



Response to a Discussion Paper on Proposed WA Privacy and Data Sharing Legislation

1. Background

Australian Society of Archivists Inc. (ASA) is the peak professional association for information professionals working in archives, recordkeeping, information and data management. The ASA advocates on behalf of its members and for the advancement of archival practice in Australia. It also advocates on behalf of the Australian community's interest in access to and preservation of memory in documentary and recorded form.

The ASA's objectives are described on its Web site.¹ Access to archives is a core concern of the Society, which operates within a national and international framework of laws, regulations and guidelines that give effect to a 'moral compass' on the handling of records and documents. One such important framework element is UNESCO's Universal Declaration on Archives adopted by the 36th Session of the General Conference of UNESCO on 10th November 2011. The declaration recognizes:

*The vital necessity of archives for supporting business efficiency, accountability and transparency, for protecting citizens' rights, for establishing individual and collective memory, for understanding the past, and for documenting the present to guide future actions.*²

2. Response to Discussion Paper

2.1 The discussion paper describes a range of legitimate concerns arising from the absence of privacy protection and responsible information sharing legislation in WA. The ASA's experience with privacy issues in the Government sector suggests the need for proper coordination of legislation with other legislation that impacts on WA Government recordkeeping and access to Government information, for example, the *State Records Act 2000*. This Act is intended to ensure a reliable persistent record of government and an access regime to records created by Government in the public interest.

2.2 In the absence of proper thought to coordination of the operation of privacy and data protection legislation, outcomes from the operation of privacy legislation can cause issues for the openness, accountability and transparency of government. They can also conflict with other information and recordkeeping legislation such as the *State Records Act 2000* and the *Freedom of Information Act, 1992*.

2.3 A number of case studies demonstrate the need for a thoughtful approach to coordination and conflict resolution, where the aims and objectives of different information laws conflict. In this submission the case of Care Leavers – people who spent time in out-of-home care as a child including Forgotten Australians, Former Child Migrants, and members of the Stolen Generations - is considered. The Response ends with a list of recommendations that the Society hopes will shape further evolution of WA's proposed privacy and information sharing laws. The restriction of this submission to one case study, is a reflection and time and opportunity to contribute. There are many more case studies.

2.4 Case Study - Care Leavers

Coordination of recordkeeping, privacy and information sharing legislation and policies covering empathetic access to records have been discussed in Australia since the *Bringing them Home Inquiry* (1995-1997). The Link-Up (NSW) submission to that Inquiry emphasised the importance and inherent value of records to the Care Leaver community:

In some cases, the records held by non-Aboriginal organisations may be the only source of information that Aboriginal people have about ourselves.³

The issues around access to records relating to out of home care were also considered in the *Lost Innocents* (2000-2001) and the *Forgotten Australians* (2003-2005) inquiries. With all inquiries and reports concluding that people who spent time in out-of-home care have a right to access records that document their lives. The *Royal Commission into Institutional Responses to Child Sexual Abuse* devoted a Volume of its Final Report to Recordkeeping and Information Sharing, (Final Report, Volume 8), reinforcing the right of Care Leavers to access records about them:

Principle 5: Individuals' existing rights to access, amend or annotate records about themselves should be recognised to the fullest extent.

Full access should be given unless contrary to law. Specific, not generic, explanations should be provided in any case where a record, or part of a record, is withheld or redacted.

Individuals should be made aware of, and assisted to assert, their existing rights to request that records containing their personal information be amended or annotated, and to seek review or appeal of decisions refusing access, amendment or annotation.⁴

However, these recommendations have not necessarily been followed, with privacy legislation regularly used to both prohibit access to records by Care Leaver, or redact (censor) those records which are released.⁵ The implications of not gaining access to records can be profound for Care Leavers, including restricting them from knowing the names of parents or siblings and thus tracing family, knowing important family medical information, and even where they grew up.

More recently, Federal Government guidelines have advocated national consistency in the provision of records access, operating on a principle that maximum access to information must be provided to Care Leavers. The Department of Social Services' *Access To Records by Forgotten Australians and Former Child Migrants: Access Principles for Records Holders, Best Practice Guidelines in providing access to records* recommends that redaction be avoided wherever possible, and where redaction is deemed to be needed, provide detailed explanations to Care Leavers about why these decisions have been made. The *Access to Records Guidelines* also recommend that all access decisions should be reviewed for consistency and empathy for the needs of Care Leavers.⁶

In July 2019, the NSW Information and Privacy Commission released *Information Access Guideline 8 – Care Leavers' access to Out-of-Home Care Records* to improve access to records for people who spent time in institutional care, to increase transparency in government processes and support national consistency for Care Leavers accessing records.⁷ We commend both guidelines to the department and suggest they provide a useful framework for considering these issues.

