that are no longer of value to the Commonwealth are disposed of in a timely and accountable manner.

The aim of a disposal regime is twofold: to identify those records which should be maintained indefinitely because of their archival value, and to appropriately dispose of those records which are no longer of value. The archival authority would have responsibility for ensuring that Commonwealth agencies establish accountable disposal regimes for the effective management of all records, as well as identifying those Commonwealth records which should be preserved for the benefit of the nation as a whole.[xvi]

3. Control the custody of Commonwealth records of archival value.

While there are circumstances in which records of archival value need not be held directly in the custody of the archival authority, it is essential that control of all such records, wherever and however held, generally be subject to a single authority.[xvii]

4. Ensure the preservation of Commonwealth records of archival value.

Preservation of records of archival value is an essential core function of an archival authority.[xviii]

5. Ensure the recovery of Commonwealth records that should be brought within Commonwealth control.

As the coordinator of the Commonwealth archival system, the archival authority should have the capacity to draw back under Commonwealth control records which have for one reason or another left the custody of the Commonwealth or Commonwealth agencies.[xix]

6. Ensure that records are made accessible to the public in accordance with the rights of access provided for in the legislation.

The proper management of records is of little point unless the archival authority is required, as one of its key functions, to ensure that access rights are properly afforded in accordance with legislative entitlements. The Commission has made recommendations which would strengthen access rights and would envisage a significant role for the archival authority in promoting acceptance and implementation of a more open approach to access.[xx]

7. Encourage and facilitate the earliest possible access to Commonwealth records.

The Commission's findings place considerable emphasis on the need for the archival authority to vigorously promote the earliest possible access to records, irrespective of whether they have yet reached the open period. Hence the need for this particular function to be included in the legislation.[xxi]

8. Encourage public awareness and understanding of the benefit to the nation of Commonwealth records and to facilitate the public use of such records.

A knowledge and understanding of its history and culture is essential to the development and well being of any society. It is important that the archival authority have as one of its functions the fostering of public awareness and understanding of the benefits of Commonwealth records and the facilitation of public use of those records.[xxii]

9. Encourage and support activities that enhance standards of recordkeeping and archiving in Australia.

The national archival authority should provide an appropriate level of leadership and guidance to the professional archival and records management community in areas of expertise relevant to the discharge of its functions.[xxiii]

10. Accept custody of records which, while not being Commonwealth records, are, in the opinion of the Minister, of such interest and value to the nation that their custody and preservation should be undertaken by the NAA.

While the Commission believes that the custodial role of the archival authority ought to be focused on Commonwealth records, it also recognises the need for the archival authority to be able to accept custody of records of such national interest and value that they ought to be preserved appropriately for the sake of posterity.[xxiv]

Recommendation 3. The legislative functions of the archival authority should be to

- facilitate and promote the effective and efficient discharge by CEOs of Commonwealth departments and agencies of their proposed statutory obligations to create, maintain and preserve such records in relation to the discharge of their functions as are necessary
  - for the efficient and accountable management of those functions
  - to record relevant rights, entitlements and obligations of persons under Commonwealth law
  - to document the history of the Commonwealth
- establish and maintain a general appraisal and disposal regime to
  - ensure the identification of those Commonwealth records that are of archival value; and
  - ensure that records that are no longer of value to the Commonwealth are disposed of in a timely and accountable manner
- control the custody of Commonwealth records of archival value
- ensure the preservation of Commonwealth records of archival value
- ensure the recovery of Commonwealth records that should be brought within Commonwealth control
- ensure that records are made accessible to the public in accordance with the rights of access provided for in the legislation
- encourage and facilitate the earliest possible access to Commonwealth records
- encourage further public awareness and understanding of the benefit to the nation of Commonwealth records and facilitate the public use of such records
- encourage and support activities whose purpose is to enhance standards of recordkeeping and archiving of a kind for which the NAA has responsibility

- accept custody of records which, while not being Commonwealth records, are, in the opinion of the Minister, of such interest and value to the nation that their custody and preservation should be undertaken by the NAA.

Operational powers of the archival authority

5.8 The archival authority needs to be empowered, in common with like authorities, to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

5.9 Importantly, the legislation should expressly include within such an encompassing power specific reference to particular powers that are essential to the discharge of the archival authority's functions. In the Commission's view it would be appropriate to include powers that correspond to the powers set out in paragraphs (a) to (m) of section 6(1) of the Archives Act, appropriately recast for alignment with the functions of the new archival authority. These are powers with regard to

- establishing and controlling repositories
- surveying, appraising, accessioning, arranging and describing, and indexing records
- making arrangements for Commonwealth acquisition of copyright in records
- recording matters relating to the structure of Commonwealth institutions
- copying records, but not so as to infringe copyright
- arranging for publication of records, but not so as to infringe copyright
- publishing indexes of, and other guides to, records
- authorising the disposal and destruction of records
- assisting in the training of persons responsible for keeping Commonwealth records or for work in connection with Commonwealth records
- obtaining and maintaining equipment for retrieving information from records
- providing information and facilities for persons accessing records.

5.10 Specific reference would also need to be made to important additional powers central to the implementation of key recommendations of the Commission. These would include powers with regard to

- promulgating standards and issuing guidelines in relation to the creation, management, appraisal, sentencing, destruction, custody, preservation and accessibility of records[xxv]
- entering into premises to monitor compliance with standards and guidelines relating to appraisal, sentencing, destruction, custody and preservation of records[xxvi]
- recovery of records[xxvii]
- payment of compensation for the acquisition of property rights, including copyright, in records[xxviii]
- entering into agreements and arrangements in relation to the custody of records[xxix]
- obtaining information concerning records[xxx]
- exhibiting and otherwise encouraging and fostering public interest in records[xxxi]
- granting awards and scholarships for the technical and professional advancement of learning related to the functions of the NAA
- accepting custody of, preserving and providing access to records (not being Commonwealth records) that are, in the opinion of the Minister, of special interest and value to the nation[xxxii]
- imposing and collecting charges in relation to the provision of services.[xxxiii]

5.11 The Commission did not receive any adverse comments in response to the following recommendation in DRP 4.

Powers of a body corporate

5.12 In addition to the operational powers set out above, as an incorporated body the proposed NAA would need to have conferred upon it those powers that would be essential to enable a body corporate to function fully as a separate and independent person. These include power to

- have and use a seal for the execution of documents in its corporate name
- enter into contracts
- sue and be sued in its corporate name
- acquire, hold and dispose of real and personal property
- erect buildings and structures and carry out work
- take on leases of land or buildings and grant leases and sub-leases of land or buildings
- purchase or take on hire, deposit or loan, and dispose of or otherwise deal with, furnishings, equipment or other goods
- appoint agents and attorneys and act as a general agent for other persons
- exercise its powers alone or jointly with another person or persons.

Recommendation 4. The legislation should confer on the archival authority

- a general power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions
- specific powers corresponding to those in section 6(1) of the Archives Act
- additional specific powers required to undertake its functions including
  —promulgating standards and issuing guidelines in relation to the creation, management, appraisal, sentencing, destruction, custody, preservation and accessibility of records
  —entering into premises to monitor compliance with standards and guidelines relating to appraisal, sentencing, destruction, custody and preservation of records
  —recovery of records
  —payment of compensation for the acquisition of property rights, including copyright, in records
  —entering into agreements and arrangements in relation to the custody of records
  —obtaining information concerning records
  —exhibiting and otherwise encouraging and fostering public interest in records
  —granting of awards and scholarships for the technical and professional advancement of learning related to the functions of the NAA
  —accepting custody of, preserving and providing access to records (not being Commonwealth records) that are, in the opinion of the Minister, of special interest and value to the nation
  —imposing and collecting charges in relation to the provision of services.
- the range of general powers necessary to enable a body corporate to function fully as a separate and independent person.

ENDNOTES

6. Structure and governance

Introduction

6.1 The Commission considers that there should be a single organisation with responsibility for providing the leadership, standard setting oversight and coordination role necessary to establish and maintain an effective federal archival system. Additionally, the organisation should have a structure and standing appropriate to its role as the body entrusted with preserving the documentary heritage of Commonwealth records and providing access by all Australians to that heritage. This chapter examines what that structure should be.

Nature of the organisation

6.2 During the past decade public sector reformers have favoured a 'functional' model for organisations. This model involves separation of policy making from operational functions. The functional model is seen to improve independent policy advice to government and facilitate greater competition in the public service.[xxxiv] The contrasting 'sectoral' model involves vertical integration of advisory, regulatory and service delivery functions within the same organisation. The advantages of the sectoral model include better policy coordination, promotion of informal sharing of information, and reduction of transaction costs.[xxxv]

6.3 The majority of archival organisations were established, and remain, generally in conformity with, a sectoral model. That is, government archival policy and service delivery functions, apart from those such as sentencing carried out by departments and agencies themselves, are provided from within the same organisation, as occurs in the national archives of Australia, the United Kingdom, the USA and Canada. The functional model has, however, been aggressively pursued in the New Zealand public sector, where a 1994 report recommended that the policy, purchasing and monitoring functions associated with archives be located within a government department, while the service delivery function, including providing access to records, be retained in a National Archives which was to be made into a Crown entity as a semi-independent provider of services. The complete policy/service division was not, however, implemented. Instead a slightly altered model was adopted in 1996 whereby separate policy and service organisations were established, but with both officially reporting to the Chief Archivist. Although both units were fully staffed in 1997, it is too early to glean much from the experience of the National Archives of New Zealand.[xxxvi]

6.4 The Commission does not favour the creation of separate policy and service providing organisations for Commonwealth archival functions. The Commission notes that the functional model has generally been found to be unsuitable when policy advisers need detailed and specific knowledge about operational matters in order to tender sound advice, and when successful policy outcomes depend on a high degree of coordination and consultation between those responsible for policy formulation and those responsible for its implementation.[xxxvii]

6.5 In the case of the recommended archival authority, the intimate interrelationship between records management and archival policy on the one hand, and service delivery to government and public users on the other, would be such as to render the functional model inefficient and inappropriate. In particular, duplication of much technical expertise essential to both areas of responsibility would be unavoidable and wasteful. The Commission's conclusion in this regard should not be taken as implying that the service provision function of the archival authority should not be open to competition.

6.6 The current private market for archival services is not well developed. There is a small number of operators, varying in size and expertise. There is a wide variety of needs, particularly between private and government clients. In some cases there may be an over reliance on technology at the expense of professional recordkeeping strategies. In this developing market the Commission envisages that there will continue to be, for some time to come, a number of services, in particular those relating to archival information and public reference requirements, which will be provided by the government archival authority. For so long as such services are required to be provided by the archival authority, the data, expertise and experience that their discharge generates will continue to provide invaluable guidance and insights to those responsible for policy formulation. In the Commission's view, that value can most effectively and efficiently be achieved if policy and service functions all repose, as now, in a single authority.

6.7 The Commission did not receive any adverse comments in response to its suggestion in DRP 4 that the proposed new authority should, as indicated in the functions outlined in Chapter 5, have both policy and service functions. As noted in that chapter, the service functions should be progressively moved to a position of competitive neutrality in the developing records management and archival market.

Recommendation 5. The archival policy making and service delivery functions should be vested in a single organisation.

Name of the archival authority

6.8 In DRP 4 the Commission suggested that the proposed archival authority should be given the name 'National Archives of Australia'. In the Commission's view, this name reflects both the professional expertise and the national character fitting for this authority.

6.9 Subsequently, on 27 February 1998, the Government announced that Australian Archives had, with the approval of the Prime Minister and the Minister for Communications, the Information Economy and the Arts, changed its name to 'National Archives of Australia'.[xxxviii]

6.10 There was some criticism of the Commission's suggestion of this name. This was primarily because it is focused on 'archives',[xxxix] whereas one of the major thrusts of this Report is to establish a government-wide regime for the creation and management of records. The Commission, however, does not accept that the authority which oversees the coordination of this regime must necessarily include the term 'records' in its title. The term 'archives' is by no means restricted to antiquarian records and extends to recordkeeping in the broad sense. A national authority with responsibility for establishing recordkeeping standards as well as the protection of important long term records of the Commonwealth is, in the Commission's view, appropriately styled by the term 'archives'. It would be one of the tasks of the new archival authority to demonstrate its relevance to all records, both old and new.

6.11 On the other hand, a number of submissions expressed support for the name 'National Archives of Australia'.[xl] The Commission endorses the recent adoption of the new name by the current archival authority, and reaffirms its recommendation that the archival authority established under new archival legislation should bear the name National Archives of Australia (NAA).

> **Recommendation 6.** The name of the archival authority should reflect both its professional expertise and its national character. The name 'National Archives of Australia' is accordingly recommended.

Need for a statutory corporation

Developing a structure for the NAA

6.12 The NAA envisaged by the Commission would have two major roles. Its primary role would be to protect and preserve the heritage of the nation as found in the records of the federal government. The NAA thus needs to have a close relationship with the public, both in providing protection for a national resource and in making that resource available to both present and future generations. A different, but complementary, role of the national archival authority would be to establish and

maintain an effective regime for the management of all Commonwealth records through recordkeeping standards and guidelines. This role would require a close working relationship with all Commonwealth agencies so as to develop an understanding of recordkeeping within agencies while providing them with the benefit of extensive experience and knowledge of the latest developments in archival practice. In order to fulfil both of these important roles the organisation requires a high degree of professionalism and the respect of its varied clients and stakeholders. The structure of the NAA must be such as to provide an organisation suited to and capable of fulfilling these and the associated requirements of the authority.

6.13 Australian Archives is established by statute as an unincorporated body within a Department of State.[xli] As such it is not independent from the Department. The Director-General is subject under section 7(3) to directions from the Minister. In IP 19 the Commission raised the issue of whether the archival authority should continue as part of an executive department or be constituted as a statutory corporation.[xlii] There was extensive comment in the submissions and consultations on this issue, primarily in support of a move to independence via a statutory corporation.

Strengthening the archival role

6.14 A major reason offered in support of the NAA having independent corporate status is the ability and authority it would provide for the NAA to develop and influence policies on a balanced and strategic long term basis to cater for the interests of all stakeholders.This, in turn, would provide an environment conducive to the maintenance of bipartisan political support for the accomplishment of the objectives of the legislation.

> Recordkeeping is not a political issue. The archives and the records it manages outlive the life of any government and should not be exposed to organisational upheaval on the whims of the government of the day.[xliii]

Removal from departmental status to independent status was also seen as assisting the NAA to establish a reputation as a professional and respected organisation with standing in the community, meeting the needs of all Commonwealth agencies and the public. As recordkeeping and the preservation of archives affect all Commonwealth agencies, independence should result in better service provision to all agencies without even the perception of undue influence from any single agency.[xliv]

6.15 In particular, an independent organisation could assist in promoting the importance of recordkeeping. As the Commission has stressed in Chapter 9, good recordkeeping is essential for the efficient discharge of, and accountability for, government functions. Matthew Gordon-Clark pointed out in his submission that

> A number of inquiries into the corporate activities of governments across Australia have stressed the need for inviolate records and separate authorities to manage and dispose of these activities. In the course of these inquiries the fact that records were often destroyed at a specific instruction of government ministers and senior officials came to light and the accountability of government actions was questioned and supporting evidence was unavailable.[xlv]

The Commission has placed considerable emphasis on the need for the NAA to play a key role in the regulation of government recordkeeping, primarily through the promulgation of mandatory recordkeeping standards. In this regard, Australian Archives submitted that giving the NAA independent status would in itself 'send a clear signal that recordkeeping and accountability are as important as other functions'.[xlvi] Given the need for standards and guidelines to be accorded high standing and to be quickly and effectively implemented, the establishment of the NAA as an independent statutory corporation would be likely to enable it to command significantly higher levels of compliance than if it were to remain within an executive department.

Considering the relationship with other Commonwealth agencies

6.16 While some submissions suggested that an enhanced role as a standard setter required greater independence in order to create an image of authority,[xlvii] other submissions offered the contrary view that this role would require the NAA to remain close to the executive government.

> The Australian Archives should not become a statutory authority. It must be closely identified with the day-to-day operations of the Government so that it can be more responsive to agency needs/concerns ... As a statutory authority, the Australian Archives is more likely to become detached from the day-to-day operations of agencies at a time when a more interactive approach is needed in dealing with the complexities and challenges in the use of information technology and with community expectations on government record keeping.[xlviii]

The Commission agrees that there needs to be close interaction between the NAA and Commonwealth agencies in order to ensure that recordkeeping standards and advice are appropriate and relevant. The Commission is not convinced, however, that the fact that the agency was a statutory corporation would adversely impact upon its capacity or resolve to interact effectively with other agencies. Under the Commission's proposals, interaction would not be limited to executive agencies but be required also between the NAA and the courts, the Parliament, and other independent authorities and Commonwealth companies. Indeed, in the cases of the other arms of government in particular, the Commission sees the conferment of independent statutory status on the authority as enhancing its standing, capacity and authority to engage in the necessary interaction.[xlix] The Commission believes that independent status would better enable the NAA to meet the needs of all Commonwealth agencies by combining flexibility with authority.

Support for an independent authority

6.17 In DRP 4 the Commission supported a substantially independent NAA. This proposal was widely supported, with many submissions giving strong endorsement to the proposed move to an independent statutory corporation.[l] Only one submission in response to DRP 4 questioned whether a sufficient case had been established for the change to statutory corporation status,[li] although as already noted, some submissions in response to IP 19 also opposed such a course.

6.18 The Commission notes that current government policy is to limit the creation of new statutory authorities to cases where sufficient justification exists.[lii] In the Commission's view, ample justification has been demonstrated for the NAA to be established as a statutory authority. In particular, the Commission considers that the strengthened and enlarged roles envisaged by the Commission's recommendations point strongly to the need for the NAA to have an independent status consistent with the leadership and authority that it will be expected to provide. Such separate standing and authority are also seen as essential to enable the NAA to command the respect and support of the significant stakeholder communities outside government by providing public confidence that the resource it controls, namely Commonwealth records of archival value, will be available to the public at all times.[liii] The Advisory Council on Australian Archives also supported independent status, which would enable the authority to undertake entrepreneurial activities exposing the 'richness' of its holdings.[liv] The value of information as a resource is increasingly being acknowledged[lv] and, as the repository of that information, the NAA would provide a powerful link between the government and the public. That link would require the high degree of independence essential to enable it to serve all of its clients, both government and public.

6.19 The conferment of separate corporate personality would enable the NAA to own and manage its own assets and have responsibility for managing its own finances in conformity with the code established for such bodies under the *Commonwealth Authorities and Companies Act 1997*. Although the Department of Finance and Administration questioned the need for a separate 'legal personality' in order to have flexibility to manage functions and deploy resources,[lvi] the Commission remains of the view that, by becoming a separate statutory corporation, the NAA would be provided with greater financial responsibility and accountability. While properly separating the NAA budget from the department and from being 'subject to the fluctuating priorities of the department to which it is attached',[lvii] establishment of the NAA as a statutory corporation would still leave ultimate budgetary flexibility to the minister and the government.

6.20 One submission warned that incorporation should not be allowed to become the first step towards commercialisation of the archives, a step which would be 'deplorable'.[lviii] While services provided by the NAA should be contestable, the Commission has pointed out that the majority of archival functions would continue to require government budget funding. Thus, while independence would give the

NAA greater flexibility to determine how it raises and spends its money, it would still be dependent on government and the Parliament for its appropriation and remain fully accountable for the expenditure of those monies.

Recommendation 7. The NAA should be established as an independent statutory corporation having its own legal personality and capacity to own its own assets and be responsible for managing its own finances.

Relationship with the Executive

Powers of ministerial direction

6.21 While there was strong support for an independent statutory corporation, there was extensive debate in submissions and consultations about the exercise of powers within the organisation and the proper relationship between the authority and the executive.

6.22 The relationship between an incorporated statutory corporation and the executive government is, to a significant extent, governed by the degree to which the relevant minister is empowered to give directions to the authority. A number of submissions pointed to the need to retain a measure of ministerial control to ensure proper accountability and responsibility.[lix]

6.23 As an independent statutory corporation, the NAA would come within the purview of the *Commonwealth Authorities and Companies Act 1997* and would, therefore, be subject under section 28 of that Act to ministerial directions on matters of policy applying generally across the Commonwealth government sector. Such directions can be given only after consultation with the directors of the corporation,[lx] but would permit the government to retain an appropriate sense of 'ownership' of the NAA.[lxi] This could be achieved additionally through a carefully defined relationship with the executive government which balanced the independence of the NAA with the need for government input into the organisation, and also through government appointments to key positions within the organisation.[lxii]

6.24 The Commission is aware that the regulatory role proposed to be given to the NAA to promulgate a range of standards and guidelines would impact significantly on the day to day recordkeeping activities of all departments and agencies. Having regard to this impact, the Commission favours the inclusion in the archives legislation of a limited power of ministerial direction in relation to policy matters concerning particular standards and guidelines.

6.25 In the Commission's view, the minister should have power to direct the NAA, when formulating a standard or guideline relating to a particular matter, to take into account any government policies in relation to that matter that the minister may identify and direct to be taken into account.

6.26 The Commission considers that, other than in relation to broad standard creation matters, the NAA should be free from the constraints of ministerial direction. A power of direction along the above lines was proposed by the Commission in DRP 4.

6.27 This power of ministerial direction would give the government the opportunity to guide the creation of government-wide standards and guidelines in order to make them consistent with government policies which would otherwise affect government recordkeeping. However, this power should not extend to the giving of directions on individual decisions being made by the NAA or its staff, in particular decisions relating to individual disposal or access decisions.

Limitations on ministerial direction

6.28 A number of submissions in response to DRP 4 raised concerns about the power of ministerial direction. In particular, there was a concern that any such power should be consistent with the terms of the archives legislation. Both the Advisory Council on Australian Archives and Australian Archives preferred the wording of section 7(3) of the Archives Act, which ensures that ministerial directions 'are not inconsistent with this Act.'[lxiii] While the Commission considers that the existing section 7(3), which gives the minister the power to give directions relating to any of the powers or duties of the Director-General, is too broad a power of direction, it does agree that ministerial directions should not be inconsistent with the archives legislation. For these reasons it has added the formula 'not inconsistent with the archives legislation' to its recommendation for a power of ministerial direction.

6.29 As an additional precautionary measure, a number of submissions suggested that ministerial directions be required to be made in writing and either reported in the NAA's annual report or laid before Parliament by the minister.[lxiv] The Commission agrees that these kinds of provisions with respect to ministerial directions, which have precedents in many Commonwealth Acts establishing statutory authorities,[lxv] would be appropriate for the NAA. However, the Commission does not consider that both annual reporting and the laying of individual directions before Parliament are necessary. In the Commission's view, it should suffice that any direction given by the minister be in writing and should be laid before Parliament within seven sitting days after the direction is given to the NAA.

Recommendation 8. The responsible minister should be empowered, in relation to any matter in respect of which the NAA may issue a standard or guideline, to give directions not inconsistent with the archives legislation regarding matters of government policy to which the NAA shall have regard in formulating that standard or guideline. Any such direction should be in writing and be laid before Parliament by the minister within seven sitting days after the direction is given.

Governing structure of the National Archives of Australia

The National Archives of Australia Council

6.30 In establishing the NAA as a statutory corporation the question arises whether the executive of the corporation should be a council, board or other group, or a single high level official as a corporation sole.

6.31 As Australian Archives is an unincorporated body, power is concentrated in the office of the Director-General who, under section 7(1) of the Act, is vested with all the powers of Australian Archives.

6.32 By contrast, the Advisory Council, established as a separate unincorporated body under section 10 of the Act, has the function of providing advice to the minister and the Director-General. Its advice and recommendations are not binding on either the minister or the Director-General.

6.33 There was substantial support in submissions for the continuation of an Advisory Council. Some submissions supported the continuation both of an Advisory Council and a single chief executive officer with or without the status of a statutory corporation.[lxvi] A number of submissions considered that stakeholder representation could best be achieved through an advisory consultative forum,[lxvii] questioning the ability of a governing council to provide independent advice.

> I believe there is a need for an Advisory Council, but am uncertain whether or not it should be enlarged in responsibility by the creation of a fully governing 'Statutory Authority'. Obviously, if this were done, the present Advisory Council would be disbanded, but it is unclear to me how mechanisms can be established which enable the Commonwealth Government to have access to wide-ranging views to assist it in the formulation of archives policy, but can avoid the situation whereby those views become self-serving and fail to give the government the sort of advice that is required.[lxviii]

6.34 While Australian Archives strongly supported the NAA becoming a statutory corporation, it did not think that a governing board or council would be appropriate.

> There are legal responsibilities which the national archival authority would perform which cannot be delegated. These include the powers which exist in the current Act to authorise disposal and grant

> access. Additional powers which the Archives seeks to strengthen its role in the creation and management of records would likewise be powers appropriately exercised by a single authority, as is the case with the Privacy Commissioner and Auditor-General.[lxix]

Australian Archives reasserted this point in its submission to DRP 4.[lxx] Other submissions supported the view that the implementation of archival policies should be clearly left exclusively in the hands of the professional staff of the NAA.[lxxi] The establishment of an independent governing council continued, however, to attract support in submissions in response to DRP 4.[lxxii]

6.35 Notwithstanding submissions to the contrary, the Commission maintains its view that, in the light of the greatly enhanced powers proposed by the Commission for the NAA, including the power to issue binding standards and guidelines, and the need for external stakeholders to have 'ownership' of the NAA as a national cultural institution, the executive of the NAA should be a normal board or council. Directly relevant precedents are to be found in the Council of the National Library of Australia and the Council of the National Gallery of Australia which are incorporated organisations entrusted with a heritage protection role. Independent bodies of a regulatory nature governed by a council/board include the Australian Broadcasting Authority and the Australian Maritime Safety Authority.

6.36 In the Commission's view, the comparisons drawn by Australian Archives between the proposed statutory corporation and the Privacy Commissioner and Auditor-General are misplaced. The characteristics and functions of those offices have little in common with the proposed NAA. In particular, their focus on supervision, auditing and oversight does not involve any of the key elements that the Commission has identified as pointing to the need for the powers of the archival authority to be vested in a governing council.

6.37 Nor does the Commission share the concerns of Australian Archives and the other submitters referred to above that a governing council would diminish the quality of professional decision making, particularly in relation to disposal and access matters. As previously noted in DRP 4, the Commission envisages that, in common with other similar organisations, decision making powers in relation to such matters as routine records disposal could be expected to be delegated to the chief executive officer and NAA staff, thus bringing to bear all the professional knowledge necessary to make those decisions consistent with NAA policy as settled by its governing council. It is inconceivable that such policy would be formulated without the benefit of the advice of the chief executive officer and the professional staff, as is traditionally the case in organisations of that kind. If, in relation to particular contentious issues, the council were to take a view that was contrary to that of some professional staff then it is entirely appropriate that such a decision be made by the broadly based council with its mix of relevant skills, rather than by a single professional officer.

6.38 In this and other relevant contexts, it is important that the proposed governing council should not be confused with the existing Advisory Council. The Advisory Council has no management or deliberative role comparable with that of a governing

council. Appointment and participation of members would be on a different basis to the existing membership of the Advisory Council,[lxxiii] although the Commission envisages that the membership of the governing council would continue to be on a part time basis, with the council meeting regularly.

6.39 In order to maintain the existing advisory capacity within the formal structure of the NAA, a few submissions proposed a two tiered system whereby a formal board could govern the authority but advisory committees could also exist to provide a wider range of views and stakeholder input into archival issues.[lxxiv] The Commission considers the need for advisory forums to support a governing council below.[lxxv]

> **Recommendation 9.** The powers and functions of the NAA should be exercisable by a council, composed of part time members, appointed by the Governor-General.

A chief executive officer

6.40 The Commission considers that the governing council of the NAA should be supported by a strong chief executive officer, to be known as the National Archivist. As the National Archivist would have a key role in the development of organisational policy and direction, he or she should be a member of the council. The Commission notes that a number of similar statutory authorities have the chief executive officer as a member of the board or council.[lxxvi]

6.41 Bearing in mind the preeminent need for the chief executive officer to have strong leadership and organisational skills, the Commission suggested in DRP 4 that it would not be appropriate that the chief executive officer be required to have professional archival qualifications. While submissions in response to DRP 4 did not question this view, some questioned the appropriateness of the title 'National Archivist', given that some appointees may not be professional archivists.[lxxvii]

6.42 While understanding such concerns, the Commission maintains a preference for the title National Archivist. In its view, the need for the chief executive officer, whether a professional archivist or not, to become intimately involved in archival functions, to deal extensively with the archival profession, and to represent the organisation and, in some cases, the profession in various official circumstances both within Australia and overseas, renders the identification of the title of the chief executive officer with the archival function entirely appropriate.

6.43 In DRP 4 the Commission raised as an issue for further consideration the method of appointment of the National Archivist. As a matter for discussion, the Commission put forward two options: appointment by the governing council of the

NAA, or appointment by the Governor-General in Council on the recommendation of the government. A third option was suggested by Eccleston Associates, whereby the council could recommend a short list with appointment by the Governor-General in Council.[lxxviii]

6.44 A number of submissions favoured appointment of the National Archivist by the council of the NAA.[lxxix] In most cases the reason for supporting council appointment was to strengthen the role and independence of the council itself.

6.45 The majority of submissions, however, supported government involvement in the appointment of the National Archivist. In some cases this was supported so that expertise in government recordkeeping was taken properly into consideration to ensure healthy relationships with other government agencies.

> I would prefer to see the CEO appointed by the government as I believe this is more likely to induce a favourable climate of relationships with client departments. The CEO would be likely to come from within the public service and be seen as someone well-grounded in the nuances of government and its attendant record-keeping goals, styles and difficulties.[lxxx]

6.46 In other cases there was concern that the interests of the stakeholder base of the governing council of the NAA would not provide the depth of consideration of the candidates required to fulfil the task.

> The National Archivist is the records manager for the Commonwealth. The appointment is one in which all Australians are stakeholders with respect to the outcomes of the management of the records of the government. On this basis, it seems appropriate that the appointment be made under the broadest terms, taking account of the breadth of interest it represents. As the government's records manager, it should be government appointed. While it may be considered that the governing council of the NAA is representative of the stakeholders, it is a limited representation nonetheless, and therefore narrower than is warranted in making this appointment.[lxxxi]

6.47 In other submissions, there was support for government involvement in order to retain a sense of government ownership in the government funded organisation.

> The current Council believes that the national archives would be established to manage a core business of the government. As a result the government is entitled to maintain some influence over the direction in which the Director-General leads the national archives. The Council proposes that the appointment of the Director-General be a matter for Cabinet.[lxxxii]

6.48 The Commission agrees that the government should have responsibility for the selection of the National Archivist. By establishing an independent statutory corporation subject to limited powers of ministerial direction, there is limited scope for government influence over the policy and operations of the organisation. The fact would remain, however, that the organisation would be largely government funded with substantial appropriations each year required to operate the authority. It would be appropriate in these circumstances for the government to decide upon the person they were willing to entrust with the task of being the National Archivist. This could be best achieved, consistent with other statutory appointments, through appointment by the Governor-General in Council. That said, the Commission would hope that a

government having confidence in the governing council would make informal soundings of the council in identifying persons who might be suitable for appointment as National Archivist.

> **Recommendation 10.** The legislation should provide for the appointment by the Governor-General in Council of a chief executive officer of the NAA whose office should be styled 'National Archivist'. The National Archivist should be an *ex officio* member of the council of the NAA with full participation and voting rights.

Staff of the National Archives of Australia

6.49 Another issue identified by the Commission in DRP 4 as meriting further consideration was whether the staff of the NAA should be employed directly by the NAA or under the public service legislation. Submissions suggested a variety of approaches to this issue.

6.50 Currently the staff of Australian Archives are employed under the *Public Service Act 1922*. There was some support for a continuation of this situation. Some saw public service employment as benefiting the staffing of the authority through the retention of mobility between government agencies, furthering career opportunities.[lxxxiii] Public service employment was also seen as providing a more uniform and consistent approach to employment of staff who would be working with government records.

> The records are generated and controlled by agencies staffed under conditions of service set out in the Public Service Act and subject to legislation governing handling of information and accountability for their actions ... It would therefore be appropriate that the management of the same Commonwealth records by the NAA, and the setting of standards for the record-keeping policies and practices governing those records, should be undertaken by staff employed on precisely the same basis and subject to the same constraints.[lxxxiv]

Australian Archives asserted that there was no argument in support of the statement that employment other than under public service legislation would be more efficient and economical.[lxxxv]

6.51 Other submissions suggested that independent staffing arrangements could provide necessary flexibility for the authority. These arrangements were seen as providing greater opportunities both to employ professionals and to provide professional archivists with greater opportunities for movement within the profession.[lxxxvi]

6.52 The Commission prefers a staffing system which provides the greatest flexibility for employing, developing and maintaining high quality staff for the

archival authority. It notes that changes are contemplated for the Australian Public Service which would remove some of the advantages which some submissions saw in public service employment, including mobility within the public service and uniform conditions of employment across agencies. The proposed changes to the public service legislation should, on the other hand, provide employers with greater flexibility to set terms and conditions necessary to attract and hold high quality professionals.

6.53 As it remains likely that the Australian Public Service will undergo major changes in the foreseeable future, the Commission is not in a position to express a final view on which of public service or independent employment would be most appropriate for the NAA. Instead it recommends that, at the time of establishment of the new authority, the matter be further considered in the light of the prevailing regime for public service employment. The option which would provide the necessary flexibility to enable the organisation to attract, develop and retain professional staff on appropriate professional terms should be adopted.

> **Recommendation 11.** The legislation should provide the NAA with a flexible employment regime tailored to meet the professional needs of the organisation.

Powers of council in relation to the National Archivist

6.54 Under the Commission's proposals set out in DRP 4, the NAA's powers and functions would be vested in the council while the National Archivist, its chief executive officer, would have responsibility for the day to day management and control of the authority — a role that would assume greater importance if, as proposed by the Commission, the membership of the council were to be part time.

6.55 As the supreme organ of the NAA, the council would determine the policy and direction of the authority. Thus, it was proposed in DRP 4 that the National Archivist should be required to comply with the directions of the council in relation to all matters coming within the functions and powers of the NAA. On the basis of sound and long standing precedent, an exception was proposed in relation to staffing matters.

6.56 Some submissions supported these proposals.[lxxxvii] However, a number of submissions preferred that certain powers, other than those relating to staffing, also be exercisable by the National Archivist alone.

> I believe it would be better to state that the exception applies to matters of day to day management of the Archives — not just staffing matters. No part-time Council can fully understand the ramifications of day to day management of the affairs of a large and complex government establishment. The Council must understand that it is there to decide the big issues, and that within the administration

> of the office there are myriads of matters with which only the full-time, professional staff can and should be involved.[lxxxviii]

6.57 The Australian Society of Archivists proposed a more detailed restriction on the power of the council.

> In areas of professional expertise, principally disposal and access, the National Archivist must ultimately act as arbiter when different community views on a question are expressed. These are areas central to archival science and the exercise of professional training and skills. The final decision in these areas must be made considering the professional stance and viewpoint.[lxxxix]

The day to day business of the NAA should be able to be discharged by the National Archivist and the professional staff of the NAA without the involvement of the council. This is how the affairs of any such authority are conducted and is consistent with the Commission's proposal that the legislation enable the council to delegate its powers to the National Archives and relevant staff.[xc]

6.58 The Commission does not, however, agree (staffing matters excepted) that certain decisions involving professional archival expertise should be reserved from the exercise of the council's powers and be vested in the National Archivist and professional staff. Such exceptions would, in the Commission's view, be at odds with the role of a governing council, which brings together diverse but relevant expertise and a range of stakeholder experience. It is unlikely that the council would make a decision on the key areas of disposal and access without seeking and taking fully into account the advice of the National Archivist and the relevant professional staff.

6.59 The Commission also points in this regard to its proposal above that the National Archivist be an *ex officio* member of the council[xci] — a proposal which, if accepted, would further ensure that the views of the National Archivist and professional staff are not overlooked and lightly demurred from.

> **Recommendation 12.** The council should have power to give directions to the National Archivist in relation to any matter except for day to day staffing matters.

Delegating powers of the council

6.60 As in the case of other statutory authorities having an extensive range of functions and powers, it is essential that the council have full capacity to delegate all or any of its functions and powers to its chief executive officer or any staff member. This is particularly crucial because of the large number of day to day decisions required to be made by the NAA and the proposed part time nature of the council.

6.61 The Commission did not receive any adverse comments in response to the following recommendation in DRP 4.

> **Recommendation 13.** The council should have the power to delegate all or any of its functions and powers (except the power of delegation) to the National Archivist or any other member of staff.

Composition of the council

Stakeholders of the NAA

6.62 As discussed above, the NAA envisaged by the Commission would be an organisation with a wide range of stakeholders. Stakeholders would include organisations and individuals with particular interests in the policies, practices and services of the organisation. It is important that the views and concerns of stakeholders are appropriately factored into the policy and other deliberations of the NAA.

6.63 The Commission has identified the stakeholders of the NAA as including the government and government agencies, public user groups (among them historians, genealogists, educators, academics and students), record subject groups (sometimes from particular cultural communities), professional archivists and records managers, information technology professionals, and private service providers. With such a diverse range of stakeholders, there is a need for the deliberative and consultative processes of the NAA to be appropriately structured to take account of their advice and aspirations.

6.64 At the highest level is the membership of the proposed council. In the Commission's view it is essential that stakeholders' technical and policy expertise in particular be brought to bear on the deliberative processes of the council. This can most effectively be achieved by structuring the qualifications and membership of the council in such a way as to ensure appropriate stakeholder inputs of that kind.

Identifying appropriate members for the council

6.65 Some archival authorities at the State level are subject to prescriptive provisions identifying particular stakeholders to be represented on their councils.[xcii] In draft recommendation 15.10 of DRP 4, the Commission deliberately avoided proposing the prescription of particular classes of stakeholders who should be appointed to the council. This draft recommendation was influenced by the need to maintain flexibility in the appointment process, recognising the changing needs of

the NAA.[xciii] Moreover, prescriptive provisions can lead to undesirable exclusions and some inflexibility. This is of particular importance having regard to the wide variety of stakeholders in the area of recordkeeping and archiving and the limited membership proposed for the council.

6.66 Some submissions supported a prescriptive formula to ensure that certain groups were guaranteed representation on the council,[xciv] or to ensure that a variety of interests were represented.

> We are concerned ... that the general nature of the direction in this [draft] recommendation may allow one kind of stakeholder to 'capture' the Council, particularly if the Government's understanding of the range of interests needing to be represented is limited. Some prescription may be necessary to avoid this.[xcv]

While mindful of these concerns, the Commission continues to favour flexible appointment provisions which will leave the government free to make the most appropriate appointments to fill vacancies as they occur, subject only to the need to limit appointments to persons with appropriate knowledge and experience. The Commission believes that this approach will also serve to emphasise that persons are appointed as members in their own right and not as representatives of particular stakeholder groups.

Size of the council

6.67 In DRP 4 the Commission suggested that the governing council of the NAA should consist of not less than 8 members, nor more than 12. While some submissions supported the establishment of a smaller council,[xcvi] another submission expressed concern that 12 members would be insufficient to represent the full spectrum of identified stakeholders.[xcvii] In the Commission's view, a maximum of 12 members, taking account of the usual absences and occasional vacancies, would provide a workable base for discussion and decision making, while allowing for a range of views to be represented. A quorum of 5 would seem appropriate for this purpose. It has already been recommended that the National Archivist be an *ex officio* member of the council.[xcviii] This would leave at least 7 other positions on the council to be filled.

Members of Parliament

6.68 While considering that, as a general rule, very specific qualifications of individual council members should not be prescribed, the Commission believes that there are two particular stakeholders which should have guaranteed representation on the council. These are the two Houses of the Federal Parliament. In DRP 4 the Commission proposed that a member of the Senate and a member of the House of Representatives be specifically included in the council. The Advisory Council on Australian Archives supported such representation.

> The presence of one member of the Senate and one member of the House of Representatives adds strength to the Council both in its deliberations and the connection they provide to the political processes of government. Even if those representatives should be busy and attendance at meetings is infrequent, their contribution outside of meetings is often immense.[xcix]

On the other hand, Robert Sharman suggested that the benefits of including members of Parliament on a governing council might be limited by their many other commitments.[c]

6.69 This concern notwithstanding, the Commission continues to believe that the inclusion on the proposed council of two members of the Parliament would provide both an accountability counter balance for the extensive independence proposed for the NAA and an opportunity for the NAA to benefit in its deliberations from the important perspectives of national legislators.

Required knowledge and experience of members

6.70 As the council would have ultimate responsibility for the NAA and have the power to determine the strategic direction and policies of the NAA, it would need a substantial majority of members with knowledge and experience in relation to records management and archival functions. The remaining members of the council should, therefore, be required to have knowledge or experience in relation to the functions of the NAA. A legislative qualification of this kind would still encompass a wide range of stakeholders, including creators and users of records from both research and administrative backgrounds, as well as records and archives professionals from both private and public sectors. It should be a matter for the government to ensure at any time that the membership adequately represents an appropriately wide range of stakeholder expertise and opinion, including representation from different regions within Australia.[ci]

6.71 The proposal in DRP 4 for a requirement for appointees to have knowledge or experience in relation to records management or archival functions was supported by a number of submissions responding to the DRP.[cii]

Recommendation 14. The council of the NAA should consist of not less than 8, nor more than 12, members comprising

- a member of the Senate and a member of the House of Representatives nominated by the Senate and House of Representatives respectively
- other persons, with knowledge and experience in relation to records management or archival functions, appointed by the Governor-General
- the National Archivist (*ex officio*).

Recommendation 15. The legislation should include a general direction that membership of the council should be chosen so as to ensure that the council

has the benefit of wide ranging opinion and expertise, including any relevant regional perspectives.

Consultation with stakeholders

6.72 As noted above, a number of submissions commented on the value of the present advisory and consultative role performed by the Advisory Council constituted under the Act.[ciii] Given the expanded role envisaged for the proposed NAA, the Commission considers that the legislation should ensure that stakeholder consultation is broadened and enhanced.

6.73 A governing council is not a forum for the representation of stakeholder interests *per se*. The council as a whole must consider all stakeholder interests, with the experience of individual members assisting to develop an understanding of the issues involved. This is different from the role of the existing Advisory Council. Other additional stakeholder forums should, therefore, be incorporated into the framework of the NAA.

6.74 At present, Australian Archives uses a number of informal mechanisms to communicate with stakeholder groups beyond the Advisory Council. These include hosting briefings by public users on their personal research, training and information sessions for agency records managers, a public interest group relating to audio visual records, and involvement in the professional activities of the Australian Society of Archivists Inc and the Records Management Association of Australia. Another key consultative forum is the Aboriginal Advisory Group, based in Darwin, established as a result of the Memorandum of Understanding between Australian Archives and a number of Aboriginal and Torres Strait Islander groups in the Northern Territory.

6.75 A few submissions suggested an organisational structure combining features of both a governing council and advisory consultative forums.[civ] The Commission agrees with this concept and accordingly supports the inclusion of statutory recognition of advisory forums.

6.76 The Commission considers, therefore, that the legislation should provide specifically for the appointment by the council and for the effective servicing by the NAA of advisory groups covering key areas of technology, major policy issues, and service needs and provision.

6.77 The Commission envisages that these issue based advisory groups would be established on a standing basis, meeting regularly and reporting to the council. The statutory recognition of advisory groups and the appointment of members by the council would enhance the image of the forums, affirming that the interests of stakeholders are important and are to be taken into consideration by the NAA. The formal recognition of advisory groups should also encourage the earnest

participation of the members. In other chapters of this report, the Commission has recommended the establishment of advisory forums relating to disposal[cv] and Aboriginal and Torres Strait Islander issues.[cvi] An advisory committee appointed by the council would be a suitable structure for these recommended forums. In this regard also the Commission notes the support expressed by the ABC for the formalisation of the existing interest group on audio visual records as an advisory committee established by the council.[cvii]

6.78 Additionally, the Commission envisages that the council convene, on an *ad hoc* basis, when and where appropriate, consultative forums to identify the needs of client groups whose special requirements or concerns warrant discrete consideration.

6.79 Australian Archives would prefer that the council be enabled rather than required to establish advisory groups and consultative forums.[cviii] Concerns were voiced that these bodies might become a burden on resources at the expense of core functions of the NAA.[cix] While the Commission believes that such resources should be made available whenever an appropriate need arises, it agrees that the legislation should enable rather than require the establishment of advisory groups and consultative forums.

> **Recommendation 16.** The NAA should be enabled to establish and service such advisory groups as are necessary to ensure that it receives timely and well informed advice on key technological, policy and service needs from major stakeholders.

ENDNOTES

7. Financing the National Archives of Australia

Introduction

7.1 This chapter outlines the financial structure of Australian Archives as it presently exists and makes recommendations as to how this structure might be better aligned to meet the objectives of the new National Archives of Australia and the archival system recommended by the Commission. It also discusses the nature of charging powers which should be included in the new legislation and the possible application of charges for the use of records of archival value by members of the public.

The financial structure of Australian Archives

7.2 Australian Archives' estimated budget outcome for the 1997–98 financial year was $34 938000. The Archives' projected revenue for 1997–98 is $2 013 000, of which the Archives would be permitted under the *Auditor-General Act 1997* to retain $850-000, the remainder being paid into consolidated revenue.

7.3 A detailed breakdown of the 1997–98 revenue estimate is not yet available. However, in 1996–97 Australian Archives earned a total revenue of $2 143 737, of which $1469163 came from records storage charges, $116271 from general photocopying charges and $131475 from charges for supplying copies of World War One Army service dossiers. Other sources of revenue in 1996–97 included the sale of publications, the provision of training courses, exhibition fees, royalties, employee subsidies and asset sales.

Short term temporary records

7.4 The great bulk of Australian Archives' current revenue comes from the storage of records which are due for disposal at an age of less than 30 years. The Archives no longer accepts new transfers of such records to its custody. Many of these records are now being stored by private contractors on a commercial basis. The Archives' revenue from this source will thus gradually diminish as records of this kind already in the Archives' custody are disposed of and not replaced by new transfers.

Long term temporary records

7.5 The Archives continues to accept custody, without charge, of records which are not of archival value, but which must be retained for more than 30 years. Such

records, a substantial proportion of which are personal and medical files created by the Armed Services and the Department of Veterans' Affairs, currently represent 22.8% of the Archives' total record holdings and their storage is estimated by Australian Archives to absorb property operating expenses of $1530000 per annum and staff costs of $170000 per annum.[cx] The Archives has calculated that the progressive introduction of storage charges on a marginal cost recovery basis for new transfers of such records would generate revenue of $145000 in the first year of operation and that this would increase to $1900000 in the tenth year of operation.[cxi] The revenue raised would progressively offset some of the cost of storage but would not provide any 'profit' to support other aspects of the NAA's operations.

Records of archival value

7.6 Australian Archives currently makes no charge, either to Commonwealth agencies or to public users, for handling records of archival value. The Commission recommends that, in undertaking its core functions with respect to records of archival value, the NAA should in the main be budget funded. These core functions relate to standard setting and disposal authorisation for all Commonwealth records and to the provision of a comprehensive management and accessibility regime for records of archival value. They include

- the issue of mandatory standards for recordkeeping
- the issue of guidelines supporting the standards
- authorising and monitoring the disposal of records to an extent sufficient to ensure the preservation of records of archival value
- the provision of storage and preservation facilities for records of archival value
- the management of the public access regime
- the provision of facilities for members of the public to access records
- the provision of information and reference services about records of archival value
- the operation of exhibition, publication and other relevant programs which open up records of archival value to the Australian people.

7.7 With respect to Commonwealth agencies, the Commission also recommends that financial responsibility for the maintenance and accessibility of records of archival value should not, through any rearrangement of budget appropriations, be moved in whole or in part to the agencies which created the records, except in the case of those records, expected predominantly to be electronic records, which, for technological reasons, can only be maintained effectively in the systems in which they originated. A general dispersal of responsibility for records of archival value would merely add administrative complexity to the present system without any prospect of significant financial savings. It might also lead to a fragmentation of holdings of such records and inappropriate disposal policies.

> If agencies are to be charged on a costs recovery basis for accessing records in the custody of the NAA, it may be in each agency's interests to retain more of those records, rather than transfer them to the NAA's custody. This will be particularly the case for the ABC.[cxii]

The Commission has recommended in what follows, however, that a small part of the total cost of dealing with records of archival value could be defrayed by public charges on those who access those records.

Cost recovery and contestability

7.8 By contrast with the position concerning records of archival value, the Commission suggested in DRP 4 that services for other records should be commercially based on cost recovery and contestability principles. This would not necessarily require the NAA to withdraw from the provision of such services immediately. The NAA has expressed concern about this suggestion.

> The Government Services Program cannot be established as a money-making or recovering venture. As in the experience of the National Archives of New Zealand, it would skew attention to those projects that will get a return, not those that are for the public good and efficiency of agencies. The Archives questions what good practice or change of current practice this proposal would encourage.[cxiii]

7.9 In making its proposal, the Commission did not intend that the NAA should view the provision of such services to other Commonwealth agencies solely as a money making venture. The Commission's intention was rather that

- the NAA should not have a statutory monopoly over any aspect of service provision (as distinct from its standard setting and authorising roles) for records which are not of archival value
- the NAA should disengage to the maximum extent possible from involvement with records which are not of archival value in order to concentrate its focus and resources on records which are of archival value
- any services which the NAA continues to provide for records which are not of archival value should be based on cost recovery and contestability principles.

Australian Archives' program structure and accounting policy

7.10 The Commission's analysis and assessment of the financial effects of its recommendations was complicated by the fact that Australian Archives presently subdivides areas of expenditure along functional lines rather than on the basis of whether the expenditure relates to records which are, or are not, of archival value. The Commission sought a cost breakdown from the Archives on the latter basis, but the Archives has been unable to provide one. It has argued that to do so would require a full recasting of its program structure and chart of accounts. The Archives' projected expenditure on salaries and administrative costs in 1997–98 is as follows.

Government services program	$7 892 711
Records accessibility program	$5 487 317
Facilities and corporate program	$8 038 203
Property operating expenses	$10 740 000
Corporate and executive	$2 785 569
	$34 943 800

Of these five areas of expenditure, the *records accessibility program* is concerned predominantly with records of archival value, but the other four areas have responsibilities for both records of archival value and records which are not of archival value. The *government services program*, for example, includes the preparation of standards, training and the provision of appraisal, storage and preservation services for all Commonwealth records.

7.11 Some 57% (measured in shelf kilometres) of the records presently held in all of the Archives' repositories are of archival value. Of the remainder, 32% are not of archival value and 11% have yet to be evaluated. On these figures, the Commission believes it could be argued that the new NAA could operate on approximately 60% of Australian Archives' present budget of some $35000000. However, two other factors need to be taken into account in forming a final judgment. Firstly, records of archival value are, in general, significantly more costly to store and service than records which are not of archival value. They are held in air conditioned buildings maintained to high standards. Many require preservation work or duplication to ensure their long term survival. They must be adequately described and listed and research and reference facilities must be provided to make them accessible. The second factor is the cost of the new standard setting role in recordkeeping which the Commission has recommended for the NAA.[cxiv] At least in its establishment phase, this will require a significant application of additional specialist resources.

7.12 In the light of these considerations, the Commission suggests that the new NAA, on the basis that it withdraws progressively through a commercial contestability process from the custody of records which are not of archival value,[cxv] could operate on a budget appropriation of some 80% (say $28 000 000) of that of the present Australian Archives.

Recommendation 17. NAA services directly related to ensuring the identification and preservation of records of archival value and the setting of records management standards should continue in the main to be budget funded.

There should also be a recasting of the NAA's program structure and chart of accounts to clearly identify and provide for reporting on resources devoted to records of archival value and records management functions.

Recommendation 18. The NAA should, progressively over the next five years, minimise its dealings with records which are not of archival value. It should not accept any new deposit of such records on a 'free' basis beyond 1998–99 and any services which it continues to provide for such records should be on a fully contestable and commercial basis.

As a consequence, progressively 20% of the NAA's appropriation should be divided among 'client' agencies which would be responsible for contracting out the provision of storage for records which are not of archival value.

The National Archives of Australia's power to impose charges

7.13 As enacted in 1983, the Act made only limited provision for the imposition of charges by the Archives. Section 71 provided that regulations might be made for charges in respect of

- searches carried out to comply with requests made for access to, or for information contained in, records
- the provision of copies or transcripts of records
- the keeping of records that do not form part of the archival resources of the Commonwealth.

7.14 Regulations were subsequently made for photocopying charges but not for searches. Australian Archives has advised the Commission that regulations were not made for search charges because such charges would in effect have required public users of the Archives to meet the cost of the failure of many Commonwealth agencies to provide adequate indexes and finding aids for their records.

7.15 In 1990 section 69A was added to the Act to permit the Director-General of Australian Archives to determine charges for the provision of discretionary [cxvi] services to Commonwealth institutions, while section 71 was amended to permit regulations to be made for charges for discretionary services provided to persons other than Commonwealth institutions. Regulations currently specify charges for a range of discretionary services, including

- provision of copies
- sentencing and destruction of records
- transport, storage and retrieval of records[cxvii]
- training courses.

7.16 The distinction between 'discretionary' and 'non-discretionary' services on which the 1990 amendments are based represents an attempt to identify the core elements of a national archival service (in particular the identification, protection and accessing of records of archival value) in order to assert the principle that they should

be provided free of charge in the national interest. However, in the Commission's view the prescription in the legislation itself of specific areas in which the NAA may or may not levy charges is too restrictive in a time of rapid administrative and technological change. The Commission suggested in DRP 4 that it would be more flexible for the NAA to have a general power to levy charges for services which it provides, or which are provided on its behalf by contractors. In so suggesting, the Commission had in mind that the distinction between those charges that are imposed by regulation and those that are imposed by determination of the Director-General would be removed.

7.17 The Commission noted in DRP 4 that the charging regime for archival services would affect the entire Commonwealth archival system. The NAA would have a key role to play in coordinating this system, but there would also be other important stakeholders. The Commission suggested, therefore, that charges under the new legislation should be promulgated as legislative instruments. This would provide an accountable process which would give the NAA primary responsibility for establishing charges, but only after consultation with relevant groups and subject to Parliamentary scrutiny. Those submissions in response to DRP 4 which commented on the issue supported the NAA having a general power to promulgate charges by legislative instrument.

7.18 The present charging regulations [cxviii] give the Director-General of Australian Archives a discretionary power to waive any charge in a range of specified circumstances, among them financial hardship, administrative efficiency and the public interest. The Commission suggested in DRP 4 that the NAA should have the power to waive charges and that the relevant legislative instruments should specify which charges could be waived automatically in certain circumstances and which charges could be waived at the discretion of the NAA. In response, Australian Archives suggested that it would be more flexible if the criteria for waiving charges were not included in the legislation, although the NAA should be required to give reasons for waiving charges.[cxix] In contrast, the Historical Society of the Northern Territory suggested that categories of persons to be exempted from charges should be specified in the legislation.[cxx] The Commission maintains its view that, in the interests of openness and accountability, the criteria for waiving charges should be specified in the relevant legislative instruments.

7.19 In recommending that the NAA have a general power to levy charges relating to records of archival value, the Commission is aware of the possibility, particularly in times of economic stringency, that tensions might arise between the need to raise revenue and the achievement of the legislation's objectives. One example would be the attempted imposition of charges so substantial that they effectively denied reasonable public access to records. But this possibility would not, in the Commissions' view, be justification for denying the NAA such a general power. The power of disallowance would, the Commission believes, be a sufficient safeguard. Added to that, the legislation should contain an injunction that, in fixing

charges, the NAA must ensure that the charges will not operate in a manner inconsistent with the achievement of the NAA's objectives.

7.20 The Commission recommends that there should be one exception to the NAA's general power to levy charges. For reasons discussed in paragraphs 7.34 to 7.39, the Commission does not believe that it is appropriate for charges to be applied to applications for access to records of archival value which are in the open access period.

7.21 The Commission has already recommended in this chapter that the NAA should charge on a fully contestable and commercial basis for any services which it continues to provide for records which are not of archival value.[cxxi] While the NAA's dealings with such records should diminish rapidly, the new legislation will need to support the NAA contracting to provide these services on a commercial basis.

Recommendation 19. Within the context of the budgetary parameters agreed with the government from time to time, the NAA should have the power to determine which of its services, other than applications for access to records of archival value, should attract charges and the amount or rate of those charges.

- Charges for services should be required to be imposed by legislative instrument and, accordingly, be subject to Parliamentary scrutiny.

- The present distinction between 'discretionary' and 'non-discretionary' services should be removed.

- Charges for services relating to records which are not of archival value should be required to be set at full commercial rates.

Recommendation 20. The NAA should have power to waive charges relating to records of archival value in appropriate circumstances. These circumstances should be set out in the legislative instrument establishing the charges.

Recommendation 21. The legislation should also provide that the NAA must ensure that charges relating to records of archival value do not significantly inhibit the attainment of the basic objectives of the legislation, which are set out in Chapter 4.

Charging the public to use Commonwealth records

7.22 The use made by the community of Australian Archives in 1996–97 is set out in the following table.

Reference inquiries	44045
Visits to reading rooms	15355
New visitors to reading rooms	4061
Record items consulted	49419

The general approach

7.23 Reference inquiries are dealt with by Australian Archives staff free of charge up to a normal maximum of one hour per request. Inquirers requiring more extensive assistance involving research are referred to private agents who work on a fee for service basis. Many of the reference inquiries simply concern the services the Archives provides and the records which it holds. Given the complexities of Commonwealth records and the limitations of indexes and finding aids in many areas, the provision of a basic reference service is an essential element in making records accessible. There is currently no charge for members of the public to visit the reading rooms of Australian Archives or to access records there. Charges are made, however, for the supply of photocopies of records and for copies of the more substantial printed finding aids.

7.24 The *records accessibility program* of Australian Archives cost $5 081 033 in salary and administrative expenditure in 1996–97. Against this, the program earned $247 746 in revenue from supplying copies of records and smaller amounts of money from the sale of publications and from other sources.

7.25 In IP 19 the Commission discussed possible approaches to charges for archival services. DRP 4 canvassed a series of options for public user charges and suggested that

- charges should not be applied to basic reference services about Commonwealth records
- consideration should be given to introducing a charge for entry to NAA reading rooms, provided that it was not so high that it effectively inhibited the use of archival records
- there should be no general charge for accessing records at the NAA, but charges might be applied to very large research projects
- clients undertaking research essentially for financial gain should pay charges at full cost recovery rates
- any charging regime should not distinguish between Australian and overseas residents.

7.26 Submissions to both IP 19 and DRP 4 commented extensively on charging, with many of the same issues being canvassed in both groups of submissions.

Members of the public argued strongly against the imposition of charges on the grounds that it would seriously restrict access to records, especially as many clients are students or retired people with low incomes.

> No reputable Archives office anywhere in the world charges fees for access. Not in Britain or America, New Zealand or Canada, Germany, Japan or Russia ... To do so would make Australia the laughing stock of the academic world.[cxxii]

> The imperative to raise money is clear, as is the chilling potential for research if this is done intensively. Unfortunately, I do not think that the review has resolved this dilemma adequately. The fact that the use of the FOI Act is largely restricted to personal information is referred to; not mentioned is the fact that this is largely due to the effects of the charging regime (as noted in the various annual reports of the Attorney-General's Department). The recommendations of the review are likely to lead to a similar situation where certain archival research will simply be priced out of existence. The review mentions this in passing, but nonetheless and in something of a contradiction, falls back upon recommendations to charge users in ways that would not prevent this.[cxxiii]

> [T]he experience of Australian cultural institutions with charges for access (entrance fees) is that significant increases in revenue from such sources result in proportional cuts to government funding — they don't end up in front. Even the DRP's own figures do not suggest the revenue from public access charges would be significant, less than 1.5% of the Records Accessibility program's costs.[cxxiv]

> The person employed to collect the fee would be far better employed in focusing his or her powers of concentration on working out the best method to reach the required information in the quickest time.[cxxv]

7.27 Australian Archives opposed the introduction of charges for basic archival services to the public.

> ... a democratic society will not function effectively if information about its government (both current and historic) does not, and cannot, flow freely. Citizens need accurate information and reliable evidence to make informed and balanced judgements, and to exercise their constitutional rights. Public archives should therefore be freely accessible to all Australians. Value added services beyond basic access, for example photocopying, should and do attract charges.[cxxvi]

7.28 The Advisory Council on Australian Archives also opposed public charges.

> Members believe that it is disingenuous to say that overseas policies on charging for access vary and note that no national archive in the world has charged for access to records by its own citizens. To the Council's knowledge only one national archives has experimented with charging for access to records by international researchers, an experiment that has met with mixed success.
>
> The Council opposes categorically any charge for access, applications for access, entry to Reading Rooms or for telephone inquiries. Basic access to government records is an integral part of good and accountable government and should be free to all. The Council would instead prefer to emphasise legitimate avenues for cost recovery by the national archives, such as reproduction of records, publications, and the broad range of services to agencies such as storage of non-archival records and appraisal services.[cxxvii]

7.29 Some Commonwealth agencies supported the introduction of charges to recover at least a proportion of the cost of providing access to records.

> Requests for access to information under the terms of the legislation place considerable demands on the resources of the agencies of the AIC. As well as any requirement to deal with their own records, they

> are engaged in the examination of records of other agencies where those records are identified as including inherent sensitivities from a national security perspective. The greatest burden in the access context falls on relatively few agencies and among these, agencies of the AIC.
>
> For researchers, provision of access is a free resource. In the current environment, it seems no longer acceptable that this should be supported in this way, particularly to this extent. While the principle of public access is supported, it now seems appropriate to apply a system of charging, just as applies for other government activities. This seems especially appropriate in cases of requests for large volumes of material. A relatively small number of researchers are constant users of archival records, requiring examination of large volumes of material on a regular basis. Essentially, the resources of particular agencies, and of the Commonwealth generally, are supporting wide ranging research programs of some individuals. Many of these programs are supported by funding under research grants schemes. It would seem reasonable to expect that they seek allocation of research funding from these sources to support their archival research.[cxxviii]
>
> The ABC reiterates its view, in response to the Issues Paper, that access to material should be on the basis that costs should be substantially recovered, notwithstanding the Commission's view that there may be tensions between the need to raise revenue and the achievement of the legislation's objectives.[cxxix]

The National Library of Australia put the alternative view.

> The Library can see no justification for charging the public for access to Commonwealth records. The whole subject of charging has been debated in the library community for many years. Among libraries there has been almost universal agreement that freedom and equity of access to information is a basic right in a democratic society and consequently free public access to library buildings, their collections and catalogues remains central to the philosophy of the public library. The National Library adheres to that principle without qualification. We consider that the same principle applies with equal force to access by members of the public to Commonwealth records and any other materials held by Australian Archives.[cxxx]

7.30 Charging policies in other government archival jurisdictions in Australia and overseas vary considerably in detail, but certain broad strands of common practice are evident. There appears to be a general assumption that it is appropriate for governments to fund the basic processes of preserving records of archival value and the making of them available for public inspection once they reach a certain age. The process of making records available is seen to include providing public facilities in which the records may be studied and at least basic information and guidance services to assist people to find records relevant to their interests. Archives generally charge the public for copies of records, publications and the provision of research and reference services beyond the basic standard.

7.31 The Australian Society of Archivists has recently issued for comment a draft statement on equity of access to records.[cxxxi] In summary the ASA suggests the following principles

- The freedom to read is a basic democratic right which is essential to the social well being of the nation.

- Publicly funded organisations in Australia should provide basic public access to the records under their control without levying any access fees or charges.

'Basic' access includes the identification and retrieval of records, access to finding aids and access to basic reference services.

- Archives should be free to charge for 'value added' services such as photocopying, detailed research assistance, consultancies, exhibitions and educational services.

7.32 The Commission has given careful consideration to the issue of public charges for archival services, particularly in the light of responses to various options for charges suggested in DRP 4. The Commission notes in this regard that the Minister for Communications, the Information Economy and the Arts has commissioned a scoping study into the potential for user charging. This study is expected to be supported by market testing of processes and charging policies currently followed by Australian Archives, as well as international benchmarking. [cxxxii] In view of this initiative the Commission does not make recommendations as to specific levels of charges which might be applied to services provided by the NAA.

7.33 The Commission accepts that the provision of public access to Commonwealth records of archival value will always be predominantly budget funded. The Commission remains convinced, however, that appropriate user charges for accessing the NAA's services are essential to raising the NAA's public profile and to ensuring that it maintains a strong client focus and sensitivity to client needs. Charges would set a value on the NAA's services and establish an expectation among NAA clients that they would receive value for their money. Charges should not be set at such a level that they significantly deter public use of the NAA and they should not be seen in the context of meeting specific cost recovery objectives. The Commission suggested in DRP 4 that a public entry charge of $5per day or $100 per year would generate revenue, on current usage rates, of up to $75 000 per year. Charges of this order should not significantly inhibit use of the NAA.

Recommendation 22. Public user charges (say of the order of $5 per day for public entry) should be introduced for accessing NAA services, but in any event should not be applied at a level which significantly deters public use of the NAA.

The NAA should establish a simple and inexpensive way of monitoring the effect of such a charging regime.

Specific charges for public access applications

7.34 Many of the records of interest to clients of Australian Archives are already available because their access status has been assessed, either as part of a general

assessment program or in response to a specific application by a previous client. However, if the access status of a record has not been assessed the client is required to make a specific application for it. In 1996–97, 17389 individual record items were subject to access applications. The NAA estimates that access applications average about five record items each, so that this figure represents around 3000individual applications. No charges have ever been levied under the Archives Act for the processing of access applications, although the Administrative Appeals Tribunal levies a filing fee of $500 to review applications. In contrast, applications for access to records under the FOI Act are subject to a $30 application fee, plus a search and retrieval fee of $15 per hour and a decision making fee of $20 per hour. FOI fees may be waived or restricted in some circumstances, but they can nevertheless constitute a barrier to the use of the legislation, particularly for research requiring access to a significant number of records.

7.35 On the basis of the 1996–97 figures a $30 application fee for Archives Act applications might generate revenue of $90000. In reality this would almost certainly be reduced substantially because clients would be discouraged from seeking access to records not already available.

7.36 In considering the application of charges to access applications it is important to bear in mind that the Commonwealth access process is application driven to an extent unusual in government archival jurisdictions. In most jurisdictions, records become available to the public as part of a systematic release program which is carried out without the need for specific applications from members of the public. In some of these jurisdictions, access to information legislation is available as a fallback mechanism to press for the release of records which have not already been released, but this is regarded as a separate undertaking apart from the mainstream of archival operations.

7.37 In contrast the Commonwealth jurisdiction has come to rely to a significant extent on access applications as a mechanism to set priorities for the assessment of the suitability of records for public release, particularly those records which are likely to require detailed examination to identify personal or national security sensitivities. This is not in accordance with the intentions of section 31(1) of the present Act, which sets out a general obligation on Australian Archives to make all records in the open access period, other than exempt records, available for public access. It has come about through a combination of resource constraints and perhaps, in some quarters, a view that Archives Act obligations, like FOI Act obligations, need only be dealt with reactively. The application provisions have thus come to occupy a more central place in the access process than was envisaged when the present legislation was enacted. To impose charges for their use on the scale of the present FOI charges would further restrict the availability of records in the open access period.

7.38 The administrative cost of assessing the suitability of records for public release varies widely. Records which are not security classified and do not relate to the personal affairs of individual people can generally be assessed quickly. At the

other end of the scale, some security records and personal case files may require intensive scrutiny and consultation to identify sensitive material. The application of decision making charges to such records would probably reduce their usage rather than generate significant revenue. It would also be inequitable for the first person who seeks access to a record to be subject to an access charge, while subsequent users of the record could do so without charge.

7.39 The Commission proposed in DRP 4 that the NAA should investigate the effect of introducing a charge for access applications as part of a general study of how members of the public might make some contribution towards the cost of providing the services which they use. After further consideration of the issues involved, the Commission has decided that, as long as the access status of a substantial proportion of Commonwealth records is determined only in response to specific applications from members of the public, it would be inequitable to levy charges for such applications. In the present circumstances, such charges would be contrary to the basic accessibility objectives of the legislation. They could even operate as a disincentive for the access status of records to be determined proactively, since records might be withheld until the lodging of a specific application enabled fees to be charged.

7.40 The Commission has recommended in Chapter 15 that access applications for records which are not of archival value should be charged for on a full cost recovery basis and in Chapter 18 that special access applications should be subject to the FOI charging regime.

Recommendation 23. Charges should not be applied to access applications for public access to records of archival value more than 30 years old.

ENDNOTES

Part D

The federal record

8. What is a record?

Defining a record

The basic properties of a record

8.1 The Act defines a record as

> a document (including any written or printed material) or object (including a sound recording, coded storage device, magnetic tape or disc, microform, photograph, film, map, plan or model or a painting or other pictorial or graphic work) that is, or has been, kept by reason of any information or matter that it contains or can be obtained from it or by reason of its connection with any event, person, circumstance or thing;[cxxxiii]

This definition was drafted in the 1970s when the great majority of Commonwealth records were still created on paper. The basic unit of records management was then the file, a folder within which were placed in chronological order all documents relevant to a particular subject, transaction or client.

8.2 During the past two decades, technologies for the capture, storage and transfer of records electronically have developed rapidly. This has compelled records managers and archivists to define clearly what is meant by a record and to recognise the distinctions between the terms 'record', 'information' (which is not necessarily a record, but may be included in a record) and 'document' (which is a device by which either a record or information may be physically presented).

8.3 The present definition acknowledges that records can exist in electronic media such as disks or tapes, but it describes them as physical objects rather than as the gateway to a complex world of 'virtual' records. It does not address adequately the essential structural properties of a record, which endure regardless of the physical medium in which the record is contained. Archivists now generally define these properties as content, structure and context. The Canadian archivist Terry Cook describes how the control of these properties differs between paper and electronic records.

> For paper records, all three elements are stored or represented on the same physical medium, and are readable to the human eye. Content is most obvious: it is the words, phrases, numbers, and symbols composing the actual text. The structure of paper documents is also readily evident from the design of the form used for special kinds of transactions: an accounts journal page is different from a business tax return or from a land grant certificate. The context for paper records is derived from the signature lines, the signature itself, the address and salutation, the letterhead, the date, the copies or 'c.c' line on the bottom of the page, perhaps the surviving envelope, various stamp impressions or annotations of date of receipt or transmission or filing, the position of the document within a larger

paper file of related documents, the file heading or title, the file number, the file's own place within a larger records classification system, mark-out cards recording who had read the file on what date, and cross-references to related documents in other media (maps, photographs, videos, etc.). Archivists consider this contextual information to be essential to the comprehension of any 'record' as an integral reflection (or recording) of acts and transactions, and thus of corporate accountability for them. Without context, one is left with information or data, but not a record, and not a good corporate memory on which to base future decisions or defend earlier ones.

For electronic media, the content, structure, and context of the record changes significantly from the traditional paper world. These are not stored in one physical place as on a paper page (and its stapled attachments), nor is the record itself readable by the human eye without machine and software intervention. The closest electronic equivalent to paper is the content element, where the letters and numbers look very much the same on the computer screen as on a paper sheet. Yet some such content may be stored in many places and then be logically imported and implanted in the text to create the content of the electronic document. Such imported content is not visible when retrieved for ASCII[cxxxiv] or 'generic' text dumps or in software-dependent system backup files (unless the original hardware and software and software version are available, and the likelihood of that happening over time is extraordinarily poor). ...

The user sees the final product on the screen but there is no such product actually stored anywhere in the computer. Rather, there is information scattered in many places which the software and operating system stitch together at a particular moment in time to form that logical or virtual document. Change that software and system, even add a new version or upgrade to the system, alter any of the data values, and those relationships between the electronic mail, letter, graphic, spreadsheet, and database are lost in the vast majority of systems operating in businesses and governments today. The virtual document vanishes. Evidence and accountability are gone with it.[cxxxv]

Possible definitions of 'record'

8.4 Current definitions of 'records' focus on the purpose for which records are created and the framework within which they reside. Australian Archives defines a record as

> something created and kept as evidence of an organisation or person's functions, activities and transactions. A record must possess content, structure and context to be considered to be evidence. It must also be part of a recordkeeping system.[cxxxvi]

8.5 Standards Australia defines records as

> recorded information, in any form, including data in computer systems, created or received and maintained by an organization or person in the transaction of business or the conduct of affairs and kept as evidence of such activity.[cxxxvii]

8.6 The International Council on Archives defines a record as

> recorded information produced or received in the initiation, conduct or completion of an institutional or individual activity and that comprises content, context and structure sufficient to provide evidence of the activity.[cxxxviii]

8.7 In DRP 4 the Commission suggested that the definition of 'record' should include the following characteristics

(a) its scope must be flexible enough to take clear and effective account of current and emerging technology
(b) it should be expressed in the simplest possible way conducive to ready comprehension and practical application by all users
(c) it should be framed in a way which recognises the evidential nature of records
(d) it should make clear that the technology essential to maintaining the accessibility of the record is part of the record (thus, for example, the software essential to the functionality of an electronic record should come within the definition)
(e) intended exceptions to the general definition should be expressly and unambiguously excluded from the definition (thus those books, maps, films, works of art, museum exhibits and models that the Commission proposed should be excluded would be so excluded by an explicit exception incorporated in a schedule to the legislation)
(f) in an environment of rapidly developing technology and changing needs, a mechanism should be included to permit the definition to take account of new forms of record and to exclude records that may, for policy reasons, need to be excepted (this could be achieved by including a power to achieve these ends by regulation).

8.8 A number of submissions in response to DRP 4 commented on these suggested characteristics, although there was a misapprehension in some responses that the Commission had intended that such criteria should be included in the legislation itself. The Commission's intention was merely to set out the issues which should be taken into account in drafting a definition for new legislation.

8.9 Two issues attracted particular comment. Firstly, while there was an appreciation of the intention of the proposal that the definition of 'record' should include the technology essential to maintaining the accessibility of the record, it was suggested that this might cause significant difficulties in application.

> It is a good principle that the technology required to access a record must be retained and available if the record is to be used. It is a very different matter to define the technology as part of the record. We would recommend deleting this and, instead, including a requirement in the legislation that agencies, or the NAA, as the case may be, maintain the means to access a technology dependent record.[cxxxix]

The Commission has addressed the need to provide statutory protection for the technology necessary to access records effectively in Chapter 14.

8.10 The second issue to attract comment was the suggested use of the definition of 'record' to exclude from the coverage of the legislation the generality of material such as books, maps, films and paintings. The Commission was aware that in some circumstances such material may have the essential characteristics of records and thus need to be included within the scope of the legislation. This could be achieved either by a general regulation specifying the circumstances in which such material meets the definition of 'record' or by regulations dealing with specific cases. The Commission's objective was to ensure that the concerns which arose in this area

when the present legislation was under consideration did not reappear. The present legislation addresses these concerns through the 'exempt material' definition in section 3(1),[cxl] which specifically excludes from the definition of 'Commonwealth record' the generality of holdings of the Commonwealth collecting institutions. The Commission's preference remains for this issue to be dealt with within the framework of the definition of 'record' rather than through a separate provision. However, if this proves impracticable, the present 'exempt material' provisions should be retained.

8.11 The Commission believes that the Standards Australia definition of 'record' is the most appropriate basis for the definition of 'record' in the new legislation. The Standards Australia definition has been endorsed by the NAA, the Australian Society of Archivists, the Australian Council on Archives and the Records Management Association of Australia.[cxli]

Recommendation 24. The term 'record' should be defined as 'recorded information, in any form, including data in computer systems, created or received or maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence[cxlii] of such activity'.

The definition should expressly exclude material such as books, maps, films and paintings, unless such material, in the opinion of the NAA, forms an integral part of a Commonwealth recordkeeping system or is declared by regulation to be a record.

Defining a Commonwealth record

The present property based definition of Commonwealth record

8.12 Section 3(1) of the present Act defines a 'Commonwealth record' as

> (a) a record that is the property of the Commonwealth or of a Commonwealth institution; or
> (b) a record that is deemed to be a Commonwealth record by virtue of a regulation under sub-section (6) or by virtue of section 22,[cxliii]
> but does not include a record that is exempt material[cxliv] or is a register or guide maintained in accordance with Part VIII;[cxlv]

8.13 The use of a property based definition such as that in section 3(1) is not universal in archival legislation. The most common alternative is an administrative provenance definition, such as was proposed in the original drafting instructions for the Archives Bill in 1974. The suggested formula was 'all records of any kind made or received by any Australian [ie Commonwealth] Government agency in the conduct of its affairs'. However, successive drafts of the Bill in 1974–75 moved from a

provenance definition through a custodial definition ('a record that is held in official custody on behalf of the government') to the present property definition. Anecdotal evidence from those involved in drafting the legislation is that the property definition was preferred because

- ownership was a term which was generally understood and which defined clearly a body of material to which the legislation would apply
- as owner of the records the Commonwealth already exercised many of the rights (for example, in relation to custody, disposal and public access) proposed to be included in the legislation
- if a definition other than that of ownership was to be adopted, confusion might arise between records which fell within the definition in the legislation and those over which the Commonwealth claimed a right of ownership
- the strong opposition in some quarters to the inclusion in the legislation of provisions for the recovery of Commonwealth records made a property definition desirable so that recovery could be pursued outside the legislation on the basis of common law ownership rights.

8.14 The property based definition appears to have worked adequately in most areas of the Act's operation and submissions to IP 19 did not indicate a significant degree of interest in change. However, there have been difficulties with the property definition in one area, namely the recovery of official records which have strayed into private hands. On the rare occasions where the Commonwealth has sought to recover what it considers to be official records from private custodians, it has proved to be impracticable to establish that the Commonwealth still owns the records concerned. The recovery issue is discussed in more detail in Chapter 11.

8.15 A second area in which a property based definition of 'Commonwealth record' has the potential to cause difficulties is that of records which have been created by a non-Commonwealth authority or individual without an intention to transmit ownership of the records concerned to the Commonwealth. Examples include records seized by Commonwealth law enforcement, military or security authorities from individuals, organisations, enemy consulates or enemy forces. A similar situation could arise with records transmitted to the Commonwealth with an express caveat that they were to remain the property of the originator, although in such a case clear evidence would be required of the intentions of the originator and of the continuing relevance of the caveat.

Should a provenance based definition of Commonwealth record be adopted?

8.16 In DRP 4 the Commission raised, as an issue for further consideration, the question of whether the present property based definition of Commonwealth record should be replaced by a provenance based definition. Only a few submissions responded to this issue and those that did favoured the change. The Australian Society of Archivists

> ... strongly supports the use of provenance as the basis for ownership and recovery of records. Provenance is one of the fundamental archival principles. It is the very nature of records that they have a provenance and therefore it is sensible that this characteristic be used as the basis for describing ownership.[cxlvi]

8.17 The provenance definition is increasingly being favoured in other Australian jurisdictions, in part because the task of recovering records which have passed out of official custody has been a larger problem in those jurisdictions. For example, the most recently enacted State legislation, the South Australian *State Records Act 1987*, defines an 'official record' as

> a record made or received by an agency in the conduct of its business, but does not include —
>
> (a) a record made or received by an agency for delivery or transmission to another person or body (other than an agency)[cxlvii] and so delivered or transmitted; or
> (b) a record made by an agency as a draft only and not for further use or reference; or
> (c) a record received into or made for the collection of a library, museum or art gallery and not otherwise associated with the business of the agency; or
> (d) a Commonwealth record as defined by the *Archives Act 1983* ...
> (e) a record that has been transferred to the Commonwealth.

8.18 While the legislation could operate effectively with either a property or a provenance definition of 'Commonwealth record', the Commission is inclined to favour a provenance definition. In the first place, the adoption of such a definition would overcome the current lacuna that exists in relation to the legislative coverage of records in Commonwealth custody that are plainly or arguably not owned by the Commonwealth, but which should be subject nevertheless to a Commonwealth recordkeeping regime.

8.19 Secondly, the ability to recover Commonwealth records would be enhanced, as recovery powers would no longer be subject to uncertainty by reason of doubts regarding the ownership of the records. As discussed in DRP 4 and further in Chapter 11, account would need to be taken of the need to provide compensation on just terms in appropriate cases.

8.20 Thirdly, the adoption of a provenance approach would bring the Commonwealth regime more into line with archival regimes in other Australian and comparable overseas jurisdictions.

Recommendation 25. The legislation should adopt a provenance definition under which the term 'Commonwealth record' embraces records made or received by Commonwealth agencies in the course of their business, regardless of whether the records are owned by the Common1wealth or by some other organisation or person. The definition would exclude records made by Commonwealth agencies for transmission to some other organisation or person, provided that this transmission had actually taken place.

The position of foreign originated material in a provenance based definition

8.21 The agencies of the Australian Intelligence Community (AIC) supported a provenance based definition in principle, but expressed concern about the status of security and intelligence material provided to Australian agencies by foreign governments.

> The provenance definition poses very real problems. It does not appear to recognise that there are agencies that receive information which is identifiably originated by foreign governments and international organisations or that the information is provided under agreements and arrangements which determine its management. There is no difficulty with this definition where information is created by an agency of the Commonwealth: there is significant difficulty with respect to information received by the Commonwealth, at least for agencies dealing with national security issues.
>
> ... the provenance based definition would appear to be the preferred option in the archival context since it relates more closely to technical archival principles. As well, it appears to be more appropriate in relation to electronic information. Despite this advantage, it is not supportable in the context of intelligence and security records unless there is a specific exclusion for information received under arrangements with foreign governments or international organisations. As well as providing the required protection, such an exclusion should drive the management of the records in such a way as to result ultimately in fewer exemptions from access under the confidentiality provisions of the exemption categories.[cxlviii]

8.22 The Department of Foreign Affairs and Trade also linked its support for a provenance based definition to a requirement that

> adequate legislative protection is provided for foreign and shared material received by the Commonwealth. In such cases, the physical document is Commonwealth property, but the originating government or organisation retains rights in the content, regardless of the age of the document.[cxlix]

8.23 The above concerns, as understood by the Commission, are based on two premises

- firstly, that the effect of a property based definition is to place certain sensitive foreign government sourced material outside the access provisions of the current Act, thus allowing the AIC to honour its protective obligations without the need to negotiate any statutory difficulties, in particular access requests, that might otherwise arise under the Archives Act
- secondly, that a provenance based definition would, in the absence of express exemption for such information, have the opposite effect of bringing such information within the access regime of the Act, thereby placing the protection of the information outside the exclusive control of the AIC.

8.24 The Commission notes, however, that the first of the above points assumes that, notwithstanding the passage of more than 30 years, property will still vest in the foreign government and not in the Commonwealth. Such an assumption would need to be tested carefully in a particular case and not taken for granted.

8.25 As for the second point, the Commission regards it as entirely appropriate in principle that such records, if still held in Commonwealth recordkeeping systems after 30 years, should be subject to the full application of the Act. Such, indeed, is one of the principal virtues of legislation based on a provenance approach. In the Commission's view, as a matter of principle, the protection of such records should then properly fall to be determined under the exemption regime of the legislation.

8.26 The Commission remains unconvinced, therefore, of the need for such records to be exempted from a provenance based regime. On the other hand, it recognises that, without access to and familiarity with the security problems associated with records of the kinds that are of concern to the AIC, it should not, in this report, express any final judgment on the matter. This is, however, an issue that would need to be fully canvassed at the highest policy level when the new legislation is being developed.

Recommendation 26. The question whether records provided by foreign governments under specific agreements should be excluded from a provenance based regime should be fully canvassed at the highest policy level when the new legislation is being developed.

The power to declare that records are no longer Commonwealth records

8.27 If a provenance definition is adopted, the legislation will need to include a provision enabling the NAA to declare that specified records are no longer Commonwealth records. This would permit the NAA to authorise, where appropriate, the transfer of records relating to a privatised government business enterprise to the new owner of that enterprise. It would also permit records to be returned to their originator in cases in which this was appropriate.

Recommendation 27. The legislation should include a provision enabling the NAA to formally declare that specified records are no longer Commonwealth records.

Records of 'enduring' or 'archival' value

8.28 The great majority of records created by the Commonwealth will sooner or later be destroyed because they are no longer required for current administrative purposes and do not justify indefinite retention for evidential, research or other purposes. In DRP 4 the Commission suggested that the legislation should include the

concept of records of 'enduring' value, which would identify those records which are of sufficient value to merit at least indefinite retention. The Commission's reasoning was that, while the legislation should continue to apply to all Commonwealth records, certain additional provisions might be appropriate in areas such as recovery and custody for that small proportion of Commonwealth records which has traditionally been described as being of 'permanent' value and which is now more commonly described as being of 'enduring' or 'continuing' value.

