REVIEW OF THE OPERATION OF THE TERRITORY RECORDS ACT 2002

February 2010

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EXECUTIVE SUMMARY

This is the Review of the operation of the *Territory Records Act 2002* required by Section 58 of the Act.

The Review was conducted with a significant amount of consultation including with Principal Officers, senior managers and Records Managers from ACT agencies, the Territory Records Advisory Council, the representative body established under the Act to provide advice to the Director of Territory Records, members of the recordkeeping professions, members of Canberra-based historical and genealogical societies and with members of the general public.

There was universal agreement that the Act was important for the people of the ACT and facilitated good administration, accountability of government to people and access to records for historical and cultural purposes. There was also universal agreement that the Act was in general operating well and its implementation and operation had not resulted in any major problems for the Territory or its people.

The three most important issues identified were those related to:

- *electronic records*
  This is not something that can be addressed by legislative change but rather requires advice, assistance and monitoring from the Territory Records Office and adherence to standards by agencies when resources allow for the implementation of electronic recordkeeping or business systems
- *coverage of the Act*
  Recommendations are made for the inclusion in the act for some purposes of records currently excluded from it
- *custody of archival records*
  The Review concludes that at some stage it will be necessary to transfer custody of archival records to the Territory Records Office but it does not recommend that this be done immediately.

A pressing issue for the Territory Records Office is a need to be able to transfer records to other jurisdictions in order to deal with the requirements of recordkeeping for inter-governmental authorities. A recommendation is made for an amendment to the Act to allow for this.

Some, generally relatively minor, potential changes to the Act were identified. These covered:

- the name of the Act
- the main purposes of the Act
- definitions
- exemptions from the Act
- the bringing of executive documents under the Act for all purposes

- the treatment of records of agencies that no longer exist
- the calculation of the start of the open access period
- the addition of an extra function for the Director of Territory Records
- a change to the functions and membership of the Territory Records Advisory Council

The review makes 20 recommendations which are listed at page 30

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TERMS OF REFERENCE

The terms of reference for the review come from the *Territory Records Act 2002* itself. Section 58 requires that

> (1) The Minister must review the operation of this Act as soon as practicable after 1 July 2009
> (2) The Minister must present a report on the outcome of the review to the Legislative Assembly not later than 1 July 2010.

METHODOLOGY

The methodology for this review consisted of:

- Review of available documentation
- Consultation with the wide range of stakeholders listed below
- Analysis and formulation of conclusions

Consultation

Significant steps were taken to offer all who wished to be involved in consultations in relation to the Review to be able to do so:

- Principal Officers were invited to speak to the consultant
- Members of the principal professional associations of recordkeepers, the Records Management Association of Australasia and the Australian Society of Archivists, were invited to meet with the consultant
- A public notice in the ACT Government's Community Noticeboard published in the Canberra Times on Saturday 30 January 2010, the ACT Government Community Engagement website and the Territory Records Office website invited all interested members of the public to an open consultation session with the consultant
- Local organisations with interests in the use of records, including the Canberra and District Historical Society, the Heraldry and Genealogical Society of Canberra and the National Trust of Australia (ACT), were individually invited to send representatives to the public consultation
- The Chief Minister issued a media release discussing the review and giving details of the public consultation and a contact number for further information
- A meeting of the ACT Government records managers' forum was arranged with the consultant
- A meeting of the Territory Records Advisory Council was arranged with the consultant
- The Director-General of the National Archives of Australia was invited to speak to the consultant

As a result the following groups and individuals discussed their views on the operation of the Act:

- 16 Chief Executives or senior management representatives from various agencies, including: Justice and Community Safety (JACS), Disability, Housing and Community Services (DHCS), Territory and Municipal Services (TAMS), Cabinet Office, Commissioner for Sustainability and the Environment, Land Development Agency, Auditor-General's Office, ACT Health, Legal Aid Commission and the Health Services Commissioner.
- Over 30 members of the public
- Representatives of the Australian Women's Archive Project, the Canberra and District Historical Society, the Heraldry and Genealogical Society of Canberra and the National Trust of Australia (ACT), Engineering Heritage Australia, Australian Institute of Architects ACT Chapter, Australian Historical Association, Civil Liberties Australia
- The coordinator of the recordkeeping program at the Canberra Institute of Technology
- 22 members of professional associations
- 25 agency records managers
- 7 members of the Territory Records Advisory Council
- 7 health records specialists from ACT Health
- The Director-General of the National Archives of Australia.

In addition a representative of the Canberra District Historical Society and the Heraldry and Genealogical Society of Canberra circulated to over 150 members, details of the discussion at the public consultation seeking further feedback.