3.0 Recommendations – Issues arising from The Discussion Paper

The Discussion Paper does not canvas issues raised in recent Inquiries about the operation of privacy principles and classes of records such as Care Leaver records. In regard to the privacy provisions of any new proposed Act, careful consideration should be given to the best way forward in coordinating the operation of the Act with recommendations and best practice in respect of citizen enforceable rights of access. With regard to the recommendations of the *Royal Commission into Institutional Child Sexual Abuse*, it would be opportune to review the recommendations contained in the Final Report: Volume 8. The Department of Social Services' *Access to Records by Forgotten Australians and Former Child Migrants* and the NSW Information

and Privacy Commission's *Information Access Guideline 8* should also be reviewed to see how the issues discussed can be implemented within the Western Australian privacy context.

4.0 Recommendations -The 2007 Bill

In regard to the 2007 Privacy Bill provided for comment, the ASA makes the following recommendations:

- That the statement of relationship between Information Privacy legislation, FOI and State Records Act, 2000 (Sections 10c, 12) should be retained. Nothing in the proposed legislation should affect the operation of the State Records Act, 2000 with respect to archival records across the functions of appraisal, disposal and access.
- That p.103 IPP reference to an obligation on the part of public organization's to *'take reasonable steps to destroy or permanently de-identify personal information that is no longer needed'* be revised.

As it stands, this section might be applied wrongfully to legitimate destruction where the access needs and rights of subjects have not been adequately considered, with the net result that access is curtailed due to destruction. This section is also anomalous with treatment of the same class under HPP elsewhere in the Bill. More recent legislation of the minimisation principle specifically excludes an unqualified warrant to destroy. For example, Article 5 of the EU's General Data Protection Directive states that

1) Personal data shall be:

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organizational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

- The information code of practice section 57 makes no reference to broad consultation in the preparation of such codes and does not articulate data subjects as stakeholders in such codes of practice. Contemporary practice, for example in relation to Care Leavers, is suggesting the principle of co-design with data subject input. The proposed legislation should explicitly support the principle of co-design.

5.0 Other observations – The 2007 Bill

Members have raised the following additional issues that may also require attention:

- The collection, use and disclosure of personal information for research. The Schedule 4 treatment of this appears very basic and could be reviewed with reference to exemplars such as NSW's statutory guidelines for health and personal information; and
- If personal data is aggregated or hacked to create new data of a personal kind, it is unclear how this is handled in the Bill. Aggregation and hacking of personal data or the use of analytics to create new personal data are practices that may require further elaboration in terms of the Bill.

6.0 Conclusion

The argument that WA needs Privacy and Data Sharing law is well presented in the Discussion Paper and The ASA welcomes the decision of the WA Government to move forward in this area. The ASA stands ready to provide further expert input to the legislative process, to make for an outcome that aligns with recommendations from recent commissions of inquiry and community expectations.

NOTES

¹ Australian Society of Archivists Inc. Mission and Objectives. Retrieved from <https://www.archivists.org.au/about-us/mission-goals-and-values>

² International Congress on Archives. (n.d.) Universal Declaration on Archives. Retrieved from <https://www.ica.org/en/universal-declaration-archives>

³ Human Rights and Equal Opportunity Commission. (1997). Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. Part 5. Chapter 16. Retrieved from <https://www.humanrights.gov.au/our-work/bringing-them-home-chapter-16> (unpaginated)

⁴ Royal Commission into Institutional Responses to Child Sexual Abuse. (2017). *Final Report: Recordkeeping and Information sharing*. Volume 8. P.23

⁵ Care Leavers Australasia Network (CLAN). (2016). CLANS submission to the Royal Commission on Records and Recordkeeping Consultation Paper. Retrieved from <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Records%20and%20recordkeeping%20Practices%20-%20Submission%20-%2013%20CLAN.pdf>.

⁶ Department of Social Services. (2015). Access To Records by Forgotten Australians and Former Child Migrants: Access Principles for Records Holders, Best Practice Guidelines. Retrieved from <https://www.dss.gov.au/families-and-children/programmes-services/family-relationships/find-and-connect-services-and-projects/access-to-records-by-forgotten-australians-and-former-child-migrants-access-principles-for-records-holders-best-practice-guidelines-in-providing-access>

⁷ Information and Privacy Commission New South Wales. (2019). Information Access Guideline 8: Care Leavers' access to their Out-of-Home Care Records. Retrieved from https://www.ipc.nsw.gov.au/sites/default/files/2019-06/IA_Guideline_8_Care_Leavers_access_to_their_Out_of_Home_Care_Records_June_2019.pdf.