8.29 The concept of 'enduring' value attracted substantial comment from professional archivists, not only in relation to the basic concept, but also in relation to the most appropriate descriptor for it and its application in specific chapters of DRP4. The Commission acknowledges that there were some inconsistencies in the use of the term 'enduring' in DRP 4 and these have been addressed in this Report.

8.30 The NSW Branch of the Australian Society of Archivists expressed concern that

> ... 'enduring value' is being used as a substitute for 'permanent' without a real shift in the underlying concept. The term 'continuing', however, is associated with essential periodic reevaluation. ASA NSW prefers the use of 'continuing' as a reflection of a continuum based approach to managing all records, not only those designated as 'archival'. On a purely semantic level, the use of the word 'enduring' seems to suggest a tolerance of something rather unpleasant, rather than simply denoting ongoing existence.[cl]

8.31 Australian Archives supported the use of a specific definition for that small proportion of the totality of Commonwealth records which merits indefinite retention.

> If the point behind its repeated use is to stress that within the universe of Commonwealth records there are a small number which are (or are going to be) very significant and that the NAA should take deliberate measures to ensure they are identified, captured and preserved, then we support this. And it is appropriate to single them out by a special name.[cli]

8.32 The Archives did, however, make two specific points.

- The concept should apply only to records traditionally described as being of 'permanent' value, and not to those traditionally described as being of 'long term temporary' value: for this reason the definition of 'enduring' value proposed by the Commission in DRP 4 was too broad.
- Whereas in its response to IP 19 the Archives preferred the term 'continuing' to 'enduring' value, it now favoured the term 'archival record'.

8.33 The Commission maintains its view that the legislation should include a specific definition of that group of records which justifies indefinite retention. This does not mean that records assessed as falling into this category can never be reevaluated and, if appropriate, disposed of. The Commission accepts that the term 'archival' is preferable to 'enduring', but prefers the wording 'records of archival value' to add emphasis to their value.

8.34 If the concept of 'records of archival value' is to be recognised in the legislation it must also be defined. Definitions of such concepts are always difficult to achieve, since they must avoid being either unduly restrictive or so open that they have little meaning.

8.35 Section 3(2) of the Act defines the 'archival resources of the Commonwealth' as

> such Commonwealth records and other material as are of national significance or public interest and relate to —
> (a) the history or government of Australia;
> (b) the legal basis, origin, development, organization or activities of the Commonwealth or of a Commonwealth institution;
> (c) a person who is, or has at any time been, associated with a Commonwealth institution;
> (d) the history or government of a Territory; or
> (e) an international or other organization the membership of which includes, or has included, the Commonwealth or a Commonwealth institution.

8.36 In drafting DRP 4 the Commission read 'the archival resources of the Commonwealth' as constituting not only a jurisdictional definition but also an attempt to identify, at least in a broad way, the types of record which were most likely to justify long term retention. Chris Hurley, who was involved in the drafting of the present legislation, has advised that this was not in fact the intention of this provision.

> [N]othing in the definition of 'archival resources of the Commonwealth' implies that retention value has anything to do with it — a piece of current ephemera (while it exists) is just as much part of the archival resources of the Commonwealth as the most prized non current permanent record.[clii]

8.37 While the Commission does not question the original intention of the definition, the fact remains that it has tended to be regarded also as the present Act's only attempt to define broadly that portion of Commonwealth records which have 'archival' value. For this reason, it would be appropriate to include some elements of the definition of 'archival resources of the Commonwealth' in a new and more substantial definition of 'records of archival value'.

8.38 The Commission recommends that the legislation should define 'records of archival value' as

> Records which are of national significance or public interest and which relate to
> - the history or government of Australia
> - the legal basis, origin, development, organisation or activities of the Commonwealth or of a Commonwealth institution
> - the development and implementation of the policies of the Commonwealth government
> - individual citizens of the Commonwealth where these personal records contribute significantly to an understanding of the history of the Commonwealth or its administration.

Recommendation 28. The legislation should include the term 'records of archival value' to identify those records which justify retention beyond current administrative needs and which require to be managed as archival records.

Recommendation 29. Records of archival value should be defined as records which are of national significance or public interest and which relate to

- the history or government of Australia
- the legal basis, origin, development, organisation or activities of the Commonwealth or of a Commonwealth institution
- the development and implementation of the policies of the Commonwealth government
- individual citizens of the Commonwealth where these personal records contribute significantly to an understanding of the history of the Commonwealth or its administration.

The records of Commonwealth agencies which are corporatised or privatised

8.39 In defining a Commonwealth record as one that is the property of the Commonwealth or of a Commonwealth institution,[cliii] the Act recognises that, while most Commonwealth property is owned by the Commonwealth as a whole, there are some Commonwealth institutions which own property in their own right. The definition of 'Commonwealth institution' includes the official establishment of the Governor-General, the Executive Council, the Parliament, a Department, the Commonwealth Courts, an authority of the Commonwealth and the Administration of an external territory other than Norfolk Island.

8.40 The Act originally defined 'authority of the Commonwealth' as

> (a) an authority, body, tribunal or organization, whether incorporated or unincorporated, established for a public purpose ...
> (b) the holder of a prescribed office under the Commonwealth; or
> (c) a prescribed company or association over which the Commonwealth is in a position to exercise control ...

In 1995 paragraph (c) was amended to read 'a Commonwealth controlled company or a Commonwealth controlled association'.

8.41 Australian Archives became aware in 1989 of the archival implications of legislation enacted in 1988–89 for the corporatisation of Australian Airlines, the Australian National Line, the Overseas Telecommunications Commission and the Snowy Mountains Engineering Corporation. The legislation included provisions to the effect that the companies which it created were to be taken as not having been incorporated or established for a public purpose. Similar provisions were included in

legislation enacted in 1990 for the corporatisation of the Commonwealth Bank, Commonwealth Funds Management and the Commonwealth Serum Laboratories. The effect of these provisions was to remove all records of these enterprises from the Act's jurisdiction, including records created prior to corporatisation, because the enterprises no longer fell within the definition of 'authority of the Commonwealth' in section 3(1) unless they were prescribed to be so by regulation. The records of Commonwealth Funds Management Limited and the Australian and Overseas Telecommunications Corporation Limited (now Telstra) were restored to the coverage of the Act by regulation in 1992.

8.42 A series of amendments was enacted in 1995 to ensure that the records of Commonwealth controlled companies continued to be subject to the Act. The amendments did not, however, seek to restore to the Act's jurisdiction those companies which had already been removed from it and which had not been restored by regulation. Details of these amendments are set out in paragraph 8.22 of DRP 4.

8.43 The Commission suggested in DRP 4 that the 1995 amendments were unduly complicated and likely to cause confusion. The Commission endorsed the basic principles that records of Commonwealth controlled companies should be subject to the legislation and that, if a company ceased to be controlled by the Commonwealth, the records which it had created up to that time should continue to be Commonwealth records. The Commission also suggested a systematic regime to support these principles. Submissions in response to DRP 4 supported the strategy suggested by the Commission.[cliv]

Recommendation 30. Commonwealth controlled associations and companies should be subject to the legislation and included in the definition of 'authority of the Commonwealth' unless they are specifically excluded from it by regulation or by a provision of some other legislation.

Recommendation 31. If a company or association ceases to be a Commonwealth controlled company or association, the records which it had created prior to that time should continue to be Commonwealth records and subject to the legislation.

Recommendation 32. The NAA may, in respect of records of a former Commonwealth controlled company or association

- approve the transfer of the custody or ownership of any part or parts of the records as are not of archival value
- lend any part or parts of those records as are of archival value to the new owners, subject to
  - inspection by the NAA and adherence to any conditions imposed by it
  - an absolute prohibition on the transfer of custody of records of more than a specified age

Recommendation 33. 'Controlling agency' responsibility for the existing records of authorities of the Commonwealth which are privatised should pass to the NAA if there is no other authority of the Commonwealth whose current responsibilities reasonably relate to the function concerned.

ENDNOTES

9. Creating and managing current records

Why does the Commonwealth need to keep records?

9.1 The Australian Council of Archives sees the role of recordkeeping as encompassing three distinct domains.

> **The Business Domain**: records are principally kept by any organisation or individual to support their business activities. Decision makers need records to provide precedent for subsequent decisions, to provide details of actions undertaken in case of challenge and to prove that required action was actually carried out. Service providers need records of dealings with customers to support claims for payment and to support further service. Individuals need records to ensure their entitlements and the obligations within, and between, organisations and families. Records support the furtherance of all business activities undertaken by organisations or individuals.
>
> **The Accountability Domain**: records are an indispensable ingredient in organisational accountability, both internal (such as reporting relationships) and external (to regulators, customers, shareholders and the law). Records show whether the organisation, or individuals in it, have defined legal, organisational, social, or moral obligations in specific cases. In all accountability forums, records are consulted as proof of activity by senior managers, auditors, Royal Commissioners, concerned citizens or by anyone inquiring into a decision, a process or the performance of an organisation or an individual.
>
> **The Cultural Domain**: when used for any purpose beyond the support of the business activity which created them, or accountability for that business activity, records may be regarded as becoming part of the resources available to society to account for its collective behaviour. The use of records as a social resource encompasses research into public health, environmental concerns, scientific endeavours, or sociological questions. Records are also used as a social resource to support the study of history and historical trends as a part of public education or private research.[clv]

9.2 The draft documentation standard issued by Australian Archives in 1995 summarises the Commonwealth's recordkeeping objectives as

- accountability for decision making processes in accordance with the law
- compliance with statutes, regulations, instructions, guidelines and other rules which make it mandatory for Commonwealth agencies to create records
- accountability for the utilisation of resources both internally and to the Parliament and ultimately the people
- ensuring that the interests of the government and of individual citizens to substantiate their rights and entitlements are protected
- providing evidence of individual and corporate performance
- ensuring that a record of significant government policies and activities is kept for posterity
- providing corporate memory and a record of business transactions over time

- recording communications in and between organisations.[clvi]

9.3 The Commission has already recommended that one of the principal elements of an effective Commonwealth archival system should be a requirement to create, maintain and make accessible full and accurate records through reliable systems.[clvii] The need for a specific Commonwealth recordkeeping obligation was endorsed in 1994 by the Public Service Act Review Group, which recommended that a new Commonwealth Public Service Act should specify among the responsibilities of Secretaries of Commonwealth departments an obligation to 'ensure that proper standards are maintained at all times in the creation, management, maintenance and retention of Commonwealth records'.[clviii] However, the Public Service Bill introduced into the Parliament in June 1997 contained no provisions relating to recordkeeping. In their 1995 review of the FOI Act, the Commission and the Administrative Review Council recommended that

> The Archives Act should impose an obligation on the chief executive officer of an agency to ensure the creation of such records as are necessary to document adequately government functions, policies, decisions, procedures, and transactions and to ensure that records in the agency's custody are maintained in good order and condition.[clix]

9.4 The Commission suggested in DRP 4 that the recordkeeping obligations of Commonwealth agencies are so important that they should be included in the archival legislation. The Commission also suggested that the legislation should require chief executive officers to ensure that an adequate standard of record-keeping is achieved in the agencies for which they are responsible. This recommendation was endorsed by all submissions in response to DRP 4 which commented on it.

9.5 Some submissions also urged that those who create records should have regard to the need to ensure that archival objectives are addressed.

> It is important that at some stage in the legislation the point should be made that the ultimate importance of archival considerations should be borne in mind when archives are created, as records of significant events. Thus the ultimate claims of future historians and other investigators can be considered at the point of formation of the record.[clx]

9.6 The Commission has addressed this point in the third objective of the following recommendation.

> **Recommendation 34**. The legislation should expressly place responsibility on the chief executive officers of Commonwealth agencies to ensure that adequate records are created and maintained.
>
> It should also state briefly that the main objectives of recordkeeping are
> - to ensure that the Commonwealth administration is conducted efficiently and accountably
> - to document the rights and obligations of individual citizens
> - to maintain a record of significant Commonwealth policies and activities.

Does the Commonwealth have a recordkeeping problem?

9.7 Most Australians become aware of failings in Commonwealth recordkeeping only when specific issues are the subject of Parliamentary or media interest, or when some problem arises with records relating to their own affairs. However, written and oral submissions made to the Commission suggest that the problems of mediocre and fragmented recordkeeping are so widespread within the Commonwealth administration that they have come to be accepted with a degree of fatalism. Australian Archives' submission suggested that

> At the time when the Archives legislation was being enacted, the last vestiges of systematic recordkeeping and high level managerial support for that process were disappearing from most Commonwealth agencies. Their decline reflects a combination of factors, some of which had their inception as far back as the 1960s. Factors such as the poor profile of the activity, the consequent loss of any ongoing expertise, the impact of the continued emphasis on streamlining and cost efficiencies, and the disappearance of any formal central agency responsibility for recordkeeping all contributed to the demise of recordkeeping as a core responsibility of agencies and as one they would continue to hold in high importance.
>
> The early 1980s was also the period when devolution became popular as a method of departmental management. In practice what occurred in regard to recordkeeping in agencies was often not devolution but effectively an abandonment of responsibility in the name of managerial efficiency. The result is that across Commonwealth agencies there has been a systemic failure in records management. Creation of proper records is no longer an essential element in much policy development and administration but rather a bothersome adjunct which attracts only grudging attention, usually during a crisis.[clxi]

9.8 Eighteen of the reports issued by the Australian National Audit Office (ANAO) in 1995–1996 made reference to problems related to inadequate recordkeeping. In some cases the ANAO found it difficult to complete its auditing functions satisfactorily because of recordkeeping failures.

9.9 In January 1997 the ANAO commenced a preliminary study to review the policies, strategies and administrative practices of five Commonwealth agencies to assess the effectiveness and relative efficiency of their electronic and hard copy records management. In the light of the findings of this study, the ANAO undertook a detailed records management audit of six agencies covering a wide range of Commonwealth functions. A draft report on the latter audit is currently being prepared by the Auditor-General and it is likely that it will be tabled in the Parliament later in 1998.

9.10 In recent years the Commonwealth Ombudsman has drawn attention to a range of recordkeeping problems. In the annual report for 1994–1995, the Ombudsman noted that

> The means by which information is generated and disseminated has also expanded significantly with computerisation and enhanced information technology. A huge variety of software applications; the

use of discs, CD ROM, and video; expansion of telecommunications networks and their integration with data transfer systems; a greater reliance on oral advice to the public; and the use of satellite transponders, optic fibre cables, information networks (such as Internet) and E-mail, have all contributed to the establishment of alternative means for distributing, recording and storing information.

For those involved in the design, development, implementation and administration of government programs and services — and for those charged with administrative review — understanding and dealing with the use of information and its delivery media, and the potential for abuse, pose a major challenge.

As well as the ability to provide an enhanced service to consumers of government services, this new information revolution raises some parallel concerns such as

- the use to which stored information is put
- who has access to that information — both within and from outside the agency
- the ease of creating parallel record systems
- the difficulty of tracing documents and the importance of audit trails, for example, where officials keep records on PC hard drives
- a lack of attention to proper electronic records management systems to replace paper based systems; and, ironically,
- a reduction in the recording of important information and advice.[clxii]

9.11 The Commonwealth Ombudsman has pointed out that particular problems have arisen over the failure to record oral advice.

Where this office investigates a complaint, it is not uncommon to find that there is no record on a client's file of an alleged conversation, or of the advice provided. Clients themselves often do not perceive the need to make a record of the advice given to them or the person who gave it. Unless they have experience to the contrary, they generally assume that any advice given to them will be accurate and reliable and will be recorded by the agency if necessary.

The result is that clients who receive incorrect or incomplete advice often find it difficult to 'prove' they received the advice, because no record of their enquiry exists.[clxiii]

9.12 The problems caused by a lack of consistent guidance and training for recordkeepers have been compounded by the fact that most Commonwealth agencies are currently operating a mixture of paper based and electronic recordkeeping systems. Links between these systems are often inadequate or non-existent, while many records which are produced on personal computers and transmitted by electronic mail may not become part of a formal recordkeeping system at all.

The need for a study of Commonwealth recordkeeping

9.13 The Commission has not found any estimate of the total annual cost of records management to Commonwealth agencies, although it is obviously far greater than the cost of operating Australian Archives.[clxiv] It is characteristic of the *laissez faire* approach to Commonwealth recordkeeping noted elsewhere in this Report[clxv] that this task has never been attempted and that, in consequence, there is nothing apart from anecdotal evidence to indicate whether the Commonwealth is receiving good value for the very substantial resources this function clearly absorbs. The

Commission suggested in DRP 4 that the present sample study of recordkeeping being undertaken by the Auditor-General should be followed by a major investigation of how the Commonwealth can achieve a high quality integrated recordkeeping system which will satisfactorily meet the needs of the coming century.

9.14 The Australian Society of Archivists supported the undertaking of a study of recordkeeping practice in the Commonwealth jurisdiction.[clxvi] Australian Archives however, disagreed.

> The Archives believes that the Commission underestimates the logistics of such an exercise and the complexities of recordkeeping across all Commonwealth agencies which would make a single study both difficult and probably unmanageable. The Archives is keenly aware of the need to develop the empirical and anecdotal knowledge of the state of Commonwealth recordkeeping but believes there are several avenues for doing this, such as the outcome of the Auditor-General's work, agency specific consultancies and surveys with specific purposes, all of which would provide the required evidence in more useful and more manageable forms.[clxvii]

9.15 While the Commission notes the concerns raised by Australian Archives, the fact remains that the Commonwealth has little idea of what it is spending on recordkeeping or of what it is receiving in return for that expenditure. The Commission does not see the proposed study as one that would absorb large resources, but rather one that would draw together and evaluate much information that is already available. Some of this work will need to be undertaken in any case by the NAA as it develops recordkeeping standards. As Australian Archives notes, the present study by the Auditor-General is a useful beginning. The Commission recommends, nevertheless, that it be followed by a more substantial study, perhaps undertaken jointly by the Auditor-General and the NAA, in consultation with the Department of Finance and Administration.

> **Recommendation 35.** As a matter of priority, the Auditor-General and the NAA, in consultation with the Department of Finance and Administration, should coordinate a high level study to identify how Commonwealth recordkeeping requirements can be met in a more efficient, effective and integrated manner.

Standards for the creation and maintenance of records

9.16 The Commission was impressed by the degree of concern displayed across the full range of its consultative processes about current failings in Commonwealth recordkeeping, not least by Commonwealth agencies themselves. While there is no reliable evidence of the cost of these failings, there can be little doubt that it is very substantial in terms of both resources and of inadequately informed decision making.

9.17 In IP 19 the Commission sought views on whether it would be either feasible or desirable to establish uniform standards for the creation and management of

Commonwealth records. Such standards would operate within the framework of the statutory obligation to create and maintain adequate records. Many of the written submissions dealt with this issue. It was also covered extensively in oral consultations. The predominant view was that the issuing of general standards for the creation and management of records would be a significant step towards improving Commonwealth recordkeeping.

9.18 The Inspector-General of Intelligence and Security wrote

> I support ... giving the Director-General of Archives a stronger role in laying down standards of records management backed up by legislative authority to ensure their compliance. Some may argue that this is inconsistent with the prevailing trend in public administration which is encouraging the development of more devolved and more diverse administrative systems with the primary emphasis on the role of the chief executive officer of the department or agency as the decision-maker. I would argue that these developments strengthen the case for central policy control of the essential elements needed to guarantee the primacy of preservation of those Commonwealth records judged important enough to warrant permanent retention.[clxviii]

9.19 The Department of Defence suggested that

> It is clearly essential for legislation to exist to provide a clear statement of goals directed specifically towards the management of Commonwealth records. Similarly, it must nominate an authority responsible for developing and monitoring those goals in order to achieve the desirable standards of recordkeeping. While standards and practices have improved greatly with respect to the management of archival records, as a result of the focus of the legislation, the emphasis has been on this final stage of recordkeeping. It does, however, seem illogical to focus on managing the endpoint without seeking to influence the process which produces the records. Management of the records from the point of creation should result not only in a much better outcome but also in greater efficiencies in the process itself.[clxix]

9.20 Submissions expressed a range of views as to whether records management standards for Commonwealth agencies subject to the Act should be advisory or mandatory. Supporters of mandatory standards were in a substantial majority, particularly among archivists and historians. Mandatory standards were also endorsed by the majority of Commonwealth agencies which made written submissions, provided that the standards were not so detailed as to be inflexible.

> To create standards under legislative authority ... which are not mandatory would appear to be an exercise in futility. If the standards are to be created ... then they should be enforced across the Commonwealth public service. This would ensure continuity and would avoid unnecessary confusion arising from divergent practices. In addition if agencies are required to comply with the disposal provisions of the [Archives] Act then logic would dictate that they also comply with record management practices.[clxx]

> A national archival authority should establish minimum standards for the creation, management and disposal of records. It would not be feasible to establish uniform standards ... given the diversity of functions undertaken by the various Commonwealth agencies. The minimum standards should be mandatory but any standards beyond that, especially where types of records are unique to a particular agency, should be advisory only.[clxxi]

9.21 Only two submitters, the Australian Federal Police[clxxii] and the Australian Taxation Office,[clxxiii] were opposed, as a matter of principle, to the issue of mandatory standards.

9.22 Several submissions emphasised the need to ensure that the standards were as flexible as possible, consistent with achieving their broad objectives.

> Standards need not simply be 'advisory' *or* 'mandatory'. Standards can express both broad mandatory principles and advice/guidance on how to structure activities so as to remain within the boundaries established by the principles. Best practice guidelines flowing from the principles would enable agencies to develop guidelines suitable to their operations.[clxxiv]

> The whole point of ... standards ... is that they represent a benchmark against which actual achievement can be measured. It is that process which allows for the flexibility. The standards themselves can embody a range of measures against which different levels of achievement can be assessed. All achievement (or failure) will be relative — not absolute. Meeting the highest level of the standards may not be appropriate for all agencies, but this flexibility can be achieved by nominating the extent to which standards must be adopted and met in specified areas — by introducing flexibility into the way the standards are applied — not by watering down the standards in the first place.

> The standards strategy is deliberately designed to avoid putting restrictions on agency flexibility. There is an emerging consensus on what the functional requirements for recordkeeping are. Standards built around these requirements are prescriptive as to **outcome** but wholly flexible as to **implementation**. Each agency is left to discover for itself how best to achieve the specified result. It is in that application of a standards regime that agencies will find the flexibility they need to conform to the regime. They will not be helped by standards which are themselves vague or confused in a mistaken attempt to give them flexibility.[clxxv]

9.23 Consistent with the general direction of views put in submissions to IP 19 and in consultations, the Commission suggested in DRP 4 that the basic recordkeeping obligations to be included in the legislation should be supported by more detailed recordkeeping standards issued by a single coordinating agency and binding on all Commonwealth agencies. The standards should be focused on outcomes rather than processes, so as to give agencies a clear vision of what needs to be achieved without locking them into detailed procedures which may or may not be appropriate to their particular circumstances. This recommendation was supported in responses to DRP 4.

9.24 In consultations, some agencies expressed concern that, if the NAA was given the power to issue mandatory standards, it would come to exercise a detailed control over their records management processes to the detriment of both the independence and efficiency of their operations.[clxxvi] This is not the Commission's intention or its expectation. The standards envisaged would set out in broad terms the objectives of good recordkeeping rather than prescribe in detail how individual systems were to be planned and managed. As the NAA developed its expertise, it would probably issue more detailed guidance on various aspects of recordkeeping, but this would be done in the form of advisory guidelines.

9.25 It was also suggested that the NAA's legitimate sphere of interest should be confined to the small proportion of records which are of archival value, so that it would be inappropriate for the NAA to issue mandatory standards for all records. However, in the Commission's view the mandatory standards should provide a framework for all Commonwealth recordkeeping. This is further discussed below in relation to the issue of who should have responsibility for issuing standards.[clxxvii]

9.26 Several submissions recommended that Commonwealth standards should be based on the AS 4390 standard for records management issued by Standards Australia in 1996,[clxxviii] supplemented as appropriate by additional standards dealing with issues of specific interest to the Commonwealth administration. It may well be that this is in practice what transpires. In the Commission's view, however it would be more flexible for the legislation to specify merely that the appropriate Commonwealth authority should issue standards, leaving the authority concerned to develop and/or endorse the most appropriate standards from the information and material available at the time.

Experience in other jurisdictions

9.27 There is substantial evidence to suggest that inadequate recordkeeping practices in Commonwealth agencies have parallels in other jurisdictions. The Western Australian Royal Commission into Commercial Activities of Government and Other Matters (generally known as the 'WA Inc' Royal Commission) found in 1992 that failures in recordkeeping were intimately involved with serious failings in the efficiency and probity of government. The Royal Commission cited examples of the destruction of potentially embarrassing departmental records on a large scale, inaccurate alteration of Cabinet records and the removal of key departmental files by departing ministers. The Royal Commission recommended the establishment of an independent State archives authority with an obligation to issue standards for the creation, maintenance and retention of records and a right to inspect the records of every government agency to ensure that the standards were being met.[clxxix]

9.28 The Royal Commission's recommendations were considered further by the Western Australian Commission on Government, which recommended in 1995 that a new Public Records Act should provide for the appointment of a Commissioner for Public Records, the holder of which office should be a person eligible for professional membership of the Australian Society of Archivists. The Commissioner would issue standards for the creation, maintenance, preservation, disposal and accessibility of public records and provide advice and training for their implementation. Public sector agencies would be required to keep full and accurate records in accordance with the standards and to be audited in accordance with performance measures developed by the Commissioner and the Auditor-General. The Commissioner would report directly to Parliament on any public office which compromised the integrity of public records.[clxxx] New archival legislation is still under consideration by the Western Australian Government in 1998.

9.29 In Queensland, the Electoral and Administrative Review Commission, which also had its origins in lapses in administrative standards, produced a draft Archives Bill in 1992. The Bill would require the proposed Queensland Archives Authority to issue standards governing the making, management and preservation of public records. The standards would be binding on public authorities. Under the 1995 draft of the Bill, the State Archivist would be permitted, but not required, to issue records management standards, but any standards that were issued would be binding on public authorities. The standards could include, *inter alia*, the issues about which public records would be required to be made and kept and the State Archivist would be required in making them to have regard to any law or convention under which a public authority is accountable, the needs of future historical research and any relevant standards issued by a professional body or by Standards Australia. New archival legislation is still under consideration by the Queensland Government in 1998.

9.30 Most other State archival jurisdictions have provided for, or propose to provide for, the issue of records management standards. The strongest of the present provisions are those of the Victorian *Public Records Act 1973* (as amended in 1986). The Keeper of Public Records is required to establish standards for the efficient management of public records, in particular with respect to their creation, maintenance and security, as well as their disposal and transfer to the Public Record Office. Those in charge of public offices are required to ensure that full and accurate records are made and kept. The South Australian *State Records Act 1997* empowers (but does not compel) the Manager of State Records to issue standards relating to records management practices. Such standards are binding on State agencies.

9.31 The Archives Authority of NSW has considered for possible inclusion in legislation a requirement that State Government agencies keep records which will fully and accurately record their functions, activities, transactions, operations, policies, decisions, procedures, affairs, administration and management. The obligation would extend to functions carried out on behalf of the agency.

Which authority should issue recordkeeping standards?

9.32 At the time the present Act was drafted the Public Service Board rather than Australian Archives was regarded as the authority responsible for policy on the management of current Commonwealth records. The Public Service Board was not very active in the records management area even prior to its abolition in 1987 and left behind no enduring recordkeeping requirements. Australian Archives has to some extent taken on *de facto* the role of providing records management advice to other Commonwealth agencies. Such advice has generally been provided on a limited basis, focusing in particular on agencies in which records management problems have caused difficulties in the disposal of records or in their transfer to archival custody.

9.33 In order to place the provision of records management advice on a more consistent basis, Australian Archives established a documentation standards project in 1994. This project has produced a report on the development of a documentation standard for Commonwealth agencies and a draft policy on the keeping of electronic records. Submissions indicate that this initiative has been received well, but that many agencies still feel an urgent need for more detailed guidance on the creation and management of their records. Most submissions suggested that the NAA should be given the power to issue records management standards, on the basis that, if recordkeeping is a continuum, a single agency should set at least broad standards for the management of each stage of that continuum.

9.34 Two Commonwealth agencies, the Australian Federal Police and the Australian Taxation Office, opposed the NAA assuming responsibility for records management standards. The Australian Federal Police suggested that the Office of Government Information Technology should recommend standards, since, in their view, Australian Archives was mainly concerned with records more than 30 years old.[clxxxi] The Australian Taxation Office argued that

> To impose standards across all agencies, whether mandatory or otherwise, to cover creation and management clearly supersedes existing responsibility. Creation is inadequately defined and infers control. Physical creation is within the business activities of agencies who must determine what records they require to discharge their respective functions ... agencies are not in the business of creating records merely to provide archival history. During the course of normal business operations certain events and transactions occur that logically lend themselves to continued management and subsequent transfer to archival custody. Records documenting such events need, upon identification, managing from within mainstream activity.
>
> These limitations severely restrict an unfettered right of a national archival authority to make all embracing standards. Indeed, the existing legislation requires promotion of efficient and economical recordkeeping. Any standard directly or indirectly increasing costs, given budgetary constraints upon agencies, must be challenged. Promotion of separate management strategies for archival records outside normal business activity falls into this category.[clxxxii]

9.35 The views of the Australian Federal Police and the Australian Taxation Office referred to above imply that the creation of 'archival' records is a separate and additional function from that of creating records for current business purposes. This view was contested by Robert Sharman.

> When Archives legislation was first passed in Australia, the archival record was thought of as a survivor from the administrative process — sometimes indeed a fortuitous survivor. Agencies of governments created, maintained, arranged and made use of records in the administrative areas in which they had competence: after that, some records were seen to have significance as archives and were handed over to the custody of institutions especially formed to 'curate' these survivals from a past existence. The experience of records managers and archivists has, since those times, produced convincing evidence that the preservation of just a few of these survivors is an inadequate and indeed fatally flawed mechanism for the retention of the evidence of what actually happened in the past. For what actually happened in the past depended upon the objectives, rights, functions and responsibilities of the agencies of government which created them, and of which they form part. Agencies must look at their need to provide documentation strategies to capture, for their present use in administration, essential evidence of their functions: these same strategies will be used to determine the future use of their records as accountability tools and as the means whereby

> scholarship will be able to reveal to society at large the ways in which these agencies fulfilled their role as instruments in a democratic and rerponsible government.[clxxxiii]

9.36 In the Commission's view the creation of 'archival' records is an integral part of a single recordkeeping continuum, oversight responsibility for which should reside in a single authority. A competently planned and managed current recordkeeping system is as essential to the creation of 'archival' records as it is to the efficient conduct of the current business of the agency concerned.

9.37 The 1995 review of the FOI Act by the Commission and the Administrative Review Council recommended that Australian Archives should assume formal responsibility for issuing recordkeeping standards for all Commonwealth agencies.[clxxxiv] Australian Archives has already issued a range of policies, standards and guidelines which deal with various aspects of recordkeeping. In most cases they are advisory material for use by the staff of the Archives and other Commonwealth agencies. Certain procedures for dealing with the appraisal and disposal of records and the handling of special access applications under section 56(2) have been promulgated as regulations under the Act. In addition, the records disposal authorities issued by the Archives, while not being legislative instruments, are based on the Archives' authority to regulate the disposal of records under section 24.

9.38 It is the Commission's view that the conferment on a single authority of the power to issue mandatory recordkeeping standards for all records is an essential step towards achieving a radical improvement in Commonwealth recordkeeping. The Commission suggested in DRP 4 that the NAA, because of its related responsibilities and its specialist knowledge of recordkeeping, would be the most logical authority to undertake this function. The recognition of the standard setting power in the legislation would enable material produced by the NAA to be promulgated in a more consistent and authoritative way. Most submissions in response to DRP 4 endorsed the Commission's suggestion. Eccleston Associates suggested the need for further consideration.

> The Commission should consider further the question of the relative merits of expanding a small, rather limited agency to one that is given a much broader span of responsibilities, albeit in a related field, and with 'a legislated license to intervene in the conduct of government administration across all agencies, and an invasive right to ensure compliance throughout Government and even beyond'.[clxxxv]

9.39 In maintaining its view that the NAA should have the power to issue mandatory recordkeeping standards and that such standards should apply to all records, the Commission is aware that it is presenting the authority with both an opportunity and a challenge. Australian Archives' staff have already been involved in a number of initiatives in electronic records management. If the NAA is to take on formally the role of advising and setting standards in this area, it must continue to develop the technical expertise currently within Australian Archives. In some cases it may need to guide the development of relevant technology as well as provide advice to Commonwealth agencies on available options. There is a clear need for the

organisation to bring together expertise in information technology and records management for the benefit of the Commonwealth as a whole.

9.40 Submissions in response to DRP 4 emphasised the importance of the NAA undertaking adequate consultations with other Commonwealth agencies before issuing recordkeeping standards.[clxxxvi] The Commission agrees that such consultation will be very important, not only to ensure that the most effective guidelines are developed, but also to pave the way for their implementation by individual agencies. While it would not be practicable to require the NAA to consult all Commonwealth agencies prior to issuing standards, the Commission recommends, nevertheless, that, as an administrative practice, the NAA should consult as widely as possible with Commonwealth agencies and other relevant organisations and individuals in the course of drafting standards. As legislative instruments, the standards would be subject, in any event, to a public consultative process and then to the scrutiny of the Parliament.

9.41 In DRP 4 the Commission recommended that the legislation not expressly compel the NAA to issue standards on any specific aspect of recording. It was not the intention of the Commission, however, to suggest that the NAA have a discretion whether to discharge its preferred function of comprehensive standards setting. Rather, it was the Commission's intention to draw attention to the need for the NAA to be able to exercise its own judgment regarding the particular matrix of standards that would be necessary to give effect to its statutory obligations.

9.42 On further consideration, the Commission believes this sense to be already clear from its recommendations as a whole, so as no longer to warrant such a specific recommendation.

Recommendation 36. The legislation should authorise the making by the NAA, as legislative instruments, of mandatory standards in relation to the creation, maintenance, disposal and preservation of Commonwealth records. The standards should be focused on outcomes rather than processes.

Chief executive officers of Commonwealth agencies would be responsible for compliance by their agencies with such standards.

Recommendation 37. As an administrative measure, the NAA should consult as widely as practicable with Commonwealth agencies and other relevant organisations and individuals in the course of drafting standards.

Which authority should audit the implementation of recordkeeping standards?

9.43 Submissions in response to both IP 19 and DRP 4 expressed a range of views as to who should audit and enforce recordkeeping standards. Some argued that the NAA should undertake this role because it would have the greatest expertise and because experience gained from auditing would assist the further development of standards. Others argued that there is an inherent conflict of interest between the roles of standard setter and auditor and that they must be undertaken by different authorities.

> It should be accepted as a principle that the body which develops and implements the recordkeeping standard should not also monitor compliance with the standard. Not to involve the national archival authority in implementation would be a waste of the expertise and experience the current organisation has accumulated. That points to the national archival authority's taking the role of setting and implementing a recordkeeping standard and another body's monitoring compliance. The appropriate independent body is the Auditor-General and the principal sanction would be naming in Parliament as not having met the standard. The current legislation imposes penalties for unlawful destruction of Commonwealth records. The courts should exercise the ultimate penalty by ruling against Commonwealth agencies which cannot produce records to support their position in contested matters of fact for which there ought to be evidence.[clxxxvii]

9.44 Australian Archives favoured the NAA taking on the standard setting role, but opposed its taking on the auditing role.

> The Archives believes that there should be a presumption against the standard setter and adviser also being the auditor. It would raise potential conflicts of interest that are not otherwise present in the relationship between the Archives and government agencies ...
>
> Some form of assessment/audit of the adequacy of recordkeeping practices in agencies is essential. The Archives believes that the primary control should be self-regulation against the recordkeeping principles and rules supported by the internal audit mechanisms, which the national archival authority and other bodies may be able to question and test. The framework of standards set by the archival authority and the responsibilities of CEOs in the area would do much to promote good recordkeeping practice. It may also be appropriate to utilise external scrutiny through existing audit mechanisms and traditional forms of public scrutiny such as Parliamentary committees. The Archives does not consider it appropriate for the archival legislation to provide for penalties, as they exist in other legislation for the same offences. There are other sanctions which can be used with more effect to improve recordkeeping by government agencies, such as reporting transgressions to Parliament.[clxxxviii]

9.45 The Archives Authority of New South Wales saw no difficulty in principle with the national archival authority undertaking the monitoring role, but suggested that, in practice, an existing body with a compliance monitoring role such as the Australian National Audit Office would be better placed in terms of resources, skills and acceptance by Commonwealth agencies to undertake the function.[clxxxix]

9.46 In the 1995 FOI Review, the Commission and the Administrative Review Council recommended that Australian Archives be given a statutory auditing role in relation to the records management standards which it set.[cxc] Since then, however, the Auditor-General has begun to address Commonwealth recordkeeping as an issue

in itself, as well as a factor in the investigation of other matters. The Auditor-General has wide investigatory powers[cxci] and will clearly continue to be involved in records related issues. The Commission therefore suggested in DRP 4 that it would be more effective for the Auditor-General to maintain and enhance the auditing role of his office in relation to records management rather than share it with the NAA. The findings of the Auditor-General's audits would, of course, be a significant input into the further development of recordkeeping standards by the NAA. This recommendation was generally supported in responses to DRP 4.[cxcii]

9.47 The Commission suggested in DRP 4 that the importance of the Auditor-General's role in auditing recordkeeping practices would be emphasised if the Act provided specifically that a performance audit as defined in section 5 of the *Auditor-General Act 1997* may include an audit of recordkeeping practices. The Australian National Audit Office has opposed this recommendation on the basis that

> ... the Auditor-General cannot accept any statutory requirement to audit recordkeeping standards being imposed upon him.
>
> Under the current Auditor-General Act 1997 any performance audit can include a consideration of record creation and records management processes. Records are important evidence which allow auditors to form an opinion on public administration. This means that audits inherently consider the standard of recordkeeping in an agency or part of an agency which is being audited.
>
> However, the ANAO is unable to support your draft recommendation 9.4 because the *Auditor-General Act 1997* states in section 8(4) that 'Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to any direction from anyone in relation to
>
> (a) whether or not a particular audit is to be conducted; or
> (b) the way in which a particular audit is to be conducted; or
> (c) the priority to be given to any particular matter.[cxciii]

9.48 The Commission is well aware of the injunction in the Auditor-General Act that guarantees the Auditor-General complete discretion in the exercise of his or her functions and powers. The burden of the Commission's assessment of what is needed is that the audit of compliance with mandatory recordkeeping standards should be included expressly amongst the functions of the Auditor-General, with the Auditor-General remaining free to determine how that audit should be conducted. While this is clearly consistent with what is stated in the first sentence of draft recommendation 9.4, the Commission concedes that the second sentence of that recommendation, in suggesting that the legislation might provide that a performance audit may include an audit of recordkeeping, may have confused matters.

9.49 The Department of Defence and the Australian Intelligence Community have noted that the Inspector-General of Intelligence and Security already exercises an oversight role in relation to the security and intelligence agencies which can involve the scrutiny of recordkeeping practices.[cxciv] However, the amendment proposed by the Commission for the Auditor-General Act is not intended to negate or duplicate any existing audit functions undertaken by other authorities. Rather, it would

complement the Auditor-General's role by ensuring that continuous compliance is maintained at the functional working level.

9.50 Section 28 of the present Archives Act provides that

> the Archives is entitled, for the purposes of this Act, to full and free access, at all reasonable times, to all Commonwealth records in the custody of a Commonwealth institution other than the Archives.

Even though the Auditor-General would be responsible for auditing the implementation of recordkeeping standards, the NAA should, in the Commission's view, retain a right of entry to other Commonwealth agencies to the extent necessary to ensure that records are being created and managed in accordance with the legislation and with standards issued under the legislation. This right should extend, where appropriate, to the premises of contractors storing records on behalf of Commonwealth agencies. The Commission's views in this regard were generally supported in responses to DRP 4.

Recommendation 38. Primary responsibility for auditing compliance with the standards promulgated under the new archives legislation should lie with the Auditor-General. The *Auditor-General Act 1997* should be amended to make it clear that the auditing of recordkeeping practices is one of the functions of the Auditor-General.

Recommendation 39. The NAA should retain a right of entry to the premises of other Commonwealth agencies, and those of contractors storing records on their behalf, to the extent that this is necessary to ensure that Commonwealth records are being created and managed in accordance with the legislation and with standards issued under the legislation.

Reporting on the state of Commonwealth recordkeeping

9.51 The Commission suggested in DRP 4 that the NAA should have a specific statutory requirement to report on the state of Commonwealth recordkeeping in its annual report to the minister, which would be tabled in Parliament. Even without a formal auditing role, the NAA will be likely to gather a substantial amount of information on this subject through its standard setting, monitoring and advisory roles and its own archival operations. Such a general reporting requirement would complement investigations in specific areas by the Auditor-General and encourage external scrutiny of a process in which all Australians have a significant interest. Submissions in response to DRP 4 generally supported this suggestion, but Eccleston Associates suggested that the NAA's reporting obligations should be confined to its own activities in order to avoid overlap with the work of the Auditor-General.[cxcv] The Commission maintains its view that the NAA's operations will bring together much

useful information about recordkeeping that should be shared with the Parliament and the community, and that a statutory reporting requirement is justified.

Recommendation 40. The NAA should be required to report on the state of Commonwealth recordkeeping in its annual report under the legislation.

ENDNOTES

10. Disposing of records — appraisal and sentencing

Introduction

10.1 In most organisations, whether government or private, large or small, the great majority of records created will sooner or later have so little value for either administrative or historical purposes that the cost of retaining them can no longer be justified. The process of determining how long specific records need to be retained is generally described as 'appraisal'. It is of crucial importance to the efficient achievement of all other archival processes. The object of appraisal is to establish consistent standards to determine an appropriate retention period for individual records. The assessment of records against these standards is known as 'sentencing', although the term 'disposal' is often used to encompass both the appraisal and sentencing processes.

The present disposal regime

10.2 Section 24 of the present Act gives Australian Archives a crucial role in the disposal of Commonwealth records. It is unlawful to destroy or otherwise dispose of, transfer the custody or ownership of, or damage or alter a Commonwealth record unless such an action is

- required by law
- approved by Australian Archives
- carried out in accordance with a practice approved by Australian Archives
- carried out in accordance with a normal administrative practice, other than a practice of which Australian Archives has notified its disapproval
- done to return Commonwealth records held by some other individual or organisation to Commonwealth custody.

10.3 The then Commonwealth National Library, which in relation to Commonwealth records was the predecessor of Australian Archives, became involved in the disposal of Commonwealth records in the 1940s. The initial stimulus for its involvement was to identify and preserve records worthy of permanent retention as part of the historical record of the Commonwealth. However, there was also a need to establish a general records disposal regime for the Commonwealth, not only to provide a context for the identification of records of archival value but also to provide an accountable housekeeping service for Commonwealth agencies which held large backlogs of non-current records. In consequence, the Archives Division of the National Library and its successors, the Commonwealth Archives Office and Australian Archives, developed a comprehensive disposal regime for all

Commonwealth records, taking into account administrative values as well as research and historical values. The Archives was not, however, permitted to authorise the disposal of records in its custody without the permission of the relevant agency.[cxcvi]

10.4 The Archives Act confirms Australian Archives' control over the disposal of Commonwealth records and lists among the functions of Australian Archives 'to ascertain the material that constitutes the archival resources of the Commonwealth'.[cxcvii]

10.5 However, the Act does not elaborate the objectives of the disposal process.

> The 1983 Act does not clearly articulate a purpose for disposal regulation outside of the need to evaluate records, prior to destruction, for their potential as archival resources of the Commonwealth. Only through subsection 5(2)(c)[cxcviii] could one argue that the disposal process involves other administrative considerations. This (and the 25 year interval before alterations are prohibited — s 26) indicates that the policy was designed to prevent disposal until their potential as 'archival resources' had been evaluated and that implementation need only be concerned with matters relevant to that issue and not, for example, with perceived 'administrative' needs. It is arguable, however, that 'an efficient and economical manner' encompasses consideration of Commonwealth needs which are wider than those within the purview of the responsible agency and also include the need to satisfy the interest of public accountability.[cxcix]

10.6 The present disposal authorisation process is based on Records Disposal Authorities (RDAs) which are approved by the Director-General of Australian Archives or his delegate. There are currently some 700 RDAs in operation, ranging in application from small groups of specialised records to the entire central recordkeeping systems of major agencies. In general, RDAs are drafted by the agency to whose records they relate, although the Archives may provide advice and training. When an RDA has been drafted it is submitted to the Archives for checking and formal approval. The Archives' assessment of the draft RDA includes consideration of its completeness and consistency, comparison with any other relevant RDAs and a check that all appraisal criteria, in particular research and display values, have been assessed adequately.

10.7 Some large groups of records are common to many Commonwealth agencies. In order to avoid each agency having to prepare essentially similar disposal authorities, the Archives issues General Disposal Authorities (GDAs) which may be used by any agency to dispose of records relating to certain functions or subjects. There are currently 13 GDAs which fall into three main groups

- housekeeping records relating to areas such as finance, property and personnel
- records of the regional, subregional or overseas offices of Commonwealth agencies
- records relating to functions common to a range of agencies, for example data matching, outsourcing or the gathering and dissemination of intelligence.

The GDAs are prepared mainly by Australian Archives staff, although agency staff are involved in providing advice and testing drafts. A high proportion of records covered by GDAs are of administrative value only or are duplicated by other records.

10.8 Australian Archives believes that the great majority of Commonwealth records are now covered by current disposal authorities, although no exact figures are available. Nor is there any reliable estimate either of the volume of Commonwealth records which exist or of the volume which is destroyed each year.

> ... for such an apparently important function, there is little research which can be drawn upon to analyze the effectiveness or otherwise of arrangements under the current Archives Act ... No empirical or other data appears to exist which might be used to evaluate the effectiveness of this regime. Inasmuch as performance indicators exist at all, these are articulated in terms of volumes of paper documents destroyed ...[cc]

Who should authorise the disposal of Commonwealth records?

10.9 The Commission asked in IP 19 whether the archival authority should continue to be the preeminent authority in relation to records disposal. The great majority of Commonwealth agencies which commented on the issue supported a continuation of the existing 'single mind' regime under which the NAA would have overall responsibility for appraisal policy and sole responsibility for authorising records disposal authorities. The Inspector-General of Intelligence and Security suggested that

> The power of the Director-General [of Australian Archives] to authorise disposal is crucial to protection of the Commonwealth's enduring record. The new Act should make this absolutely clear.[cci]

Australian Archives also recommended that it should retain sole responsibility for authorising the disposal of Commonwealth records and for setting down policy, standards and procedures.[ccii]

10.10 Agencies opposed to a central role for the NAA included the Australian Bureau of Statistics,[cciii] which suggested that the NAA's role be confined to records of archival value, and Australia Post[cciv] and the Australian Federal Police,[ccv] both of which would prefer to determine their own appraisal policies within general standards set by the NAA.

10.11 The most common criticism by agencies of the present system was that some draft disposal authorities took a long time to be approved by Australian Archives. This appears to be due to a combination of resource constraints, complex procedures and perhaps an over attention to fine detail. The lack of experienced appraisal staff in some agencies is probably a further complicating factor, since it is likely to result in draft authorities having to be extensively modified by the Archives. The need to update some of the existing General Disposal Authorities was also emphasised.

10.12 Other stakeholder groups also supported the NAA retaining a central role in the disposal process.

> By and large the practices developed by the Australian Archives to control the disposal of governmental records are adequate in providing a measure of central control or guidance whilst still allowing appropriate flexibility at the agency level. There are, however, dangers involved in laying down broad guidelines to be taken into account by agencies when making decisions about the disposal of a wide range of records of varying historical significance. Unless instructions about the treatment of records are framed in specific terms differing interpretations from agency to agency or by officers within a single agency are likely to lead to the loss of important material.[ccvi]

10.13 The Commission stated in DRP 4 that it had considered three options for a statutory framework for the disposal of records. The first was to maintain the present system, whereby the NAA would be responsible for authorising the disposal of all Commonwealth records. This would not necessarily require the NAA to issue detailed disposal authorities for all records; nor need it specify which agency was responsible for drafting those authorities. However, it would require the NAA to be satisfied that records had been evaluated adequately and to issue clear directions as to their retention or disposal.

10.14 The second option was that agencies be required to notify the NAA of any records for which they wished to undertake disposal action. The NAA would then identify those groups of records which it believed were likely to include material of archival value. The agency responsible for those records would be required to ensure that they were appraised and that the NAA approved a disposal authority for them. Records not identified by the NAA as likely to include records of archival value could be disposed of as the agency saw fit, subject to whatever general guidelines had been issued by the NAA.

10.15 The third option was for the NAA to give up any detailed involvement in the appraisal process. The NAA would issue general standards and guidelines for the identification of records of archival value, which agencies would be required to adhere to when sentencing records. The resources currently devoted by the NAA to checking appraisal reports and draft records disposal authorities could be diverted to more intensive monitoring of agency sentencing projects to ensure that records of archival value were identified.

10.16 The Commission suggested in DRP 4 that each of these options has strengths and weaknesses. The first option is the safest, since it establishes the most detailed central control over the appraisal process. Its weaknesses are that it can be labour intensive and that it puts pressure on the NAA to concentrate on the most urgent, rather than the most valuable, cases. The second option targets archival resources on the most valuable records provided that they can be identified effectively. Its weaknesses are that valuable records might be overlooked and also that, if the NAA gave up issuing disposal authorities for records which were not of archival value, agencies might devote substantial resources to 'reinventing the wheel' by devising their own disposal authorities for such records. The third option is, at least at first sight, the most streamlined. However, it would require extensive testing to establish

whether general guidelines could effectively replace specific disposal authorities and also whether more intensive monitoring of sentencing could compensate adequately for less comprehensive written guidance.

10.17 In the light of these considerations, the Commission suggested that the NAA should retain the sole power to authorise the disposal of all Commonwealth records. Given the sheer volume of records, the large number of agencies involved and the fact that identifying records of archival value is a complex process, any fragmentation of the disposal power might well cause as many problems as it solved. This recommendation was supported in responses to DRP 4.

Recommendation 41. The NAA should retain sole authority for authorising the disposal of Commonwealth records and the present section 24 provisions should be retained.

Appraisal policy

10.18 Appraisal is fundamental to the disposal process since it establishes a consistent and accountable framework within which individual records may be assessed and records of archival value identified. However, the present Act is virtually silent as to the nature of the archival record of the Commonwealth. A number of submissions contrasted the very general wording of 'the archival resources of the Commonwealth' in section 3(2)[ccvii] with the more specific public access exemption criteria set out in section 33,[ccviii] expressing concern that the Act gave so little guidance on a process which determines whether records survive or are destroyed.

> The legal framework is therefore sparse and Archives has the responsibility for determining the practices and procedures appropriate for disposal. The Archives Act does not provide clear directions to Archives for its disposal practices, nor does it refer to the professional skills of archivists and the philosophies and principles of that discipline. There is no objects clause which sets out the fundamental principles to guide the decision makers in what is worthy of disposal. The only indication is in section 3(2) which defines the **archival resources** of the Commonwealth. In practice, Archives is responsible for determining whether a matter is within the definition of section3(2) and their assessment is not subject to external public review.[ccix]

10.19 Australian Archives has complemented the meagre legislative provisions by issuing detailed guidance for the staff of Commonwealth agencies to assist them in appraising records.[ccx] This material discusses the range of administrative, accountability, research and display values which records may have and how these should be balanced against considerations such as storage costs.

10.20 The Commission asked in IP 19 whether the principles which determine whether records are retained or disposed of should be stated in the legislation, for

example by listing key objectives and broad document classifications. Most submissions felt that it would be impracticable to reduce appraisal policy to a set of clearly defined categories brief enough to be included in legislation, especially as they would probably need to change over time. Some submissions suggested including appraisal criteria in the regulations rather than in the Act itself.

10.21 Since IP 19 was published, Australian Archives has reexamined the philosophical basis of its appraisal policies.[ccxi] The Archives suggests that there are three grounds on which there is financial justification for retaining records beyond the point at which they are required for administrative purposes or for organisational accountability

- to provide a concise record of the source of authority, machinery and most important activities of the Commonwealth and Commonwealth institutions
- to retain other records for which there is a high expectation that they will be of considerable use in the future to further the public good
- to retain some other records that can be expected to satisfy innate curiosity about Australia's people, culture and heritage.

The appraisal of records should, in the Archives' view, take into account also

- the likelihood that a well organised core of carefully selected records offers more value for future users than an overwhelming mass of detail
- a decision that a record merits permanent retention is not irreversible, but it should only be reversed if this is consistent with existing or revised aims of retention
- all records designated for permanent retention should be reviewed at the age of say 50 years
- the future use of records cannot be predicted reliably, but potential future use should be a more important factor than past use
- no appraisal and sentencing system can deliver perfect results, but if proper processes are implemented objectively a satisfactory result is achievable.

10.22 The Commission suggested in DRP 4 that a statement of the criteria on which decisions about the retention or destruction of Commonwealth records are to be based is a matter of interest to the Parliament and the community. Building on the work already undertaken by Australian Archives, the NAA should issue a standard relating to appraisal criteria. The standard should be supported by more detailed guidelines. This recommendation was supported in responses to DRP 4.

Recommendation 42. The NAA should issue a standard relating to appraisal criteria.

New appraisal strategies for electronic and other records

10.23 The appraisal process has so far been concerned largely with paper records which have been in existence for a number of years and in some cases for several decades. Some records disposal authorities have been issued for electronic recordkeeping systems, but many electronic systems appear to be operated on the basis that it is less trouble to retain all the records indefinitely than to devise a disposal regime for them. This view must change as the use of electronic systems increases, as is likely to occur rapidly over the next decade. Whereas many of the present electronic systems are concerned with administrative and case management processes which do not generate records of archival value, the development of whole-of-agency electronic systems will mean that policy and general correspondence records will also be managed electronically. Unless there is an effective appraisal and sentencing regime for such systems, valuable records may be lost.

10.24 Submissions and consultations emphasised the need to make appraisal strategies more proactive, to articulate general principles more clearly through a 'top down' approach and to try to reduce the amount of appraisal resources being devoted to records which are of little or no archival value. This was seen to be essential in relation to electronic records and highly desirable in relation to paper records. Many archivists now support the concept of functional appraisal[ccxii] as a way of establishing records appraisal on a more proactive and less labour intensive basis.

> Under functional appraisal, agencies no longer offer records for evaluation prior to destruction. The decision to create a record reflects a decision about the need for it (the need to document a process) and this decision embodies all the elements needed for appraisal. In traditional terms, the decision was seen as comprising three sequential stages: should I make a record, for how long should I keep it, can I destroy it now? Paper transactions left a documentary trace, the only decision needing to be made was whether or not to file it. This administrative decision did not include all of the elements of disposal. Electronic transactions will leave no trace unless there is intervention to capture records of specified processes and maintain them for a specified period. These decisions include all the elements of disposal. The need to create and maintain records must be articulated at the system design stage and cannot be left to a subsequent stage in a life cycle. 'Appraisal becomes a matter of records creation and retention', rather than destruction.[ccxiii]

> Increasingly, sentencing is undertaken continuously and automatically by a computer system when records are created. No further human intervention is necessary. As the proportion of records held in electronic forms by agencies continues to grow, the challenge lies in the development of systems and procedures for the sentencing of these electronic records. Progressively more and more decisions will be made on the basis of records which only exist electronically and with electronic signatures which are the only proof that a particular person made a particular decision, gave approval or exercised a delegation.[ccxiv]

10.25 Australian Archives issued a draft report on functional appraisal strategies in March 1997. This suggested a range of criteria which might be used in evaluating functions.[ccxv]

- longevity
- potential influence in society

- representation in Cabinet
- whether administrative structures (for example government departments) are routinely created to administer the function
- the existence of legislation specific to the function
- size of budget allocation
- whether the function is managed/oversighted by its own board, appeal tribunal or Parliamentary committee
- uniqueness in the national or international context.

10.26 Not all of these criteria are individually reliable indicators of importance, although a scoring system based on adding together values ascribed to individual criteria might produce a more reliable overall view. Further perspectives could be gained from considering the degree of contemporary public interest and current research interest in the function.

10.27 The most cost effective outcome of functional appraisal would be to link specific functions to broad and simple records disposal outcomes. For example, records of a function which attracted a high score might be retained without more detailed appraisal unless they fell within the coverage of the General Disposal Authorities. Conversely, the records of a function which had a low score might be retained only if they fell within a small number of clearly defined classes intended to preserve a basic record of the history of the function. Whether such broad outcomes are achievable without unacceptable levels of loss of valuable records and retention of valueless records will need to be demonstrated by the testing of a substantial model.

10.28 The Commission suggested in DRP 4 that it is important, particularly for electronic records, that the NAA give a high priority to developing strategies which will enable the appraisal of records in all formats to be undertaken efficiently and effectively. While there appears to be a range of views in both the archival and research communities as to the most appropriate appraisal strategies, there is general agreement that appraisal is the key to all other recordkeeping processes and that the more closely it can be integrated with the creation and management of current records the better the quality of archival records which will ultimately survive. Submissions in response to DRP 4 endorsed the need to continue the development of new appraisal strategies as matter of high priority and stressed the need for close consultation between the NAA and other Commonwealth agencies in this process.[ccxvi] The Commission reaffirms its view that, as an administrative measure, the NAA should give high priority to the development and testing of new appraisal strategies, particularly in relation to electronic records. This should be done in close consultation with agencies such as the Office of Government Information Technology and the Department of Finance and Administration. There should also be consultation with all major Commonwealth agencies before new strategies are finalised.

Recommendation 43. The NAA, in consultation with other Commonwealth agencies, should give high priority to the development and testing of new appraisal strategies, particularly in relation to electronic records.

Disposal as a matter of normal administrative practice

10.29 Section 24(2)(c) permits records to be disposed of 'in accordance with a normal administrative practice, other than a practice of a Department or authority of the Commonwealth of which the Archives has notified the Department or authority that it disapproves'. The section has been interpreted as permitting the disposal (without a specific authority) of trivial, ephemeral or duplicate material which does not normally become part of a structured recordkeeping system. Interpretative guidelines issued by Australian Archives see the provision as encompassing material like superseded drafts of reports or correspondence, ephemeral phone or electronic mail messages and duplicates of material such as manuals, forms, directories and published reports.

10.30 One submission suggested that the present usage is not that which was intended when the legislation was drafted.

> It was intended to ensure the Act did not make technically illegal practices which form part of a normal office routine — e.g. despatching correspondence. This was perceived to be a loophole which would be progressively closed as Australian Archives gradually proscribed more and more abuses of it. Ephemera might (or might not) be Commonwealth records. If they are, their disposal should be no different from any other Commonwealth records and it was 'intended' that it be covered by an authority — just like any other record. What was needed under s 24(2)(c) was a growing list of disallowed practices. Instead the 'NAP' rule has now become the standard method by which the State and Federal Archives have allowed for disposal of ephemera, duplicates and other materials the disposal of which should instead be by schedule. This practice is now so entrenched that it is probably too late to do anything about it.[ccxvii]

10.31 Submissions in response to IP 19 did not provide any specific evidence that the 'normal administrative practice' provision had led to the improper destruction of records, although some concern was expressed that, notwithstanding the existence of guidelines, the wording of the provision is so open ended as to be liable to abuse. If an efficient regime for the disposal of ephemeral material does not exist, or if such disposal is subject to needlessly complicated procedures, the whole appraisal regime will be brought into disrepute and genuinely valuable records put at risk. The Commission suggested in DRP 4 that the provision be maintained, subject to the NAA continuing to issue guidelines for its implementation and considering whether the disposal of some of the material now dealt with through the guidelines could be authorised more appropriately through specific records disposal authorities. No views were offered to the contrary.

Recommendation 44. The 'normal administrative practice' disposal provision

should be retained, subject to the NAA issuing guidelines for its implementation and to considering whether the disposal of some material could be authorised more appropriately through specific records disposal authorities.

Penalties for the unauthorised disposal of records

10.32 Section 24 of the Archives Act provides a $2000 penalty for the unauthorised destruction or other disposal of Commonwealth records. It would also be open to the Commonwealth to take action against a person who wilfully and unlawfully damaged Commonwealth property under section 29 of the *Crimes Act 1914*. No prosecution for a breach of section 24 of the Archives Act has ever been commenced. Several submissions commented on the failure to initiate action under section 24 in cases where records had almost certainly been destroyed incorrectly in the course of sentencing operations. These failures appear to have flowed partly from the belief that 'the Commonwealth should not prosecute itself' and partly from the difficulty of establishing who was responsible for the improper disposal of a particular record and whether they had acted deliberately or because of a lack of training and guidance. The issue is complicated by the fact that the principal item of evidence, the record itself, is no longer available because it has been destroyed. The only relevant evidence is likely to be the title of the record item, which is often an unreliable guide to the value of the contents, and any recollections of those who had had dealings with the record when it was in administrative use.

10.33 The Commission suggested in DRP 4 that the section 24(2) penalty is an important one and should be retained. If possible, it should be strengthened by specifying that unauthorised destruction encompasses cases in which a record has been inappropriately destroyed through carelessness or inadequate attention to the relevant disposal authority.This was supported in responses to DRP 4.

10.34 Criticism of the failure of Australian Archives to take action under section24(2) could be addressed by requiring the NAA to include in its annual report details of any significant examples identified of the illegal or inappropriate destruction of records and of the measures taken to deal with them. This would reassure stakeholders that the problem was being taken seriously.

Recommendation 45. The section 24(2) offence for the unauthorised disposal of records should be retained and defined more stringently.

Recommendation 46. The NAA should be required to report annually on any significant case of inappropriate destruction of records identified and the measures taken to deal with it.

Altering or amending records more than 25 years old

10.35 Section 26 prohibits the alteration of a Commonwealth record after it has been in existence for 25 years unless the alteration is required by law or is done either with the permission of the Archives or in accordance with a practice or procedure approved by the Archives. The object of this provision is to prevent records, and in particular records of archival value, remaining liable indefinitely to alteration (for example by the addition, amendment or removal of individual folios) by the agency which created it. The proviso that alterations may be made to records more than 25 years old if this is required by law recognises that under the FOI Act record subjects have an indefinitely retrospective right to seek amendment or annotation of personal information. This issue is dealt with in Chapter 21.

10.36 The proviso that the Archives may authorise alteration beyond the age of 25-years recognises that in exceptional circumstances such alteration might be justified, subject to the approval of an appropriate authority. Australian Archives has rarely been asked to approve such alterations. Very occasionally permission has been sought by the subject, or a surviving relative of the subject, of an ASIO file to have a statement added to the file contesting information contained in it. Since the security and intelligence agencies are not subject to the FOI Act, it is necessary for such an action to be sanctioned under the Archives Act.

10.37 The Commission suggested in DRP 4 that records of archival value should not be able to be amended indefinitely, provided that there is a discretion for the NAA to authorise the addition of material to a record in exceptional circumstances. The Commission also suggested the inclusion of an additional safeguard requiring that alterations or additions to records more than 25 years old should not be undertaken in a way that results in any existing information in the record being modified or deleted. For example, if the NAA agreed that information in a record was so harmfully misleading as to justify correction even after 25 years, this should be done by adding an amending statement rather than by deleting existing information.

10.38 Responses to DRP 4 supported these recommendations. Australian Archives suggested that the changes which inevitably occur when electronic records are migrated from system to system should be regulated in a way that is neither needlessly restrictive nor so open that the essential content and functionality of the records is at risk.[ccxviii] This could be addressed through the recordkeeping guidelines which the Commission proposes that the NAA should issue. It should also be taken into account when the provisions relating to the alteration of records more than 25-years old are being drafted.

Recommendation 47. The legislation should provide that alterations to records more than 25 years old should only be undertaken if required by law or approved by the NAA. No such alteration should be able to be undertaken in a way that involves the alteration or deletion of information already included in the record.

Recommendation 48. The legislation and standards issued in accordance with it should make appropriate provision for the migration of electronic records between systems.

The rights of the record subject

10.39 Submissions from Aboriginal and Torres Strait Islander organisations raised the issue of the right of the subject of a record to be consulted over its disposal when it ceased to be required for administrative purposes. Such a right might involve seeking the subject's approval for the record to be destroyed or transferring ownership of the record to the subject. The issue was raised in connection with the destruction over the years of records relating to the removal of Indigenous people from their families. However, similar issues of principle arise in relation to any record created by the Commonwealth which documents the affairs of individual citizens.

10.40 In a democratic society, it is difficult to contest in principle the proposition that record subjects should have the right to acquire or request the destruction of records relating to them once they are no longer of administrative use. Exceptions would include records which were of archival value (for example the service dossiers of members of the First Australian Imperial Force) and records which might prejudice the interests of some other person or organisation if they were given to the principal subject. In practice the issue is complicated by the sheer size of the task. The Commonwealth has compiled many millions of individual case files over the years, the vast majority of which will sooner or later be destroyed. Some include current information about the location of the subject; others do not. But, even when the subject can be traced readily, there would be a formidable administrative effort in contacting all the subjects and implementing their wishes.

10.41 The Freedom of Information and Privacy Acts have between them addressed the rights of record subjects to access records relating to themselves, to seek their amendment or endorsement and to be reassured that the information they contain is not misused. No legislation specifically addresses the disposal of such records. The Commission suggested in DRP 4 that the Privacy Commissioner should in due course consider possible options in this area, at least in relation to records created after a policy had been determined. In the short term these might include a notification to all record subjects of the records disposal regime applying to the records of the agency with which they are dealing. It might also include a 'tick this box' option for those who wish to assume ownership of the record if this becomes appropriate. In the longer term, the design of new systems should take into account the rights of the record subject as far as this is practicable.

10.42 A number of submissions in response to DRP 4 commented on the practical problems associated with strengthening the rights of records subjects.

> While agreeing that the record subject may wish to assume ownership of the records when the Commonwealth no longer requires them ... Treasury cannot envisage such a system being devised which would be effective without being prohibitively expensive to operate. Some records about people are kept for many years and even if they had 'ticked the box' to assume ownership when the records were created, the likelihood of their whereabouts being known when the transfer of ownership became appropriate is very low.[ccxix]

10.43 Australian Archives raised two issues in relation to this suggestion. Firstly, it emphasised its opposition as a matter of principle to the destruction of records solely on privacy grounds, if the records merited retention on some other ground. Secondly, it suggested that giving the Privacy Commissioner a statutory role in records disposal would be contrary to the basic disposal scheme of the present Act, which the Commission has recommended should continue.

10.44 Having given further consideration to this issue since the publication of DRP 4, the Commission maintains its view that the rights of the record subject are not addressed adequately in the present legislation. While it considers that the only effective way to rectify this deficiency is by legislation, it is conscious of the need to not place unrealistic burdens on recordkeepers. This is reflected in the following recommendation.

Recommendation 49.
The legislation should
- require all agencies which create records relating to individual citizens to take all reasonable steps to ensure that the disposal policies relating to the records are known to the record subjects. Such steps might include the provision of an explanatory leaflet to all new clients and the posting of display material on agency premises.
- require all agencies which create records relating to individuals to give the record subject an opportunity to state, when entering their relationship with the agency concerned, whether they wish to be given the opportunity to assume ownership of the record when it is no longer required by the agency. Where a record subject indicates a wish to have such an opportunity, the agency's obligation to make contact with the record subject, when the record becomes available, should be limited to such enquiries as are, in the circumstances, reasonable having regard to the age of the record.
- provide that a record subject is not entitled to acquire ownership of a record, or portion of a record, for which exemption would have been claimed under the Freedom of Information Act in response to an application from the record subject.

Quality control problems in sentencing paper records

10.45 Sentencing is the process by which the value of individual records is assessed against the disposal classes set out in the relevant records disposal authorities. The object of sentencing is to establish which records are of continuing value and require appropriate custodial arrangements. Records which are assessed as having administrative and/or evidential value only are sentenced for destruction at the age at which that value is expected to have ceased. Some records which are of administrative value only are suitable for destruction at the time of sentencing, while others need to be retained for some further period of years.

10.46 Sentencing is still concerned largely with the assessment of paper records, most of which are in the form of files (folders) containing as many as 200 individual folios relating to a specific subject. The amount of time required to sentence individual records varies substantially in accordance with their size and complexity. Records documenting highly structured routine administrative processes can generally be sentenced quickly, in some cases without checking individual files. Policy and correspondence records of major agencies are likely to require more detailed examination. Poor records management procedures such as inadequate or inaccurate file titles, duplication of papers and confusion between the main and subsidiary files dealing with a specific issue can also increase the time required to sentence records.

10.47 Until the 1980s, responsibility for sentencing records was shared between Australian Archives and the agency which created the records. The Archives has now withdrawn almost entirely from direct involvement in sentencing work, which is undertaken either by the staff of the relevant agency or by contractors employed by the agency. The use of private contractors in sentencing began in the later 1980s and it is estimated that they are now responsible for as much as one third of Commonwealth sentencing work.

10.48 Public debate on the accuracy of sentencing work and on appraisal policy generally has been restricted by the fact that most sentencing is undertaken before records reach the open access period at the age of 30 years. Researchers often learn of a record's existence only years after it has been destroyed through finding references to it in indexes or in other papers. There is no single list of records which have been destroyed.

10.49 In recent years, Australian Archives' campaign to sentence all unevaluated records in its custody has caused public attention to be focused on sentencing practices because the campaign led to some records which were already accessible to the public being withdrawn from archival custody for sentencing.[ccxx] Many of these records were confirmed as being of archival value and returned to the Archives, but some were destroyed. This prompted a range of public representations to the Archives and the Advisory Council and a debate between archivists and historians in the professional literature as to the adequacy of sentencing practices and the desirability of involving historians in disposal decisions. A number of submissions raised concerns about the apparently inappropriate destruction of records. It has also

been suggested that sentencing has been reduced to an industrial process undertaken by staff who are ill equipped to make informed decisions about the real value of records.

> The Australian Archives ... has been largely developed to address three housekeeping needs of the Commonwealth bureaucracy — the control of access to its records; the prevention of massive accumulation of records; and the storage and retrieval of semi-current files — mostly ephemeral — required for bureaucratic back-reference.
>
> These are all legitimate concerns, which any archival program needs to address. What is not legitimate is the way they have come to dominate the mentality of government archivists, at the expense of enthusiasm for the facilitation of the use of archives for scholarly research.
>
> Not that government archivists are altogether to blame for this. They have to tailor their product to the market in which they find themselves, and face a situation where the bureaucracy pays the piper and calls the tune, to the extent that historians often come to be grudgingly tolerated almost as parasitical nuisances. I sometimes even feel the same way myself, when I read unrealistic and uninformed complaints about the service, made by people who take for granted the miracle that a bunch of archivists (alchemists?) have accepted an agenda of bureaucratic housekeeping — something akin to 'stores and transport' — and managed to extract from it some semblance of a cultural institution. It is a miracle, really, that at least some of the enduringly significant records of government and quasi-government survive through the operations of government Archives... And that they survive, furthermore, in conditions of relative safety, integrity, control, retrievability and accessibility — the latter free of charge to the public user.
>
> The chain, however, is only as strong as its weakest link — and that is the massive and deliberate reliance upon non-archivists in agencies to do all the actual sentencing — not just getting rid of the routine and predictable stuff like time sheets and purchase orders after 2 or 7 or whatever years, but the sifting of the wheat from the chaff in general correspondence series and such-like complex areas. All with the aid merely of that grossly overrated bureaucratic substitute for archivists at the coal-face — the disposal schedule.[ccxxi]

10.50 Sentencing is a difficult function over which to establish complete accountability. It is undertaken on a very large scale in a wide variety of locations and by a wide variety of staff. It is also subject to significant time constraints and cost pressures. The staffing of records management areas of Commonwealth agencies has traditionally been given a low priority, while the development of contract sentencing has brought new pressures to recruit staff as quickly and cheaply as possible and to dispense with them between projects. It is likely that there is still a considerable range of experience and commitment among those engaged in sentencing Commonwealth records. It is also likely, in the light of submissions and other comments made to the Commission both by Commonwealth officers and by users of archival records, that there are still some instances in which records of archival value are destroyed and valueless records are retained.

10.51 Commonwealth agencies are responsible for monitoring sentencing work undertaken by their own staff and contractors. Regulation 7 of the Archives Regulations requires Commonwealth agencies to notify the Archives within 30days of destroying or otherwise disposing of records. This information is provided on standard forms which do not normally include details of individual records. The forms are submitted to the Archives after the records have been destroyed so that they can be used only as a general guide to sentencing work in progress and as an

indicator of possible problems such as the misinterpretation of records disposal authorities. It is the Archives' view that many more records are destroyed than are actually reported even at this summary level, although this does not necessarily imply that the records concerned have been destroyed inappropriately.

10.52 The Commission suggested in DRP 4 that the present requirement to report the destruction of records after the event should be replaced by a provision in the legislation requiring agencies to give the NAA reasonable warning of any planned sentencing work involving records likely to include material of archival value. This attracted a range of responses. Some archivists suggested that sentencing was an activity that should be left to the professionals without legislative intervention. In an ideal world this might be so, but the fact remains that submissions in response to IP 19 put the view strongly that there were quality control problems in the sentencing of Commonwealth records which the present regime may not be addressing adequately.

10.53 The Commission accepts the view put in some submissions that it would be impractical to confine a requirement on Commonwealth agencies to notify the NAA of planned sentencing projects to records likely to include material of archival value, since most groups of records are likely to include at least some material of this kind. Instead, the Commission now considers that Commonwealth agencies should be required, either by a provision in the legislation or by an NAA standard, to give the NAA reasonable notice of their intention to sentence records and a reasonable opportunity to monitor that process. It would be for the NAA to determine how its monitoring resources could be allocated most effectively.

10.54 The Department of Transport and Regional Development has questioned the meaning of 'reasonable notice', suggesting that it could indicate a period ranging from a month to a year.[ccxxii] The Department also noted that a need for sentencing can arise at short notice as a result of administrative changes. The Commission accepts that it is desirable that agencies should give the NAA as much notice of impending sentencing projects as possible, perhaps through the preparation of annual sentencing plans. However, given the wide variations in the volume and complexity of sentencing projects it seems more flexible to stipulate a 'reasonable' period of notice rather than to prescribe a specific period. That said, it would seem desirable for the NAA to issue guidelines regarding what may or may not be 'reasonable' in particular circumstances.

Recommendation 50. The present requirement in Archives Regulation 7 to report the destruction of records should be replaced by a legislative provision or regulation requiring Commonwealth agencies to give the NAA reasonable notice (as elaborated in NAA guidelines) of their intention to sentence records and a reasonable opportunity to monitor that process.

Recommendation 51. The NAA should give priority to designing and implementing a simple, efficient and effective monitoring regime of sentencing.

Ensuring timely sentencing

10.55 The present legislation includes a range of provisions to protect Commonwealth records from inappropriate disposal, but it has no specific requirement for records to be sentenced in a timely manner. During the past decade, Australian Archives has placed increasing pressure on Commonwealth agencies to maintain effective sentencing programs by refusing to accept custody of unsentenced records and by introducing penalty storage charges for unsentenced records already in archival custody. [ccxxiii] The increasing pressure on resources available to Commonwealth agencies is a further deterrent to the funding of storage space for records which are in fact ready for disposal.

10.56 Nevertheless, the effective achievement of the functions which the Commission has recommended should be undertaken by the NAA will depend on the reliable and complete identification of records of archival value before they reach the open access period. The notification procedures recommended above in this chapter[ccxxiv] will assist in achieving this objective, but, since the publication of DRP 4, the Commission has given further consideration as to how its achievement might be strengthened. The Commission now recommends that the legislation should require that all Commonwealth records must be appraised and sentenced not later than at the age of 20 years, unless the NAA has given a specific dispensation to the contrary. There seems no valid reason for records more than 20 years old to continue to exist in an unevaluated limbo. In the event of agencies failing to sentence records more than 20 years old, the NAA should have the power to undertake the work itself at the expense of the agency concerned. These recommendations should ensure that all agencies are in a position to meet the Commission's recommended requirement that all records of archival value, subject to certain specified exclusions, should be transferred to the custody of the NAA by the age of 25 years.[ccxxv]

Recommendation 52. The legislation should require that all Commonwealth records must be appraised and sentenced no later than at the age of 20 years, unless the NAA has given a specific dispensation.

Recommendation 53. In the event of agencies failing to sentence records more than 20 years old, the NAA should have the power to undertake the work itself at the expense of the agency concerned.

Documenting and notifying disposal decisions

10.57 Commonwealth agencies are already expected, as a matter of administrative practice, to keep a record of when and by what authority records are disposed of, although in some cases this may not be done in an easily traceable way. The Commission suggested in DRP 4 that Commonwealth agencies should be subject to a

statutory requirement to document the disposal of records, provided that this can be done in a way that does not impose an unreasonable administrative burden. In the paper records context, for example, it would be reasonable to expect that the disposal of a file of papers should be recorded, but it would not normally be necessary to record the disposal of ephemera. In view of the need for interpretative guidelines, the Commission suggested that the NAA should issue a standard for the recording of records disposal decisions by Commonwealth agencies.

10.58 Submissions endorsed this proposal. They also noted that the development of electronic recordkeeping systems will permit the establishment of a much more detailed and accessible level of control over the disposal of individual records, provided that these needs are identified when systems are designed.

> Whatever may or may not be possible in the paper world, we are clearly heading for a situation in cyberspace where the existence and disposal of every record can be documented 'permanently'. Any review of the Act should be heading towards, not away from, the desirability of documenting disposal so that it does 'include details of individual records' ... If an Act of Parliament can oblige agencies to make records, I can't see that any particularly onerous obligation is involved in making them account for unmaking them.[ccxxvi]

10.59 Since the publication of DRP 4, the Commission has given further consideration to the operation of the proposed requirement that records of archival value be transferred to NAA custody by the age of 25 years. The Commission now recommends that agencies should be required to notify the NAA of records of archival value identified in the course of meeting the 20 year appraisal and sentencing obligation.[ccxxvii] This would enable the NAA to plan the allocation of its custodial resources and to ensure that the 25 year transfer obligation is met. The NAA should issue standards to assist agencies to meet the notification obligation in a way that is effective without being unduly onerous.

Recommendation 54. The NAA should issue a standard for the recording of records disposal decisions by Commonwealth agencies.

Recommendation 55. The NAA should ensure that Commonwealth agencies are aware of the need to take into account standards for recording disposal decisions when they are designing electronic recordkeeping systems.

Recommendation 56. Agencies should be required to notify the NAA of records of archival value identified in the course of meeting the 20 year appraisal and sentencing obligation. The NAA should issue guidelines to assist agencies to meet the notification obligation in a way that is effective without being unduly onerous.

Name identified Census records

10.60 A number of submissions argued strongly for the retention of name identified Census records (that is the Census forms completed by individual citizens), which are currently destroyed after the Australian Bureau of Statistics (ABS) has extracted statistical data from them.

> The Society of Australian Genealogists has a membership of approximately 8000 and we are not aware of any one of those members who does not support the retention of the census. Indeed hardly a day goes by when some new user of our library discovers that past census information has not been kept and expresses their dismay to our staff or volunteers. There are major family history organisations in every capital city and smaller societies throughout the country and we are sure that their experience would be similar to ours. Very few historians, genealogists, social scientists or researchers in certain areas of medicine, moreover, would agree with the argument used to justify the destruction of Australia's census returns. It is suggested that 'community concern' about the retention of the name-identified returns 'would threaten the integrity of the census' and that this outweighs any research value the records might have. In fact no evidence has been adduced for this proposition and there is no reason to assume that there has been any effect on the integrity of the census in those countries which retain the returns. The record of Australian archival authorities in maintaining the confidentiality of documents in their care is very good and census returns could be safely retained and opened to public access after, say, 100 years without infringement of individual privacy. There are far more serious threats to privacy than are posed by retention of census returns and it is time we ended a policy which is little better than historical vandalism.[ccxxviii]

10.61 The ABS strongly supported the continued destruction of name identified Census records and, in addition, recommended that they be removed from the disposal provisions of the Archives Act.

> Since the introduction of the *Archives Act*, the Director-General [of Australian Archives] has exercised his power to determine the disposal of only one type of ABS form — Census forms. Although the Director-General concluded in each case to destroy the Census forms, after a separate review was undertaken into the research value of the 1986, 1991 and 1996 Census forms, he might have decided to retain the forms. Such a decision would have been in conflict with the intention of the Government and the Parliament and the secrecy provisions of the *Census and Statistics Act*. Also, it would have significantly impacted on ABS' capacity to conduct effective population censuses and other collections ...
>
> ABS considers that the disposal of Census and other ABS forms is a matter for the Government and the Parliament to decide. It, therefore, recommends that the *Archives Act 1983* be amended to remove the Director-General's authority to decide on the disposal of ABS forms and other records containing identifiable information obtained under the provisions of the *Census and Statistics Act 1905*.[ccxxix]

10.62 In DRP 4 the Commission noted that, as the question whether name identified Census records should be retained or destroyed was then being considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs, it did not at that stage express a view about it. In his submission in response to DRP 4, the Australian Statistician has questioned the appropriateness of the Commission expressing a view on this issue.

> I don't see how the terms of reference for this review of the Archives Act can be read to suggest that the Law Reform Commission should ever put any formal view on this matter. Also, I can't see how this review could have put the Commission in a position to make a conclusion on this matter. As this matter is a significant statistical policy issue, I would appreciate knowing, and as soon as possible, if the Commission ever proposes to express any view on this matter. At the very least, I would want to be able to present the significant case for destruction, as the earlier ABS submission only really skims across the issue. I would expect the current Director-General of the Australian Archives, if asked, would also support destruction.[ccxxx]

10.63 The Commission considered issues relating to the disposal of name identified Census records because they were raised in a number of submissions in response to IP 19, including that of the ABS. In view of the fact that the House of Representatives Standing Committee on Legal and Constitutional Affairs had not, at the time of the completion of the Commission's deliberations, tabled its report on Census records, the Commission did not believe that it would be appropriate to make a recommendation as to whether these records should be retained or destroyed.[ccxxxi] The Commission emphasises, however, that, if it had proposed to make a recommendation, it would have ensured that the various stakeholders had an adequate opportunity to put their views on an issue on which there is clearly a significant range of opinions.

10.64 In DRP 4 the Commission did not support the Australian Statistician's proposal that name identified Census records be removed from the disposal provisions of the Archives Act. In the Commission's view, the Act is a general measure intended to ensure that Commonwealth records are managed consistently and as far as possible in the interests of all stakeholders. It remains the Commission's view that, if records are to be removed from the disposal provisions of the Act, this should be done through the legislation which regulates the function to which the records relate.[ccxxxii] This would ensure that the justification for such a measure is considered in the Parliament. In his response to DRP 4 the Australian Statistician indicated that he would consider seeking changes to the *Census and Statistics Act 1905* to achieve this objective.

Recommendation 57. It is appropriate that name identified Census records should continue to be subject to the normal disposal provisions of the Act.

Consulting stakeholders on appraisal and disposal policy

10.65 Section 25(1) of the Act requires Australian Archives to provide the Advisory Council on Australian Archives with particulars of the practices followed by, or approved by, the Archives in respect of the destruction or other disposal of Commonwealth records. The Act does not give the Council the right to formally approve, disapprove or modify Australian Archives' disposal practices, although it is open to the Council to discuss any relevant issue and provide advice to the minister on it. Australian Archives has responded to its section 25(1) obligations by producing a booklet setting out the legislative and administrative basis of the disposal system. Since the Council was established, it has considered appraisal and sentencing policy and procedures on a number of occasions both in relation to the policy statement and in response to representations about the destruction of individual records.

10.66 The Commission has recommended in Chapter 6 that the Advisory Council's functions should be subsumed within the functions of the proposed governing

council and advisory groups. As the governing body of the NAA, the new council would be responsible for disposal policy and have the right to involve itself in disposal processes to whatever extent it considered appropriate. Specific recommendations about the role of the new body in relation to disposal are, therefore, unnecessary.

10.67 In Chapter 6 the Commission recommends that the new governing council should establish advisory groups to facilitate input from a wider range of specialists and stakeholders than can be accommodated on the council itself. The Commission would expect one such group to be established to focus upon appraisal and disposal issues. Some submissions recommended that such a body be established in each State and Territory. However, it would probably be more effective to centralise consideration of what is a fairly specialised subject within a single group. Some submissions also suggested the establishment of more specialised panels of advisers to focus on the records of particular agencies. Here again, the best starting point is likely to be a single group which can invite specialists to join it for specific projects.