Other sources

Written documentation consulted included:

- *Territory Records Act 2002*
- *Territory Records Regulation 2009*
- Explanatory Memorandum to the Territory Records Bill 2002
- *Executive Document Release Act 2002*
- *Health Records (Privacy and Access) Act 1997*
- *Children and Young People Act 2008*
- AS ISO 15489 – Records Management (2002)
- *Freedom of Information Act 1989*
- *Heritage Act 2004*
- *Legal Aid Act 1977*
- *State Records Act 1998* (NSW)
- *Public Records Act 1973* (Vic)
- *Archives Act 1983* (Cwth)
- *Public Sector Management Act 1994*
- *Public Records Act 2002* (Qld)
- National Archives of Australia (2005). *Records in Evidence*. Canberra: NAA
- Auditor-General's Report 3/2008 (ACT Auditor-General's Office, *Performance Audit Report: Records Management in ACT Government Agencies*), 2008
- Government response to the Auditor-General's report

- Advices from ACT Government Solicitor about the operation of the Act and related matters
- Documents provided by the Director of Territory Records
- Documents provided by some of those who took part in the consultation sessions or from organisations which were represented at the sessions.

Besides these, the consultant benefitted from extensive discussions with the Director of Territory Records and other staff of the Territory Records Office and with the Chair of the Territory Records Advisory Council.

BACKGROUND

The Act

The *Territory Records Act 2002* commenced in July 2003 except for Part 3 which commenced in July 2008.

The main purposes of the Act are to support accountable government through good recordkeeping, to preserve Territory records for future generations and to ensure that public access to records is consistent with the principles of the *Freedom of Information Act 1989*.

The Act is supported by a suite of subordinate legislation:

- *Territory Records Regulation 2009*
- 8 standards for records management
- 83 records disposal schedules.

As well as these the Director of Territory records has issued 8 *Guidelines* and 53 *Records Advices.*

Auditor-General's Report

In June 2008 the Auditor-General provided a performance audit report, *Records Management in ACT Government Agencies*[1]. This report found no major problems caused by the *Territory Records Act* and that substantial progress in recordkeeping had been made by agencies since the passage of the Act in 2002. It noted however some significant shortcomings in the effective implementation of the Act at the working level in agencies. It made 11 recommendations for improvement. These are referred to as appropriate in the body of the report.

THE OPERATION OF THE ACT

In all the consultations undertaken there was universal agreement that the Act:

- was and would remain important to the people of the ACT
- was in general operating well
- had not caused any major problems to those specifically concerned with implementing it or to the administration of the Territory.

There was general understanding by all involved that legislation dealing with government recordkeeping must balance the requirements of three different needs:

- efficient support for the business processes of agencies

[1] ACT Auditor-General's Office, *Performance Audit Report: Records Management in ACT Government Agencies*, (Report 3/2008), June 2008

- accountability of government to people
- eventual access by the public to information for cultural and related purposes.

There was no case of anyone arguing either that the Act was inappropriate or that its implementation had caused major problems to individuals or to public administration.

Three significant issues did however become apparent during the Review. These were the issues of:

- electronic recordkeeping and problems in dealing with it
- coverage of the Act
- custody of archival records.

These issues are discussed in the body of the report.

Besides these there was a significant number of issues that were considered to effect the optimal operation of the Act. These are discussed in the next section.

SPECIFIC ISSUES WITH THE ACT

This section of the report traverses the Act in order, discussing those sections about which issues were raised during consultations and from other sources consulted.

Section 1 Name of Act

A number of members of professional associations of records managers and archivists and of the public participating in the consultation sessions expressed disappointment that the Act made no mention of archives. They pointed out that the second of the three main purposes of the Act was, without using the term, an archival one. They argued that the creation and maintenance of a historical record of the ACT embodied in records retained as Territory archives was such an important part of the thrust of the Act that it should be reflected in the Act's name. They suggested that the Act should be renamed as the *Territory Records and Archives Act*.

This would be counter to the tendency in other jurisdictions where what used to be known generally as Archives acts have gradually been replaced by a new generation of legislation usually known as Records acts. That change was a reflection of the recordkeeping theory behind the then Australian standard for records management, but there is no reason why both records and archives cannot be used in the Act's title, particularly if a significant group of Territory citizens see it as important.

> ***Recommendation 1.***
> *that consideration be given to renaming the Act the Territory Records and Archives Act.*

Section 3 Main purposes of Act

Section 3 lists three main purposes of the Act:

> (a) to encourage open and accountable government by ensuring that Territory records are made, managed and, if appropriate, preserved in accessible form; and
> (b) to preserve Territory records for the benefit of present and future generations; and
> (c) to ensure that public access to records is consistent with the principles of the *Freedom of Information Act 1989*.

