Australian Society of Archivists

Submission to the Attorney General's Department on Australia's current information frameworks for public information, and options for reform to information access laws, policies and practices

1   Preamble

1.1   The Australian Society of Archivists Inc (ASA) is the peak professional body in Australia representing archivists and archives, and the recordkeeping profession. The ASA was established in 1975, and has been actively informing, educating, and leading Australians in their understanding of archives and recordkeeping since that time.

1.2   In 2016 the Australian Government released the first *Open Government Partnership National Action Plan* (the Plan). The Plan includes a number of commitments under the umbrella theme of 'Access to Information', with the goal being to "Improve and modernize the way in which the public accesses Government information."

1.3   The Plan includes a commitment to develop a simpler and more coherent legislative framework for managing and accessing government information within the context of digital government, supported by efficient and effective policies and practices." (Commitment 3.1: Information management and access laws for the 21st century)

1.4   The ASA notes that the Attorney General's Department (AGD) is working towards making a recommendation to Government by September 2017 on preferred reforms to deliver this framework. Consultations undertaken by the AGD are to consider both the existing framework and the range of options for reform.

1.5   The ASA endorses the principles discussed in the Plan, in particular those relating to civic and social rights, and government accountability and transparency.

1.6   The ASA, in referring to 'records' means: "Information created, received, and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business." (ISO 15489-1:2016, *Records Management*, 3.14)

1.7   Furthermore, the ASA wishes to make clear that the concept of a 'record' is not bound by format or form. Any information – including data – that is made, used or received in the conduct of business or affairs, can serve as a record. 'Recordness' comes about as a result of what information does and how it is managed, rather than what form or type it is. Metadata is an essential part of any record, giving it context and supporting its management. More authoritative records are likely to have higher quality and better managed metadata. Archives are commonly understood to be those records which are identified as having continuing value for a person,

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organization, community or government. In government, this generally involves such records being put under the control and sometimes also the custody of an archival authority, for further contextualization and the provision of access to the public in due course. They are also not bounded by format or form, and are now largely being identified in 'born digital' business environments.

2   **The existing framework**

2.1   Overall there is a lack of harmony between laws on privacy, information security, archives/records and freedom of information. There needs to be a knitting of the framework together – as it stands the increasing fragmentation provides multiple loopholes making it easy for agencies to slip through commitments to access. For example, there are secrecy provisions (restrictions to access) in a plethora of unconnected legislation, mandatory data retention in one place, data sovereignty issues under some policy and legislative agendas and a multitude of players, with their own information access barrows to push. There is a lack of cohesive oversight on what is happening in all these corners of government. In addition to the issues at the Federal level, there are different pieces of information access legislation in every State and Territory.

2.2   Under the current framework, the distinctions made in the laws and policy between information types such as records, documents, archives and data are increasingly unhelpful, especially in the digital world. For example, by referring to 'documents', FOI legislation can be interpreted to mean 'not data' or to exclude records and information that are not in document-like digital objects. In reality, the majority of the key systems of government today are generating important records in a range of formats, including databases, complex digital objects (including audio and visual objects), datasets, GIS platforms and more, which should fall into the scope of public access requests and be delivered where there are no genuine reasons not to disclose.

2.3   The existing legislative framework does not enable a coherent understanding of information management nor does it encourage the proactive or strategic management necessary to support good public access. Effective information management is not seen as a critical dependency but it is necessary to enable, support and maintain public access. The reality is that without well governed and well managed information, the costs, risks and inefficiencies of public access provision will consistently railroad attempts to make government information available.

2.4   At the Federal level, many information management requirements are defined under the *Archives Act 1983*. This legislation has appears to have little traction with the public sector, and information management frameworks defined by the National Archives are slow to be applied to emerging digital environments. They are also not legislatively enforced. The Act has long suffered from not having the ability to set standards or monitor compliance on the creation and management of records in agencies. More recent archives / records legislation does this, such as the records/archives Acts for West Australia, New South Wales, or New Zealand.

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2.5   With respect to archival and medium to long term records, much of the data is still in paper format and will not be accessible via digital portals for a long time, if ever. The State Library of NSW has recently identified that after 10 years and $72 million, only 1% of their collection has been digitised. They are now seeking commercial partners to expand on the work. This means that data and information resources that are digitised may be locked up in commercial contracts with respect to release of digital images over time.

2.4   Access to information under the *Archives Act 1983* is stuck in a paper paradigm. The idea that there is a standard closed-to-public-access period for government records of 20 or 30 years under Archives law is not appropriate given the push for proactive release and open data initiatives. The Act also includes a review before release provision which holds up release and is not sustainable.

2.5   There seems to be a worrying alignment potentially being made that open data initiatives render Freedom of Information access redundant. Data sets brought together for point in time access is not a replacement for the transactional base data, which shows how (government) business takes place.

2.6   Valuable public information is not proactively identified and made available. Under the *Archives Act 1983*, the National Archives identifies key national information resources through its retention and disposal rules. These rules are primarily used to identify archival resources and are not used to identify key current information resources. This means that key long term or public interest government information is generally not proactively flagged or identified prior to its creation, nor during its active lifespan. Instead this information is often left to be retrospectively identified, reconstituted and managed once its active business use has ceased. By this time much digital information is lost, inaccessible, locked in proprietary systems or in the custody of third party service providers, and so is effectively lost and never made available to the public, either immediately or as a long term archival record.