Publicising significant sentencing projects

10.68 Submissions also suggested a range of notification processes for specific sentencing projects so that researchers could put forward their views on the value of the records. The Commission does not accept that strategies such as advertising lists of individual records proposed to be destroyed would justify the very substantial costs involved. However, the combination of the recommended requirement for agencies to give notice of sentencing projects and the recommended establishment of a disposal advisory group should encourage more effective public input.

10.69 The Commission suggested in DRP 4 that the NAA should make public the information it receives from agencies about planned sentencing projects. This information might be made available in the public research areas of the NAA and also on the NAA Internet site,[ccxxxiii] with appropriate facilities for public comment. Australian Archives has opposed this suggestion on the grounds that the proposed disposal advisory group would deal adequately with public consultation.[ccxxxiv] The Commission accepts that the establishment of the advisory group will be the key factor in improving public consultation over the disposal process. The group will no doubt develop consultative strategies and the Commission does not make specific recommendations as to what they should be.

ENDNOTES

11. Recovery of Commonwealth records

Introduction

11.1 In most government archival jurisdictions there have been examples of official records passing into the custody of private individuals or organisations without appropriate authority. Some records may have passed through a series of custodians. Many of these records have not been of archival value and there has been little incentive to recover them. However, even when the government concerned has sought actively to recover the record,[ccxxxv] the process has not always been an easy one, particularly if (as is the case with the present Act) there is no specific recovery power in the relevant archival legislation.

11.2 Apart from records accumulated by some early Commonwealth ministers and officials,[ccxxxvi] the unauthorised removal of records from Commonwealth custody does not appear to have been a major problem over the years. This may be due to the fact that the Commonwealth archival jurisdiction, by comparison with those of some of the States, is a relatively recent one, and one that has generally held its records securely. However, there may still be instances of removal of which the Commonwealth is unaware. Any unauthorised removal of records is undesirable both in itself and as a precedent which others might be encouraged to follow.

11.3 The 1976 draft of the Archives Bill included provisions for Australian Archives to direct that records should be returned to Commonwealth custody and to take any court action necessary to achieve this. It also provided that courts could award compensation to the person required to surrender the records. These provisions did not appear in the 1977 and subsequent drafts of the Bill. Their removal appears to have been due mainly to strong opposition from a number of major libraries and their supporters. This opposition was based on a fear that Australian Archives might use a recovery power to compel them to surrender papers deposited over the years by former Commonwealth ministers and officials.

Official records in private custody

11.4 Official records which have passed into private custody fall very broadly into three categories.

1. Records of significant value

This category includes individual records which are of particular historic significance because of the events which they document. It also includes items such as plans, designs, pictures, stamps and original signatures of well known people, all of which are likely to be of financial value and/or to appeal to individual collectors. Records in this category are likely to have been removed from official custody by people who had a clear idea of their value and who were also aware that their removal was unlawful.

2. Records retained by ministers and senior officials

Most government agencies have, or formerly had, structured recordkeeping systems intended to ensure that records are traceable and accessible and that they do not remain in the possession of individual officers for long periods. However, centrally managed recordkeeping systems have never entirely discouraged individuals from maintaining their own independent systems. Independent systems have tended to be most prominent in ministers' offices and specific issues relating to such records are discussed below.[ccxxxvii] It has also been quite common for some senior departmental officials to maintain a personal collection of records about issues with which they were involved. In many cases such records are eventually destroyed as duplicates or incorporated into the agency's main recordkeeping system, but some officials have retained records when they have left office.

3. Records retained by individuals with a particular interest in them

There have also been cases where individual officers with a strong interest in particular records in effect took custody of them to ensure that they were not destroyed. Such cases have related particularly to technical records such as plans of buildings or equipment. They were probably more common in the past when disposal authority coverage was less comprehensive.

Penalties for the unauthorised transfer of the custody or ownership of Commonwealth records

11.5 Section 24 prohibits the transfer of the ownership or custody of Commonwealth records without the authority of Australian Archives. Any person who undertakes such a transfer is liable to a $2000 penalty. However, it would be necessary for the Commonwealth to bring an action for trespass or detinue to obtain a court order to recover custody of the records. No action has been taken under section 24, presumably because no unauthorised transfer of custody or ownership which clearly took place after the Act came into force in 1984 has been identified. Australian Archives has on two occasions sought legal advice on the possibility of recovering records which had passed out of Commonwealth custody prior to 1984. However, in view of the fact that the records had been removed prior to the legislation being enacted and of uncertainties about the circumstances in which the

removal had taken place, the advice was that legal action would be unlikely to succeed.

11.6 The Commission has already recommended in Chapter 10 that the NAA should continue to regulate the disposal of Commonwealth records and that the present section 24(1) prohibition of the unauthorised transfer of the custody or ownership of Commonwealth records should be retained, together with provision for appropriate penalties. It is important that the legislation should declare unequivocally that such unauthorised dealings with Commonwealth records are unlawful.

Recovering Commonwealth records from individuals

11.7 Recovery may serve two related but distinct objectives. The first is the administrative and disciplinary objective of reinforcing the general prohibition on the unauthorised transfer of Commonwealth records by requiring that any record so transferred be returned to the Commonwealth. The second is the recordkeeping objective of securing the return to the Commonwealth of records which are of archival value and/or of continuing administrative value. The second group is probably only a small subset of the first, since many of the records which have passed out of Commonwealth custody over the years are unlikely to be of interest to the NAA or to some other Commonwealth agency, either because of their ephemeral content or because they are duplicated by records remaining in Commonwealth custody.

11.8 Submissions in response to IP 19 predominantly favoured a recovery provision, although opinions varied on issues such as retrospectivity, compensation and limiting the provision to records of archival value.

> Given that controls currently exist concerning the export of artifacts of national significance it would be appropriate for a similar control to exist concerning those Commonwealth records which have passed out of the federal public service and the national archives. I would strongly support a scheme similar to that in force in Victoria where the minister responsible can require the return of a record to the archives and pay compensation if necessary.[ccxxxviii]

> I believe that it would be advisable for new Commonwealth legislation to provide for the compulsory acquisition of material that can be shown to be (or to have been) a Commonwealth record, and that there should also be a provision for compensation to be paid, where it could be shown that the current holder was not criminally liable. It is true that such legislation is often not acted upon, and that where it is acted upon there are many obstacles to obtaining a judgement favourable to the archives authority, but the existence of the legislation might be a deterrent, or might dissuade a third party from acquiring an item which might be shown to be an archival estray.[ccxxxix]

11.9 One argument put against a recovery power was that

> Records which are of immense value are often destroyed in routine sentencing, yet copies may through good fortune be preserved in private hands. This form of records retention is unlikely to

> receive positive encouragement, but in the larger picture of the history of the nation it forms a valuable function. It should not be suffocated.[ccxl]

11.10 Most of the State jurisdictions have some form of recovery provision in their archival legislation, or propose to include such provisions in projected legislation. The most comprehensive existing provisions are those of the Victorian *Public Records Act 1973*, which empower the minister to require a person who has possession of a public record to deliver it to the Public Record Office. The minister has a discretion to pay compensation for the record, with disputes over the amount of compensation being determined by the Magistrates' Court. The legislation also empowers the minister to prescribe a record if it

- would be a public record if it were not owned beneficially by a person or body other than the Crown or a public office
- is of special historic significance to Victoria
- should be preserved by the State.

Records so prescribed become subject to the following conditions

- the owner must produce them for copying if required to do so
- the owner must not sell or otherwise dispose of the record without the consent of the minister, who may exercise the right to purchase the record at the price which a private buyer is prepared to pay for it
- on the death of the owner (or, if the owner is not a natural person, 50 years after the date of acquisition[ccxli]) the record will become the property of the State, which will pay compensation to the owner or deceased estate in accordance with an independent valuation.

11.11 The South Australian *State Records Act 1997* empowers the Manager of State Records to require a person who has custody of an official record (other than in an official capacity) to deliver the record to State Records. This requirement may be applied regardless of whether ownership of the record has passed to the person who has custody of it and if necessary it can be enforced by an order of the Magistrates' Court. The minister has a discretion to pay compensation for deprivation of the record.

11.12 The Archives Authority of NSW has suggested in informal discussions with the Commission a set of principles relating to recovery. These include

- the archival authority should be able to apply for a court order for possession of an official record of archival significance which is in private hands, regardless of whether or not the custodian of the record owns it
- once the archival authority has obtained a court order and gained possession of the record ownership of the record would pass to the Crown
- compensation would be payable to the former holder of the record, with any dispute as to the amount being resolved by a court.

11.13 The Commission suggested in DRP 4 that the new legislation should include a specific recovery power, which would be exercised by the NAA and if necessary enforced by order of an appropriate court. The Commission based its suggestion on the premise that, even if the discovery in private hands of a Commonwealth record of archival value is a comparatively rare event, the Commonwealth should have an effective recovery regime available to it. Those submissions in response to DRP 4 which dealt with the recovery issue predominantly supported the inclusion of a recovery power.[ccxlii]

11.14 The Commission suggested in DRP 4 that the recovery power should be confined to records which the NAA had determined to be of enduring (now termed 'archival') value and that the NAA should be required to give reasons as to why it was desirable that the records concerned should be transferred to NAA custody. It was the Commission's view that the recovery of records which were not of archival value could be dealt with through section 24(1) and other legislative and administrative regimes designed to ensure the good management of the Commonwealth administration.

11.15 Australian Archives accepted that the recovery power would generally be applied only to records of archival value, but suggested that there might be occasions when the Commonwealth would wish to recover a record which, while not being of archival value, was required for administrative purposes. The Archives was also concerned that the restriction of the recovery power to records of archival value might adversely affect the operation of the provision by leaving the way open for jurisdictional disputes as to whether or not a record was of archival value.[ccxliii] The Commission accepts the force of these concerns and now considers that the recovery power should apply to all Commonwealth records.

11.16 The Commission suggested in DRP 4 that the recovery power should be retrospective. It pointed out that, since the proclamation of the present Act on 6June 1984, the unauthorised transfer of the custody or ownership of a Commonwealth record has been explicitly unlawful, and that, even before 6 June 1984, section 71 of the *Crimes Act 1914* (Cth) and regulations 34 and 35 of the Public Service Regulations provided a basis for action against a person who carried out such a transfer. The Commission considers, therefore, that the proposed recovery power would be a reinforcement of a principle that has always been understood.

11.17 The effective implementation of a recovery power would be facilitated by the adoption, as recommended in Chapter 8, of a provenance based definition of 'Commonwealth record'. Under a provenance based approach recovery would not be limited to records in respect of which Commonwealth ownership could be proved, which is often a difficult task many years after a record has been removed from Commonwealth custody. On the other hand, where doubts existed about Commonwealth ownership of a Commonwealth record recovered under a provenance based regime, or where the ownership of some property rights in the record were shown to be vested in a person other than the Commonwealth, section-

51(xxxi) of the Constitution would necessitate inclusion in the legislation of provision for compensation on just terms.

11.18 The Department of Foreign Affairs and Trade recommended that the recovery power should not extend to records which are in the custody of some other bona fide collecting institution.

> Any records already in the custodial ownership of other bona fide collecting institutions should be exempt. The current Act already exempts records in major custodial institutions from any powers of recovery by the Archives, a position which should be maintained.[ccxliv]

11.19 The Commission accepts that there may be cases in which it is appropriate for a Commonwealth record to remain in the custody of a non-Commonwealth collecting institution, provided that this does not diminish the rights and protections relating to that record. However, such a custodial arrangement should be at the discretion of the NAA rather than established as an absolute right.

Recommendation 58. The legislation should make specific provision for the NAA to recover records which have passed out of Commonwealth custody without appropriate authority. The power should extend retrospectively to all Commonwealth records which passed out of Commonwealth custody prior to the commencement of the new recovery provisions.

Recommendation 59. The recovery procedure should be initiated by the NAA issuing a determination that the record concerned is a Commonwealth record and setting out reasons for the need to return it to Commonwealth custody. The NAA should have the power to apply to the Federal Court for a recovery order where a return to Commonwealth custody is refused.

Recommendation 60. Provisions should be included in the legislation for an entitlement to the payment of compensation on just terms where the return to Commonwealth custody of a Commonwealth record constitutes the compulsory acquisition of the property rights of another person.

Compensation for records recovered from individuals

11.20 Most existing and projected State archival legislation provides at least a discretion for the payment of compensation for the compulsory recovery of public records. However, the State jurisdictions, as successors to the colonial governments, have a much longer administrative history than the Commonwealth. In consequence there is a stronger case for the payment of compensation for the compulsory recovery of records which may have been in private hands for generations. Australian Archives suggested in response to IP 19 that

> Where it can be established that the Commonwealth is the owner of records it would be inappropriate to pay for them. However, in cases where it would be very difficult to prove that records of Commonwealth origin and of national significance or public interest are actually owned by the Commonwealth, it would be appropriate for the Archives to have the power to acquire them compulsorily and pay compensation to the private owner.[ccxlv]

11.21 The Commission suggested in DRP 4 that, in the Commonwealth jurisdiction, there seems to be no case for even discretionary compensation for the recovery of records which were removed from Commonwealth control without authority after the proclamation of the Archives Act on 6June 1984. However, a discretionary power to pay compensation would be appropriate for records removed prior to 6 June 1984 or for which the circumstances of removal cannot now be established. This position was generally supported in responses to DRP 4, although one submission argued that compensation provisions might be used to frustrate the basic recovery provisions.[ccxlvi]

11.22 As noted in paragraph 11.17, section 51(xxxi) of the Constitution would require that compensation be paid on just terms in any case in which the Commonwealth recovered a record which was a Commonwealth record under the provenance definition, but property rights in which were owned by another party.

11.23 Administrative decisions relating to the recovery of Commonwealth records, including decisions relating to eligibility for compensation, and the amount of any compensation, should be reviewable by the AAT.

> **Recommendation 61.** Except in cases involving an acquisition of property, no compensation should be payable in relation to the recovery of records which passed out of Commonwealth custody on or after 6June 1984.
>
> **Recommendation 62.** Except in cases involving an acquisition of property, there should be a discretion for the payment of compensation in relation to the recovery of records which passed out of Commonwealth custody prior to 6 June 1984, or for which the circumstances of removal cannot now be established.
>
> **Recommendation 63.** Decisions made by the NAA under the recovery provisions should be reviewable by the AAT.

Making records available for copying

11.24 The Commission suggested in DRP 4 that the legislation should give the NAA the power (subject to appeal) to require the holder of a Commonwealth record to deliver the record to it for copying. The object of copying would generally be to facilitate action to recover the original, by giving the NAA an opportunity to assess

the value and uniqueness of the record concerned. On occasions the needs of the NAA might reasonably be met by making a copy of the record, which could be made available for public research. The original could then be returned to the private custodian. In either case, reasonable costs associated with the delivery of the record would be payable by the NAA. As this right would only be exercised in relation to records to which the NAA was entitled to custody, the Commission suggested that it would be appropriate to exempt such copying from copyright infringement. Such an amendment, which might be included in an amendment to section 51AA of the *Copyright Act 1968* (Cth) would, in the Commission's opinion, be consistent with the terms of the existing exemptions in that section.

11.25 Submissions in response to DRP 4 supported this recommendation. However, the Attorney-General's Department noted that it will need to be considered in the context of any relevant recommendations which may be made by the Copyright Law Review Committee, which is due to report to the Attorney-General on 30 June 1998.[ccxlvii]

Recommendation 64. The NAA should have the power to require that a Commonwealth record be made available for copying.

Recommendation 65. Decisions made by the NAA to require a record to be made available for copying should be reviewable by the AAT.

Recommendation 66. Subject to any relevant recommendations which may be made in the report of the Copyright Law Review Committee in relation to section 51AA of the *Copyright Act 1968*, that act should be amended to expressly exempt such copying from copyright infringement.

The status of official records retained by former ministers

11.26 The present Act does not make specific provision for the records of former ministers. In principle, therefore, those records in ministers' offices which are Commonwealth records are subject to the disposal, custody and public access provisions of the Act. This means that former ministers would be in breach of the legislation if they retained custody of such records after leaving office. Former ministers are free to retain or dispose of their non-Commonwealth records as they see fit.

11.27 Australian Archives operates a Personal Records Service which encourages former ministers and senior officials to deposit their records (both Commonwealth and personal) with the Archives.[ccxlviii] Many former ministers have now done this, but, if ministers do not respond to approaches about their records, it may be difficult to determine whether or not they actually include Commonwealth records.

11.28 It would be open to the Commonwealth to invoke section 24(1) to compel departing ministers to return official records to Commonwealth custody, but this has never been done. Some ministers retain their sets of Cabinet documents in spite of requests that they be returned to the Cabinet Office. Australian Archives accepts Cabinet material in deposits of records from former ministers on the rationale that, if they did not do so, depositors might take all their records elsewhere. Cabinet Office has accepted this situation in practice because it results in at least some Cabinet material[ccxlix] being returned to Commonwealth custody.

11.29 The normal public access regime has been modified for those who deposit Commonwealth records with the Personal Records Service. As proclaimed in 1984, the Act gave no specific access rights to such depositors so that, at least in theory, they could be denied access to records which they had deposited until the records were 30 years old. In recognition that this would be likely to deter intending depositors, particularly if there was no compulsion to return Commonwealth records, Archives Regulation 9(2)(c) was made in 1988. This provides that depositors have a right of access to Commonwealth records which they have transferred to the custody of the Archives, regardless of whether or not the records have reached the open access period. This right of access does not extend to records of the Parliament, Executive Council or Cabinet, for which specific authority is required. Depositors may access or authorise others to access non-Commonwealth records which they have transferred to the Archives as they see fit.

11.30 The official records of ministers are a significant element in Commonwealth recordkeeping. They should be defined clearly as Commonwealth records and be subject to the same obligations as departmental records subject, however, as at present, to depositors continuing to have unrestricted access to those records. It would be open to the NAA to consider and, if appropriate, authorise any request made by a depositor in relation to the custody of their records. This might include the temporary loan of records to depositors for the purpose of writing autobiographies.

11.31 The Commission suggested in DRP 4 that the status of the official records of former ministers would be clarified if the legislation provided that any record in the possession of a minister is a Commonwealth record unless it is obviously a private document or carries an endorsement that it is a private document. The Commission also suggested that, as an administrative measure, the NAA should encourage Commonwealth agencies forwarding official papers to ministers' offices to endorse the papers as being Commonwealth records.

11.32 Submissions in response to DRP 4 generally supported the Commission's recommendations. However, Australian Archives opposed the inclusion of a provision relating to the endorsement of a document as a private document on the grounds that such a provision could be open to misuse. The Archives also saw a specific 'possession' provision as unnecessary if the legislation were to clarify, by express provision in that regard, that Commonwealth records include 'any records

created or received by ministers in the course of undertaking their ministerial responsibilities'.[ccl] The Commission accepts these suggestions.

Recommendation 67. The legislation should provide that

- any records created or received by ministers in the course of undertaking their ministerial responsibilities are Commonwealth records
- all Commonwealth records in the possession of a minister must be transferred to the custody of the NAA not later than when the minister leaves office, unless the NAA authorises some other custodial arrangement
- such records are subject to the public access provisions of the legislation
- notwithstanding the fact that the records are subject to the public access provisions, the person who created them (and that person's nominated representative) has a continuing right of unrestricted access to them
- decisions about the public access status of the records when they reach the open access period should be made by the NAA in consultation as appropriate with agencies responsible for the functions to which the records relate
- the NAA may not, during the lifetime of a former minister, destroy or otherwise dispose of Commonwealth records received from the minister without his or her approval. This requirement would cease to apply on the death of the depositor or if the depositor failed to respond within a reasonable time to approaches from the NAA.

ENDNOTES

12. A general custodial regime

Introduction

12.1 Custody is the physical possession (or at least the effective control) by an archival institution of records created within the jurisdiction which the archival institution serves and which have been identified as being worthy of long term preservation for administrative, evidential or research purposes. However, the fact that the archival institution has custody of the records does not necessitate that it own them or that it have sole responsibility for determining how they may be used.

12.2 The basic objective of archival custody has been to give sanctuary to records of archival value. This includes housing them, maintaining them in good condition and arranging and describing them in a way that allows them to be accessed effectively. In some jurisdictions, the transfer of records to archival custody has also been regarded as an act of authentication, so that the very fact that they have been received by the archival authority is a confirmation of their reliability and their standing in the jurisdiction which created them. Even in jurisdictions such as the Commonwealth where there is no specific legal basis for the concept of archival authentication, there has been a long tradition of major inquiries, courts and a wide range of administrative bodies seeking out archival records as a crucial resource and accepting the validity of those records unless there was some specific ground on which to challenge it.

12.3 The concept of custody has been associated closely with the existence of archives as institutions. Because of the huge volume of paper records generated in the larger jurisdictions, the custodial role of archival institutions has been emphasised by the sheer size of the buildings which they need to house the records for which they are responsible and by the resources required to service them. This has been true particularly in jurisdictions such as the Commonwealth, where the archival institution has had custody not only of records of archival value but also of records retained solely for administrative purposes.

The present custodial provisions of the Act

12.4 The Archives Act gives Australian Archives a central role in the custody of Commonwealth records.

12.5 The statutory functions of the Archives include

> to have the custody and management of Commonwealth records, other than current Commonwealth records, that —
> (i) are part of the archival resources of the Commonwealth;
> (ii) ought to be examined to ascertain whether they are part of those archival resources; or
> (iii) although they are not part of those archival resources, are required to be permanently or temporarily preserved.[ccli]

The powers of Australian Archives include

> [to] establish and control repositories or other facilities to house or exhibit the material of the Archives and, in association with a State, the Northern Territory, or other person, control repositories or other facilities in which the material of the Archives is housed or exhibited.[cclii]

12.6 Australian Archives' role in the custody of Commonwealth records is elaborated in Part V of the Act.

- Section 24 gives the Archives the sole power, subject to certain exceptions, to authorise the transfer of the custody or ownership of Commonwealth records.

- Section 27 requires that, when a Commonwealth record has ceased to be required to be readily available to a Commonwealth institution, it must be transferred to the custody of the Archives.[ccliii] If such a transfer has not taken place by the time the record has reached the age of 25 years, it must be undertaken as soon as practicable thereafter. However, section 29 provides for certain exceptions to this regime, not all of which require the approval of the Archives.

- Section 28 provides that the Archives is entitled, for the purposes of the Act, to full and free access at all reasonable times to records in the custody of Commonwealth institutions other than the Archives. This provision was intended to pave the way for records to pass into archival custody by facilitating processes such as appraisal and series registration.

- Section 64 permits the Archives to entrust the custody of material of the Archives to a person where it is appropriate to do so. This provision is intended to facilitate and protect the loan of Commonwealth records on a short or long term basis where there is a particular reason for them to be placed in the custody of an individual or organisation other than the Archives.

12.7 The custodial provisions of the present Act reflect a regime which developed after the Second World War. The immediate object of establishing a Commonwealth archival function in 1944 was to secure the preservation of records of archival value. However, this task expanded so that the Archives became the policy maker and to a large extent the service provider for the appraisal and disposal of all Commonwealth records. In consequence the

Archives also came to provide storage and retrieval services for all Commonwealth records not immediately required by the agency which created them, even though a large proportion of the records taken into archival custody were not of archival value. This followed the prevailing administrative philosophy that major Commonwealth support services should be provided by specialist service agencies. A broadly similar approach was adopted by the national archival authorities in the United States, Canada and the United Kingdom.

12.8 The present Act was drafted at a time when the central service agency concept still prevailed and Australian Archives itself was in the course of replacing its first generation of storage facilities, many of which were poor quality buildings adapted from other functions, with modern archival repositories in each State and Territory capital city. In consequence, the custody provisions made no distinction between records of archival value and records which were to be retained only as long as there was an administrative need for them.[ccliv] Subject to certain exclusions, most of which required the authority of the Archives, all records were required to be transferred to the custody of the Archives once they had ceased to be regularly used by the agency which created them. Any records remaining in the custody of an agency at the age of 25 years were required to be transferred to the Archives as soon as practicable thereafter.

12.9 During the past decade Australian Archives' role in the custody of Commonwealth records has changed substantially in the face of financial pressures and new administrative philosophies. From the late 1980s the Archives in general ceased to accept transfers of records from agencies unless their disposal status had already been determined. This prevented agencies from transferring records to the Archives as a cheaper option than appraising and sentencing them. In 1990 storage charges were introduced for unevaluated records already in archival custody (other than those dating from 1964 or earlier) and for records which had been sentenced for destruction at an age of less than 25 years. The object of these charges was to encourage both timely sentencing and the transfer of short term records to private sector storage where this was appropriate. In 1995 storage charges were extended to all records sentenced for destruction at an age of less than 30 years. In addition, the Archives ceased to accept custody of records sentenced for destruction at an age of less than 30 years unless they carried a national security classification or there was some other ground for accepting them. The standard storage charge currently applied by the Archives is $15.50 per linear metre for the first year of storage and $10.50 per linear metre for subsequent years. However, penalty rates of up to $57.50 per linear metre may be applied to the storage of unevaluated records in order to put pressure on the controlling agencies to sentence them.

12.10 Australian Archives' submission in response to IP 19 indicated that the transfer of responsibility for records storage to individual agencies is likely to be extended further.

> ... in recent years the Archives has practically stopped taking in records assessed as needing to be kept for less than 30 years — these are left with agencies which in turn may, under certain conditions, store them with private sector

> providers until destroyed — and gradually this could be extended to encompass all records assessed and sentenced as having only temporary value. This makes sense in view of the efficiencies achievable through allowing agencies to make their own arrangements for storage. It would enable the Archives to complete the transition from warehouse operator to running a network of repositories purpose-designed and built for the protection of the nation's official memory. How agencies ensure public knowledge of and public access to records they retain which are over 30 years old but earmarked for eventual destruction should be left to them and the archival authority to resolve within the bounds of standards and procedures set by the archival authority.[cclv]

12.11 The effect of these changes in storage strategies has been substantial. On 30June 1990 the Archives held in its various repositories 209 shelf kilometres of records which had not been sentenced, 144 shelf kilometres of records which had been sentenced and identified as being of permanent value and 115 shelf kilometres of records which had been sentenced and identified as being of temporary value. By 30 June 1997 the Archives held only 44 shelf kilometres of records which had not been evaluated or sentenced. It also held 238 shelf kilometres of records of permanent value and 150 shelf kilometres of records of temporary value.[cclvi]

The custodial role of the National Archives of Australia

The custody of records of archival value

12.12 The Commission asked in IP 19 what, if any, records should be required to be held in the custody of the national archival authority, as opposed to the custody of the agency with functional responsibility for the records concerned. Submissions in response to IP 19 predominantly supported a continuing role for the NAA as the central custodian of records of archival value, except where there is a strong administrative or technological case for some other custodial arrangement for specific categories of records.

> It is hard to imagine a national archival authority that does not hold in its custody the archival resources of the nation. For ease of client access, control and care, it is essential that the authority hold all records regardless of format. The national archival authority should have physical custody of permanent or long-term Commonwealth records once they are non-current ...
> The primary focus of agencies will always be on business activities, not custody of records in the longer term. Many agencies have neither resources or expertise to manage long-term value Commonwealth records ... Distributed custody arrangements may work well in some cases, but to have a larger number of agencies setting up their own archives and managing access to their archival resources would not be efficient.[cclvii]

> ... the management of Commonwealth agency records by a 'single mind' at a policy level will be facilitated by the retention of a primary physical custody role for the national archival authority, with the capacity for agencies to store on site where it is considered appropriate. However, the national archival authority should have the overarching right to require retention of some records in its custody.[cclviii]

12.13 Members of the public who use archival records, and the professional and research organisations which represent them, argued strongly in submissions and consultations for the NAA to remain the custodian of records of research interest.

> The Federation [of Family Historians], a major user group of these records, is of the opinion that all records after they become available for public access should be held in the custody of the national archival authority. Holding of all the records in regional repositories of the Australian Archives makes access by the general public much easier. If agencies were responsible for holding their own records access to them could become much more difficult for a variety of reasons, thus denying the fundamental principle of right of public access that is incorporated in the Act.[cclix]

12.14 The alternative case for an entirely decentralised custodial and public access regime for Commonwealth records was put by the Law Society of New South Wales.

> The assumption in the Archives Act for Australian Archives to store all Commonwealth records needs to change. The responsibility for the management of records rests with the organisations which create them. The management process relating to archival material would be assisted by policy and guidelines developed by Australian Archives.
>
> The benefits of organisations managing their own records, including archiving, include
> - records remain the responsibility of the organisation
> - organisation staff can access the records as they require with a minimum of delay
> - costs of storing and accessing can be controlled by the organisation
> - persons wishing to access the organisation's records would only need the permission of one organisation (the creating organisation itself)
> - no need for the organisation to select records to be held with Australian Archives.[cclx]

12.15 The Commission appreciates that the Freedom of Information public access regime operates on the basis that the records are, in general, in the custody of the agency which created them rather than in a central repository. However, there are substantial differences between the FOI and archival environments. FOI is concerned mainly with relatively recent records which are likely to be an integral part of current agency recordkeeping systems. It also operates on a smaller scale.

12.16 The Commission, therefore, suggested in DRP 4 that, in the interests of both administrative efficiency and community accessibility, the archival authority should continue to have primary responsibility for the custody of records of archival value. The Commission noted its particular concern that, if every Commonwealth agency was required to retain custody of records of archival value for ever, the result would be a proliferation of small archival repositories in which preservation and accessibility standards would be likely to decline without any commensurate saving in overall operating costs.The Commission suggested that, with the exception of security and intelligence records subject to a withholding determination, the NAA should have the power to require that records of archival value should be transferred to its custody or to approve or require some other custodial arrangement. Distributed custody arrangements for electronic records are discussed below in this chapter[cclxi] and other custodial options in Chapter 13.

12.17 Submissions in response to DRP 4 supported the retention of a statutory requirement on agencies to transfer records of archival value to the custody of the NAA by the age of 25 years.[cclxii] Concerns were raised in both a submission[cclxiii] and oral consultations, however,

that agencies might delay the appraisal and sentencing of records in order to evade the 25 year transfer obligation. The Commission has met these concerns in its recommendation in Chapter 10 that the legislation include specific obligations on agencies to appraise and sentence records by the age of 20 years.

The custody of records which are not of archival value

12.18 The present section 27 provision that all records (other than those which have been lawfully destroyed) must be transferred to the custody of Australian Archives once they are no longer required to be readily available for current business, and at the latest by the age of 25 years, reflects a custodial regime which has already been partially superseded. In general, Australian Archives no longer accepts custody of records which need to be retained for less than 30 years, or of records which have yet to be evaluated. The storage of such records is now *de facto* the responsibility of the agencies which created them. These agencies either store the records themselves or contract the storage to private companies. Australian Archives is currently reviewing custodial arrangements for records which are needed for administrative purposes beyond the age of 30 years, but which are not of archival value.

12.19 The Commission suggested in DRP 4 that the statutory requirement to transfer all records to the custody of the Archives should be confined to records of archival value. This suggestion was opposed by Australian Archives, which suggested instead that the legislation should give the NAA the power to determine custodial arrangements for any record that is to be retained for more than 25 years. The principal reason for the Archives' suggestion was that some so-called 'long term temporary' records, for example certain medical records, require to be retained for very long periods of time. In some cases the records might eventually be reassessed as being of archival value. It might be appropriate, therefore, in the interests of ensuring the preservation and accessibility of such records, that they should be stored by the NAA rather than by the agency with residual functional responsibility for them.[cclxiv]

12.20 The Commission maintains its view that the NAA's resources should be focused on the custody of records of archival value. The custody of records which are not of archival value should be the responsibility of the relevant controlling agencies and managed on a fully commercial and contestable basis. It may be that the NAA will continue to have custody of some of these records as a commercial service provider, but it should no longer have the power to require that such records be transferred to its custody. The Commission, therefore, reaffirms its view that the present requirement for the transfer of records to the custody of the Archives by the age of 25 years should be confined to records of archival value. The appraisal, sentencing and notification requirements necessary to achieve this objective have been discussed in Chapter 10.

12.21 Subsequent to its submission in response to DRP 4, Australian Archives suggested to the Commission that there might be exceptional cases in which it would be in the interests of the Commonwealth that records which were not of archival value should be held in the custody of the NAA. Such an arrangement might have regard to the high level of sensitivity of the records concerned, or to some specialised preservation requirement.

12.22 The Commission accepts that there might be exceptional circumstances in which the NAA could appropriately have custody of records which are not of archival value. It recommends, therefore, that the legislation should permit the minister responsible for the NAA to authorise NAA custody of records which are required to be retained for more than 25 years, but which are not of archival value, where, in the minister's opinion, the records are of such national significance that they should be held by the NAA. The relevant controlling agency should be responsible for storage costs. Any such ministerial authorisation should be required to be tabled in the Parliament.

12.23 The Commission emphasised in DRP 4 that it did not propose that the NAA should abandon policy responsibility for the storage of records which are not of archival value. This would be contrary to the 'single mind' philosophy which requires that the legislation should provide a comprehensive framework for the management of Commonwealth records. This view was not contested in submissions in response to DRP 4 and the Commission reaffirms that all Commonwealth records should be subject to mandatory storage standards issued by the NAA as legislative instruments. These standards will ensure that the records are stored in accordance with standards appropriate to their format and expected lifespan. The NAA should have a reasonable right of access to the premises of Commonwealth agencies to ensure that storage standards are being implemented adequately.

12.24 The legislation should make clear that the standards extend to records stored on behalf of Commonwealth agencies by private contractors. Any contractual arrangements entered into for the storage of records should refer to the standards and include adequate provisions for ensuring that they are complied with. This would include monitoring by the NAA.

Recommendation 68. The present section 27(2) requirement that records be transferred to the custody of Australian Archives by the age of 25 years, or as soon as practicable thereafter, should be limited to records of archival value and be qualified to take account of the specific exceptions recommended by the Commission.[cclxv]

Recommendation 69. The custody of records which are not of archival value should be the responsibility of the relevant controlling agencies and be managed on a fully commercial and contestable basis.

Recommendation 70. In the light of the two immediately preceding recommendations, the present section 27(1) requirement that all records be transferred to the custody of Australian Archives once they cease to be required to be reasonably available for current administrative purposes should be removed.

Recommendation 71. The legislation should permit the minister responsible for the NAA to authorise NAA custody of records which are required to be retained for more than 25 years but which are not of archival value, provided that, in the minister's opinion, the records are of such national significance that they should be held by the NAA. The relevant controlling agency should be responsible for storage costs. Any such ministerial authorisation should be required to be tabled in the Parliament.

Recommendation 72. The NAA should issue and monitor standards for the storage of all Commonwealth records. The standards should address the physical integrity of the records and the protection of their security, privacy, functionality and evidential integrity. Chief executive officers of agencies would be responsible under the legislation for ensuring that these standards are implemented.

Recommendation 73. The legislation should ensure that the NAA's storage standards apply equally to Commonwealth records stored by private contractors and that chief executive officers of agencies have a responsibility to put in place contractual and monitoring arrangements to ensure that this is so.

Recommendation 74. The NAA should have a reasonable right of access to records stored by Commonwealth agencies and private contractors in order to monitor and report on the implementation of the standards.

The custody of electronic records

12.25 Archival institutions will continue to play a crucial role in the storage of paper records, including a very large volume of recent paper records which are still held by the agencies which created them. However, the rapid development of electronic recordkeeping systems has profound implications for the traditional concept of archival custody. Given the complex and rapidly developing technologies for managing electronic records, there is a fundamental question whether such records can best retain their integrity and functionality by remaining part of the systems in which they were created (an arrangement generally known as 'distributed custody'), or whether they should be transferred to 'archival' electronic systems operated by archival authorities. Resolving this question is complicated by the fact that, in the longer term, the question itself may become irrelevant as further developments in technology bring electronic recordkeeping systems closer together.

12.26 Electronic records are unlikely to diminish the importance of archival institutions in the management of the records continuum, but they will place further pressure on those institutions to concentrate on their policy making, standard setting, documentation and monitoring roles. If they cannot exercise these roles effectively from the time that records are created, they will risk becoming irrelevant to the recordkeeping process. The challenge to archival institutions is to move beyond their traditional emphasis on the physical custody of records and to ensure that the fundamental objectives of good recordkeeping are achieved regardless of the technological and administrative environment in which this is undertaken.

12.27 The Commission asked in IP 19 whether a distributed custody strategy should be adopted for electronic records. Submissions from archivists and records managers generally supported the distributed custody approach under which the records remain in the system in which they were created. However, even among the archivists, there were significant variations in the enthusiasm expressed for distributed custody, some seeing it as a concept to be embraced eagerly and others as an unavoidable but potentially dangerous consequence of the present state of electronic recordkeeping technology. There was a general feeling that distributed custody could be a serious threat to records if it was not managed adequately. Outside the ranks of the records professionals there was considerable unease about distributed custody, in particular the prospect of custody moving from a central and relatively user friendly archival organisation to a wide range of agencies, some of which might have little interest in archival records and those who used them.

12.28 The case for distributed custody was put by Chris Hurley.

> Long before any question arises of electronic records being 'transferred' ... Archives must ensure that records are created and maintained on agency systems. The electronic records program requires that automated recordkeeping systems are in place throughout government — capable of capturing records of government activity and maintaining them for as long as they are needed. In evaluating data warehousing options, it must be understood that, no matter how long electronic records have to be maintained (and for whatever purpose) after the initial decision to capture them has been taken no new technical issues arise. The archival methods needed to maintain a record for one second are essentially the same as will be needed to maintain it for a thousand years.
>
> An archival system will, therefore, be in operation in every agency which keeps records. The only question remaining is whether, at any stage, it is economically and technically desirable to transfer records to an archives (data warehouse). Under an electronic archiving option, electronic records would, at some stage, be migrated into a centrally managed application — as it happens now with paper records. Under the distributed custody ('post-custodial') model, records would remain distributed across the government network until they were deleted. Distributed custody is (and always has been) unavoidable. Records are created and kept in the 'custody' of records-creating agencies — i.e. supported by their technical and management regimes. The question now is no different from what it has ever been: should some of them be moved somewhere else at any stage? The point is that with electronic records the concepts of being 'moved' and 'being somewhere' are simply meaningless.[cclxvi]

12.29 Hurley saw developing technology as a crucial factor in distributed custody.

> Technically, the idea that electronic records will be 'held' either by Archives or by an agency is untenable. The government (like any other large organisation) will almost certainly develop an integrated network of systems in

which many data management and control issues must be decided on a government-wide level, rather than agency-by-agency. In this environment, managing records by 'transferring' them from one networked application (operated by an agency) to another networked application (managed by another agency, viz. Archives) will be seen to be an old-fashioned and inappropriate notion. Alternatively, 'transferring' records within the networked environment will come to be seen as so routine and trivial that it will not be worth noticing in an archives statute.

An agency might well integrate data warehousing into its recordkeeping regime but the idea which seems to have got about that data warehousing will operate some kind of universal software for housing old data everywhere in the same format is, in my view, not likely to eventuate. Standardisation for warehousing purposes will be local not universal. If data warehousing is used at all, agencies will either develop their own or look about for that which best meets their needs (one of a variety of commercial providers, presumably). Agencies will want variety of choice not universal standardisation. ... Data warehouses will be extensions of each agency's system, not a uniform graveyard maintained by Archives.

The idea that the functionality of hundreds of systems could be rebuilt and held on a single application controlled by Archives raises technical problems of a high order. Even if it were done, it would be risky. Maintaining electronic records means migrating them through changes to application software, data structure, and system configuration. If the records are distributed over many applications, the risk of loss is also distributed. If the records are aggregated into a single application controlled by Archives, the technical problems (and by extension the risks) are magnified and failure would result in 100% loss of records rather than partial loss.[cclxvii]

12.30 Australian Archives has endorsed the distributed custody of electronic records as a general principle, while noting that it may not be the most appropriate option in every case. The Archives' policy statement *Managing electronic records: a shared responsibility*[cclxviii] argues that

Traditionally, archives have maintained the essential characteristics of records — content, structure, context — by preserving the physical 'carriers' of those records in the original order in which they were created and accumulated. In the case of electronic records, concentrating on preserving the physical carriers will not suffice. First ... computer systems must be specifically programmed if the essential characteristics of records are to be maintained. Secondly, while carriers (disks, tapes, CD-ROM, etc) may last a long time, the records they carry may effectively cease to exist because the technology necessary to retrieve them is no longer accessible ...

The best prospect for maintaining electronic records and ensuring their accessibility over time is for such records to remain with the agencies which create or manage them. This strategy ensures that the essential characteristics of records are maintained ... As technology changes over time, agencies are best placed to ensure that records of enduring value are successfully transferred or migrated as systems evolve.

In contrast, the Archives is not positioned to manage a wide range of electronic systems and records applications or to manage the migration of records to other media and standards over time. Taking on these roles would entail the Archives becoming a museum of obsolete technology — an ultimate exercise in futility.

12.31 The concerns of those who had reservations about distributed custody focused on doubts about both the practicality and fairness of requiring agencies to satisfactorily maintain electronic records beyond their current administrative needs.

... organisations which probably rate preserving historical records lower than refurbishing the toilets, are going to be entrusted to maintain their electronic records, in an accessible form, over periods of up to 30 years, competently migrating the records through multiple hardware and software upgrades, and ensuring the 'contextual' information is not lost.

> There is no evidence that such organisations are going to be willing or able to carry out such a task. Have government agencies demonstrated this ability with the preservation of physical records? For every organisation, public or private, which has a viable records management programme ... there are probably a hundred (and that is being generous) which have no systems ... The fundamental changes in organisations, especially government agencies over the last few years, has seen the introduction of the ubiquitous 'business unit', run by managers who see no further than the end of the current financial year. Are such managers, who are fully autonomous in all managerial matters, going to expend energy, resources and money on something as arcane as ensuring public access 30 years into the future?[cclxix]

12.32 Eccleston Associates expressed similar reservations.

> Devolving responsibility for the capture, description and maintenance of inactive and archival records in whatever format to the creating agency, which has neither warrant nor necessarily the will to accept it, is of major concern. Government agencies are under increasing pressure to limit their energies and fiscal allocations to their core functions. The devolution of additional administrative loads, which are now expressly the legislated responsibility of the Australian Archives, could well result in recordkeeping not receiving the administrative support required to assure the Government, business or the community of the authenticity, inviolability and reliability of inactive and archival government records.[cclxx]

12.33 The Department of Industrial (now Workplace) Relations questioned the need for distributed custody.

> In our view, the standardisation of records management systems ... will allow agencies to control and maintain their electronic records in a way which will ease migration to a central repository. In this way, concerns that migration of electronic records in many varied formats may lead to a loss of contextual data would be overcome. There would also be no need for a 'museum of technology' to enable access to records.
>
> With the likelihood of continuing technological change and the emerging dominance of electronic records in the future, we believe long-term storage of electronic records is best coordinated and undertaken by a central agency.[cclxxi]

12.34 The Commission noted in DRP 4 that, in the present state of technology, there were electronic recordkeeping systems in Commonwealth agencies which could not be transferred to the custody of the NAA without a risk that information would be lost or linkages between records would be damaged. The Commission recommended, therefore, that the NAA should have the power to require agencies to retain custody of records of archival value if, in the opinion of the NAA, this was necessary to ensure their preservation and accessibility. Agencies retaining custody of records of archival value would be required to maintain them in accordance with standards set by the NAA.

12.35 This suggestion was based on the premise that the Archives' existing power to delegate the custody of records of archival value, which the Commission has recommended in Chapter 13 should be maintained, might not always deal adequately with the custody of electronic records. The existing power assumes that certain agencies will wish to retain custody of records and that a mechanism is, therefore, required under which such arrangements may be approved by the NAA. In the light of views put to the Commission in submissions and consultations, it is possible that the situation with electronic records of

archival value might be the reverse of that assumption, namely that for financial reasons some agencies would wish to transfer responsibility for their older records to the NAA but that for technological reasons the NAA would not be able to receive them.[cclxxii]

12.36 Submissions in response to DRP 4 generally accepted that a distributed custody strategy would be necessary for at least some electronic records, although several submissions expressed concern about the resource burden this might create for the agencies concerned.[cclxxiii] The Commission reaffirms its view that the legislation should include provisions to ensure that electronic records of archival value are protected adequately, particularly in cases in which an agency might be reluctant to maintain responsibility for records which the NAA does not have the technology to manage adequately. The NAA should have the power to require an agency to retain the custody of records of archival value in cases in which the NAA considers that the agency is better placed to preserve the records and ensure their accessibility, or the NAA is unable to provide appropriate custodial facilities itself. Agencies having custody of records of archival value should be required to maintain them in accordance with standards set by the NAA.

Recommendation 75. The NAA should have the power to require agencies to retain custody of records of archival value if, in the opinion of the NAA, this is necessary to ensure their preservation and accessibility.

Such records would be required to be maintained in accordance with standards set by the NAA.

The 'controlling agency' concept

12.37 In some archival jurisdictions, records of archival value (or at least those records considered suitable for public release) pass into the full control of the archival authority at a specified age. This means that the archival authority becomes the final arbiter of issues relating to their management and accessibility, although this may be done in consultation with the agency which created them.

12.38 The present Act includes several provisions which give the agencies which created records (or their functional successors) ongoing rights over the records which override those of Australian Archives indefinitely. These include

- the section 24(4) provision that agency approval must be obtained if Australian Archives wishes to destroy records in its custody

- the section 29 provisions under which ministers and the security and intelligence agencies may withhold records from archival custody without the concurrence of Australian Archives
- the section 30 provision that the Archives must make available records in its custody to, or at the direction of, the agency to whose functions they relate[cclxxiv]
- the section 34 provision permitting ministers to certify conclusively that a record is an exempt record
- the section 35 provision requiring Australian Archives to consult ministers or their delegates about arrangements for assessing the suitability of records for public release.

12.39 Approaches to this issue in other jurisdictions vary considerably. The Archives Authority of NSW, suggested that

- 'control' should be defined as an entitlement to possession or custody of a record, including having it in the possession or custody of some other person
- once an official record is no longer required for current administrative purposes, control of it should pass to the archival authority
- once an official record has reached the age of 25 years it should be regarded as being no longer required for current administrative purposes unless the relevant agency has made a determination to the contrary
- the archival authority should be consulted about the issue of a 'still in use' determination and it should have the right to request a minister to review the determination
- the archival authority should take control of an official record by taking the record into its possession or custody or by entering into an arrangement with some other person to have possession or custody of the record.

12.40 In contrast to the scheme suggested by the Archives Authority of NSW, the South Australian *State Records Act 1997* maintains indefinitely certain rights for the agency which created a record. The Act requires that records be transferred to the custody of State Records by the age of 15 years, although the Manager of State Records may agree to some other custodial arrangement. However, the creating agency retains the right to make access decisions about the records (if it chooses to exercise that right), to prevent State Records from disposing of the records and to recall records from archival custody to the extent that this is necessary for the proper performance of the agency's functions.

12.41 Some Commonwealth agencies take a strongly protective interest in even their oldest records. This interest is most apparent in Cabinet records, in records bearing the higher levels of national security classification and in the personnel and welfare records of former members of the armed services. In principle the Commission supports the view that once records of archival value reach a certain age they should pass into the effective control of the NAA, even if they remain in the physical control of some other agency. This does not mean that special arrangements should not be made for particular groups of records where it is

appropriate to do so. But it does mean that the NAA should ordinarily be the final arbiter of such arrangements.

12.42 The Commission suggested in DRP 4 that, in the light of submissions made in response to IP 19, conferment on the NAA of sole authority over records of archival value once they reached a specified age would meet with strong opposition from some agencies. Those agencies might argue that a range of obligations and sensitivities associated with their records would make it inappropriate for the NAA to assume full control of them even at the age of 25 or 30 years. The Commission accordingly suggested that the legislation should recognise the concept of 'controlling agency' and set out any residual rights or responsibilities of controlling agencies over records of archival value more than 25 years old.

12.43 Submissions in response to DRP 4 endorsed this suggestion.

> The concept of the 'controlling agency' needs to be set out in terms and definitions under the Act. The status of the controlling agency with respect to the records for which it is responsible cannot be subject to interpretation and dispute, especially where there are national security issues involved ... [there should be] clear acknowledgement of the concept of 'controlling agency', including defining the term to ensure that particular national responsibilities rest only with the agency responsible for the records.[cclxxv]

> The concept of the controlling agency is significant in the management of records and archives administration in Australia. Particularly for records exhibiting national security sensitivities, it is vital that this concept be clearly identified and upheld. ... Such a definition would need to ensure that, while describing the term, it allows for the inclusion of the rights, as well as the responsibilities, that this concept is meant to bestow on the agency responsible for the records.[cclxxvi]

12.44 The Commission noted in DRP 4 that some Commonwealth government functions have had a complex history of reorganisation and movement between agencies. The Commission suggested, therefore, that if it proved impossible for the NAA to determine clearly which, if any, current agency should have responsibility for certain groups of records, the legislation should provide that the controlling agency rights for the records should pass to the NAA. Apart from endorsement by Australian Archives, this recommendation did not attract significant comment in response to DRP 4.

12.45 In its submission in response to DRP 4, Australian Archives suggested that, for all records that are more than 100 years old, ownership should pass to the NAA. In the light of the Commission's recommendation that a provenance, as opposed to a property based, definition of Commonwealth record should be adopted, the Commission has considered this suggestion in the context of control rather than ownership. Even so, the Commission is unconvinced of the need for such a provision. If a record which is more than 100 years old can still be identified clearly as coming under the functional control of a particular agency then there would seem to be no compelling reason to end that control merely because of the passage of time. If, on the other hand, the identity of the controlling agency had become

blurred with time, the controlling agency function would, in any case, pass to the NAA in accordance with the Commission's recommendation in the preceding paragraph.

Recommendation 76. Records of archival value which have reached the age of 25 years should, to the fullest extent possible, pass into the effective control of the NAA.

Recommendation 77. The legislation should recognise the concept of the 'controlling agency' and set out any residual rights or responsibilities of controlling agencies over records of archival value more than 25 years old.

The NAA should assume the role of 'controlling agency' in respect of records that are not identifiable with the current functions of any agency.

Returning records to the custody of other agencies

12.46 Section 30(2) provides that, where a record more than 25 years old is made available to a Commonwealth institution, it should not leave the custody of the Archives unless this is necessary for the proper conduct of the business of that institution. The object of this provision is to protect records which are in, or close to, the open access period by ensuring that they do not become inaccessible to members of the public or risk being lost or altered by being reabsorbed into a departmental recordkeeping system. Australian Archives has always sought to minimise the loan of open access period records to other agencies, but a considerable number of such loans have taken place either to serve current administrative needs or to obtain the agency's advice about the public access status of the record concerned. The Commission suggested in DRP 4 that older records should leave archival custody only if there is a compelling administrative need for them to do so and that the issue is sufficiently important to be recognised in legislation. No contrary view was put to this suggestion and the Commission recommends that the section 30(2) provision be retained, although it need apply only to records of archival value.

Recommendation 78. The legislation should provide that records of archival value that are more than 25 years old should leave the custody of the NAA only if, in the opinion of the NAA, there is a compelling administrative need for them to do so.

Samples of records and objects of archival significance

12.47 Section 61 provides that an object which is the property of the Commonwealth or of a Commonwealth institution may be declared by the Minister to be an object of archival significance. Objects subject to such a declaration cannot be destroyed without the permission of the Archives and must be transferred to the custody of the Archives when no longer required for current administrative purposes. The purpose of section 61 is to provide for the preservation of material which is relevant to the history of the Commonwealth but which does not fall within the normal definition of a record. The requirement for a ministerial declaration was seen to reflect the exceptional nature of such a decision and the need to ensure that the Archives was in fact the most appropriate custodian for the object.

12.48 Section 62 provides that, to the extent required by the Archives, the Reserve Bank must provide samples of current bank notes, the Royal Australian Mint must provide samples of current coins and the Australian Postal Commission must provide samples of current postage stamps. In addition the Minister has the power to declare that any other objects that are the property of the Commonwealth or of a Commonwealth institution are subject to the requirement to provide samples to the Archives.

12.49 Submissions in response to IP 19 did not address either provision, perhaps because they have been little used and appear to serve little current purpose. Australian Archives does not exercise its right to obtain samples of notes, coins and stamps, which are, in any event, housed and presented by the institutions which created them. Any other obligations to retain samples of records are set out in records disposal authorities, avoiding the need for specific ministerial determinations.

12.50 The Commission acknowledged in DRP 4 that there should be some provision for material that does not fall within the general definition of records but which merits preservation and for which the NAA is the most appropriate custodian. The Commission suggested, however, that in view of the disparate nature of the material involved, the low level of use of the existing provisions and the fact that both values and custodial options may change over time, the most flexible option would be to deal with specific instances as they arise. This could be achieved either by accepting custody of material outside the mandatory provisions of the legislation or by a regulation adding the material concerned to the definition of a record.[cclxxvii]

12.51 Two submissions in response to DRP 4 addressed this issue. Australian Archives agreed that sections 61 and 62 could be deleted, but suggested that the NAA should negotiate with the Royal Australian Mint, the Reserve Bank and Australia Post to ensure that the intention of section 62 continued to be met. A submission provided to the Commission in confidence commented that

> The fact that these sections have not been used by Australian Archives does not mean that they have not been used within the agencies concerned ... In addition, the disposal authorities often do not go down to the level of detail

that would be regarded as satisfactory by philatelists, numismatics or note collectors ... I would argue that the existing provisions act as a catalyst for higher standards and should be retained.[cclxxviii]

12.52 In the light of these responses the Commission recommends that the NAA should consult with relevant agencies and any other relevant stakeholders about the continuing need for section 62, but if that need cannot be clearly demonstrated the provision should be removed. In the absence of any submissions advocating a continuing need for section 61 the Commission recommends that the provision be removed.

Recommendation 79. The present section 61 should be deleted. If it is considered appropriate to extend the application of the legislation to material that does not constitute a record as defined in the legislation, this should be achieved by regulation.

Recommendation 80. The NAA should consult relevant agencies and any other relevant stakeholders about the continuing need for section 62. If the requirement for this provision cannot be clearly demonstrated it should be removed.

The location of the National Archives of Australia's custodial facilities

12.53 Section 63 requires Australian Archives, in determining where records are to be located, to take into account

- the convenience of persons likely to require access to the material
- the desirability of keeping related material in the same place
- the appropriateness of keeping in a State or Territory material that relates in particular to that State or Territory or to places in that State or Territory.

12.54 Australian Archives operates public research facilities in every State and mainland Territory capital city. Records created by Commonwealth agencies are normally held in the office of the Archives in the State or Territory in which they were created, so that the spirit of section 63 has been respected. Indeed, the records of the national government are more widely distributed geographically in Australia than in many other countries. In Canada, for example, records of archival value are held predominantly in Ottawa.

12.55 Some submissions in response to IP 19 noted that much material relating to specific States and Territories was held in old head office records which are now located in the Canberra or Melbourne offices of the Archives, remote from those likely to have most interest in them. This problem has been recognised by the Archives, but in many cases the transfer of individual records to the areas to which they relate would involve splitting a

recordkeeping system between several locations. In this sense the first and second objectives of section 63(1) can on occasions conflict. Difficulties also arise where individual items relate to more than one area. The Archives has microfilmed some of the most heavily used record series so that copies can be made available in each office, but the substantial costs involved mean that microfilming can only ever be a partial solution to the problem.

12.56 The making of any recommendation about section 63 is complicated by the fact that it cannot be assumed that the NAA would continue to be able to operate in each State and Territory, although the Commission notes an encouraging trend towards the establishment of joint Commonwealth/State archival facilities. For example, in 1997 Australian Archives and the Public Record Office of Victoria opened a joint public research facility in central Melbourne. Other such cooperative ventures are under consideration. Joint research facilities can enhance the visibility and efficiency of both institutions involved and also help researchers navigate the often complex interface between Commonwealth and State functions. It is certainly preferable from the user's viewpoint for the NAA to participate in a joint venture rather than withdraw entirely from a State or Territory and transfer all the records relating to that State or Territory to some other part of the country.

12.57 In the longer term, the development of electronic records and of electronic networks to access them will overcome some of the problems which section 63 was intended to address. However, much of the history of the nation and its citizens will continue to be held on paper in a single location.

12.58 The Commission suggested in DRP 4 that the general intention of section 63 remains valid today, but that in a rapidly changing world it was probably of little benefit to include such a directory provision in legislation. This suggestion was endorsed in submissions in response to DRP 4.

Recommendation 81. The section 63 provisions relating to the location of archival records should be deleted.

Recommendation 82. As an administrative objective the NAA should, if it becomes necessary to terminate or significantly reduce its presence in any State or Territory, endeavour to enter into a cooperative arrangement with the relevant State or Territory archival authority, or with some other appropriate organisation, to accept custody of Commonwealth records of archival value that ought to be located in that State or Territory.

ENDNOTES

13. Exceptions to the general custodial regime

Introduction

13.1 In most government archival regimes the generality of records of archival value pass into the custody, or at least the effective control, of the relevant archival authority either at a specified age or when they cease to be regularly required for current administrative purposes. In some jurisdictions this process is sanctioned by legislation, while in others it is a matter of administrative practice. However, in most, if not all, jurisdictions there are some groups of records which are withheld from transfer to the archival authority indefinitely, either because they are considered to be highly sensitive or because they are required by the agency which created them for some continuing administrative purpose. In some jurisdictions the archival authority has a role in the sanctioning of such arrangements, or is at least informed of them, but in others the archival authority may not even be aware of the records' existence.

13.2 The present Act provides an accountable regime for withholding records from Australian Archives' custody. In most cases the specific approval of the Archives is required for such an action and, even if it is not, the action is required to be documented by the making of a determination. This chapter examines how such provisions have operated and makes recommendations for their improvement.

The present section 29 provisions relating to the withholding of records from archival custody

13.3 Section 29 of the Act includes four provisions which may be used to override the section 27 requirement to transfer records to the custody of Australian Archives at or before the age of 25 years.

- Under section 29(1) a Commonwealth institution may determine, with the concurrence of the Director-General of Australian Archives, that a record, or class of records, is not required to be transferred to the custody of the Archives.

- Under section 29(2) the responsible minister[cclxxix] may determine that a record is not required to be transferred to the custody of the Archives.

- Under section 29(8) the Australian Security Intelligence Organization, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Intelligence Organisation, the Office of National Assessments and the Inspector-General of Intelligence and Security may make a section 29(1) determination, without needing the concurrence of the Director-General of Australian Archives, that a record, or class of records, is not required to be transferred to the custody of the Archives.

- Under section 29(9) the Commissioner of the Australian Federal Police may make a section 29(1) determination, without needing the concurrence of the Director-General of Australian Archives, that any record containing information the release of which would endanger the safety of a person (a) who is, or has been, assessed for inclusion in the National Witness Protection Program or (b) who is, or has been, a witness within the meaning of the *Witness Protection Act 1994* under that Program, is not required to be transferred to the custody of the Archives.

13.4 Section 29(1) determinations made with the concurrence of the Director-General of Australian Archives have not been used very widely. Australian Archives has a record of 24 determinations issued between 1985 and 1997, three of which were subsequently cancelled. Notable among these were determinations covering the functional and working records of the Senate, the curatorial records of the Australian War Memorial and large groups of personnel records of the armed services. Most of the other determinations covered smaller groups of records retained by agencies to serve specific administrative needs or occasionally because they were perceived to have a high degree of sensitivity.

13.5 Anecdotal evidence provided to the Commission suggests that a number of agencies have withheld groups of records bearing high levels of national security classification from transfer to Australian Archives' custody without apparently seeking the Director-General's concurrence with a formal determination under section 29(1). If such records become subject to a public access application and are assessed as suitable for release, either the originals or copies are transferred to the Archives. In addition the Archives is aware of various groups of very old records still held by agencies for administrative or historical purposes.

13.6 The Commission suggested in DRP 4 that there may be circumstances in which records of archival value might appropriately remain in the custody of an agency other than the NAA, provided that such retention did not threaten the preservation of the records or frustrate public knowledge of or access to them. This view was generally supported. Accordingly, the Commission recommends the retention of a provision along the lines of the present section29(1) permitting the NAA to agree to records of archival value more than 25 years old being withheld from archival custody. The need to comply with relevant standards would ensure that any such determination did not operate in a way that would adversely affect the preservation or accessibility of the records concerned. The Commission has recommended in Chapter 12 that the NAA should no longer have the power to require that records which are not of archival value should be transferred to its custody, so that there would be no need to include such records in the proposed provision.

13.7 The section 29(2) provision under which the minister responsible for a particular record may determine that it need not be transferred to the custody of the Archives has never been used. A possible role for ministerial determinations in relation to security and intelligence records is discussed below.[cclxxx] The Commission suggested in DRP 4 that, other than in relation to security and intelligence records, a provision of this nature is unnecessary and should be deleted. Australian Archives supports the removal of this provision altogether.[cclxxxi] However, the Department of Foreign Affairs and Trade has advocated its retention on the grounds that the provision exists to protect agencies in the unlikely event that the Director-General of the NAA would not accept a valid case for records being retained by an agency.[cclxxxii] The Commission maintains its recommendation that the provision be deleted.

Recommendation 83. The present section 29(1) provision should be retained, but only for records of archival value. Any records subject to such a determination must be managed in accordance with general or specific standards approved by the NAA.

Recommendation 84. The section 29(2) provision for the responsible Minister to determine that records need not be transferred to the custody of the NAA should be removed.

The right of the security and intelligence agencies to unilaterally withhold records from archival custody

13.8 The section 29(8) and section 29(9) provisions, under which the security and intelligence agencies and the Australian Federal Police (the latter agency in relation to certain witness protection records only) may determine to withhold records from archival custody without the concurrence of the Director-General of Australian Archives, constitute one of the few areas of the legislation in which there are significant policy differences between Australian Archives and some other Commonwealth agencies. These differences were addressed extensively in responses to both IP 19 and DRP 4.[cclxxxiii]

13.9 Australian Archives asserted in its submission to IP 19 that it should be a fundamental principle of archival management that the archival authority should in all cases have the right, after appropriate consultation, to determine finally the custodial arrangements for records more than 25 years old. This view was supported generally by archivists and users of archival records and by some Commonwealth agencies.

13.10 In opposition to this view, the security and intelligence agencies, the Department of Defence, the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Australian Federal Police argued that records relating to security and intelligence functions were so sensitive even after 25 years that their custodial arrangements should continue to be determined finally by the agency with functional responsibility for the records concerned. The security and intelligence agencies have utilised the combination of the section 29(1) and 29(8) provisions to withhold a very substantial volume of their records from archival custody.

13.11 The security and intelligence agencies have not suggested that Australian Archives is unable to provide appropriate storage for records carrying high levels of national security classification. Rather, their position is based on the premises that

- the sensitivities of security and intelligence records are not, in general, diminished by time
- such records include material received from foreign governments under strict guarantees of confidentiality which would be compromised if they passed out of the direct custody of the receiving agency

- there is a risk that the views of the NAA on sensitivities and the appropriate protection for records may differ from the views of the security and intelligence community.

13.12 The Commission recognises the high degree of sensitivity attaching to some records beyond the age of 25 years and the need for custodial arrangements for such records to be seen as adequate and appropriate by all stakeholders. It also recognises that the right given by the present Act to the security and intelligence agencies, and in some circumstances the Australian Federal Police, to withhold records from archival custody without a requirement to obtain the approval of the Director-General of the Australian Archives is now well established. Nevertheless, it is important that the management regime for Commonwealth records should be as consistent and accountable as possible.

13.13 The Commission therefore suggested in DRP 4 that the present section 29(8) and 29(9) provisions should be replaced by the following arrangements

- If a security or intelligence agency, or the Australian Federal Police in relation to witness protection records, wished to withhold records under its control from transfer to archival custody beyond the age of 25 years, it should first seek the concurrence of the NAA.

- In the event of the NAA refusing its concurrence, the agency concerned should have the right to ask the minister to which it is responsible for a determination that the records need not be transferred to archival custody. This determination would be binding on the NAA. Any such determinations should be required to be notified to the NAA and also be tabled in the Parliament. Each determination would be supported by a statement describing the records to be withheld and the reasons for doing so, but not in a way which would involve the release of information which would itself merit exemption from public release under the legislation.

13.14 This suggestion was opposed by both Australian Archives and the Australian Intelligence Community. The former maintained its preference for the removal of the section 29(8) and 29(9) provisions altogether, while the latter favoured their retention in their present form. The AIC also suggested that, as their recordkeeping was already subject to the scrutiny of the Inspector-General of Intelligence and Security, the addition of ministerial authorisation as proposed by the Commission was unnecessary.

13.15 The Commission maintains its preference for the inclusion of a provision for ministerial involvement, on the basis that a decision by an agency to withhold records from NAA custody against the wishes of the NAA is one that should be subject to an appropriate degree of scrutiny and review. In line with the Commission's recommendation in Chapter 12 that the compulsory transfer requirement be confined to records of archival value, the Commission considers that provisions enabling records to be withheld should similarly be confined to records of archival value.

13.16 In the light of the submissions in response to DRP 4, the Commission has given further consideration to the circumstances and manner in which security and intelligence records should be able to be withheld from NAA custody without the authority of the NAA. It now proposes that such authority be limited to cases where the head of a security or intelligence agency, or of any other agency which holds security and intelligence records in a recordkeeping system established and maintained specifically for that purpose, certifies, and the responsible minister confirms by counter certification, that the retention of those records in the custody of the agency concerned is essential to the maintenance of the security of the sources, methodologies or capabilities of a security or intelligence agency. In the Commission's view, this approach would permit security and intelligence agencies to continue to be the initiators of action to withhold records while ensuring appropriate high level review and accountability by requiring ministerial counter certification. The proposed formulation would also ensure that records could only be withheld where the security of sources, methodologies and capabilities of the agency could be otherwise compromised.

13.17 A corresponding counter certification provision should be included in relation to those classes of Australian Federal Police records relating to witness protection which are specified in the present section 29(9).

13.18 In addition to suggesting the maintenance of the present section 29(8) provision, the security and intelligence agencies have also suggested that it be extended to records which they created or supplied, but which are now in the custody of other Commonwealth agencies. Such records are found in particular in agencies such as the Department of the Prime Minister and Cabinet, the Department of Defence, the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Department of Immigration and Multicultural Affairs and the Australian Federal Police. Under the present section 29(8), only records under the

direct control of the nominated security and intelligence agencies may be withheld from archival custody without the concurrence of the Director-General of Australian Archives.

13.19 In DRP 4 the Commission suggested that it was, in principle, reasonable that such records should be subject to the same regime as was proposed for the records of the security and intelligence agencies themselves. However, the Commission noted that any extension of the right to withhold records from archival custody without need for the concurrence of the NAA should be confined to situations in which it was clearly appropriate. In some agencies, security and intelligence records are held quite separately from other records. In other agencies such material may be scattered widely through general policy and correspondence recordkeeping systems. It is not appropriate that any special custodial provisions should extend to the latter group, which include security and intelligence records only because of poor management procedures in the past.

13.20 The Commission therefore suggested in DRP 4 that, if the then proposed right of ministerial custodial determination could practicably be extended to recordkeeping systems established and maintained solely for the handling of security and intelligence records, it would be appropriate to do so. However, if a workable distinction could not be established between these specialised systems and the general recordkeeping systems of the major departments, the right of ministerial determination should be confined to the records of the security and intelligence agencies themselves.

13.21 The Attorney-General's Department suggested that the proposed approach might be too restrictive.

> There may be many files that are clearly devoted to security and intelligence matters that are contained within the general filing system of an agency and which would appropriately come within the provisions for the withholding of records from NAA's custody.[cclxxxiv]

13.22 The Commission maintains its view that the custody withholding powers proposed for the records of security and intelligence agencies should extend also to records originating from those agencies and now held by other agencies in separate recordkeeping systems established for the purpose. However, it restates its concern that any enabling provision should not be expressed so widely that it might be misused.

Recommendation 85. The legislation should provide that records of archival value may be withheld from NAA custody without the authority of the NAA where the head of a security or intelligence agency, or of any other agency which holds security and intelligence records in a recordkeeping system established and maintained specifically for that purpose, certifies, and the responsible minister confirms by counter certification, that the retention of those records in the custody of the agency concerned is essential to the maintenance of the security of the sources, methodologies or capabilities of a security or intelligence agency. Such decisions should be notified to the NAA and tabled in the Parliament.

Recommendation 86. A corresponding ministerial counter certification requirement should be included in relation to those classes of Australian Federal Police records relating to witness protection that are specified in the present section 29(9). These decisions also should be notified to the NAA and tabled in the Parliament.

The delegation of custody by the National Archives of Australia

13.23 Section 64 permits the Director-General of Australian Archives to make arrangements with a person to have the custody of material of the Archives. Any such arrangements are required to provide for the care of the material concerned and for its regular inspection by the Archives. Section 64 has been used only occasionally, mainly to sanction the loan of individual items for display.

13.24 The use of the wording 'material of the Archives'[cclxxxv] limits the use of the provision to records already in the custody of the Archives. This has proved to be an inhibiting factor in the use of section 64, since any Commonwealth institution with the facilities and expertise to run its own archives is likely to be holding records which have never been in the custody of Australian Archives. An example is the Reserve Bank of Australia, whose custody of its own archival records had to be authorised under section 29 rather than section 64 because the records had never been in the Archives' custody.

13.25 The Commission suggested in DRP 4 that a provision is required for the NAA to be able to authorise the loan of Commonwealth records in the custody of the NAA

or of the agency which created them to some other Commonwealth agency, private organisation or individual. Such loans would generally be on a short term basis, for purposes such as exhibition or research, and should be subject to the following conditions.

- The NAA should set and monitor appropriate conditions for the physical care of the records.

- The rights and reasonable expectations of other potential users of the records should not be prejudiced by a loan arrangement.

13.26 This suggestion was generally supported in responses to DRP 4, although Australian Archives suggested that it was unnecessary in the light of the Commission's recommendation that the NAA should have a general power to issue storage standards.[cclxxxvi] However, the Commission believes that the issue is of sufficient significance to warrant a specific provision.

Recommendation 87. The legislation should permit the NAA to authorise a Commonwealth institution, a non-Commonwealth institution or an individual to have custody of records of archival value, subject to appropriate conditions.

The custody of records bearing national security classifications

13.27 Australian Archives has suggested that it is essential that all non-electronic national security classified records, irrespective of whether they are of temporary or archival value, should be transferred to the custody of the NAA once they are no longer required for administrative purposes. This would ensure that they would be stored at an appropriate standard of security.[cclxxxvii]

13.28 The Commission suggested in DRP 4 that the NAA should not have custody of records of a kind which would not normally be required to be transferred to it simply because they carried a national security classification. That should be the responsibility of the chief executive officer of the relevant agency. In discharging those responsibilities, chief executive officers would be bound, under the scheme proposed by the Commission, to comply with mandatory custody standards

applying to all Commonwealth records. These standards would make specific provision for the custody of records bearing national security classifications. The Commission's suggestion did not attract significant comment in response to DRP 4.

Recommendation 88. Standards issued by the NAA should make appropriate provision for the custody of records carrying national security classifications. However, the new legislation should not require that all such records should be transferred to NAA custody once they cease to be required for current administrative purposes.

The 'exempt material' provisions relating to Commonwealth collecting institutions

13.29 When the Archives Bill was under consideration during the 1970s there was some concern among the various Commonwealth collecting institutions that the definition of Commonwealth record might be read so widely that it would encompass not merely any official written records which they might hold but also material such as books and paintings. In consequence the Act defines as 'exempt material' (and thereby excludes from the definition of 'Commonwealth record') the memorial collection of the Australian War Memorial, the library material of the National Library of Australia, the collection of works of art maintained by the National Gallery of Australia, historical material in the possession of the National Museum of Australia and the collection of the Australian National Maritime Museum.

13.30 The exempt material provision addresses two separate issues. Firstly, it clarifies that Commonwealth owned cultural material such as books, paintings and artifacts do not fall within the definition of 'Commonwealth record'. Secondly, it recognises that certain official records, as a result of present or past administrative arrangements, are held by the Australian War Memorial or the National Library of Australia rather than by Australian Archives.

13.31 Apart from the institutions immediately concerned, few submissions commented on the 'exempt material' provision. The National Library conceded that it was 'probably superfluous' in relation to the great bulk of the Library's collections.[cclxxxviii] However, the Australian National Maritime Museum expressed a

concern that, if the provision was removed, the NAA might become the formal custodian of items such as helicopters or destroyers, which would then have to be loaned to the Museum.[cclxxxix]

13.32 The Commission suggested in DRP 4 that, if it is still considered necessary for the legislation to state explicitly that Australian Archives' responsibilities do not extend to such materials as books and paintings, this should be done through the general definition of the term 'record' rather than through an 'exempt material' provision. However, in drafting the definition regard would need to be had to the fact that some books, paintings, models and other materials might be justifiably defined as Commonwealth records because their subject matter is so closely related to other Commonwealth records. An example of this would be a model or sketch which formed an integral part of the documentation of a Commonwealth construction project. Provision should, therefore, be made for material to be added to the definition of 'record' by legislative instrument.[ccxc]

13.33 This recommendation elicited a range of responses. Some argued that to exclude certain formats from the definition of 'record' would remove from the coverage of the legislation material which, despite its format, had all the essential characteristics of records.

> ... a book or a painting may well be a record — depending on its provenance. If a [provenance] definition is adopted in place of the existing property test ... it will be just as necessary to allow for this. Collections are technically records because they are documentary evidence of the activities of the collecting institutions and they must therefore be exempted. To exclude the types of materials they normally collect from the definition of record means that true records in that format created by government agencies will be excluded. Under this recommendation, the protection currently afforded those parts of their collections comprising manuscripts or data files, for example, would be removed. The only sensible approach to this issue is to exclude the collections *per se*, regardless of format.[ccxci]

13.34 The Commission maintains its preference for excluding material such as books and paintings from the application of the legislation by the inclusion of appropriate wording in the definition of 'record'. Such an exclusion would relate not only to material held in the other national collections but also, for example, to books held in departmental libraries. However, the wording should make it clear that if such material forms part of a recordkeeping system it may fall within the definition of 'record'. Provision should also be made for adding to the definition of 'record' by regulation.

13.35 In its submission in response to IP 19, the National Library of Australia raised the issue of official records which came into its custody prior to the proclamation of the Archives Act among deposits of personal papers received from former ministers and senior officials. When the Commonwealth Archives Office became a separate organisation in 1961, responsibility for personal papers remained with the Library. After the commencement of the Archives Act and the development of Australian Archives' Personal Records Service, the Library and the Archives agreed that new deposits of personal papers which included significant quantities of official papers would be directed to the Archives. However, records deposited with the Library prior to 1984 were subject to the 'exempt material' provision and remained with the Library. The Library reiterated its concern that the pre 1984 material should remain in its custody, noting that much of it duplicates records held by the Archives and that the Library and the Archives operate similar access regimes.

13.36 The Commission agreed in DRP 4 that there was no reason to disturb the pre 1984 material and suggested that, if its custodial status was still considered to require formal regulation, this should be done though the NAA's general power to authorise custodial arrangements rather than through a continuation of the 'exempt material' provision. This suggestion was supported by the Archives and did not attract other significant comment.

Recommendation 89. In the light of the Commission's recommendations in relation to the definition of 'record', the present 'exempt material' provisions relating to material such as books and paintings in the custody of other Commonwealth collecting institutions should be removed.

Recommendation 90. The existing custodial arrangements for official records acquired by the National Library of Australia prior to 1984 should be confirmed by the NAA in the exercise of its custodial powers rather than by a continuation of the 'exempt material' provision.

The custodial role of the Australian War Memorial

13.37 The Australian War Memorial (AWM) has always been recognised as the custodian of operational records created by Australian military agencies in wars and warlike operations. It is thus responsible for the custody, care and accessibility of an

important group of official records. The 'exempt material' formula in the Archives Act excludes from the definition of 'Commonwealth record' any 'material included in the memorial collection within the meaning of the *Australian War Memorial Act 1980*, although there is provision for such records to be deemed to be Commonwealth records by regulation. Some of the AWM's official records (that is records which would have been Commonwealth records but for the 'exempt material' provision) were subsequently made subject by regulation to certain provisions of the Archives Act, in particular those relating to public access.[ccxcii] The managers of the AWM's official records have always worked closely with Australian Archives and common access procedures and descriptive standards have been adopted.

13.38 The Commission suggested in DRP 4 that the AWM's role in the management of official records should be recognised positively in the legislation rather than, as at present, through a somewhat negative combination of an exclusion and a complex regulation. The AWM's right to custody of records created by Australian military agencies in war, warlike operations and peacekeeping operations should thus be incorporated expressly in the legislation, while making it clear that this in no way diminishes the application of the archives legislation in all other respects to those records. This suggestion has been endorsed by the AWM and Australian Archives.[ccxciii]

13.39 For the past 15 years, intermittent negotiations have taken place between Australian Archives and the AWM to establish a detailed agreement on the classes of official records which should pass to the custody of the AWM. The Commission suggested in DRP 4 that these negotiations should be brought to a satisfactory conclusion as expeditiously as possible, not least for the guidance of Commonwealth agencies which may be uncertain as to which institution they should deliver records. Both organisations agreed with the Commission that this should be done.

Recommendation 91. The legislation should expressly recognise the Australian War Memorial's custodial role in relation to certain Commonwealth records. This would enable the present 'exempt material' provision relating to the AWM to be dispensed with.

Recommendation 92. As an administrative measure, the NAA and the Australian War Memorial should bring to a conclusion as expeditiously as possible the negotiation of arrangements specifying the classes of records to be held by the Australian War Memorial.

ENDNOTES

14. Preservation and protection of records

The preservation role of the National Archives of Australia

14.1 In the archival context, the word 'preservation' has generally been taken to mean not only ensuring the survival of records but also maintaining them in reasonable condition. With the advent of electronic records it has gained the additional meaning of preserving the functionality of records so that their evidential value is not impaired.

14.2 Section 5(2)(a) of the Act lists first among the functions of the Archives

> to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth.

The Act also includes several specific provisions relating to the preservation of Commonwealth records in addition to the general section 24 prohibition on unauthorised destruction or damage. These are aimed essentially at the protection of records of archival value already in the custody of Australian Archives by providing mechanisms which can be used to prohibit inappropriate forms of access to, or use of, records by either agencies or the public.

14.3 Over the years, Australian Archives has received from agencies many records which are in less than ideal condition. Common problems have included the use of poor quality papers, damage through careless handling or bad filing practices and the presence of corrosive materials such as thermal copy paper or metal pins and clips. It would be far beyond the Archives' resources to systematically repair or microfilm a significant proportion of its paper record holdings. Instead, resources have been concentrated on records which are most valuable and most at risk. During the past decade, the Archives has also addressed preservation problems at source by publicising the dangers of the inappropriate use of thermal and recycled papers and by participating in the development of standards for papers used by Commonwealth agencies.

14.4 The Commission sought views in IP 19 regarding the extent to which records preservation standards should be included in the legislation and how they might be promulgated and enforced. Many submissions in response to IP 19 addressed these issues, noting that preservation guidelines already issued by Australian Archives in areas such as paper standards have proved useful to other Commonwealth agencies.

> To be effective, the national archival authority must be responsible for setting standards for the physical preservation of records. It should certainly retain a role in setting standards for records not in its custody and should have the power to enforce compliance with those standards. It should also play a proactive role in monitoring compliance with its standards by agencies and contractors, which can be achieved only by enforcing compliance through legislation.[ccxciv]

14.5 There was general support for the NAA having the power to issue standards for the preservation of records. Some submissions supported the NAA having a monitoring and reporting role, while others saw enforcement in relation to records in the custody of agencies as being the sole responsibility of chief executive officers.

14.6 The obligation to preserve records in good order for as long as they are needed is as fundamental as the obligation to create records. Indeed the need for guidance on preservation issues is even greater because of the technical complexity of issues such as paper deterioration and fire or water damage. The Commission suggested in DRP 4 that the NAA should be empowered to issue standards for the appropriate preservation of Commonwealth records and that such standards should apply equally to private contractors storing records on behalf of the Commonwealth. The Commission also suggested that the NAA should have a reasonable right of access to the premises of agencies and contractors for the purpose of ensuring that the preservation standards are being implemented adequately. Responses to DRP 4 supported these recommendations.

Recommendation 93. The NAA should issue standards for the preservation of all Commonwealth records. The standards should apply equally to private contractors storing records on behalf of the Commonwealth.

Recommendation 94. The NAA should have a reasonable right of access to the premises of agencies and contractors for the purpose of ensuring that the preservation standards are being implemented adequately.

Preserving the functionality of electronic records

14.7 An electronic record which has become inaccessible or corrupted is as useless as a paper record which has become illegible. Even if an electronic record remains retrievable, its functionality may be significantly reduced if its linkages with other records in the system, or with other systems, are reduced or broken by software changes. The recommended general requirement for the adequate preservation of records implies a requirement to maintain functionality. However, the point is so important that the Commission suggested in DRP 4 that it would be appropriate to reinforce it with a specific provision that 'preservation' includes an obligation to protect the evidential value of a record by maintaining its functionality. Responses to DRP 4 supported this recommendation.

> **Recommendation 95.** The legislation should make it clear that preservation includes the maintenance of an adequate level of functionality for electronic records.

Protecting records in archival custody

14.8 Section 36(4)(c) provides that, where acceding to an application for access to a record in a particular form (for example an opportunity to inspect the original or to purchase a copy) would be detrimental to its preservation, access to the record in that form may be refused and access granted in another form. Section 37 provides that the Director-General may, for the purpose of ensuring the safe custody and proper preservation of a record, determine that it be withheld from public access or made available only subject to reasonable conditions. If access to the original record is withheld the Archives must provide a copy if this can be done without detriment to the preservation or safe custody of the original.

14.9 Only a very small proportion of records sought by members of the public have been subject to limitations under section 36(4)(c) or section 37 and in most cases in which originals have been withheld copies have been made available. Decisions under section 37 are subject to the access appeal provisions, but those under section 36(4)(c) are not. There have been no appeals to the Administrative Appeals Tribunal

from decisions to withhold or modify access to records on preservation grounds and only occasional applications for internal reconsideration of such decisions.

14.10 Submissions in response to IP 19 indicated that the existing preservation provisions appear to have worked adequately. The Commission suggested in DRP4 that these provisions should be maintained and that the right of appeal should be extended to decisions under the present section 36(4)(c). Submissions in response to DRP 4 endorsed this recommendation.

> **Recommendation 96.** The NAA should retain the right to refuse or restrict access to records on preservation grounds and to provide copies in place of access to original records. Such decisions should be subject to the normal access appeal process.

ENDNOTES

Part E

Australians' access to their records

15. The access right

Introduction

15.1 Access to government information is an essential element of a democratic society. An effective access regime is essential to ensuring that governments make records available to the public.

15.2 This chapter examines the structure of the existing access regime for Commonwealth records, including the relationship between the FOI Act, the Privacy Act, the Archives Act and other relevant legislation. It then considers options for creating a more effective access regime.

The peoples' right to access archival records

15.3 The fundamental premise from which any consideration of access rights should flow is that the records of government are created and held in trust for the people. It necessarily follows that any limitation or qualification that the legislation places on the right of access by individuals to the records of their government must be justified on carefully and narrowly defined grounds that serve the interests of the nation as a whole.

15.4 In their joint report on the FOI Act in 1995, the Commission and the Administrative Review Council emphasised the crucial importance of effective access to government information.

> Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of the Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information. While much material about government operations is provided voluntarily and legislation must be published, the FOI Act has an important role to play in enhancing the proper working of our democracy by giving individuals the right to demand that specific documents be disclosed. Such access to information permits the

> government to be assessed and enables people to participate more effectively in the policy and decision making processes of the government.[ccxcv]

The Commission and the Administrative Review Council also noted that

> The information holdings of the government are a national resource. Neither the particular Government of the day nor public officials collect or create information for their own benefit. They do so purely for public purposes. Government and officials are, in a sense, 'trustees' of that information for the Australian people. ... It follows that government-held information should be maintained carefully and should generally be accessible to the public.[ccxcvi]

15.5 The wide support expressed to the Commission for continued recognition of such a right is exemplified by the views of former Deputy Prime Minister Lionel Bowen.