What is missing here is one of the main purposes of recordkeeping, ensuring the best possible business outcomes. As the Australian and International Standard on Recordkeeping states "a records management system results in a source of information about business activities that can support subsequent activities and business decisions."

It goes on to state that:

> Records enable organizations to
>
> - conduct business in an orderly, efficient ... manner,
> - deliver services in a consistent and equitable manner,
> - support and document policy formation and managerial decision making,
> - provide consistency, continuity and productivity in management and administration,
> - facilitate the effective performance of activities throughout an organization,
> - provide continuity in the event of a disaster,
> - provide protection and support in litigation including the management of risks associated with the existence of, or lack of, evidence of organizational activity,
> - protect the interests of the organization ... ,
> - support and document current and future research and development activities, ...
> - maintain corporate ... memory[2]

The Act is not silent about the importance of recordkeeping for the success of agency business activities. Section 10 comprehends the importance of agencies managing records to meet their operational needs. Making the management of records for current business purposes one of the main purposes of the Act would however underline to Chief Executives and other principal officers the role that good recordkeeping can play in their agencies.

> ***Recommendation 2.***
> *that a fourth purpose, that of supporting the better management and operation of Territory agencies, be added to the Act.*

[2] *Australian Standard – Records Management* AS ISO 15489, Standards Australia, 2002, p.4

Section 6 Application of Act

The exemption of records from the Act

Section 6 of the Act provides that

> (1) This Act does not apply to records that are health records within the meaning of the *Health Records (Privacy and Access) Act 1997* (*the* Health Records Act).
>
> (2) This Act does not apply to records of the human rights commission in relation to—
>
> (a) a complaint made to the commission under the Health Records Act, section 18; or
>
> (b) the exercise of a function under the *Human Rights Commission Act 2005* in relation to a complaint mentioned in paragraph (a).
>
> (3) This Act does not apply to records of the legal aid commission that relate to the exercise of a function of an officer or employee of the commission when practicing as, or exercising a function of, a solicitor under the *Legal Aid Act 1977*.

At the public consultation there was a unanimous and very strongly expressed view that there should be a single regime for all government recordkeeping in the ACT. This was supported by records managers and members of professional associations.

In this view health records, the legal practice records of the Legal Aid Commission and records of complaints to the Human Rights Commission should all be covered by the Territory Records Act. All government records should be Territory Records. All should have the same requirements for management, protection, care and disposal. This is not to argue that all records should be treated in the same way or that some records should not have specific privacy and security provisions or be protected from general public access. Exemption from the normal recordkeeping requirements of the Act is not however the only, or indeed the best, way of doing this.

Health records, the legal practice records of the Legal Aid Commission and records of complaints to the Human Rights Commission are exempted from the Act because they are records of specific sensitivity and need to be protected from inappropriate disclosure and from any general right of public access. Health records are also exempted because the *Health Records (Privacy and Access) Act 1997* applies to private health providers as well as to Territory agencies.

However the exemption from the Act not only removes the agencies that create and manage those records from the access provisions of the Territory Records Act in relation to them, it also exempts the agencies from having to manage the records in appropriate ways. The relevant Acts do not provide an alternative recordkeeping regime for the exempt records. Agencies are not required to have records management programs for these records. They do not have authorized disposal coverage for them. This is not to assert that the records are currently managed inappropriately but rather to underline the lack of any statutory provision mandating such adequate recordkeeping.

The purpose of the Territory Records Act is, for a number of reasons, "to establish the basis for good recordkeeping … and to ensure that full and accurate records are created and managed."[3] Health records, the legal practice records of the Legal Aid Commission and records of complaints to the Human Rights Commission should also be subject to good recordkeeping that would ensure that full and accurate records are created and managed appropriately.

There is no reason why the agencies involved should not be required to include details of how they will manage and deal with these records in their records management programs. Because the records require special and sensitive treatment is more reason, not less, to ensure that the recordkeeping requirements relating to them have been carefully considered and are codified to allow proper implementation and auditing. Because the records require special and sensitive treatment is more reason, not less, to ensure that their disposal is carefully considered, that retention periods have been properly approved and that there is no doubt about the legal basis for their eventual destruction.

There are two ways of doing this. The first is to incorporate requirements for an appropriate recordkeeping regime into the relevant acts. The second, which was clearly that preferred by participants in the public consultation, is to bring under the Territory Records Act for the purpose of ensuring an appropriate recordkeeping regime the records now exempt. This could be done by applying Part 2 of the Act (with the possible exception of Section 15) to these records.