2.6   Information sharing is not enabled. The existing information framework also does not enable information sharing between government agencies. This lack of coordination heightens inefficiencies and can in extreme cases lead to serious process break-downs affecting individuals. At the same time, improved information coordination between agencies introduces privacy risks and must be carefully managed.

2.7   While it is stated that the National Archives of Australia has a focus on digitising high value research data, there is no clarity about how this is demonstrated or achieved. Funding and programs appear to be more aligned with family history and genealogy data, rather than the ARC funding priorities.

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3   Options for reform

3.1   Solutions are complex. Reforms need to acknowledge that digital information access and management are not simple, nor are they technological problems that can be resolved by the rollout of a technological solution. Reforming public access to information requires large leaps forward in system procurement, design and management, coordinated and consistent agency information management, data quality, internal processes for assessing and approving information releases, processes and strategies for data safeguarding (masking, redacting or perturbing personal or sensitive information in order to release remaining information as open information), the deployment of privacy by design strategies etc. Creating information management and access laws for the 21st century are fundamentally transformation exercises and they are wicked, multi-part challenges to solve.

3.2   Solutions need to be strategic. Reforms need a focus on proactivity. Information accessibility and management need to be 'by design'. Legislation also needs to require agencies to proactively and routinely make information available to the public, instead of allowing agencies to wait and respond to public requests for information.

3.3   Digital transformation assessments need to rethink how public access to government information can be enabled. Traditional models of applying for access, agency assessments and one to one information releases need to be abandoned as burdensome, inefficient and inimical to open government. Instead, priority areas for information release could be legislatively defined and agencies required to provide live feeds or regular information releases on certain core government functions.

3.4   Digital transformation processes need to address the complex area of access. Do open government frameworks need to enable one standard form of open access or will access be more nuanced? For example, should specific communities only have open access to certain forms of information? Therefore, do technology and process frameworks need to define a range of accessibility pathways to allow for multiple channels of controlled access, instead of a one size fits all approach?

3.5   Long term accessibility needs to be supported. Legislative reform needs to recognise the long term requirements applying to information access. The public will expect some open release information to be available in perpetuity. Budget allocations and management arrangements need to ensure that this information is accessible, well managed and accountable as a long term archive into the future. In an open government framework, the expectation also has to be set, however, that the government will not maintain *all* information in perpetuity. To do so would be too costly and would result in privacy risks. Therefore, retention and destruction statements also   ed to be made clear.

3.6   High value information should be identified. Reforms should require the identification of key public value information assets in each agency. Reforms should require that as much of this information as possible should be made publicly available, in real time where possible.

3.8   Coordination between responsible agencies: The NAA, NLA, OAIC and offices responsible for Open Government should offer more unified leadership on information access matters.

3.9   Government information takes many forms from analogue to digital, structured and unstructured, digitized and born digital, information that is transactional and retained as records, raw data, data presented in sets, information controlled by agencies and information held by archives, published information (Web based and other), audio-visual material and code (software). These are not exclusive groupings but rather they overlap in myriad ways. In order to apply a framework for access that is consistent, all need to be 'in scope' for legislative reform. Proposed legislation should avoid terminology that constrains the interpretation and application of new access rules across all of these forms.

3.10   Register of archives: The *Archives Act 1983* provides that the National Archives should have both a register of archives, including but not restricted to Commonwealth records, (s.65) and a register of research (data) (s.67). Using harvesting and interoperability measures such registers could be more easily maintained than in the analogue world, and offer a valuable service to the public seeking information.

3.11   High value data sets: The Plan focuses on the data currently found in the data.gov.au repository. This is not and should not be the only measure of where data is found or how open it is. There is a need to work with both Federal and state bodies, including research bodies including Universities, to identify different types of data and how to make them more open.

3.12   Government information should be publicly owned and controlled. Reforms need to address information ownership in digital business environments. Currently, much information that is a public asset and a public good is locked in proprietary cloud or third party systems, or restricted under 'commercial in confidence' provisions of outsourcing contracts, and is never repatriated to government or public control. Legislative and contractual requirements need to identify when information is required as a public asset and specify that it must be provided back into public control or made available to the public.

3.13   Reforms need to have a public focus. Any reforms proposed need to have public engagement and consultation at their core. They also need to prioritise the information needs of those who are frequently unable to advocate for themselves. Citizens need to have knowledge of and access to government information and the ability to engage in agency policy development and service delivery.

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3.14   Ensure that the reform process takes account of the recent Productivity Commission report *Data Availability and Use* with regard to advocating consumer rights of access to personal data.

3.15   The concept of personal data: third party privacy rules have been exceptionally narrowly defined and quite damaging for communities, such as survivors of sexual abuse. Being able to define one's mother's maiden name (for example) as an instance of shared personal data could relieves her (or her direct legal executor etc.) from approving release.

3.16   Technology purchase and design needs to include information access and management as core functional requirements. Cabinet submissions for system procurement should require clear statements around how information management and public information access will be enabled in the proposed solution/s. Cabinet approval for such procurement exercises should in part be contingent on the effectiveness of proposed information management solutions.

3.17   Innovative solutions for real-time or near-time public information provision should be encouraged and rewarded.

3.18   The provision of only part and less usable records to people seeking access to information (PDFs of printed out digital records, for example) needs to be reformed to make source data and its context available in the fullest and most usable forms (machine readable).

SUBMITTED:

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Prepared by the ASA Advocacy Committee
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