> A strong democracy requires a well informed public and it is essential that the people are given information as to how decisions were made and what was said by their elected representatives in the making of those decisions.[ccxcvii]

15.6 In the first half of this century, access to Commonwealth government records was provided on an *ad hoc* basis by the agency which had created the records or its successors. There was no statutory right of public access and no policy guidelines to determine which records might be made available. In 1955 the Commonwealth Archives Committee issued a document entitled *Report on and recommendations for the granting of access to Commonwealth archives for non-official research purposes*. This encouraged discussion of access policy among historians and archivists but, despite the efforts of the Commonwealth Archives Office, policy continued to vary substantially between agencies. In 1966 the Commonwealth adopted the British model of releasing records to the public once they reached 50years of age (the 50 year rule), specifying certain categories of documents which could not be released without agency approval. The United Kingdom adopted a 30year rule in 1968 and the Commonwealth made a similar decision in 1970. Guidelines were approved by Cabinet identifying categories of records which should be exempted from public release. Some of these categories were the predecessors of exemptions which, with further refinements, were incorporated into the FOI Act and the Archives Act. While a 30 year rule was established at the administrative level, there was no guarantee of access to records in the open period and no avenue for the review of a decision to withhold records from the public.

15.7 The establishment of a statutory right of access to government documents was first discussed in Australia in the 1960s, following the introduction of FOI legislation

in the USA. After its election in 1972, the Whitlam government initiated the drafting of FOI legislation and, in 1974, an interdepartmental committee recommended the legislating of an enforceable right of access to official documentation.[ccxcviii] Various committees then continued to work on policy proposals and draft legislation which culminated in the enactment of the *Freedom of Information Act 1982* (in operation from 1 December 1982) and the *Archives Act 1983* (in operation from 6 June 1984). Although the FOI Act initially applied only to records created after its commencement,[ccxcix] and the Archives Act to records more than 30years old, the exemption and review provisions of the two pieces of legislation were closely related.

15.8 Access regimes in other jurisdictions have adopted a range of approaches, some statutory and some purely administrative.[ccc] However, the Commission is firmly convinced that administrative orders and subordinate legislation are too insubstantial a basis for guaranteeing such an important right. The right, and the means by which it is to be enforced, need to be clearly established in primary legislation. Submissions to the review strongly supported the maintenance and enhancement of a statutory access right.

15.9 The archival records of the Commonwealth are a national resource to which the people of Australia need, and ought to have, a right of access. This access cannot be guaranteed unless an effective and non-discretionary access regime is in place. However, a *prima facie* right of public access must be balanced against competing interests such as the protection of personal privacy and national security. These competing interests, which need to be expressed as exceptions to a right of access, must also be clearly defined in legislation.

> **Recommendation 97.** The access regime, including a right of access to Commonwealth records, clearly defined exceptions to that right, and effective review mechanisms, should continue to be legislatively based.

Electronic records and access

15.10 The traditional access regime is based on paper records. The reality is that Commonwealth records are created and stored in many different media. These include not only records created by computers but also video, film, and audio

records. Technology will no doubt generate other media, all of which need to be covered by the new legislation.

15.11 An access regime must be able to deliver an effective right of access to all records, regardless of the medium in which they are contained.[ccci] In some cases there will be practical differences in the way access is delivered to the public, with technology providing more effective systems to assist the open access objective.[cccii] These systems may also enable access decisions to be made much earlier in the life of a record. However, the basic right to apply for and gain access should be common to all records, regardless of age or medium.

> **Recommendation 98.** The access regime should apply to all records regardless of medium. Development of legislation and administrative procedures should take into consideration the need to encompass all record media.

The open period and FOI legislation

Maintaining the concept of an open period

15.12 The current Archives Act establishes a uniform open access period whereby all records are to be made available after reaching 30 years of age unless they fall within one or more specified exemption categories.[ccciii] The concept of a uniform open access period is a basic element of most archival systems and has been adopted in many jurisdictions, including the United Kingdom, the United States, France, the Netherlands, China and the Australian States.[ccciv]

15.13 The basic purpose of a uniform open access period is to make it clear that records will be available to the public at a certain age, either completely or relatively free from exemption, and to ensure that the records are available at that time. This is a particularly appropriate concept in jurisdictions where there is no general statutory right of access to records before they reach this period, for example, in the United Kingdom.[cccv]

> The benefits of an open access period are that it signifies that at a single-easy-to-determine point the generality of records are available to all. An open access period is a declaration of an open culture in government.[cccvi]

> The concept of an open access period is a useful indicator to the public of the principle that the sensitivity of records diminishes over time. There are also administrative advantages in applying a single time frame even though there may be allowance for special circumstances where there is a public interest in earlier release of material. The idea that there is an 'automatic right' to access after a set period of time should be maintained.[cccvii]

15.14 There can, however, be disadvantages in applying a uniform open access period. In particular, records are released in accordance with age rather than sensitivity. Thus, some records may be withheld from public access for longer than their sensitivity warrants.

> ALIA would recommend that access is based on the nature of the material rather than a single statutory period. Information of a personal or sensitive nature requires appropriate protection, whereas much other information does not.[cccviii]

15.15 There are two alternatives to an archival access regime based on an open period. The first is to have a single access regime which applies to all records in the jurisdiction, regardless of their age. The second is to have a tiered access system in which groups of records relating to particular subjects become eligible for release at specific ages. A tiered system might begin at the time records are created, or commence operation only when records reach some specified age.

15.16 The Commission does not favour a single access and exemption regime applying to all records regardless of age. Nor was this option favoured by submissions in response to IP 19 and DRP 4.[cccix] The Commission's principal concern is that a single exemption regime tailored, as it must be, to provide adequate protection for recent, more sensitive, records is bound to operate more restrictively than is necessary for older records. In this regard the Commission notes that the exemption regime that it is proposing for the new legislation would be significantly less restrictive than that of the FOI Act.[cccx]

15.17 The second alternative, namely that of a tiered access scheme, attracted some support in submissions. Reference has already been made to the views of the Australian Library and Information Association,[cccxi] while the ABC also supported a tiered regime.

> In relation to non-exempt ABC records, the ABC favours a multi-tiered access period, on the basis that ABC files of interest to researchers may contain material that is sensitive for varying time periods. For example, publicity files, (including press cuttings) would need only a very short period before access commenced, but more administrative files should probably still require 30 years before commencement of the open access period. Other files with a stronger personal or financial component, such as artists' files, may need an even longer period.[cccxii]

Another argument in support of a tiered regime is that records which were no longer sensitive could be targeted for release without the need for resource intensive FOI application procedures.

15.18 The Commission recognises the attractions of a tiered access system and a progressive release of records based on sensitivity rather than age. Such a system could diminish the present reluctance to consider records for release until they are 30 years old. There are, however, a number of complexities and resource implications which could outweigh the possible benefits.

15.19 A major problem with a tiered system would be the definition of the classes of records upon which the tiers should be based. It might prove particularly difficulty to strike a balance between the need for unambiguous clarity and the competing need to define the categories broadly enough to avoid the legislation becoming too complicated and administratively cumbersome. Legislative definitions below a broad level could produce an inflexible system that might not move with changing community views.[cccxiii] A further problem would be that few records relate exclusively to one subject, making it difficult to link specific records with specific classes.[cccxiv] A tiered system could thus become complex and difficult to administer and researchers might find it difficult to determine when specific records would become available.[cccxv]

15.20 While recognising that such difficulties might well be overcome over time and with appropriate resources, the Commission considers it likely that the short term result would be confusion and indecision, leading to conservative access decisions and an erosion of the concept of open access. A uniform open access arrangement thus appears to be the least resource intensive option consistent with the objective of the highest practicable level of open access. The Commission therefore suggested in DRP 4 that a uniform open access period be retained. This suggestion was opposed in only one response, although the submission in question also acknowledged that a uniform open period combined with exceptions might be a suitable compromise.[cccxvi]

15.21 In recommending the retention of a uniform open access period, the Commission is aware that improvements can and should be made to release non-sensitive records prior to the open access period. Options for encouraging the discretionary early release of records in advance of the open access period are discussed in Chapter 18.

Recommendation 99. The existing concept of an open access period at a defined age should be retained as the complexities and resource implications of a tiered access system would be likely to outweigh the benefits.

Setting a date for the commencement of the open period

15.22 A 30 year rule was adopted by the Commonwealth in 1970, and maintained in the Act, as a suitable balance between open access and the protection of continuing sensitivities. The Commission has considered whether 30 years remains a suitable period or whether the period should be lengthened or shortened.

15.23 A number of submissions suggested that certain categories of records might require protection beyond 30 years,[cccxvii] but none suggested that the general closed period should be extended beyond 30 years. The Commission does not consider it appropriate to extend the closed period. Appropriately framed and applied exemption categories are, in the Commission's view, the best way to protect information which remains sensitive beyond 30 years.[cccxviii]

15.24 A number of submissions supported a reduction in the closed period. The lowest period suggested was five years,[cccxix] although there was more support for the adoption of a 20 or 25 year rule. While most of this support came from researchers and archivists,[cccxx] there was also some support from Commonwealth agencies. The Clerk of the Senate had no objection to a reduction of the 30 years as he felt this was consistent with 'principles of transparency of decision-making and open government.'[cccxxi] The Australian Taxation Office also did not object to a reduction from 30 years.[cccxxii]

15.25 The ideal situation would be for agencies to identify non-sensitive records and to make them available to the public, by the Internet or by some other means, as soon after their creation as possible, thus reducing to a minimum the number of

documents remaining to be released after 30 years. However, this might not always be possible, particularly in agencies with large volumes of records containing information which remains sensitive beyond 30 years. The Department of Foreign Affairs and Trade, while supporting a reduction of the open period to 25years, pointed out certain difficulties that would be involved in reducing the period by even 5 years.[cccxxiii] These include

- relations with foreign countries and agreements over release of records
- increased workload in assessing an extra five years of records — this would be particularly pressing considering the period of records (ie late 1960s and early 1970s) and the extent of activities of the government during this time
- continuing sensitivities of certain categories of records including security, intelligence and personal records.

15.26 The 30 year rule is common but not universal in other jurisdictions. A 1993 report in the United Kingdom recommended the retention of the 30 year period as 'appropriate and sensible', based upon comparative standards in Europe.[cccxxiv] The 1997 United Kingdom white paper on freedom of information has also recommended the retention of a 30 year rule.[cccxxv] The development and release of this white paper has prompted discussion in the United Kingdom of the appropriateness of a 30 year rule, including the introduction of private member's bill for a 20 year period. A report on archives in the European Community cites 30years as a ceiling rather than a threshold.[cccxxvi]

15.27 The United States now requires security classifications to be reviewed at 25-years. The Netherlands has recently adopted a 20 year rule.

15.28 As pointed out by one submitter, there is nothing sacred about a 30 year rule.[cccxxvii] While it might be argued that compatibility with the access periods of foreign countries is necessary in order to provide for the mutual protection of sensitive information, the divergence in practice between countries provides little assistance in determining what period should be adopted in Australia. However, as long as the period is between 20 and 30 years, there should be reasonable compatibility with other countries and exemption categories can be adequately defined to assist the protection of information where release would affect Australia's international relations.

15.29 A reduction in the present closed period would clearly have resource implications for Commonwealth agencies. When the 50 year rule was replaced by the

30 year rule in 1970 very substantial resources were devoted to the examination of records in the 20 year gap. However, even these resources were insufficient to meet initial targets.[cccxxviii] Although a five or ten year reduction might be expected, on that experience, to require less resources, the volume of records created by the Commonwealth Government during the late 1960s and 1970s greatly exceeds the records of the period up to 1945. Moreover, the resources available for access clearance in the 1990s and beyond are likely to be considerably less than those in the early 1970s. Block methods of opening could be adopted to assist with clearance of this material, but many of the records most likely to be in demand would still require detailed access examination.

15.30 The majority of submissions, including those of Australian Archives and other Commonwealth agencies, supported the retention of the 30 year rule.[cccxxix] Many archivists and researcher bodies supported the 30 year rule as a balance providing 'a good reconciliation of the need for confidentiality with the need for scrutiny'.[cccxxx] Concern was also expressed that the reduction of the 30 year rule would not provide more open access but, instead, bolster the culture of secrecy within agencies.

> Attempts to shorten the access period might well prove to be a disincentive for agencies, who may be tempted to try to gain exemption for records which scholars ought to have the chance to see.[cccxxxi]

15.31 In relation to those records of the most sensitive type, namely security, intelligence and personal records, the Commission agrees that a 30 year rule should remain in place. Any reduction in the closed access period could be expected to require increased resources for the identification and exemption of sensitive material, without providing a commensurate increase in the volume of records released. Accordingly the Commission proposed in DRP 4 that a 30 year rule should be retained. While one submitter maintained his support for a shorter period,[cccxxxii] the majority of submissions in response to DRP 4 endorsed this proposal.

15.32 The Commission considers that the retention of a 30 year period would provide the best balance between the competing priorities of, on the one hand, the need to safeguard privacy, security and confidentiality and to use available resources to best effect and, on the other hand, maximising public access to records. However, a 30 year period should only be retained in conjunction with a number of other changes to the Commonwealth access scheme, including ensuring, by closing the access gap between the FOI Act and the archives legislation, that records of all ages

are subject to a right of access, and the implementation of discretionary early release schemes designed to release non-sensitive records prior to reaching 30 years of age.

15.33 The Commission cannot overemphasise the importance to its thinking of the relationship between its recommendations for the retention of the 30 year rule and those set out in Chapter 18 concerning the discretionary early release of records in advance of that age. While the maintenance of the 30 year rule is justified for the reasons discussed, a situation in which the vast majority of records were not released before that age could neither be justified nor tolerated. Discretionary early release must become a normal and central part of recordkeeping in the future, not an island of exception. The 30 year rule should, therefore, be seen as a guarantee, providing minimum standards of access, and it should not inhibit a significantly more active approach to the earlier release of records.

> **Recommendation 100.** The open access period should continue to commence at 30 years.

The relationship with FOI legislation

15.34 During their review of the FOI Act, the Commission and the Administrative Review Council met strong opposition to an initial proposal for the amalgamation of the FOI Act, the Privacy Act and the Archives Act. In the final report there was no recommendation for amalgamation.[cccxxxiii] Submissions in response to IP 19 presented the same arguments against the amalgamation of all three Acts and the Commission agrees that amalgamation would be inappropriate.

15.35 As part of its consideration of the ideal access regime, the Commission has looked in particular at the relationship between the FOI Act and the Archives Act. The existing situation at the federal level is atypical, in that the Archives Act incorporates a right of access and detailed mechanisms for implementing that right in relation to records in the open period.[cccxxxiv] Archives legislation in most jurisdictions, while establishing a framework for an archival institution which can provide access to archival records, falls short of providing a specific access regime that guarantees access to archival records. In some jurisdictions, however, separate FOI legislation provides such rights of access to all records, regardless of age, including formal mechanisms for seeking access to withheld records and a review system. This is the

case in Canada, [cccxxxv] New Zealand, [cccxxxvi] Queensland, [cccxxxvii] Western Australia,[cccxxxviii] New South Wales[cccxxxix] and a number of Canadian provinces.[cccxl]

15.36 A number of submissions preferred a single 'Access to Information Act' which would cover access to all records regardless of age.[cccxli] In practical terms, this would involve amalgamation of the FOI Act and the access provisions of the Archives Act. This could simplify access by incorporating all rights and obligations in a single piece of legislation. It might also be more conducive to a tiered system of access, but it would not be inconsistent with the concept of a uniform open access period. The legislation could provide that certain exemption categories ceased to have effect when a record reached 30 years of age. While some submissions argued that such an amalgamation would create unnecessarily complex legislation, one submission considered the existing situation to be even more confusing.

> [Both] Acts deal essentially with the same basic activity: access to the information and the records. Combining the two would produce complex legislation but the fact of applying two separate Acts is already complex. A single Act would focus on differences as well as similarities and the management of access would then be made more efficient and more consistent.[cccxlii]

On the other hand, the existence of separate legislative regimes does have the advantage of reinforcing the distinctly different policy considerations that ought to govern access to records in the open period. The Commission's recommendations in relation to exemption categories underscore this advantage.[cccxliii]

15.37 A number of submitters suggested that different perceptions of the objectives and operation of the two Acts would make it difficult to combine them.[cccxliv]

> The objectives of the Acts when applied in practice generate different observable public servant styles. Usually the staff of Australian Archives help to facilitate access to information by the service user in accordance with the Act, while staff from government departments more imbued with the intentions of the FOI and Privacy Acts respond with a *fortress mentality* to user requests.[cccxlv]

15.38 Having weighed the competing arguments, the Commission remains of the view that, at the present time, the complexities associated with drafting and implementing a new piece of legislation, and particularly the costs of educating staff and the public, outweigh the possible benefits of a single access act. There were no comments on the Commission's proposal to this effect in DRP 4.

Recommendation 101. The legislation and FOI Act should not be amalgamated.

Scope of the application of the access regime under the new legislation

15.39 The Archives Act currently provides rights of access to all Commonwealth records over the age of 30 years, regardless of whether they are of archival value or are merely being retained because of their long term administrative value, and regardless of whether they are in the custody of the Archives or of some other agency. In view of the emphasis in DRP 4 on the role of the NAA in relation to records of archival value (referred to in DRP 4 as 'enduring' value), some uncertainty appears to have arisen as to whether the Commission envisages the new access regime applying to all records over 30 years of age, or only to those of archival value.

15.40 The Commission confirms its view that the access regime under the new legislation should continue to apply to all records which are 30 years or more of age, and not only to those of archival value. This recommendation is based on the principle that all Commonwealth records should be subject to a statutory access regime and also on the apprehension that confusion might arise if some records more than 30 years old were subject to the access provisions of the archival legislation and others were not. The Commission has recommended, however, that access decisions in relation to records which are not of archival value should be a matter solely for the relevant controlling agency.[cccxlvi]

Recommendation 102. The access regime should apply to all records in the open access period.

Closing the 'access gap'

15.41 The existing relationship between the FOI Act and the Archives Act involves a 'gap' in the coverage of the right of access to Commonwealth records. While the Archives Act provides for access to all records in the open period, the FOI Act only provides access to records created since 1 December 1977.[cccxlvii] Thus there is currently no right of access to records created between 1 January 1968 and 1 December 1977.

15.42 This 'access gap' is an historical anomaly, the product of a reluctance by governments to make the FOI Act fully retrospective. At the time of drafting, there was some concern that the workload which would result from applications under the FOI Act would have a deleterious effect on the administration of government. A similar reluctance to make freedom of information legislation fully retrospective was manifested in the initial Victorian, New South Wales, Tasmanian and South Australian FOI legislation.[cccxlviii] However, experience at the Commonwealth level subsequently showed that the demand for information did not meet expectations. Most departments overestimated the demand for applications by between 10 and 100 times the actual level.[cccxlix] More recent FOI enactments in Queensland and Western Australia have included a right of access regardless of when the record came into existence.[cccl] In 1992 New South Wales amended the *Freedom of Information Act 1989* (NSW) to make the Act fully retrospective.[cccli]

15.43 Closure of the 'access gap' at the Commonwealth level was recommended by the Commission and the Administrative Review Council in their 1995 review of the FOI Act.[ccclii] Those submissions to IP 19 which referred to the access gap supported its closure.[ccccliii] Arguments about the resource implications of closing the gap have now lost much of their relevance, particularly as more than 80% of FOI applications are for personal information.[ccccliv] The Department of Foreign Affairs and Trade noted that the advent of computerised systems has made the administrative workload argument largely irrelevant, with the result that the access gap can justifiably be closed.[ccclv]

15.44 There was only one response to the Commission's proposal in DRP 4 that the access gap be closed by extending the coverage of the FOI Act to all records less than 30 years old. The Department of Defence supported the continuation of an existing informal policy, established through a government direction in 1985, not to refuse access to records merely because they fall within the access gap.[ccclvi] While the Commission supports continued adherence to this policy, it remains firmly of the opinion that a right of access to all records, subject to appropriate exemptions, should be established in legislation rather than left to the discretion of agencies.

Recommendation 103. The FOI Act should be extended to all records which do not fall within the open period as defined in the archives legislation.

An obligation to assess records by the age of 30 years

15.45 The Commission suggested in DRP 4 that there should be a statutory obligation on all Commonwealth agencies to make records of enduring (archival) value accessible to the public at the earliest practicable time, but no later than approximately 30 years after creation, with all sentencing and access exemption work completed. The Commission's intention was that this obligation would, firstly, encourage the discretionary early release of as many records as possible prior to the age of 30 years and, secondly, ensure that records which had not undergone discretionary early release by the time they were 30 years old should be made available promptly at that age.

15.46 The Commission has maintained its recommendation that there should be a statutory obligation on Commonwealth agencies to make all records available at the earliest practicable time. This issue is discussed in relation to discretionary early release in Chapter 18. The Commission has also strengthened its recommendations in relation to sentencing by recommending that the sentencing of all records should be required to be completed by the age of 20 years.[cccvii]

15.47 The Commission has given further consideration to the proposed requirement that the access examination of all Commonwealth records should be completed no later than approximately 30 years after their creation. Three responses to DRP 4 raised concerns about this suggestion, partly on resource grounds and partly because many records are not used by researchers until some time after they reach the age of 30 years and thus need not be assessed until access is sought to them.[cccviii]

15.48 The Commission appreciates that some records, because of their potential sensitivities, require a more intensive application of resources to assess their suitability for public release.[cccix] This is true particularly of older paper based records, which have not been created and maintained in the high quality recordkeeping systems which the Commission envisages as being the standard for the future. Such records are unlikely to have been assessed for public release at an age of less than 30 years.

15.49 The Commission is nevertheless concerned that, under the present access regime, many records of archival value are not even considered for release until they become subject, at some time after reaching the age of 30 years, to a formal access application. It may be that some of these records would not be immediately used by members of the public even if they were available at the age of 30 years. But this is

not sufficient justification for the present reactive approach to access examination, particularly in relation to records bearing national security classifications. Cabinet Office has shown in its annual release of 30 year old Cabinet records that it is possible to have a major group of policy records available for public use immediately they enter the open access period. This principle should be extended progressively to all records of archival value.

15.50 The Commission recommends, therefore, that all records of archival value which enter the open access period from the time of commencement of the new legislation should be required to have had their public access status determined prior to reaching the open period. There should also be a requirement on the NAA to complete, **within 10 years of the commencement of the new legislation**, the assessment of the public access status of all records of archival value more than 30-years old which were in its custody at the time of commencement of the legislation.

> **Recommendation 104.** All records of archival value which enter the open access period from the time of commencement of the new legislation should be required to have had their public access status determined prior to reaching the open period.
>
> **Recommendation 105.** The NAA should be required to complete, within 10 years of commencement of the new legislation, the assessment of the public access status of all records of archival value more than 30 years old which were in its custody at the time of commencement of the legislation.

Block examination techniques

15.51 Block techniques are commonly employed in archival institutions to assess in a prompt and economical manner whether particular series of records are suitable for public release. For this reason a number of researcher groups supported the block examination of records.[cccix] However, the use of such techniques is not recognised in the Archives Act. On the contrary, section 38 of the Act requires Australian Archives to provide access to as much of a record as possible. Thus when a part of a record is exempt the remainder must, wherever possible, be made accessible to the public. This is generally done by providing copies of the record with the exempt information cut out or effectively masked.

15.52 In DRP 4 the Commission opposed the general application of block exemptions, not only because of the formal requirements of section 38, but also because of evidence that many individual records of significant interest which contain some sensitive material also contain material that is suitable for release. Security records were mentioned as a particular example.

15.53 In the Commission's view, therefore, the resource benefits of allowing block exemption of records known to contain some sensitive material do not outweigh the central importance of guaranteeing the highest practicable level of public access. The provisions in the present section 38 should therefore be retained.

15.54 This does not mean, however, that the Commission does not see advantages in using block examination methods whenever groups of records which can properly be released without detailed examination are identified.

> While the current legislation sets out rights of access which the ASA supports, the Society believes that the current regime has been cumbersome and resource intensive in practice ... In particular, it is clear that the vast majority of government records can be released after 30 years without exemption. Efforts should be made to streamline processes so that these records are identified and decisions made about their access status as early as possible.[cccLxi]

15.55 The Commission notes that, since 1994–95, Australian Archives has been using a sampling technique to examine blocks of records which have not yet been cleared for access, with the aim of identifying material suitable for release without the need for individual examination. Since the implementation of sampling techniques on a large scale, more than 80% of records cleared for access each year have been examined in this way. The Commission would strongly encourage the continuing use of such methods where, after due consideration of the nature of the records concerned, it is determined that the risk of inadvertent release of exempt material is negligible.[cccLxii]

> **Recommendation 106.** The existing requirement in section 38 to provide access to the non-exempt portions of exempt records should be retained.
>
> **Recommendation 107.** As an administrative measure, open access decisions should be made wherever possible on blocks of records without detailed examination of individual records.

Relationship with the Privacy Act

15.56 At present the Information Privacy Principles contained in the Privacy Act do not apply to records in the open period. Thus, access decisions made under the Archives Act do not need to adhere to the Privacy Principles. The Commission agrees that the application of the Privacy Principles to records more than 30 years of age would be needlessly restrictive. The access regime in the open period must take into consideration the fact that sensitivities attaching to information may diminish after 30 years. Prohibiting the disclosure of all personal information, including names of individuals, would greatly restrict access to archival records. This does not mean, however, that privacy should be disregarded when making access decisions. Exemption categories within the archives legislation must continue to include appropriate protection for personal information. The legislation should also provide individuals with appropriate rights to access information relating to themselves. These issues are dealt with in Chapters 20 and 21 respectively.

15.57 In making recommendations in Chapter 18 to facilitate access to records less than 30 years old, the Commission has recognised that these records are subject to the Privacy Act and that proper account needs to be taken of that fact in developing and implementing proactive release schemes.

Open period access and other legislation

15.58 A number of statutes other than the Archives Act include restrictions on those who may access information collected under that statute, or require officers not to disclose information to which they have access. The Archives Act makes no reference to non-disclosure provisions in other legislation, giving rise to some uncertainty as to the relationship between such provisions and the public access provisions of the Archives Act.

15.59 Several specific instances of this problem were raised in submissions. Under the spent convictions provisions of the *Crimes Act 1914* (Cth),[cccLxiii] it is an offence to divulge information about criminal convictions without the convicted person's consent, in cases in which the conviction falls within the definition of 'spent'.[cccLxiv] At present this information may be opened to public access under the Archives Act unless, in a particular case, it falls within an exemption category. Public access to this

kind of information, even after 30 years, may be inconsistent with the aims of the spent conviction scheme as established by Parliament.

15.60 The second instance raised with the Commission relates to personal information provided to the Australian Bureau of Statistics in confidence under the *Census and Statistics Act 1905* (Cth).[cccLxv] Again, unless that information falls within an exemption category under the Archives Act, it might be released to the public when it reaches 30 years of age. In most cases this information, where it continues to exist after 30 years of age, would seem to be protected by the existing exemption categories of the Archives Act. However, the Australian Bureau of Statistics is concerned to achieve its absolute protection.

15.61 A third instance concerns non-disclosure orders made by the AAT.[cccLxvi] These orders can be compared to non-disclosure orders made by judges in courts. However, unlike access to records involving court orders, which can be dealt with by the courts themselves in accordance with specific court related provisions of the Archives Act,[cccLxvii] the records of the AAT are subject to the general provisions of the Archives Act. It is thus debatable whether non-disclosure orders made by the AAT would withstand the open access obligations of the Archives Act once the records reach 30 years of age.

15.62 The 1979 draft of the Archives Bill included a clause which provided for a schedule of enactments which would override the provisions of the archives legislation and prohibit the disclosure of information. The Senate Standing Committee which examined the Bill strongly opposed the inclusion of such a provision.

> No reason has been suggested to us why records protected by secrecy provisions should potentially be excluded from the access provisions. At most we can assume that these records may, in certain circumstances, be retained by agencies like the Australian Bureau of Statistics, the Department of Social Security and the Commissioner of Taxation, pursuant to the statutory obligations those agencies have to protect confidential material. If this is the case, these obligations can be adjusted legislatively so that no conflict arises between this Bill and other legislation. A possible conflict of obligations would not, to our mind, justify or necessitate the exclusion of some categories of records from the access provisions.[cccLxviii]

15.63 The clause was subsequently removed from the Bill. In the absence of such a provision, the Archives Act has generally been administered on the basis that non-disclosure provisions in other legislation cease to have effect once the record reaches 30 years of age. However, this has been disputed in a number of cases,

particularly where the non-disclosure provisions were enacted subsequent to the commencement of the Archives Act. Reference has been made to the rule of statutory interpretation which states that where two Acts are inconsistent, the later Act takes precedence.

> ... so far as possible the Acts are to be read together and as forming one document, and so far as there is anything in a later Act inconsistent with the provisions of the earlier Acts the later Act must be read as a proviso or exception to the former ...[cccLxix]

15.64 Cooperation between agencies and Australian Archives has avoided the need to obtain a court determination on this issue.[cccLxx] In light of the above considerations, the Commission is of the view that the matter needs to be put beyond doubt in the new legislation.

15.65 For reasons similar to those which found favour with the Senate Standing Committee in 1979, the Commission considers that protection of any information which remains sensitive beyond 30years should be contained within the exemption regime in the archives legislation.[cccLxxi] That said, however, it is recognised that, if the Parliament is satisfied that additional legislative protection is needed, legislation to so provide is a matter for the Parliament.[cccLxxii] The Commission proposed in DRP 4 that a provision be included in the new legislation to make clear that, in the absence of express provision to the contrary in another enactment, the access rights and obligations under the archives legislation should prevail.

15.66 A number of submissions noted that the implementation of this proposal would necessitate an extensive review of other legislation to determine if non-disclosure provisions should continue to apply in the open period, and amendment of legislation where necessary.[cccLxxiii] The need to do this should be thoroughly considered in each case and weighed against the concept of the open period.

> **Recommendation 108.** The legislation should expressly provide that non-disclosure provisions in other legislation do not override the public access provisions of the archives legislation unless this is expressly provided for in the legislation concerned.

ENDNOTES

16. Responsibility for access decisions

Introduction

16.1 All records have a controlling agency which continues to have some responsibility for them once they are in the open period.[cccLxxiv] In many jurisdictions it is the controlling agency, as opposed to the archival authority, which makes access decisions. A balance needs to be maintained between the specialist knowledge which an agency may have about its own records, and the general knowledge of government records accumulated by the staff of the archival authority. This balance can be affected by the time at which access decisions are made, the history and nature of the function to which the records relate, and physical access to the records.

Decisions on closed period records

16.2 As discussed in Chapter 18, the Commission strongly supports the early identification and release of non-sensitive records. Thus, wherever possible, access decisions should be made before records reach the open period. In such cases decisions will ordinarily be made (perhaps with the guidance and assistance of the NAA) by the controlling agencies. Agencies should, therefore, be responsible for all access decisions made in relation to records less than 30 years of age. This would be consistent with both the fact that agencies are responsible for making access decisions under the FOI Act and the Commission's recommendation to amend the FOI Act to close the 'access gap'.[cccLxxv] Access decision making procedures would need to provide for the accumulation of information about access decisions in a centrally accessible location.[cccLxxvi]

Decisions on open period records which are not of archival value

16.3 In accordance with the Commission's recommendations in Chapter10, all records which have reached the age of 30 years should have been evaluated to

determine if they are of archival value, or if they are temporary records with a finite life span.[cccLxxvii] The Commission has further recommended that only those records that are of archival value should be required to be transferred to the custody of the NAA.[cccLxxviii] This means that temporary records still in existence at 30 years would ordinarily be in the custody of either the controlling agency or of the NAA or some other service provider on a fully commercial basis. This distinction was not made clear in DRP 4 and thus the question of responsibility for making access decisions on these records was not separately dealt with.

16.4 The Commission has reaffirmed that records of temporary value still in existence after 30 years should be subject to the same rights of access as records of archival value.[cccLxxix] It considers, however, that there should be a different access regime for such records. Since these records will have only justified retention because of ongoing administrative need within the controlling agency, the Commission is of the view that all decision making responsibility should reside with that agency. The legislation should, accordingly, place responsibility for receiving and processing access applications for such records on the controlling agency. However, the legislation should take account of the fact that the NAA may receive applications that are found to apply to such records. Accordingly, there should be a statutory obligation to transfer such applications to the controlling agency and vice versa where an agency receives an application that in fact relates to a record of archival value.

16.5 In addition, the Commission believes that, as these records are not records of archival value and therefore not of heritage interest to the nation, controlling agencies should charge for providing access to these records on a full cost recovery basis. However, it is likely that the majority of temporary records in the open period will be personal case files. Consistent with the FOI regime, where applicants seek access to personal information relating to themselves without charge, the Commission believes that there should be no charge for processing such applications under the archival legislation.

Recommendation 109. Controlling agencies should have responsibility for access applications and access decisions relating to all records in the open period which are not of archival value.

Recommendation 110. Controlling agencies should charge on a full cost recovery basis for the provision of access to such records. Charges should

not, however, be levied in relation to applications by record subjects for access to personal information about themselves.

Decisions on records of archival value in the open period

16.6 In the Commonwealth jurisdiction, records of archival value in the open period have traditionally been held in the custody of the archival authority. Thus, its physical custody of the records has tended naturally to point to the archival authority as the agency which should have responsibility for access decision making in the open period. The archival authority is, however, merely the custodian of the records and the controlling agency may maintain an ongoing interest in the records and have a real stake in the granting of access to them. In the current environment of moves towards distributed custody, particularly in relation to electronic records, significant numbers of records in the open period can be expected to remain in the custody of agencies. All of these factors need to be taken into consideration when determining who should have the responsibility for making access decisions about records of archival value in the open period.

16.7 Section 35(1) of the Archives Act authorises the Director-General of Australian Archives to make arrangements for access decision making in consultation with the responsible minister or a person authorised by the responsible minister. In accordance with section 35(1), Australian Archives has entered agreements with most agencies or their controlling department about who will make access decisions and how they will be made. Section 40(5)(b) includes the phrase 'where the decision is a decision of the Archives', thereby contemplating that someone other than the Archives may legitimately make access decisions. In accordance with agreements made under section 35(1), a number of agencies complete examinations and make decisions themselves. In other cases, Australian Archives is required to consult with an agency prior to making a decision. However, Australian Archives and agencies have proceeded on the basis that, strictly, only delegates of the Director-General of Australian Archives may make access decisions, and in practice delegations have been limited to staff of Australian Archives. Thus all access decisions are formally made by Australian Archives, regardless of the source of the actual decision. In 1996–97, 88% of access requests were examined and determined directly by Australian Archives. The remaining 12% of access requests were determined by the controlling agency, although formally made by the Director-General of Australian Archives or by a staff member of the Archives with appropriate delegation.

16.8 Despite the fact that all access decisions are formally made by Australian Archives, there has been some uncertainty as to whether, particularly in the light of the language of section 40(5)(b), the Act authorises agencies to make access decisions without reference to Australian Archives. Disputes can also arise between Archives and an agency about whether an exemption which the agency wishes to claim is in fact justified. The issue is further complicated by the requirement in section 35(2) that all access examination is to take place on the premises of the Archives. Clearly, the new legislation needs to put the responsibility for decision making, and for any subsequent review processes, beyond doubt.

16.9 On the issue of where authority and responsibility should lie, a number of submissions supported agencies having sole responsibility for making access decisions about their own records.

> The national archival authority should **not** have responsibility for making access decisions. It is inappropriate for a third party to make a decision about an agency's records when it may not necessarily appreciate all the implications flowing from the release of documents. This is especially so for agencies whose functions relate to security, intelligence, defence or international relations.[cccLxxx]

Other submissions raised concern about the expertise of Australian Archives' staff who undertake access examination, particularly in relation to specialised records.

> From the AFP's perspective, the policy in relation to public access to documents should allow Commonwealth agencies to take responsibility for their records ... The AFP believes that Australian Archives staff are not experienced enough in law enforcement issues to make judgements as to the suitability for release of our information.[cccLxxxi]

16.10 Noting the extensive resources that it already applies to access examination, ASIO also opposed the NAA having responsibility for access decisions relating to its records. In 1995-96, ASIO received 270 requests resulting in approximately 105000 folios being assessed. ASIO suggested, therefore, that resources could be saved if the agency was given sole responsibility for initial access decisions.[cccLxxxii]

16.11 On the other hand, there was recognition of a number of factors which favour the NAA having primary responsibility for access decision making. These include the need to deal effectively with records of defunct functions and records which have passed from agency to agency, especially where the current controlling agency no longer has an interest in the records.[cccLxxxiii] Other considerations supporting NAA responsibility for access decisions include the limited resources and access experience

of some smaller agencies and the fact that most open period records are already in the custody of the NAA. The centralising of access decision making with the NAA was also seen as facilitating the standardisation of access decisions across all government records, enhancing accountability and consistency and making proper use of the NAA's expertise and experience.

> [The Archives] is the only agency which has the overall perspective and the historical understanding. Departments tend to look at things in current terms ...[cccLxxxiv]

> Devolution of both the mechanics and responsibility for access decision making to agencies would jeopardise accountability and would undoubtedly encourage an obstructionist approach in some agencies to public access.[cccLxxxv]

> The benefits to the public and to government of the national archival authority making all access decisions are that they are consistent, efficient, made on the basis of experience in handling a wide variety of records (and not just the records of a single agency) and from a disinterested perspective.[cccLxxxvi]

16.12 A common theme in most submissions which addressed the issue of access decision making was the need for a consultative relationship between the NAA and those agencies which took an interest in access decisions relating to their records. Such consultation recognises the need to combine the wider expertise and knowledge of the NAA with the specialist knowledge and experience of individual agencies. Some submissions proposed that the primary responsibility for decision making should be given to agencies, consulting as required with the NAA,[cccLxxxvii] while others supported the NAA as the primary decision maker.[cccLxxxviii] A third option proposed was joint responsibility.[cccLxxxix]

16.13 While the Commission supports the need for flexible, practical and cooperative access decision making, it is concerned to ensure that the legislation should provide a clear and unambiguous legal basis for responsibility. The Commission considers, therefore, that ultimate authority should be vested in a single body. Given the location of the majority of open period records with the NAA, the problems some agencies would have in maintaining their own archival services, and the access examination experience of Australian Archives, the Commission proposed in DRP 4 that the NAA be given primary responsibility and power for the making of all access decisions relating to records in the open period.

16.14 That does not, however, mean that controlling agencies should not be appropriately involved in the access decision making process. If an agency so requests, therefore, the NAA should be required to seek to negotiate an agreement

with the agency about access decision making. The agreement might result in all access decisions being made by the agency, access decisions over certain material being made by the agency, or decisions being made by the NAA after conferring with the agency. In the absence of such an agreement, power and responsibility for access decision making would continue to lie with the NAA. The Commission accordingly suggested in DRP 4 that the NAA should have the initial access decision making power, with agencies being able to enter an access agreement and undertake access decision making if they wished.

16.15 One submission in response to DRP 4 opposed the Commission's proposals, preferring instead to see sole responsibility being given to either the NAA or the controlling agencies.[cccxc] Australian Archives was also strongly opposed to a greater distribution of access decision making power.

> Preserving and improving the effectiveness and efficiency of the public access regime is one of the fundamental objectives of the review. The Archives believes that this objective is best met if access decision making is centrally authorised. The Archives' concern is that a distributed regime will lead to increasingly conservative, inconsistent and idiosyncratic decisions.[cccxci]

The Commission recognises that the argument for centralised and consistent access decision making is a potent one. However, evidence to the Commission suggests that the agencies which would wish to enter into an access agreement would primarily be those already involved and experienced in access decision making, notwithstanding that formal decisions relating to their records have hitherto been made by Australian Archives. These agencies would continue to be subject to the same exemption provisions and review procedures as apply to decisions made by the NAA. While Australian Archives is concerned that some agencies might make inappropriate decisions if given access decision making power,[cccxcii] the Commission believes that agencies with concern for continuing sensitivities in their records should have the opportunity to take responsibility for access decisions.[cccxciii]

16.16 Another submission expressed concern, on resource grounds, for records if agencies were forced to make access decisions on open period records.[cccxciv] This concern would be met by the Commission's proposal that entry into an arrangement with the NAA require initiation by an agency.

16.17 The agencies of the Australian Intelligence Community strongly supported the provision of an option for agencies to enter agreements giving them full authority and responsibility for making access decisions.

> The AIC welcomes the Commission's recommendations regarding arrangements for access decision making. These regularise existing arrangements while providing clear lines of responsibility that, under current arrangements, are sometimes in dispute.[cccxcv]

The ability to enter arrangements will provide agencies with the flexibility to take on responsibilities where they consider this to be necessary and appropriate, while providing the NAA with clear authority to make decisions in the absence of agreements.

16.18 One agency which expressed concern about the ability of NAA staff to make access decisions suggested that the legislation should include a process for agencies to appeal a decision by the NAA to release records.[cccxcvi] However if agencies have the option of becoming responsible for access decision making, the Commission does not consider it necessary to include an appeal provision of this kind. If an agency is dissatisfied with decisions made by the NAA in relation to its records, it could seek to enter an agreement to assume responsibility for this task itself.

16.19 In cases where an agency sought an agreement, but the agency and the NAA could not settle the terms of the agreement, there would be a need for an ultimate arbiter. The Commission proposed in DRP 4 that the minister responsible for the agency seeking to enter the agreement should be the arbiter in the event of any such disagreement.[cccxcvii] One agency objected to the involvement of a minister where the agency itself is established as an independent statutory authority.

> Agencies such as the ABC are set up to be entirely independent of government direction except in very limited circumstances, yet this aspect of the Draft Recommendation envisages a quite direct role for the minister in the agency's day-to-day affairs. The final arbiter should be an entity that is independent of the government of the day.[cccxcviii]

The Commission agrees that the archives legislation should not enable an otherwise independent agency to be directed in day-to-day matters by its minister. However, the minister's involvement in this case would be restricted to arbitrating in respect of a dispute about agreements for general access decision making responsibilities. This would not in any way provide ministers with the ability to give directions on particular access decisions or interfere with day-to-day operations of the agency.[cccxcix] The Commission envisages that resort to the minister would be the ultimate fall back option in the case of an irreconcilable dispute between the NAA and the relevant agency.

16.20 An agreement about access decision making responsibilities would have the effect of conferring the initial decision making responsibilities on the agency instead of the NAA and thus affect the rights of applicants. The Commission suggested, therefore, in DRP 4 that it might be appropriate that such agreements be given the standing of legislative instruments, to ensure that their existence was widely known. Australian Archives agreed that, if such agreements were to be legislated for, awarding them the status of legislative instruments would be appropriate.[cd] On further consideration, however, the Commission considers that the giving of legislative standing to such agreements cannot be justified. It does, however, consider that the formal notice of their existence should be required. Accordingly it proposes that the making of such agreements be required to be notified in the Commonwealth of Australia Gazette.

16.21 An access agreement should, ideally, encompass all access decisions which might be made relating to records in the open period. These would include decisions relating to access by a record subject[cdi] and special access.[cdii] The agreement should also acknowledge the responsibility of the controlling agency to review its primary access decisions.[cdiii]

16.22 The legislation would need to make clear that the agency which makes the access decision is also responsible for the procedural matters relating to the decision. These matters would include communicating directly with the applicant where appropriate, notifying the applicant of the decision, providing a statement of reasons where access has been refused and recording and advising the NAA of details of the decision.

Recommendation 111. The NAA should have responsibility for making access decisions on records of archival value in the open period unless there is in place an agreement with the agency with functional responsibility for the records establishing alternative arrangements for access decision making. Where an agreement cannot be reached over responsibility for access decisions, the minister responsible for the agency function should determine the matter. The initiative in seeking to negotiate an agreement should lie with the agency.

Recommendation 112. The making of agreements between the NAA and a controlling agency regarding access decisions relating to records of archival

value should be required to be notified in the Commonwealth of Australia Gazette.

Recommendation 113. Where an agency enters an agreement with the NAA that the agency will be responsible for the making of access decisions relating to records of archival value, that agency should thereby become responsible for all aspects of the decision making process, including notifying the applicant of the decision, recording the access decision and advising the NAA of the decision.

Coordinating access applications

16.23 Responsibility for making access decisions and for accepting access applications are two separate things. Regardless of the physical location of the records and of who makes access decisions, the Commission is concerned about keeping records of archival value as publicly accessible as possible. This requires that the public have a clear and identifiable line of communication when using records of archival value, including a single line of contact for making access applications.

16.24 As noted above, a number of submissions favoured the involvement of the NAA in access decision making in order to provide a centralised approach to open period access. [cdiv] While the Commission recommends that decision making responsibility be devolved in some circumstances, there is a strong case for providing a centralised approach to the coordination of access applications.

16.25 At present all access applications are made through and processed by Australian Archives. If this were not the case access to archival records would need to involve an FOI type procedure whereby researchers would have to identify and approach individual agencies to make access applications.[cdv]

> A consistent and reliable regime for regulating access to records requires a centralised operation. Co-ordination of access administration should remain with the national archival authority, even if the Act is amended to reflect the increasing involvement of some agencies in decision-making. Central coordination benefits the users of records, who can make all their requests to the Archives, rather than having to approach individual agencies. It also ensures that all relevant agencies are consulted in the assessment process and that consistency of decision-making on similar material is maintained across different agencies.[cdvi]

16.26 While, as discussed above,[cdvii] the Commission considers that it is appropriate for applicants seeking access to records which are not of archival value to be required to apply directly to the controlling agency, it takes a different view in relation to records of archival value. As these records are to be maintained in perpetuity for the purpose of documenting the record of Commonwealth government for the benefit of both government and the public, the emphasis should be on providing a single, readily identifiable access route. This requires that the public be able to approach one body both to obtain information about the availability of archival records and to request access to those records. The Commission considers, therefore, that the making of applications and the provision of access in relation to records of archival value should continue to be coordinated through a single agency, the NAA.

16.27 Where an arrangement is in place between the NAA and a controlling agency whereby access decisions are to be made by the controlling agency, the onus would be on the NAA to transfer the request to that agency in a timely manner rather than on the inquirer to determine whether an arrangement exists and then direct their request to that agency.

16.28 The placing of responsibility on the NAA for receiving and coordinating responses to all requests is also consistent with the Commission's proposals that the NAA continue to provide extensive reading room facilities for the public (in preference to a proliferation of duplicative facilities in various agencies) and that the NAA have responsibility for developing finding aids [cdviii] and maintaining information offices around Australia.[cdix]

16.29 The Commission's proposal in DRP 4 to require all access applications to be lodged initially with the NAA drew only one criticism. The Department of Defence expressed concern about being denied the ability to establish the necessary communication links with applicants if the NAA was given authority to deal initially with all access applications.[cdx] Where another agency is responsible for making access decisions, the NAA would have an established relationship with the applicant due to initial contact and possible assistance with locating relevant records. The responsible agency would not, however, be prevented from also establishing a direct relationship with the applicant.

Recommendation 114. All access applications for records of archival value should be lodged initially with the NAA for processing by the NAA or for reference to the controlling agency under an agreement with the NAA.

Transferring applications to another agency

16.30 As discussed above, where an agreement is entered between the NAA and an agency giving the agency responsibility for making access decisions over records of archival value, that agency would take responsibility for making decisions in relation to records for which it is the 'controlling agency'.[cdxi] In some cases, however, an agency may be a controlling agency for records which it has received from another agency and incorporated into its own recordkeeping system. Correspondence between agencies is an example of how records created by one agency can come to be controlled by another agency. In some cases these records may contain potentially sensitive information relating closely to the functions of the creating agency.

16.31 Two submissions in response to DRP 4 raised the need for a provision permitting an agency with responsibility for an access decision to transfer the application to a more appropriate agency for decision.[cdxii] A broadly analogous provision is included in the FOI Act, permitting transfer of requests for records in cases where the 'subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made'.[cdxiii] Importantly, where such a request is transferred, the original application is taken to be a request to the transferred agency and is taken to be received at the time the application was received by the original agency.[cdxiv] This ensures that the applicant is not disadvantaged in any way by the need to transfer the request to a more appropriate agency.

16.32 It is desirable that similar transfer be possible between agencies under the archives legislation where each of the agencies has authority to deal with an access request under its access arrangements with the NAA. As in the case of FOI transfers, it is desirable that the agreement of the proposed transferee agency be sought and obtained for any such transfer. In those cases where the agency to which it would be desirable to transfer the request does not have an arrangement with the NAA, the appropriate course would be for the transferor agency to be able to transfer the request to the NAA.

16.33 At the same time the Commission recognises that there may be instances in which the same objective could be more readily and equally effectively achieved by informal consultation with the other affected agency rather than by formal transfer to

it. The Commission would not wish to discourage the use of that procedure wherever practicable. However, there should always be recourse to the formal transfer route if there is any concern that informal consultation may not produce a sound and acceptable decision.

Recommendation 115. The legislation should include a provision permitting an agency with responsibility under an arrangement with the NAA for making access decisions in the open period to transfer an application to another agency where the subject matter of the record is more closely connected with the functions of the other agency than with the functions of the controlling agency and the decision is one that the second agency is entitled to make under an arrangement with the NAA. Transfer of applications should only be allowed with the agreement of the receiving agency.

Where the other agency does not have an agreement with the NAA, the transferring agency may transfer the request to the NAA.

A transferred application should be taken to be an application made to the receiving agency or the NAA, as the case may be, and should be taken to have been received at the date the original application was lodged with the NAA.

Location of records during examination

16.34 Section 35(2) of the Archives Act requires access examination to be conducted on the premises of the Archives.[cdxv] This requirement is a relic of the paper age which fails to take account of issues such as the distributed custody of electronic records, the desirability of access decisions being made at or near the point of creation, and the likelihood of arrangements being made for some controlling agencies to take responsibility for access decisions. It is also inconsistent with the concept of discretionary early release of records. In the Commission's view, therefore, this location requirement is no longer appropriate and should be removed. Where access arrangements between the NAA and a controlling agency are in place in relation to access to records of archival value, those arrangements might appropriately address the issue of where or how the records should be made available for inspection.

Recommendation 116. Access examination should no longer be required to take place on the NAA's premises.

Providing information about records

16.35 In order to lodge an effective access application, an applicant must be able to access information about the types of records that are available and from whom they may be available. It is also necessary for the applicant to know whether a particular record has already been opened for public access. This need not be limited to records in the open period if an agency has made a decision to open records which are less than 30 years of age. There needs, therefore, to be some mechanism for the collation of information about records, particularly records of archival value, in the open period.

16.36 Just as there needs to be a coordinating body for the lodgment and receipt of access applications, there is also a need to give one body the responsibility for collecting, collating and making accessible information about records of archival value and their availability. The NAA is the obvious body to assume this responsibility. Even where it had ceased to be the physical repository for some records of archival value in the open period by reason of distributed custody arrangements, the NAA should continue to be the repository of knowledge about those records. In addition, it should be able to provide information about records which have been identified as being of archival value, but which have not yet reached the open period. In short, the NAA should be able to provide extensive information about the archival record of the nation. The public must feel confident that they can approach one body and conduct research across all records of archival value. The role of collecting and collating such information is of such importance to the access regime that the Commission believes that the NAA should have an obligation to undertake it.

16.37 The Commission suggested in DRP 4 that there should be an obligation on the NAA to collect information about the 'content, location and accessibility' of records of enduring (archival) value. Australian Archives suggested that the term 'content' be replaced by the term 'function'.[cdxvi] The Commission agrees that the term 'function' better represents the type of information the NAA should collect.

16.38 To enable the NAA to meet this obligation, there would need to be close cooperation with Commonwealth agencies. In DRP 4 the Commission proposed that these agencies should be obliged to provide information to the NAA about all records of archival value in their custody and/or control. This information could then be made publicly available by the NAA.[cdxvii] Providing public access to information about records not yet in the open period would not create an obligation on the agency to make the contents of the record available except in accordance with the FOI Act. However, any decision to open a record of archival value prior to reaching the open period should be quickly incorporated into the NAA's public information databases.

16.39 The possible increase in distributed custody makes it all the more necessary for agencies to be obliged to provide current information about records of archival value which are in the open period but not in the NAA's custody. Information about access decisions made by agencies under arrangements with the NAA would also need to be given to the NAA. Only in this way could there be a government wide accessibility regime covering all archival records in the open period. The Commission's proposals in DRP 4 were generally supported by submissions.

16.40 There will, of course, be situations where the content, or the very knowledge of the existence, of a record would be exempt information. In DRP 4 the Commission proposed that, in these cases, information should not be required to be passed to the NAA. The Commission did not receive any adverse comments in response to this proposal.

Recommendation 117. There should be a statutory obligation on the NAA to collect and disseminate information about the function, location and accessibility of all records of archival value.

Recommendation 118. There should be a statutory obligation on all Commonwealth agencies to provide all possible information about the function, location and accessibility of all records of archival value to the NAA, unless that information, being information relating to records in the custody of the agency, would be exempt information under the FOI Act in relation to closed period records, or the archives legislation in relation to open period records.

ENDNOTES

17. Access procedures

Introduction

17.1 The ideal of the access regime should be to ensure that all records which have reached the open period, other than records properly subject to exemption, are made available for public access without further delay. While the Commission's recommendations will, over time, greatly increase the amount of material that is accessible by the commencement of the open period, that will obviously involve a period of transition. There would also, despite these recommendations, continue to be a number of records, particularly records retaining sensitivities, which could not be examined, and the non-sensitive portions made accessible, prior to the age of 30-years. Streamlined and efficient access procedures continue, therefore, to be a matter of importance.

17.2 In DRP 4 the Commission made a number of proposals designed to establish the rights and obligations which it regards as the minimum essential to guarantee appropriate and timely access to Commonwealth records.

17.3 In its submission to DRP 4, Australian Archives questioned the approach adopted by the Commission.[cdxviii] It suggested that, instead of the various procedures proposed by the Commission, there should be a single legislative provision giving the NAA the power to formulate the procedures necessary to give effect to the access regime. However the Commission, while supporting in principle the adoption of the most efficient and flexible access procedures, does not consider that the proposed level of legislative prescription is excessive. Indeed, it regards the legislating of these requirements as not only being essential to the guaranteeing of access rights but also as being particularly useful for the guidance of those agencies which, under the access regime proposed by the Commission, would be responsible for the handling of access requests and the making of access decisions in respect of records in the open period.

Application requirements

Personal details

17.4 Where a record has not been previously examined for access, or where an applicant wishes to have a previous access decision reconsidered, the applicant is required to complete an application for access. Completing applications should be made as simple as possible. At the same time, applicants need to provide adequate information to assist the agencies to process their applications.

17.5 Submissions in response to IP 19 and DRP 4 generally indicated satisfaction with the current application requirements under section 40 of the Archives Act and only three proposed changes to them.

17.6 In response to DRP 4, one submission suggested that all applications for access should include reasons for the application, in order to prevent the information being used for dishonest reasons.[cdxix] The Commission does not favour this suggestion, as it would be contrary to the concept of open access to all records in the open period. It is central to this concept that the intentions of the applicant are irrelevant.

17.7 Current provisions require that access applicants must specify an address in Australia.[cdxx] In some countries rights of access have been confined to citizens or taxpayers of the relevant jurisdiction. Access to Commonwealth records in the open period is not so restricted under the present Act. Foreign citizens can apply to access records while they are in Australia, provided that they supply the Australian address of a friend, relative or agent. The requirement to provide an Australian address seems, therefore, to be of little point, except perhaps to ensure that overseas postage or freight is not incurred. Moreover, it fails to recognise the fact that Australian Archives, as the Commonwealth archival authority, attracts a number of foreign researchers and that these numbers are likely to increase as international communication improves and Australian Archives' databases find a wider audience on the Internet.[cdxxi] Account also needs to be taken of the fact that Australian researchers often derive much benefit from the use of archival institutions in other countries.

17.8 Thus, in the interests of maintaining a cooperative international research community, foreign researchers should not be unnecessarily hindered in using Australian archival records by having to make arrangements for an Australian address.

17.9 The essential requirement for an application should be to provide an address at which the applicant can be contacted. A contact address would be needed if the agency required further information, wished to send the applicant copies of records, or needed to notify the applicant of a delay in decision making or a refusal to grant access. In today's electronic world, an e-mail address is just as viable a contact address as an ordinary street address in Australia. The key factor should be whether or not the applicant can reasonably be contacted at the stated address.

17.10 It was suggested in two submissions in response to IP 19 that the legislation should require the application to be dated by the applicant.[cdxxii] While a date is included in the application form as a matter of practice, there is currently no legislative requirement in that regard. As the date of the application is important in establishing time limits and hence appeal rights, the Commission reaffirms that the legislation should require the inclusion of the date on the application.

A record identification test

17.11 On occasions, members of public may find it difficult to identify clearly the records which they are seeking, often as a result of poor records management practice at the time the records were created or unfamiliarity with archival control systems. Agency resources should be preserved by ensuring that applications provide the clearest possible information about the records sought. A number of submissions supported the inclusion of some form of identification requirement in the access application,[cdxxiii] to 'reduce fishing trips' and hence reduce implementation costs.[cdxxiv] At the same time, there was a general recognition that the right to access records should not be eroded by stringent application requirements which, in an archival context, may be impossible to meet.

17.12 Section 40(1)(d) of the Act requires an access application to include such particulars, if any, about the records sought as are contained in the Australian National Guide to Archival Material (ANGAM). Australian Archives has developed ANGAM in electronic database format. The ANGAM database lists records at an item level, providing a method of searching for items using words in the title or by date. The database also includes information about any access decision which has been made on the item.[cdxxv] The database was primarily developed to record access decisions. It does not, therefore, include many records in the open period on which access decisions have yet to be made.The fact that no relevant records can be found in ANGAM in relation to an issue does not necessarily mean that no such records

exist.[cdxxvi] Information from other sources is, therefore, needed to identify them. A specific requirement to include information from the ANGAM database on an access application would not, therefore, greatly improve the efficiency of access decision making procedures. Australian Archives, which assists the public to complete all access applications, proposed the removal of the need to specify ANGAM particulars.[cdxxvii]

17.13 One alternative would be to include a provision similar to section 15(2)(b) of the FOI Act, which requires the request for access to

> ... provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; ...

This provision complements the workload test included in the FOI Act, which enables an agency to refuse an access application on the ground that identifying, locating or collating the documents would substantially and unreasonably divert the resources of the agency from its other operations.[cdxxviii] An identification test along the lines of section 15(2)(b) of the FOI Act was supported by some submissions.[cdxxix]

17.14 A number of submissions highlighted the sometimes daunting task of locating records in the open period and its implications for any identification test proposal.

> I would not support the amendment of section 40(1)(d) in alignment with section15(2) of the FOI Act as a majority of users of archives in the first case are unaware of what resources exist to assist them with their research. In addition any archive, but particularly the national archival authority, will receive a large number of requests from researchers so far physically removed from the archives, e.g. overseas, interstate, that they cannot have access to the existing guides. To amend the Act as suggested would leave both of the above examples of researchers at a severe disadvantage as their access request could be denied by a combination of circumstances beyond the researchers' control.[cdxxx]

A number of submissions, while supporting an identification test, also expressed concern that such a test should not unnecessarily inhibit access.[cdxxxi]

17.15 The Commission remains of the opinion that it would be inappropriate to apply an identification test which would result in a refusal of access if the identification requirements were not met. Finding aids developed by the NAA can assist to identify relevant records, but the task of providing detailed information about the many millions of record items in the open access period is still far from complete. Public users cannot be expected to know more than the NAA or an agency about the records in their custody. Empowering access decision makers to refuse to

process an application on the basis of inadequate information would unjustly restrict the right of access. There is a clear distinction between open period and FOI access, the latter relating to more recent records which are generally easier to identify.

17.16 The Commission does, however, recognise the need to ensure that the access application process is as simple and effective as possible. Thus, the Commission considers that some reasonable level of identification of records should be required to be included in an application, but that the application should not be able to be refused merely because it includes insufficient information. In such cases, communication between the decision maker and the applicant is more likely to produce a constructive result than recourse to the review and appeal mechanisms.

17.17 To meet adequate identification requirements, some applicants will need assistance. The Archives Act already includes a statutory obligation for Australian Archives to give all reasonable assistance to applicants to enable them to provide particulars about records.[cdxxxii] As the repository of information about records of archival value, the NAA should continue to have an obligation to assist applicants. This can be achieved both through direct assistance to individual applicants and through the publication of further guides, databases and other finding aids.

Recommendation 119. The legislation should require an application to include

- the name of the applicant, the means by which the applicant can reasonably be contacted (which may be an electronic address) and the date of the application.
- such reasonably available information about the records as will make identification as simple as possible. Failure to meet this requirement should not, however, be able to be used as a basis for refusal to process the application.

Recommendation 120. The legislation should reaffirm the statutory obligation of the NAA to assist applicants to meet the requirement to provide all reasonably available identifying information about the records.

Time limits on access decision making

Problems with time limits

17.18 The legislation should continue to include limits on the time within which an application must be processed. Without time limits the right of access is seriously devalued. At present applications are required to be processed within 90days from the time Australian Archives receives the application. If an applicant is not notified of a decision within 90 days, the Archives is deemed to have refused access and the applicant is entitled to appeal directly to the AAT.[cdxxxiii]

17.19 Generally, the submissions indicated satisfaction with the 90 day limit, although some suggested that it could be used more flexibly. A graduated time limit was also suggested, allowing shorter time periods for simple access applications but longer periods for more complex applications where referral to other parties is required. [cdxxxiv] Of particular concern were cases where referral to non-Commonwealth parties was required, especially to organisations in foreign countries. Such referrals often necessarily extend access examination procedures well beyond the 90 days.

17.20 A number of submissions raised the possibility of establishing a compulsory procedure for negotiation with the applicant where the processing of an application was expected to exceed the 90 day limit. [cdxxxv] The evidence presented to the Commission suggested that many problems arise through a lack of communication between applicants and agencies, with misunderstandings resulting in dissatisfaction over the service provided. The suggested procedure would require applicants to be advised of delays and invited to communicate with the responsible agency (whether this be the NAA or another agency making the decision) about the application.

17.21 While the Commission can see the potential for flexibility in such a proposal, particularly in the context of agreements being reached between the applicant and the agency concerned, it is reluctant to recommend the removal of ultimate time obligations on agencies and thus reduce the existing rights of applicants. It is also concerned that the introduction of differential limits might cause more confusion than benefit and lead to argument about which classes of records should be subject to specific limits. Accordingly, the Commission in DRP 4 favoured retention of a time limit.

17.22 Improved communication can promote understanding of the requirements and difficulties faced by both agencies and applicants, and thus reduce the need for applicants to resort to statutory appeal rights. However, there needs to be some

statutory remedy for applicants when an application is not processed within a reasonable time. As the Commission suggested in DRP 4, the existing provision, which deems a failure to make a decision within the specified period to be a refusal of access, should therefore remain in the legislation, thus guaranteeing a right of appeal.

Retaining a 90 day time limit

17.23 Some submissions supported the reduction of the time limit for response to access applications to as little as 30 days. As a general rule, however, such a short period would be too stringent, particularly in cases where referral to an external body is required. Another submission suggested that, if fees for access were to be introduced, a 60 day limit would be preferable in order to provide an efficient service to fee paying clients.[cdxxxvi] Despite some suggestions supporting extension of the 90 day period to cope with external reference requirements, the Commission continues, as proposed in DRP 4, to favour the retention of the 90 day period. A shorter period, even with the collection of charges, would in some cases be impractical.

17.24 An alternative suggestion was that, if the 90 day limit is not met, the record should be automatically declared open to the public without further need for examination.[cdxxxvii] It was suggested that this would discourage cumbersome and resource intensive access clearance procedures. Such a provision could, however, have far reaching consequences, particularly at the international level and in relation to security and intelligence records. The Commission considers that the deemed decision to refuse access and the consequent right to initiate an external review remains the best balance between the two objectives of providing effective access and protecting genuinely sensitive information.

17.25 While the NAA would, under the Commission's proposal, continue to be the agency which receives access applications,[cdxxxviii] the agency responsible for making the access decision should be held responsible for a deemed decision of refusal of access.[cdxxxix] The Commission considers that, regardless of who is responsible for making the access decision, the 90 days should be calculated from the time that the application is received by the NAA. To delay the start of the 90 day period until the application is transferred to the decision making agency would create the possibility of extending the processing time for the application indefinitely, affecting the rights of applicants. Applicants should have the same rights regardless of who has the responsibility for making the access decision. As pointed out in the previous chapter,[cdxl] this would require the NAA and decision making agencies to develop a

sound working relationship in order to ensure that efficient procedures were established for the speedy transfer of applications.

Recommendation 121. If a period of 90 days has elapsed since the application was received by the NAA and the applicant has not received notice of the decision, the legislation should continue to provide that there has been a deemed decision refusing to grant access to the record on the ground that the record is an exempt record.

Recommendation 122. The agency with responsibility for making the access decision over the record in question, whether that be the NAA or an agency which has entered into an access agreement with the NAA, should be responsible for a deemed decision to refuse access and accordingly be the respondent to any external review tribunal proceedings.

Encouraging communication between decision maker and applicant

17.26 As many submissions acknowledged, a 90 day time limit is unnecessarily long for the majority of access applications. The Commission considers that shorter response times should be encouraged, particularly by communication between applicants and the responsible agency.

17.27 Australian Archives has imposed upon itself an informal 30 day time limit on the processing of access applications. Around 90% of access decisions which do not require consultation with other agencies are made by the Archives within 30days.[cdxli] The Commission believes that agencies which enter agreements with the NAA to make decisions in relation to their own records should likewise attempt to meet an informal 30 day limit for general access applications. Applications requiring more than 30 days usually involve consultation with another agency or with an external body. In these cases, even 90 days has sometimes proved to be inadequate, particularly as foreign governments and organisations that are required to be consulted cannot be forced to meet Australian deadlines. In other cases, delays in responding to applications may be due to the large volume of records involved. In all of these situations it is important to advise the applicant promptly of actual or possible delays. In DRP 4 the Commission proposed that, if an application is not processed within 30 days, the decision maker should be required to contact the applicant (if not contacted previously) to provide information on the progress of the

application. Such communication may well clarify the applicant's needs and avoid an application for review on the basis of a deemed refusal of access.

17.28 The Commission does not recommend any penalty or consequence for a failure to contact the applicant, although it is hoped that the requirement to enter into correspondence with the applicant if the process exceeds 30 days would encourage agencies to meet the 30 day requirement. The Commission would expect the review tribunal to examine the respondent's attention to this requirement although it would not, of course, affect the tribunal's adjudication on the merits of the application.

17.29 A number of submissions in response to DRP 4 opposed the proposal for a 30 day communication requirement.[cdxlii] This opposition came primarily from agencies which considered that a 30 day requirement was too restrictive, that resources would not permit particular types of access applications to be completed within such a short time frame, and that requiring the agency to contact the applicant after 30 days would be an added resource imposition which should instead be directed towards completing the access examination.[cdxliii] The Commission appreciates that some access cases, in particular those involving large volumes of records or complex referrals to other agencies or to foreign governments, are unlikely to be completed within 30 days. The Department of Foreign Affairs and Trade[cdxliv] has noted that such delays may be compounded by the time taken to transfer the application from Australian Archives to another agency for consideration. As noted above,[cdxlv] the NAA and other decision making agencies would need to develop a sound working relationship to maintain effective transfer procedures. In light of these difficulties in completing access examination, the Commission has recommended the retention of a 90 day limit before deemed appeal rights become available.

17.30 However, the Commission maintains its view that the resources required to contact applicants after 30 days and advise them of the progress of their applications would be small in comparison to the resources required to communicate at a later date with irate applicants who were not previously aware of difficulties in the processing of their applications. They would certainly be much less than the cost of appearing before an external tribunal. As one submission noted 'it is sensible to advise an applicant of the progress of the application and of any complications that have arisen.'[cdxlvi]

Recommendation 123. The legislation should include a provision requiring agencies to take all available steps to process access applications within 30-

days after the NAA has received the application. If an application is not processed within 30 days, the agency responsible for making the decision should be required to notify the applicant forthwith of the reasons for the delay and invite the applicant to communicate with the agency about the application. The appeal tribunal should be entitled to comment on the failure to contact the applicant within 30days where appropriate.

Deleting section 31(4)

17.31 Section 31(4), which provides that the Archives may withhold a record for 'a reasonable time' pending access examination, has never been used. It appears to permit the indefinite withholding of records from public access pending access examination, but it has no clear relationship with the normal 90 day time limit on the processing of access applications. Only four submissions addressed section31(4), three of them calling for a clarification of the provision.[cdxlvii]

17.32 Australian Archives proposed the clarification and retention of section31(4), enabling the NAA to withhold records from the public, pending access examination, up to a defined period of 180 days.[cdxlviii] This would enable the NAA to handle very large applications, or to consult with other parties in difficult cases.

17.33 As stated in DRP 4, the Commission is unconvinced of the need to retain section 31(4) in any form. Once a record becomes the subject of an access application there would seem to be no justifiable reason why it should be withheld from the public beyond the usual time limits. Resource problems should be dealt with in other ways, either through effective communication with the applicant or through adequate provision of resources to access programs. There would seem to be no need or justification for the added protection of section 31(4).

Recommendation 124. Section 31(4), which provides the Archives with the power to withhold records from the public pending access examination, should be removed from the legislation.

Factors affecting access decision making

A workload test

17.34 A number of submissions called for the inclusion in the legislation of a workload test along the lines of the test in section 24(1)(a) of the FOI Act.[cdxlix] Such a test would permit agencies to refuse access without processing the application if the work would substantially and unreasonably divert the resources of the agency from its other operations. Dealing with large requests was identified as a particular problem.

> A workload test should be included in the legislation and particularly so in the event of a whole or partial distributive custody arrangement. Large requests can exhaust the resources of an agency and divert these resources away from the agency's core business for large periods of time.[cdl]

A number of submissions, while supporting the principle of a workload test, emphasised the need for it to be carefully developed and monitored in order to balance resource demands with the concept of open access.[cdli]

17.35 There was also strong opposition to a workload test, as being inappropriate for archival records because it would provide an easy avenue to restrict access.[cdlii] Some submissions noted that archival research, by its very nature, often necessitated accessing large numbers of records, either because the researcher is unsure where the information sought may be located, or to give an overview of a large subject. It was suggested that there were other ways of solving resource problems besides refusing access, among them the provision of increased resources and better communication with applicants.[cdliii] The latter strategy would ensure that resources were focused on those records of most interest to the applicant. The Commission's recommendations to enter communication with the applicant where an application would take more than 30 days to process would also assist with dealing with large applications.[cdliv]

17.36 The Commission remains unconvinced of the need for a workload test to deal with requests for access to records in the open period, which is essentially different to access under the FOI Act. The ideal of the open period is that records should generally be available to the public, subject only to justifiable exemptions, with a minimum of inconvenience. The Commission has made recommendations that should ensure that the great bulk of Commonwealth records of archival value are available for public access at or before the age of 30 years. Only those records which had not been cleared for access prior to reaching the open period would need to be subject to an access application.[cdlv] Thus, records subject to a workload test would primarily be those which had not previously been examined, either due to their

complex or sensitive nature or to an inadequate provision of access examination resources. In either case, it should not be the applicant and the concept of public access which suffer.

17.37 The object of a workload test is to relieve an agency where resources would affect the core business of that agency. As one of the primary obligations of the NAA is to provide access to archival records, the NAA should not have recourse to such a test.

17.38 The workload test was strongly supported by a number of those agencies which would be likely to enter into an arrangement with the NAA to make access decisions in respect of their own records. In the Commission's view, if an agency wishes to enter an agreement with the NAA to take on responsibility for access decisions, it should be prepared to devote the necessary resources to this task. If not, it should leave responsibility with the NAA which, as discussed above, ought not to be able to invoke a workload test. In relation to temporary records in the open period, for which controlling agencies would be responsible for providing access, the Commission has recommended that the agency have the power to apply charges on a cost recovery basis.[cdlvi] In such cases, the agency clearly should not have recourse to a workload test.

> **Recommendation 125.** The legislation should not include a provision for a workload test.

Frivolous or vexatious applications

17.39 In its response to IP 19, Australian Archives proposed a new provision which would permit the NAA to disallow an application for access which is frivolous or vexatious.[cdlvii] The Archives' experience had led it to conclude that, in a small number of instances, such a provision might be desirable. While the Commission understands that from time to time applications might be made that are driven more by a desire to cause inconvenience than by a genuine desire to be informed, it has difficulty with the notion that a request for records in the open period — records that by definition are to be available for all — ought to be able to be refused on the grounds of frivolity or vexation.

17.40 While recognising that there might occasionally be situations where a frivolous or vexatious application provision would be useful, the Commission does not consider that this would outweigh the need to preserve the concept of a right of access as free as possible of legislative qualification.

> **Recommendation 126.** The legislation should not include a provision allowing refusal of an access application on the grounds that it is frivolous or vexatious.

Lost or destroyed records

17.41 The matter of lost records, on the other hand, needs to be addressed in legislation. Although the Commission agrees in principle with those who argue that the grounds for refusal of access should not be widened,[cdlviii] the practical reality is that records are sometimes lost or destroyed and the present Act is deficient in not dealing with such situations.

> Given the idiosyncratic and defective state of many original control records, it would be justified if the Act contained some provision for a formal declaration that records sought by the public had been lost, were never created or were likely to have been destroyed, where there is no record of destruction.[cdlix]

At present the Archives Act makes no reference to lost records, and thus provides no basis for dealing with an application where the records sought cannot be located. A number of submissions recognised the need for a provision in the legislation which enables applications to be brought to a definite conclusion in cases where the records cannot be found or are thought to have been destroyed.[cdlx] The provision should not, however, be able to be used as an escape route for agencies. Thus, the scope for notifying an applicant of an inability to provide access on the grounds that the records cannot be found must be strictly limited.

17.42 In DRP 4 the Commission proposed that there should be three grounds on which access could be refused to a record that could not be located.[cdlxi] These were

- there is no evidence that the record was ever created
- the record was created but cannot now be located
- the record was created and destroyed — details of evidence of destruction should be included in the notification.

Australian Archives suggested the inclusion of an additional ground relating to a record which has been transferred out of Commonwealth custody.[cdlxii] While this circumstance might, arguably, be seen to be covered by the second of the above grounds, those situations in which records have been legitimately transferred to another party through an authorised disposal of records would also seem to merit express recognition. Details of the transfer should be included in the notification of reasons for the decision, although this need not include names of the person to whom the records were transferred in cases where confidentiality is at issue in the transfer.

17.43 Additionally, with the proposed move to a provenance based definition of Commonwealth record,[cdlxiii] the grounds for claiming a lost record should include not only a record which was created by the Commonwealth or a Commonwealth agency, but also a record received by the Commonwealth or a Commonwealth agency.

17.44 Any decision based on an inability to locate a record should, in common with other decisions to refuse access, be reviewable. While two submissions thought that a review process would impose an unreasonable burden on the responsible agency,[cdlxiv] many other submissions supported a right of review. The Commission agrees that any provision which provides a ground for refusing access should carry with it a right to seek review of the decision. As with other decisions to refuse access, a decision based upon this provision should require the decision maker to provide a statement of reasons for the decision. Internal review would be appropriate as the first level of review, and then review by an external body. As there would be no record upon which a review could be based, the review would need to be able to examine the procedures undertaken to locate the record and determine if they were adequate. Thus, the statement of reasons should include details of the procedures undertaken to locate the record as well as the particular ground relied upon.

Recommendation 127. The legislation should include a provision enabling an access application to be met with a decision that the record cannot be located. Notification of a decision that a record cannot be located should be permitted only on one of the following grounds

- there is no evidence that the record was ever created or received
- the record was created or received but cannot now be located
- the record was created or received and destroyed — details of evidence of destruction should be included in the notification

- the record was created or received but has been legitimately transferred to another party and is no longer in the custody of the Commonwealth or any Commonwealth agency — details of the authority for the transfer should be included in the notification.

In all four cases, the notification should be required to include details of the search undertaken, including where and by whom.

The decision should be reviewable in the same way as a decision to exempt a record. The legislation should state that the reviewer is to examine the procedures undertaken to locate the record. If they are found to be unsatisfactory at the external tribunal review stage, the tribunal should be able to order the responsible agency to undertake a more extensive search.

Giving reasons for decisions

17.45 Notification of reasons for a decision to refuse access is an essential part of the decision making process. Section 40(5) of the Act requires such notification to include a statement of the reasons for the decision. A statement of reasons provides an applicant with basic reasons for a decision to refuse access, and may assist applicants to determine whether or not to seek a review of the decision. There is a need to retain the requirement for a statement of reasons as a part of the notification of the decision. However, problems have arisen in practice relating to the content of statements of reasons. On the one hand, skeletal statements of reasons, which add little beyond the wording of the claimed exemption provision, have been found to be of little use to the applicant. On the other hand, if more detailed statements were provided there would be a danger of including information which would risk revealing the exempt information in the record.

> ... comprehensive description of the information in order to support the decision to exempt, is a self-defeating outcome when the information is based on national security sensitivities. The simple statements of fact which identify the information as having national security sensitivities have generally been accepted. The problem of a more comprehensive description seems to arise only in the context of appeals ... Accepted practice should be recognised formally by limiting the scope of information required in statements of reasons supporting exemptions for national security reasons.[cdlxv]

17.46 Section 40(7) of the Archives Act makes it clear that a statement of reasons is not required to contain any matter that is of such a nature that its inclusion would make the statement itself an exempt record. This protects sensitive information from being required to be included in the statement of reasons. On the other hand the statement must include clear reasons for exemptions, as the statement of reasons is the commencement of the review process and the basis upon which the applicant determines if an appeal could be beneficial.[cdlxvi]

17.47 The Commission considers that it is not desirable to include in the legislation detailed requirements relating to the contents of statements of reasons. In particular, the range of matters that might be included would vary so much from case to case that the prescription of a comprehensive list to cover all contingencies would be too broad and unwieldy to be of real use. To date there has been no judicial comment on the sufficiency or otherwise of the contents of statements of reasons under the Archives Act, and there is a division of opinion over whether or not AAT and Federal Court decisions relating to FOI statements of reasons should be followed.

17.48 In DRP 4 the Commission proposed the retention of provisions for notifying applicants of decisions to refuse access based upon the existing sections 40(5) and 40(7) of the Act.[cdlxvii] A number of submissions, while agreeing that detailed requirements for statements of reasons should not be included in the legislation, were not satisfied with the Commission's proposal. These submissions called for clearer provisions concerning what should be in the statement of reasons, ensuring that they went beyond the wording of the exemption categories in the legislation[cdlxviii] and were in plain English, thus ensuring that the applicant had a basis for determining whether or not to seek a review of the decision.[cdlxix] If, due to the sensitivity of the information, the decision maker was unable to add anything to the statement of reasons beyond the wording of the exemption category, the decision maker should be obliged to state their dependence on the provision equivalent to section 40(7).[cdlxx]

17.49 The Commission agrees that, in a number of cases, the existing wording of section 40(5) of the Archives Act has been narrowly interpreted, rendering statements of reasons ineffective. For these reasons the Commission also proposed that, in order to provide additional guidance in this area, the NAA should monitor the quality of statements of reasons and provide advice for the assistance of agencies unfamiliar with access decision making or whose performance relating to statement of reasons comes under criticism.

17.50 Australian Archives has pointed out that the NAA's ability to to monitor the standard of statements of reasons would rely heavily upon the cooperation of agencies and their willingness to provide the necessary information.[cdlxxi] The Commission notes this possible limitation on the effectiveness of monitoring. Nevertheless, the NAA should be able to use its relationships with agencies and its authority to good advantage to ensure that this monitoring role is undertaken effectively.

17.51 After further consideration, the Commission is convinced of the need to replace section 40(5) with a simpler provision spelling out the objectives of a statement of reasons. The provision should make clear that the statement of reasons should extend beyond the mere wording of the exemption category upon which the decision is based. However, this would stop short of requiring the inclusion of such information as would make the statement itself an exempt record. In such cases the agency should, however, make it clear in the statement that any additional information about the reasons for the decision would be exempt information. Clearer wording of the provisions relating to statement of reasons, combined with a role for the NAA in monitoring quality, should be sufficient to improve the standard of statement of reasons in all access decision making agencies.

Recommendation 128. The legislation should provide that, where a decision has been made to refuse access, the decision maker must notify the applicant of that decision and provide a written statement of the reasons for the decision. The statement of reasons should go beyond the mere wording of the exemption category which is being relied upon, but not be required to contain matter that is of such a nature that its inclusion would make the statement itself an exempt record. An agency which cannot elaborate its reasons due to this consideration should specifically declare so in the statement of reasons.

Recommendation 129. The NAA should be required to monitor the standard of notifications, particularly statements of reasons, and provide advice to agencies about appropriate standards.

ENDNOTES

18. Discretionary early release and privileged access

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Introduction

18.1 As discussed in Chapter 15, the Commission has recommended the retention of the 30 year rule, in conjunction with the application of the FOI Act to all records less than 30 years old, as the basis of a statutory access regime for all Commonwealth records. In order to encourage, to the maximum extent practicable, the discretionary release of records in advance of statutory obligations, the Commission also recommends the inclusion in the legislation of an obligation on all Commonwealth agencies to make records accessible to the public at the earliest practicable time. The Commission has described this concept as discretionary early release.

18.2 There will also be occasions when particular individuals might properly be given access to records which, because of various sensitivities, are not suitable for general public access. Such access is described as 'special' or 'privileged' access. This chapter considers what provision the legislation should make for privileged access, particularly in cases where the applicant is not the subject of the record. Issues relating to access by record subjects to information about themselves are considered in Chapter 21.

Discretionary early release

An accessibility obligation

18.3 The Commission suggested in DRP 4 that there should be a statutory obligation on all Commonwealth agencies to make records of enduring (archival) value accessible to the public at the earliest practicable time, but not later than approximately 30 years after creation, with all sentencing and access exemption work completed. Such an obligation would not, however, mean that sensitive records would be required to be released to the public. It would still be important to take into account existing restrictions on the disclosure of records, including those in the

Privacy Act, the FOI Act and in other legislation which prohibits the disclosure of certain types of information.

18.4 Submissions in response to DRP 4 generally supported the development of discretionary early release programs.

> Improving access by encouraging the proactive release of records which are not sensitive is in line with the objective of open government, and in some agencies may reduce the number of FOI applications.[cdlxxii]

18.5 There was some opposition to the introduction of an obligation for the early release of certain categories of records, in particular security and intelligence records. Some submissions suggested that these records should be excluded from the early release provisions as a class.[cdlxxiii] The Commission opposes, however, the exemption of particular classes of records from discretionary early release. While certain records would clearly continue to be sensitive up to and beyond 30 years, entire classes of records should not be withheld from even the possibility of early release. As the Australian Intelligence Community acknowledged, there are some cases in which even intelligence information is released to the public prior to reaching the open period.[cdlxxiv] All agencies should be encouraged to consider the discretionary early release of appropriate records, even if the majority of their records would remain sensitive for 30 years or more.

18.6 In DRP 4 the Commission limited its proposal for a discretionary early release obligation to records of enduring (archival) value, in order to focus agency resources on records which would clearly continue to exist in the open period. The Commission now considers that the obligation would operate more simply and effectively if it applied to all records less than 30 years old. While the Commission has recommended that all sentencing of Commonwealth records should be completed by the time the records are 20 years of age[cdlxxv] there will be many records which will be suitable for release before that age. To limit discretionary release obligations to records of archival value would unnecessarily deprive the public of access to records merely because they had not yet been sentenced. The guidelines for discretionary release which the Commission recommends should be issued by the NAA would, nevertheless, emphasise the need to give priority to records identified as being of archival value, or records which were likely to be so identified.

18.7 The Commission's recommendation that the access status of all records of archival value should be determined by the age of 30 years is discussed in Chapter 15.

> **Recommendation 130.** There should be a statutory obligation on all Commonwealth agencies to make records accessible to the public at the earliest practicable time.

Encouraging agencies to undertake discretionary early release

18.8 A number of administrative measures could be taken to assist agencies to meet the proposed discretionary early release obligation. Early identification of records suitable for release is crucial to the wider provision of access, particularly in the case of electronic records. Records in an electronic format will not be as easy to examine individually for sensitivities as paper format records; thus the metadata [cdlxxvi] collected at the time of creation will be particularly useful for both current and future users of the records. While it is recognised that not all access decisions can be made at the point of creation, identifying metadata can help to group records into categories to assist decision making at a later date.

18.9 The implementation of systematic early release programs would also benefit agencies by reducing the number of FOI applications which they would be likely to receive[cdlxxvii] and by encouraging a staged approach to the meeting of the general 30 year public access obligation which the Commission has recommended.