> ***Recommendation 3.***
> *that the Act be amended so that Part 2 applies to the health records, the legal practice records of the Legal Aid Commission and, records of complaints to the Human Rights Commission currently totally exempted from the Act under Section 6.*

There is an argument that the access provisions of Act, particularly the provisions of Section 28, are sufficient to protect these records from inappropriate public access. There are indeed many records that are covered by the Act which have similar sensitivities to health or legal records – records created to administer the *Children and Young People Act 2008* and national security records managed by the Security and Emergency Management Branch of Justice and Community Safety are examples – which are able to be managed in a way that respects privacy and sensitivity properly and appropriately. Nevertheless the framers of the Act recognised the special status of health, legal practice and complaint records and leaving them exempt from the access provisions of the Act would continue this recognition in a reasonable way.

Personal health information in records outside the health system

The definition of health records in the *Health Records (Privacy and Access) Act 1997* ("any record that consists of or includes personal health information") is taken by recordkeepers administering both that Act and the Territory Records Act to mean that if a file includes one

[3] Explanatory Memorandum to Territory Records Bill 2002, p.3, Cl.3

record containing personal information it is a health record. As a result many Department of Education and Training (DET) records and DHCS records, and some JACS records, which may include a counselling report or a medical report should be defined as health records and therefore not covered by the Territory Records Act even though all other records in the same record class are covered.

In practice these records are not generally treated as health records. The files which may include counselling or medical reports are viewed as administrative records rather than health ones. However, it remains an issue of concern to Records Managers. This is best addressed with a review of the definition of health record which is discussed below in the section relating to Section 9 (Meaning of record of an agency).

Legal Aid records covered by the exemption

Legal Aid records relating to the exercise of a function of an officer or employee of the commission when practising as, or exercising a function of, a solicitor are exempt in order to protect the lawyer client relationship. The Legal Aid Commission has pointed out that for the same reason records relating to the affairs of people who have sought legal services under Parts 5 or 5A of the *Legal Aid Act 1977* should also be exempt.

This is unexceptionable and reflects the intent of the exemptions. Records relating to the affairs of people who have sought legal services from the Legal Aid Commission should be exempt from the same parts of the Territory Records Act as records relating to the exercise of solicitor functions by officers of the Legal Aid Commission.

> ***Recommendation 4.***
> *that the exemption of Legal Aid records in Section 6(3) be amended to include records that relate to the affairs of any person who has sought legal services under parts 5 or 5A of the Legal Aid Act 1977.*

Executive Documents.

The *Executive Documents Release Act 2002* makes provision for the release of Executive documents 10 years after they were submitted to a meeting of the executive. Apart from the provisions in that Act relating to release and access, executive documents are treated in the same way as all other Territory records. Many people consulted as part of the Review argued that there was no reason for a separate act and that, as part of the aim of having a single recordkeeping regime for all ACT Government records, access to executive documents should be brought under the Territory Records Act. Unlike health records for example, it was not considered appropriate to exempt executive documents from the Act and there is no obvious reason why access arrangements for executive documents cannot be handled under the Act in the same way as access to all other records

Recommendation 5.
that consideration should be given to bringing Executive Documents under the Territory Records Act.

Section 7 Meaning of agency and Section 8 Meaning of principal officer

There was some discussion during the consultation phase about these definitions. One Chief Executive in particular argued that the Act gave administrative powers that, on the grounds of good administration, should remain with chief executives, to staff of the agency. The argument is that all departmental agencies should be covered by a single records management program with a single principal officer.

The Explanatory Memorandum to the Territory Records Bill noted that the meaning of the term "agency" was based largely on the definition of prescribed authority in the *Freedom of Information Act 1989* which was used to achieve consistency of wording in describing the agencies to which the Act would apply. The need for consistent definitions of agency remains.

There is nothing to prevent small agencies within departments from adopting the parent department's Records Management Program or from using the parent department's recordkeeping system. This is perhaps a matter best left for management arrangements in departments rather than by legislative action.

Section 9 Meaning of record of an agency

Agency records managers find significant difficulty with the definitions.

Members of the recordkeeping professional associations argued to the Review that the definitions of "record" and related terms should reflect the Australian and International standard (AS ISO 15489) rather than have an idiosyncratic meaning specific to this Act only.

Staff involved in the administration of the Health Records (Privacy and Access) Act found it difficult to reconcile the meaning of "record" in the two Acts.

