

Australian Society of Archivists Inc.

Australian Council of Archives

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the Privacy Amendment (Private Sector) Bill 2000

These comments are provided by the Australian Society of Archivist Inc. (ASA) and the Australian Council of Archives (ACA). The ASA and the ACA appreciate the opportunity to comment on the Privacy Amendment (Private Sector) Bill 2000.

The ASA was established in 1975 and represents some 800 individual professional archivists and archival organisations in Australia. The ACA was established in 1985 and represents archival organisations in Australia. Archivists ensure that records which have value as authentic evidence of administrative, corporate, cultural and intellectual activity are made, kept and used. The work of archivists is vital for ensuring organisational efficiency and accountability, and for supporting understandings of Australian life through the management and retention of its personal, corporate and social memory.

The ACA issued a position statement on Privacy in 1996 (copy enclosed). The ASA has also issued a general policy statement "Position Paper on Privacy, 1998" (copy enclosed), which outlines best practice in managing the use of records containing personal information. In addition, the ASA has a Code of Ethics, parts of which relate to the ethical handling of personal information in archival collections.

As illustrated in these position papers, the archives industry and profession in Australia has demonstrated a long-standing commitment to the need to respect and protect personal privacy. For this reason the ASA and ACA support and applaud the intent of Commonwealth legislation that will extend privacy protection to the private sector.

The ASA and the ACA do, however, have some significant concerns about the future impact that key provisions of the Bill could have on archival research in Australia. These concerns relate primarily to the need for an archival exemption or sunset clause on the operation of the National Privacy Principles so as to permit the conduct of bona fide research in archival institutions.

The Bill defines an organisation as

- (a) an individual;
- (b) a body corporate
- (c) a partnership
- (d) any other unincorporated association

(e) a trust

Most archival organisations in the private sector would fall under this definition.

Our concerns with the implications of the National Privacy Principles are set out below:

Principle 1 Collection

Our understanding is that this Principle will apply to personal information collected after the commencement of the Act.

It is a primary function of archival collecting institutions to collect records that are of enduring value of individuals, organisations and businesses. The transfer of custody of these records usually occurs after active reference to the records by the records creators has ceased. Many individuals deposit their own records directly with an archival institution. These individuals could be advised of the matters raised in sub-clause 1.3. In other cases the records are deposited with an archival institution by a family member after the individual concerned has passed away. Moreover, it needs to be recognised that the private papers of individuals usually include personal information relating to a large number of other individuals, for example in correspondence received from friends and relatives.

In addition, records about individuals in archival institutions are often collected by an organisation or business and then deposited by that organisation or business with an archival institution as a part of that organisation's records. These records are not collected directly from the individual to whom they may refer (sub-clause 1.4). Archival institutions may therefore come into the possession of personal information about a large number of individuals and it would not be possible to fulfill the requirements of sub-clause 5 to notify all these individuals of the matters outlined in sub-clause 1.3

Principle 2 Use and Disclosure

Our understanding is that this Principle will apply to personal information collected after the commencement of the Act.

Sub-clause 2.1 states that "An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection...."

One of the primary functions of an archival institution is to make records available for access and research. This use of the information may be quite unrelated to the original purpose for collection of the information and is usually undertaken many years after the initial collection.

In relation to Sub-clause 2.1 (b) Archival institutions administer access to records under set access policies and conditions being aware of existing legislation, protocols, individual donor agreements, organisational policies etc. In the example of the individual depositing records with an archival institution, access conditions stipulating possible use of the records would normally be an integral part of the donor agreement. Such an agreement would, however, only cover the privacy aspects of personal information on the individual donor. It would not cover the privacy aspects of personal information relating to any other individual that may reside in the records being handed over. Likewise, in the instance of records deposited by organisations and businesses, it is not possible to seek the consent for the use of personal information of all individuals recorded in these records.

The ASA's general policy statement "Position Paper on Privacy, 1998", which outlines best practice in managing the use of records containing personal information, states that "...archivists believe that records containing personal information should be able to be used for research purposes without the permission of the record subject, provided that a sufficient period of time has elapsed since the creation of the records or that any information that identifies the record subject is deleted in a way that does not compromise the integrity of the record". If such deletion cannot be done, access may be allowed after receipt of a written undertaking on the part of the researcher guaranteeing that any information enabling identification of the an individual will not be included, and any personal information the researcher sees will not be revealed"

Sub-clause 2.1 (d) (ii) includes the provision for the use or disclosure of health information conducted in accordance with guidelines approved by the Commissioner under section 95A. and Sub-clause 2.1 (d) (iii) allows disclosure where "...the organisation reasonably believes that the recipient of the health information will not disclose the information, or personal information derived from the health information.."

The ASA and ACA would recommend a similar provision as Sub-clause 2.1 (d) (ii) for the approval of guidelines for the use or disclosure of personal information held in archival institutions for the purpose of research which could incorporate a similar provision as Sub-clause 2.1 (d) (iii).

An over-riding concern for the ASA and the ACA is to seek to ensure that privacy restrictions on access to records containing personal information are finite in their application. We would suggest a sunset clause of 100 years after the information is first collected.