18.10 The NAA would have a crucial role to play in advising and guiding agencies to develop suitable procedures for the introduction of discretionary early release schemes. In particular, the NAA should encourage the early identification and release of records likely to exist beyond 30 years. Australian Archives agrees with this objective, but opposes a legislative requirement to establish guidelines.[cdlxxviii] The Commission considers, however, that the NAA's effective participation is so crucial to the success of discretionary early release that there should be a legislative obligation placed on the NAA to establish such guidelines. The emphasis of the guidelines would be on establishing systems for identifying records which can be released prior to the open period and then providing information about these records to the public.

18.11 As the Commission's recommendations relating to discretionary early release are not limited to records of archival value, there would be nothing to prohibit an agency from making any of its records available to the public,[cdlxxix] even though they might subsequently be destroyed. One submission saw the early release of these kinds of records as providing an opportunity to improve the accountability of the disposal regime.[cdlxxx]

> **Recommendation 131.** There should be a statutory obligation on the NAA to establish appropriate guidelines for the creation and implementation of discretionary early release schemes by Commonwealth agencies.

Legislative support for discretionary early release schemes

18.12 The discretionary early release arrangements recommended by the Commission would give new and enhanced significance to the existing discretionary release provisions in section 58 of the Archives Act and section 14 of the FOI Act. Although little used to date, such broad enabling provisions would provide authority for the new schemes envisaged by the Commission. The Commission accordingly proposed in DRP 4 that provisions along these lines be retained. It also suggested that the NAA guidelines should assist agencies in relation to the scope and application of these provisions. However, neither the Archives Act nor the FOI Act presently confers any legal protection from defamation, breach of confidence or copyright infringement proceedings that might be brought as a result of such release. The need to remedy this shortcoming is addressed below.[cdlxxxi]

18.13 Such protection presently exists for the accelerated release of records less than 30 years of age under section 56(1) of the Archives Act. That provision has, however, been used only twice, probably because of the requirement for Prime Ministerial approval. Although some submissions supported the retention of this provision,[cdlxxxii] the Commission is not satisfied that it is sufficiently flexible to warrant retention and suggested in DRP 4 that it be removed. Moreover, the clothing of release under section 58 of the Archives Act and section 14 of the FOI Act with an appropriate level of legal protection would seem to the Commission to be a preferable course,[cdlxxxiii] given the proposal for enhanced discretionary release programs across all agencies.

18.14 Some concern was expressed, particularly by the Attorney-General's Department,[cdlxxxiv] that the greater use of discretionary release powers should not be

at the expense of existing protections provided by the Privacy Act and other non-disclosure legislation. The Commission accepts the force of this concern and would expect it to be met both by the NAA guidelines and by express statutory elaboration where necessary.

18.15 The Commission is aware that the Attorney-General's Department already issues guidelines in relation to discretionary release under section 14 of the FOI Act. For that reason, and having regard to that Department's responsibility for FOI policy, the Commission proposes that the NAA consult where appropriate with the Attorney-General's Department and the Privacy Commissioner in formulating guidelines that would uniformly cover discretionary release under both section 14 of the FOI Act and the provision of the new archives legislation corresponding with section 58 of the Archives Act.

Recommendation 132. In order to facilitate discretionary early release schemes, provisions based upon those in section58 of the Archives Act and section 14 of the FOI Act should be retained in both the FOI Act and the new legislation.

Recommendation 133. The NAA should have the power to issue guidelines as to when it would be proper to release records under the discretionary release provisions of the FOI Act or the new legislation. In formulating its guidelines for the discretionary release of records under section 14 of the FOI Act and section 58 of the Archives Act, the NAA should consult, where appropriate, with the Attorney-General's Department and the Privacy Commissioner.

Recommendation 134. The accelerated release provision in section 56(1) of the Archives Act should not be included in the new legislation.

Continuity of access decisions

18.16 One consequence of the proposed discretionary early release programs would be that access decisions would already have been made in the context of the FOI Act in respect of substantial numbers of records before they entered the open access period.

18.17 It will, therefore, be important that, in order to eliminate unnecessary duplication of effort, agencies document such access decisions in a way that will permit the NAA to access them quickly and reliably.

> **Recommendation 135.** The NAA should include in its guidelines relating to discretionary early release administrative measures that will ensure that the NAA has immediate access to all access decisions made by agencies in relation to records of archival value not yet in the open access period.

Legislative protection for discretionary early release

18.18 Section 57 of the Archives Act currently provides protection from action for defamation, breach of confidence or infringement of copyright for releases made under the provisions for accelerated release, special access and release in response to an access application. Similar protection exists for release in response to an access application under the FOI Act.[cdlxxxv] There is no protection for releases of records through the discretionary provisions of section 58 of the Archives Act or section 14 of the FOI Act. The lack of protection for such release 'outside the Act' is an inhibitor of more open access decisions and is likely to pose a significant impediment to the discretionary early release regime recommended by the Commission.

18.19 In DRP 4 the Commission suggested the extension of this protection to *bona fide* releases under section 58 of the Archives Act and section 14 of the FOI Act. This was supported by both Australian Archives and the Department of the Prime Minister and Cabinet.[cdlxxxvi] The Commission reaffirms its support for the extension of legal indemnity to any *bona fide* release by an authorised officer of the responsible agency.[cdlxxxvii]

18.20 While the Attorney-General's Department supported the extension of legal protections in appropriate cases, it was concerned that the extension of these protections without limitation might override important existing safeguards against inappropriate release.

> Release under the FOI Act involves safeguards for the interests of third parties, both in the form of exemptions and in the form of procedures to be followed where certain exemptions may apply. These safeguards do not apply to disclosure 'outside' the Act. Civil actions currently do provide some safeguard. The Department is concerned about the removal of these safeguards where the safeguards provided by the FOI Act would not apply.[cdlxxxviii]

18.21 The Department was particularly concerned that personal and third party information might be put at risk. While noting the Commission's view that guidelines issued by the NAA should assist the proper use of the discretionary release provisions, the Department was concerned that the guidelines might not be fully adequate.

18.22 The Commission agrees that legal protection from civil actions should only be available where the consequences of release have been fully and carefully considered. After further consideration, and in particular having regard to the concerns expressed by the Attorney-General's Department, the Commission has concluded that the relevant protections should only be available in respect of section 58 and section 14 releases where a decision maker had a reasonable belief that the record was not exempt, or, if the record would have been exempt, had received permission from all affected parties to release the record.[cdlxxxix] These qualifications would, in the Commission's view, be consistent with the aims of a proactive release scheme while protecting records with continuing sensitivities. Thus the protections would not be available where decision makers were clearly acting inappropriately and not in accordance with the protections afforded by existing legislative provisions.

18.23 The appropriate legal protections from civil action should extend to all affected persons. Thus, not only should individual officers making decisions be protected, but also the Commonwealth and any decision making agency which has a separate identity to the Commonwealth.[cdxc] The current term in the Archives Act of 'the Commonwealth or any person concerned in the authorizing or giving of access'[cdxci] should be sufficient to cover these eventualities.

18.24 The Attorney-General's Department also raised the need to provide protection under the archives legislation from criminal prosecution for *bona fide* decision makers in line with section 92 of the FOI Act.[cdxcii] The Commission considers that the existing protections in section 57(1)(c) of the Archives Act already provide appropriate protection and should be included in the new archives legislation.

Recommendation 136. In addition to existing protections for release in conjunction with the relevant Act, including special access, the legislation and the FOI Act should, in respect of any record released in pursuance of provisions based on section 58 of the Archives Act or section 14 of the FOI Act, provide that it is a defence to any action for defamation, breach of

confidence or infringement of copyright against the Commonwealth, or any person concerned in the authorising or giving of access, that the decision maker

- had a reasonable belief that the record was not exempt under the relevant legislation; or
- being of the opinion that the record was exempt, consulted with all persons reasonably believed to be interested parties, each of whom agreed to the release of the document.

Special access under the Archives Act

18.25 Under section 56(2) of the Archives Act, special access[cdxciii] may be granted to an approved person to records which have not otherwise been released to the public, either because they are not in the open period or because they are exempt records. The present scheme for special access is elaborated in Archives Regulation 9 and associated arrangements approved by the Prime Minister.[cdxciv] This makes special access unnecessarily complicated. At present, special access may be granted in the following circumstances.[cdxcv]

- Governors-General, ministers, departmental secretaries and other senior officials[cdxcvi] may access records which would have been dealt with by them while holding their respective offices, for the purpose of refreshing their memories about the records.

- Governors-General, ministers, departmental secretaries and other senior officials[cdxcvii] may access records which would have been dealt with by them while holding their respective offices, for the purpose of preparing their biographies.

- Where Commonwealth records have been deposited with Australian Archives by a person who is not a Commonwealth institution and that person has an arrangement with Archives relating to the custody and management of those records.

- Where a person is carrying out research for the purposes of preparing a work for publication and the Minister[cdxcviii] has approved the work on the grounds that the work is likely to make a substantial contribution to the recording and

assessment of events in the political, social, economic, cultural, scientific or other development of Australia, particularly as that development relates to the administration of the affairs of the Government of the Commonwealth.

18.26 The arrangements approved by the Prime Minister set out details of application procedures and identify those who may approve special access decisions. The arrangements provide that, in the case of applications under the first two circumstances in the preceding paragraph, there is a right of access if the specified circumstances are shown to exist. Special access by depositors of records is usually determined according to the arrangements between Australian Archives and the depositor established at the time of deposit; thus, there is generally a guaranteed right of access. Special access in relation to research projects is at the discretion of the minister, or his or her delegate, responsible for the portfolio to which the records relate. [cdxcix] There is no procedure for administrative review of special access decisions, although judicial review is available under the ADJR Act.

18.27 The Commission has examined each of the existing circumstances providing for special access under the Act. It has concluded that each of these circumstances should continue to be recognised in the Act, although this should be done in the primary legislation rather than by regulation. In some cases the provisions should be amended for the sake of clarification and to better reflect existing practices.

Access by Governors-General, Ministers and Secretaries

18.28 Submissions in response to IP 19 generally supported the retention of access privileges for Governors-General, ministers, departmental secretaries and other senior officials (referred to collectively in this section as senior office holders).[d] Only one submission suggested the removal of these access privileges, on the grounds that senior officer holders should not have any access privileges beyond those of the general public.[di] Senior Commonwealth office holders are in a special position in relation to the records with which they have been involved during their terms of office. Access to the records is desirable for the affirmation and clarification of their recollections of events of importance to the nation.

18.29 The Commission suggested in DRP 4 that, because of their special place in the development of the nation's history, these senior officer holders should continue to be accorded privileged access as a right. Nothing presented to the Commission would lead it to conclude that the present access right should be replaced by the

introduction of an access discretion.[dii] Moreover, there is a danger that the introduction of a discretion might lead to the politicisation of access decisions.

18.30 The Commission accordingly suggested the retention of a right of access for senior office holders. However, the existing restrictions specified within the regulations should continue. Thus, the right should only extend to records that were, or could reasonably be presumed to have been, seen or personally dealt with by the person in the course of the exercise of the duties of their office. The purposes for seeking access should continue to be limited to refreshment of memory or preparation of a biography.

18.31 In the Commission's view, this right of access should now be included in the primary legislation. In order to maintain the desirable legislative distinction between access to records in the open period and access to records less than 30years of age, the provisions in the archives legislation should be limited to records in the open period and corresponding provisions should also be included in the FOI Act.

18.32 The Commission did not receive any comments in relation to these issues in responses to DRP 4.

Recommendation 137. The legislation should reaffirm the right of privileged access for former Governors-General, ministers, departmental secretaries and other specified senior officials to Commonwealth records relating to their respective terms in office for the purposes of refreshing their memories or preparing biographical works. This right should apply only in relation to records in the open period.

Recommendation 138. Identical provisions should be inserted in the FOI Act in relation to records which are not yet in the open period.

Access to voluntary deposits of records

18.33 The Commission has recommended in Chapter 11 arrangements that would reinforce the right of privileged access by former ministers to records which they have deposited with the NAA. The Commission considers that, in all cases where there is a voluntary deposit of records, the depositor should correspondingly retain a

right of access to those records. Voluntary depositors of records could include former ministers, senior Commonwealth officials, or organisations with records of significant interest which should be held in the custody of the NAA.[diii] In some cases these records might contain Commonwealth records which would become subject to the normal access provisions. While public access arrangements for non-Commonwealth records would be determined according to the instrument of deposit agreed between the depositor and the NAA, the depositor should retain a right to personal access to all of the deposited records. In order to facilitate access for biographical purposes, as well as covering the situation of organisational depositors, the right of access should be specifically extended to nominated representatives of the depositor.

18.34 The Commission did not make a specific recommendation in DRP 4 in relation to access to records voluntarily deposited with the NAA, referring instead to the situation relating specifically to records deposited by ministers. The Commission has recognised, however, that the same principle needs to be applied generally to any individual or organisation which makes a voluntary deposit of records with the NAA. These issues did not attract specific comment in responses to DRP 4.

> **Recommendation 139.** The legislation should specify that, where records are voluntarily deposited with the NAA, the depositor, or his or her nominated representative, should retain a right to access those records.

Access for the purposes of research

Grounds for special access

18.35 Some research projects necessitate access either to large volumes of official records which have not been assessed for ongoing sensitivities, or to records which would clearly be wholly or partially exempt from general public access. Special access for research purposes must, therefore, be restricted to appropriately defined special circumstances and be subject to appropriate safeguards.

18.36 With the closing of the access gap and greater emphasis on the discretionary early release of non-sensitive records, the Commission envisages that the majority of non-sensitive records less than 30 years old should be able to be made available to

researchers without the need to resort to special access. However, it acknowledges that there would continue to be situations where, because of their volume or format, such records could not be generally released because their assessment would require substantial resources. There would also be cases in which the majority of the records sought were of a non-sensitive nature, but small portions of them required exemption.

18.37 In such cases it might be appropriate for the researcher to see all the records concerned, subject to an undertaking not to disclose sensitive material. Special access applications could, therefore, benefit researchers who satisfied the relevant criteria by providing an avenue to access both sensitive records and unreleased non-sensitive records.

18.38 While the Commission acknowledges that the right to seek special access should be available in relation to all records, it notes that, in the majority of cases, a researcher granted special access would become privy to information which would not otherwise be disclosed to the public. Thus, special access to otherwise exempted records should only be granted in appropriately circumscribed circumstances and use of the information should be strictly monitored.

18.39 Archives Regulation 9(d) establishes criteria and rules for considering special access applications in relation to research projects. These require that

- the applicant must be carrying out research for the purpose of preparing a work for publication
- the minister, or a person authorised by the minister, must approve the research work
- the work will only be approved if it is likely to make a substantial contribution to the recording and assessment of events in the political, social, economic, cultural, scientific or other development of Australia, particularly as that development relates to the administration of the affairs of the Government of the Commonwealth
- the records requested must be relevant to the research.

18.40 Submissions in response to IP 19 offered a range of views on special access. Many saw the value of some form of special access, and several called for a broader application of the provision.[div] These submissions criticised what they saw as the unduly restrictive, and thus discriminatory, categories of persons permitted to apply for special access under the present arrangements. Issues were also raised about the

purely discretionary nature of special access, and the absence of any avenue for administrative review.

> My concerns arise, firstly, from the potential, in some instances demonstrated, for arbitrary or discriminatory decision-making by government agencies ... Agencies currently have the scope to refuse special access to a doctoral student, for example, not to mention a student of lesser standing, because they do not have the requisite professional standing ... I am concerned that the current operation of this provision has meant that certain historians and, therefore, points of view, can be favoured and advantaged by agencies.[dv]

There is concern that, under the current provisions, and despite specification of the eligibility criteria in Archives Regulation 9, decisions by agencies to approve or reject special access applications lack consistency. There is anecdotal evidence that some applications have been disallowed for resource reasons, while others have not met the 'national significance' requirements as interpreted by the agency. In light of this, a number of submissions requested that special access decisions be subject to some form of administrative review.[dvi]

18.41 At the same time, a number of submissions noted that special access is intended to be a privilege and not a right. Special access involves a balancing of the need to treat all researchers equitably with the preservation of confidentiality of the material.[dvii] While supporting current arrangements, one submission drew attention to the possible resource implications of a broader provision.[dviii] The majority of submissions opted to retain the existing special access provisions and eligibility criteria.

18.42 Some submissions suggested that the special access provisions be removed from the Act.[dix] This flowed from the Commission's recommendations for improved early release provisions, the closure of the access gap between the FOI Act and archives legislation, and the extension of legal protections for any *bona fide* release of records. Any access beyond the FOI Act or archives legislation could, it was suggested, be made through a protected discretionary release mechanism, removing the need for any structured and restrictive special access application. One agency pointed out that its existing discretionary release practices removed the need for any broader application of the special access regime.[dx]

18.43 The Commission remains of the opinion that access to actually or potentially sensitive records should necessarily be strictly limited. This is of particular concern where the records contain sensitive personal information.

> As more and more researchers demand access to records containing personal information of varying degrees of sensitivity, archivists are faced with uneasy questions concerning the conditions, if any, under which access to all or some of these records is permissible. Taken together with changing public attitudes concerning the state's and the citizen's rights to personal information, changing trends in historical research and the ensuing pressure for more access to personal information held in government archives have forced archivists to reassess their traditional role as mediator in negotiating access and privacy rights.[dxi]

Providing access to records otherwise exempted for reasons of apprehended harm to the state should similarly be carefully circumscribed. Thus, access to records which have been identified as requiring protection from public disclosure should only be permitted where the research in question would clearly benefit the public as a whole. The Commission believes that the necessary level of protection and circumscription can only be effectively provided by express legislative provision. In DRP 4 the Commission suggested that the grounds set out in Archives Regulation 9(d) are appropriate in limiting the circumstances in which special access should be permitted and should be applied to a provision for special access under the new archives legislation. As recommended earlier in this chapter, these provisions should be included in the primary legislation rather than in regulations.

18.44 One submission opposed the continued use of the words 'substantial contribution' in defining the circumstances in which special access for research purposes should be considered.

> What is a work that will make a 'substantial contribution' to knowledge. Upon this phrase rests a considerable amount of interpretative freedom; the review would serve researchers well by defining this better ... It is inherently difficult to predict the results of research, and the standards for decision making create incentives for sensationalism over careful research, since a sensationalist account is more likely to achieve notoriety and 'influence'. There are many good reasons for special access, but none of them appear here. There is much that can be revealed if the researcher undertakes to exercise prudence when using it, and this should be reflected.[dxii]

The Commission notes the criticisms of the open ended nature of the term 'substantial contribution'. It is, however, reluctant to recommend a more definitive term for inclusion in the legislation as, ultimately, any determination of the worth of a research project must necessarily involve a substantial degree of subjectivity.

> **Recommendation 140.** Special access should continue to be provided for in the archives legislation on identical grounds to those currently set out in Archives Regulation 9(d).

Guidelines relating to decisions to grant special access

18.45 In recognition of the extent of the discretion involved in granting special access, the Commission recommends that guidelines be established to assist decision makers in determining whether it would be appropriate to grant special access in any given circumstances.

18.46 In this regard the Commission notes that the present regulations setting out grounds for special access are accompanied by detailed guidelines, issued by Australian Archives with the approval of the Prime Minister. These guidelines, which cover all aspects of special access, including access by former ministers, Governors-General and senior officials, set out procedures to be followed when dealing with special access applications. Part Four sets out guidelines on the assessment of applications for special access for research purposes. While the Commission does not necessarily endorse the existing guidelines, it would envisage that the recommended guidelines be along similar lines.

18.47 The most appropriate body to issue such guidelines would, in the opinion of the Commission, be the NAA in consultation with interested agencies.

> **Recommendation 141.** The NAA should be required, in consultation with other interested agencies, to issue guidelines for administrative procedures relating to applications seeking special access for the purposes of research.

Location of special access provisions

18.48 In DRP 4 the Commission proposed that identical special access provisions should be included in both the archives legislation and the FOI Act. This was to facilitate recognition of the differing responsibilities for access decision making in the open and closed periods. However, a number of submissions, while supporting the concept of special access provisions applying to the closed period, opposed the inclusion of special access provisions in the FOI Act.[dxiii] The Australian Intelligence Community pointed out that many applications for special access extend to records in both the open and closed periods, and that separate provisions in each Act would necessitate separate applications for these records. The Commission acknowledges

this practicality, and would thus recommend that special access provisions be included in the archives legislation only, clearly indicating that the provisions extend to all records regardless of age. However, the provisions would also need to include a clear delineation of responsibility for making special access decisions.

> **Recommendation 142.** Special access provisions should be included in the legislation covering records in both the open and the closed periods of access.

Responsibility for special access provisions

18.49 In the existing regulations covering special access for research purposes, the decision to approve the research work lies with the minister of the controlling agency, or a person approved by the minister. As these powers are ordinarily exercised by a delegate of the minister within the controlling agency, the Commission considers that it would be appropriate to reflect that practice by reposing the decision making power directly in the agency itself.

18.50 In other recommendations, the Commission has proposed that controlling agencies have responsibility for making access decisions relating to records in the open period where these records are of archival value and an arrangement is in place with the NAA, or where the records are not of archival value.[dxiv] Consistent with those recommendations, the Commission proposes that authority for special access decisions repose in controlling agencies in respect of records in the open period that are of archival value and are the subject of an access arrangement with the NAA, and in respect of records that are not of archival value. Similarly, in respect of special access in the open period to records of archival value to which no arrangement applies, the decision making power should reside in the NAA. Consistent with the FOI Act, all special access decisions in relation to records in the closed period should be made by the controlling agency.

18.51 Australian Archives questioned whether agencies should be consulted in relation to decisions made by the NAA.[dxv] In the Commission's view, if an agency wishes to be consulted about special access decisions over open period records, that agency should seek to make specific provision for this in an access agreement between the agency and the NAA. In cases in which the NAA has responsibility for access decisions over open period records, and the records sought span the closed

and open periods, the controlling agency and the NAA should, as a matter of administrative procedure, consult before making their respective decisions.

> **Recommendation 143.** Special access decisions should be made at agency rather than at ministerial level. The NAA should have responsibility for special access decisions relating to records of archival value in the open period unless there is in place an arrangement with the controlling agency under which that agency is to have that responsibility. The controlling agencies should have responsibility for special access decisions relating to records in the closed period and records in the open period that are not of archival value.

Application charges for special access

18.52 The Commission recommended in Chapter 7 that charges should not be applied to general access applications for records in the open period.[dxvi] This recommendation recognises the importance of the right of access to open period records. However, as special access is a form of privileged access beyond the statutory rights available to the public in general, the Commission believes that applicants should be required to contribute towards the costs involved. In DRP 4 the Commission accordingly proposed that applications for special access attract application, search and retrieval, and decision making fees based upon those applied under the FOI Act for general access applications.

18.53 Australian Archives opposed charges on the grounds that the fee would merely act as a behaviour manager to deter special access applications.[dxvii] While of the view that any charges applied to special access applications should not inhibit the proper use of the special access provisions, the Commission nevertheless believes that they should acknowledge the special nature of the access and the resources required to process applications. The Commission considers that the current charges for general applications under the FOI Act would be suitable, that is a $30 application fee, plus a search and retrieval fee of $15 per hour and a decision making fee of $20 per hour.

Recommendation 144. Applications for special access should attract application, search and retrieval, and decision making fees based upon those applied under the FOI Act for general access applications.

Reviewing special access decisions

18.54 As already acknowledged, a special access decision is, by nature of the criteria concerned, a matter involving considerable discretion and individual judgment. However, the Commission appreciates concerns that, on occasions, narrow interpretation and prejudicial attitudes may have been evident in decision making.

18.55 The Commission therefore favours some form of administrative review that, while not circumscribing the exercise of proper judgment and discretion by the initial decision maker, will have a beneficial effect on decision making and permit effective review of poorly made decisions.

18.56 In DRP 4 the Commission proposed that special access decisions should be subject to external review on the merits by the AAT or a similar external review tribunal. [dxviii] This recommendation was strongly opposed in a number of submissions, primarily on the grounds that permitting administrative review of a privilege has the effect of turning the privilege into a right. This would inappropriately alter the nature of special access.

> The Intelligence elements of the Department of Defence reject the proposal on the grounds that special access is exactly that: special and privileged. As such, it is discretionary and should not be subject to review. Applications are assessed against stated criteria and therefore considered in terms of the value of the proposed project and the research capacity of the applicant. To suggest that there is a right of review of the decision moves the idea of a special and privileged position to one where there is a right, and if it is denied it is contestable.[dxix]

18.57 In light of these submissions, the Commission has reconsidered both the need for and the possible extent of review of special access decisions. The Commission agrees that special access should not, by reason of a formal review process, become a right of access. This would conflict with the need to protect certain records which have existing sensitivities. Agencies should continue to have a discretion to determine if the records sought might appropriately be released. However, the Commission maintains the view that there should be some form of review to make the processing of special access applications more equitable and accountable.

18.58 The Commission agrees, however, that review of special access decisions by the AAT or a similar administrative tribunal may not be appropriate. Rather, what would seem to be required is a reviewer who can reconsider the decision against the criteria, but nevertheless retain a wide discretion appropriate to the nature of the request. It should also be a cost effective method of review for both applicants and agencies.

18.59 Internal review is the cheapest and easiest form of administrative review.[dxx] However, the Commission does not consider that internal review would be appropriate for special access decisions, particularly in the light of evidence suggesting that special access applications are often determined at first instance at a senior level. Review by an external body or person would be more appropriate.

18.60 The Commission has considered whether review by a panel of persons would be appropriate, with the panel including, for example, a representative of the controlling agency, a representative of the NAA, and an academic with experience in the field of research. While the Commission considers that this would provide a well balanced panel to consider the decision, the costs and likely time delays involved militated against adoption of this solution.

18.61 Instead the Commission recommends that a review of special access decisions should be undertaken by the minister with responsibility for the portfolio of the decision making agency. The minister would be able to seek appropriate advice from relevant persons, including the agency, the NAA or any relevant experts in the field of research. In this way the nature of the discretion and the need for a public interest assessment would be appropriately preserved.

> **Recommendation 145.** The proposed special access provisions relating to access for research purposes should include a right to seek review of a decision to refuse special access by the minister responsible for the portfolio of the decision making agency.

Monitoring the use of exempt records

18.62 Because of the sensitive nature of the information to which special access

may apply, there should be some mechanism for its administration and control. Section 56(3) of the present Act provides a $2 000 penalty if conditions of special access are contravened. This penalty has never been enforced.

18.63 In a number of overseas jurisdictions, including the federal and provincial/ state levels in Canada and the USA, access to personal information which would normally be exempt from public access has been regulated by research contracts. The contract is a written agreement between the researcher and either the archival institution or the controlling agency. The agreement attempts to balance the right of privacy with the researcher's need for information and legally binds the researcher to accept conditions of research use. The primary condition in all cases is that, while the researcher may have access to the personal information, they must keep confidential any identifiable personal information about the record subject.[dxxi] Penalties for violating the conditions of the contract may include withdrawal of access rights, monetary fines, and the pursuit of other legal remedies such as injunctions.

18.64 A similar concept has been adopted by Australian Archives in its agreement to permit access by Aboriginal and Torres Strait Islander people undertaking family and community research to records containing sensitive personal information. The concept of the research contract could be expanded to cover access to any sensitive information which would otherwise be exempted from public access. Contracts should set out clearly the terms and conditions of access and the consequences for breach of the contract conditions, assisting with the monitoring of the use of the information. A successful special access applicant should be required to enter into a research contract as part of the special access procedures. Only those persons who are clearly identified in the contract should be permitted to access the records in question.[dxxii]

18.65 The other advantage of research contracts is that they can be individually designed to cater for the type of information being accessed and the particular situation of the applicant. While, in some cases, researchers would be bound not to disclose any of the exempt information, in other cases they might be able to publish certain types of information, or use statistical data gained from the information without revealing identifying details. Research contracts should cover issues such as confidentiality requirements, the security of any copies or notes in the applicant's custody, the power of the agency to review work prior to publication, and provisions for breach of contract, including withdrawal of access privileges, defined monetary damages and other legal remedies.

18.66 The Commission did not receive any adverse comments in response to its proposal in DRP 4 that successful special access applicants be required to enter a research contract.

18.67 The question arises whether a contractual arrangement would provide sufficient incentive to the researcher to scrupulously adhere to the terms of the agreement, particularly the confidentiality provisions. In this regard, the Commission notes that in one US jurisdiction, Michigan, the archival legislation provides for the payment of the fixed sum of $1 000 by way of liquidated damages if the research contract is violated.[dxxiii]

18.68 Bearing in mind the damage, particularly to personal sensitivities, that can arise if such contracts are not fully honoured, the Commonwealth is attracted to the Michigan model and proposes for consideration that the legislation governing access contracts specify as a statutory condition a liquidated damages clause of $2000. An amount set at that level is likely to be high enough to provide the required incentive to strict adherence while not being so high as to attract the risk of being regarded as a penalty.[dxxiv]

Recommendation 146. The special access provisions in the legislation should require successful special access applicants to enter a research contract specifying the conditions of access and the consequences of breaching those conditions.

Recommendation 147. The legislation should include provision for liquidated damages of $ 2 000 for the breach of conditions of a research contract.

ENDNOTES

19. Services to the public

Introduction

19.1 An effective right of access must be supported by adequate information about access and service delivery procedures.

19.2 Submissions drew attention to the fact that only a small proportion of the population makes use of archival records in Australia. Comparisons between the State archival institutions and Australian Archives also indicate that Australian Archives does not have a very high public profile. Reasons suggested for this situation included the geographical dispersal of the records, lack of education about archival systems of arrangement, and a lack of awareness of the wealth of information contained within Commonwealth records.

19.3 This chapter examines issues relating to the services provided to the public to support access to Commonwealth records and considers how that access could be enhanced.

A charter of service obligations

19.4 The Commission has recommended that the legislation should confer a number of statutory obligations on the NAA and other agencies which would support the provision of enhanced services to the public. These include obligations on

- all agencies to make records accessible to the public at the earliest practicable time[dxxv]
- the NAA to collect and disseminate information about the function, location and accessibility of records of archival value[dxxvi] and
- the NAA to create adequate finding aids in appropriate formats.[dxxvii]

The Commission has also recommended the inclusion of an objects clause at the commencement of the archives legislation.[dxxviii]

19.5 In IP 19 the Commission asked whether the legislation should include a charter of 'rights' of users. Several submissions supported the inclusion of such a charter,[dxxix] but the majority of submissions which commented on this issue were opposed to the suggestion. Some were cautious about the principle of legislating rights in this way,[dxxx] while others considered it unnecessary as the legislation already does, or should, include the necessary specific rights and obligations.[dxxxi]

19.6 Australian Archives is subject to a general government requirement to establish a service charter by June 1998.[dxxxii] Under this initiative, all government departments, agencies and business enterprises which deal with the public are required to develop customer service charters according to standard principles.[dxxxiii]

19.7 The proposed service charter differs from a charter of rights.

> A service charter is a simple and short plain language document which sets out the quality of service customers can expect to receive from that body. Service charters also outline any avenues for taking up complaints, the means of commenting on the charter and the way the charter is kept up to date.
> ...
>
> A service charter in itself is not intended to confer legally enforceable rights on customers of Commonwealth agencies. However, a charter should state if there is legislation relevant to the charter's contents. It should also include information about any specific and/or legally enforceable rights which the charter does confer on customers under any relevant legislation.[dxxxiv]

A service charter would, in the Commission's view, be a suitable vehicle for drawing together the NAA's legislative rights and obligations in order to identify how the public can access its services. The charter should also specify relevant user obligations, including security and preservation requirements in relation to the records.

19.8 In DRP 4 the Commission proposed the inclusion, beyond the existing government initiative, of a statutory obligation on the NAA to create and maintain a service charter. While Australian Archives is currently developing its initial service charter for release by 30 June 1998, it is opposed to a specific legislative requirement to establish a charter.[dxxxv] The Commission acknowledges that its suggestion for a legislative charter obligation goes beyond the current government initiative. It considers, however, that an organisation such as the NAA would benefit from an obligation to maintain a service charter, since it would ensure that the charter

continued to be updated appropriately. It would also be an appropriate tool for defining service levels in an environment where an increasing number of services may attract charges.[dxxxvi]

19.9 The Commission does not believe that it is appropriate to include the charter itself in the archives legislation. Service charters contain detailed information about the relationship between the agency and the public. These details change with time, often to improve services in the light of experience. Inclusion of the charter in the legislation itself would make it difficult to update it promptly when changes are justified.

19.10 The Commission notes that submissions and consultations raised the possibility of extending the opening hours of the NAA's reading rooms.[dxxxvii] This is an issue which should be fully considered when the service charter is being drawn up and in continuing consultations with stakeholder groups.

> **Recommendation 148.** The NAA should have a statutory obligation to create and maintain a service charter, but the charter itself should not be incorporated in the legislation.

Security of reading rooms

19.11 In its submission in response to IP 19, Australian Archives asked the Commission to consider recommending that the NAA be given powers to remove persons from its premises.[dxxxviii] This suggestion flows from occasional difficulties that Australian Archives has experienced in dealing with persons disrupting public areas or threatening staff members. Enhanced powers of removal might be useful in cases where clients are disruptive, offensive or damage property, or where staff or other members of the public are under threat.

19.12 The Commission appreciates the Archives' concern, but it considers that there are already options for the NAA to pursue if such situations arise.These include common law rights of occupiers, the *Public Order (Protection of Persons and Property) Act 1971* (Cth) and the *Crimes Act 1901* (Cth), and the NAA's powers to protect and preserve Commonwealth records.

19.13 Under common law, the NAA would be entitled to impose conditions on entry to and use of its premises. Australian Archives has issued Reading Room Rules, copies of which are given to all persons who enter a public reading room. A failure to comply with these rules permits Australian Archives to request a person to leave the premises or to refuse access to the premises.

19.14 If a request to leave the Archives' premises is refused, the person concerned may be liable for trespass. However, the most practical solution would generally be to remove the person from the premises, although an occupier (or a security guard hired by the occupier) is only permitted to use reasonable force to achieve this. The use of unreasonable force leaves the occupier subject to legal action for assault or for negligence if the person is injured while being removed from the premises. Police may be called in to assist in the removal.

19.15 The existing premises of Australian Archives, and the premises of the new NAA, would come within the provisions of section 12 of the *Public Order (Protection of Persons and Property) Act 1971*. Any person who trespasses, disrupts, or acts in an offensive or disorderly manner, commits a federal offence under the Act. If the common law right to ask a person to leave the premises is exercised by a police officer, [dxxxix] a member of the Australian Protective Service or an authorised Commonwealth officer, it is an offence for the person to remain on the premises without reasonable excuse.[dxl] These offences attract fines up to $1100 for trespass and $2200 for offences under section 12(2).

19.16 The fact that an offence had been committed under the *Public Order (Protection of Persons and Property) Act 1971* would not automatically give the archival authority the power to remove the person from the premises. Common law rights of removal would need to be relied upon. However, under the Act the police and members of the Australian Protective Service [dxli] have powers of arrest in situations where summons would not be effective or in order to prevent further offences under the Act.[dxlii] However, police must give the person the opportunity to present reasonable grounds in justification of their remaining on the premises.[dxliii]

19.17 In addition to the *Public Order (Protection of Persons and Property) Act 1971*, the *Crimes Act 1914* provides a number of other offences which may protect Commonwealth property and Commonwealth officers. It is an offence to obstruct, hinder, use violence against, threaten or intimidate a Commonwealth officer carrying out duties or exercising lawful powers.[dxliv] It is also an offence to wilfully and unlawfully destroy or damage any Commonwealth property.[dxlv] Powers of arrest,

either by a private citizen or by the police, must be carried out in accordance with the *Crimes Act 1914*.

19.18 Where the records themselves are endangered, the NAA may be able to refuse access to records and public reading rooms under its specific powers relating to the protection and preservation of records. The Commission has recommended the retention of these powers.[dxlvi] Any decision made using these powers would be subject to the general review provisions for decisions to refuse access.

19.19 All of these options could be used to remove persons from reading rooms or to restrict access to records. They have been developed either at common law or by the legislature to balance the rights of the occupier and the potential disturber. It is not appropriate to give the NAA any additional powers to remove persons from its premises.

Access to information about records

19.20 The Commission has recommended in Chapter 16 that the NAA should have a statutory obligation to collect and make accessible information about records of archival value and that other Commonwealth agencies should have an obligation to provide such information to the NAA. These recommendations are essential to the achievement of an effective public access regime. Australian Archives has developed many finding aids for Commonwealth records. These range from simple guides and fact sheets to computer databases which contain comprehensive information about the history of Commonwealth agencies and the records which they have created. Nearly all these finding aids are available to the public in Australian Archives' reading rooms and the Archives is close to completing a project to provide electronic access to its principal databases via the Internet.[dxlvii]

19.21 The present Act requires Australian Archives to maintain three specific finding aids.

19.22 **The Australian National Register of Records.** The Archives is required under section 65 to maintain the Australian National Register of Records, which must contain such details of the material of the Archives[dxlviii] as the Director-General considers appropriate. The Register may also include details of current Commonwealth records, material in State government and other archives, and other archival resources relating to Australia.[dxlix] Australian Archives has developed two

computer databases as its basic repository of information about Commonwealth records. The RINSE database includes information about nearly all Commonwealth agencies and those record series which they have created which include records of archival value. The ANGAM database includes information about almost two million individual record items, most of which are in the Archives' custody. These two databases meet the Archives' section 65 obligation. For both technical and resource reasons the Archives has not, in general, exercised its option under section 65 to include information about records held in other archival institutions.

19.23 **The Australian National Guide to Archival Material.** Under section 66 the Archives is required to maintain the Australian National Guide to Archival Material. This Guide is required to contain particulars of all Commonwealth records in the open access period which have undergone access examination unless they are subject to a ministerial conclusive certificate under section 34. The Archives has met its section 66 obligation through the establishment of the ANGAM database, which includes details of all individual record items about which public access decisions have been made.

19.24 **Australian National Register of Research Involving Archives.** The Archives is required under section 67 to maintain the Australian National Register of Research Involving Archives. The Archives is required to endeavour to list all research that is being done involving the use of archival material. The Archives may seek the cooperation of persons and organisations interested in research but it cannot compel them to contribute information. The Archives has not formally established the Register as required by section 67. However, it does maintain a list of all published works known to include material derived from records in its custody and it encourages those who undertake research to make others aware of their fields of interest.

19.25 While many submissions in response to IP 19 noted the importance of adequate finding aids, only three supported the existing requirements for specific finding aids.[dl] Most preferred the inclusion of a more flexible, general obligation to provide information about records.[dli] Some submissions emphasised that finding aids should provide adequate information about electronic records as well as paper based records.[dlii]

19.26 The Commission suggested in DRP 4 that the existing obligations to establish the prescribed finding aids should be replaced with a more general obligation to create adequate finding aids in appropriate formats, thus leaving it to the NAA to

determine from time to time how best to discharge its obligations. This flexibility would permit appropriate finding aids to be created upon demand and in the most appropriate formats as new technologies become available. Australian Archives agreed with this proposal.[dliii]

19.27 One submission strongly opposed the Commission's proposal to remove the specific requirements from the archives legislation. Chris Hurley argued that the National Register of Records and ANGAM were not merely 'finding aids', but an essential part of the access regime.

> It is a mechanism which supports the statutory right of access by ensuring that the existence of records in the Archives' custody is knowable and (once access decisions to open or close are made) that this knowledge is made public. To replace this mechanism with a mere exhortation to produce 'finding aids' represents a serious attack on the access right itself.[dliv]

The Commission maintains its view that a legislative obligation on the NAA to collect and disseminate information about the function, location and accessibility of records of archival value,[dlv] combined with a general obligation to establish appropriate finding aids, would be sufficient to ensure that relevant information was made available to the public and support the right of access.

19.28 The term 'finding aid' has particular connotations in archival practice. With the removal from the legislation of requirements to maintain specific finding aids, the Commission considers that a definition of 'finding aid' should be added to the new archives legislation. This definition should include a broad outline of 'finding aid', including its primary purpose of assisting the identification of relevant records. The definition should give guidance on the general objectives of finding aids, leaving the NAA with flexibility to develop finding aids that are the most appropriate at any point in time.

Recommendation 149. The current statutory obligations to establish the Australian National Register of Records, the Australian National Guide to Archival Material, and the Australian National Register of Research Involving Archives, should be replaced with a general statutory obligation on the NAA to create adequate finding aids in appropriate formats and to promote their availability.

Recommendation 150. The legislation should include a broad definition of 'finding aid'.

Personal assistance

19.29 Given the often complicated nature of archival systems, it is important that experienced and knowledgeable staff should be available to assist public users to identify and locate relevant records. Technology has not yet created a situation where all people can access the information they require from their homes, although such services are rapidly improving. A number of submissions praised the work of Australian Archives' reference staff,[dlvi] noting that their personal assistance goes beyond the services available electronically in areas such as explaining how to access databases, providing an understanding of the complicated archival systems of organisation, and guiding users to the most appropriate records. This form of assistance should not be confined to public users able to visit Canberra or a major east coast city.[dlvii]

19.30 In DRP 4 the Commission proposed that, as a minimum requirement, the NAA should be required to locate information staff in every capital city. These staff would provide the general and specialised knowledge necessary to assist public users in each region as well as providing contacts with other archives offices where appropriate.

19.31 As noted in Australian Archives' response to DRP 4,[dlviii] maintaining an information office in each capital city would require resources to accommodate staff and materials, and to maintain communication between the offices. However, resource problems should not be permitted to erode existing levels of access to information and records.

> No aspect of the practice or organisation of the national archives including staffing, resourcing and physical access practices should impinge on presumed right of access principles.[dlix]

In order to minimise costs, the Commission suggests consideration of a range of options for the provision of information services. In this regard, the Commission has been impressed by a cooperative venture between the Public Record Office of Victoria and Australian Archives in establishing a joint facility for the public in Melbourne. More cooperative ventures such as this, involving the sharing of resources, experience and information with other government archival institutions, are to be encouraged.

19.32 The Commission does not recommend that a requirement to maintain an information office in each capital city should be incorporated into the legislation. It does, however, consider that this is an important aspect of the functions of the NAA and that resources should be allocated accordingly to maintain this situation.

> **Recommendation 151.** As an administrative measure, an information office of the NAA should be maintained in each capital city with knowledgable staff to assist with the identification of appropriate records.

Improving access to the records

19.33 The geographical spread of Commonwealth records around the country can make it difficult for the public to access records. The Commission has proposed that further attention be given to the development of new technologies for accessing records.

> There is generally an accepted view that the wealth of information available in government agencies is under-used by Australians. Several reasons could explain this: the cost of accessing information (particularly for Australians living in rural areas); the difficulty faced by agencies in making the existence of information widely known; a reluctance to embrace 'open government' on the part of agencies, and also perhaps an assumption that information held in structured forms (eg in a database) would not be able to be readily used or would not be of value outside the agency.[dlx]

19.34 The networking of electronic records will improve the accessibility of records, but many will continue to be available only in paper format. For preservation reasons original paper records are not normally moved between the various offices of Australian Archives.[dlxi] Those who cannot conveniently access the records in person may purchase photocopies, but this requires the purchaser to identify clearly the specific records required. Australian Archives has also microfilmed some of the most heavily used record series so that copies can be made available in all of its offices and in other institutions.

19.35 Beyond these basic methods, new technology is being developed to improve the accessibility of records, in particular in the area of electronic digitisation. The Internet also promises to become a useful tool for reaching a wider audience.

> The Committee believes that the Internet provides the infrastructure needed to overcome many of the barriers to accessing information. Internet software is also advancing to the point where relatively unskilled people can access information held in a structured form.[dlxii]

19.36 The Commission strongly encourages the application of resources to projects of these kinds. Efforts should be concentrated on selecting popularly used records so as to make the most efficient possible use of resources. The provision of effective access to records is a core function of an archival authority and improvements to that service should always be sought.

> The NAA should have the best modern equipment by way of computers, etc, for indexing its material that would allow ready access to records required by the public ... If that is not the case, then the fault should be rectified so that records sought by the public can be quickly supplied at a reasonable cost.[dlxiii]

The Historical Society of the Northern Territory also supported improvement of services through technology.[dlxiv]

19.37 In addition to improving access to information about records through the provision of finding aids and staff, the Archives needs to continue its efforts to raise its public profile. Australian Archives has attempted to improve awareness of the records and services available with its public programs activities, which promote the image of the Archives through exhibitions, publications, marketing, and working with schools.[dlxv] One submission suggested that the authority should target its core client groups more effectively in order to promote archival records.

> This could involve closer constructive client relationships, for example, with Universities in order to acquaint faculties and students with archives holdings, and to better service their research needs. This, in turn, should increase the amount of archives material exposed in publications and create a broader awareness in both specialised and the general communities of the Archives' facilities available.[dlxvi]

19.38 Some significant developments have already occurred. In February 1998 the Australian Archives changed its name to the National Archives of Australia.[dlxvii] In April 1998 the National Archives of Australia moved into permanent premises in East Block in the Parliamentary Triangle in Canberra, incorporating office space for staff, a large public exhibition space and a public reading room. The location and prominence of this building will assist to promote the National Archives of Australia to the public. This kind of awareness raising needs to continue in order to better facilitate public access to archival records.

Recommendation 152. The NAA should expand the availability of records, particularly through new technologies, and through public promotion of the availability of the records.

Developing an electronic information locator system

19.39 The development of the Internet has provided a powerful new medium for making government information available to the public. The initial stage of the Commonwealth's involvement with the Internet has been characterised by the independent development of many individual agency sites displaying information specifically created for public use. In some cases, this information includes copies of records. However, there is clearly a need for a more integrated approach in order to realise the full potential of the technology and to make information in the system more readily retrievable. Under the auspices of OGIT, the Information Management Steering Committee (IMSC) has developed a strategy for a whole-of-government approach to the management of access to government information. The IMSC has released a report on information management,[dlxviii] which includes recommendations for the establishment of a single entry point to government information and the development of an Australian Government Information Locator System (AusGILS).

19.40 A single entry point to government information would provide the public with simple access to a wide range of information. The single entry point service provided by the National Library of Australia is a prototype for this development.[dlxix] However, this is merely the precursor of a much larger system which should enable the public, from a single point of entry, to locate relevant government information in a matter of moments.

19.41 The concept of an Australian Government Information Locator System (AusGILS) is based upon a similar system which has been adopted in the United States (GILS).[dlxx] AusGILS is an essential step towards a unified access service to all government information. It has received support from a number of Commonwealth agencies.

> As part of meeting its corporate objectives, it is essential for Departments to be able to provide the public of Australia with information. The development of an Australian Information Locator System (AusGILS) is seen as essential in assisting to meet these objectives. The introduction of the system

> would highlight the need for agencies to implement standardised reference techniques to facilitate ready access to records.[dlxxi]

19.42 In the future, accessing government information will entail not merely locating the home pages of relevant Commonwealth agencies, but also searching a wide range of individual records. This will require a locator system which contains information (generally described as metadata) about the structure of individual information and recordkeeping systems. Well structured metadata should permit a search of the entire body of publicly available government information, regardless of its location. To do this the metadata must be in a standardised format. The IMSC has recommended that the primary role in developing and implementing standardised metadata formats should be undertaken by Australian Archives. This would be consistent with the Commission's recommendations for the role of the NAA in establishing recordkeeping standards.

19.43 One of the tools for developing standardised metadata will be a thesaurus containing keywords for describing and identifying records. The Records Management Office of NSW has developed the AAA Keyword Thesaurus for use by NSW Government agencies. Australian Archives has bought the rights to use the AAA Keyword Thesaurus and has begun to develop a Commonwealth Thesaurus catering specifically to the needs of Commonwealth agencies.

19.44 The NAA will have a vital interest in the development of AusGILS. Australian Archives has already compiled and stored electronically large amounts of information about Commonwealth agencies and the records which they have created. This information has been gathered primarily to identify and control older records which are in archival custody or likely to be so soon. However, one of the objectives underlying the Commission's review of the Act has been to reduce the barriers between 'current' and 'archival' records in order to encourage a more proactive approach to the public release of Commonwealth records. Even though many of the older records will probably always remain in paper or non-standard electronic formats, it is important that information about their existence, function and location should be accessible through a single electronic network. The IMSC has taken various formats of records into consideration when devising a structure for AusGILS.

> The strategy acknowledges that public users will want access to government information regardless of the way it may be created and stored; and that mechanisms which agencies currently use to provide access to government information will continue to operate and be developed in line with quality service considerations, emerging technologies and standards.

> For significant holdings of government information which are not currently visible outside agencies, the strategy assumes that the visibility of this information will be increased by preparing descriptions available through the Internet. This would be a minimum level of access needed to allow the public to get a perception of the operations of government and the information created and held and to allow them to apply for access to information, including that permissible under the FOI and Archives Acts.[dlxxii]

19.45 An additional reason for the NAA taking an active part in the development of AusGILS is that the creation of standardised metadata formats will facilitate the networking of electronic recordkeeping systems which include records of archival value. In an environment where it is expected that the majority of electronic records, including those of archival value, will be maintained by individual agencies in a distributed custody regime, a standardised system would assist to ensure that the public have continued access to those records, regardless of their location.

19.46 AusGILS is not a concept designed to manage archival records; thus the development of AusGILS should not be focused on the NAA.[dlxxiii] However, to focus merely on current information would reduce the effectiveness of a tool which could facilitate access to all government records. The Commission supports the concept of AusGILS, but it is necessary to ensure that AusGILS adopts a 'whole of government' approach to information, including information contained in archival records. The participation of the NAA in the development of AusGILS is, therefore, essential.[dlxxiv] In DRP 4 the Commission suggested that all Commonwealth agencies should support AusGILS and that the NAA should participate actively in the development process. It did not suggest that any requirements of participation be included in legislation.

19.47 A number of submissions suggested that the importance of AusGILS was such as to require legislative provisions ensuring the participation of the NAA and other agencies in the development of the metadata standards and the fulfilment of the AusGILS objectives.[dlxxv] The Commission sees the development of AusGILS as an administrative initiative and does not recommend that legislative requirements be established for participation in its implementation. It does note, however, that the proposed power of the NAA to establish standards for the creation and management of records would assist with the implementation of the AusGILS project across the whole of government.

> **Recommendation 153.** Commonwealth agencies should support the further development of an electronic information locator system for

Commonwealth government information and records. The NAA should participate actively in this process.

Using archival records with Crown copyright

19.48 Users of Australian Archives often wish to reproduce records, sometimes for private purposes and sometimes for commercial purposes such as the production of books, posters, or films. The *Copyright Act 1968* (Cth) permits copying for purposes of research or study, covering most situations where a public user wants copies for their own private use.[dlxxvi] However, problems may arise when a member of the public wishes to use records for commercial purposes.

19.49 Copyright in most records created by, or on behalf of, the Commonwealth, is Crown copyright.[dlxxvii] For administrative convenience, the Australian Government Publishing Service (AGPS) administers copyright on behalf of the Commonwealth. When a member of the public wishes to make use of a record in a way which would otherwise infringe Crown copyright, they are required to approach the AGPS for permission. However, in the case of video and audio format records the agency which created the record must be contacted directly. This is due to the greater commercial value of material in video and audio formats, which may be regarded as a valuable asset by some agencies. As AGPS functions focus on published records, the originating agency must also be approached directly where the record has not been published.

19.50 In the case of records with Crown copyright, the copyright exists for 50years after the first publication. Only a very small proportion of Commonwealth records has ever been published, so that most Commonwealth records in the open period are still subject to an indefinite period of copyright protection.[dlxxviii] This means that a public user would need to identify and contact the creating agency or its successor to seek permission to use an unpublished record. It is then the responsibility of the agency to consider all relevant issues, including the value of the intellectual property in the record, concepts of public access, confidentiality, defamation, and whether or not the permission would affect the Commonwealth's capacity to earn revenue from selling copies of the record.[dlxxix]

19.51 The Commission sees no need to alter the current administrative arrangements in relation to Crown copyright in published Commonwealth records or records in

video or audio format. In these cases public users should be required to contact the AGPS or the creating agency respectively. However, there appears to be a need to simplify administrative arrangements for approving the use of unpublished Commonwealth records.

19.52 In the case of current records, knowledge of the records is likely to be concentrated in the creating agency. Thus the creating agency should continue to have copyright responsibility, administered with the assistance of AGPS. In the case of unpublished records in the open period, the Commission considers that centralised administration of Crown copyright by the NAA would be the preferable administrative arrangement. Awareness and knowledge of archival records differ greatly between Commonwealth agencies. Thus a centralised body would provide the public with a more focused and simplified procedure for obtaining permission to use unpublished open period records for commercial purposes where Crown copyright is involved.

19.53 The Commission proposed in DRP 4 that the NAA be given appropriate responsibility for the regulation of Crown copyright in unpublished records in the open period. The ABC noted that agencies such as itself would not be affected by the recommendation because of their separate identity and thus their ownership of intellectual property rights separate from the Commonwealth.[dlxxx] Other agencies which responded to DRP 4 on this issue supported an administrative arrangement to be controlled by the NAA,[dlxxxi] except for Australian Archives which preferred that the agency with physical custody of records of any age should have control over unpublished Crown copyright. In the Commission's view, however, a situation such as this would only give rise to greater confusion about who was responsible for copyright, particularly in an environment of distributed custody. If any change were to be made to the existing arrangements for unpublished Crown copyright, the Commission suggests that a simple arrangement should be made, to be applicable at a particular age of the records and focused on a particular agency.

19.54 It would remain important for the NAA to consult with other Commonwealth agencies about the approach to their control of the use of Crown copyright. A relationship with the AGPS should be established in order to administer Crown copyright in a uniform manner, regardless of the age of the records. Communication with agencies about their perceived value of the records should also be undertaken. The Commission recommends, however, that the NAA should be the body from which to seek permission to use the relevant records, and the body which makes the decision about any such application.

Recommendation 154. An administrative arrangement should be established to enable the NAA to have the primary responsibility for administering Crown copyright in unpublished Commonwealth records which are in the open period.

ENDNOTES

Part F

Sensitive records — access and review

20. Exemption issues

Introduction

20.1 An archival access regime should aim to provide the most complete disclosure of records possible in the open period. This aim is reflected in the Commission's recommendations relating to the objectives of the new archival legislation and the principal elements on which the legislation should be based.[dlxxxii] That said, it must also be recognised that certain information is of such a sensitive nature that it should remain protected from public disclosure, even after it has attained 30 years of age. The challenge is to strike an appropriate balance between maximising access and ensuring the necessary protection of sensitive information.

20.2 The Commission is of the opinion that the existing exemption provisions in the Archives Act do not strike that balance. This chapter considers the provisions that would be required to achieve it.

The objective of exemption provisions in archives legislation

20.3 Section 33 of the Archives Act specifies a series of exemption categories, which define the types of information which may be considered to be sensitive and warrant protection beyond 30 years. If a record or part of a record falls within one of these categories a decision may be made to exempt it from public access.

20.4 The current section 33 has clearly been derived from the exemption categories set out in the FOI Act. During its drafting in the 1970s, the Archives Bill became linked to the development of freedom of information legislation. The result was one of the most comprehensive and detailed access regimes for archival records ever incorporated into legislation. The access provisions of the Archives Act are essentially a replication of those introduced under the FOI Act, with certain variations intended to take account of the age of the records. A number of submissions noted the relationship between the archives exemptions and the FOI

Act, and criticised the number of categories currently contained in the Archives Act.[dlxxxiii]

20.5 The Commission does not consider it appropriate to continue to base access in the open period on the same precepts as access under the FOI Act. For an open access period to be effective it needs to be reflected more strongly in the exemption provisions.

20.6 The key difference between records in the closed and open periods is their age. Exemption categories under the FOI Act were designed to protect sensitive information within current records. However, sensitivity of information is temporal in nature. In some cases information ceases to be sensitive within a day of its documentation. In other cases sensitivity will diminish over a period of decades. The Commission has recommended the retention of a 30 year rule to reflect the time at which most records will have ceased to be sensitive. While many may consider this to be an arbitrary date, it does establish a clear line after which a stronger exposition of open access can be mounted. At that point the Commission believes that there is a strong public interest in the disclosure of all Commonwealth records. Accordingly, the objective of the exemption provisions should be to protect from disclosure such information, and such information only, as is of clearly demonstrable continuing sensitivity.

The Commission's proposals in DRP 4

20.7 In order to better achieve this objective, the Commission in DRP 4 proposed four changes to the exemption regime.

20.8 The first was to preface the exemption provisions with a strong affirmation of the presumption of public access to records in the open period, and of the need to construe the exemption provisions accordingly. The onus should thus be on the decision maker to demonstrate conclusively, and to so articulate in the decision, that the record falls within the scope of the relevant exemption, if a decision to withhold access is made.

20.9 The second proposed change was that a new, and additional, public interest test be included in all exemption categories so that, in every case, the adverse consequence of the disclosure specified in the test would need to outweigh the public interest in disclosure.

20.10 Thirdly, the Commission proposed that, in respect of every category of exemption, it be necessary to demonstrate actual as opposed to apprehended harm. This would have affected those categories in which it is currently necessary to demonstrate that disclosure 'would, or could reasonably be expected to' cause the specified harm, detriment or adverse effect.

20.11 Finally, the Commission proposed that some categories be amalgamated and some others be deleted. This would have involved the amalgamation into one category of the two categories of exemption relating to information given in confidence (section 33(1)(b) and section 33(1)(d)), the amalgamation into one category of the four law enforcement related categories in sections 33(1)(e)(i), (f)(i), (f)(ii) and (f)(iii), the amalgamation into one category of the business related exemptions in sections 33(1)(h) and (j), and the deletion of the exemptions relating to legal professional privilege (section 33(2)) and personal and business affairs relating to taxation laws (section 33(3)).

20.12 This package of proposals drew a number of comments and criticisms. These focused in the main on the second and third proposals, that is, those relating to a public interest test for all exemptions and the universal application of an actual harm test. Both of these proposals drew strong objections.

20.13 Most objections to the proposed public interest test focused on what was considered to be the inappropriateness of such a test to particular types of information, in particular information concerning national security and foreign relations (which were regarded by some as inherently involving a high public interest judgment already),[dlxxxiv] and personal information.[dlxxxv]

20.14 Other submissions expressed reservations about the practical application of the proposed test,[dlxxxvi] with one submission pointing to the need for more specific guidance on what would constitute the public interest.[dlxxxvii] Another observed that there are different forms of public interest test with different effects and that the meaning of the test proposed by the Commission was unclear.[dlxxxviii]

20.15 Objections to the actual harm test centred particularly on the difficulties that would be occasioned in satisfying the test and the undesirable consequences of failure to satisfy that high threshold in certain cases.

20.16 One submission expressed concern that the test might only be able to be satisfied in some cases by actually releasing the record, thus causing the foreshadowed harm or detriment to transpire.[dlxxxix] Agencies whose functions relate to security and foreign relations were particularly concerned that the test would impose a burden of proof that would be so high as to be unacceptable, if appropriate levels of protection were to continue to be afforded.[dxc]

20.17 Similar difficulties regarding the ability to discharge the necessary onus of proof were also expressed in relation to personal information.[dxci] Other submitters also argued that the test would, in certain cases, be too stringent.[dxcii]

A new approach to exemption provisions in the archives legislation

20.18 In the light of these submissions, the Commission has reconsidered its approach to the structure that the exemption regime should assume in order to ensure that the essential focus on the public interest in the fullest possible access to records in the open access period is established and maintained. It believes that this objective can be achieved, and the major objections to the earlier proposed regime overcome, by a scheme having the following elements.

20.19 First, the Commission believes that the earlier proposed preface should be replaced by two key legislative directions to be observed by decision makers, reviewers and reviewing tribunals alike.

20.20 One direction would be to the effect that persons making decisions relating to claims for exemptions must, in determining whether grounds for exemption exist, take due and proper account of the legislative objective that records in the open period are made available unless there are compelling grounds for justifying their non-disclosure.[dxciii]

20.21 The other legislative direction would be that exemption decisions must be based, to the fullest extent practicable, on contemporary evidence and information relating to the actual or (in applicable cases) apprehended effect of release of the relevant information and the reasons for the decision must expressly identify the contemporary evidence and information that was taken into account.

20.22 The effect of these legislative directions would be to ensure that the fundamental objective of public access is focused upon by all decision makers at all

times and that decisions are based not merely on historical evidence and past understandings of sensitivities but on contemporary evidence and understandings.

20.23 The second limb of the Commission's revised regime is a proposal, in substitution for its earlier proposal for a universal actual harm test, for a legislative requirement that the actual or (in applicable cases) apprehended damage, prejudice or adverse effect relied on for a claim of exemption, be real and substantial, as opposed to ephemeral or nominal. The Commission sees this as a desirable and reinforcing complement to the proposed broad legislative injunctions described in the first limb of the proposal.

20.24 Additionally, and again for the purpose of reinforcing the proposed legislative directions, the Commission proposes that the legislation expressly provide that exemptions relating to information given in confidence only be available where such inquiries as are reasonable in the circumstances have been made to locate the person to whom the obligation of confidence is understood to be owed and to determine whether that person wishes to maintain the benefit of that obligation. This requirement is further dealt with in discussion of the relevant categories below.[dxciv]

Recommendation 155. The legislation should include the following legislative directions in relation to the consideration of exemption claims

- decision makers are to take due and proper account of the legislative objective that records in the open period are made available unless there are compelling grounds for justifying their non-disclosure
- decisions to claim exemption must be based on contemporary evidence and information, and that evidence and information is to be expressly identified in reasons for decisions.

Additionally, the legislation should specify that the damage, prejudice or adverse effect relied on for a claim of exemption must be real and substantial.

Exemption categories

20.25 For the reasons discussed in DRP 4, including, as mentioned earlier, the proposed amalgamation of some exemption categories and the elimination of others,

the Commission recommended the reduction of the existing 15 exemption categories to eight and the inclusion of a new category of exemption relating to information considered to be secret or sacred under the customary law of Aboriginal or Torres Strait Islander people. As elaborated below in relation to individual categories, the Commission adheres, with one exception, to its earlier conclusion that a significant reduction in the number of categories is warranted. The exception relates to the Commission's acceptance, based on submissions in response to DRP 4, that the proposed amalgamation of the information given in confidence categories (currently in sections 33(1)(b) and (d)) is not justified.

20.26 Accordingly, the Commission now proposes that the 15 existing categories be reduced to nine and maintains its view that an additional category relating to information whose disclosure is restricted under the customary law of Aboriginal or Torres Strait Islanders should be included. Subject to the application of the above discussed legislative directions, the Commission's revised proposals relating to the definition of specific exemption categories are as follows.

Security, defence and international relations

20.27 The current exemption category in section 33(1)(a) is —

> (a) information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth;

Support for the retention of this category was stronger than for any other category. Not surprisingly, this support was most compellingly presented by the security and intelligence agencies and the Department of Foreign Affairs and Trade.[dxcv]

20.28 For the reasons discussed earlier in this chapter, the Commission now considers that the test should not be restricted to cases of actual damage as proposed in DRP 4.

20.29 The Commission agrees that this ground of exemption should remain.[dxcvi]

> **Recommendation 156.** The legislation should continue to include an exemption category relating to information the disclosure of which would, or

could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth.

Information given in confidence

20.30 There are currently two exemption categories relating to information given in confidence. These are sections 33(1)(b) and (d) —

> (b) information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth, being information or matter the disclosure of which under this Act would constitute a breach of that confidence;
>
> (d) information or matter the disclosure of which under this Act would constitute a breach of confidence;

Because the harm test of both exemptions is identical, the Commission suggested in DRP 4 that they be amalgamated. However, as pointed out by the Attorney-General's Department,[dxcvii] the effect of such an amalgamation would be that the application of the ministerial certificate provisions to the former category, as favoured by the Commission, would need to extend also to records covered by section 33(1)(d). On further consideration, the Commission agrees that this would be undesirable and accordingly now favours the continued separation of the categories dealt with in paragraphs 33(1)(b) and (d) respectively.[dxcviii]

20.31 The Commission has noted situations in which it has been found difficult to uphold an exemption claim under section 33(1)(b) alone, due to the evidence required to prove a continuing relationship of confidence.[dxcix] However, in many cases, material in respect of which a section 33(1)(b) exemption was claimed was also the subject of an exemption claim under section 33(1)(a).[dc] For these reasons Australian Archives suggested that section 33(1)(b) be deleted. The Commission has concluded, notwithstanding, that, on balance, the section 33(1)(b) exemption should remain. In this regard it is persuaded by the force of the contention by the Department of Foreign Affairs and Trade that the omission of this provision might cause undue concern and misunderstanding amongst foreign governments and agencies.

> It has been suggested that s 33(1)(b) could be omitted altogether and exemption for foreign-sourced information be claimed exclusively under the international relations provisions of s 33(1)(a). We would argue strenuously against such a proposal, on the grounds that omission of any specific protection for foreign government information in the legislation would undoubtedly cause concern in those countries whose governments share information with Australia ... To omit any mention of foreign-originated information among the categories of exemption, could ... excite comment among friendly governments.[dci]

20.32 In DRP 4 the Commission proposed that there be added to the proposed amalgamated breach of confidence provision a statement that the category should not apply in situations where, notwithstanding that the Commonwealth was in a continuing relationship of confidentiality, the information had become public knowledge through another source. Evidence had been given to the Commission suggesting that claims had been made under section 33(1)(b) in situations where the withheld information had in fact been made publicly available overseas. However, as pointed out to the Commission in submissions, there are many circumstances in which information might become 'public knowledge'.[dcii] The information might have been leaked, or made public through unreliable processes, so that its official release by the Commonwealth could, nevertheless, result in a breach of confidence.

20.33 Accordingly, the Commission has decided not to persist with the proposed qualification relating to confidential information that has become public knowledge. It considers that the concern that led to this suggestion would adequately be addressed by the proposal, already outlined above, that information in confidence exemptions be available only where such enquiries as are reasonable in the circumstances have been made to determine whether the person to whom the obligation is understood to be owed wishes to maintain the benefit of that obligation. In the Commission's view, the need to make such enquiries would enable the effect of any prior unauthorised or unlawful release of the information into the public domain to be canvassed fully with the party to whom the duty of confidence is owed and a satisfactory resolution to be reached regarding whether confidentiality ought to be maintained.

20.34 As regards section 33(1)(d), while few examples were provided in submissions of material which would qualify for exemption under that test, there was strong support for its retention. Only two submissions called for its removal, one of them on the grounds that the interests of a third party supplying information to government should not enjoy greater protection then the interests of the record subject.[dciii]

20.35 The Commission is satisfied that this category should be retained, subject, as in the case of section 33(1)(b), to the additional qualification that such enquiries as are reasonable in the circumstances have been made to establish the desire of the person concerned to maintain the obligation of confidence.

20.36 The Commission regards this formulation as sufficiently flexible to admit of the circumstance in which reasonable enquiries may not be able to identify the person to whom the obligation of confidence is understood to be owed. In other words, the undertaking of 'such enquiries as are reasonable in the circumstances' would not necessitate that the enquiries in fact reveal that person before the exemption claim could be established.

Recommendation 157. The legislation should continue to include exemption categories relating to

- information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth, being information or matter the disclosure of which under this Act would constitute a breach of that confidence;
- information or matter the disclosure of which under this Act would constitute a breach of confidence;

provided, in each case, that such enquiries as are reasonable in the circumstances have been made to locate the person to whom the obligation of confidence is understood to be owed and to determine whether that person wishes to maintain the benefit of that obligation.

Commonwealth financial and property interests

20.37 The current exemption category relating to Commonwealth financial and property interests is section 33(1)(c), which reads as follows —

> (c) information or matter the disclosure of which under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution and would not, on balance, be in the public interest;

20.38 The Commission notes that the Senate Standing Committee 1979 Report could not suggest any use for an exemption category protecting the financial and property interests of the Commonwealth beyond 30 years and recommended that it be deleted from the Archives Bill.[dciv] The category was, however, included in the Act as section 33(1)(c), but it was a strictly limited category, requiring actual substantial adverse harm to be proven, and subject to a public interest test.

20.39 Australian Archives identified in consultations a need to apply section33(1)(c) to certain types of material, for example, plans showing positions of existing vaults in banks or post offices. Two submissions, however, questioned whether the category might be able to be used to withhold material which would otherwise be available for use in litigation against the Commonwealth.[dcv] Litigation relating to native title and compensation to Indigenous people were cited as examples.

20.40 The original drafts of the FOI Act and the Archives Act contained a provision exempting information 'reasonably likely to have a substantial adverse effect on the interests of the Commonwealth or a Commonwealth institution in or in relation to pending or likely legal proceedings'.[dcvi] The Senate Standing Committee rejected both of these clauses because they would have created protection under legislation which was not provided at common law.

> The fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side is no such 'plain overruling principle of public interest' as to justify any claim of privilege... In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production — one only to be overborne by the gravest considerations of State policy or security.[dcvii]

While the Commission appreciates the basis of the doubts expressed in 1979 by the Senate Standing Committee, it is, on balance, persuaded that the section 33(1)(c) exemption might have some limited purpose to serve in circumstances such as those drawn to the Commission's attention by Australian Archives. It should, therefore, be retained with the public interest test currently applicable under section33(1)(c).

20.41 With the retention of a public interest test, the Commission does not share the concern of some submitters that the exemption could be used for the sole purpose of withholding information so as to benefit the Commonwealth position in litigation. The wording of the provision and its context suggest that the provision could not be so used.

Recommendation 158. The legislation should retain an exemption category relating to information the disclosure of which would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution and would not, on balance, be in the public interest.

Enforcement and administration of the law

20.42 There are currently five exemption categories that relate to aspects of enforcement and administration of the law. These are sections 33(1)(e)(i), (e)(ii), (f)(i), (f)(ii) and (f)(iii) —

> (e) information or matter the disclosure of which under this Act would, or could reasonably be expected to —
>
> (i) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
>
> (ii) disclose, or enable a person to ascertain, the existence of identity of a confidential source of information in relation to the enforcement or administration of the law;
>
> ...
>
> (f) information or matter the disclosure of which under this Act would, or could reasonably be expected to —
>
> (i) prejudice the fair trial of a person or the impartial adjudication of a particular case;
>
> (ii) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
>
> (iii) prejudice the maintenance or enforcement of lawful methods for the protection of public safety;

Exemption categories provided in sections 33(1)(e)(i), (f)(i), (f)(ii) and (f)(iii)

20.43 In DRP 4 the Commission proposed a single new exemption category amalgamating the existing sections 33(1)(e)(i), (f)(i), (f)(ii), and (f)(iii), provisions which are also included in the FOI Act. While a number of submissions supported the retention of each of these categories, others questioned the need for them in relation to records more than 30 years of age.[dcviii] Australian Archives suggested the deletion of all of these categories on the basis that any information over 30 years of age that was exempt under these categories would also be protected by another exemption category.[dcix]

20.44 The Commission agrees that the likelihood of resorting to these categories after 30 years is slight, and that other exemption categories might also provide adequate coverage. The central importance to society of the enforcement and administration of the law has, however, led the Commission to conclude that the retention of an exemption expressly recognising and preserving that role is nevertheless justified.

20.45 At the same time the Commission does not consider that there is a need for all four separate categories. Instead it favours the adoption of a simplified approach that amalgamates the four existing categories into one category. While some concern was expressed that a single category might be too broad,[dcx] the Commission is of the view that the amalgamated provision, when applied subject to the proposed new legislative requirements set out in recommendation 155 above, would be appropriately limited.

> **Recommendation 159.** The legislation should include an exemption category, replacing those in sections 33(1)(e)(i), (f)(i), (f)(ii), and (f)(iii), relating to information the disclosure of which would, or could reasonably be expected to, prejudice the enforcement or administration of the law, including the prejudicing of investigations, trials, and lawful methods or procedures.

Confidential source of information — section 33(1)(e)(ii)

20.46 Many submissions supported the retention of a category protecting confidential sources.

> Protection of sources of information is one of the fundamental principles for the agencies of the AIC. Section 33(1)(e)(ii) is applied to protect confidential sources of information. It is a critical provision for the intelligence and security agencies since it enables information which identifies these sources to be exempted under the provisions of the legislation. It is often not the content of the information that is sensitive but rather its source or even the fact that a source exists. Since these sources are often individuals, protection is vital. If such a provision were removed, the inability to protect sources may well eliminate the potential flow of information.[dcxi]

Only one submission in response to IP 19 suggested that the category be removed from the legislation.[dcxii] This was on the ground that section 33(1)(d) could adequately protect the same information. It should be noted, however, that this category does not cover the information given by a source, only the fact of the

existence or identity of the source.[dcxiii] No submission in response to DRP 4 commented adversely on the Commission's proposal to retain a separate confidential source of information category. As recent cases have acknowledged, confidentiality goes to the heart of ASIO's operations.[dcxiv] That is undoubtedly true of a number of other law enforcement and intelligence agencies.

Recommendation 160. The legislation should retain an exemption category relating to information which would, or could reasonably be expected to, disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement and administration of the law.

Endangering life and physical safety

20.47 Section 33(1)(e)(iii) currently defines this exemption category as —

> (e) information or matter the disclosure of which under this Act would, or could reasonably be expected to —
> ...
> (iii) endanger the life or physical safety of any person;

20.48 Although this category has not often been invoked,[dcxv] there was no opposition to the Commission's suggestion in DRP 4 that it be retained.

20.49 For the reasons discussed earlier in this chapter, the Commission now considers that the test should not be restricted to cases of actual endangerment as proposed in DRP 4.

Recommendation 161. The legislation should retain an exemption category relating to information the disclosure of which would, or could reasonably be expected to, endanger the life or physical safety of any person.

Personal information

20.50 Section 33(1)(g) of the present Act defines this exemption category as —

> (g)information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

In DRP 4 the Commission recommended that this category be replaced with the following —

> Information relating to personal affairs the disclosure of which would cause harm to any person.

This articulation stemmed in part from the Commission's proposal for a universal actual harm test. For reasons discussed earlier in this chapter, the Commission has been persuaded that such an approach should not be persisted with.

20.51 The Commission now proposes that the category be recast in the following terms —

> Personal information the disclosure of which would, or could reasonably be expected to, have an adverse effect on any person.

This involves two major divergences from the category as currently provided in section 33(1)(g). The first is to replace the reference to personal affairs with a reference to personal information. The second is to replace the requirement that the disclosure be 'unreasonable' with a requirement that the disclosure 'would, or could reasonably be expected to, have an adverse effect' on any person. These changes are discussed below.

Personal information versus personal affairs

20.52 In response to IP 19, a number of submissions suggested that the reference to personal affairs be replaced by a reference to personal information.[dcxvi] The Commission also took into account a recent Parliamentary report[dcxvii] and the fact that relevant provisions of the Privacy Act and the FOI Act refer to personal information rather than personal affairs. Bearing in mind, however, the fundamental objective of the new legislation to provide the highest possible level of access to all records in the open period, the Commission had some concern that the adoption of the term 'personal information' might widen the scope of the provision. Additionally,

the Commission's sense was that 'personal affairs' was likely to describe more accurately the kind of information that would need protecting.

20.53 Responses to DRP 4 offered a range of views on this issue. Australian Archives supported the retention of 'personal affairs',[dcxviii] while some others supported uniformity with the FOI and Privacy Acts.[dcxix] Additionally, the Attorney-General's Department drew attention to concerns that had been raised about the scope of the expression 'personal affairs', including a case in which it had been described as an 'inherently imprecise concept'.[dcxx] The Attorney-General's Department also suggested that a change to 'personal information' would not dramatically change the workload of decision makers. The Human Rights and Equal Opportunity Commission considered that, given that the proposed guidelines will create a framework for the application of the exemption, it would be unlikely that the scope of the provision would be widened merely by a change to 'personal information'.[dcxxi]

20.54 In the light of these considerations, and taking account of the greater precision that would be likely to follow from the proposed adverse effect test (see below), the Commission is now satisfied that the benefits of uniformity that the adoption of the expression 'personal information' would provide on balance outweigh any perceived disadvantages.

Actual or apprehended adverse effect versus unreasonableness

20.55 Bearing in mind the fundamental imperative of public access to records in the open period, the Commission is concerned that a test of 'unreasonableness' is too wide and uncertain in its application. In particular, it is capable of being invoked to withhold information on grounds that do not go directly to an assessment of any actual or apprehended adverse effect on any person.

20.56 While the Commission no longer proposes a universal actual harm test for all exemption categories, it nevertheless considers that the personal information exemption should have as its focus the need for the decision maker to be satisfied of an actual or apprehended adverse effect on a person. Such a test would be free of the inherent uncertainties of a reasonableness test, as well as having the advantage of allowing an exemption to be claimed not only where an actual adverse effect would follow disclosure but also where such an effect could reasonably be expected to occur.

20.57 The latter effect is seen as particularly important where identification, and any consultation with, the person concerned is impractical; after 30 years or more that is likely to often be the case.

20.58 In reaching these conclusions, the Commission has been mindful of concerns expressed by the Human Rights and Equal Opportunity Commission that provisions such as those proposed in DRP 4 and in this Report, would be contrary to the privacy concept that individuals should be empowered to choose who may have access to their personal information.[dcxxii] The Commission notes, however, that the Privacy Act does not apply to records in the open period and that no suggestion has been made that it should. The full application of the Information Privacy Principles would, in the Commission's view, severely hamper the concept of open access. The need, however, to balance the concept of open access with appropriate privacy considerations is recognised by the Commission. It is a balance that, in its view, would be appropriately struck by adopting the category which it now recommends for the exemption of personal information.

Deceased persons

20.59 In DRP 4 the Commission did not propose that the new exemption category be expressed to extend to information relating to the personal affairs of deceased persons. The Commission's view was that it would be more appropriate to require the demonstration of actual harm to some living person, without in any way limiting the capacity of such a person to claim an exemption based on the harm that would be caused to that person by the disclosure of information relating to a deceased person.

20.60 While the Commission now proposes a different test of actual or apprehended adverse effect on any person, that does not affect the position taken by the Commission in relation to the need to refer to deceased persons. An exemption category cast in the form now proposed by the Commission would enable full account to be given to any actual or apprehended adverse effect that might be caused to any living person by the release of personal information relating to any other person, alive or dead. That said, the Commission would not be concerned if, out of abundant caution, the exemption was phrased in the legislation so as to cover 'personal information, including information relating to a deceased person'.

Recommendation 162. The legislation should include an exemption category relating to personal information the disclosure of which would, or could reasonably be expected to, have an adverse effect on any person.

Business affairs

20.61 There are currently two exemption categories that relate to business affairs in the Archives Act. These are sections 33(1)(h) and (j) —

> (h) information or matter relating to trade secrets, or any other information or matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information or matter were disclosed;
>
> (j) information or matter (other than information or matter referred to in paragraph (h)) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information or matter the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs.

In DRP 4 the Commission proposed that these categories be amalgamated into a single new category.

20.62 The amalgamation of these provisions into a single simpler provision was not opposed, although a number of submissions in response to IP 19 questioned the need for specific protection of trade secrets and other commercial information beyond 30 years.[dcxxiii]

20.63 The proposal that the exemption be based on adverse effect is favoured (particularly over the unreasonable effect test in paragraph (j)) for considerations of greater certainty and relevance, similar to those canvassed in relation to the adverse effect test proposed for the personal information category. Additionally, the awkward overlapping between categories (h) and (j) would be eliminated.

20.64 For the reasons discussed earlier in this chapter, the Commission now considers that the amalgamated test should not be restricted to cases of actual adverse effect as proposed in DRP 4.

Recommendation 163. The legislation should include an exemption category covering information, including trade secrets or other information of commercial value, relating to a person's business or professional affairs, or relating to an organisation's business, commercial or financial affairs, where disclosure of that information would, or could reasonably be expected to, have an adverse effect on that person or organisation.

Information restricted under Indigenous tradition

20.65 The current legislation contains no exemption category relating expressly to Indigenous people and their customary law and traditions. Some Indigenous people suggested to the Commission that the public access policies applied by Australian Archives to records more than 30 years old have led to the release of material which would be restricted from disclosure under the customary law of Indigenous people and their communities. Submissions did not give specific examples of such releases, although Australian Archives staff advised informally that on occasions users of the records had expressed concerns about some material made available for general public access. The Commission notes that discussions are in progress between the Attorney-General's Department and Australian Archives concerning the adequacy of the existing exemptions for the protection of this kind of information.

20.66 In DRP 4 the Commission proposed that a new exemption category should be inserted into the archives legislation to protect secret or sacred information where disclosure would contravene customary law.[dcxxiv] This proposal recognised that this kind of information did not clearly fall under any existing exemption category and that there was a valid basis for its protection.

20.67 Some submissions in response to DRP 4 questioned the appropriateness of conferring what were seen as specific rights of secrecy on a specific group of citizens.[dcxxv] Other submissions supported the recognition of the customary law of Indigenous groups in the archives legislation.[dcxxvi] The Commission had not received any evidence in response to IP 19 of a specific need to give special recognition to, or protection for, information relating to any other particular community.

20.68 A recent report by the Hon Elizabeth Evatt also recognised the need for protection of certain kinds of sensitive information.

> Restrictions on access to certain kinds of information are a central feature of traditional Aboriginal life. This aspect of Aboriginal traditional life has long been an issue for Aboriginal people in their interactions with non-Aboriginal people. Accommodating these restrictions in non-Aboriginal laws and procedures is not new either. It has been acknowledged and provided for in some laws and in practice, for example, in Northern Territory land rights legislation and procedures. Despite this, there continues to be a lack of understanding in the non-Aboriginal community about the importance to Aboriginal people of this element of their culture, particularly where protection of heritage is concerned.[dcxxvii]

That report, arising out of a review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), focused on the protection of information required to establish heritage claims. One of the report's recommendations was that heritage protection legislation should specifically provide that a claim for public interest immunity may be made in respect of such information.[dcxxviii]

20.69 On 2nd April 1998, the Government introduced into Parliament the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998. This Bill, which seeks to replace the existing *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, largely incorporates the recommendations of the Evatt report, including a public interest immunity from disclosure of information pertaining to those traditions where disclosure would be contrary to Indigenous traditions. In addition, the Bill proposes amendments to the Archives Act, including the addition of an exemption provision to the Archives Act (as 33(3A)) which would read

> For the purposes of this Act, a Commonwealth record is an exempt record if it:
> (a) is, or is a copy of, or of a part of, or contains an extract from, a document that is supplied, or created, for the purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1998*; and
> (b) contains information that, under indigenous tradition (within the meaning of the Act), is confidential or subject to particular disclosure restrictions.[dcxxix]

'Indigenous tradition' is defined in the Bill as

> ... the body of traditions, observances, customs and beliefs of indigenous persons generally or of a particular community or group of indigenous persons, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.[dcxxx]

The Bill also provides for the issue of ministerial certificates in respect of records that would fall within the new exemption category. A similar exemption category and power to issue ministerial certificates is included in the Bill for insertion into the FOI Act. The Bill has been sent to the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund for consideration, with the Committee due to report on 1 June 1998.

20.70 The Commission considers that the protection for this kind of information in the new legislation should extend beyond records related to matters dealt with in the Aboriginal and Torres Strait Islander Heritage Protection Bill. While heritage claims have encouraged a particular interest in the protection of such information, there already exists in Commonwealth records other sensitive information, collected for a variety of purposes, with or without the approval of the Indigenous community to which it relates. The disclosure of this information could affect either an individual or a community in ways which are not otherwise anticipated in existing legislation, whether that be the FOI Act, the Privacy Act or the Archives Act. A separate exemption category is, in the Commission's view, required to ensure adequate protection for all information of this kind.

20.71 In DRP 4 the Commission used the terms 'secret or sacred' and 'customary law' in relation to the proposed exemption category. The Aboriginal and Torres Strait Islander Heritage Protection Bill adopts a more precise terminology in referring to the kind of information which should be protected, including a definition of 'Indigenous tradition'. In the interests of consistency in Commonwealth legislation, the Commission proposes that terminology similar to that used in the Bill be incorporated into a more general exemption category for such information under the archives legislation. Thus, the exemption category should refer to information that, under Indigenous tradition, is confidential or subject to particular disclosure restrictions. The term Indigenous tradition should be defined in the same way as in the Bill, either through reference to the Aboriginal and Torres Strait Islander Heritage Protection Act (when passed) or through express incorporation into the new archives legislation.

20.72 Decision makers may experience difficulty in determining what kind of information should be considered to be confidential or to require disclosure restrictions under Indigenous tradition, especially as the nature of such information may differ between various Indigenous communities. Consultation with Indigenous communities would be essential, therefore, to ensure the appropriate use of such an exemption category.