In this context it should be noted that in the Act:

- The dictionary includes the term "record" but directs the user to Section 9 for its meaning
- Section 9 defines the meaning of "record of an agency" but not specifically of "record". Insofar as this is the Act's only definition of "record" it is seen by recordkeeping practitioners and experts as reflecting a dated understanding of the nature of a record and one which holds within it potential problems as technology advances
- "Record of an agency" is used as both as a definition of "record" and to denote control of that record
- "Record" insofar as it is defined under "record of an agency" is defined differently in the *Territory Records Act* to the way "record" is defined under the *Health Records (Privacy and Access) Act 1997*

- The Long Title and Section 3 of the Act use the term "Territory records" but this is not defined or used elsewhere in the Act
- "Document" is defined in the *Legislation Act 2001*

Definitions of "record"

Those most intimately involved in the administration of this Act argue that they need definitions of:

- "record" (which preferably should reflect the definition in AS ISO 15489), which applies to all records of the ACT Government
- "Territory record", which reflects the definition of "record"
- "health record" which
    - reflects the definition of record
    - clearly distinguishes between records which facilitate health administration and those that are clinical records
- "record of an agency" which reflects the definition of "Territory record"
- "Territory archive".

To have separate definitions of "record" and "Territory record" would not be an unusual approach. The *State Records Act 1998* (NSW) for example includes the following definitions:

> ***record*** means any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means.
>
> ***State record*** means any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office ...
>
> ***State archive*** means a State record that the Authority has control of under this Act

The *Public Records Act 1973* (Vic) includes the following definitions:

> ***record*** means any document within the meaning of the Evidence Act 2008.
> [the Victorian Evidence Act defines Document as "any record of information ..."]
>
> ***public record*** means ... any record made or received by a public officer in the course of his duties ...

The definition in the Australian Standard is:

> **Records**: 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.

What is suggested is a series of definitions encompassing the general meaning of:

- Record - 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

- Territory record – any record made and kept, or received and kept, by any person in the course of the exercise of official Territory functions
- Record of an agency – a Territory record under the control of the agency or to which it is entitled to control
- Territory archive – a Territory record that has been sentenced according to a disposal schedule approved by the Director of Territory Records as "retain as Territory archives".

Using the International Standard's definition, or one based on it, underlines the medium-independent nature of a record as evidence and information rather than as an object. Using that definition in a hierarchy of definitions like that above ensures that the definition of record informs all subsequent definitions and as such removes the problems records managers currently have.

> ***Recommendation 6.***
> *that new definitions be provided in the Act of:*
> ■ *record*
> ■ *Territory record*
> ■ *record of an agency*
> ■ *Territory archive.*

Definition of "health record"

The Health Records (Privacy and Access) Act includes a series of definitions which impinge on the exemptions of health records from the Territory Records Act and which to practitioners lack the specificity to ensure that records apparently caught by the definition are actually clinical and not administrative records.

These definitions are:

> ***record*** means a record in documentary or electronic form that consists of or includes personal health information in relation to a consumer (other than research material that does not disclose the identity of the consumer), and includes—
>
> (a) a photograph or other pictorial or digital representation of any part of the consumer; and
>
> (b) test results, medical imaging materials and reports, and clinical notes, relating to the consumer; and
>
> (c) any part of a record; and
>
> (d) a copy of a record or any part of a record.
>
> ***health record*** means any record, or any part of a record—
>
> (a) held by a health service provider and containing personal information; or
>
> (b) containing personal health information.

> ***personal health information***, of a consumer, means any personal information, whether or not recorded in a health record—
>
> (a) relating to the health, an illness or a disability of the consumer; or
>
> (b) collected by a health provider in relation to the health, an illness or a disability of the consumer.

Health record specialists at the Royal Canberra Hospital argue that, using these definitions, any record in the health service that includes the name and address of a patient, including the most innocuous patient administration records such as food service records, bed allocation records or ambulance call out records, which are created and maintained for the proper running of the hospital and are not maintained as records about patients or their health, meet the definition of personal health information because they include "personal information" which is "collected by a health provider" and because of that person's presence in the hospital is information "in relation to the health … of the consumer".

In their view these must then be treated as health records outside the Territory Records Act.

The issue here is not that the privacy of health consumers should not be protected in relation to non-clinical health records – it should and the Territory Records Act and the FOI Act both have mechanisms to do so – but rather how the records should be dealt with.

To both the health record specialists and other recordkeepers concerned with administering the Territory Records Act the blanket exclusion of records held by health providers that have any personal information in them inhibits the best recordkeeping of both clinical records and of general administrative records. If all the records of a health provider that include any personal information are defined as health records, then significant medical records resources which should be used for managing clinical records are wasted on treating administrative records as if they were clinical records.