Legislating NPP2 would potentially have a catastrophic effect on the ability of future researchers to undertake archival research in this country. Unless the

legislation provides for some kind of exception for archival institutions in relation to NPP2, collecting archives would in the course of fulfilling their mission be faced with the choice of either breaking the law or closing down their operations.

Principle 3 - Data Quality

Our understanding is that this Principle will apply to personal information collected before and after the commencement of the Act.

Archivists make records available for research and must ensure their value as authentic evidence of administrative, corporate, cultural, and intellectual activity over time. They are therefore responsible for disclosing personal information which was authentic at the time of creation to enable research of past experiences. Maintaining the integrity of the record is an important function of the archivist. The ASA's general policy statement "Position Paper on Privacy, 1998" states "In many jurisdictions laws, protocols and agreements allow record subjects to correct information about them that is incomplete, inaccurate or misleading. Archivists should ensure, however, that such action does not delete information of ongoing value - but rather, a separate record amending the original information should be added. " It would be against archival principles to seek to up-date the original archival record. In addition with the passage of time it could be practically impossible to verify the accuracy, completeness and currency of this information.

Principle 4 - Data Security

Our understanding is that this Principle will apply to personal information collected before or collected after the commencement of the Act.

In relation to sub-clause 4.2 as previously stated one of the primary functions of an archival institution is to make records available for access and research. This use of the information may be quite unrelated to the original purpose for collection of the information and is usually undertaken many years after the initial collection. Enforced destruction of this personal information after the original purpose for collection has elapsed or the de-identification of the personal information will make the opportunity for future research impossible or of negligible value. Individuals undertaking genealogical research are specifically seeking name-identified information.

Principle 6 - Access and correction

Our understanding is that this Principle will apply to personal information collected after the commencement of the Act.

In relation to sub-clause 6.5, as noted previously, archivists are responsible for disclosing personal information which was authentic at the time of creation to enable research of past experiences. The ASA's general policy statement "Position Paper on Privacy, 1998" recommends that legislation which allows

individuals to correct information about themselves which is incomplete, inaccurate or misleading should not result in the deletion "of information of ongoing value - but rather, a separate record amending the original information should be added. " We wish to stress here the fact that, while original records often contain inaccurate information, for those records to be able to act as authentic evidence of an activity or a transaction they MUST be kept inviolate.

Principle 9 - Transborder data flows

Our understanding is that this Principle will apply to personal information collected before or collected after the commencement of the Act.

Archival institutions in Australia provide information for research purposes to individuals around the world. As previously stated, in the example of the individual depositing records with an archival institution access conditions stipulating possible use of the records by overseas researchers could be included as part of the donor agreement. In the instance of records deposited by organisations and businesses it is not possible to seek the consent of all individuals recorded in these records for the provision of personal information to overseas researchers. The sub-clause 9(e) (ii) would apply to the provision of information for overseas research by archival institutions.

Principle 10 - Sensitive information

Our understanding is that this Principle will apply to personal information collected after the commencement of the Act.

As previously explained some individuals deposit their own records directly with an archival institution. The consent to collect sensitive information is implicit in the donation (Sub-clause 10.1 (a)). However in many instances the records about individuals in archival institutions would be collected by an organisation or business and then deposited by that organisation or business with an archival institution. Archival institutions may therefore hold sensitive information about a large number of individuals and it would be impractical to fulfill the requirements of this sub-clause.

Suggestions

The ASA and ACA are concerned that the implementation of this Bill will seriously impair the ability of archival institutions in Australia to collect, preserve and make available documentation of Australian life in the 21st Century. Organisations may be concerned that the future transfer of the custody or ownership of records to archival institutions may breach the National Privacy Principles. These organisations may consider the destruction of records rather than the transfer of these records to archival institutions such as the National Library, the State Libraries and the various University Archives.

We stress that archivists and archival institutions are both sensitive to and experienced in the ethical handling of privacy issues in relation to archival collecting and research. As evidenced in the ASA and ACA Position Statements on Privacy and the ASA Code of Ethics, archivists take a measured and professional approach to balancing the sometimes conflicting interests of privacy and historical research. The passage of this privacy legislation in its current form could override the ability of archivists to apply professional discretion, policy and experience to this critical area of our endeavour.

The ASA and ACA recommend the exemption of archival institutions from the provisions of the National Privacy Principles (similar to the existing exemption for the Media) in order to ensure the possibility of continued research into the administrative, corporate, cultural and intellectual activity of Australia and, specifically, to ensure continued social and genealogical research. The ASA would be most happy to discuss with the Government how such an exemption may be incorporated into the legislation.

Alternatively, the legislation could be altered to incorporate a sunset clause after which the NPPs would not apply in the context of archival research. For example, the legislation could specify that the Act ceases to apply to information fifty years after it is initially created or collected.

Another alternative option would be the inclusion of a similar provision as Sub-clause 2.1 (d) (ii) for the approval of guidelines for the use or disclosure of personal information held in archival institutions for the purpose of research which could incorporate a similar provision as Sub-clause 2.1 (d) (iii). The ASA would be most happy to develop such guidelines to apply to archival institutions.

As a further option, the ASA and ACA could make an application for the approval of a privacy code for archival institutions based on our respective position papers on privacy and the ASA Code of Ethics.