20.73 The Commission recommends that a similar category be developed for insertion into the FOI Act to ensure appropriate and uniform protection for all such information in Commonwealth records, regardless of their age.

Recommendation 164. The legislation should include an exemption category relating to information that, under Indigenous tradition, is confidential or subject to particular disclosure restrictions. The format of this category should be consistent with the language of the exemption proposed in the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998.

Recommendation 165. A similar provision should be inserted in the FOI Act.

Deleting some existing exemption categories

Legal professional privilege

20.74 In their 1979 report, the Senate Standing Committee recommended against the inclusion of a legal professional privilege exemption in the Archives Bill.

> We see no reason to retain even that standard in the Archives Bill. In light of the various statutes of limitations, most actions, generally speaking, have to be brought within six years of the cause of the action arising. It is difficult therefore to conceive of documents which, thirty years from creation, could still be protected by legal professional privilege. Perhaps the only categories would be legal opinions on the interpretation of current statutes that are more than thirty years old, or opinions as to the Commonwealth's legal rights or obligations. In our opinion the public interest in access overrides continued secrecy for longer than thirty years.[dcxxxi]

An exemption covering legal professional privilege was, nevertheless, incorporated into the Archives Act in section 33(2), but is subject to a public interest test. Consistent with the expectations of the Senate Standing Committee's 1979 Report, this category has been used only twice. In both cases the same information was also protected by another exemption category.[dcxxxii]

20.75 In DRP 4 the Commission proposed that the legal professional privilege exemption category be removed from the archives legislation. A number of submissions in response to IP 19 supported the retention of a legal professional privilege exemption category in order to deal with exceptional cases.[dcxxxiii] However, given that records would be a minimum of 30 years of age, and in the absence of any evidence that information attracting the privilege under a public interest test would not also be protected by another exemption category, the Commission was not convinced that the exemption should remain. Moreover, three submissions noted that the exemption category, particularly with a public interest test attached, could be

removed without any substantial adverse consequences.[dcxxxiv] The Commission remains of the view that retention of this category is not justified.

Recommendation 166. Section 33(2), which exempts records covered by legal professional privilege, should not be included in the legislation.

Special information exemptions

20.76 Section 33(3) is a special exemption for information relating to personal or business affairs which should not be disclosed under taxation laws. In effect, the category extends to open period records restrictions on access which are provided in specific tax laws. The Australian Taxation Office is concerned to ensure the continued protection of confidential information beyond 30 years.[dcxxxv] The Australian Bureau of Statistics also stressed the importance of protecting information provided to it in confidence.[dcxxxvi]

20.77 While recognising that these were valid concerns, the Commission was not convinced that extra protection for these records is required in the open period. Most of the records of concern in this provision are routinely destroyed before they reach 30 years of age. For those records which are not destroyed, the Commission considered that any information with continuing sensitivity would be adequately protected by other exemption categories, including the information given in confidence, personal information and business affairs exemptions.[dcxxxvii] Accordingly the Commission proposed in DRP 4 that section 33(3) be removed from the legislation.

20.78 Two submissions, in response to DRP 4, objected to the removal of section33(3) from the archives legislation.

> Any proposed change to the legislation relating to s. 33(3) that will have a consequential effect on restrictions on access to taxation and/or census records, should be brought to the attention of the wider public. Implementation of the recommendation could well be seen by the public as an abrogation of the government's commitment to ensure confidentiality of personal business information beyond the 30-year rule.
>
> The Commission's view that 'sensitive information would be adequately protected by other exemption categories' is unlikely to be shared by the public ...[dcxxxviii]

> If there were to be any doubt about the ATO's ability to ensure confidentiality we would quickly lose the community's confidence. The ATO does not believe the more general 'personal affairs' and 'business affairs' provisions are robust enough to maintain that confidence. These provisions, and the mirror provisions in the Freedom of Information Act 1982, have been shown to be open to wide interpretation and this is consistent with early guidelines published on their operation. There is no guarantee that future tribunals will accept that these provisions protect in the same way the information currently protected by subsection 33(3). A mere perception of a less stringent legislative framework is likely to jeopardise community confidence. All our experience and research leave no doubt that managing perceptions about the tax system continues to be crucial to securing compliance with taxation laws.[dcxxxix]

20.79 Having reviewed the matter, the Commission maintains the view that the archives legislation provides adequate protection for such of these records as may survive to the open period. However, as noted at para 15.65, it remains a matter for Parliament to determine whether non-disclosure provisions in other legislation should apply to open period records. Rather than including a provision such as section 33(3) in the archives legislation, the Commission considers that any perceived need for added protection of information provided to the Australian Taxation Office or the Australian Bureau of Statistics in confidence should be addressed in a review of the relevant non-disclosure provisions in federal legislation, followed, if appropriate, by amendment of that legislation to clearly indicate that the non-disclosure provisions apply to records in the open period.

20.80 As noted above, the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 seeks to add another such exemption category to the Archives Act. This exemption category, which would be section 33(3A), is similar to section33(3) in that it refers specifically to information created or collected for the purpose of another Act. If the Commission's recommendation for the addition of an exemption category relating generally to information that is confidential or subject to disclosure restrictions under Indigenous tradition were adopted, there would seem to be no need for the more particular exemption category proposed by the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998. Alternatively, consistent with the Commission's recommendations relating to non-disclosure provisions in other legislation,[dcxl] any necessary protection beyond 30 years for information created or collected in pursuance of a heritage claim should be explicitly dealt with in that Bill without the need to include a further exemption category in the archives legislation itself.

> **Recommendation 167.** Section 33(3), which provides special protection for personal or business affairs relating to taxation laws, should be removed from the legislation.

Defining a confidential source of information

20.81 The Act currently includes in section 33(1A) a definition provision setting out particular circumstances in which a person providing information should be regarded under section 33(1)(e)(ii) as a confidential source of information. These circumstances include the provision of confidential information to the National Crime Authority or the Australian Federal Police, or participation in the National Witness Protection Program. They are not exhaustive provisions, but they cover important regimes central to the protection of confidential information given to certain agencies.

20.82 In DRP 4 the Commission proposed that the substance of section 33(1A) should be included in regulations rather than the primary legislation. This was in order to provide a more flexible approach, allowing for the addition of new schemes to the provision where appropriate. While Australian Archives supported the proposal,[dcxli] other submissions opposed the removal of the provision from the primary legislation.[dcxlii]

20.83 In particular, it was argued that the special needs of the National Crime Authority, the Australian Federal Police and the Witness Protection Program are such that the special treatment provided in section 33(1A) is merited and, moreover, deserves prominent treatment in the primary legislation.

20.84 Additionally, it was pointed out that very few amendments to section33(1A) are likely to be warranted. It was further argued that the most other situations in which a similar exemption might be required could be addressed adequately under the appropriate exemption category without the need for an express addition to section 33(1A). On the other hand, the Commission received one submission suggesting an addition to section 33(1A). That was from the ABC which proposed that the provision be extended to cover confidential sources of information to ABC programs.[dcxliii]

20.85 Having taken these matters into account, the Commission now favours the retention of section 33(1A).

Recommendation 168. Section 33(1A) should remain in the legislation as a provision assisting with clear but non-exhaustive definitions of confidential sources of information.

Guidelines for protecting personal information

20.86 The Commission sees a need for guidelines for access decision makers to assist them in determining whether personal information is exempt under the archives legislation. Australian Archives has already created a wide range of access guidelines intended to assist in the making of consistent access decisions. These guidelines are available to the public, but few people appear to be aware of their existence.

20.87 In DRP 4 the Commission proposed that the NAA, in consultation with the Privacy Commissioner and other relevant agencies, should be required by the legislation to formulate and publish guidelines to assist in the administration of the personal affairs category. This proposal was supported by a number of submissions in response to DRP 4.[dcxliv]

20.88 Australian Archives, on the other hand, considered that consultation and establishment of guidelines could be undertaken without enshrining these responsibilities in legislation.[dcxlv] The Commission agrees that, in most cases, guidelines could be produced by the NAA without the need for specific legislative obligation to do so. The Commission would encourage this to occur in relation to all exemption categories. This exemption category will raise, nevertheless, complex issues because of the difficulties that have been encountered with the interpretation of the existing personal affairs provision, the fact that the wording of the provision would be significantly altered under the new legislation, and the large range of agencies who may make use of the provision. For these reasons the Commission considers that the new legislation should include an obligation on the NAA to establish guidelines relating to personal information, and a requirement that the NAA consult with key agencies including the Privacy Commissioner.

Recommendation 169. The NAA, in consultation with the Privacy Commissioner and relevant responsible agencies, should be required by the legislation to formulate and publish guidelines to assist in the administration of the personal information exemption category.

Limitations or sunsets on exemption categories

20.89 Information which has a continuing sensitivity at 30 years will not necessarily still be sensitive at 40 or 60 years. If information is no longer sensitive it should cease to be exempted from public access.

20.90 A number of submissions urged the Commission to consider recommending the placing of ultimate limits on the period for which exemption categories under the archives legislation should continue to apply.[dcxlvi] Such limits are often referred to as sunset exemption clauses. Concerns were raised about the current lack of mechanisms for later review of decisions to withhold access to records (other than immediate appeal rights). Once a decision is made that an exemption applies, that exemption is only reconsidered upon the making of a new application for access from a member of the public. Although section 35(4) of the Act provides for administrative arrangements to be made for the reconsideration of earlier decisions, such arrangements are not widely used, predominantly for resource reasons.

20.91 A number of other national archives and state archives use administrative guidelines to either review or open records after a certain period of time. For example, the United Kingdom Public Records Office has a series of closure guidelines, based on the nature of information within a record, ranging from the basic 30 year rule to 100 years.[dcxlvii] However, these are merely administrative guidelines, not legislative provisions. New Zealand practice provides for specific restrictions on access to be set at the time of transfer of records to the National Archives. These restrictions, usually based upon exemption categories set out in the *Official Information Act 1982* (NZ), can range from 10 years to 100 years after the last date of action, and are at the discretion of the transferring agency.[dcxlviii] Similar practices apply in most Australian states.

20.92 A number of submissions queried the appropriateness of sunset clauses.

> It may appear a responsible option to apply sunset clauses to exemptions. But exemptions to protect national security tend to be enduring: usually only shifts in policy change the status of information, otherwise decisions are likely to remain unchanged by time. Legislation provides for review on request in any case, and this seems to be an efficient way to deal with this issue: if an applicant requests review the decision is re-examined. Sunset clauses seem therefore to be unnecessary.[dcxlix]

> From the [Australian Federal Police's] perspective in respect to our intelligence information, sensitivities can quite easily extend beyond a person's and indeed a family's lifetime, therefore, sunset clauses would not seem to be appropriate.[dcl]

20.93 These submissions provide some sense of the difficulties that may be faced in determining effective time limits to be applied to categories of exemptions.[dcli] These difficulties would be compounded by the likelihood that, in order to ensure the continued protection of the most sensitive information, the time periods applied to some categories would be much longer than was necessary for the majority of records that would fall within those categories. This in turn might give rise to other difficulties.

> There is a danger that the creation of sunset clauses in this way would create a de facto extended closed period on such records. There might be a temptation, for example, for pressure of workload to lead to insufficiently considered exemption of records in the knowledge that the exemption would lapse at a defined time.[dclii]

20.94 Having further considered the matter, the Commission reaffirms that it does not support the inclusion of individual sunset exemption clauses in the legislation. While Australian Archives suggested that individual sunset clauses might be placed in regulations,[dcliii] this added flexibility would not be sufficient to convince the Commission of the wisdom of adopting such clauses.

20.95 However, the Commission favours an increased effort to implement administrative programs for the review of decisions to exempt material. This could include the development of administrative guidelines establishing appropriate time periods for reviewing decisions, as opposed to time periods at which exemptions would be deemed to terminate.

20.96 While maintaining its view that sunset clauses for individual categories of exemptions are not appropriate in the open period, the Commission nevertheless supports the inclusion of an ultimate sunset for all exemption clauses. Evidence suggests that there is an age when any remaining sensitivity would be so low that release to the public could not cause any harm. The Archives Office of Tasmania has a legislative provision whereby all exemptions cease to have effect when the record reaches 75 years of age.[dcliv] Administrative guidelines in the United Kingdom[dclv] and New South Wales[dclvi] set the longest period for the withholding of records at 100 years.

20.97 In the light of submissions to IP 19 supporting a period of 100 years,[dclvii] the Commission proposed in DRP 4 that all records be made available to the public without exemption at 100 years. The Commission received support for this proposal from several submissions in response to DRP 4.[dclviii] Australian Archives also supported the 100 year sunset clause, but noted that people should be aware that this would disclose to the public *all* information in Commonwealth records which was 100 years of age.

> If such a sunset clause is included in the legislation it should be done so in the knowledge that it will apply equally to records documenting individuals suffering from mental illness, those in incestuous relationships, census records, records identifying individuals as paedophiles, records naming confidential sources and records containing information about secret and sacred indigenous material.[dclix]

At 100 years the resources involved in examining or reexamining records would, in the Commission's view, far outweigh any possible risk of harm from continuing sensitivities. The legislation should, therefore, provide that, with one exception, all exemptions should cease to have effect 100 years after the date the record was created.

20.98 The exception recommended by the Commission relates to the disclosure of information which, under Indigenous tradition, is confidential or subject to particular disclosure restrictions, likely to remain sensitive indefinitely.

> **Recommendation 170.** All exemptions, except those relating to information which under Indigenous tradition is confidential or subject to particular disclosure restrictions, should cease to have effect 100 years after the date a record was created.

Cabinet notebooks

20.99 The Cabinet notebooks of officials are the only records currently subject to an unappealable exemption beyond 30 years of age. Until 1994, the Act specifically excluded Cabinet notebooks from the definition of a Commonwealth record, thereby excluding them from all disposal and public access obligations. Following amendments in 1994, Cabinet notebooks are now subject to the Act.[dclx] However, under section 22A, they are subject to a mandatory 50 year exemption from public

access. As most Cabinet ministers are no longer involved in political life after 50 years, the 50 year exemption was seen as a reasonable compromise between public access and Cabinet confidentiality.

20.100 A number of submissions called for Cabinet notebooks to be brought into line with other records and opened at 30 years.

> Cabinet notebooks are in no more need of protection than other cabinet materials, which are leaked to journalists and others daily. To preserve their secrecy is to preserve both a myth, and a set of groups (journalists, lobbyists, etc.) with privileged access to official information which has no democratic legitimacy.[dclxi]

These submissions argued that information in Cabinet notebooks with a continuing sensitivity could be protected under the standard exemption categories, but that information which is already public knowledge, or is not sensitive, should be released to the public as a part of the whole historical record.

20.101 Other submissions, including that of the Department of the Prime Minister and Cabinet, supported the retention of the 50 year rule for Cabinet notebooks.[dclxii] These agencies submitted that the extra 20 years of exemption provide a necessary distancing of time from events and personal comments recorded in the notebooks.

20.102 In DRP 4 the Commission suggested that Cabinet notebooks should not be exempted from open access any longer than other records. In response to DRP 4, some submissions supported release at 30 years.[dclxiii] Other submissions suggested that Cabinet notebooks should be made available prior to 30 years.

> I see no reason why all Cabinet records including Cabinet notebooks should be released no later than the expiration of the Government's term of office.[dclxiv]

One archivist suggested that, after 50 years, the extent of the information released would be more revealing and more historically useful.[dclxv] No other submissions in response to DRP 4 supported protection for Cabinet notebooks beyond 30 years.

20.103 After further consideration, the Commission remains unconvinced of the need to exempt Cabinet notebooks beyond 30 years. Moreover, no compelling, or even persuasive, evidence has been adduced that would suggest that existing exemption categories would not be sufficient to provide any necessary protection beyond 30 years.

20.104 To the contrary, the Commission believes that it is entirely appropriate that, if Cabinet records are to be made accessible, subject to exemptions, after 30 years, Cabinet notebooks relating to those deliberations should similarly be accessible for the benefit they provide in better understanding the record of the nation as recorded in the Cabinet papers themselves.

Recommendation 171. Cabinet notebooks should enter the open period at 30-years subject to the same exemptions as all other records.

Ministerial conclusive certificates

Application of certificates

20.105 Under section 34 of the Archives Act, a minister who is satisfied that a record contains information or matter of a kind referred to in paragraphs 33(1)(a) or (b) may certify conclusively that the record is an exempt record. The minister may issue such a certificate without the need for examination of the record under section 35 and without a decision being given in respect of the record under that section.

20.106 Conclusive certificates remain in force indefinitely. While an appeal lies to the AAT in respect of an exemption claim based on a conclusive certificate, the Tribunal's powers are limited under section 44 to determining whether there exist reasonable grounds for that claim. The Tribunal cannot order the release of the document.

20.107 The ministerial conclusive certificate system was included in both the FOI Act and the Archives Act to provide a mechanism for ministers to ensure that particularly sensitive information relating to defence, security and foreign relations is protected. However, the right of ministers to apply conclusive certificates to groups of records, exempting these records from the public without the need for examination, can be seen as being diametrically opposed to the presumption of openness for records which are 30 or more years old.

> A legislative scheme pursuant to which the executive decides what documents concerning its activities are to be made available to the public is clearly antidemocratic. If public access to complete and reliable information concerning the executive is an integral part of the process of making the executive

> accountable, it logically follows that the executive itself should not be the ultimate adjudicator of what information about its operations should be disclosed to the public.[dclxvi]

20.108 Submissions in response to IP 19 showed both strong support for and opposition to the retention of conclusive certificates. While one submission warned of the 'extraordinary abuses that this system can be subject to',[dclxvii] other submissions pointed to the low level of use of ministerial certificates under the Archives Act, suggesting that there has been a responsible attitude by agencies towards access to archival records.[dclxviii]

20.109 The submissions showed mixed support for the existing system of limited review by the AAT. Some submissions supported giving the AAT the power to conduct a full review of decisions to apply certificates,[dclxix] while others considered that conclusive certificates should remain subject to the existing review system or be removed from review altogether. The Australian Intelligence Community considered that tribunal review is in conflict with the concepts of ministerial responsibility and conclusiveness,[dclxx] while the Department of Defence argued that the responsible use of certificates has proved that there is no need for review.

> Experience has shown that, given the terms of the legislation, certificates have, in fact, been used very sparingly indeed and their reasonableness has not been questioned. The idea that the issuing of certificates might need to be questioned or in some way controlled seems now to be unnecessary. To sustain this provision seems too restrictive.[dclxxi]

20.110 At present ministerial certificates can be applied to information which would be exempt under sections 33(1)(a) and (b), that is to information relating to national security, defence and international relations, or to information given in confidence by a foreign source. The Commission considers that ministerial certificates should continue to be able to be applied to these categories of information.

20.111 In DRP 4 the Commission recommended the retention of the existing system, including the limitation of AAT review to determining whether reasonable grounds existed for the claim of exemption on which the conclusive certificate was based. Additionally, the Commission commented that, consistently with its proposal for a public interest test to apply to all exemptions, the AAT should also take relevant public interest considerations into account. As previously observed, the Commission is no longer proposing a universal public interest test within each exemption category. The effect of this decision has, therefore, been to meet concerns expressed in response to DRP 4 regarding the application of a public interest test to the claiming of exemptions in relation to ministerial certificates.[dclxxii]

20.112 In DRP 4 the Commission also recommended the amalgamation into a single exemption category of the 'in confidence' exemptions in sections 33(1)(b) and

(d). In consequence, the Commission expressed the view that, in addition to section-33(1)(a), the application of ministerial certificates to the amalgamated provision would seem appropriate. Reference has already been made to criticism of this suggestion. This was on the ground that it would be inappropriate to apply certificate provisions to that part of an amalgamated confidence provision that did not relate, as in the current section 33(1)(b), to information communicated by or on behalf of a foreign government, an authority of a foreign government or an international organisation. On the basis of that criticism, which the Commission accepts, it has already proposed in a revised recommendation that the two categories of in confidence exemptions remain separate.

20.113 Accordingly the Commission no longer proposes that the conclusive certificate powers extend beyond information covered by sections 33(1)(a) and (b).

20.114 Apart from the concerns noted above, no objections were raised in DRP 4 to the Commission's proposals for a continuation of the existing conclusive certificate regime and limited AAT review.

20.115 While accepting that ministerial certificates might seem to fly in the face of the objective of public access to records in the open access period, the Commission accepts that very high levels of sensitivity relating to limited classes of security, defence and foreign relations records necessitate the retention of this device. The Commission is reassured in this regard by evidence that the use of certificates has been very limited and would appear to have been exercised responsibly.

20.116 The existing limitations on the power of the AAT continue to be justified on the basis of the same considerations.

20.117 As mentioned earlier in this chapter, the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 was introduced into Parliament after DRP 4 was issued. In that Bill the government has proposed that there be an additional exemption category in the Archives Act, relating to information supplied or created for the purposes of the Bill where the information is confidential or subject to particular disclosure restrictions under Indigenous tradition. In addition the Bill proposes that this exemption category could be the basis of a claim for exemption for which a ministerial certificate should be applied. The Commission agrees that information of this kind is of a high level of sensitivity, with a very considerable potential to cause damage to Indigenous individuals and communities by disregard of their traditions. The Commission, therefore, recommends that ministerial

certificates should be able to be applied where there is a claim for exemption under the proposed category relating to information which, under Indigenous tradition, is confidential or subject to particular disclosure requirements.

> **Recommendation 172.** The current system of ministerial conclusive certificates should be retained together with a power of review by an external tribunal, limited to determining the question whether there exist reasonable grounds for the claim that a record is an exempt record. The power to issue certificates should be limited to three exemption categories, namely, information the disclosure of which would, or could reasonably be expected to, damage the security, defence or international relations of the Commonwealth, information given in confidence by a foreign government or international organisation where disclosure of the information would constitute a breach of confidence, and information that, under Indigenous tradition, is confidential or subject to particular disclosure restrictions.

Time limits on certificates

20.118 Despite the existing power to make regulations to prescribe time limits for ministerial certificates,[dclxxiii] no such regulation has been made. All certificates issued under the Archives Act will, therefore, remain in force indefinitely unless they are revoked. A number of submissions supported the imposition of time limits on conclusive certificates to 'oblige the Executive to re-examine and submit its reasons for non-disclosure to public scrutiny in the light of current circumstances and values'.[dclxxiv]

20.119 Possible time limits suggested for ministerial certificates included three years,[dclxxv] five years,[dclxxvi] a maximum of ten years,[dclxxvii] and the occasion of the minister's departure from office.[dclxxviii] Another submission suggested that there should be no mandatory time limit, but that the minister should set the period according to advice regarding how long the certificate should remain in force.[dclxxix]

20.120 In 1991 an attempt was made to prescribe by regulation a mandatory five year limit for certificates under the FOI Act. However, the Senate rejected this as being too long a period, instead preferring two years. A time limit has still not been imposed for certificates under the FOI Act. In its 1992 review of the effect on ASIO of the access provisions of the Archives Act, the Parliamentary Joint Committee on the

Australian Security Intelligence Organization recommended that a three year limit be introduced for certificates under the Archives Act.[dclxxx] This recommendation has never been acted upon.

20.121 In DRP 4 the Commission suggested that a five year limit on ministerial certificates be included in the legislation.[dclxxxi] The Commission suggested that periodic review would enhance the credibility of the certificate system and ensure the revocation in a timely way of certificates, the need for which could no longer be justified. The Commission noted that the imposition of such a time limit would not prevent renewal of the certificate where appropriate. Five years seems to the Commission to strike an appropriate balance between the need for review within a reasonable time and the need to avoid imposing an undue burden on ministers.

20.122 In response to this proposal, the Department of Defence[dclxxxii] and the Australian Intelligence Community[dclxxxiii] again asserted their support for a more flexible approach, permitting ministers to establish an appropriate period before review was required, with a maximum period of ten years. The Commission is concerned, however, that the longest period might become the norm. Given this, the Commission maintains its view that ten years is too long a period of time to conclusively exempt information from public disclosure without reconsideration. On the other hand, despite support for a three year term, the Commission believes that if a record in the open period is of such sensitivity as to justify the issue of a certificate, it is unlikely that sensitivity would diminish significantly within three years. The Commission continues to favour a five year time limit, after which time the certificate would lapse. There would be no impediment to applying another certificate with respect to the same records provided, or course, that the exemption to which it related could still be claimed.

20.123 The Commission considers that, consistent with its recommendation relating to a sunset on exemptions,[dclxxxiv] ministerial certificates should not be able to be applied to records which are more than 100 years of age.

Recommendation 173. A ministerial conclusive certificate should cease to have effect after five years, but should be renewable. Certificates should not be able to have effect in relation to records which are more than 100years old.

Other restrictions on access

Where knowledge of the existence of a record would be exempt information

20.124 Section 39 of the Act permits an agency to neither confirm nor deny the existence of a record if knowledge of the record's existence would constitute exempt information. Section 39 is a safeguard provision. It provides a necessary protection in cases where the mere admission or denial of the existence of a record could cause harm. One submission commented that the use of section 39 may indirectly confirm the existence of a record, [dclxxxv] so that section 39 may seem artificial or nonsensical.[dclxxxvi] However, all submissions which addressed the issue supported the retention of section 39.

20.125 Accordingly, in DRP 4 the Commission proposed that a provision similar to section 39 be retained in the archives legislation. The Commission commented that, consistent with its proposal for a public interest test to be applied to all exemption claims, such a test should correspondingly apply to a determination under section 39 that information would be exempt. As already noted, the Commission has not proceeded with the proposal for a universal public interest test.

20.126 Only one submission in response to DRP 4 addressed this issue. The Department of Defence objected to the application of the proposed public interest test to the use of section 39.[dclxxxvii] Despite the low level of use of this provision, the Commission remains of the view that it should be retained.

Recommendation 174. The legislation should continue to permit an agency to neither confirm nor deny the existence of a record if knowledge of its existence would be exempt information.

Consultation with States and Territories

20.127 Section 32 of the Act requires consultation, where appropriate, with the States and Territories about access decisions. While the section does not in itself provide a ground for exemption, the requirement for consultation could be used to delay or frustrate access to certain records. A number of submissions supported the retention of section 32, including the Australian Federal Police, who are required to consult frequently with State and Territory police forces,[dclxxxviii] and the Archives

Authority of NSW, which saw section 32 as a 'valuable safeguard for interests of the States.'[dclxxxix] The Commission considers that the interests of the States and Territories can be adequately taken into consideration within normal access decision making procedures using the exemption categories that have been proposed.[dcxc] Appropriate consultation can be undertaken with other interested parties, including foreign governments, without any legislative compulsion. The requirement to consult with the States and Territories is, therefore, unnecessary and should be removed from the legislation.

20.128 In DRP 4 the Commission proposed the removal of the provision. There was only one response to this proposal. That was in support of the retention of the provision as a safeguard for the interest of the States.[dcxci] Despite this and previous support for the provision, the Commission maintains its view that the provision is unnecessary and should not be included in the legislation.

Recommendation 175. The requirement to consult with the States and Territories in relation to access decisions should be removed from the legislation.

Security classification

20.129 Some records will continue to be subject to security classifications applied by the creating agencies even after they enter the open period. Section 59 of the Archives Act states that security classifications cease to have effect for any purpose if the record becomes available for public access under the Act. This does not mean that all security classifications cease to have effect when a record reaches 30 years of age. Security classification continues to apply where a record has not been examined, or where a record is found to have continuing sensitivities and is accordingly exempted from public access. However, the mere existence of a security classification is not in itself sufficient ground to exempt a record in the open period. The legislation should maintain this situation by express provision. The Commission did not receive any comments on this issue in response to DRP 4.

Recommendation 176. The legislation should continue to provide expressly that security classifications cease to apply for any purpose once a record is found to have no continuing sensitivities and is opened to the public.

ENDNOTES

21. Personal information

Introduction

21.1 This chapter considers three issues relating to personal information. The first is the right of a record subject to be informed of a disclosure of personal information. The second is the right of a record subject to have access to their own personal information in Commonwealth records. The Commission also considers extending this right of access to next of kin or legal representatives of a record subject. The third issue is the right to seek alteration of personal information where it is incomplete, incorrect, out of date or misleading.

The rights of the record subject and public release

21.2 Personal information is a broad term, extending from a person's name to their intimate medical details. The personal information exemption category[dcxcii] only provides protection for information considered to have continuing sensitivity after 30 years. Thus, the legislation does not prohibit access to non sensitive personal information. The North Australian Aboriginal Legal Aid Service suggested that such access should only be permitted if the record subject has been contacted and given their approval.[dcxciii] This would be consistent with the Information Privacy Principles of the Privacy Act.[dcxciv]

21.3 The release of records under the Archives Act has, however, been excluded deliberately from the operation of the Privacy Act. This is a recognition that after 30 years there may be different sensitivities attaching to personal information. It also recognises that the relationship between the record subject and the creator of the record will be significantly weaker than at the time of creation, or may no longer exist. Measures to protect privacy have been built into the Archives Act, and should continue to apply in the new archives legislation. Any material released to the public should have been examined and identified as not being of a sensitive nature. The further step of establishing a mandatory procedure for seeking to locate and contact the record subject would become increasingly difficult with the passage of time, in

particular because of changes in names and addresses, or the death of the record subject.

21.4 The Commission considers that the privacy of record subjects would be protected adequately in open period records by the proposed personal information exemption provision. In DRP 4 it suggested that it would not be practicable to oblige access decision makers to seek contact with records subjects prior to releasing non exempt personal information in the open period. The resources required to attempt to contact every record subject would be overwhelming and, in the Commission's view, clearly out of proportion to the possible risk of infringing personal privacy.

21.5 A number of submissions expressed doubts about the Commission's conclusions, in part because of their wider concerns about the Commission's proposals in DRP 4 in relation to the personal affairs exemption category.[dcxcv] As discussed in the previous chapter, the Commission has reconsidered its approach to the exemption of personal information and has recommended that it be recast in a way that should meet concerns that the previous proposal was too narrowly cast.[dcxcvi] Having regard to its revised proposal, the Commission is satisfied that personal information should be exempted from public access if its release would have an adverse effect. In relation to other personal information, the Commission remains of the view that it would be impracticable to require that decision makers contact record subjects prior to disclosure of non sensitive personal information in the open period.

21.6 This would not stop the NAA from implementing contact procedures in specific cases, or in relation to groups of records of particular concern.

21.7 The particular concerns of the North Australian Aboriginal Legal Aid Service regarding records relating specifically to Aboriginals or Torres Strait Islanders, would, in the Commission's view, be better dealt with by developing a greater understanding of issues of sensitivity within these communities and ensuring they are protected through the general exemption provisions of the legislation. Chapter 24 considers these issues further.

Recommendation 177. The legislation should not oblige access decision makers to seek to contact record subjects prior to releasing to the public such personal information as does not fall within the personal information exemption category.

Taking into consideration the identity of the applicant

Access by record subjects to information about themselves

21.8 Record subjects should, however, have rights to access their own information beyond those of the general public. Under the Archives Act, decisions are made to open records to the public in general. Thus the identity of the applicant is not taken into consideration.[dcxcvii] If the record is not suitable for general release, it will not be released to anyone, even the record subject. There was strong support in submissions for a legislative requirement that the identity of the applicant be taken into consideration. [dcxcviii] While noting that Australian Archives has developed discretionary practices which can provide access to record subjects or other persons, the Commission considers that further measures might be incorporated into the legislation itself to provide record subjects and other appropriate persons with legislative recognition of their claims to access.

21.9 The boundaries of the FOI and Archives Acts overlap in the area of access to personal information relating to the applicant. Under the FOI Act individuals may apply for information about themselves, regardless of whether or not the information would be exempt from access by a third party on the grounds that it was personal information or was related to a person's business or professional affairs.[dcxcix] There is no date restriction on this entitlement;[dcc] thus, records in the open period can be accessed in this way. The Commission considers, however, that for two reasons this right does not operate effectively in relation to records in the open period.

21.10 The first reason relates to administrative effectiveness. To pursue the right of access under the FOI Act, an applicant must apply directly to the agency with functional responsibility for the records sought. The majority of records in the open period are in the custody of Australian Archives. As a result, considerable resources of the agency, Australian Archives, and the applicant may be required to locate, transfer, assess and provide access to the records. This process could be greatly simplified if the NAA had the power to accept an application directly from the applicant.

21.11 The second reason is that a number of agencies whose records are subject to the Archives Act are exempted from the provisions of the FOI Act. No right of access

to a person's own information is available under the FOI Act in respect of these agencies, even once the record reaches the open period.

21.12 For the above reasons, the Commission in DRP 4 proposed that the new legislation should confer a right of access to personal information in the open period comparable to the right given by the FOI Act. This proposal received support from a number of submissions in response to DRP 4.[dcci]

21.13 The Commission does not, however, see the need for any modification of the existing right under the FOI Act. While this would have the effect in some cases of creating parallel rights for the record subject, one under the FOI Act and one under the new legislation, it would cumulatively provide the best possible access to the applicant, particularly in cases where the material required includes records which are both more and less than 30 years of age, or where the record subject has an established long term relationship with the relevant agency. While this situation might create the possibility of 'forum shopping',this could be avoided by agencies entering into access decision making arrangements with the NAA.

> **Recommendation 178.** The legislation should include a right to access an applicant's own personal information which is more than 30 years old. The parallel right under the FOI Act should continue.

Access by next of kin or legal representatives

21.14 Submissions generally supported not only a right of access by record subjects, but also a right of access for certain other persons. The Commission believes there are merits in this suggestion in so far as it can envisage situations in which a person has a genuine need for access. Such situations might include access by next of kin for medical purposes or in order to trace a family member, or access to information relating to the personal affairs of a family member in order to clarify the applicant's own personal affairs. The Commission can also envisage circumstances where the legal relationship between the record subject and another person is such that there is a demonstrable need for that person to have access to exempt information relating to the personal affairs of the record subject. These circumstances include the relationship between a legal guardian and a record subject, and a trustee or an executor of the estate of a record subject and the subject.

21.15 The major difficulty in framing an appropriate access provision to meet such circumstances is that of defining eligibility. In relation to kinship, in particular, it would be impossible to define those relationships that qualified and those that did not. An added difficulty is that kinship may not be the only personal relationship that should qualify. This is particularly so in contemporary society where many close personal relationships do not involve a legally recognised kinship relationship. At the same time, some kind of relationship and/or need should be required to be established, to avoid any risk of needlessly eroding the privacy of the record subject through the indiscriminate release of sensitive information.

21.16 The Commission suggested in DRP 4 that the solution to these difficulties lay in the fashioning of a statutory right for any person to seek access to otherwise exempt information relating to the personal affairs of a record subject, provided that the person can demonstrate a special need, based on their personal or legal relationship with the record subject. The Commission proposed that the decision maker be required to impose such conditions as might be necessary to preserve the privacy of the information in question and that the NAA be required to issue guidelines to assist in the assessment of applications. In view of the subjective nature of such an access decision, the Commission suggested that a right of review and appeal to an external merits review tribunal should be permitted.

21.17 While one submission strongly supported this recommendation,[dccii] other submissions queried its appropriateness in certain circumstances.

> The Department notes the proposal to enable access to otherwise exempt information where a person can demonstrate a special need for access by reason of their personal or legal relationship with the record subject. However, the Department notes that the existence of such a relationship does not always indicate that the record subject, if consulted during his or her lifetime, would be prepared to have such information disclosed to the person concerned. The Department also queries the appropriateness of such access where the record subject is still alive and could, should they wish, procure access for the person concerned.[dcciii]

21.18 The question of the extent to which special needs should be recognised beyond the rights of the record subject is a difficult one. While the Commission is sensitive to privacy concerns it is also sympathetic to the needs of those who are genuinely undertaking research in order to establish family connections, either for themselves or for those who they legitimately represent.

21.19 Having further considered the matter in the light of submissions and consultations, the Commission remains convinced that access to exempt personal

information by persons other than the record subject who can demonstrate a genuine special need should be permitted under the legislation.

21.20 It does, however, believe that the right needs to be qualified so as to take into account the wishes of a living record subject, provided that the subject is capable of being contacted. The Commission considers that such a qualification would strike an appropriate balance between the desirability of the record subject maintaining appropriate control over personal information relating to themselves, and the special needs of the applicant.

21.21 Accordingly, the Commission proposes that, where the record subject is known, or understood, to be alive, the applicant should be required to obtain the consent of the record subject before access to the exempt information may be permitted. This qualification should not apply where such enquiries by the applicant as are reasonable in the circumstances have failed to locate the record subject.

> **Recommendation 179.** The legislation should entitle any person to seek access to otherwise exempt personal information provided that the person can demonstrate a special need for such access by reason of their personal or legal relationship with the record subject.
>
> Where the record subject is known, or understood, to be alive, access should not be granted without the agreement of the record subject, unless such enquiries as are reasonable in the circumstances have failed to locate the record subject.
>
> Any grant of access should be on such conditions as are necessary to ensure that the privacy of the information in question is protected to the maximum extent possible. The NAA should be required to issue guidelines to assist in the assessment of applications.
>
> A refusal to grant access should be reviewable and subject to appeal to an external merits review tribunal.

Counselling for persons given access to exempted personal information

21.22 In line with similar requirements under the FOI Act,[dcciv] the Commission in DRP 4 suggested the inclusion in the legislation of an obligation to consider the effect on records subjects of the disclosure of exempt information. Even if the record subject has some idea of what information may be contained in a record, its disclosure could sometimes have a distressing impact. Where it is considered that disclosure might be detrimental to the record subject's physical or mental health or wellbeing, the record subject should be advised that they may wish to seek the professional assistance of a qualified person. In line with the FOI Act provisions, a qualified person should be defined to include a person in an occupation that involves the provision of care for the physical and mental health of people for their wellbeing.[dccv] The decision as to whether to seek counselling and the type of counselling required should be in the hands of the record subject.

21.23 The Commission considered that a similar obligation should apply in relation to the release of information about the personal affairs of a record subject to a person to whom access is granted by reason of special need arising out of their personal or legal relationship with the record subject.

21.24 In its response to DRP 4, Australian Archives expressed a preference for such counselling requirements to be undertaken under an administrative arrangement rather than by specific legislative requirement.[dccvi] The Commission maintains its view that it would be appropriate to include that requirement in the legislation to ensure its observance by decision makers.

21.25 These proposals were strongly supported by International Social Service Australia,[dccvii] an organisation with extensive experience in the area of accessing and communicating personal information from naturalisation and migration records. The experience of organisations such as ISS could be drawn upon by the NAA in establishing guidelines for staff who would need to be alert to the possible effects of disclosure of personal information.

Recommendation 180. The legislation should require a decision maker to consider the need for counselling where otherwise exempted information is released to a record subject or to a person who has demonstrated a special need to have access to the information by reason of their personal or legal relationship with the record subject. The decision whether to seek counselling and the type of counselling required should ultimately be in the hands of the applicant.

Amending personal information

21.26 The Archives Act does not contain any provisions permitting a record subject, or any other person, to seek amendment of or additions to a record.

21.27 Under the FOI Act an individual has the right to request an amendment or annotation of a record where the personal information about the individual is incomplete, incorrect, or misleading. The provisions of the FOI Act give the terms 'amendment' and 'annotation' particular meaning.

21.28 **Amendment of a record may** involve either

- alteration of the record under section 50(2)(a), or
- addition to the record of a note made by the agency under section 50(2)(b).

Such amendment can only be made where the agency is satisfied that the information in question is incomplete, incorrect, or misleading.

21.29 **Annotation of a record** is provided for in sections 51A and 51B, and involves addition to the record of a note made by the applicant. The note should contain the applicant's reasons for claiming that the information is incomplete, incorrect, or misleading. The agency may add its own comments to the note. The agency can only refuse to make an annotation where the annotating statement is irrelevant, defamatory or unnecessarily voluminous.[dccviii]

21.30 The right to request amendment or annotation under the FOI Act has no time limitations; thus, records in the open period can be the subject of alteration or annotation in accordance with the FOI Act. As amendment or annotation in conjunction with the provisions of the FOI Act is undertaken as a legal requirement, it falls outside the general prohibition in section 26 of the Archives Act of the alteration of records more than 25 years of age.

21.31 In DRP 4 the Commission proposed removing the right of amendment in relation to records more than 30 years old, but supported maintaining the right of annotation as provided in the FOI Act. In addition it recommended that the right of annotation as it relates to records in the open period should be included in the

archives legislation to ensure that those records not subject to the FOI Act would also be subject to a right of annotation. These recommendations would have the effect of removing the power to erase or obliterate information after 30 years, while continuing to provide an avenue for record subjects to have their objections to the inaccuracy of information placed on the record via the annotation procedure.

21.32 While a number of submissions supported the removal of a right to amend records in the open period,[dccix] one submission in response to DRP 4 strongly opposed limiting the existing rights available under the FOI Act to documents in the closed period.

> Although extremely rare, there have been cases in Defence where the only way to do justice to the individual was to expunge information from the record ... The Department, therefore, rejects the proposition that, once a record of enduring value reaches 30 years of age, it must remain unamended. Why should the desire amongst the archival fraternity to preserve the original record override other legitimate interests or needs?[dccx]

The Attorney-General's Department also expressed reservations about removing the right of amendment as provided by the FOI Act.

> The Department is not persuaded that the provisions for amendment of personal records in the FOI Act should cease to have any application to records in the open access period. Personal records retained for that period are likely to be of considerable importance, and some of them are likely to relate to controversial matters, for example, information about individuals collected by the security or law enforcement agencies, information about internment of foreign nationals during the world wars, or information concerning legal or other disputes of individuals with government. However, the Department agrees that amendment by alteration of a record within the 30 year period may interfere with documenting the historical aspect of decisions and could be undesirable.[dccxi]

Having further considered the matter in the light of submissions and consultations, the Commission remains firmly of the view that the existing right under section-50(2)(a) of the FOI Act to alter a record in the open period should be removed. The Commission believes that concerns that might lead an individual to seek alteration of a record should ordinarily have been addressed, or have dissipated, well before the expiration of 30 years after the creation of the record. In those cases where such concerns may arise or persist after 30 years, the Commission believes that the need to maintain the integrity of what is by then an historical record outweighs any public interest in permitting the alteration of the record.

21.33 That said, the Commission now considers that the record subject should continue to have the opportunity, in respect of records in the open period, to either

(a) request the addition by the controlling agency of a note of the kind permitted by section 50(2)(b) of the FOI Act, ie. a note the effect of which would be to correct a statement that, left unqualified, would be incomplete, incorrect or misleading, or
(b) request that the agency add a notation, of the kind permitted by sections51A and 51B of the FOI Act, prepared by the record subject who claims that the record is incomplete, incorrect or misleading.

21.34 The Commission notes in this regard that submissions were highly supportive of a right to annotate records in the open period.[dccxii]

> While archived records are less likely to be used in a way which would result in administrative action against an individual, their greater public availability suggests that individuals mentioned in records should have the right to add a statement to defend or protect their reputation if necessary.[dccxiii]

Recommendation 181. The FOI Act should be amended to provide that records in the open period may not be altered in accordance with section-50(2)(a).

Recommendation 182. The legislation should include a provision giving the controlling agency power to add a document or official note to a record in the open period where the agency is satisfied that the information is incomplete, incorrect, out of date or misleading. This power should be identical to that in section 50(2)(b) of the FOI Act.

Recommendation 183. The legislation should include a right to request annotation of personal information in the open period by adding a statement by the record subject to the record. The right of annotation in the archives legislation should be identical to that in sections 51A and 51B of the FOI Act.

ENDNOTES

22. Review of decisions

Introduction

22.1 The existing mechanisms for reviewing access decisions are similar to those in the FOI Act. They were the most strongly supported part of the current access regime, with few suggestions for change made in the submissions. The Commission supports the retention of the basic review structure.

Internal review

Maintaining internal review procedures

22.2 Internal review is used here and in many other jurisdictions as the first step in reviewing administrative decisions. In some cases this review is based on administrative authority and in others it has a statutory basis. The latter generally ensures that the rights of the applicant are enforceable and the process better defined.[dccxiv]

22.3 Section 42 of the Archives Act establishes a statutory internal review process for access decisions which, with one exception, is compulsory before any further review can be sought.[dccxv] Each access decision is formally made by Australian Archives, although if the responsible agency has a particular view on the decision, that view will ordinarily be taken into consideration.[dccxvi] If the applicant is not notified of a decision within 14 days, section 43(3) permits the applicant to seek review by the AAT.

22.4 In DRP 4, the Commission suggested that internal review be generally maintained. None of the submissions, in response either to IP 19 or DRP 4, recommended the removal of internal review and a range of compelling reasons were suggested for its retention.

> [Internal review] should be seen as another level of full merits review, with many features of external review. It must be timely; it must be of no or low cost to the applicant; internal review officers must

> in fact be independent of the primary decision-making process, and impartial in the way they conduct their reviews, as well as being seen to be such; and internal review decisions must be based on adequate fact finding (preferably involving personal contact with the applicant) ... In the AAT's view, if these conditions are met, internal review can and will make a valuable contribution to the effectiveness and efficiency of the system of Archives Act review and appeals.[dccxvii]

Internal review provides an opportunity to revisit a decision and for senior managers to monitor, and where appropriate improve, decision making in their agencies. It provides a cost effective review option for both the applicant and the agency, and keeps the number of appeals to the AAT to a minimum.[dccxviii] Australian Archives' statistics confirm the success of internal reconsideration as a form of review. Figures for the years from 1994–95 to 1996–97 show that more than 80% of decisions subject to internal review were wholly or partially reversed.[dccxix]

22.5 In DRP 4, the Commission proposed that internal review should not be a mandatory prerequisite to external review, in particular in cases where there was a deemed refusal of access on the expiration of 90 days after the making of the original application. This proposal took account of views expressed in a number of submissions in response to IP 19 suggesting that an applicant should have the option of appealing directly to an external tribunal.[dccxx] There was also support for retaining internal review as a mandatory prelude to external review, some also emphasising the desirability of exhausting all cost effective options before proceeding to external review.[dccxxi]

22.6 While there is no doubt that internal review serves a very useful purpose, it does not necessarily follow that direct access to external review should generally be excluded. Indeed, it is the Commission's view that the usefulness of internal review would be reinforced rather than weakened if the legislation were to recognise that in some cases the level of contest between the parties may be such that the interests of all would be best served by the applicant having direct access to external review. The Commission is satisfied that the significant cost difference for the applicant between internal review and tribunal proceedings would be sufficient to ensure that this option was not used inappropriately.

22.7 At present, the legislation recognises one situation where the right of appeal is directly to the external tribunal. This is in the case of a deemed decision under section 40(8) to refuse access where a decision has not been made within 90 days. No opposition was raised to the Commission's proposal in DRP 4 that this right of direct appeal be reaffirmed.

22.8 The Commission noted in DRP 4 that some uncertainty currently exists as to whether internal review of a ministerial conclusive certificate is technically necessary under the Act before an appeal regarding the reasonableness of the exemption claim can be made to the AAT. Clearly, internal review is meaningless in such circumstances and its exclusion from the process should be made clear in the legislation. No objection was raised to the Commission's proposal in DRP 4 that this be clarified.

Recommendation 184. Internal review procedures should be maintained as the first stage of a statutory right of review but should not be a mandatory prerequisite to external review of a decision to refuse access. An applicant should have the ability to appeal directly to the external tribunal.

Recommendation 185. The legislation should reaffirm that an appeal lies to the external tribunal, without internal review, where there is a deemed decision to refuse access after 90 days have elapsed since the original application.

Recommendation 186. Where records are subject to a ministerial conclusive certificate the legislation should clarify that the only review option available is appeal directly to the external tribunal.

Time limitations on internal review decisions

22.9 Under section 43(3) of the Act, an applicant who has not been notified of a decision on an internal review application within 14 days is entitled to make an application for review by the AAT. A large number of submissions supported the extension of the period of notification for internal review decisions, on the basis that 14 days is too short a period in which to effect a genuine review of a decision, particularly in cases where external consultation is required.[dccxxii]

22.10 The Commission notes that 30 days is allowed for internal review under the FOI Act.[dccxxiii] This seems to the Commission to be a more realistic time frame for similar decisions under the archives legislation. No submissions opposed the proposal made in DRP 4 for extension of this period to 30 days. The Commission favours retention of the existing obligation in section 42(2)(b) of the Archives Act to notify the applicant of a decision as soon as possible.

Recommendation 187. The statutory period of notification for internal review decisions should be extended from 14 to 30 days, with the retention of an obligation to notify the applicant of a decision as soon as possible.

Standards for internal review

22.11 In its submission in response to DRP 4, the AAT suggested the establishment of standards for the conduct of internal review.[dccxxiv] This suggestion was based on the AAT's view of the 'importance of internal review to the overall decision making and review process' and the desire to ensure a consistently high standard of internal review — an issue of importance given the Commission's recommendation that a significant level of access decision making should be undertaken by agencies other than the NAA.[dccxxv]

> Some of these agencies may not have established structures for internal review. Minimum standards would be particularly valuable in ensuring that internal review of access decisions is of a consistently high standard across agencies.[dccxxvi]

22.12 The Commission agrees that, particularly in the proposed new environment, some attempt should be made to achieve uniformity. However, at this stage the Commission is unsure whether formal standards would be necessary in order to enforce uniform procedures. Instead, it favours the formulation of guidelines to provide assistance to agencies undertaking internal review. These guidelines would benefit agencies taking on internal review responsibilities for the first time, and assist all agencies on an ongoing basis by making known the latest developments in the interpretation of exemptions and in rulings on procedural matters. The NAA should have responsibility for establishing such guidelines in consultation with reviewing agencies.

22.13 The Commission notes also in this regard that the Administrative Review Council has commenced an examination of internal review procedures with the aim of developing a best practice guide for Commonwealth internal review. The project is currently in its preliminary stages, with a pilot study of internal review systems to be conducted in five agencies.[dccxxvii] This project should assist in the further development of an understanding of internal review procedures by agencies and the need for consistency across the full spectrum of review.

Recommendation 188. The NAA should have responsibility for establishing guidelines for the conduct of internal review of access decisions under the archives legislation.

Charging for internal review

22.14 IP 19 asked whether an application fee should be levied for internal review applications. While this issue was not raised again in DRP 4, the Commission regards the consideration of charges for internal review as an important element of the review process.

22.15 A number of submissions supported the imposition of a fee in order to contribute to the cost of conducting internal reviews.[dccxxviii] Other submissions considered that a fee would help discourage frivolous and vexatious applications.[dccxxix] Submissions also raised the need to ensure that any fee that was imposed should not be so excessive as to deter genuine requests for review. Australian Archives, while favouring a fee, shared some of these concerns.

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22.16 Overall, the number of submissions for and against the imposition of a fee was evenly divided. The majority of opposing submissions considered that the basic principle of a right of access would be diminished by a fee for review, even with a proviso that the fee should be refunded if the application were successful.

> The imposition of fees for review would either be insignificant to the real cost of the review or be so restrictive in their effect to make the review process meaningless. An organisation should be required to provide for an internal review as a matter of course. This would promote the objective of the presumed right of access.[dccxxxi]

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> **Recommendation 189**. An application fee for internal review applications should not be introduced.

An external merits review tribunal

Forms of external review

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review function in relation to access decisions in the open period is appropriately and effectively reposed in the AAT.

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22.24 The future of the AAT is currently under review by the Government, which has announced that the AAT will be amalgamated with three other tribunals into a new general tribunal to be known as the Administrative Review Tribunal (ART).[dccxlii] Full details of the new ART are not yet available, although it appears that the ART, like the existing AAT, will provide independent merits review and have a non-adversarial approach. A two tier system of review is anticipated, with limited access to second tier review of first instance ART decisions. The structure of the ART is unlikely to affect the Commission's view regarding the desirability of tribunal review of archival access decisions, provided that the fundamental characteristics of an independent merits review body remain.

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22.27 The AAT contends that it, or its successor the ART, should have complete discretion in relation to the constitution of review tribunals for all archives matters.

> This will enable applications for review to be dealt with as speedily and economically as possible, while retaining the provision for multi-member tribunals to be constituted, when appropriate, to review highly sensitive applications.[dccxlviii]

22.28 Given the experience of the AAT in archives cases since 1984, the Commission believes that, in the vast majority of cases, a hearing could be appropriately dealt with by a single presidential member of the Tribunal. All archives cases involve records claimed to be sensitive. While cases involving security and intelligence records may require particular rules to protect records and witnesses involved in hearings, there does not appear to be a need to establish a three member tribunal which would merely increase the overall costs of the hearing.

> **Recommendation 191.** When reviewing access decisions under the Act, the external tribunal should be constituted by a single presidential member.

Costs of Tribunal hearings

22.29 A number of submissions raised the issue of the cost of AAT hearings. The fee for making an application to the AAT is now $500. The fee may be waived by the AAT in certain circumstances.[dccxlix]

> As yet the AAT has not been able to detect a trend in rates of application in Archives Act matters that suggests any link between the increase in fee and decrease in enthusiasm for application. Generally speaking it is likely that application fees <u>do</u> discourage applications. However the fee may discourage frivolous and trivial applications while the fee waiver provisions should ensure that those with genuinely meritorious cases will be able to pursue their rights of review.[dccl]

22.30 In DRP 4 the Commission made no comment on the cost of external review, but it did suggest that the existing provisions giving the AAT a general power to waive an applicant's fee remain in place. This is an important safeguard for

applicants who should have the opportunity to approach the AAT but who are unable to afford the expense.

> **Recommendation 192.** The external tribunal's power to waive the applicant's fee to the tribunal for applications relating to the archives legislation should be retained.

Preliminary conferences

22.31 Evidence to the Commission has shown that a large number of records have been released prior to and during AAT hearings, thus reducing the number of records ultimately at issue in those proceedings. Preliminary conferences, an essential part of AAT procedures, have helped to resolve a number of disputes. Submissions largely supported the use of preliminary conferences, with some suggesting that wider use be made of other informal consultation mechanisms between parties.

22.32 A number of submissions suggested that preliminary conferences should also be held at the internal review level to reduce the need for more costly appeals.[dccli] The Commission is concerned, however, that the introduction of an additional formal conference mechanism might merely duplicate the existing procedures of the external tribunal and be unlikely to reduce costs for agencies or applicants. In DRP 4 the Commission proposed that formal requirements for preliminary conferences be limited to the procedures for merits review by an external tribunal.

22.33 While noting its view that preliminary conference requirements at the internal review level are not necessary, the AAT nevertheless expressed a strong preference for internal review procedures to involve personal contact with the applicant.

> Such contact is desirable as a means of clarifying issues, enhancing communication and encouraging early resolution of disputes. As noted in the AAT's previous submission to the Review, such contact currently does not take place until the parties meet at the preliminary conference stage of the AAT review process. Earlier contact may well assist in the resolution of some matters prior to application to the external tribunal.[dcclii]

The AAT's concern to encourage personal contact at an earlier stage is also reflected in the Commission's recommendations relating to increased communication with applicants at the initial decision making level.[dccliii] However, the Commission remains reluctant to suggest the introduction of an express legislative requirement

for mandatory meetings between agencies and applicants at the initial or even internal review level. In some cases, due to circumstances of time and geography, contact beyond telephone and written communication may be difficult. The Commission agrees, however, that personal contact should be encouraged wherever possible, and considers this to be an appropriate issue for addressing in guidelines for internal review procedures.

Recommendation 193. Formal use of preliminary conferences should be limited to merits review by an external tribunal.

Responsibility for review decisions

Establishing primary responsibility

22.34 Under the existing Act, all access decisions are formally made by Australian Archives. Thus Australian Archives makes all internal review decisions and is the respondent to any review by the AAT. However, in practice, interested agencies have a substantial influence over the internal review decisions made by Australian Archives. In the light of the Commission's recommendations relating to responsibility for making initial access decisions,[dccliv] consideration must be given to how the formalised decision making role of the agencies should be reflected in the new legislation.

22.35 The most logical option would be to give responsibility for internal review decisions to the agency which took responsibility for the initial access decision.[dcclv] It would also follow that the agency which undertook internal review should then be the respondent to any further action before the external tribunal. This option was favoured by a number of submissions.[dcclvi] It would reflect the realities of access decision making and ensure that the real decision makers were responsible at all levels for their decisions.

22.36 Against this, it might be said that, in those cases where the decision maker was not the NAA, the value of the NAA's extensive experience would be lost and the risk of inconsistent decision making between agencies would increase. In this context, cases were cited in which Australian Archives has been instrumental in achieving the reassessment of some of the more conservative access decisions recommended by

other agencies and the communication of understandable reasons for exemptions to applicants. It has also been suggested that the NAA could provide a more independent investigation of the decision and make suggestions for change where appropriate.[dcclvii]

22.37 The Commission is not convinced, however, of the need for the NAA to be involved in all reviews of decisions to refuse access. Where an agency seeks to take responsibility for making access decisions and enters into an agreement with the NAA to enable it to do so, that agency should assume the responsibility for reviewing the decision and defending it before an external tribunal. The agency could be expected to quickly gain familiarity with the process and, with guidance from the NAA, establish a pattern of consistent, well argued, review decisions.

22.38 The allocation of responsibility for review decisions to the initial decision maker was generally supported in submissions to DRP 4. Australian Archives, while not in favour of giving other agencies the power to make access decisions, agreed that, if such power were to be given, the same agency should be responsible for review decisions and procedures.[dcclviii]

22.39 The AAT was concerned to ensure that responsibility should be made clear, both to the relevant agencies and to applicants.[dcclix] The Commission considers that its recommendations relating to access decision making responsibility, including NAA responsibility in the absence of an access agreement, the need to establish access agreements as legislative instruments, and the need for initial decision makers to directly notify the applicants of decisions, would ensure that responsibility for access decisions and their review was clearly defined.

> **Recommendation 194.** The responsibility for reviewing a decision to refuse access should lie with the agency which has responsibility for making the initial access decision, whether this is the NAA or another agency acting in accordance with an access agreement.

Joining respondents to external tribunal proceedings

22.40 A number of submissions raised the possibility of joining parties to external review proceedings in order to better represent agency interests in access decisions.[dcclx] It is likely that many of these concerns would be assuaged if the

Commission's recommendations to share responsibility for access decision making were adopted. However, there may be situations in which the NAA, with an overarching role in access policy, might wish to participate in external review proceedings in particular cases. In DRP 4 the Commission proposed that the NAA should be able to approach the tribunal directly to seek being joined to proceedings under the archives legislation where the access decision of another agency is in issue.

22.41 The Department of Defence considered that joining the NAA to proceedings would be both inappropriate and unnecessary.[dcclxi] The Department's first concern was that the NAA might appear in proceedings with an interest seen to conflict with the decision making agency, a result which the Department considered to be inappropriate in a public forum. Secondly, it considered that any conflict could be overcome through consultation and cooperation, making formal joining of parties unnecessary.

22.42 While the Commission agrees that, in those exceptional cases where the NAA might disagree with a decision of an agency, the appropriate course would be to seek to resolve their differences at the review level, there may, nevertheless, be important cases in which agreement cannot be reached. In such exceptional cases, the Commission believes that the NAA should be entitled to intervene where it believes that the decision might have important access implications extending beyond the particular decision. Bearing in mind the NAA's responsibility for achieving the objectives of the archives legislation, it ought to have the right to approach the tribunal on its own motion to seek to be heard on this issue. The AAT supported the Commission's draft recommendations in this regard on the basis of the specialist interest and expertise of the archival body.[dcclxii]

> **Recommendation 195.** The legislation should expressly recognise the interest which the NAA has in external review proceedings relating to access decisions under the legislation. The reviewing tribunal should have the discretion to join the NAA to the proceedings and the NAA should have the right to approach the tribunal for that purpose on its own motion.

Other formal avenues of review

22.43 Another element in the review of access decisions is the ability to seek assistance from the Ombudsman or to seek judicial review by the Federal Court under the ADJR Act. There is also a right of appeal to the Federal Court from an AAT decision on a question of law.

22.44 Only five complaints have been lodged with the Ombudsman relating to the operation of the Archives Act. Three of them were lodged by the same applicant and all five related to the handling of access applications. Despite this low level of complaint, review by the Ombudsman remains an important aspect of the administrative review scheme and it was opposed by only one submission.[dcclxiii]

22.45 The Federal Court may hear matters relating to the Archives Act in two ways. The first is on appeal from a decision of the AAT on a matter of law. A small number of access related applications have been made to the Federal Court, but all were withdrawn or dismissed on procedural grounds without a hearing of the substantive issues. This does not, however, indicate that the right to appeal to the Court should be removed. In the Commission's view, the right of appeal on a question of law should remain a fundamental part of the system of administrative review of access decisions through an external merits review tribunal.

22.46 The other method of making an application to the Federal Court is under the provisions of the ADJR Act. This Act provides for judicial review of administrative decisions on certain specified grounds. Unlike the Archives Act and review by the AAT, the ADJR Act places no limitation on the kinds of decisions which may be reviewed. While review under this Act is more difficult and expensive to conduct than review by the AAT, it remains an important alternative for seeking review of a wider range of administrative decisions where the relevant grounds are thought to exist.

Recommendation 196. The right to make a complaint to the Ombudsman should be maintained.

Recommendation 197. The ability to seek judicial review of decisions by the Federal Court under the ADJR Act or on appeal from the external merits review tribunal on a question of law should be maintained.

ENDNOTES

22. Review of decisions

Introduction

22.1 The existing mechanisms for reviewing access decisions are similar to those in the FOI Act. They were the most strongly supported part of the current access regime, with few suggestions for change made in the submissions. The Commission supports the retention of the basic review structure.

Internal review

Maintaining internal review procedures

22.2 Internal review is used here and in many other jurisdictions as the first step in reviewing administrative decisions. In some cases this review is based on administrative authority and in others it has a statutory basis. The latter generally ensures that the rights of the applicant are enforceable and the process better defined.[dcclxiv]

22.3 Section 42 of the Archives Act establishes a statutory internal review process for access decisions which, with one exception, is compulsory before any further review can be sought.[dcclxv] Each access decision is formally made by Australian Archives, although if the responsible agency has a particular view on the decision, that view will ordinarily be taken into consideration.[dcclxvi] If the applicant is not notified of a decision within 14 days, section 43(3) permits the applicant to seek review by the AAT.

22.4 In DRP 4, the Commission suggested that internal review be generally maintained. None of the submissions, in response either to IP 19 or DRP 4, recommended the removal of internal review and a range of compelling reasons were suggested for its retention.

> [Internal review] should be seen as another level of full merits review, with many features of external review. It must be timely; it must be of no or low cost to the applicant; internal review officers must

> in fact be independent of the primary decision-making process, and impartial in the way they conduct their reviews, as well as being seen to be such; and internal review decisions must be based on adequate fact finding (preferably involving personal contact with the applicant) ... In the AAT's view, if these conditions are met, internal review can and will make a valuable contribution to the effectiveness and efficiency of the system of Archives Act review and appeals.[dcclxvii]

Internal review provides an opportunity to revisit a decision and for senior managers to monitor, and where appropriate improve, decision making in their agencies. It provides a cost effective review option for both the applicant and the agency, and keeps the number of appeals to the AAT to a minimum.[dcclxviii] Australian Archives' statistics confirm the success of internal reconsideration as a form of review. Figures for the years from 1994–95 to 1996–97 show that more than 80% of decisions subject to internal review were wholly or partially reversed.[dcclxix]

22.5 In DRP 4, the Commission proposed that internal review should not be a mandatory prerequisite to external review, in particular in cases where there was a deemed refusal of access on the expiration of 90 days after the making of the original application. This proposal took account of views expressed in a number of submissions in response to IP 19 suggesting that an applicant should have the option of appealing directly to an external tribunal.[dcclxx] There was also support for retaining internal review as a mandatory prelude to external review, some also emphasising the desirability of exhausting all cost effective options before proceeding to external review.[dcclxxi]

22.6 While there is no doubt that internal review serves a very useful purpose, it does not necessarily follow that direct access to external review should generally be excluded. Indeed, it is the Commission's view that the usefulness of internal review would be reinforced rather than weakened if the legislation were to recognise that in some cases the level of contest between the parties may be such that the interests of all would be best served by the applicant having direct access to external review. The Commission is satisfied that the significant cost difference for the applicant between internal review and tribunal proceedings would be sufficient to ensure that this option was not used inappropriately.

22.7 At present, the legislation recognises one situation where the right of appeal is directly to the external tribunal. This is in the case of a deemed decision under section 40(8) to refuse access where a decision has not been made within 90 days. No opposition was raised to the Commission's proposal in DRP 4 that this right of direct appeal be reaffirmed.

22.8 The Commission noted in DRP 4 that some uncertainty currently exists as to whether internal review of a ministerial conclusive certificate is technically necessary under the Act before an appeal regarding the reasonableness of the exemption claim can be made to the AAT. Clearly, internal review is meaningless in such circumstances and its exclusion from the process should be made clear in the legislation. No objection was raised to the Commission's proposal in DRP 4 that this be clarified.

Recommendation 184. Internal review procedures should be maintained as the first stage of a statutory right of review but should not be a mandatory prerequisite to external review of a decision to refuse access. An applicant should have the ability to appeal directly to the external tribunal.

Recommendation 185. The legislation should reaffirm that an appeal lies to the external tribunal, without internal review, where there is a deemed decision to refuse access after 90 days have elapsed since the original application.

Recommendation 186. Where records are subject to a ministerial conclusive certificate the legislation should clarify that the only review option available is appeal directly to the external tribunal.

Time limitations on internal review decisions

22.9 Under section 43(3) of the Act, an applicant who has not been notified of a decision on an internal review application within 14 days is entitled to make an application for review by the AAT. A large number of submissions supported the extension of the period of notification for internal review decisions, on the basis that 14 days is too short a period in which to effect a genuine review of a decision, particularly in cases where external consultation is required.[dcclxxii]

22.10 The Commission notes that 30 days is allowed for internal review under the FOI Act.[dcclxxiii] This seems to the Commission to be a more realistic time frame for similar decisions under the archives legislation. No submissions opposed the proposal made in DRP 4 for extension of this period to 30 days. The Commission favours retention of the existing obligation in section 42(2)(b) of the Archives Act to notify the applicant of a decision as soon as possible.

Recommendation 187. The statutory period of notification for internal review decisions should be extended from 14 to 30 days, with the retention of an obligation to notify the applicant of a decision as soon as possible.

Standards for internal review

22.11 In its submission in response to DRP 4, the AAT suggested the establishment of standards for the conduct of internal review.[dcclxxiv] This suggestion was based on the AAT's view of the 'importance of internal review to the overall decision making and review process' and the desire to ensure a consistently high standard of internal review — an issue of importance given the Commission's recommendation that a significant level of access decision making should be undertaken by agencies other than the NAA.[dcclxxv]

> Some of these agencies may not have established structures for internal review. Minimum standards would be particularly valuable in ensuring that internal review of access decisions is of a consistently high standard across agencies.[dcclxxvi]

22.12 The Commission agrees that, particularly in the proposed new environment, some attempt should be made to achieve uniformity. However, at this stage the Commission is unsure whether formal standards would be necessary in order to enforce uniform procedures. Instead, it favours the formulation of guidelines to provide assistance to agencies undertaking internal review. These guidelines would benefit agencies taking on internal review responsibilities for the first time, and assist all agencies on an ongoing basis by making known the latest developments in the interpretation of exemptions and in rulings on procedural matters. The NAA should have responsibility for establishing such guidelines in consultation with reviewing agencies.

22.13 The Commission notes also in this regard that the Administrative Review Council has commenced an examination of internal review procedures with the aim of developing a best practice guide for Commonwealth internal review. The project is currently in its preliminary stages, with a pilot study of internal review systems to be conducted in five agencies.[dcclxxvii] This project should assist in the further development of an understanding of internal review procedures by agencies and the need for consistency across the full spectrum of review.

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Charging for internal review

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22.27 The AAT contends that it, or its successor the ART, should have complete discretion in relation to the constitution of review tribunals for all archives matters.

> This will enable applications for review to be dealt with as speedily and economically as possible, while retaining the provision for multi-member tribunals to be constituted, when appropriate, to review highly sensitive applications.[dccxcviii]

22.28 Given the experience of the AAT in archives cases since 1984, the Commission believes that, in the vast majority of cases, a hearing could be appropriately dealt with by a single presidential member of the Tribunal. All archives cases involve records claimed to be sensitive. While cases involving security and intelligence records may require particular rules to protect records and witnesses involved in hearings, there does not appear to be a need to establish a three member tribunal which would merely increase the overall costs of the hearing.

> **Recommendation 191.** When reviewing access decisions under the Act, the external tribunal should be constituted by a single presidential member.

Costs of Tribunal hearings

22.29 A number of submissions raised the issue of the cost of AAT hearings. The fee for making an application to the AAT is now $500. The fee may be waived by the AAT in certain circumstances.[dccxcix]

> As yet the AAT has not been able to detect a trend in rates of application in Archives Act matters that suggests any link between the increase in fee and decrease in enthusiasm for application. Generally speaking it is likely that application fees <u>do</u> discourage applications. However the fee may discourage frivolous and trivial applications while the fee waiver provisions should ensure that those with genuinely meritorious cases will be able to pursue their rights of review.[dccc]

22.30 In DRP 4 the Commission made no comment on the cost of external review, but it did suggest that the existing provisions giving the AAT a general power to waive an applicant's fee remain in place. This is an important safeguard for

applicants who should have the opportunity to approach the AAT but who are unable to afford the expense.

> **Recommendation 192.** The external tribunal's power to waive the applicant's fee to the tribunal for applications relating to the archives legislation should be retained.

Preliminary conferences

22.31 Evidence to the Commission has shown that a large number of records have been released prior to and during AAT hearings, thus reducing the number of records ultimately at issue in those proceedings. Preliminary conferences, an essential part of AAT procedures, have helped to resolve a number of disputes. Submissions largely supported the use of preliminary conferences, with some suggesting that wider use be made of other informal consultation mechanisms between parties.

22.32 A number of submissions suggested that preliminary conferences should also be held at the internal review level to reduce the need for more costly appeals.[dccci] The Commission is concerned, however, that the introduction of an additional formal conference mechanism might merely duplicate the existing procedures of the external tribunal and be unlikely to reduce costs for agencies or applicants. In DRP 4 the Commission proposed that formal requirements for preliminary conferences be limited to the procedures for merits review by an external tribunal.

22.33 While noting its view that preliminary conference requirements at the internal review level are not necessary, the AAT nevertheless expressed a strong preference for internal review procedures to involve personal contact with the applicant.

> Such contact is desirable as a means of clarifying issues, enhancing communication and encouraging early resolution of disputes. As noted in the AAT's previous submission to the Review, such contact currently does not take place until the parties meet at the preliminary conference stage of the AAT review process. Earlier contact may well assist in the resolution of some matters prior to application to the external tribunal.[dcccii]

The AAT's concern to encourage personal contact at an earlier stage is also reflected in the Commission's recommendations relating to increased communication with applicants at the initial decision making level.[dccciii] However, the Commission remains reluctant to suggest the introduction of an express legislative requirement

for mandatory meetings between agencies and applicants at the initial or even internal review level. In some cases, due to circumstances of time and geography, contact beyond telephone and written communication may be difficult. The Commission agrees, however, that personal contact should be encouraged wherever possible, and considers this to be an appropriate issue for addressing in guidelines for internal review procedures.

Recommendation 193. Formal use of preliminary conferences should be limited to merits review by an external tribunal.

Responsibility for review decisions

Establishing primary responsibility

22.34 Under the existing Act, all access decisions are formally made by Australian Archives. Thus Australian Archives makes all internal review decisions and is the respondent to any review by the AAT. However, in practice, interested agencies have a substantial influence over the internal review decisions made by Australian Archives. In the light of the Commission's recommendations relating to responsibility for making initial access decisions,[dcccIV] consideration must be given to how the formalised decision making role of the agencies should be reflected in the new legislation.

22.35 The most logical option would be to give responsibility for internal review decisions to the agency which took responsibility for the initial access decision.[dcccV] It would also follow that the agency which undertook internal review should then be the respondent to any further action before the external tribunal. This option was favoured by a number of submissions.[dcccVI] It would reflect the realities of access decision making and ensure that the real decision makers were responsible at all levels for their decisions.

22.36 Against this, it might be said that, in those cases where the decision maker was not the NAA, the value of the NAA's extensive experience would be lost and the risk of inconsistent decision making between agencies would increase. In this context, cases were cited in which Australian Archives has been instrumental in achieving the reassessment of some of the more conservative access decisions recommended by

other agencies and the communication of understandable reasons for exemptions to applicants. It has also been suggested that the NAA could provide a more independent investigation of the decision and make suggestions for change where appropriate.[dcccvii]

22.37 The Commission is not convinced, however, of the need for the NAA to be involved in all reviews of decisions to refuse access. Where an agency seeks to take responsibility for making access decisions and enters into an agreement with the NAA to enable it to do so, that agency should assume the responsibility for reviewing the decision and defending it before an external tribunal. The agency could be expected to quickly gain familiarity with the process and, with guidance from the NAA, establish a pattern of consistent, well argued, review decisions.

22.38 The allocation of responsibility for review decisions to the initial decision maker was generally supported in submissions to DRP 4. Australian Archives, while not in favour of giving other agencies the power to make access decisions, agreed that, if such power were to be given, the same agency should be responsible for review decisions and procedures.[dcccviii]

22.39 The AAT was concerned to ensure that responsibility should be made clear, both to the relevant agencies and to applicants.[dcccix] The Commission considers that its recommendations relating to access decision making responsibility, including NAA responsibility in the absence of an access agreement, the need to establish access agreements as legislative instruments, and the need for initial decision makers to directly notify the applicants of decisions, would ensure that responsibility for access decisions and their review was clearly defined.

> **Recommendation 194.** The responsibility for reviewing a decision to refuse access should lie with the agency which has responsibility for making the initial access decision, whether this is the NAA or another agency acting in accordance with an access agreement.

Joining respondents to external tribunal proceedings

22.40 A number of submissions raised the possibility of joining parties to external review proceedings in order to better represent agency interests in access decisions.[dcccx] It is likely that many of these concerns would be assuaged if the

Commission's recommendations to share responsibility for access decision making were adopted. However, there may be situations in which the NAA, with an overarching role in access policy, might wish to participate in external review proceedings in particular cases. In DRP 4 the Commission proposed that the NAA should be able to approach the tribunal directly to seek being joined to proceedings under the archives legislation where the access decision of another agency is in issue.

22.41 The Department of Defence considered that joining the NAA to proceedings would be both inappropriate and unnecessary.[dcccxi] The Department's first concern was that the NAA might appear in proceedings with an interest seen to conflict with the decision making agency, a result which the Department considered to be inappropriate in a public forum. Secondly, it considered that any conflict could be overcome through consultation and cooperation, making formal joining of parties unnecessary.

22.42 While the Commission agrees that, in those exceptional cases where the NAA might disagree with a decision of an agency, the appropriate course would be to seek to resolve their differences at the review level, there may, nevertheless, be important cases in which agreement cannot be reached. In such exceptional cases, the Commission believes that the NAA should be entitled to intervene where it believes that the decision might have important access implications extending beyond the particular decision. Bearing in mind the NAA's responsibility for achieving the objectives of the archives legislation, it ought to have the right to approach the tribunal on its own motion to seek to be heard on this issue. The AAT supported the Commission's draft recommendations in this regard on the basis of the specialist interest and expertise of the archival body.[dcccxii]

> **Recommendation 195.** The legislation should expressly recognise the interest which the NAA has in external review proceedings relating to access decisions under the legislation. The reviewing tribunal should have the discretion to join the NAA to the proceedings and the NAA should have the right to approach the tribunal for that purpose on its own motion.

Other formal avenues of review

22.43 Another element in the review of access decisions is the ability to seek assistance from the Ombudsman or to seek judicial review by the Federal Court under the ADJR Act. There is also a right of appeal to the Federal Court from an AAT decision on a question of law.

22.44 Only five complaints have been lodged with the Ombudsman relating to the operation of the Archives Act. Three of them were lodged by the same applicant and all five related to the handling of access applications. Despite this low level of complaint, review by the Ombudsman remains an important aspect of the administrative review scheme and it was opposed by only one submission.[dcccxiii]

22.45 The Federal Court may hear matters relating to the Archives Act in two ways. The first is on appeal from a decision of the AAT on a matter of law. A small number of access related applications have been made to the Federal Court, but all were withdrawn or dismissed on procedural grounds without a hearing of the substantive issues. This does not, however, indicate that the right to appeal to the Court should be removed. In the Commission's view, the right of appeal on a question of law should remain a fundamental part of the system of administrative review of access decisions through an external merits review tribunal.

22.46 The other method of making an application to the Federal Court is under the provisions of the ADJR Act. This Act provides for judicial review of administrative decisions on certain specified grounds. Unlike the Archives Act and review by the AAT, the ADJR Act places no limitation on the kinds of decisions which may be reviewed. While review under this Act is more difficult and expensive to conduct than review by the AAT, it remains an important alternative for seeking review of a wider range of administrative decisions where the relevant grounds are thought to exist.

Recommendation 196. The right to make a complaint to the Ombudsman should be maintained.

Recommendation 197. The ability to seek judicial review of decisions by the Federal Court under the ADJR Act or on appeal from the external merits review tribunal on a question of law should be maintained.

ENDNOTES

Part G

Other significant matters

23. Records of the Parliament, the courts and royal commissions

Present arrangements for the records of the Parliament

23.1 The records of the Parliament are Commonwealth records as defined in the Act. However, the effect of sections 18 and 20 is that Division 2 (which includes the disposal and custody provisions) and Division 3 (the access provisions) do not apply to records in the possession of the Senate, the House of Representatives or a Parliamentary department unless regulations are made to that effect. Such regulations can only be made after consultation between the Minister, the President of the Senate and the Speaker of the House of Representatives.

23.2 Divisions 4 and 5 of the Act (which deal principally with the review of access decisions, special and accelerated access and defamation protection) apply automatically to Parliamentary records. However, Division 4 is, in effect, inoperative unless the records are made subject by regulation to the access provisions in Division 3.

23.3 The need for specific provisions relating to the Parliament and the courts was questioned by the Senate Standing Committee on Constitutional and Legal Affairs during its consideration of the Archives Bill in 1978–79.

> The purpose of the Archives Bill is to guarantee that our national history can be both preserved and reconstructed. This guarantee must exist with respect to the operation of the Head of State, of the Legislature and of the Judiciary, much as it exists in relation to the operation of departments. We are not dealing in the Archives Bill with contemporary access to records,where there may exist special reasons for allowing organs of the State like the Legislature and the Judiciary to regulate access. Rather we are dealing with access to records that are thirty years of age. To argue that the Legislature and the courts should regulate access to their own documents is to disguise the fact that at the time access is desired the particular legislature or court that would decide upon access is constituted quite differently to that of the time at which the document was created; it is a fiction to suppose that the institution still has some association with, or understanding of, the records that a trained and professional archivist would not have.[dcccxiv]

23.4 The Committee recommended that no category of records should be excluded from the 'open access' provisions of the Bill. Nevertheless, the special provisions relating to the Parliament and the courts were retained in the legislation. The Explanatory Memorandum for the Archives Bill issued in 1983, in commenting on the proposal that application of Divisions 2 and 3 of the Archives Act be effected as appropriate by regulation, stated

> The use of regulations arises from the need to ensure that the ways in which the provisions of Divisions 2 and 3 are applied to records of the Parliament and of the Courts are such as properly give effect to the relationships which exist between the Executive Government and the Parliament and the Courts.

23.5 The Archives (Records of the Parliament) Regulations were made on 11May 1995. The object of the regulations is to

> provide for the preservation, management and use of the records of the Parliament in a manner that reflects:
> (a) the position of the Parliament within the Commonwealth; and
> (b) the special recognition and treatment that should be given to particular records of the Parliament; and
> (c) the different powers and functions of the Parliament and the Executive Government of the Commonwealth.[dcccxv]

The regulations divide the records of the Parliament into two categories, identified as Class A records and Class B records.

23.6 In summary, Class A records consist of

- the records of the proceedings of the Senate and the House of Representatives
- records laid before or tabled in the Senate or House of Representatives
- records presented to a Parliamentary committee in camera or on a confidential or restricted basis and which have not been authorised to be published
- records prepared by a Parliamentary department and which relate to records presented to a Parliamentary committee.

Class B records comprise all records in the possession of the Senate, the House of Representatives or a Parliamentary department which are not Class A records.

23.7 Class A records are those over which the Parliament essentially retains effective control. They are subject to the Act's basic obligations in relation to disposal (section 24(1)) and alteration (section 26(1)), although dealings with records under

those provisions may be authorised by the Presiding Officers or by resolution of the Senate. The application to Class A records of section 27 (transfer of records to archival custody), section 28 (access to the records by Australian Archives) and section 29 (withholding records from archival custody) is at the discretion of the Presiding Officers. Class A records are exempt records under section 33, so that any public release of them is purely discretionary.

23.8 Class B records are subject to the main statutory obligations of the Act, although the regulations modify the way in which some of the provisions operate. For example, the disposal of a Class B record may take place in accordance with a Parliamentary practice, while a record over 25 years old may be altered with the permission of a Presiding Officer. Class B records are, however, subject to mandatory transfer to archival custody and to the public access and appeal provisions.

23.9 Since the regulations were made, Australian Archives, in consultation with officers of the Parliament, has issued records disposal authorities for the records of the Senate and the House of Representatives. Australian Archives has custody of a substantial volume of records of the Parliament.

Present arrangements for the records of the Commonwealth courts

23.10 The records of the Commonwealth courts are Commonwealth records as defined in the Act. However, section 19 provides that, subject to sections 20 and 21, Divisions 2 and 3 do not apply to records in the possession of a court or of the registry of a court. Under section 20(1) regulations may be made to bring court records under some or all of the provisions of Divisions 2 and 3. Section 20(3) provides that such regulations can only be made after consultation between the minister and the Chief Justice, Chief Judge or the judicial officer with principal responsibility for the administration of the court concerned.

23.11 Section 19(2) provides that Divisions 4 and 5 of the Act do not apply to records in the possession of a court, other than records that are of an administrative nature. This means that, even if court records are brought by regulation under the public access provisions in Division 3, it would not be possible to appeal against a decision to exempt records from public access unless the records concerned were administrative records.

23.12 No regulations under section 20 have ever been made in relation to court records. Australian Archives has worked with the Commonwealth courts to develop records disposal authorities and to take many of the courts' older records into its custody. Records disposal authorities have been completed for the High Court and the Federal Court and the authority for the Family Court is close to completion. The courts can also make use of the General Disposal Authorities. The authorities are not legally binding on the courts until such time as they are regulated into Division 3. However, their existence means that in practice the courts are adhering to a records disposal regime consistent with that applied to other Commonwealth records.

23.13 The High Court is the only Commonwealth court with significant volumes of records of archival value which have reached the open access period. These have been made available for public access at Australian Archives' Canberra office subject to the withholding of any material the High Court has considered unsuitable for release.

Simplifying arrangements for the records of the Parliament and the Commonwealth courts

23.14 The Commission asked in IP 19 whether the new archival authority should have a role in the custody and disposal of the records of the Parliament and the Commonwealth courts and, if so, whether that role would be affected by the authority becoming an independent statutory authority. Few submissions addressed this issue in detail. The agencies immediately involved broadly supported a continuation of the present arrangements, as did Australian Archives. A small number of submissions suggested that the records of the Parliament should be brought fully into the general provisions of the legislation, particularly if the NAA became a statutory authority.

23.15 The Clerk of the Senate suggested that the present regime should be maintained.

> It is the strong view of the Department of the Senate that the Houses will need to retain exclusive control over the records of their proceedings and records presented to them and their committees, including records presented in camera or on a restricted or confidential basis. The Houses would continue to require the exemption of Class A records from mandatory public access provisions and to have the final say on such access. It should be noted that most documents in Class A are already public documents: the practical effect of the exemption is to ensure that the Houses retain full control of those records and documents and retain the authority to determine when access is granted to

confidential material, usually in camera evidence to committees, in the possession of the Houses. The department would be willing to comply with any mandatory public access provisions in respect of Class B records.

Standing order 44 requires that the custody of the records of the Senate and of all documents presented to the Senate shall be in the Clerk, and that the records of the Senate are kept physically on the premises. The department would wish to see those arrangements continue. As is now the case, the department would welcome Archives' input and assistance in the proper maintenance of its records. It may also be willing to accept mandatory standards in respect of such maintenance.[dcccxvi]

23.16 The Clerk of the Senate also suggested that

... if a national archival authority is to have a role in respect of the records of the parliamentary and judicial arms of government, as well as the executive arm of government, it should be constituted as a separate independent authority. An independent statutory authority would be answerable to its clients and the Parliament rather than the executive government. Its actions would have greater transparency and public accountability and it would be less likely to be influenced by particular requirements of the executive of the day.[dcccxvii]

23.17 The case for change was put by Matthew Gordon-Clark.

The division of powers is one of the hallmarks of the Westminster system of government and acts as a check on the exercise of power by the executive arm of government. As a result any move to bring the judicial and parliamentary arms of government under the authority of the national archives can only be considered if the national archival authority is constituted as a separate statutory authority ...