> ***Recommendation 7.***
> *that the definition of health record in the Health Records (Privacy and Access) Act be examined and, as appropriate, amended to ensure that it does not inadvertently remove significant quantities of records from the coverage of the Territory Records Act.*

Section 16 Approved records management programs

The section above dealing with Section 6 (Application of Act) includes discussion of, and a recommendation relating to a requirement for details about the management of health records, the legal practice records of the Legal Aid Commission and records of complaints to the Human Rights Commission to be included in relevant agency records management programs.

Section 19 Approval of schedules for the disposal of records

From time to time it is necessary to introduce a freeze on disposal of records in order to minimise the risk of losing crucial evidence when an issue has been identified. The freeze on the destruction of selected personnel and other records that may be needed in processing claims concerning eligibility to join a Commonwealth superannuation scheme is a current example.

The Director has done this by issuing a records advice suspending the operation of the relevant records disposal schedule(s). A records advice is not a notifiable instrument in the same way that a records disposal schedule is. To ensure that the Act is consistent in this regard Section 19 should be amended to ensure that the director may amend schedules as well as approve them and that such suspensions are also notifiable instruments.

> ***Recommendation 8.***
> *that the Act be amended to ensure that the Director of Territory Records may amend records disposal schedules as well as approve them and that such suspensions are notifiable instruments.*

The section above dealing with Section 6 (Application of Act) includes discussion of, and a recommendation relating to, a requirement for health records, the legal practice records of the Legal Aid Commission and records of complaints to the Human Rights Commission to have disposal coverage authorized by the approval of records disposal schedules.

Section 21 Inspection of records management programs

Section 21 of the Act requires that the Principal Officer of an agency must make the agency's Records Management Program available for public inspection without charge during ordinary working hours at the office of the Principal Officer. Some participants at the public consultation suggested that it would be more appropriate to require Principal Officers to publish their Records Management Programs on their agency websites.

Agency Records Management Programs typically consist of both statements of policy and commitments to good recordkeeping and detailed procedures and working instructions for the implementation of the program in that agency. The latter, while they should be accessible to members of the public in the interests of accountability, are unlikely to be of concern to many people outside agencies. If this proposal was to be implemented, it would perhaps therefore be more appropriate to require that the statements of policy and compliance be published on agency websites while the detailed procedures were treated primarily as internal agency documents. There would be good reasons of accountability however still to require the procedures to be made available on request.

There was no evidence that the lack of this requirement had led to any negative consequences or inability on the part of anyone to access agency Record Management Programs. It may not be necessary therefore to add another compliance requirement on

Principal Officers to the Act. Rather the issue could be addressed in guidelines, with best practice advice from the Director of Territory Records supporting the publication of programs, or at least the policy and compliance parts of them, on agency websites.

> ***Recommendation 9.***
> *that Guideline no 1 issued under the Act be amended to include best practice advice relating to the publication of Records Management Programs on agency websites.*

Section 23 Protection measures

An issue of some urgency is a requirement for an amendment of the Act to allow the transfer of Territory records to other jurisdictions. The Commonwealth can, and does, transfer records to States and Territories. The ACT, however, like most States and Territories is unable to reciprocate. This causes significant difficulties in relation to personal security files, for example, which should be transferred to other jurisdictions when people move, but more importantly it impedes Territory participation in quite a number of new National approaches, particularly in relation to inter-governmental authorities formed under the aegis of COAG.

The issue has been considered by the Council of Australasian Archives and Records Authorities, the representative body of government records authorities, which supports National consistency in this matter and which is pushing for a speedy resolution to the issue.

Section 23 of the *Archives Act 1983* (Cwth) provides specifically for records of inter-governmental authorities:

> The regulations may provide for restricting or excluding the operation of all or any of the provisions of this Act in relation to all or any records of or relating to an authority or body established:
> (a) for the performance of functions under the law of the Commonwealth and the law of any State or States, the Australian Capital Territory, the Northern Territory, Norfolk Island or another country; or
> (b) for the purpose of an agreement between the Commonwealth and any State or States, the Australian Capital Territory, the Northern Territory, Norfolk Island or another country;
> or to the operations of an authority or body so established.

> ***Recommendation 10.***
> *that the Act be amended to allow the transfer of Territory records to other jurisdictions, but that this be done as part of a unified approach with all State and Territory record authorities.*

Section 25 Records of agency that no longer exists etc

Section 25 currently provides that, in general, if an agency is abolished or otherwise ceases to exist or if a function of an agency is discontinued, the records of the agency become the records of the agency that exercises the functions of the original agency to which the record most closely relates.

This can result in agencies being responsible for records for which they have no current functional responsibility and no business interest. While presumably Principal Officers will attend to their statutory responsibilities it is not an arrangement that is likely to result in the best outcomes in relation to protecting and providing access to these records.

During consultations members of both the public and of professional associations saw this situation as a potential problem. The solution suggested by both was that the Territory Records Office, the agency responsible for the regime to enable the protection of and access to records, should become the agency entitled to control "orphan" records – those that lack an obvious parent agency or current function – that are or will become Territory archives.

This could be accomplished under Section 25 as it stands, by the Chief Executive of the administrative unit responsible for administering the *Public Sector Management Act 1994* directing that such records become records of the Territory Records Office. This would depend though on the records being identified, and the Chief Executive making the relevant direction, in every individual case. Passing control of unwanted Territory archives to the Territory Records Office in a routine way would solve this.

There is however a significant practical problem. The Territory Records Office as currently established lacks the resources for a custodial role. This is discussed below in the Section relating to custody of records.

Section 26 Access to records

Section 26 specifies that

> A record of an agency is open to public access under this Act if 20 years has elapsed since the record, or the original of which it is a copy, came into existence

Nearly all records currently available are paper records in files. These are typically compiled over a period of time. There are many files which include some records that are open and later records which are closed. Users are entitled under the Act only to consult that part of the file from the open period. This means that each folio on a file which had papers added it to it on consecutive days over a period of weeks would come into the open period on consecutive days 20 years later. This is both inconvenient to researchers and a potential burden on agencies and Archives ACT.

Some jurisdictions, the Commonwealth and Queensland for example, release records in annual tranches. In the Commonwealth the timing of the open access period is "from the

end of the year ending on 31 December in which the record came into existence"[4]. This is not only administratively more convenient but it allows the National Archives of Australia the advantage of a public annual records release with significant attendant free publicity as the media report on major events from the newly released records.

The *Executive Documents Release Act 2002* follows this pattern by nominating "the next 1 July after the end of 10 years after the document's submission day" as an annual release date for executive documents. This could be followed for records released under the Territory Records Act as well, although, several people suggested that Canberra Day would be a more obvious date for an annual records release.

> ***Recommendation 11.***
> *that the Act be amended to provide that records come into the open access period from the end of the year (ending on a specified date) 20 years after the year in which the record came into existence.*

Section 28 Declaration applying provisions of FOI Act

Effect of changes to FOI Act on Territory Records act

Section 28 allows for a declaration by the Director of Territory Records that records that would otherwise be open to public access are, in fact, exempt from public access. It is a way of applying some, but not all, of the exemption categories of the Freedom of Information Act to the Territory Records Act in order to close public access to records that are at least 20 years old. This is a particularly neat and effective way of ensuring that records that affect relations with Commonwealth and States, the enforcement of the law and the protection of public safety or personal privacy or records that are subject to legal professional privilege or the disclosure of which would be contempt of the Legislative Assembly or a court are kept exempt from public access.

As a result of this mechanism, however, any change to the FOI Act will have potential repercussion on the Territory Records Act. Sensitivity of information usually diminishes with time, and as a result any change to the exemption categories in the FOI Act will need to be examined from the perspective of access to archival records to ensure that this section remains appropriate.

> ***Recommendation 12.***
> *that the appropriateness of the application of the exemption categories of the Freedom of Information Act to the Territory Records Act be kept in mind if the FOI Act is amended.*

[4] *Archives Act 1983* (Cwth) S.3(7)

Effect of provisions in other acts restricting access to records

Section 55 of the *Heritage Act 2004* prohibits the publication of information declared under Section 54 of that Act to be "restricted". Chapter 25 of the *Children and Young People Act 2008* (CYP Act) provides that information declared to be "protected information" or "sensitive information" under that Act is not to be disclosed except in accordance with the arrangements in Chapter 25. Some officials working with both these acts have asserted that these provisions mean that the access provisions of the Territory Records Act do not apply to records that are identified as "restricted" in the one case or as "sensitive" or "protected" in the other.

Section 55 of the Heritage Act makes clear that the prohibition of publication does not apply if the publication is made for the exercise of a function under another Territory law. Providing access to heritage records is a function under the Territory Records Act and is therefore authorized. The only way for the Heritage Council to protect "restricted" information that is 20 years old from public access is through the Section 28 mechanism of the Territory Records Act.