That said, it is inappropriate for two such vital sections of government to operate records management and disposal programs, handling vital national records, independent of professional guidance and control. I would support, in the strongest terms, the extension of the authority of the national archival authority to cover the judicial and parliamentary arms of government dependent on the national archives being constituted as a separate statutory authority.[dcccxviii]

23.18 The Commission suggested in DRP 4 that the records of the Parliament and the Commonwealth courts are a vital part of the record of the Commonwealth and endorsed the principle that these records should be subject to the legislation to the maximum extent possible consistent with maintaining the separation of the legislative, judicial and executive functions.

23.19 The Commission noted that the present Act recognises the basic principle that the records of the Parliament and the courts are Commonwealth records, but leaves many of the most significant provisions of the legislation to be implemented by regulation. In view of the facts that the Act has now been in operation for 13years, that regulations have been made for the records of the Parliament and that Australian Archives has developed an extensive working relationship with the Parliament and

the courts, the Commission also suggested that it was now appropriate for provisions relating to these institutions to be included in the legislation itself rather than in regulations.

23.20 Responses to DRP 4 generally supported the Commission's suggestions, although one submission proposed, as an alternative, the establishment of a separate Parliamentary Archives which would not be subject to the legislation.[dcccxix] In response to the Commission's suggestion that provisions for the records of the Parliament and the courts be included in the legislation itself rather than in regulations, the Clerk of the Senate stated that, while he did not have a strong view on the matter, he preferred on balance to retain the status quo because it appeared to be working well.[dcccxx] Australian Archives supported the inclusion of these provisions in the legislation, but noted that this would be 'a challenge for the drafting process'.[dcccxxi] The Commission maintains its preference for including the provisions in the legislation, if it is feasible to do so.

Recommendation 198. The records of the Parliament and the Commonwealth courts should be subject to the new legislation to the maximum extent possible consistent with maintaining the separation of the legislative, judicial and executive functions.

Recommendation 199. The provisions relating to the Parliament and the Commonwealth courts should be included in the legislation itself rather than in regulations.

Distinguishing between the core and secondary records of the Parliament and the courts

23.21 The Commission suggested in DRP 4 that it is not appropriate to treat all records of the Parliament and the courts in the same way. The Commission noted that the need for some degree of differentiation is recognised in the distinction between Class A and Class B records in the regulations dealing with the records of the Parliament[dcccxxii] and in the section 19(2) wording 'records in the possession of a court or of a registry of a court' and 'records that are of an administrative nature.' In both cases these provisions seek to distinguish between records which are

fundamental to the independent authority of the Parliament and the courts and those which support their functions.

23.22 The Commission suggested in DRP 4 that these distinctions should be maintained and included in the legislation itself, but that an attempt should be made to simplify the quite complex existing definition of Class A records. One submission questioned the need for the Class A/B distinction,[dcccxxiii] but in general responses to DRP 4 endorsed the Commission's recommendations.

> **Recommendation 200.** The present distinction between Class A and Class B records of the Parliament should be maintained and set out as concisely as possible in the legislation rather than in regulations.
>
> **Recommendation 201.** The present distinction between the judicial and administrative records of the courts should be maintained and set out in the legislation.

Creating, maintaining and disposing of the records of the Parliament and the courts

23.23 The Commission suggested in DRP 4 that the Parliament and the courts should be subject to the mandatory standards issued by the NAA for the creation and maintenance of records, provided that the NAA was required to consult with the institution concerned and to issue guidelines which address its particular circumstances. Submissions supported this recommendation.

23.24 The Commission suggested in DRP 4 that the Parliament and the courts should be subject generally to the custodial provisions of the legislation, but that Presiding Officers and Chief Justices should have a right to issue determinations that Class A records of the Parliament and judicial records of the courts respectively would not be required to be transferred to the custody of the NAA. The Clerk of the Senate has suggested, however

> ... that the legislation specifically reflect the current situation, which is that Class A records of each House remain in the permanent custody and control of each House, but with provisions for transfer to and access by the NAA as currently set out in sections 27 and 28 of the schedule to regulation 5.

> That is, the Department considers that rather than the Presiding Officers being enabled to determine exemptions in respect of Class A records, all Class A records should be exempt from NAA custody under the legislation, but with provision for custody to be transferred or for access to be granted to the NAA in accordance with sections 27 and 28.[dcccxxiv]

23.25 The Clerk of the Senate's suggestion is in accordance with the basic principle adopted by the Commission that the Parliament should have the ultimate authority over Class A records. The issue is merely whether Class A records should be subject to the custody provisions of the legislation unless the Parliament determines otherwise or whether the provision should be reversed so that Class A records are only subject to the custodial provisions if the Parliament so determines in specific cases. The Commission's preference remains for the first option as emphasising more strongly that all Commonwealth records should be subject to the main provisions of the legislation to the maximum extent appropriate.

23.26 Final authority for the disposal of the Class A records of the Parliament and the judicial records of the courts should reside with the institutions concerned. However, each institution should be required to consult the NAA before disposing of records. In practice this should entail a continuation of the current practice whereby the institution and Australian Archives cooperatively develop non-mandatory records disposal authorities. The Class B records of the Parliament and the administrative records of the courts should be subject to the normal disposal provisions of the legislation.

Recommendation 202. The Parliament and the courts should be required to adhere to recordkeeping standards issued by the NAA after consultation with the institution concerned.

Recommendation 203. The Parliament and the courts should be subject to the custodial provisions of the legislation. However, the relevant Presiding Officer or Chief Justice should be able to determine that Class A records of the Parliament or judicial records of the courts should not be required to be transferred to the custody of the NAA.

Recommendation 204. The Parliament should continue to have the right to dispose of Class A records as it sees fit, provided that it first consults with the NAA. Disposal of Class B records should require the approval of the NAA.

Recommendation 205. The courts should continue to have the right to dispose of their judicial records as they see fit, provided that they first consult with the NAA. Disposal of the administrative records of the Courts should require the approval of the NAA.

Accessing the records of the Parliament and the courts

23.27 The Commission suggested in DRP 4 that the Class A records of the Parliament and the judicial records of the courts should not be subject to a mandatory public access regime. Decisions about the suitability of such records for public release should be made instead by resolution of the relevant House of the Parliament or by the Chief Justice of the relevant court. Such decisions would not be appealable. This recommendation was supported in responses to DRP 4.

23.28 The Commission suggested in DRP 4 that if the Class A records of the Parliament and the judicial records of the courts were not to be subject to a statutory right of access, the legislation should require those responsible for them to ensure that their public access status was determined once they reached the open access period. In response to this suggestion the Clerk of the Senate noted that it would be unusual for a statute to bind the Houses of the Parliament or their Presiding Officers to perform a specific function. He suggested that these objectives should be achieved by administrative means rather than by statute. The Commission accepts this suggestion and accordingly proposes that the Houses of the Parliament and their Presiding Officers should have regard to the desirability of determining the public access status of Class A records when they reach the open access period. Judicial records of courts that reach the open access period should be treated correspondingly by the relevant Chief Justice.

23.29 The Commission suggested in DRP 4 that the Class B records of the Parliament and the administrative records of the courts should be subject to the normal public access provisions of the legislation, but that it would not be appropriate for access decisions relating to these records to be subject to internal reconsideration by the NAA or appeal to the Administrative Appeals Tribunal. The Commission suggested that, if access were refused, applicants should have a right to request a review of the decision by the Clerk of the relevant House of the Parliament or by the Registrar of the relevant court.

23.30 Both the Administrative Review Council and Australian Archives[dcccxxv] noted that the Class B records of the Parliament are currently subject to the access appeal provisions and that the administrative records of the Courts would become so if regulations for the records of the courts were made under section 19. They suggested that this arrangement should continue. The Commission agrees that this would be appropriate.

Recommendation 206. The Class A records of the Parliament and the judicial records of the courts should not be subject to the public access provisions of the new legislation. The Class B records of the Parliament and the administrative records of the courts should be subject to the public access provisions, including the appeal provisions.

Recommendation 207. As an administrative objective, the Houses of the Parliament and their Presiding Officers should have regard to the desirability of determining the public access status of Class A records when they reach the open access period. Correspondingly, the Chief Justices of Commonwealth courts should have regard to the desirability of determining the public access status of judicial records of their respective courts when they reach the open access period.

The records of royal commissions

23.31 Section 22 provides that the Commonwealth is entitled to possession of records no longer required by royal commissions and that they are Commonwealth records for the purposes of the Act. Once the records reach the open access period, the public access provisions of the Act override any restrictions on their publication made by the royal commission. Records created by Commonwealth royal commissions working in conjunction with State royal commissions are subject to the Act only to the extent agreed between the governments concerned. Royal commission records are subject to the public access provisions of the Act, but Australian Archives is not entitled to custody of them unless this has been authorised by the Minister responsible for the administration of the *Royal Commissions Act 1902* (Cth) (currently the Prime Minister).

23.32 The Commission noted in DRP 4 that royal commission records are an important element of the history of the Commonwealth and suggested that they should continue to be subject to the legislation. To avoid any uncertainty this should matter should continue to be the subject of specific provisions. This recommendation was endorsed by Australian Archives and did not otherwise attract significant comment.

23.33 The National Crime Authority has drawn attention to the practical and legal complexities which may arise when records which are generated by royal commissions are subsequently used for some other purpose, for example prosecutions.[dcccxxvi] In such case they may assume a new or added sensitivity which may not be apparent in the original records. The Commission notes this concern and suggests that it be further considered in the context of determining the detailed content of the new archives legislation.

Recommendation 208. The legislation should specify that

- royal commission records are Commonwealth records for the purposes of the Act
- once royal commission records reach the age of 30 years the access provisions of the Act prevail over any restriction on access to them imposed by that royal commission
- the Minister responsible for the Royal Commissions Act exercises the controlling agency function for them
- the status of the records of joint royal commissions should be determined by agreement between the governments concerned.

ENDNOTES

25. Records relating to functions and services provided by contractors

Introduction

25.1 The drafters of the present Act did not fully envisage the complexities which would be caused for the management of Commonwealth records by the corporatisation, privatisation, outsourcing and contracting in of large areas of Commonwealth activity. Issues relating to the corporatisation and privatisation of Commonwealth agencies have been dealt with in Chapter 8. This chapter considers the recordkeeping relationships which can now exist between the Commonwealth and the private sector in the provision of services to and on behalf of the Commonwealth and the ways in which they should be addressed by the legislation.

The records of contractors providing services on behalf of government

25.2 It is increasingly common for services which form part of ongoing Commonwealth responsibilities to be delivered on behalf of the Commonwealth by private contractors. As was noted in the 1995 review of the FOI Act, this raises significant accountability issues.

> Where an agency contracts with a private sector body to provide services to the public on behalf of government, public information access considerations arise because it is the public, not the contracting agency, that is the ultimate recipient of the service. It is in this situation that the traditional distinction between the public and private sectors becomes blurred. So long as the service is provided in an acceptable manner, the fact that it is provided by a private sector body rather than a government agency is likely to be of little consequence to the public. However, if any problems occur in relation to the provision of the service, it is members of the public who will be affected and whose ability to seek redress may be reduced by the fact that they are not party to the contract.[dcccxxvii]

25.3 The Commission raised in IP 19 the general question of extending the legislation to the private sector. Most responses were also in general terms, but a few addressed the specific problem of records of functions which are contracted out.

> The fact that the Commonwealth government is disbursing public funds for these services should be a basis for retaining a public right of access to the records generated by the contracted services and

> for placing an onus on the service providers to create and maintain those records which should enable public scrutiny, discussion, comment and review. The increasing variety of means of delivering government services is an argument for maintaining a strong legislative framework for ensuring accountability through recordkeeping and strong regulatory mechanisms to protect individuals' privacy and preserve public access.[dcccxxviii]

25.4 Australian Archives, in both its submission and in guidelines issued for Commonwealth agencies in April 1997, recommended that

> Where the Commonwealth or a Commonwealth body enters into an agreement or arrangement with another party (whether it is a state, territory, private business or an individual etc), which requires that party to provide services **on behalf of the Commonwealth or Commonwealth body**, then physical and intellectual ownership of existing or new records resulting from the arrangement should be vested in the Commonwealth (or the Commonwealth body if it can own property in its own right) and subject to the requirements of the Archives Act. The advice is articulated in the 'Attorney-General's Legal Services Guidelines' issued 1 July 1995.[dcccxxix]

25.5 The Administrative Review Council (ARC) is currently considering whether administrative law concepts can appropriately be applied to government services delivered on contract by the private sector and, if they can be, how this might be achieved. The ARC issued a discussion paper in December 1997 which proposed two general principles in relation to access to information.[dcccxxx]

- rights of access to information relating to government services should not be lost or diminished because of the contracting out process
- the Government, rather than individual contractors, should normally be responsible for ensuring that the rights of access to information currently provided by the FOI Act are not lost or diminished as a result of contracting out.

The ARC suggested five options for achieving these principles.

- extend the FOI Act to apply to contractors
- amend the FOI Act to deem specified documents in the possession of contractors to be in the possession of a government agency
- amend the FOI Act to deem documents in the possession of contractors that relate directly to the performance of their contractual obligations to be in the possession of the government agency which let the contract
- incorporate information access rights into individual contracts
- establish a separate information access regime by legislation for contracted services.

25.6 The ARC provisionally favoured the third option because it avoids the need to identify every relevant document at the time of drawing up the contract, while at the same time excluding documents held by the contractor which do not relate to the delivery of the service. The option of extending the FOI Act to contractors was seen as being inconsistent with established principles of government accountability, in that the preservation of public access to information rights would become dependent on private companies. The option of incorporating access rights in individual contracts was seen as being too open ended and uncertain in outcome, while the option of enacting separate legislation would not solve difficulties associated with imposing specific recordkeeping obligations on contractors and might deter them from seeking government contracts.

25.7 The Attorney-General announced on 3 February 1998 that the Government had decided to extend the operation of the FOI Act to records held by contractors on behalf of the Commonwealth, but only in relation to applications by individuals seeking access to, or amendment of, information relating to themselves. Other rights of access to information held by contractors will be governed by specific provisions in the contracts concerned.

25.8 The Commission suggested in DRP 4 that, in cases in which legislation is enacted to authorise the contracting out of particular functions or services to private sector bodies, the legislation should provide that the archives legislation should apply to all records created by such contractors, but only in relation to the provision of those functions or services. Where there is no statutory scheme, the Commission suggested that the contracts for the functions or services concerned should ensure that appropriate recordkeeping and access arrangements are put in place. These suggestions were supported in submissions in response to DRP 4.

25.9 Australian Archives has already provided advice to Commonwealth agencies on recordkeeping issues relating to the outsourcing of functions and has issued detailed guidelines and a General Disposal Authority on the same subject. These guidelines will assist the preparation of individual contracts.

25.10 While recognising that the proposed regime would differ from the FOI proposals recently announced by the Attorney-General, the Commission does not regard them as inconsistent, bearing in mind the different functions and objectives of the FOI and archives legislation and, in particular, the objective of the archives

legislation in ensuring the preservation of a complete historical record of Commonwealth government activity.

Recommendation 218. If legislation is enacted to authorise the contracting out of particular functions or services to private sector bodies, the legislation should provide that the archives legislation is to apply to records created by such contractors, but only in respect of records that relate to the provision of those functions or services.

Recommendation 219. Where there is no statutory scheme, contracts for the provision of functions or services on behalf of the Commonwealth should ensure that appropriate recordkeeping obligations and access arrangements are put in place in respect of records that relate to the provision of those functions or services.

The records of contractors providing services to government

25.11 Services provided to the Commonwealth, as opposed to services provided on behalf of it, include a wide range of administrative support functions, among them information technology services, property management and vehicle hire. The Commission noted in DRP 4 that it is not always appropriate for records created by contractors in the course of providing such services to the Commonwealth to be subject to the archives legislation, provided of course that the Commonwealth agency which contracted to receive the service maintains adequate records of the transaction. It is already common practice for contracts to state whether records generated in the course of delivering a service are owned by the Commonwealth or by the contractor. Records of services provided to Commonwealth agencies by contractors are now also covered by guidelines and a General Disposal Authority.

25.12 The Commission suggested, therefore, that contracting agencies should ensure that contracts for the provision of services to the Commonwealth contain such recordkeeping obligations as are necessary to ensure the completeness and integrity of the agency's records, taking account of relevant guidelines issued by the NAA. This suggestion was supported in submissions in response to DRP 4.

Recommendation 220. Contracting agencies should ensure that contracts for the provision of services to the Commonwealth contain such recordkeeping obligations as are necessary to ensure the completeness and integrity of the agency's records, taking account of relevant guidelines issued by the NAA.

Issues relating to the outsourcing of information technology functions

25.13 Paper records exist physically within the walls of the Commonwealth agency responsible for them. However, the situation in relation to electronic records can be more complex. An electronic recordkeeping system may be operated from a computer situated in a location distant from the agency for which it was created. Agency staff would have direct access to the system through terminals on their desks, but this would not necessarily guarantee that the records it contained always remained accessible and functional. For example, the recordkeeping system of a Commonwealth agency might be operated by a private contractor on a computer located in another country. If the operating company became bankrupt or suffered major fire damage there might be little the Commonwealth agency could do to fully recover its recordkeeping system. Even if the contract included stringent conditions for backup facilities, the loss of access to key operating systems might adversely affect their functionality.

25.14 The contract itself is the basic means of ensuring adequate protection for Commonwealth recordkeeping systems managed by private sector bodies. The Commission suggested in DRP 4 that contracts must ensure that adequate backup facilities for systems are maintained within Australia and that the functionality of the backup system can be maintained even in the event of catastrophic damage to the main operating site. The Commission also suggested that the consequences for the Commonwealth of any failure to achieve adequate protection, particularly in the case of large financial or case management systems, would be so serious that the need to ensure that adequate safeguards are in place should also be dealt with specifically in the recordkeeping standards which the Commission has recommended should be issued by the NAA. These suggestions were supported in submissions in response to DRP 4.

Recommendation 221. Contracts relating to the management of Commonwealth recordkeeping systems by private sector organisations, especially electronic systems, should be required to include provisions to ensure the maintenance of the integrity and functionality of the system in any eventuality.

Recommendation 222. The mandatory recordkeeping standards to be issued by the NAA should include specific guidance on maintaining the integrity and functionality of recordkeeping systems, especially electronic systems, subject to outsourcing arrangements.

ENDNOTES

26. Beyond the federal record

Introduction

26.1 In earlier chapters of this Report, the Commission has dealt with the essential role of archives legislation in relation to Commonwealth records and the part that an archival authority plays in ensuring compliance by Commonwealth departments and agencies with that legislation. In accordance with its functions under the existing legislation, Australian Archives also has dealings with a range of non Commonwealth organisations and non Commonwealth records. This chapter examines those dealings and discusses the extent to which they should be maintained under the new archives legislation.

The NAA's role in relation to non Commonwealth records

Private records and national archival institutions

26.2 Most countries have established some kind of archival control over the records of their government. However, the treatment of private archives varies widely. In some countries, most notably in Europe, specific protection is provided for certain types of private archives to ensure their continued preservation. Archives so protected may include those of religious organisations and industrial and commercial enterprises.[dcccxxxi] Many jurisdictions specifically authorise the archival authority to purchase or accept private archives into their collections. In some jurisdictions, voluntary deposit is encouraged through tax incentives,[dcccxxxii] but in others the archival authorities have not exercised their powers to collect private archives. A 1989 study found that China, Mexico, Canada, Finland, France, Italy, the Netherlands and Sweden had shown the greatest concern for the protection of private archives. [dcccxxxiii] In the United States, the National Archives and Records Administration may accept custody of non government records relating to the President, a former President or the federal government.[dcccxxxiv]

'The archival resources of the Commonwealth'

26.3 The present Act defines the area in which Australian Archives may exercise its functions in terms of what Chris Hurley has described as three concentric circles.[dcccxxxv] The innermost circle is that of Commonwealth records, which are, with certain exceptions, subject to the mandatory provisions of the legislation. The next circle consists of 'the archival resources of the Commonwealth'. This definition includes Commonwealth records and also records, which while not falling within the definition of Commonwealth record, are likely to be of significant relevance to the history of the Commonwealth.

26.4 Section 3(2) of the Act defines the 'archival resources of the Commonwealth' as

> such Commonwealth records and other material as are of national significance or public interest and relate to —
> (a) the history or government of Australia;
> (b) the legal basis, origin, development, organization or activities of the Commonwealth or of a Commonwealth institution;
> (c) a person who is, or has at any time been, associated with a Commonwealth institution;
> (d) the history or government of a Territory; or
> (e) an international or other organization the membership of which includes, or has included, the Commonwealth or a Commonwealth institution.

26.5 The term 'archival resources of the Commonwealth' is discussed in Chapter8 in the context of the definition of records of archival value.

'Archival resources relating to Australia'

26.6 The third or outermost circle of records identified in the present legislation embraces 'archival resources relating to Australia'. This term is included in certain of the functions of Australian Archives set out in section 5(2), but its meaning is not elaborated further in the legislation. The functions concerned are

> (a) to ensure the conservation and preservation of the existing and future archival resources of the Commonwealth;
> (b) to encourage and foster the preservation of all other archival resources relating to Australia;
> (g) with the approval of the Minister, to accept and have the custody and management of material that, though not part of the archival resources of the Commonwealth, forms part of archival resources relating to Australia and, in the opinion of the Minister, ought to be in the custody of the Archives in order to ensure its preservation or for any other reason;
> (l) 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;

The term 'archival resources relating to Australia' was intended to serve two main purposes. Firstly, it was to permit Australian Archives to accept custody of records which did not fall within the definition of 'archival resources of the Commonwealth' but which might nevertheless be housed appropriately in the national archives.[dcccxxxvi] The legislation made it clear that Australian Archives could accept, but not demand, the custody of such material. It also suggested that the acceptance of such material by the Archives would be relatively unusual, by providing that it should be sanctioned at ministerial level. The second purpose of the provision was to identify a facilitative and to some extent a leadership role for Australian Archives in the national archival community.

The NAA and non Commonwealth records

26.7 Apart from the personal records of former ministers and senior officials, Australian Archives has used its existing power to accept custody of non Commonwealth records very sparingly. No change to this policy is envisaged. Australian Archives has entered into an agreement with the National Library about the sharing of responsibility for the records of individuals who have been associated closely with the Commonwealth administration, with the Archives taking responsibility only for collections which consist predominantly of Commonwealth records.

26.8 The Commission asked in IP 19 to what extent the role and functions of the archival authority should extend beyond the management of Commonwealth records to other records of national interest or significance. Specifically, it asked whether the authority's mandatory or permissive custodial rights should be extended to 'any records which in the broadest sense documented the history of the nation'. This definition might extend, for example, to the records of major companies and professional, welfare or industrial organisations which have impacted on the history of the nation.

26.9 Submissions generally recommended that the archival authority should continue to be concerned essentially with Commonwealth records and with personal records closely related to Commonwealth functions. A few submissions supported a broader role.

> National archival legislation should, in the absence of any responsible attitude in the private sector, extend to cover records of national significance created by the non-Commonwealth sector. Legislation

should clearly set out the types of activities that might be considered of 'national significance' and we believe it is necessary to establish a broadly representative advisory committee to define records of national significance.[dcccxxxvii]

26.10 Specific concern was expressed about records of value to the history of Australia being put at risk by the cost pressures which are forcing some non government archival institutions to close or to refuse new deposits. The threatened closure of the Noel Butlin Archives at the Australian National University in Canberra is a recent example of such difficulties. Australian Archives does not, however, think it appropriate to act as a permanent custodian for such records, although it can play a role in ensuring their protection.

This role can extend from acting as a broker to find appropriate places of deposit for records which are at risk, to providing temporary accommodation for such collections in the Archives itself. Provided this is seen only as a temporary measure it does not extend the Archives' existing collecting mandate but ensures that other archival resources are adequately protected.[dcccxxxviii]

26.11 The National Library raised concerns about the role of a government archival authority in relation to non Commonwealth records and suggested that the legislation should limit the NAA's power to accept custody of non Commonwealth records to specific categories of records not collected by other Commonwealth institutions.

The National Library has been collecting manuscripts and private archives for eighty years. The Library's current collecting policy refers to papers of individuals of national standing and records of national organisations. We believe that if it were left open for two Commonwealth institutions to collect any records of national significance it would inevitably lead to confusion, competition and conflict and possibly a misuse of limited resources.[dcccxxxix]

26.12 The Commission considers that the NAA should, as Australian Archives has done, devote its resources and expertise predominantly to the management of Commonwealth records. However, the NAA should retain the right to accept, but not demand, the custody of non Commonwealth records which because of their subject matter and value can be housed most appropriately in the national archives. The Commission suggested, therefore, in DRP 4 that the functions of the NAA should include

To accept custody of records which, while not being Commonwealth records, are, in the opinion of the Minister, of such interest and value to the nation that their custody and preservation should be undertaken by the NAA.[dcccxl]

26.13 This suggestion was endorsed by Australian Archives,[dcccxli] but did not otherwise attract significant comment. The Archives expressed a preference for the power to determine what records might be taken into NAA custody to be vested in the authority rather than in the minister. However, the Commission continues to favour the inclusion of a requirement for ministerial involvement, which could be exercised either by the establishment of general acquisition parameters or by the approval of individual cases. This should ensure that acquisitions by the NAA are appropriate and do not lead to duplication or competition between the NAA and other organisations. The Commission does not consider that the NAA's role in relation to non Commonwealth records should be confined to specific categories of records set out in the legislation, since it would be difficult to envisage every situation in which it might, or might not, be appropriate for the NAA to take such records into its custody. For these reasons, the Commission has maintained its support for the inclusion of the above function in the list of functions of the NAA.[dcccxlii]

The NAA and the Australian archival community

26.14 Australian Archives remains the largest single archival institution in Australia. Because of its size and its status as the archives of the national government, Australian Archives has come to exercise an important role in assisting the development of other archival and records management organisations and of the professional bodies which support them. This assistance takes many forms, among them the development of policies and standards, support for conferences, training courses and publications and the training of archivists, many of whom have now moved on to serve other organisations. As noted elsewhere in this report, cooperation is now extending to the development of joint Commonwealth/State facilities.[dcccxliii]

26.15 In some countries, the national archives may have a formal regulatory or assistance role in relation to other archival institutions.[dcccxliv] While a regulatory role would not be appropriate in Australia, there should still be an opportunity for the NAA to coordinate or otherwise participate in the activities of the broader archival community.

26.16 The Commission asked in IP 19 whether the legislative charter of the archival authority should include a leadership role in the broader Australian archival community, both public and private. Submissions predominantly supported a

continuation of the archival authority's leadership role along the lines which have already been established by Australian Archives.

> The leadership role exhibited by Australian Archives in the State and Territory government archival arena has been significant in ensuring the initiation, development and coordination of a number of successful major joint projects. It is essential, in maintaining Australia's leadership role in a variety of critical areas, that this activity continue.[dcccxlv]

> The Archives Authority believes that the national records authority's charter should include a leadership role in the archives and records management community. Particularly in recent years, the Australian Archives has played such a role most effectively in a number of areas and a hallmark of this role has been cooperation and partnership.[dcccxlvi]

> The ASA strongly supports a leadership role for the national archives authority to be defined in legislation ... As a large employer it can exert an influence on the vibrancy of the profession through its overall support and participation in professional activities such as conferences and publications. As a national archives it will be looked to by the international archival community as a leader of archives in Australia regardless of how its responsibilities are defined in legislation.[dcccxlvii]

26.17 Submissions did not propose that the NAA should be empowered to provide direct financial assistance to smaller archival institutions, as is done in some other countries. However, there was support for a wider program of scholarships and awards to encourage individual archivists and institutions.

26.18 The Commission suggested in DRP 4 that the functions of the NAA should include the encouragement and support of activities which would enhance standards of recordkeeping and archiving.[dcccxlviii] This suggestion was endorsed by Australian Archives,[dcccxlix] but did not otherwise attract significant comment. The Commission endorses the leadership and support role which Australian Archives has developed within the Australian archival community in areas such as

- development of national policies and standards
- support for training and professional development
- joint ventures in areas such as exhibitions and publications.

26.19 In support of these objectives, the Commission has recommended in Chapter 5 that the functions of the NAA should include

> To encourage and support activities that enhance standards of recordkeeping and archiving in Australia.

The Commission has also recommended that the powers of the NAA should include

Granting of awards and scholarships for the technical and professional advancement of learning related to the functions of the NAA.

Recommendation 223. The legislation should make specific reference to the NAA's role in providing leadership and support to the Australian archival community.

ENDNOTES

Appendix A

Participants

ALRC

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* for the purposes of this reference comprises the following:

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Deputy President
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Gavan McCarthy, Australian Science Archives Project
Ron McLeod AM, Commonwealth Ombudsman, formerly Inspector-General of Intelligence and Security
Associate Professor Sue McKemmish, Monash University
David Roberts, Archives Authority of NSW
Professor Emeritus Michael Roe, formerly University of Tasmania
Robert Sharman, formerly State Archivist of Tasmania, Queensland and Western Australia
Matthew Storey, North Australian Aboriginal Legal Aid Service
Eric Wainwright, James Cook University, formerly National Library of Australia

Appendix B

List of submissions

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Australian Council of Professional Historians Associations Inc	50, 101
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Australian Historical Association	53
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Laurie Varendorff	19
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Appendix C

List of recommendations

4. The new federal archival system — an overview

1. The legislation should include an objects clause specifying that its major objectives are to
   - ensure that the Commonwealth administration creates records sufficient to
     - manage current Commonwealth functions efficiently and accountably
     - record and safeguard the rights, entitlements and obligations of individual citizens
     - document the history of the Commonwealth and the nation by maintaining a record of significant events, policies, movements and people
   - establish an accountable framework for the evaluation of Commonwealth records
   - ensure that records are preserved, and are functionally accessible, for as long as they are of value to the Commonwealth administration or to the people
   - ensure that records in the open access period are made available unless there are compelling and appealable grounds for justifying their non-disclosure
   - encourage the provision of access to records beyond minimum statutory obligations
   - encourage the greatest possible public use of Commonwealth records as a vital element in the history of the nation
   - establish an authority to ensure that the objectives of the Act are achieved.

2. The Explanatory Memorandum and other legislative material for the new archives legislation should elaborate the interpretation of the objects clause by referring in detail to the objectives and principal elements on which the legislation is based.

5. Functions and powers

3. The legislation should confer on the archival authority the following functions to
   - facilitate and promote the effective and efficient discharge by CEOs of Commonwealth departments and agencies of their proposed statutory obligations to create, maintain and preserve records in relation to the discharge of their functions as are necessary
     - for the efficient and accountable management of those functions
     - to record relevant rights, entitlements and obligations of persons under Commonwealth law
     - to document the history of the Commonwealth
   - establish and maintain a general appraisal and disposal regime to
     - ensure the identification of those Commonwealth records that are of archival value; and
     - ensure that records that are no longer of value to the Commonwealth are disposed of in a timely and accountable manner
   - control the custody of Commonwealth records of archival value
   - ensure the preservation of Commonwealth records of archival value
   - ensure the recovery of Commonwealth records that should be brought within Commonwealth control
   - ensure that records are made accessible to the public in accordance with the rights of access provided for in the legislation
   - encourage and facilitate the earliest possible access to Commonwealth records
   - encourage further public awareness and understanding of the benefit to the nation of Commonwealth records and facilitate the public use of such records
   - encourage and support activities whose purpose is to enhance standards of recordkeeping and archiving of a kind for which the NAA has responsibility
   - accept custody of records which, while not being Commonwealth records, are, in the opinion of the Minister, of such interest and value to the nation that their custody and preservation should be undertaken by the NAA.

4. The legislation should confer on the archival authority
   - a general power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions
   - specific powers corresponding to those in section 6(1) of the Archives Act
   - additional specific powers required to undertake its functions including
     - promulgating standards and issuing guidelines in relation to the creation, management, appraisal, sentencing, destruction, custody, preservation and accessibility of records

  - entering into premises to monitor compliance with standards and guidelines relating to appraisal, sentencing, destruction, custody and preservation of records
  - recovery of records
  - payment of compensation for the acquisition of property rights, including copyright, in records
  - entering into agreements and arrangements in relation to the custody of records
  - obtaining information concerning records
  - exhibiting and otherwise encouraging and fostering public interest in records
  - granting of awards and scholarships for the technical and professional advancement of learning related to the functions of the NAA
  - accepting custody of, preserving and providing access to records (not being Commonwealth records) that are, in the opinion of the Minister, of special interest and value to the nation
  - imposing and collecting charges in relation to the provision of services
- the range of general powers necessary to enable a body corporate to function fully as a separate and independent person.

6. Structure and governance

5. The archival policy making and service delivery functions should be vested in a single organisation.

6. The name of the archival authority should reflect both its professional expertise and its national character. The name 'National Archives of Australia' is accordingly recommended.

7. The NAA should be established as an independent statutory corporation having its own legal personality and capacity to own its own assets and be responsible for managing its own finances.

8. The responsible minister should be empowered, in relation to any matter in respect of which the NAA may issue a standard or guideline, to give directions not inconsistent with the archives legislation regarding matters of government policy to which the NAA shall have regard in formulating that standard or

guideline. Any such direction should be in writing and be laid before Parliament by the minister within seven sitting days after the direction is given.

9. The powers and functions of the NAA should be exercisable by a council, composed of part time members, which should be appointed by the Governor-General.

10. The legislation should provide for the appointment by the Governor-General in Council of a chief executive officer of the NAA whose office should be styled 'National Archivist'. The National Archivist should be an *ex officio* member of the council of the NAA with full participation and voting rights.

11. The legislation should provide the NAA with a flexible employment regime tailored to meet the professional needs of the organisation.

12. The council should have power to give directions to the National Archivist in relation to any matter except for day to day staffing matters.

13. The council should have the power to delegate all or any of its functions and powers (except the power of delegation) to the National Archivist or any other member of staff.

14. The council of the NAA should consist of not less than 8, nor more than 12, members comprising
    - a member of the Senate and a member of the House of Representatives nominated by the Senate and House of Representatives respectively
    - other persons, with knowledge and experience in relation to records management or archival functions, appointed by the Governor-General
    - the National Archivist (*ex officio*).

15. The legislation should include a general direction that membership of the council should be chosen so as to ensure that the council has the benefit of wide ranging opinion and expertise, including any relevant regional perspectives.

16. The NAA should be enabled to establish and service such advisory groups as are necessary to ensure that it receives timely and well informed advice on key technological, policy and service needs from major stakeholders.

7. Financing

17. NAA services directly related to ensuring the identification and preservation of records of archival value and the setting of records management standards should continue in the main to be budget funded.

    There should also be a recasting of the NAA's program structure and chart of accounts to clearly identify and provide for reporting on resources devoted to records of archival value and records management functions.

18. The NAA should, progressively over the next five years, minimise its dealings with records which are not of archival value. It should not accept any new deposit of such records on a 'free' basis beyond 1998–99 and any services which it continues to provide for such records should be on a fully contestable and commercial basis.

    As a consequence, progressively 20% of the NAA's appropriation should be divided among 'client' agencies which would be responsible for contracting out the provision of storage for records which are not of archival value.

19. Within the context of the budgetary parameters agreed with the government from time to time, the NAA should have the power to determine which of its services, other than applications for access to records of archival value, should attract charges and the amount or rate of those charges.

    - Charges for services should be required to be imposed by legislative instrument and, accordingly, be subject to Parliamentary scrutiny.

    - The present distinction between 'discretionary' and 'non-discretionary' services should be removed.

    - Charges for services relating to records which are not of archival value should be required to be set at full commercial rates.

20. The NAA should have power to waive charges relating to records of archival value in appropriate circumstances. These circumstances should be set out in the legislative instrument establishing the charges.

21. The legislation should also provide that the NAA must ensure that charges relating to records of archival value do not significantly inhibit the attainment of the basic objectives of the legislation, which are set out in Chapter 4.

22. Public user charges (say of the order of $5 per day for public entry) should be introduced for accessing NAA services, but in any event should not be applied at a level which significantly deters public use of the NAA.

    The NAA should establish a simple and inexpensive way of monitoring the effect of such a charging regime.

23. Charges should not be applied to access applications for public access to records of archival value more than 30 years old.

8. What is a record?

24. The term 'record' should be defined as 'recorded information, in any form, including data in computer systems, created or received or maintained by an organisation or person in the transaction of business or the conduct of affairs and kept as evidence of such activity'.

    The definition should expressly exclude material such as books, maps, films and paintings, unless such material, in the opinion of the NAA, forms an integral part of a Commonwealth recordkeeping system or is declared by regulation to be a record.

25. The legislation should adopt a provenance definition under which the term 'Commonwealth record' embraces records made or received by Commonwealth agencies in the course of their business, regardless of whether the records are owned by the Commonwealth or by some other organisation or person. The definition would exclude records made by Commonwealth agencies for transmission to some other organisation or person, provided that this transmission had actually taken place.

26. The question whether records provided by foreign governments under specific agreements should be excluded from a provenance based regime should be fully canvassed at the highest policy level when the new legislation is being developed.

27. The legislation should include a provision enabling the NAA to formally declare that specified records are no longer Commonwealth records.

28. The legislation should include the term 'records of archival value' to identify those records which justify retention beyond current administrative needs and which require to be managed as archival records.

29. Records of archival value should be defined as records which are of national significance or public interest and which relate to
    - the history or government of Australia
    - the legal basis, origin, development, organisation or activities of the Commonwealth or of a Commonwealth institution
    - the development and implementation of the policies of the Commonwealth government
    - individual citizens of the Commonwealth where these personal records contribute significantly to an understanding of the history of the Commonwealth or its administration.

30. Commonwealth controlled associations and companies should be subject to the legislation and included in the definition of 'authority of the Commonwealth' unless they are specifically excluded from it by regulation or by a provision of some other legislation.

31. If a company or association ceases to be a Commonwealth controlled company or association, the records which it had created prior to that time should continue to be Commonwealth records and subject to the legislation.

32. The NAA may, in respect of records of a former Commonwealth controlled company or association
    - approve the transfer of the custody or ownership of any part or parts of the records as are not of archival value
    - lend any part or parts of those records as are of archival value to the new owners, subject to
        - inspection by the NAA and adherence to any conditions imposed by it
        - an absolute prohibition on the transfer of custody of records of more than a specified age.

33. 'Controlling agency' responsibility for the existing records of authorities of the Commonwealth which are privatised should pass to the NAA if there is no other authority of the Commonwealth whose current responsibilities reasonably relate to the function concerned.

9. Creating and managing records

34. The legislation should expressly place responsibility on the chief executive officers of Commonwealth agencies to ensure that adequate records are created and maintained.

    It should also state briefly that the main objectives of recordkeeping are
    - to ensure that the Commonwealth administration is conducted efficiently and accountably
    - to document the rights and obligations of individual citizens
    - to maintain a record of significant Commonwealth policies and activities.

35. As a matter of priority, the Auditor-General and the NAA, in consultation with the Department of Finance and Administration, should coordinate a high level study to identify how Commonwealth recordkeeping requirements can be met in a more efficient, effective and integrated manner.

36. The legislation should authorise the making by the NAA, as legislative instruments, of mandatory standards in relation to the creation, maintenance, disposal and preservation of Commonwealth records. The standards should be focused on outcomes rather than processes.

    Chief executive officers of Commonwealth agencies would be responsible for compliance by their agencies with such standards.

37. As an administrative measure, the NAA should consult as widely as practicable with Commonwealth agencies and other relevant organisations and individuals in the course of drafting standards.

38. Primary responsibility for auditing compliance with the standards promulgated under the new archives legislation should lie with the Auditor-General. The *Auditor-General Act 1997* should be amended to make it clear that the auditing of recordkeeping practices is one of the functions of the Auditor-General.

39. The NAA should retain a right of entry to the premises of other Commonwealth agencies and those of contractors storing records on their behalf to the extent that this is necessary to ensure that Commonwealth records are being created and managed in accordance with the legislation and with standards issued under the legislation.

40. The NAA should be required to report on the state of Commonwealth recordkeeping in its annual report under the legislation.

10. Disposing of records — appraisal and sentencing

41. The NAA should retain sole authority for authorising the disposal of Commonwealth records and the present section 24 provisions should be retained.

42. The NAA should issue a standard relating to appraisal criteria.

43. The NAA, in consultation with other Commonwealth agencies, should give high priority to the development and testing of new appraisal strategies, particularly in relation to electronic records.

44. The 'normal administrative practice' disposal provision should be retained, subject to the NAA issuing guidelines for its implementation and to considering whether the disposal of some material could be authorised more appropriately through specific records disposal authorities.

45. The section 24(2) offence for the unauthorised disposal of records should be retained and defined more stringently.

46. The NAA should be required to report annually on any significant case of inappropriate destruction of records identified and the measures taken to deal with it.

47. The legislation should provide that alterations to records more than 25 years old should only be undertaken if required by law or approved by the NAA. No such alteration should be able to be undertaken in a way that involves the alteration or deletion of information already included in the record.

48. The legislation and standards issued in accordance with it should make appropriate provision for the migration of electronic records between systems.

49. The legislation should
    - require all agencies which create records relating to individual citizens to take all reasonable steps to ensure that the disposal policies relating to the records are known to the record subjects. Such steps might include the provision of an explanatory leaflet to all new clients and the posting of display material on agency premises
    - require all agencies which create records relating to individuals to give the record subject an opportunity to state, when entering their relationship with the agency concerned, whether they wish to be given the opportunity to assume ownership of the record when it is no longer required by the agency. Where a record subject indicates a wish to have such an opportunity, the agency's obligation to make contact with the record subject, when the record becomes available, should be limited to such enquiries as are, in the circumstances, reasonable having regard to the age of the record
    - provide that a record subject is not entitled to acquire ownership of a record, or portion of a record, for which exemption would have been claimed under the Freedom of Information Act in response to an application from the record subject.

50. The present requirement in Archives Regulation 7 to report the destruction of records should be replaced by a legislative provision or regulation requiring Commonwealth agencies to give the NAA reasonable notice (as elaborated in NAA guidelines) of their intention to sentence records and a reasonable opportunity to monitor that process.

51. The NAA should give priority to designing and implementing a simple, efficient and effective monitoring regime of sentencing.

52. The legislation should require that all Commonwealth records must be appraised and sentenced no later than at the age of 20 years, unless the NAA has given a specific dispensation.

53. In the event of agencies failing to sentence records more than 20 years old, the NAA should have the power to undertake the work itself at the expense of the agency concerned.

54. The NAA should issue a standard for the recording of records disposal decisions by Commonwealth agencies.

55. The NAA should ensure that Commonwealth agencies are aware of the need to take into account standards for recording disposal decisions when they are designing electronic recordkeeping systems.

56. Agencies should be required to notify the NAA of records of archival value identified in the course of meeting the 20 year appraisal and sentencing obligation. The NAA should issue guidelines to assist agencies to meet the notification obligation in a way that is effective without being unduly onerous.

57. It is appropriate that name identified Census records should continue to be subject to the normal disposal provisions of the Act.

11. Recovery of records

58. The legislation should make specific provision for the NAA to recover records which have passed out of Commonwealth custody without appropriate authority. The power should extend retrospectively to all Commonwealth records which passed out of Commonwealth custody prior to the commencement of the new recovery provisions.

59. The recovery procedure should be initiated by the NAA issuing a determination that the record concerned is a Commonwealth record and setting out reasons for the need to return it to Commonwealth custody. The NAA should have the power to apply to the Federal Court for a recovery order where a return to Commonwealth custody is refused.

60. Provisions should be included in the legislation for an entitlement to the payment of compensation on just terms where the return to Commonwealth custody of a Commonwealth record constitutes the compulsory acquisition of the property rights of another person.

61. Except in cases involving an acquisition of property, no compensation should be payable in relation to the recovery of records which passed out of Commonwealth custody on or after 6June 1984.

62. Except in cases involving an acquisition of property, there should be a discretion for the payment of compensation in relation to the recovery of records which passed out of Commonwealth custody prior to 6 June 1984, or for which the circumstances of removal cannot now be established.

63. Decisions made by the NAA under the recovery provisions should be reviewable by the AAT.

64. The NAA should have the power to require that a Commonwealth record be made available for copying.

65. Decisions made by the NAA to require a record to be made available for copying should be reviewable by the AAT.

66. Subject to any relevant recommendations which may be made in the report of the Copyright Law Review Committee in relation to section 51AA of the *Copyright Act 1968*, that act should be amended to expressly exempt such copying from copyright infringement.

67. The legislation should provide that
    - any records created or received by ministers in the course of undertaking their ministerial responsibilities are Commonwealth records
    - all Commonwealth records in the possession of a minister must be transferred to the custody of the NAA not later than when the minister leaves office, unless the NAA authorises some other custodial arrangement
    - such records are subject to the public access provisions of the legislation
    - notwithstanding the fact that the records are subject to the public access provisions, the person who created them (and that person's nominated representative) has a continuing right of unrestricted access to them
    - decisions about the public access status of the records when they reach the open access period should be made by the NAA in consultation as appropriate with agencies responsible for the functions to which the records relate
    - the NAA may not, during the lifetime of a former minister, destroy or otherwise dispose of Commonwealth records received from the minister without his or her approval. This requirement would cease to apply on the death of the depositor or if the depositor failed to respond within a reasonable time to approaches from the NAA.

12. A general custodial regime

68. The present section 27(2) requirement that records be transferred to the custody of Australian Archives by the age of 25 years, or as soon as practicable thereafter, should be limited to records of archival value and be qualified to take account of the specific exceptions recommended by the Commission.

69. The custody of records which are not of archival value should be the responsibility of the relevant controlling agencies and be managed on a fully commercial and contestable basis.

70. In the light of the two immediately preceding recommendations, the present section 27(1) requirement that all records be transferred to the custody of Australian Archives once they cease to be required to be reasonably available for current administrative purposes should be removed.

71. The legislation should permit the minister responsible for the NAA to authorise NAA custody of records which are required to be retained for more than 25 years but which are not of archival value, provided that, in the minister's opinion, the records are of such national significance that they should be held by the NAA. The relevant controlling agency should be responsible for storage costs. Any such ministerial authorisation should be required to be tabled in the Parliament.

72. The NAA should issue and monitor standards for the storage of all Commonwealth records. The standards should address the physical integrity of the records and the protection of their security, privacy, functionality and evidential integrity. Chief executive officers of agencies would be responsible under the legislation for ensuring that these standards are implemented.

73. The legislation should ensure that the NAA's storage standards apply equally to Commonwealth records stored by private contractors and that chief executive officers of agencies have a responsibility to put in place contractual and monitoring arrangements to ensure that this is so.

74. The NAA should have a reasonable right of access to records stored by Commonwealth agencies and private contractors in order to monitor and report on the implementation of the standards.

75. The NAA should have the power to require agencies to retain custody of records of archival value if, in the opinion of the NAA, this is necessary to ensure their preservation and accessibility.

    Such records would be required to be maintained in accordance with standards set by the NAA.

76. Records of archival value which have reached the age of 25 years should, to the fullest extent possible, pass into the effective control of the NAA.

77. The legislation should recognise the concept of the 'controlling agency' and set out any residual rights or responsibilities of controlling agencies over records of archival value more than 25 years old.

    The NAA should assume the role of 'controlling agency' in respect of records that are not identifiable with the current functions of any agency.

78. The legislation should provide that records of archival value that are more than 25 years old should leave the custody of the NAA only if, in the opinion of the NAA, there is a compelling administrative need for them to do so.

79. The present section 61 should be deleted. If it is considered appropriate to extend the application of the legislation to material that does not constitute a record as defined in the legislation, this should be achieved by regulation.

80. The NAA should consult relevant agencies and any other relevant stakeholders about the continuing need for section 62. If the requirement for this provision cannot be clearly demonstrated it should be removed.

81. The section 63 provisions relating to the location of archival records should be deleted.

82. As an administrative objective the NAA should, if it becomes necessary to terminate or significantly reduce its presence in any State or Territory, endeavour to enter into a cooperative arrangement with the relevant State or Territory archival authority, or with some other appropriate organisation, to accept custody of Commonwealth records of archival value that ought to be located in that State or Territory.

13. Exceptions to the general custodial regime

83. The present section 29(1) provision should be retained, but only for records of archival value. Any records subject to such a determination must be managed in accordance with general or specific standards approved by the NAA.

84. The section 29(2) provision for the responsible Minister to determine that records need not be transferred to the custody of the NAA should be removed.

85. The legislation should provide that records of archival value may be withheld from NAA custody without the authority of the NAA where the head of a security or intelligence agency, or of any other agency which holds security and intelligence records in a recordkeeping system established and maintained specifically for that purpose, certifies, and the responsible minister confirms by counter certification, that the retention of those records in the custody of the agency concerned is essential to the maintenance of the security of the sources, methodologies or capabilities of a security or intelligence agency. Such decisions should be notified to the NAA and tabled in the Parliament.

86. A corresponding ministerial counter certification requirement should be included in relation to those classes of Australian Federal Police records relating to witness protection that are specified in the present section 29(9). These decisions also should be notified to the NAA and tabled in the Parliament.

87. The legislation should permit the NAA to authorise a Commonwealth institution, a non-Commonwealth institution or an individual to have custody of records of archival value, subject to appropriate conditions.

88. Standards issued by the NAA should make appropriate provision for the custody of records carrying national security classifications. However, the new legislation should not require that all such records should be transferred to NAA custody once they cease to be required for current administrative purposes.

89. In the light of the Commission's recommendations in relation to the definition of 'record', the present 'exempt material' provisions relating to material such as books and paintings in the custody of other Commonwealth collecting institutions should be removed.

90. The existing custodial arrangements for official records acquired by the National Library of Australia prior to 1984 should be confirmed by the NAA in the exercise of its custodial powers rather than by a continuation of the 'exempt material' provision.

91. The legislation should expressly recognise the Australian War Memorial's custodial role in relation to certain Commonwealth records. This would enable the present 'exempt material' provision relating to the AWM to be dispensed with.

92. As an administrative measure, the NAA and the Australian War Memorial should bring to a conclusion as expeditiously as possible the negotiation of arrangements specifying the classes of records to be held by the Australian War Memorial.

14. Preservation and protection of records

93. The NAA should issue standards for the preservation of all Commonwealth records. The standards should apply equally to private contractors storing records on behalf of the Commonwealth.

94. The NAA should have a reasonable right of access to the premises of agencies and contractors for the purpose of ensuring that the preservation standards are being implemented adequately.

95. The legislation should make it clear that preservation includes the maintenance of an adequate level of functionality for electronic records.

96. The NAA should retain the right to refuse or restrict access to records on preservation grounds and to provide copies in place of access to original records. Such decisions should be subject to the normal access appeal process.

15. The access right

97. The access regime, including a right of access to Commonwealth records, clearly defined exceptions to that right, and effective review mechanisms, should continue to be legislatively based.

98. The access regime should apply to all records regardless of medium. Development of legislation and administrative procedures should take into consideration the need to encompass all record media.

99. The existing concept of an open access period at a defined age should be retained as the complexities and resource implications of a tiered access system would be likely to outweigh the benefits.

100. The open access period should continue to commence at 30 years.

101. The legislation and FOI Act should not be amalgamated.

102. The access regime should apply to all records in the open access period.

103. The FOI Act should be extended to all records which do not fall within the open period as defined in the archives legislation.

104. All records of archival value which enter the open access period from the time of commencement of the new legislation should be required to have had their public access status determined prior to reaching the open period.

105. The NAA should be required to complete, within 10 years of commencement of the new legislation, the assessment of the public access status of all records of archival value more than 30 years old which were in its custody at the time of commencement of the legislation.

106. The existing requirement in section 38 to provide access to the non-exempt portions of exempt records should be retained.

107. As an administrative measure, open access decisions should be made wherever possible on blocks of records without detailed examination of individual records.

108. The legislation should expressly provide that non-disclosure provisions in other legislation do not override the public access provisions of the archives legislation unless this is expressly provided for in the legislation concerned.

16. Responsibility for access decisions

109. Controlling agencies should have responsibility for access applications and access decisions relating to all records in the open period which are not of archival value.

110. Controlling agencies should charge on a full cost recovery basis for the provision of access to such records. Charges should not, however, be levied in relation to applications by record subjects for access to personal information about themselves.

111. The NAA should have responsibility for making access decisions on records of archival value in the open period unless there is in place an agreement with the agency with functional responsibility for the records establishing alternative arrangements for access decision making. Where an agreement cannot be reached over responsibility for access decisions, the minister responsible for the agency function should determine the matter. The initiative in seeking to negotiate an agreement should lie with the agency.

112. The making of agreements between the NAA and a controlling agency regarding access decisions relating to records of archival value should be required to be notified in the Commonwealth of Australia Gazette.

113. Where an agency enters an agreement with the NAA that the agency will be responsible for the making of access decisions relating to records of archival value, that agency should thereby become responsible for all aspects of the decision making process, including notifying the applicant of the decision, recording the access decision and advising the NAA of the decision.

114. All access applications for records of archival value should be lodged initially with the NAA for processing by the NAA or for reference to the controlling agency under an agreement with the NAA.

115. The legislation should include a provision permitting an agency with responsibility under an arrangement with the NAA for making access decisions in the open period to transfer an application to another agency where the subject matter of the record is more closely connected with the functions of the other agency than with the functions of the controlling agency and the decision is one that the second agency is entitled to make under an arrangement with the NAA.

Transfer of applications should only be allowed with the agreement of the receiving agency.

Where the other agency does not have an agreement with the NAA, the transferring agency may transfer the request to the NAA.

A transferred application should be taken to be an application made to the receiving agency or the NAA, as the case may be, and should be taken to have been received at the date the original application was lodged with the NAA.

116. Access examination should no longer be required to take place on the NAA's premises.

117. There should be a statutory obligation on the NAA to collect and disseminate information about the function, location and accessibility of all records of archival value.

118. There should be a statutory obligation on all Commonwealth agencies to provide all possible information about the function, location and accessibility of all records of archival value to the NAA, unless that information, being information relating to records in the custody of the agency, would be exempt information under the FOI Act in relation to closed period records, or the archives legislation in relation to open period records.

17.Access procedures

119. The legislation should require an application to include
    - the name of the applicant, the means by which the applicant can reasonably be contacted (which may be an electronic address) and the date of the application
    - such reasonably available information about the records as will make identification as simple as possible. Failure to meet this requirement should not, however, be able to be used as a basis for refusal to process the application.

120. The legislation should reaffirm the statutory obligation of the NAA to assist applicants to meet the requirement to provide all reasonably available identifying information about the records.

121. If a period of 90 days has elapsed since the application was received by the NAA and the applicant has not received notice of the decision, the legislation should continue to provide that there has been a deemed decision refusing to grant access to the record on the ground that the record is an exempt record.

122. The agency with responsibility for making the access decision over the record in question, whether that be the NAA or an agency which has entered into an access agreement with the NAA, should be responsible for a deemed decision to refuse access and accordingly be the respondent to any external review tribunal proceedings.

123. The legislation should include a provision requiring agencies to take all available steps to process access applications within 30days after the NAA has received the application. If an application is not processed within 30 days, the agency responsible for making the decision should be required to notify the applicant forthwith of the reasons for the delay and invite the applicant to communicate with the agency about the application. The appeal tribunal should be entitled to comment on the failure to contact the applicant within 30days where appropriate.

124. Section 31(4), which provides the Archives with the power to withhold records from the public pending access examination, should be removed from the legislation.

125. The legislation should not include a provision for a workload test.

126. The legislation should not include a provision allowing refusal of an access application on the grounds that it is frivolous or vexatious.

127. The legislation should include a provision enabling an access application to be met with a decision that the record cannot be located. Notification of a decision that a record cannot be located should be permitted only on one of the following grounds
    - there is no evidence that the record was ever created or received
    - the record was created or received but cannot now be located
    - the record was created or received and destroyed — details of evidence of destruction should be included in the notification
    - the record was created or received but has been legitimately transferred to another party and is no longer in the custody of the Commonwealth or any

Commonwealth agency — details of the authority for the transfer should be included in the notification.

In all four cases, the notification should be required to include details of the search undertaken, including where and by whom.

The decision should be reviewable in the same way as a decision to exempt a record. The legislation should state that the reviewer is to examine the procedures undertaken to locate the record. If they are found to be unsatisfactory at the external tribunal review stage, the tribunal should be able to order the responsible agency to undertake a more extensive search.

128. The legislation should provide that, where a decision has been made to refuse access, the decision maker must notify the applicant of that decision and provide a written statement of the reasons for the decision. The statement of reasons should go beyond the mere wording of the exemption category which is being relied upon, but not be required to contain matter that is of such a nature that its inclusion would make the statement itself an exempt record. An agency which cannot elaborate its reasons due to this consideration should specifically declare so in the statement of reasons.

129. The NAA should be required to monitor the standard of notifications, particularly statements of reasons, and provide advice to agencies about appropriate standards.

18. Discretionary early release and privileged access

130. There should be a statutory obligation on all Commonwealth agencies to make records accessible to the public at the earliest practicable time.

131. There should be a statutory obligation on the NAA to establish appropriate guidelines for the creation and implementation of discretionary early release schemes by Commonwealth agencies.

132. In order to facilitate discretionary early release schemes, provisions based upon those in section58 of the Archives Act and section 14 of the FOI Act should be retained in both the FOI Act and the new legislation.

133. The NAA should have the power to issue guidelines as to when it would be proper to release records under the discretionary release provisions of the FOI Act or the new legislation. In formulating its guidelines for the discretionary release of records under section 14 of the FOI Act and section 58 of the Archives Act, the NAA should consult, where appropriate, with the Attorney-General's Department and the Privacy Commissioner.

134. The accelerated release provision in section 56(1) of the Archives Act should not be included in the new legislation.

135. The NAA should include in its guidelines relating to discretionary early release administrative measures that will ensure that the NAA has immediate access to all access decisions made by agencies in relation to records of archival value not yet in the open access period.

136. In addition to existing protections for release in conjunction with the relevant Act, including special access, the legislation and the FOI Act should, in respect of any record released in pursuance of provisions based on section 58 of the Archives Act or section 14 of the FOI Act, provide that it is a defence to any action for defamation, breach of confidence or infringement of copyright against the Commonwealth, or any person concerned in the authorising or giving of access, that the decision maker
    - had a reasonable belief that the record was not exempt under the relevant legislation; or
    - being of the opinion that the record was exempt, consulted with all persons reasonably believed to be interested parties, each of whom agreed to the release of the document.

137. The legislation should reaffirm the right of privileged access for former Governors-General, Ministers, Secretaries and other specified senior officials to Commonwealth records relating to their respective terms in office for the purposes of refreshing their memories or preparing biographical works. This right should apply only in relation to records in the open period.

138. Identical provisions should be inserted in the FOI Act in relation to records which are not yet in the open period.

139. The legislation should specify that, where records are voluntarily deposited with the NAA, the depositor, or his or her nominated representative, should retain a right to access those records.

140. Special access should continue to be provided for in the archives legislation on identical grounds to those currently set out in Archives Regulation 9(d).

141. The NAA should be required, in consultation with other interested agencies, to issue guidelines for administrative procedures relating to applications seeking special access for the purposes of research.

142. Special access provisions should be included in the legislation covering records in both the open and the closed periods of access.

143. Special access decisions should be made at agency rather than at ministerial level. The NAA should have responsibility for special access decisions relating to records of archival value in the open period unless there is in place an arrangement with the controlling agency under which that agency is to have that responsibility. The controlling agencies should have responsibility for special access decisions relating to records in the closed period and records in the open period that are not of archival value.

144. Applications for special access should attract application, search and retrieval, and decision making fees based upon those applied under the FOI Act for general access applications.

145. The proposed special access provisions relating to access for research purposes should include a right to seek review of a decision to refuse special access by the minister responsible for the portfolio of the decision making agency.

146. The special access provisions in the legislation should require successful special access applicants to enter a research contract specifying the conditions of access and the consequences of breaching those conditions.

147. The legislation should include provision for liquidated damages of $2000 for the breach of conditions of a research contract.

19. Services to the public

148. The NAA should have a statutory obligation to create and maintain a service charter, but the charter itself should not be incorporated in the legislation.

149. The current statutory obligations to establish the Australian National Register of Records, the Australian National Guide to Archival Material, and the Australian National Register of Research Involving Archives, should be replaced with a general statutory obligation on the NAA to create adequate finding aids in appropriate formats and to promote their availability.

150. The legislation should include a broad definition of 'finding aid'.

151. As an administrative measure, an information office of the NAA should be maintained in each capital city with knowledgable staff to assist with the identification of appropriate records.

152. The NAA should expand the availability of records, particularly through new technologies, and through public promotion of the availability of the records.

153. Commonwealth agencies should support the further development of an electronic information locator system for Commonwealth government information and records. The NAA should participate actively in this process.

154. An administrative arrangement should be established to enable the NAA to have the primary responsibility for administering Crown copyright in unpublished Commonwealth records which are in the open period.

20. Exemption issues

155. The legislation should include the following legislative directions in relation to the consideration of exemption claims
    - decision makers are to take due and proper account of the legislative objective that records in the open period are made available unless there are compelling grounds for justifying their non-disclosure

- decisions to claim exemption must be based on contemporary evidence and information, and that evidence and information is to be expressly identified in reasons for decisions.

Additionally, the legislation should specify that the damage, prejudice or adverse effect relied on for a claim of exemption must be real and substantial.

156. The legislation should continue to include an exemption category relating to information the disclosure of which would, or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth.

157. The legislation should continue to include exemption categories relating to
- information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth, being information or matter the disclosure of which under this Act would constitute a breach of that confidence;
- information or matter the disclosure of which under this Act would constitute a breach of confidence;

provided, in each case, that such enquiries as are reasonable in the circumstances have been made to locate the person to whom the obligation of confidence is understood to be owed and to determine whether that person wishes to maintain the benefit of that obligation.

158. The legislation should retain an exemption category relating to information the disclosure of which would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution and would not, on balance, be in the public interest.

159. The legislation should include an exemption category, replacing those in sections 33(1)(e)(i), (f)(i), (f)(ii), and (f)(iii), relating to information the disclosure of which would, or could reasonably be expected to, prejudice the enforcement or administration of the law, including the prejudicing of investigations, trials, and lawful methods or procedures.

160. The legislation should retain an exemption category relating to information which would, or could reasonably be expected to, disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement and administration of the law.

161. The legislation should retain an exemption category relating to information the disclosure of which would, or could reasonably be expected to, endanger the life or physical safety of any person.

162. The legislation should include an exemption category relating to personal information the disclosure of which would, or could reasonably be expected to, have an adverse effect on any person.

163. The legislation should include an exemption category covering information, including trade secrets or other information of commercial value, relating to a person's business or professional affairs, or relating to an organisation's business, commercial or financial affairs, where disclosure of that information would, or could reasonably be expected to, have an adverse effect on that person or organisation.

164. The legislation should include an exemption category relating to information that, under Indigenous tradition, is confidential or subject to particular disclosure restrictions. The format of this category should be consistent with the language of the exemption proposed in the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998.

165. A similar provision should be inserted in the FOI Act.

166. Section 33(2), which exempts records covered by legal professional privilege, should not be included in the legislation.

167. Section 33(3), which provides special protection for personal or business affairs relating to taxation laws, should be removed from the legislation.

168. Section 33(1A) should remain in the legislation as a provision assisting with clear but non-exhaustive definitions of confidential sources of information.

169. The NAA, in consultation with the Privacy Commissioner and relevant responsible agencies, should be required by the legislation to formulate and

publish guidelines to assist in the administration of the personal information exemption category.

170. All exemptions, except those relating to information which under Indigenous tradition is confidential or subject to particular disclosure restrictions, should cease to have effect 100 years after the date a record was created.

171. Cabinet notebooks should enter the open period at 30years subject to the same exemptions as all other records.

172. The current system of ministerial conclusive certificates should be retained together with a power of review by an external tribunal, limited to determining the question whether there exist reasonable grounds for the claim that a record is an exempt record. The power to issue certificates should be limited to three exemption categories, namely, information the disclosure of which would, or could reasonably be expected to, damage the security, defence or international relations of the Commonwealth, information given in confidence by a foreign government or international organisation where disclosure of the information would constitute a breach of confidence, and information that, under Indigenous tradition, is confidential or subject to particular disclosure restrictions.

173. A ministerial conclusive certificate should cease to have effect after five years, but should be renewable. Certificates should not be able to have effect in relation to records which are more than 100years old.

174. The legislation should continue to permit an agency to neither confirm nor deny the existence of a record if knowledge of its existence would be exempt information.

175. The requirement to consult with the States and Territories in relation to access decisions should be removed from the legislation.

176. The legislation should continue to provide expressly that security classifications cease to apply for any purpose once a record is found to have no continuing sensitivities and is opened to the public.

21. Personal information in records

177. The legislation should not oblige access decision makers to seek to contact record subjects prior to releasing to the public such personal information as does not fall within the personal information exemption category.

178. The legislation should include a right to access an applicant's own personal information which is more than 30 years old. The parallel right under the FOI Act should continue.

179. The legislation should entitle any person to seek access to otherwise exempt personal information provided that the person can demonstrate a special need for such access by reason of their personal or legal relationship with the record subject.

    Where the record subject is known, or understood, to be alive, access should not be granted without the agreement of the record subject, unless such enquiries as are reasonable in the circumstances have failed to locate the record subject.

    Any grant of access should be on such conditions as are necessary to ensure that the privacy of the information in question is protected to the maximum extent possible. The NAA should be required to issue guidelines to assist in the assessment of applications.

    A refusal to grant access should be reviewable and subject to appeal to an external merits review tribunal.

180. The legislation should require a decision maker to consider the need for counselling where otherwise exempted information is released to a record subject or to a person who has demonstrated a special need to have access to the information by reason of their personal or legal relationship with the record subject. The decision whether to seek counselling and the type of counselling required should ultimately be in the hands of the applicant.

181. The FOI Act should be amended to provide that records in the open period may not be altered in accordance with section50(2)(a).

182. The legislation should include a provision giving the controlling agency power to add a document or official note to a record in the open period where the agency is satisfied that the information is incomplete, incorrect, out of date or

misleading. This power should be identical to that in section 50(2)(b) of the FOI Act.

183. The legislation should include a right to request annotation of personal information in the open period by adding a statement by the record subject to the record. The right of annotation in the archives legislation should be identical to that in sections 51A and 51B of the FOI Act.

22. Review of decisions

184. Internal review procedures should be maintained as the first stage of a statutory right of review but should not be a mandatory prerequisite to external review of a decision to refuse access. An applicant should have the ability to appeal directly to the external tribunal.

185. The legislation should reaffirm that an appeal lies to the external tribunal, without internal review, where there is a deemed decision to refuse access after 90 days have elapsed since the original application.

186. Where records are subject to a ministerial conclusive certificate the legislation should clarify that the only review option available is appeal directly to the external tribunal.

187. The statutory period of notification for internal review decisions should be extended from 14 to 30 days, with the retention of an obligation to notify the applicant of a decision as soon as possible.

188. The NAA should have responsibility for establishing guidelines for the conduct of internal review of access decisions under the archives legislation.

189. An application fee for internal review applications should not be introduced.

190. External review on the merits of decisions to withhold access should be retained. This review should be undertaken by the AAT.

191. When reviewing access decisions under the Act, the external tribunal should be constituted by a single presidential member.

192. The external tribunal's power to waive the applicant's fee to the tribunal for applications relating to the archives legislation should be retained.

193. Formal use of preliminary conferences should be limited to merits review by an external tribunal.

194. The responsibility for reviewing a decision to refuse access should lie with the agency which has responsibility for making the initial access decision, whether this is the NAA or another agency acting in accordance with an access agreement.

195. The legislation should expressly recognise the interest which the NAA has in external review proceedings relating to access decisions under the legislation. The reviewing tribunal should have the discretion to join the NAA to the proceedings and the NAA should have the right to approach the tribunal for that purpose on its own motion.

196. The right to make a complaint to the Ombudsman should be maintained.

197. The ability to seek judicial review of decisions by the Federal Court under the ADJR Act or on appeal from the external merits review tribunal on a question of law should be maintained.

23. Records of the Parliament, the Courts and the royal commissions

198. The records of the Parliament and the Commonwealth courts should be subject to the legislation to the maximum extent possible consistent with maintaining the separation of the legislative, judicial and executive functions.

199. The provisions relating to the Parliament and the Commonwealth courts should be included in the legislation itself rather than in regulations.

200. The present distinction between Class A and Class B records of the Parliament should be maintained and set out as concisely as possible in the legislation rather than in regulations.

201. The present distinction between the judicial and administrative records of the courts should be maintained and set out in the legislation.

202. The Parliament and the courts should be required to adhere to recordkeeping standards issued by the NAA after consultation with the institution concerned.

203. The Parliament and the courts should be subject to the custodial provisions of the legislation. However, the relevant Presiding Officer or Chief Justice should be able to determine that Class A records of the Parliament or judicial records of the courts should not be required to be transferred to the custody of the NAA.

204. The Parliament should continue to have the right to dispose of Class A records as it sees fit, provided that it first consults with the NAA. Disposal of Class B records should require the approval of the NAA.

205. The courts should continue to have the right to dispose of their judicial records as they see fit, provided that they first consult with the NAA. Disposal of the administrative records of the Courts should require the approval of the NAA.

206. The Class A records of the Parliament and the judicial records of the courts should not be subject to the public access provisions of the new legislation. The Class B records of the Parliament and the administrative records of the courts should be subject to the public access provisions, including the appeal provisions.

207. As an administrative objective, the Houses of the Parliament and their Presiding Officers should have regard to the desirability of determining the public access status of Class A records when they reach the open access period. Correspondingly, the Chief Justices of Commonwealth courts should have regard to the desirability of determining the public access status of judicial records of their respective courts when they reach the open access period.

208. The legislation should specify that
    - royal commission records are Commonwealth records for the purposes of the Act,
    - once royal commission records reach the age of 30 years the access provisions of the Act prevail over any restriction on access to them imposed by that royal commission,
    - the Minister responsible for the Royal Commissions Act exercises the controlling agency function for them,

- the status of the records of joint royal commissions should be determined by agreement between the governments concerned.

24. Records relaing to Aboriginal and Torres Strait Islander people

209. Within the framework of the legislation, the NAA should do all it reasonably can to make copies of records of particular significance to Aboriginal and Torres Strait Islander people available more readily, in particular by assisting in the development of keeping places.

210. Ownership or custody of Commonwealth records should only be transferred to Indigenous organisations with the approval of the NAA.

211. The ownership of Commonwealth records relating to Indigenous people should not be transferred to another government or to a private organisation without appropriate consultation with all stakeholders. No such transfer should take place in a way that diminishes existing rights and protections.

212. The NAA should prepare and circulate a discussion paper on the appraisal of records relating to Aboriginal and Torres Strait Islander people.

213. The Commission endorses the present Memorandum of Understanding between Australian Archives and Indigenous groups regulating access by Indigenous people to sensitive records more than 30 years old. A similar Memorandum of Understanding should be negotiated by relevant Commonwealth agencies for records less than 30 years old.

214. In consultation with community representatives, and pending the introduction of legislation giving effect to the new exemption proposed in Chapter 20, the NAA should revise its guidelines for the application of the section33(1)(g) personal affairs exemption category to records relating to Aboriginal and Torres Strait Islander people.

215. In making appointments to the governing council, appropriate regard should be had to the significance of Aboriginal and Torres Strait Islander people as stakeholders in Commonwealth records.

216. In establishing advisory groups or convening consultative forums, and in making appointments to advisory groups, the governing council of the NAA should give particular attention to the concerns and needs of Aboriginal and Torres Strait Islander communities.

217. Australian Archives, and thereafter the NAA, should, as an administrative measure, take a proactive role in encouraging the training and employment of Indigenous archivists.

25. Records relating to functions and services provided by contractors

218. If legislation is enacted to authorise the contracting out of particular functions or services to private sector bodies, the legislation should provide that the archives legislation is to apply to records created by such contractors, but only in respect of records that relate to the provision of those functions or services.

219. Where there is no statutory scheme, contracts for the provision of functions or services on behalf of the Commonwealth should ensure that appropriate recordkeeping obligations and access arrangements are put in place in respect of records that relate to the provision of those functions or services.

220. Contracting agencies should ensure that contracts for the provision of services to the Commonwealth contain such recordkeeping obligations as are necessary to ensure the completeness and integrity of the agency's records, taking account of relevant guidelines issued by the NAA.

221. Contracts relating to the management of Commonwealth recordkeeping systems by private sector organisations, especially electronic systems, should be required to include provisions to ensure the maintenance of the integrity and functionality of the system in any eventuality.

222. The mandatory recordkeeping standards to be issued by the NAA should include specific guidance on maintaining the integrity and functionality of recordkeeping systems, especially electronic systems, subject to outsourcing arrangements.

26. Beyond the federal record

223. The legislation should make specific reference to the NAA's role in providing leadership and support to the Australian archival community.

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i. See Sue McKemmish and Michael Piggott (eds) *The Records Continuum* Melbourne 1994, Appendix 2.

ii. W Kaye Lamb *Development of the National Archives* Canberra 1974.

iii. Statement to the House of Representatives by the Hon. Lionel Bowen MP, Special Minister of State, 7 March 1974

iv. It did incorporate, however, other significant elements of archival policy and management which had been on the agenda for legislation long before the development of the administrative law package and which had been given further impetus by Dr Lamb's report in 1973. See also para 2.15.

v. Senate Standing Committee on Education and the Arts *Inquiry into the Archives Bill 1978* Canberra 1979; Senate Standing Committee on Constitutional and Legal Affairs *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* Canberra 1979.

vi. In particular the concern of the then Public Service Board that it should have policy responsibility for current recordkeeping and the concern of some other Commonwealth agencies that their recordkeeping should not be subject to external direction.

vii. Australian Society of Archivists Inc *IP Submission 95*.

viii. One provider subsequently withdrew. The remaining four providers are CVSI with *Optegra* and *TRIM*, Educom Pty Ltd with *Docs Open* and *Records Manager*, GE Capital IT Solutions with *Objective* and IBM Australia with *VisualInfo* and *TRIM*.

ix. Letter from the acting Chief Government Information Officer to heads of Commonwealth agencies 8 January 1998.

x. *Freedom of Information Act 1982* s 12.

xi. *Freedom of Information Amendment Act 1983* s 7.

xii. Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40 *Open government* Sydney 1995, rec 14 (ALRC 77/ARC 40).

xiii. See rec 103

xiv. For further discussion of the need for recordkeeping standards and the role of the archival authority see ch 9.

xv. See ch 9.

xvi. See ch 10.

xvii. See ch 12 and 13.

xviii. See ch 14.

xix. See ch 11.

xx. See ch 15 and 17.

xxi. See ch 15 and 18.

xxii. See ch 19.

xxiii. See ch 26.

xxiv. See ch 26.

xxv. The Commission has recommended that the NAA should be responsible for promulgating government wide standards and issuing guidelines in relation to a number of records management and archival functions. See ch 9 for a general discussion of standards.

xxvi. See rec 39.

xxvii. Ch 11 discusses the requirement of powers to recover Commonwealth records which are not in Commonwealth custody.

xxviii. It may be necessary to exercise this power in relation to the recovery of records: see ch 11.

xxix. The Commission has recognised the need for flexible custodial arrangements in the legislation, and has accordingly recommended that the NAA have the power to approve or require alternatives to custody of records of archival value by the NAA: see ch 12 and 13.

xxx. This is an essential power which supports the function of making records accessible to the public: see para 16.35–40 for further discussion.

[xxxi]. See rec 152.

[xxxii]. See ch 26.

[xxxiii]. See ch 7 on charges to be imposed by the NAA

[xxxiv]. Jonathan Boston 'Institutional Design' in Jonathan Boston, John Martin, June Ballot and Pat Walsh *Public Management: The New Zealand Model* Oxford University Press Auckland 1996, 76. A recent example of the application of a functional model at the Commonwealth level would be the creation of Centrelink as a separate service providing body with the Department of Social Security becoming a small policy making organisation.

[xxxv]. id 72.

[xxxvi]. An overview of the changes made to the National Archives of New Zealand can be found in Rachel Lilburn 'The Restructuring of the National Archives of New Zealand: An Ideological Experiment?' (1996) 13 *Government Information Quarterly* 285.

[xxxvii]. Baden Ewart and Jonathan Boston 'The Separation of Policy Advice from Operations' (1993) 52 *Australian Journal of Public Administration* 238.

[xxxviii]. Senator Richard Alston, Minister for Communications, the Information Economy and the Arts, press release, 27 February 1998. There has not at this stage been any amendment to the Archives Act to change the official name from Australian Archives.

[xxxix]. See for example The Treasury *DRP Submission 19*.

[xl]. Robert Sharman *DRP Submission 9*; Dzidra Knochs *DRP Submission 12*; Gerald Fischer *DRP Submission27*.

[xli]. Archives Act s 5(1). Australian Archives has been a part of The Department of the Special Minister of State (1974–1975), Department of Administrative Services (1975–1977, 1987–1993), Department of Home Affairs (1977–1980), Department of Home Affairs and Environment (1980–1984), Department of Arts, Heritage and Environment (1984–1987), Department of the Arts and Administrative Services (1993–1994), Department of Communications and the Arts (1994–1998).

[xlii]. IP 19 para 5.11.

[xliii]. Helen Cross *IP Submission 38*. See also The Genealogical Society of Victoria Inc *IP Submission 9*; Health Insurance Commission *IP Submission 67*.

[xliv]. Department of Veterans' Affairs *IP Submission 98*. See also National Film and Sound Archives *IP Submission 41*; Department of Defence *IP Submission 82*.

[xlv]. *IP Submission 5*.

[xlvi]. Australian Archives *IP Submission 56*. See also Australian Society of Archivists Inc *IP Submission 95*.

[xlvii]. Inspector-General of Intelligence and Security, RL McLeod, *IP Submission 46*; History Institute, Victoria Inc *IP Submission 75*; National Library of Australia *IP Submission 76*.

[xlviii]. Australian Agency for International Development *IP Submission 61*. See also Australian War Memorial *IP Submission 47*.

[xlix]. See Matthew Gordon-Clark *IP Submission 5*; Office of the Clerk of the Senate *IP Submission 15*. See ch 23 for a discussion of the relationship with the Parliament and the courts.

[l]. Archives Authority of NSW *DRP Submission 11*; National Film & Sound Archives *DRP Submission 18*; Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; Gerald Fischer *DRP Submission 27*; Department of Health and Family Services *DRP Submission 30*; Australian Society of Archivists Inc *DRP Submission 34*; Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*; Australian Archives *DRP Submission 39*.

[li]. Department of Finance and Administration *DRP Submission 43*.

[lii]. Department of Prime Minister and Cabinet *IP Submission 55*; Department of Finance and Administration *DRP Submission 43*.

[liii]. National Library of Australia *IP Submission 76*.

[liv]. Advisory Council on Australian Archives *IP Submission 70*.

[lv]. Eccleston Associates *IP Submission 74*.

[lvi]. Department of Finance and Administration *DRP Submission 43*.

[lvii]. Australian Archives *IP Submission 56*.

[lviii]. Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

[lix]. Inspector-General of Security and Intelligence, RL McLeod, *IP Submission 46*; Australian Securities Commission *IP Submission 52*; Department of Prime Minister & Cabinet *IP Submission 55*; Eccleston Associates *IP Submission 74*; Department of Defence *IP Submission 82*.

[lx]. *Commonwealth Authorities and Companies Act 1997* s 28(1). The 'directors' are members of the governing body.

[lxi]. Robert Sharman *DRP Submission 9*.

[lxii]. Discussion of appointment of a Council and the National Archivist follows at para 6.65–66 and 6.43–46 respectively.

[lxiii]. Advisory Council on Australian Archives *DRP Submission 32*; Australian Archives *DRP Submission 39*.

[lxiv]. Robert Sharman *DRP Submission 9*; Advisory Council on Australian Archives *DRP Submission 32*.

[lxv]. For example see *Australian Broadcasting Corporation Act 1983* s 78, 80; *Australian National Maritime Museum Act 1990* s 14.

[lxvi]. The Genealogical Society Of Victoria Inc *IP Submission 9*; Robert Sharman *IP Submission 18*; Professional Historians Association NSW Inc *IP Submission 32*; Australian Federal Police *IP Submission35*; Australian Archives *IP Submission 56*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Anne Picot *IP Submission 79*.

[lxvii]. Australian Council of National Trusts *IP Submission 58*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

[lxviii]. Robert Sharman *IP Submission 18*.

[lxix]. Australian Archives *IP Submission 56*.

[lxx]. Australian Archives *DRP Submission 39*.

[lxxi]. Professional Historians Association NSW Inc *IP Submission 32*; Australian Council of Professional Historians Associations Inc *IP Submission 50*.

[lxxii]. Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; Gerald Fischer *DRP Submission 27*; Advisory Council on Australian Archives *DRP Submission 32*.

[lxxiii]. This does not mean that existing members of the Advisory Council would not be eligible for appointment to a governing council, merely that appointment would be made with a different intention and participation would be at a different level.

[lxxiv]. Matthew Gordon-Clark *IP Submission 5*; History Institute, Victoria Inc *IP Submission 75*; Australian Society of Archivists Inc *IP Submission 95*.

[lxxv]. See paras 6.72–79 below.

[lxxvi]. For example see the *National Library Act 1960*; *National Gallery Act 1975*; *Australian Broadcasting Corporation Act 1983*; the Civil Aviation Safety Authority established by the *Civil Aviation Act 1988*; *Australian Maritime Safety Authority Act 1990*.

[lxxvii]. Robert Sharman *DRP Submission 9*; Advisory Council on Australian Archives *DRP Submission 32*.

[lxxviii]. Eccleston Associates *DRP Submission 42*.

[lxxix]. Michael Roe *DRP Submission 2*; Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; Australian Broadcasting Corporation *DRP Submission 33*; Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*.

[lxxx]. Robert Hyslop *DRP Submission 8*.

[lxxxi]. Australian Intelligence Community *DRP Submission 37*. See also Department of Defence *DRP Submission 21*; Clyde Cameron *DRP Submission 25*.

[lxxxii]. Advisory Council on Australian Archives *DRP Submission 32*. See also Robert Sharman *DRP Submission 9*; Australian Archives *DRP Submission 39*.

[lxxxiii]. Robert Hyslop *DRP Submission 8*; Robert Sharman *DRP Submission 9*; Advisory Council on Australian Archives *DRP Submission 32*; Eccleston Associates *DRP Submission 42*.

[lxxxiv]. Department of Defence *DRP Submission 21*. See also Australian Intelligence Community *DRP Submission 37*.

[lxxxv]. Australian Archives *DRP Submission 39*.

[lxxxvi]. Clyde Cameron *DRP Submission 25*; Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*.

[lxxxvii]. Historical Society for the Northern Territory Inc *DRP Submission 5*; Dzidra Knochs *DRP Submission12*.

lxxxviii. Robert Sharman *DRP Submission 9*. See also Advisory Council on Australian Archives *DRP Submission32*.

lxxxix. Australian Society of Archivists Inc *DRP Submission 34*.

xc. See para 6.60 below.

xci. See rec 10.

xcii. See for example *Archives Act 1960* (NSW) and *State Records Act 1997* (SA).

xciii. June Edwards *IP Submission 7*; Inspector-General of Intelligence and Security, RL McLeod *IP Submission 46*.

xciv. Australasian Federation of Family History Organisations Inc *IP Submission 33*; History Institute, Victoria Inc *IP Submission 75*.

xcv. Archives Authority of New South Wales *DRP Submission 11*.

xcvi. Lionel Bowen *DRP Submission 4*; Dzidra Knochs *DRP Submission 12*.

xcvii. Eccleston Associates *DRP Submission 42*.

xcviii. See rec 10 above.

xcix. Advisory Council on Australian Archives *IP Submission 70*. The inclusion of Parliamentary representatives was supported by Lionel Bowen *DRP Submission 4*.

c. Robert Sharman *IP Submission 18* and *DRP Submission 9*. The need for two Parliamentary members was also questioned by Eccleston Associates *DRP Submission 42*.

ci. Historical Society of the Northern Territory *DRP Submission 5*.

cii. National Film & Sound Archives *DRP Submission 18*; Clyde Cameron *DRP Submission 25*; Australian Society of Archivists Inc *DRP Submission 34*; Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*.

ciii. See para 6.39 above.

civ. Matthew Gordon-Clark *IP Submission 5*; History Institute, Victoria Inc *IP Submission 75*; Australian Society of Archivists Inc *IP Submission 95*.

cv. para 10.65–67.

cvi. para 24.30.

cvii. Australian Broadcasting Corporation *DRP Submission 33*.

cviii. Australian Archives *DRP Submission 39*.

cix. Australian Archives *DRP Submission 39*. Similar concerns were raised by Eccleston Associates *DRP Submission 42*

cx. Information provided to the Commission by Australian Archives.

cxi. Australian Archives *Review of Potential for Savings/Charges* Canberra February 1998 (for internal circulation).

cxii. Australian Broadcasting Corporation *DRP Submission 33*.

cxiii. Australian Archives *DRP Submission 39*.

cxiv. See ch 9.

cxv. See ch 12.

cxvi. 'Non-discretionary' services are those which the Act requires the Archives to perform or which are essential to the delivery of services (for example, the provision of information and research facilities) which the Archives is required to perform. 'Discretionary ' services are non core or value added services such as the storage of some records which are not of archival value, the provision of photocopies and the sale of guides to records.

cxvii. Charges are currently confined to records which have not been evaluated or which have been sentenced for disposal at an age of less than 30 years.

cxviii. Archives Regulation 11(6).

cxix. Australian Archives *DRP Submission 39*.

cxx. Historical Society of the Northern Territory Inc *DRP Submission 5*.

cxxi. See rec 18.

cxxii. Barbara Poniewierski *IP Submission 11*.

[cxxiii]. Greg Terrill *DRP Submission 13*.

[cxxiv]. Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*.

[cxxv]. Clyde Cameron *DRP Submission 25*.

[cxxvi]. Australian Archives *IP Submission 56*.

[cxxvii]. Advisory Council on Australian Archives *DRP Submission 32*.

[cxxviii]. Australian Intelligence Community *IP Submission 42*.

[cxxix]. Australian Broadcasting Corporation *DRP Submission 33*.

[cxxx]. National Library of Australia *IP Submission 76*.

[cxxxi]. A copy of this draft statement was included in Australian Society of Archivists Inc *DRP Submission34*.

[cxxxii]. Department of Finance and Administration *DRP Submission 43*

[cxxxiii]. s 3(1).

[cxxxiv]. American Standard Code for Information Interchange.

[cxxxv]. Terry Cook 'Electronic Records, Paper Minds' *Archives and Manuscripts* 22(2) (1994), 312–13.

[cxxxvi]. Australian Archives *Australian Archives Handbook* Canberra 1996, 116.

[cxxxvii]. Standards Australia *Australian Standard AS 4390 Records Management* Part 1 Sydney 1996, 4.21.

[cxxxviii]. Cited in Eccleston Associates *DRP Submission 42*.

[cxxxix]. Archives Authority of NSW *DRP Submission 11*. The Australian Broadcasting Corporation raised similar issues relating to the equipment needed to access audiovisual records in its *DRP Submission33*.

[cxl]. See para 13.29–36 for discussion of the present 'exempt material' provision and material such as books and maps.

[cxli]. Australian Archives *DRP Submission 39*.

[cxlii]. Chris Hurley has suggested that the inclusion of the word 'evidence' in the definition might cause confusion with the legal definition of evidence. He suggests instead that the evidential quality of records be defined in some other way: Chris Hurley *DRP Submission 14*.

[cxliii]. See para 23.31–33 which deal with the records of royal commissions.

[cxliv]. See para 13.29–36.

[cxlv]. The term 'register or guide' refers to registers or guides required under s 65–67 of the Archives Act to be maintained by Australian Archives. For further discussion of registers and guides see para19.21–24.

[cxlvi]. Australian Society of Archivists Inc *DRP Submission 34*.

[cxlvii]. s 3(1) of the Act provides a detailed definition of 'agency', which basically encompasses the Governor, ministers, the courts and the State and local government administrations, but not the Parliament.

[cxlviii]. Australian Intelligence Community *DRP Submission 37*. The Department of Defence raised similar concerns in *DRP Submission 21*.

[cxlix]. Department of Foreign Affairs and Trade *DRP Submission 35*.

[cl]. Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*.

[cli]. Australian Archives *DRP Submission 39*.

[clii]. Chris Hurley *DRP Submission 14*.

[cliii]. s 3(1).

[cliv]. See for example Clyde Cameron *DRP Submission 25*; Australian Archives *DRP Submission 39*; Eccleston Associates *DRP Submission 42*

[clv]. Australian Council of Archives *Corporate Memory in the Electronic Age* Melbourne 1996, 5–6.

[clvi]. Australian Archives *A Report on the Development of a Documentation Standard for Commonwealth Agencies* Canberra 1995, para 3.3.1.

[clvii]. See para 4.27.

[clviii]. Public Service Act Review Group *Report of the Public Service Act Review Group* Canberra 1994, 161.

[clix]. Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982* Sydney 1995 (ALRC 77/ ARC40), para 5.11–5.12.

[clx]. Robert Sharman *DRP Submission 9*.

[clxi]. Australian Archives *IP Submission 56*.

[clxii]. Commonwealth Ombudsman *Annual Report 1994–95* AGPS Canberra 1995.

[clxiii]. Commonwealth Ombudsman *Clients Beware* Canberra 1997, para 5.1.

[clxiv]. The Records Management Systems Working Group, which was convened under the auspices of the Office of Government Information Technology in 1995, undertook a survey of records management costs in a range of Commonwealth agencies. In 32 agencies which supplied indicative costings total annual expenditure on records management was of the order of $120 000 000. See Department of Immigration and Multicultural Affairs *IP Submission 83*.

[clxv]. See ch 3.

[clxvi]. Australian Society of Archivists Inc *DRP Submission 34*.

[clxvii]. Australian Archives *DRP Submission 39*.

[clxviii]. *IP Submission 46*.

[clxix]. *IP Submission 82*.

[clxx]. Matthew Gordon-Clark *IP Submission 5*.

[clxxi]. Australia Post *IP Submission 25*.

[clxxii]. *IP Submission 35*.

[clxxiii]. *IP Submission 57*.

[clxxiv]. Australian Securities Commission *IP Submission 52*.

[clxxv]. Chris Hurley *IP Submission 27*.

[clxxvi]. See for example Attorney-General's Department *DRP Submission 29*.

[clxxvii]. See para 9.34–39.

[clxxviii]. Standards Australia *Australian Standard AS 4390 Records Management* Sydney 1996.

[clxxix]. Western Australia Commission on Government *Report No. 2 Part 2* Perth 1995, para 7.4.1–7.4.5.

[clxxx]. id para 7.5.5–7.6.5.

[clxxxi]. Australian Federal Police *IP Submission 35*.

[clxxxii]. *IP Submission 57*.

[clxxxiii]. *IP Submission 18*.

[clxxxiv]. ALRC 77/ARC 40, para 5.11.

[clxxxv]. Eccleston Associates *DRP Submission 42*.

[clxxxvi]. See for example Attorney-General's Department *DRP Submission 29*; Australian Intelligence Community *DRP Submission 37*.

[clxxxvii]. Anne Picot *IP Submission 79*.

[clxxxviii]. Australian Archives *IP Submission 56*.

[clxxxix]. Archives Authority of NSW *IP Submission 97*.

[cxc]. ALRC 77/ARC 40, para 5.11–5.13.

[cxci]. s 15(1) of the *Auditor-General Act 1997* (Cth) empowers the Auditor-General to 'at any time conduct a performance audit of an agency'. s 18(1) empowers the Auditor-General to 'at any time conduct a review or examination of a particular aspect of the operations of the whole or part of the Commonwealth public sector, being a review or examination that is not limited to the operations of only one Agency, body or person'.

[cxcii]. The Archives Authority of NSW did however suggest in *DRP Submission 11* that the NAA should have a compliance monitoring role as well as the Auditor-General so that more regular and comprehensive surveys of recordkeeping could be undertaken.

[cxciii]. Australian National Audit Office *DRP Submission 1*.

cxciv. Department of Defence *DRP Submission 21*; Australian Intelligence Community *DRP Submission 37*.

cxcv. Eccleston Associates *DRP Submission 42*

cxcvi. This prohibition was confirmed in s 24(4) of the Act.

cxcvii. s 5(2)(d). See also para 8.35.

cxcviii. s 5(2)(c) provides that the functions of Australian Archives include 'to promote ... the keeping of current Commonwealth records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth'.

cxcix. Chris Hurley *IP Submission 27*.

cc. Mark Brogan *IP Submission 26*.

cci. Inspector-General of Intelligence and Security, RL McLeod *IP Submission 46*.

ccii. Australian Archives *IP Submission 56*.

cciii. Australian Bureau of Statistics *IP Submission 86*.

cciv. Australia Post *IP Submission 25*.

ccv. Australian Federal Police *IP Submission 35*.

ccvi. Society of Australian Genealogists *IP Submission 37*.

ccvii. See para 8.35.

ccviii. See in particular Advisory Council on Australian Archives *IP Submission 70*.

ccix. Kim Rubenstein *IP Submission 1*.

ccx. This material is set out in detail in the Archives' *Disposal Manual*. It is summarised in *Australian Archives Handbook* Canberra 1996 and in Australian Archives *Commonwealth records: a guide to the disposal practices of the Australian Archives* Canberra 1994. For a general discussion of appraisal and disposal issues see Barbara Reed 'Appraisal and Disposal' in *Keeping Archives* Melbourne 1993, 156–206.

ccxi. See Australian Archives *Appraisal Philosophy for the Australian Archives* Canberra 1997.

ccxii. Functional appraisal focuses on the nature and value of functions undertaken within the relevant jurisdiction, rather than on the administrative structures within which those functions are undertaken.

ccxiii. Chris Hurley *IP Submission 27*.

ccxiv. Australian Bureau of Statistics *DRP Submission 15*.

ccxv. A copy of the report was provided to the Commission by Australian Archives.

ccxvi. Department of Defence *DRP Submission 21*.

ccxvii. Chris Hurley *DRP Submission 14*.

ccxviii. Australian Archives *DRP Submission 39*.

ccxix. The Treasury *DRP Submission 17*.

ccxx. See para 3.34.

ccxxi. Colin Smith 'Some More About Dreams and Nightmares ' *New Zealand Archivist* 5(4) (1994), 10–11.

ccxxii. Department of Transport and Regional Development *DRP Submission 22*.

ccxxiii. See para 12.9.

ccxxiv. See para 10.52–54.

ccxxv. See ch 12.

ccxxvi. Chris Hurley *DRP Submission 14*.

ccxxvii. See para 10.56.

ccxxviii. Society of Australian Genealogists *IP Submission 37*.

ccxxix. Australian Bureau of Statistics *IP Submission 86*.

ccxxx. Australian Bureau of Statistics *DRP Submission 15*.

[ccxxxi] The Committee tabled its report in the Parliament on 25 May 1998 as this Report went to press. The Committee recommended that legislative provision be made for the retention of name identified Census records and for their release to the public at the age of 99 years.

[ccxxxii] In the case of Census records, the *Census and Statistics Act 1905*.

[ccxxxiii] 'National Archives of Australia' <http://www.naa.gov,au/index.htm>.

[ccxxxiv] Australian Archives *DRP Submission 39*

[ccxxxv] The process of bringing such records back into official custody has generally been known as 'recovery'. However 'repossession' has also been suggested: Michael Roe *DRP Submission 2*.

[ccxxxvi] Many of these records have subsequently been deposited voluntarily in libraries or archives.

[ccxxxvii] para 11.26–32.

[ccxxxviii] Matthew Gordon-Clark *IP Submission 5*.

[ccxxxix] Robert Sharman *IP Submission 18*.

[ccxl] Greg Terrill *DRP Submission 13*.

[ccxli] The minister may extend this period by up to 50 years.

[ccxlii] See for example National Film and Sound Archive *DRP Submission 18*; Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; Clyde Cameron *DRP Submission 25*; Department of Health and Family Services *DRP Submission 30*; Australian Broadcasting Corporation *DRP Submission 33*; Australian Archives *DRP Submission 39*.

[ccxliii] Australian Archives *DRP Submission 39* and supplementary oral advice.

[ccxliv] Department of Foreign Affairs and Trade *IP Submission 60*. See ch 13 for recommendations on the existing 'exempt material' provisions as they relate to other Commonwealth collecting institutions.

[ccxlv] Australian Archives *IP Submission 56*.

[ccxlvi] Clyde Cameron *DRP Submission 25*.

[ccxlvii] Attorney-General's Department *DRP Submission 29*.

[ccxlviii] The Archives provides written information to ministers' offices about the Personal Records Service and endeavours to make direct contact with all offices prior to federal elections. The Archives will shortly publish a personal records kit for ministers.

[ccxlix] This is duplicate material only. Original Cabinet records are retained by Cabinet Office and copies provided to the Archives for release in accordance with the 30 year rule.

[ccl] Australian Archives *DRP Submission 39*

[ccli] s 5(2)(e).

[cclii] s 6(1)(a). 'Material of the Archives' is defined in s 3(1) as '(a) records in the custody of the Archives (other than current Commonwealth records relating to the administration of the Archives); or (b) an object, other than a record, that forms part of the archival resources relating to Australia and is in the custody of the Archives, and includes material kept in the custody of a person in accordance with arrangements made under section 64'.

[ccliii] This provision does not apply to records which have already been disposed of lawfully in accordance with s 24.

[ccliv] Such records are generally described as being of temporary value.

[cclv] Australian Archives *IP Submission 56*.

[cclvi] 105 shelf metres of the temporary material had been sentenced to be retained for a period of more than 30 years and the remainder for less than 30 years. Such records are generally known as 'long term' and 'short term' temporary records respectively.

[cclvii] Department of Foreign Affairs and Trade *IP Submission 60*.

[cclviii] Australian Broadcasting Corporation *IP Submission 59*.

[cclix] Australasian Federation of Family History Organisations Inc *IP Submission 33*.

[cclx] The Law Society of New South Wales *IP Submission 93*.

[cclxi] See para 12.25–36.

[cclxii] See for example Chris Hurley *DRP Submission 14*; Department of Health and Family Services *DRP Submission 30*; Australian Broadcasting Corporation *DRP Submission 33*; Australian Archives *DRP Submission 39*; Eccleston Associates *DRP Submission 42*.

cclxiii. Chris Hurley *DRP Submission 14*.

cclxiv. Australian Archives *DRP Submission 39* and supplementary oral advice.

cclxv. See rec 75 below and ch 13 generally.

cclxvi. Chris Hurley *IP Submission 27*.

cclxvii. Chris Hurley *IP Submission 27*.

cclxviii. Published by Australian Archives Canberra 1995.

cclxix. Kevin Bourke 'Abandoning Responsibility — Australian Archives and electronic records' (1996) 7(4) *New Zealand Archivist* 8.

cclxx. Eccleston Associates *IP Submission 74*.

cclxxi. Department of Industrial Relations *IP Submission 45*.

cclxxii. Department of Defence *DRP Submission 21*.

cclxxiii. Chris Hurley *DRP Submission 14*; The Treasury *DRP Submission 17*; Australian Broadcasting Corporation *DRP Submission 33*; Eccleston Associates *DRP Submission 42*.

cclxxiv. This provision is limited by s 30(2) to the extent that records more than 25 years old are not to leave the custody of the Archives unless this is necessary for the proper conduct of the business of the Commonwealth institution concerned.

cclxxv. Defence Department *DRP Submission 21*.

cclxxvi. Australian Intelligence Community *DRP Submission 37*.

cclxxvii. See para 8.10.

cclxxviii. *DRP Submission 40* (confidential)

cclxxix. Defined in s 3(1) as 'the Minister to whose ministerial responsibilities the record is most closely related'.

cclxxx. See para 13.8–22.

cclxxxi. Australian Archives *DRP Submission 39*.

cclxxxii. Department of Foreign Affairs and Trade *DRP Submission 35*.

cclxxxiii. Australian Archives *IP Submission 56* and *DRP Submission 39*; Australian Intelligence Community *IPSubmission 42* and *DRP Submission 37*; Department of Defence *IP Submission 82* and *DRP Submission 21*; Department of Foreign Affairs and Trade *IP Submission 60*; Australian Federal Police *IP Submission 35* and *DRP Submission 41*; Attorney-General's Department *DRP Submission 29*.

cclxxxiv. Attorney-General's Department *DRP Submission 29*.

cclxxxv. See ch 12 fn 2.

cclxxxvi. See para 12.23–24.

cclxxxvii. Australian Archives *IP Submission 56*.

cclxxxviii. National Library of Australia *IP Submission 76*.

cclxxxix. Australian National Maritime Museum *IP Submission 23*.

ccxc. See para 8.10.

ccxci. Chris Hurley *DRP Submission 14*.

ccxcii. Archives Regulation 7AA.

ccxciii. Australian War Memorial *DRP Submission 26*; Australian Archives *DRP Submission 39*

ccxciv. Department of Foreign Affairs and Trade *IP Submission 60*

ccxcv. Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982* Sydney 1995 (ALRC 77/ ARC40), para 2.3.

ccxcvi. id para 4.9.

ccxcvii. Lionel Bowen *DRP Submission 4*.

ccxcviii. Attorney-General's Department *Proposed Freedom of Information Legislation: Report of Interdepartmental Committee* AGPS Canberra 1974.

ccxcix. The FOI Act was amended in 1983 to apply to all records created after 1 December 1977.

ccc. In most jurisdictions where a right of access is provided for in legislation, access to records in the custody of the government archival institution is guaranteed through general freedom of information type legislation rather than under

legislation relating specifically to archives. However, the archival institution often provides more open access than is guaranteed in the general legislation.

[ccci] June Edwards *IP Submission 7*; Australian Federal Police *IP Submission 35*; Australian Intelligence Community *IP Submission 42*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*. See also Australian Broadcasting Corporation *IP Submission 59* and *DRP Submission 33* for an overview of access problems arising from audio and video format records.

[cccii] See para 19.39–47 for discussion of the use of networking technology to improve access to government records.

[ccciii] The exception to the 30 year rule is Cabinet notebooks which do not enter the open period until they are 50 years old: Archives Act s 22A.

[ccciv] Only Queensland and Tasmania have specifically defined open periods, but the remaining States by convention have adopted 20, 25 or 30 years as a guideline as to when records would normally become available to the public with minimal restrictions.

[cccv] The UK has no FOI type legislation, although the current government has established a *Code of Practice on Access to Government Information* which applies to a number of government agencies, and has recently released a white paper recommending the establishment of comprehensive FOI style legislation: see White Paper Cm 3818 *Your Right to Know: Freedom of Information* London 1997.

[cccvi] Australian Archives *IP Submission 56*.

[cccvii] Australian Society of Archivists Inc *IP Submission 95*.

[cccviii] Australian Library and Information Association *IP Submission 44*. See also North Australian Aboriginal Legal Aid Service *IP Submission 73*; The Law Society of NSW *IP Submission 93*; Independent Scholars Association of Australia — Sydney Chapter *IP Submission 96*.

[cccix] A number of submissions supported the creation of a single piece of legislation covering access to all records, but this is not necessarily the same as a single access regime with uniform exemptions: see, for example, Department of Immigration and Multicultural Affairs *IP Submission 83*.

[cccx] See ch 20.

[cccxi] para 15.14 above.

[cccxii] Australian Broadcasting Corporation *IP Submission 59*.

[cccxiii] Australian Archives *IP Submission 56*.

[cccxiv] Department of Defence *IP Submission 82*.

[cccxv] International Social Services Australia *IP Submission 24*; The Treasury *IP Submission 64*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Allan Seymour *IP Submission 78*; Reserve Bank *IPSubmission 81*.

[cccxvi] Australian Broadcasting Corporation *DRP Submission 33*.

[cccxvii] Barbara Poniewierski *IP Submission 11*; Historical Society of the Northern Territory Inc *IPSubmission16*; Australia Post *IP Submission 25*; Department of Foreign Affairs and Trade *IPSubmission 60*; Australian Bureau of Statistics *IP Submission 86*.

[cccxviii] This was supported by the Australian Intelligence Community *IP Submission 42*; Australian Security Intelligence Organization *IP Submission 62*; Privacy Commissioner, Moira Scollay *IP Submission 68*.

[cccxix] Greg Terrill *IP Submission 3*.

[cccxx] Baiba Berzins *IP Submission 4*; June Edwards *IP Submissions 7*; AJ & J Winterbotham *IP Submission 14*; Historical Society of the Northern Territory Inc *IP Submission 16*; International Social Services Australia *IP Submission 24*; Professional Historians Association NSW Inc *IP Submission 32*; Australian Council of Professional Historians Associations Inc *IP Submission 50*; Anne Picot *IP Submission 79*; Independent Scholars Association of Australia Inc *IP Submission 91*; Australian Society of Archivists Inc *IP Submission 95*.

[cccxxi] Office of the Clerk of the Senate *IP Submission 15*.

[cccxxii] Australian Taxation Office *IP Submission 57*.

[cccxxiii] Department of Foreign Affairs and Trade *IP Submission 60*.

cccxxiv. White Paper Cm 2290 *Open Government* London 1993, para 9.5.

cccxxv. White Paper Cm 3818 *Your Right to Know: Freedom of Information* London 1997, para 6.5.

cccxxvi. Commission of the European Communities *Archives in the European Union* The Office for the Official Publications for the European Communities Luxembourg 1994, 32.

cccxxvii. Greg Terrill *DRP Submission 13*.

cccxxviii. For a history of Commonwealth access practice see HJW Stokes 'The Evolution of Commonwealth Access Policy' in Sue McKemmish and Michael Piggott (eds) *The Records Continuum* Melbourne 1994, 52–53.

cccxxix. Australian Archives *IP Submission 56*; Australian Customs Service *IP Submission 20*; Australian Securities Commission *IP Submission 52*; ASIO *IP Submission 62*; Department of Education, Employment, Training and Youth Affairs *IP Submission 69*; Department of Defence *IP Submission 82*; Australian Intelligence Community *DRP Submission 37*; Australian Archives *DRP Submission 39*.

cccxxx. Australian Historical Association *IP Submission 53*. See also Matthew Gordon-Clark *IP Submission 5*; Barbara Poniewierski *IP Submission 11*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Society of Australian Genealogists *IP Submission 37*; Australian Society of Archivists Inc — NSW Branch *DRP Submission 36*.

cccxxxi. Robert Sharman *IP Submission 18*. This point was also raised at a number of public consultations.

cccxxxii. Greg Terrill *DRP Submission 13*.

cccxxxiii. ALRC 77/ARC 40, para 5.6.

cccxxxiv. The Tasmanian *Archives Act 1983*, which was largely based on drafts of the Commonwealth Archives Bill, also incorporates exemptions and access procedures, but does not include an appeal mechanism.

cccxxxv. *Access to Information Act 1983*. This Act is usually cited together with the *Privacy Act 1983* as ATIP.

cccxxxvi. *Official Information Act 1982* (NZ).

cccxxxvii. *Freedom of Information Act 1992* (Qld).

cccxxxviii. *Freedom of Information Act 1992* (WA).

cccxxxix. *Freedom of Information Act 1989* (NSW). Unlimited retrospectivity, and thus application to archival records, has only been in place since the enactment of the *Freedom of Information (Amendment) Act 1992* (NSW).

cccxl. For example, Ontario's *Freedom of Information and Privacy Act 1992* and British Columbia's *Freedom of Information and Privacy Act 1993*.

cccxli. This idea was particularly developed by the Department of Immigration and Multicultural Affairs *IP Submission 83*.

cccxlii. Australian Intelligence Community *IP Submission 42*.

cccxliii. See ch 20.

cccxliv. June Edwards *IP Submission 7*; Australian Customs Service *IP Submission 20*; Australia Post *IPSubmission 24*; Chris Hurley *IP Submission 27*; Australian War Memorial *IP Submission 47*; Australian Securities Commission *IP Submission 52*; Australian Archives *IP Submission 56*; Department of Health and Family Services *IP Submission 89*; The Law Society of NSW *IPSubmission93*; Archives Authority of NSW *IP Submission 97*.

cccxlv. *IP Submission 24*.

cccxlvi. See para 16.3–5.

cccxlvii. Unless the document contains personal information relating to the applicant or information relating to the applicant's business, commercial or financial affairs: FOI Act s 12(2).

cccxlviii. *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1991* (SA). The ACT *Freedom of Information Act 1991* is aligned with the Commonwealth FOI Act due to common records of administration.

cccxlix. Robert Hazell 'Freedom of Information: Lessons From Canada, Australia and New Zealand' (1991) 12(3) *Policy Studies* 38, 41.

cccl. *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1992* (WA).

cccli. *Freedom of Information (Amendment) Act 1992* (NSW).

[ccclii] ALRC 77/ARC 40, para 5.7.

[ccliii] Matthew Gordon-Clark *IP Submission 5*; South Australian Government *IP Submission 54*; Australian Archives *IP Submission 56*; Department of Foreign Affairs and Trade *IP Submission 60*; Australian Society of Archivists Inc *IP Submission 95*.

[ccliv] Applications for personal information are not subject to the date of creation limitation placed on other applications. Statistical information is derived from Robert Hazell 'Freedom of Information: Lessons From Canada, Australia and New Zealand' (1991) 12(3) *Policy Studies* 38, 40. Accurate statistics on the division between requests for personal information and general FOI requests are not required to be kept and are not reported in the Annual Report on the FOI Act produced by the Attorney-General's Department.

[ccclv] Department of Foreign Affairs and Trade *IP Submission 60*.

[ccclvi] Department of Defence *DRP Submission 21*.

[ccclvii] See rec 52.

[ccclviii] Department of Defence *DRP Submission 21*; Australian Intelligence Community *DRP Submission 37*; Australian Archives *DRP Submission 39*.

[ccclix] See para 15.51–55.

[ccclx] Society of Australian Genealogists *IP Submission 37*; Federation of Australian Historical Societies Inc *IP Submission 39*.

[ccclxi] Australian Society of Archivists Inc *IP Submission 95*. See also Chris Hurley *IP Submission 27*.

[ccclxii] See Department of Defence *DRP Submission 21* on the risks of release of sensitive information.

[ccclxiii] s 85ZW(b)(i). This instance of inconsistency was raised by Australian Federal Police *IP Submission 35*.

[ccclxiv] Spent conviction is defined in s 85ZM of the Crimes Act.

[ccclxv] Australian Bureau of Statistics *IP Submission 86* and *DRP Submission 15*. s 19 of the *Census and Statistics Act 1905* prohibits unauthorised direct or indirect communication of information furnished in pursuance of the Act, with a penalty of maximum $5 000 or imprisonment not exceeding 2 years, or both.

[ccclxvi] The AAT has powers to order the protection of a range of matters, including names of witnesses and records produced before proceedings: *Administrative Appeals Tribunal Act 1975* s 35(2) and 35AA.

[ccclxvii] See ch 23 for further discussion of the courts and the archives legislation.

[ccclxviii] Senate Standing Committee on Constitutional and Legal Affairs *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* Canberra 1979, para 33.28 (hereafter cited as 1979 Senate Report).

[ccclxix] *Goodwin v Phillips* (1908) 7 CLR 1 at 7.

[ccclxx] Australian Bureau of Statistics *DRP Submission 15*.

[ccclxxi] A number of submissions stated that they did not support this recommendation without changes to the Commission's draft recommendations on exemptions: ASIO *DRP Submission 28*; Attorney-General's Department *DRP Submission 29*. For a discussion of the Commission's recommendations in relation to exemptions under the archives legislation see ch 20.

[ccclxxii] See further discussion of this issue in the context of the exemptions provided by s 33(3) at para20.76–80.

[ccclxxiii] Attorney-General's Department *DRP Submission 29*; Eccleston Associates *DRP Submission 42*

[ccclxxiv] See para 12.37–45.

[ccclxxv] See rec 103.

[ccclxxvi] See para 16.35–40.

[ccclxxvii] See in particular para 10.55–56.

[ccclxxviii] See para 12.18–22.

[ccclxxix] See para 15.39–40.

[ccclxxx] Australia Post *IP Submission 25*. See also Records Management Association of Australia *IP Submission88*.

cclxxxi. Australian Federal Police *IP Submission 35*. See also Barbara Poniewierski *IP Submission 11*; Health Insurance Commission *IP Submission 67*; Australian Bureau of Statistics *IP Submission 86*. See also concerns raised by National Crime Authority *DRP Submission 31*.

cclxxxii. Australian Security Intelligence Organization *IP Submission 62*.

cclxxxiii. The Treasury *IP Submission 65*.

cclxxxiv. June Edwards *IP Submission 7*.

cclxxxv. Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

cclxxxvi. Australian Archives *IP Submission 56*. See also Australian Society of Archivists Inc *IP Submission 95*.

cclxxxvii. Department of Immigration and Multicultural Affairs *IP Submission 83*; The Law Society of NSW *IP Submission 93*.

cclxxxviii. Matthew Gordon-Clark *IP Submission 5*; Australian Customs Service *IP Submission 20*; Department of Foreign Affairs and Trade *IP Submission 60*; The Treasury *IP Submission 65*; Department of Health and Family Services *IP Submission 89*.

cclxxxix. Professional Historians and Researchers Association (WA) Inc *IP Submission 31*; Australian Intelligence Community *IP Submission 42*.

cccxc. Chris Hurley *DRP Submission 14*.

cccxci. Australian Archives *DRP Submission 39*.

cccxcii. *DRP Submission 39*.

cccxciii. This responsibility should be continued throughout the entire review process: see para 22.34–39.

cccxciv. Eccleston Associates *DRP Submission 42*.

cccxcv. Australian Intelligence Community *DRP Submission 37*.

cccxcvi. National Crime Authority *DRP Submission 31*.

cccxcvii. In the case of the records of Parliament it should be the presiding officer, and in the case of records of a court the Chief Justice of the court should be the final arbiter. See ch 23 for discussion of arrangements for the records of Parliament and the courts.

cccxcviii. Australian Broadcasting Corporation *DRP Submission 33*.

cccxcix. A minister's power to affect access decisions would be dependent upon the relationship between the minister and a decision making agency, whether that be determined by statute or otherwise. In all cases, however, access decisions would still be subject to the statutory avenues of review.

cd. Australian Archives *DRP Submission 39*.

cdi. See ch 21.

cdii. See ch 18.

cdiii. See ch 22.

cdiv. See para 16.11.

cdv. Some agencies supported this approach: see Australian Securities Commission *IP Submission 52*; Australian Bureau of Statistics *IP Submission 86*.

cdvi. Department of Foreign Affairs and Trade *IP Submission 60*. See also Australian Customs Service *IPSubmission 20*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; History Council of NSW *IPSubmission 87*.

cdvii. See para 16.3–5.

cdviii. rec 149.

cdix. rec 151.

cdx. *DRP Submission 21*.

cdxi. Access agreements may also refer to responsibility for making decisions in relation to a particular subset of records under that agency's control.

cdxii. Department of Defence *DRP Submission 21*; Australian Intelligence Community *DRP Submission 37*.

cdxiii. FOI Act s 16(1)(b).

cdxiv. s 16(5).

cdxv. Except for records exempted from transfer by s 29 of the Act.

cdxvi. Australian Archives *DRP Submission 39*.

cdxvii. At present this kind of information is incorporated into a number of publicly accessible databases, including one available on the Internet. See para 19.20–28 for a discussion on finding aids

cdxviii. *DRP Submission 39*.

cdxix. Dzidra Knochs *DRP Submission 12*.

cdxx. Archives Act s 40(1)(c).

cdxxi. The Archives of Australia database can be found at <http://www.naa.gov.au/research/collectdb/collectdb.htm>.

cdxxii. Australian Archives *IP Submission 56*; Department of Immigration and Multicultural Affairs *IP Submission 82*.

cdxxiii. Australia Post *IP Submission 25*; Australian Securities Commission *IP Submission 52*; Australian Archives *IP Submission 56*; Australian Security Intelligence Organization *IP Submission 62*; Department of Employment, Education, Training and Youth Affairs *IP Submission 69*; North Australian Aboriginal Legal Aid Service *IP Submission 73*; Allan Seymour *IP Submission 78*; Department of Defence *IP Submission 82*; Department of Immigration and Multicultural Affairs *IP-Submission 83*; Australian Bureau of Statistics *IP Submission 86;* The Law Society of NSW *IPSubmission 93*.

cdxxiv. Reserve Bank *IP Submission 81.*

cdxxv. See also para 19.20-28.

cdxxvi. It is estimated by Australian Archives that ANGAM contains information on nearly 2 000 000 records, approximately 15% of records in the open access period.

cdxxvii. *IP Submission 56*.

cdxxviii. FOI Act s 24(1) and (2)(a).

cdxxix. Australia Post *IP Submission 25*; Australian Securities Commission *IP Submission 52*. Other submissions supporting an identification test did not specify the need to align the provision with the FOI Act.

cdxxx. Matthew Gordon-Clark *IP Submission 5*.

cdxxxi. Australian Archives *IP Submission 56*; Department of Defence *IP Submission 82*; Australian Bureau of Statistics *IP Submission 86*; The Law Society of NSW *IP Submission 93*.

cdxxxii. Archives Act s 40(2).

cdxxxiii. Archives Act s 40(8).

cdxxxiv. Department of Foreign Affairs and Trade *IP Submission 60*; North Australian Aboriginal Legal Aid Service *IP Submission 73*; Eccleston Associates *IP Submission 74*; Department of Defence *IP Submission82*; Department of Immigration and Multicultural Affairs *IP Submission 83*; Australian Bureau of Statistics *IP Submission 86*.

cdxxxv. Australian Customs Service *IP Submission 20*; Australia Post *IP Submission 25*; Australian Federal Police *IP Submission 35*; Australian Intelligence Community *IP Submission 42*; Australian War Memorial *IP Submission 47*; Department of Foreign Affairs and Trade *IP Submission 60*; Australian Security Intelligence Organization *IP Submission 62*; Eccleston Associates *IP Submission 74*; Department of Defence *IP Submission 82*; Department of Immigration and Multicultural Affairs *IPSubmission 83*; The Law Society of NSW *IP Submission 93*.

cdxxxvi. Historical Society of the Northern Territory Inc *DRP Submission 5*.

cdxxxvii. Australian Archives *IP Submission 56*; Australian Society of Archivists Inc *IP Submission 95* and *DRP Submission 34*.

cdxxxviii. See rec 114.

cdxxxix. The responsible agency would be either the NAA or, if there is an access decision making agreement, the controlling agency: see rec 111.

cdxl. See para 16.27.

cdxli. See statistics for 1995–96 and 1996–97 in Australian Archives *Annual Reports of Australian Archives and Advisory Council on Australian Archives 1996–97* Canberra 1997, 30.

cdxlii. DRP 4 draft rec 17.5.

cdxliii. Department of Defence *DRP Submission 21*; Department of Foreign Affairs and Trade *DRP Submission 35*; Australian Intelligence Community *DRP Submission 37*.

cdxliv. *DRP Submission 35*.

cdxlv. para 17.25.

cdxlvi. Eccleston Associates *DRP Submission 42*.

cdxlvii. Australia Post *IP Submission 25*; Australian Archives *IP Submission 56*; Department of Foreign Affairs and Trade *IP Submission 60*.

cdxlviii. *IP Submission 56*.

cdxlix. Australian Customs Service *IP Submission 20*; Australia Post *IP Submission 25*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Australian Federal Police *IP Submission 35*; Australian Securities Commission *IP Submission 52*; Australian Broadcasting Corporation *IP Submission 59*; Department of Employment, Education, Training and Youth Affairs *IP Submission 69*; Allan Seymour *IP Submission 78*; Reserve Bank *IP Submission 81*; Department of Immigration and Multicultural Affairs *IP Submission 82*; Australian Bureau of Statistics *IP Submission 86*; Department of Health and Family Services *IP Submission 89*; The Law Society of NSW *IP Submission 93*.

cdl. Australian Bureau of Statistics *IP Submission 86*.

cdli. Matthew Gordon-Clark *IP Submission 5*; Australian War Memorial *IP Submission 47*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

cdlii. International Social Service Australia *IP Submission 24*; Australian Council of Professional Historians Associations Inc *IP Submission 50*; History Institute, Victoria Inc *IP Submission 75*; Department of Defence *IP Submission 82*; Australian Society of Archivists Inc *IP Submission 95*.

cdliii. AJ & J Winterbotham *IP Submission 11*; Australian Intelligence Community *IP Submission 42*; Australian War Memorial *IP Submission 47*; Privacy Commissioner, Moira Scollay *IP Submission 68*; Eccleston Associates *IP Submission 74*.

cdliv. See rec 123 above.

cdlv. Unless an applicant wishes a previous decision to exempt a record to be reviewed.

cdlvi. See rec 110.

cdlvii. *IP Submission 56*.

cdlviii. Dr FE Peters *IP Submission 17*.

cdlix. Department of Foreign Affairs and Trade *IP Submission 60*.

cdlx. Matthew Gordon-Clark *IP Submission 5*; Australian Customs Service *IP Submission 20*; Australia Post *IP Submission 25*; Australian Securities Commission *IP Submission 52*; Australian Broadcasting Corporation *IP Submission 59*; Department of Foreign Affairs & Trade *IP Submission 60*; The Treasury *IP Submission 65*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Department of Employment, Education, Training and Youth Affairs *IP Submission 69*; History Institute, Victoria Inc *IP Submission75*; Allan Seymour *IP Submission 78*; Reserve Bank *IP Submission 81*; Department of Defence *IP Submission 82*; Department of Immigration and Multicultural Affairs *IP Submission 82*; Australian Bureau of Statistics *IP Submission 86*; Australian Society of Archivists Inc *IP Submission 95*.

cdlxi. Draft rec 17.8.

cdlxii. Australian Archives *DRP Submission 39*.

cdlxiii. See para 8.18–20.

cdlxiv. Matthew Gordon-Clark *IP Submission 5*; Australian Customs Service *IP Submission 20*.

cdlxv. Australian Intelligence Community *IP Submission 42*.

cdlxvi. Matthew Gordon-Clark *IP Submission 5*; Eccleston Associates *IP Submission 74*.

cdlxvii. Draft rec 17.9.

cdlxviii. Department of Defence *DRP Submission 21*.

cdlxix. Historical Society of the Northern Territory Inc *DRP Submission 5*.

cdlxx. Department of Defence *DRP Submission 21*.

cdlxxi. Australian Archives *DRP Submission 39*

cdlxxii. The Treasury *DRP Submission 17*. See also Australian Society of Archivists Inc *Submission 34*.

cdlxxiii. Department of Defence *DRP Submission 21*; Australian Security Intelligence Community *DRPSubmission 37*.

cdlxxiv. Australian Intelligence Community *DRP Submission 37*.

cdlxxv. See ch 10.

cdlxxvi. Metadata is information about the structure of records.

cdlxxvii. However a number of agencies noted that the majority of their existing FOI requests were for records containing sensitive information which could not be subject to proactive release: see for example The Treasury *DRP Submission 17*.

cdlxxviii. Australian Archives *DRP Submission 39*.

cdlxxix. See para 18.12–15 below on discretionary powers to provide access to records.

cdlxxx. Greg Terrill *DRP Submission 13*.

cdlxxxi. See para 18.18–24.

cdlxxxii. Matthew Gordon-Clark *IP Submission 5*; Barbara Poniewierski *IP Submission 11*; Australia Post *IPSubmission 25*.

cdlxxxiii. See similar arguments justifying the removal of the accelerated access provision in Robert Sharman *IP Submission 18*.

cdlxxxiv. *DRP Submission 29*.

cdlxxxv. FOI Act s 91.

cdlxxxvi. *IP Submission 56* and *IP Submission 55* respectively.

cdlxxxvii. The Commission and Administrative Review Council have previously recommended an extension of legal indemnity for any *bona fide* release under the FOI Act: ALRC 77/ARC 40, para 4.20–4.21.

cdlxxxviii. Attorney-General's Department *DRP Submission 29*. See similar concerns raised in Eccleston Associates *DRP Submission 42*.

cdlxxxix. It could be argued that where affected parties have agreed to the release of the record, the record could no longer be claimed to be exempt. If this were the case the decision maker could then make a decision believing that the record was not exempt under the legislation, and this second category of afforded protection would not be necessary. While the Commission heeds this argument, it would prefer to ensure that this second category was afforded the relevant protection and would thus specifically include it in the legislation.

cdxc. Attorney-General's Department *DRP Submission 29*.

cdxci. Archives Act s 57(1)(a).

cdxcii. *DRP Submission 29*. Protection from criminal prosecution was also raised by Eccleston Associates *DRP Submission 42*.

cdxciii. The term 'special access' appears in the heading to s 56 but not in the wording of s 56(2) itself.

cdxciv. The special access arrangements currently in force date from November 1988.

cdxcv. These specified circumstances are set out in Archives Regulation 9.

cdxcvi. Other senior officials must be specifically approved by the Prime Minister to fall within the ambit of this provision.

cdxcvii. Other senior officials must be specifically approved by the Prime Minister to fall within the ambit of this provision.

cdxcviii. The minister in question is the minister to whose ministerial responsibilities the record is most closely related: Archives Act s 3(1).

cdxcix. In practice all ministers have made delegations for the purpose of special access decisions and these decisions are made by senior officers within the agency responsible for the records.

d. The retention of this kind of privileged access was supported separately from general special access provisions: see Robert Sharman *IP Submission 18*; Department of Prime Minister & Cabinet *IPSubmission 55*; Australian Archives *IP Submission 56*; Advisory Council on Australian Archives *IPSubmission 70*.

di. Australian Securities Commission *IP Submission 52*.

dii. None of the submissions to DRP 4 raised this point, either to support or oppose a right of access in these circumstances.

diii. The circumstances in which the NAA should be able to accept custody of records other than Commonwealth records are discussed in ch 26.

[div]. Dr FE Peters *IP Submission 2*; AJ & J Winterbotham *IP Submission 14*; International Social Service Australia *IP Submission 24*; Australian Securities Commission *IP Submission 52*; Department of Immigration and Multicultural Affairs *IP Submission 83*; Independent Scholars Association of Australia Inc — Sydney Chapter *IP Submission 96*.

[dv]. Dr Gregory Pemberton *IP Submission 48*.

[dvi]. Dr FE Peters *IP Submission 2*; Dr Gregory Pemberton *IP Submission 48*.

[dvii]. Australian Customs Service *IP Submission 20*.

[dviii]. Australian Intelligence Community *IP Submission 42*.

[dix]. Robert Sharman *IP Submission 18*; Department of Prime Minister & Cabinet *IP Submission 55*; Australian Archives *IP Submission 56*; Advisory Council on Australian Archives *IP Submission 70*; The Law Society of NSW *IP Submission 93*.

[dx]. Department of Foreign Affairs and Trade *IP Submission 60*.

[dxi]. Heather MacNeil *Without Consent: The Ethics of Disclosing Personal Information in Public Archives* Scarecrow Press USA 1997, 127.

[dxii]. Greg Terrill *DRP Submission 13*.

[dxiii]. Department of Defence *DRP Submission 21*; Attorney-General's Department *DRP Submission 29*; Australian Intelligence Community *DRP Submission 37*.

[dxiv]. See ch 16.

[dxv]. Australian Archives *DRP Submission 39*.

[dxvi]. rec 23.

[dxvii]. Australian Archives *DRP Submission 39*.

[dxviii]. Draft rec 18.6.

[dxix]. Department of Defence *DRP Submission 21*. See also Department of Foreign Affairs and Trade *DRPSubmission 35*; Australian Intelligence Community *DRP Submission 37*; Australian Archives *DRPSubmission 39*.

[dxx]. See para 22.4.

[dxxi]. Roland M Baumann 'The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law' (1986) 49 *American Archivist* 349, 363.

[dxxii]. This could include research assistants to ensure they are bound by the same conditions and obligations as the principal researcher.

[dxxiii]. Roland M Baumann 'The Administration of Access to Confidential Records in State Archives: Common Practices and the Need for a Model Law' (1986) 49 *American Archivist* 349, 363.

[dxxiv]. If a set sum for damages is not a true estimate of the costs incurred as a result of the breach of contract, it will be regarded as a penalty and not enforceable at law: JG Starke, NC Seddon, MPEllinghaus *Cheshire & Fifoot's Law of Contract* (5th ed.) Butterworths Sydney 1988, 664

[dxxv]. rec 130.

[dxxvi]. rec 117.

[dxxvii]. rec 149 below.

[dxxviii].rec 1.

[dxxix]. Historical Society of the Northern Territory Inc *IP Submission 16*; International Social Service Australia *IP Submission 24*; Professional Historians and Researchers Association (WA) Inc *IPSubmission 31*.

[dxxx]. The Genealogical Society of Victoria Inc *IP Submission 9*; Australia Post *IP Submission 25*; Records Management Association of Australia *IP Submission 88*.

[dxxxi]. Australian Federal Police *IP Submission 35*; Australian Securities Commission *IP Submission 52*; Australian Broadcasting Corporation *IP Submission 59*; Department of Foreign Affairs and Trade *IPSubmission 60*; National Library of Australia *IP Submission 76*; Department of Defence *IP Submission 82*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

[dxxxii]. G Prosser, Minister for Small Business and Consumer Affairs, press release, 26 March 1997.

dxxxiii. Those principles are detailed in a guide published by the Department of Industry, Science & Tourism: *Putting Service First: Principles for Developing a Service Charter* AGPS Canberra 1997. The Service Charters Implementation Unit has been established within the Department of Industry, Science and Tourism in Canberra to specifically assist agencies to develop service charters. Detailed information on service charters can be found at Department of Industry, Science and Tourism, "Service Charters" <http://www.dist.gov.au/consumer/charters> (22 Jan 1998).

dxxxiv. Department of Industry, Science and Tourism *Putting Service First: Principles for Developing a Service Charter* Canberra 1997, vii and xi.

dxxxv. Australian Archives *DRP Submission 39.*

dxxxvi. See ch 7 for discussion of public charges for services.

dxxxvii. See for example Queensland Family History Society *IP Submission 30.*

dxxxviii. *IP Submission 56*.

dxxxix. Of either the Australian Federal Police or any of the State or Territory police forces: *Public Order (Protection of Persons and Property) Act 1971* s 4.

dxl. Specific senior officers on all Archives premises have been duly authorised to act under s 12(2)(c).

dxli. In accordance with *Australian Protective Service Act 1987* (Cth) s 13.

dxlii. *Public Order (Protection of Persons and Property) Act 1971* s 22.

dxliii. *Commonwealth of Australian v Graves* (1990) 171 CLR 167.

dxliv. s 76. Penalty: Imprisonment for 2 years.

dxlv. s 29. Penalty: Imprisonment for 10 years.

dxlvi. See rec 96. These powers are currently contained in Archives Act s 37(1) and s 36(4)(c).

dxlvii. See National Archives of Australia, "The Collection Database" May 1998 <http://www.naa.gov.au/research/collectdb/collectdb.htm>.

dxlviii. See ch 12 fn 2.

dxlix. see para 26.6.

dl. Australian Securities Commission *IP Submission 52*; Department of Foreign Affairs and Trade *IP Submission 60*; History Institute, Victoria Inc *IP Submission 75*.

dli. Matthew Gordon-Clark *IP Submission 5*; Australia Post *IP Submission 25*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Australasian Federation of Family History Organisations Inc *IP Submission 33*; South Australian Government*IP Submission 54*; Australian Archives *IP Submission 56*; National Library of Australia *IP Submission 76*; Reserve Bank *IP Submission 81*; Department of Immigration and Multicultural Affairs *IP Submission 83*; Australian Society of Archivists Inc *IP Submission 95*.

dlii. International Social Service Australia *IP Submission 24*; Brisbane History Group Inc *IP Submission 28*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dliii. Australian Archives *DRP Submission 39.*

dliv. Chris Hurley *DRP Submission 14*.

dlv. See rec 117.

dlvi. For example see Australian Council of Professional Historians Association Inc *IP Submission 50*; International Social Service Australia *DRP Submission 20.*

dlvii. A number of submissions commented on the geographical accessibility of information: June Edwards *IP Submission 7*; Australian Council of National Trusts *IP Submission 58*; Independent Scholars Association of Australia Inc *IP Submission 91.*

dlviii. *DRP Submission 39.*

dlix. Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dlx. Office of Government Information Technology *IP Submission 77*.

[dlxi]. Although one submission proposed making inter-repository transfers available for a fee: AJ & JWinterbotham *IP Submission 14*.

[dlxii]. Office of Government Information Technology *IP Submission 77*.

[dlxiii]. Clyde Cameron *DRP Submission 25*.

[dlxiv]. Historical Society of the Northern Territory Inc *DRP Submission 5*.

[dlxv]. One submission particularly supported promotion of the NAA through school education: DzidraKnochs *DRP Submission 12*.

[dlxvi]. Eccleston Associates *DRP Submission 42*.

[dlxvii]. See para 2.16–17 for further details.

[dlxviii]. IMSC *Management of Government Information as a National Resource* Canberra 1997. This report also incorporates the previous work completed by the IMSC Technical Group documented in *Architecture for Access to Government Information* 1996.

[dlxix]. National Library of Australia "Australian Governments' Entry Point" <http://www.nla.gov.au/oz/gov/> (22 Jan 1998). The Government has recently launched a new Single Entry Point to government information at <www.fed.gov.au> which links to the Australian Governments' Entry Point provided by the National Library of Australia. See the Hon John Fahey, Minister for Finance and Administration, press release, 31 March 1998.

[dlxx]. For an overview of the development of GILS in the United States see William E Moen & Charles RMcClure *An Evaluation of the Federal Government's Implementation of the Government Locator Service* US 1997: <http://www.access.gpo.gov/su_docs/gils/gils-eval/pdf/ch2.pdf> p 9–10 (2 Feb 1998).

[dlxxi]. Department of Health and Family Services *DRP Submission 30*.

[dlxxii]. IMSC *Management of Government Information as a National Resource* Canberra 1997, 82.

[dlxxiii]. Australian Bureau of Statistics *IP Submission 86*.

[dlxxiv]. This was supported in a number of submissions: Allan Seymour *IP Submission 78*; Reserve Bank *IPSubmission 81*; Department of Librarianship, Archives and Records, Monash University *IP Submission 84*; Australian Society of Archivists Inc *IP Submission 95* and *DRP Submission 34*.

[dlxxv]. Australian Society of Archivists Inc *DRP Submission 34*; Australian Archives *DRP Submission 39*.

[dlxxvi]. *Copyright Act 1968* (Cth) s 40, s 49, s 51, s 103C, s 110A.

[dlxxvii].It should be noted that in most cases where a record is created by another person or organisation and sent to the Commonwealth, copyright resides in the creator of the record, not the Commonwealth. In addition most statutory authorities of the Commonwealth own copyright in their records separately from the Commonwealth. In these cases the records are not regulated by Crown copyright.

[dlxxviii]. Although see *Copyright Act 1968* (Cth) s 51 which permits copying of unpublished works in archives and libraries in certain situations where 75 years have passed since the work was created.

[dlxxix]. In practice most government bodies consult with AGPS on such matters.

[dlxxx]. Australian Broadcasting Corporation *DRP Submission 33*.

[dlxxxi]. Australian War Memorial *DRP Submission 26*; Attorney-General's Department *DRP Submission 29*

[dlxxxii].See ch 4.

[dlxxxiii]. Robert Sharman *IP Submission 18*; Advisory Council on Australian Archives *IP Submission 70*; History Institute, Victoria Inc *IP Submission 75*. Many other submissions suggested the deletion of some of the existing categories.

[dlxxxiv]. Department of Defence *DRP Submission 21*; Attorney-General's Department *DRP Submission 29*; Department of Foreign Affairs and Trade *DRP Submission 35*; Australian Intelligence Community *DRP Submission 37*.

[dlxxxv].Human Rights and Equal Opportunity Commission *DRP Submission 23*.

[dlxxxvi]. Advisory Council on Australian Archives *DRP Submission 32*; Australian Archives *DRP Submission 39*.

[dlxxxvii]. Eccleston Associates *DRP Submission 42*.

[dlxxxviii]. Attorney-General's Department *DRP Submission 29*.

dlxxxix. National Crime Authority *DRP Submission 31*.

dxc. Department of Defence *DRP Submission 21*; Australian Security Intelligence Organization *DRP Submission 28*; Department of Foreign Affairs and Trade *DRP Submission 35*; Australian Intelligence Community *DRP Submission 37*.

dxci. Human Rights and Equal Opportunity Commission *DRP Submission 23*; Australian Security Intelligence Organization *DRP Submission 28*.

dxcii. Attorney-General's Department *DRP Submission 29*; Australian Archives *DRP Submission 39*; Eccleston Associates *DRP Submission 42*.

dxciii. See para 4.20.

dxciv. See para 20.33 and 20.35–36.

dxcv. See for example Australian Intelligence Community *IP Submission 42* and *DRP Submission 37*; Australian Security Intelligence Organization *IP Submission 62* and *DRP Submission 28*; Department of Foreign Affairs and Trade *IP Submission 60* and *DRP Submission 35*.

dxcvi. The Commission queries whether the inclusion of the words 'or matter' add anything to the expression 'information', bearing in mind the broad contemporary meaning and usage of the expression.

dxcvii. *DRP Submission 29*.

dxcviii. See para 20.112.

dxcix. *Re Throssell and Australian Archives* (1986) 10 ALD 403 at 405. In *Throssell No 1* it was found that the continuing relationship of confidence could not be proven, thus exemption under section 33(1)(b) was not upheld. In *Throssell No 2* (1987) 145 ALD 292, the relationship was found in the case of some records, and the benefit of the doubt given to the respondent in the case of others.

dc. In *Throssell No 1* (1986) 10 ALD 403 the material found not to be exempt under s 33(1)(b) was found to be properly exempt under s 33(1)(a).

dci. Department of Foreign Affairs and Trade *IP Submission 60*.

dcii. Attorney-General's Department *DRP Submission 29*; Department of Foreign Affairs and Trade *DRP Submission 35*; Australian Intelligence Community *DRP Submission 37*.

dciii. North Australian Aboriginal Legal Service *IP Submission 73*. Removal of the category was also supported by AJ & J Winterbotham *IP Submission 14* on unstated grounds.

dciv. 1979 Senate Report (see ch 15 fn 74), para 33.39 and 33.45.

dcv. Barbara Poniewierski *IP Submission 11*; North Australian Aboriginal Legal Aid Service *IP Submission73*.

dcvi. Clause 31(e) Archives Bill 1978. A similar provision can be found in the FOI Bill 1978 at clause 31(1).

dcvii. *Robinson v South Australia [No. 2]* [1931] AC 704 at 715–716, quoted by Senate Standing Committee 1979 Report, para 23.4.

dcviii. The Genealogical Society of Victoria Inc *IP Submission 9* (in relation to e(i)); Barbara Poniewierski *IP Submission 11* (in relation to (f)); AJ & J Winterbotham *IP Submission 14* (in relation to (f)); Australian Securities Commission *IP Submission 52*.

dcix. Australian Archives *IP Submission 56*.

dcx. Attorney-General's Department *DRP Submission 29*.

dcxi. Australian Intelligence Community *IP Submission 42*. See also Matthew Gordon-Clark *IP Submission5*; The Genealogical Society of Victoria Inc *IP Submission 9*; AJ & J Winterbotham *IP Submission 14*; Australia Post *IP Submission 25*; Australian Federal Police *IP Submission 35*; Australian Security Intelligence Organization *IP Submission 62*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dcxii. Barbara Poniewierski *IP Submission 11*.

dcxiii. Sometimes information given by the source may indirectly identify the source and must therefore be withheld. This was the case in *Re Ewer and Australian Archives* (1995) 38 ALD 789 and *Re Millis and Australian Archives* unreported 1996, where the sources were obviously participants in the activities of the Communist Party of Australia, and any other person involved in those activities would have been able to identify the source if they had access to the information

provided by the source. In both of these cases the 'mosaic theory' was applied and the exemption under s33(1)(e)(ii) upheld.

dcxiv. *Re Ewer and Australian Archives* (1995) 38 ALD 789 and *Re Millis and Australian Archives* unreported 1996. In both cases the Tribunal relied upon evidence presented by the respondents in the form of a survey of ASIO sources, including sources relating to the documents in question, which categorically supported indefinite continuance of confidentiality.

dcxv. The category was only claimed 12 times from 1994–95 to 1996–97: statistics supplied by Australian Archives September 1997.

dcxvi. See in particular Australian Securities Commission *IP Submission 52*; Privacy Commissioner, Moira Scollay *IP Submission 68*; Department of Defence *IP Submission 82*.

dcxvii. House of Representatives Standing Committee on Legal and Constitutional Affairs *In Confidence* AGPS Canberra 1995, para 9.2.1–9.2.20.

dcxviii. Australian Archives *DRP Submission 39*.

dcxix. Human Rights and Equal Opportunity Commission *DRP Submission 23*; Attorney-General's Department *DRP Submission 29*.

dcxx. Queensland Information Commissioner *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 255.

dcxxi. Human Rights and Equal Opportunity Commission *DRP Submission 23*.

dcxxii. Human Rights and Equal Opportunity Commission *DRP Submission 23*.

dcxxiii. The Genealogical Society of Victoria Inc *IP Submission 9*; Barbara Poniewierski *IP Submission 11*; AJ & J Winterbotham *IP Submission 14*; Robert Sharman *IP Submission 18*; Australian Securities Commission *IP Submission 52*; Australian Archives *IP Submission 56*.

dcxxiv. DRP 4 draft rec 23.7.

dcxxv. Michael Roe *DRP Submission 2*; Dzidra Knochs *DRP Submission 12*; Gerald Fischer *DRP Submission 27*.

dcxxvi. National Sound and Film Archives *DRP Submission 18*; Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; Australian Archives *DRP Submission 39*.

dcxxvii. Hon Elizabeth Evatt *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* AGPS Canberra 1996, para 4.1.

dcxxviii. id rec 4.4.

dcxxix. sch 2. The exemption would be inserted as s 33(3A) of the Archives Act.

dcxxx. cl 5.

dcxxxi. 1979 Senate Report (see ch 15 fn 74), para 33.40.

dcxxxii. In one of these cases the exemption was claimed because of proceedings before the International Court of Justice in 1993 and was removed after settlement of the case.

dcxxxiii. Matthew Gordon-Clark *IP Submission 5*; Australia Post *IP Submission 25*; Australian Federal Police *IPSubmission 35*; Australian Securities Commission *IP Submission 52*; ABC *IP Submission 59* and *DRP Submission 33*; Department of Foreign Affairs and Trade *IP Submission 60*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dcxxxiv. AJ & J Winterbotham *IP Submission 14*; Australian Archives *IP Submission 56*; Department of Defence *IP Submission 82*; Dzidra Knochs *DRP Submission 12*; Australian Archives *DRP Submission 39*.

dcxxxv. *IP Submission 57*. Other submissions supporting the retention of s 33(3) were Matthew Gordon-Clark *IP Submission 5*; Australia Post *IP Submission 25*; Australian Federal Police *IP Submission 35*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Department of Defence *IP Submission 82*.

dcxxxvi. The ABS proposed that there be a specific exemption under the archives legislation for all information collected under the *Census and Statistics Act 1905* (Cth): *IP Submission 86*.

dcxxxvii. A number of submissions suggested that s 33(3) was unnecessary: AJ & J Winterbotham *IP Submission14*; Robert Sharman *IP Submission 18*; Australian Archives *IP Submission 56*; Department of Immigration and Multicultural Affairs *IP Submission 83*; Australian Archives *DRP Submission 39*.

dcxxxviii. Eccleston Associates *DRP Submission 42*; a similar view was expressed in Australian Taxation Office *DRP Submission 45*.

dcxxxix. Australian Taxation Office *DRP Submission 45*.

dcxl. See rec 108.

dcxli. *DRP Submission 39*.

dcxlii. See for example Attorney-General's Department *DRP Submission 29*.

dcxliii. Australian Broadcasting Corporation *DRP Submission 33*.

dcxliv. The Treasury *DRP Submission 17*; Human Rights and Equal Opportunity Commission *DRP Submission23*.

dcxlv. *DRP Submission 39*.

dcxlvi. The Genealogical Society of Victoria Inc *IP Submission 9*; Barbara Poniewierski *IP Submission 11*; AJ & J Winterbotham *IP Submission 14*; International Social Service Australia *IP Submission 24*; Mark Brogan *IP Submission 26*; Australian Archives *IP Submission 56*; History Institute, Victoria Inc *IPSubmission 75*; Reserve Bank *IP Submission 81*; Australian Society of Archivists Inc *IP Submission 95*; Independent Scholars Association of Australia Inc — Sydney Chapter *IP Submission 96*.

dcxlvii. The guidelines are based on criteria established in the 1993 White Paper *Open Government* Cm 2290, para 9.10–9.22.

dcxlviii. There are no exemption categories or appeal mechanisms in the *Archives Act 1960* (NZ). If access restrictions are placed on records in the custody of the National Archives an applicant must seek access under the *Official Information Act 1982* (NZ).

dcxlix. Australian Intelligence Community *IP Submission 42*.

dcl. Australian Federal Police *IP Submission 35*.

dcli. See also Australia Post *IP Submission 25*; Department of Foreign Affairs and Trade *IP Submission 60*; Department of Defence *IP Submission 82*.

dclii. Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dcliii. *IP Submission 56*.

dcliv. *Archives Act 1983* (Tas) s 15(10).

dclv. Census records, the identity of rape victims and some other personal information are withheld for 100years.

dclvi. Adoption records are released to the public after 100 years.

dclvii. Barbara Poniewierski *IP Submission 11*; Australian Archives *IP Submission 56*; Privacy Commissioner, Moira Scollay *IP Submission 68*.

dclviii. Dzidra Knochs *DRP Submission 12*; Advisory Council on Australian Archives *DRP Submission 32*. Michael Roe supported the recommendation for a 100 years sunset clause, but preferred a time of 80 years: *DRP Submission 2*.

dclix. Australian Archives *DRP Submission 39*.

dclx. The amendments were contained in the *Prime Minister and Cabinet (Miscellaneous Provisions) Act 1994*.

dclxi. Greg Terrill *IP Submission 3*. See also Matthew Gordon-Clark *IP Submission 5*; AJ & J Winterbotham *IP Submission 11*; Professional Historians and Researchers Association (WA) Inc *IP Submission 31*; Australian Securities Commission *IP Submission 52*; History Institute, Victoria Inc *IP Submission 75*; Australian Society of Archivists Inc *IP Submission 95*.

dclxii. Department of the Prime Minister and Cabinet *IP Submission 55*; Reserve Bank *IP Submission 81*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

dclxiii. Advisory Council on Australian Archives *DRP Submission 32*; Australian Archives *DRP Submission 39*.

dclxiv. Lionel Bowen *DRP Submission 4*. See also Dzidra Knochs *DRP Submission 12*; Clyde Cameron *DRP Submission 25*.

dclxv. Gerald Fischer *DRP Submission 27*.

dclxvi. Vince Morabito *IP Submission 10*.

dclxvii. Greg Terrill *IP Submission 3*. Other submissions which supported the abolition of conclusive certificates were AJ & J Winterbotham *IP Submission 14*; The Law Society of NSW *IP Submission 93*.

dclxviii. Australian Intelligence Community *IP Submission 42*; Department of the Prime Minister and Cabinet *IP Submission 55*. Only five ministerial conclusive certificates have been issued under the Archives Act.

dclxix. Matthew Gordon-Clark *IP Submission 5*; Australian Securities Commission *Submission 52*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; History Institute, Victoria Inc *IP Submission 75*.

dclxx. Australian Intelligence Community *DRP Submission 37*.

dclxxi. Department of Defence *DRP Submission 21*.

dclxxii. Department of Defence *DRP Submission 21*; Attorney-General's Department *DRP Submission 29*; Australian Intelligence Community *DRP Submission 37*.

dclxxiii. Archives Act s 34(4).

dclxxiv. Mark Brogan *IP Submission 26*. For other supporters of a time limit on ministerial certificates see fn96–100.

dclxxv. Matthew Gordon-Clark *IP Submission 5*; AJ & J Winterbotham *IP Submission 14*; History Institute, Victoria Inc *IP Submission 75*.

dclxxvi. Australian Archives *IP Submission 56*; Dzidra Knochs *DRP Submission 12*; Australian Archives *DRP Submission 39*.

dclxxvii. Australian Intelligence Community *IP Submission 42*; Department of Defence *IP Submission 82*.

dclxxviii. Barbara Poniewierski *IP Submission 11*.

dclxxix. Australian Security Intelligence Organization *IP Submission 62*.

dclxxx. Parliamentary Joint Committee on the Australian Security Intelligence Organization *ASIO & the Archives Act* AGPS Canberra 1992, 45.

dclxxxi. Draft rec 19.11.

dclxxxii. *DRP Submission 21*.

dclxxxiii. *DRP Submission 37*.

dclxxxiv. See rec 170 above.

dclxxxv. Australian Customs Service *IP Submission 20*.

dclxxxvi. Department of Defence *IP Submission 82*.

dclxxxvii. Department of Defence *DRP Submission 21*.

dclxxxviii. Australian Federal Police *IP Submission 35*.

dclxxxix. Archives Authority of NSW *IP Submission 97*. Other supporters of s 32 were Matthew Gordon-Clark *IP Submission 5*; Australian Intelligence Community *IP Submission 42*; Department of Prime Minister & Cabinet *IP Submission 55*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

dcxc. See AJ & J Winterbotham *IP Submission 14*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dcxci. Dzidra Knochs *DRP Submission 12*

dcxcii. s 33(1)(g).

dcxciii. *IP Submission 73*.

dcxciv. In particular see Information Privacy Principle 11.

dcxcv. See for example Human Rights and Equal Opportunity Commission *DRP Submission 23*.

dcxcvi. See para 20.50–60.

dcxcvii. Australian Archives always follows this principle when making access decisions: see Australian Archives *IP Submission 56*.

dcxcviii. Matthew Gordon-Clark *IP Submission 5*; Barbara Poniewierski *IP Submission 11*; AJ & J Winterbotham *IP Submission 14*; Australia Post *IP Submission 25*; Australian Federal Police *IP Submission 35*; Australian Broadcasting Corporation *IP Submission 59*; Department of Foreign Affairs and Trade *IP Submission 60*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Privacy Commissioner, Moira Scollay *IP Submission 68*; North Australian Aboriginal Legal Aid Service *IP Submission 73*; Department of Defence *IP Submission 82*; Independent Scholars Association — Sydney Chapter *IP Submission 96*.

dcxcix. FOI Act s 41(2) and s 43(2).

dcc. FOI Act s 12(2).

dcci. Dzidra Knochs *DRP Submission 12*; Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; International Social Service Australia *DRP Submission 20*.

dccii. International Social Service *DRP Submission 20*.

dcciii. Attorney-General's Department *DRP Submission 29*.

dcciv. FOI Act s 41(3)–(8).

dccv. FOI Act s 41(8). The definition includes a medical practitioner, a psychiatrist, a psychologist, a marriage guidance counsellor and a social worker.

dccvi. Australian Archives *DRP Submission 39*.

dccvii. International Social Service Australia *DRP Submission 20*.

dccviii. FOI Act s 51B.

dccix. Submissions which criticised a right to amend (though not necessarily a right to request an annotation) were Matthew Gordon-Clark *IP Submission 5*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Department of Foreign Affairs and Trade *IP Submission 60*; Department of Employment, Education, Training and Youth Affairs *IP Submission 69*; History Institute, Victoria Inc *IP Submission 75*; The Law Society of NSW *IP Submission 93*; Australian Society of Archivists Inc *IP Submission 95*.

dccx. Department of Defence *DRP Submission 21*.

dccxi. Attorney-General's Department *DRP Submission 29*.

dccxii. Australian Society of Archivists Inc — Queensland Branch *DRP Submission 19*; International Social Service Australia *DRP Submission 20*. While a number of submissions pointed out that amendment was not appropriate, only two submissions totally rejected the concept of a right to annotate records in the open period: Matthew Gordon-Clark *IP Submission 5*; Australian Archives *IP Submission 56*.

dccxiii. Privacy Commissioner, Moira Scollay *IP Submission 68*

dccxiv. R Baxter 'Freedom of Information: Dispute Resolution Procedures' (1996) 4 *European Public Law* 635, 651.

dccxv. Where there is a deemed decision to refuse access the applicant may appeal directly to the AAT: Archives Act s 40(8).

dccxvi. The Commission is not aware of any cases in which Australian Archives has made a decision which ignored or opposed the view of an agency, although in some cases there has been extensive discussion between the Archives and agencies about the appropriateness of recommended decisions.

dccxvii. Administrative Appeals Tribunal *IP Submission 63*.

dccxviii. The Treasury *IP Submission 65*.

dccxix. See statistics for 1994–95, 1995–96 and 1996–97 in Australian Archives *Annual Reports of Australian Archives and Advisory Council on Australian Archives 1996–97* Canberra 1997, 31. It should be noted that decisions may affect only a few words within a record, so that the amount of material in the record publicly available will not always be significantly increased by modification of the original decision at internal review.

dccxx. AJ & J Winterbotham *IP Submission 14*; Australian Customs Service *IP Submission 20*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Australian Federal Police *IPSubmission 35*; Department of Foreign Affairs and Trade *IP Submission 60*; Department of Employment, Education, Training and Youth Affairs *IP Submission 69*; Department of Defence *IPSubmission 82*; Australian Bureau of Statistics *IP Submission 86*.

dccxxi. Australia Post *IP Submission 25*; Australian Securities Commission *IP Submission 52*; Australian Broadcasting Corporation *IPSubmission 59*; Australian Security Intelligence Organization *IP Submission 62*; The Treasury *IPSubmission 65* and *DRP Submission 17*.

dccxxii. Matthew Gordon-Clark *IP Submission 5*; Administrative Review Council *IP Submission 21*; Australian Federal Police *IP Submission 35*; Australian Intelligence Community *IP Submission 42*; Australian Security Intelligence Organization *IP Submission 62*; Dr Lucy Taksa and Rosemary Webb *IPSubmission 66*; Department of Defence *IP Submission 82*.

dccxxiii. FOI Act s 55(3).

dccxxiv. Administrative Appeals Tribunal *DRP Submission 7*.

dccxxv. See para 22.34–39 below which advocate that internal review be carried out by the initial decision maker, a change from the current system whereby all internal review under the Archives Act is carried out by Australian Archives.

dccxxvi. Administrative Appeals Tribunal *DRP Submission 7*.

dccxxvii. For further information on the internal review project see (1997) 49 *Admin Review* 40.

dccxxviii. Matthew Gordon-Clark *IP Submission 5*; Australia Post *IP Submission 25*; Australian Federal Police *IPSubmission 35*; Australian Broadcasting Corporation *IP Submission 59*; Department of Immigration and Multiculturalism *IP Submission 83*; Australian Bureau of Statistics *IP Submission 86*.

dccxxix. AJ & J Winterbotham *IP Submission 14*; Australian Archives *IP Submission 56*; Australian Security Intelligence Organization *IP Submission 62*; The Treasury *IP Submission 65*.

dccxxx. Australian Archives *IP Submission 56*.

dccxxxi. Law Society of NSW *IP Submission 93*. See also Greg Terrill *IP Submission 3*; Administrative Review Council *IP Submission 21*; Professional Historians and Researchers Association (WA) Inc *IPSubmission 31*; Australian Securities Commission *IP Submission 52*; Department of Foreign Affairs and Trade *IP Submission 60*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; History Institute, Victoria Inc *IP Submission 75*; Independent Scholars Association of Australia Inc — Sydney Chapter *IP Submission 96*.

dccxxxii. Barbara Poniewierski *IP Submission 11*.

dccxxxiii. ALRC 77/ARC 40, rec 92. See also ARC Report No 39 *Better Decisions: review of Commonwealth Merits Review Tribunals* Canberra 1995, rec 75.

dccxxxiv. The new NSW Administrative Decisions Tribunal is expected to commence operations in July 1998. That tribunal will have the power to hear appeals under the NSW *Freedom of Information Act 1989*, which is fully retrospective, and could thus include appeals relating to archival records. The Victorian *Freedom of Information Act 1982* provides for appeals to a general merits review tribunal, however that Act only applies to records created after 5 July 1978.

dccxxxv. RS Baxter 'Freedom of Information: Dispute Resolution Procedures' (1996) 4 *European Public Law* 635; Robert Hazell 'Freedom of Information: Lessons from Canada, Australia and New Zealand' (1991)12(3) *Policy Studies* 38.

dccxxxvi. Robert Hazell 'Freedom of Information in Australia, Canada and New Zealand' (1989) 67(2) *Public Administration* 189 at 195.

dccxxxvii. In these jurisdictions review of access decisions on archival records are determined under general FOI type legislation.

dccxxxviii. For example the Information Commissioners in British Columbia, Ontario and Queensland have the power to make a binding order overturning the decision of an agency.

dccxxxix. Australian Federal Police *IP Submission 35*; Department of Defence *IP Submission 82*.

dccxl. ALRC 77/ARC 40, para 6.19 and rec 84.

dccxli. While most submissions assumed the continued jurisdiction of the AAT, a number of submissions specifically supported its retention: Administrative Review Council *IP Submission 21*; Australian Archives *IP Submission 56*; Department of Foreign Affairs and Trade *IPSubmission 60*; Administrative Appeals Tribunal *IP Submission 63* and *DRP Submission 7*; Australian Archives *DRP Submission 39*.

dccxlii. This was recommended by the Administrative Review Council in its Report No. 39 *Better Decisions: review of Commonwealth Merits Review Tribunals* Canberra 1995. While original proposals included the amalgamation of five separate tribunals, it has since been determined that the Veterans' Review Board will remain as a separate body with appeal rights to the ART: see Attorney-General and Minister for Justice, press release, 20 March 1997; and Attorney-General, press release, 3 March 1998.

dccxliii. Australian Intelligence Community *IP Submission 42*; Australian Archives *IP Submission 56*.

dccxliv. *Administrative Appeals Tribunal Act 1975* s 19(6)(b). All provisions relating to the Security Appeals Division were inserted into the Act by the *Law and Justice Legislation Amendment Act (No. 1) 1995* sch1. There have only been three applications made to the Security Division since its commencement, all involving the review of a decision under the Archives Act.

dccxlv. Administrative Appeals Tribunal Act s 21AA(2).

dccxlvi. There are only five full-time members appointed to the Division and there are no part-time members.

dccxlvii. Archives Act s 46.

dccxlviii. Administrative Appeals Tribunal *DRP Submission 7*.

dccxlix. Situations where the prescribed fee is not payable or can be waived by the Tribunal are set out in Administrative Appeals Tribunal Regulation 19.

dccl. Administrative Appeals Tribunal *IP Submission 63*. The AAT restated its confidence in the existing waiver procedures in *DRP Submission 7*.

dccli. Australian Federal Police *IP Submission 35*; Department of Foreign Affairs and Trade *IPSubmission60*; Administrative Appeals Tribunal *IP Submission 63*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

dcclii. Administrative Appeals Tribunal *DRP Submission 7*.

dccliii. See rec 123.

dccliv. See ch 16.

dcclv. If no agreement is entered the NAA would have responsibility for making access decisions: see rec111.

dcclvi. Australian Broadcasting Corporation *IP Submission 59*; Department of Foreign Affairs and Trade *IPSubmission 60*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

dcclvii. Department of Defence *IP Submission 82*.

dcclviii. Australian Archives *DRP Submission 39*.

dcclix. Administrative Appeals Tribunal *DRP Submission 7*.

dcclx. Matthew Gordon-Clark *IP Submission 5*; AJ & J Winterbotham *IP Submission 14*; Australia Post *IPSubmission 25*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Australian Federal Police *IP Submission 35*; Australian Securities Commission *IP Submission 52*; History Institute, Victoria Inc *IP Submission 75*; Department of Immigration and Multicultural Affairs *IP Submission 83*; Australian Bureau of Statistics *IP Submission 86*.

dcclxi. Department of Defence *DRP Submission 21*.

dcclxii. Administrative Appeals Tribunal *DRP Submission 7*.

dcclxiii. Dzidra Knochs *DRP Submission 12*

dcclxiv. R Baxter 'Freedom of Information: Dispute Resolution Procedures' (1996) 4 *European Public Law* 635, 651.

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dcclxvi. The Commission is not aware of any cases in which Australian Archives has made a decision which ignored or opposed the view of an agency, although in some cases there has been extensive discussion between the Archives and agencies about the appropriateness of recommended decisions.

dcclxvii. Administrative Appeals Tribunal *IP Submission 63*.

dcclxviii. The Treasury *IP Submission 65*.

dcclxix. See statistics for 1994–95, 1995–96 and 1996–97 in Australian Archives *Annual Reports of Australian Archives and Advisory Council on Australian Archives 1996–97* Canberra 1997, 31. It should be noted that decisions may affect only a few words within a record, so that the amount of material in the record publicly available will not always be significantly increased by modification of the original decision at internal review.

dcclxx. AJ & J Winterbotham *IP Submission 14*; Australian Customs Service *IP Submission 20*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Australian Federal Police *IPSubmission 35*; Department of Foreign Affairs and Trade *IP Submission 60*; Department of Employment, Education, Training and Youth Affairs *IP Submission 69*; Department of Defence *IPSubmission 82*; Australian Bureau of Statistics *IP Submission 86*.

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dcclxxv. See para 22.34–39 below which advocate that internal review be carried out by the initial decision maker, a change from the current system whereby all internal review under the Archives Act is carried out by Australian Archives.

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dcclxxxii. Barbara Poniewierski *IP Submission 11*.

dcclxxxiii. ALRC 77/ARC 40, rec 92. See also ARC Report No 39 *Better Decisions: review of Commonwealth Merits Review Tribunals* Canberra 1995, rec 75.

dcclxxxiv. The new NSW Administrative Decisions Tribunal is expected to commence operations in July 1998. That tribunal will have the power to hear appeals under the NSW *Freedom of Information Act 1989*, which is fully retrospective, and could thus include appeals relating to archival records. The Victorian *Freedom of Information Act 1982* provides for appeals to a general merits review tribunal, however that Act only applies to records created after 5 July 1978.

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dcclxxxvi. Robert Hazell 'Freedom of Information in Australia, Canada and New Zealand' (1989) 67(2) *Public Administration* 189 at 195.

dcclxxxvii. In these jurisdictions review of access decisions on archival records are determined under general FOI type legislation.

dcclxxxviii. For example the Information Commissioners in British Columbia, Ontario and Queensland have the power to make a binding order overturning the decision of an agency.

dcclxxxix. Australian Federal Police *IP Submission 35*; Department of Defence *IP Submission 82*.

dccxc. ALRC 77/ARC 40, para 6.19 and rec 84.

dccxci. While most submissions assumed the continued jurisdiction of the AAT, a number of submissions specifically supported its retention: Administrative Review Council *IP Submission 21*; Australian Archives *IP Submission 56*; Department of Foreign Affairs and Trade *IPSubmission 60*; Administrative Appeals Tribunal *IP Submission 63* and *DRP Submission 7*; Australian Archives *DRP Submission 39*.

dccxcii. This was recommended by the Administrative Review Council in its Report No. 39 *Better Decisions: review of Commonwealth Merits Review Tribunals* Canberra 1995. While original proposals included the amalgamation of five separate tribunals, it has since been determined that the Veterans' Review Board will remain as a separate body with appeal rights to the ART: see Attorney-General and Minister for Justice, press release, 20 March 1997; and Attorney-General, press release, 3 March 1998.

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dccxciv. *Administrative Appeals Tribunal Act 1975* s 19(6)(b). All provisions relating to the Security Appeals Division were inserted into the Act by the *Law and Justice Legislation Amendment Act (No. 1) 1995* sch1. There have only been three applications made to the Security Division since its commencement, all involving the review of a decision under the Archives Act.

dccxcv. Administrative Appeals Tribunal Act s 21AA(2).

dccxcvi. There are only five full-time members appointed to the Division and there are no part-time members.

dccxcvii. Archives Act s 46.

dccxcviii. Administrative Appeals Tribunal *DRP Submission 7*.

dccxcix. Situations where the prescribed fee is not payable or can be waived by the Tribunal are set out in Administrative Appeals Tribunal Regulation 19.

dccc. Administrative Appeals Tribunal *IP Submission 63*. The AAT restated its confidence in the existing waiver procedures in *DRP Submission 7*.

dccci. Australian Federal Police *IP Submission 35*; Department of Foreign Affairs and Trade *IPSubmission60*; Administrative Appeals Tribunal *IP Submission 63*; Dr Lucy Taksa and Rosemary Webb *IP Submission 66*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

dcccii. Administrative Appeals Tribunal *DRP Submission 7*.

dcccciii. See rec 123.

dcccciv. See ch 16.

dcccv. If no agreement is entered the NAA would have responsibility for making access decisions: see rec111.

dcccvi. Australian Broadcasting Corporation *IP Submission 59*; Department of Foreign Affairs and Trade *IPSubmission 60*; Department of Immigration and Multicultural Affairs *IP Submission 83*.

dcccvii. Department of Defence *IP Submission 82*.

dcccviii. Australian Archives *DRP Submission 39*.

dcccix. Administrative Appeals Tribunal *DRP Submission 7*.

dcccx. Matthew Gordon-Clark *IP Submission 5*; AJ & J Winterbotham *IP Submission 14*; Australia Post *IPSubmission 25*; Professional Historians & Researchers Association (WA) Inc *IP Submission 31*; Australian Federal Police *IP Submission 35*; Australian Securities Commission *IP Submission 52*; History Institute, Victoria Inc *IP Submission 75*; Department of Immigration and Multicultural Affairs *IP Submission 83*; Australian Bureau of Statistics *IP Submission 86*.

dcccxi. Department of Defence *DRP Submission 21*.

dcccxii. Administrative Appeals Tribunal *DRP Submission 7*.

dcccxiii. Dzidra Knochs *DRP Submission 12*

dcccxiv. Senate Standing Committee on Constitutional and Legal Affairs *Freedom of Information: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978* Canberra 1979, para 33.23.

dcccxv. reg 2.

dcccxvi. Office of the Clerk of the Senate *IP Submission 15*.

dcccxvii. ibid.

dcccxviii. Matthew Gordon-Clark *IP Submission 5*.

dcccxix. Gerald Fischer *DRP Submission 27*.

dcccxx. Clerk of the Senate *DRP Submission 16*.

dcccxxi. Australian Archives *DRP Submission 39*.

dcccxxii. See para 23.6–8 above.

dcccxxiii. Department of Health and Family Services *DRP Submission 30*.

dcccxxiv. Clerk of the Senate *DRP Submission 16*.

dcccxxv. *DRP Submissions 44* and *39*.

dcccxxvi. National Crime Authority *DRP Submission 31*

dcccxxvii. Australian Law Reform Commission Report No 77/Administrative Review Council Report No 40 *Open government: a review of the federal Freedom of Information Act 1982* Sydney 1995 (ALRC77/ARC40), para 15.12.

dcccxxviii. Anne Picot *IP Submission 79*.

dcccxxix. Australian Archives *IP Submission 56*.

dcccxxx. Administrative Review Council *The contracting out of Government services: access to information* AGPS Canberra 1997

dcccxxxi. Carol Coutre and Marcel Lajeunesse 'Impact of Archival Legislation on National Archives Policies: A Comparative Study' Archives 21 (No 91, Spring 1994) 1, 13.

dcccxxxii. For example Argentina, the Dominican Republic, France.

dcccxxxiii. Carol Coutre and Marcel Lajeunesse 'Impact of Archival Legislation on National Archives Policies: A Comparative Study' Archives 21 (No 91, Spring 1994) 1, 13.

dcccxxxiv. 44 U.S.C.A. § 2111.

dcccxxxv. Chris Hurley *DRP Submission 14*.

dcccxxxvi. Archives Act s 5(2)(g).

dcccxxxvii. Dr Lucy Taksa and Rosemary Webb *IP Submission 66*.

dcccxxxviii. Australian Archives *IP Submission 56*.

dcccxxxix. National Library of Australia *IP Submission 76*.

dcccxl. Draft rec 6.1.

dcccxli. Australian Archives *DRP Submission 39*.

dcccxlii. See ch 5.

dcccxliii. See para 12.56 and 19.31.

dcccxliv. Eric Ketelaar *Archival and Records Management Legislation and Regulations: A RAMP Study with Guidelines* UNESCO Paris 1985, 33–35.

dcccxlv. John Curtin Prime Ministerial Library *IP Submission 49*.

dcccxlvi. Archives Authority of NSW *IP Submission 97*.

dcccxlvii. Australian Society of Archivists Inc *IP Submission 95*.

dcccxlviii. Draft rec 6.1.

dcccxlix. Australian Archives *DRP Submission 39*