The situation with the CYP Act is more complicated. Legal advice obtained by DHCS is clear that the Section 28 mechanism is the only appropriate means of preventing a general public right of access to sensitive care and protection records, it also points out that this must be done on an individual basis for each record and must refer to the exact item(s) within the record that give rise to the need to apply one of the exemption categories. This is administratively unwieldy at best and is possibly practically unworkable.

Two solutions are apparent. The first is to amend the Act to exempt "sensitive information" care and protection records from the access provisions of the Act in the same way that health records are exempted. The second is to allow the making of Section 28 declarations to cover classes of records rather than just individual records. This would not be a unique approach in Australia. Sections 51 and 52 of the *State Records Act 1998* (NSW) allow for access decisions to be made closing classes of records to public access.

> ***Recommendation 13.***
> *that consideration be given as to how best to protect "sensitive information" in care and protection records from inappropriate public access under the Act and if considered appropriate to amend the Territory Records Act to allow for the closure of classes of records.*

Section 29 Giving access to records under this Act

Section 29 gives, subject to some exemptions, a user of records in the open access period access in a form of their choosing. Some records, land records in particular, are highly used by researchers but also in continuous business use by agencies. Relevant Records Managers felt strongly that the Act should be amended to ensure that such records could be provided

to researchers for use for a limited time only. Section 29 however already has sufficient provision to deal with this. Sub-section 29(2)(c) allows an agency to provide access in a way other than by providing the researcher an opportunity to inspect the record if that would "interfere unreasonably with the agency's operations".

The alternative method of access most feasible would be by providing a copy of the record. If the cost of providing copies was high enough to be a burden on agencies then it might be appropriate to determine a fee for this.

It would be sensible in providing copies to researchers in cases like these to do so by scanning and digitizing rather than by photocopying so that any single file will only have to be copied once, rather than having to be copied anew each time it is requested. The National Archives of Austraila digitization on demand service is a model for this approach[5].

Section 33 Functions (of the Director)

Sub-section 33 (e) lists as one of the functions of the Director of Territory Records the giving of advice to agencies about the preparation of, and the approval of, schedules for the disposal of records under Records Management Programs. The meetings of both agency Records Managers and members of professional associations requested that consideration be given to formally adding to this the function of oversight of the disposal of records. Disposal in recordkeeping terms does not just mean destruction but includes transfer of records and the retention of records as archives. It is one of the most important of recordkeeping functions and the strong feeling of those most involved was that this should be recognized more powerfully in the legislation.

This is also a reflection of the Auditor-General's view that the Territory Records Office should increase its compliance activities[6].

It is arguable that the Director already has sufficient powers to carry out this role in his function of examining and reporting on the operation of the Records Management Program of an agency and the agency's compliance with the Act. However, to remove any doubt and to equip the Director with clear authority it is sensible to add the function of monitoring all aspects of the disposal of records by agencies.

> ***Recommendation 14.***
> *that the Act be amended to include as a specific function of the Director of Territory Records the function of monitoring the disposal of records by agencies.*

Although the section gives the Director the function of approving records disposal schedules it does not specifically give the power of suspending schedules. As discussed above under

[5] http://www.naa.gov.au/services/digitisation-copying/digitisation.aspx
[6] Recommendation 1, ACT Auditor-General's Office, 3/2008, p.19

the section dealing with Section 19 (Approval of schedules for the disposal of records) it would be sensible to remove any doubt about the power of the Director to suspend records disposal schedules.

> ***Recommendation 15.***
> *that the Act be amended to include a specific function for the Director of Territory Records of suspending records disposal schedules.*

Section 42 Functions of council

The issue of the appropriateness of reporting lines of the Territory Records Advisory Council was raised, specifically if it was better that Council also report to Minister. The consultant raised this issue at his meeting with the Council. No members thought that such a change was needed and all were of the opinion that the current reporting arrangements reflected what they considered should be the role of Council. The Chair expressed his view that should the Council feel that any issue was important enough to be brought directly to the attention of the Minister that there was nothing in the Act to prevent them from doing this. All Council members present at the meeting supported this view and noted that they would, should extraordinary circumstances warrant it, expect the Chair to approach the Minister directly under existing arrangements.

Members of professional associations felt that the Council should have the additional function of advising the Director about access to those Territory records which are, under Section 26, open to public access. It seems strange that a Council, which includes at least one representative selected to represent heritage and historical interests does not have this function. The interests of those from the heritage and historical fields are primarily interests of access. Indeed one of the primary reasons for having an advisory council made up of community members is to ensure that the community's interests in being able to access records appropriately are considered. Access is also one of the critical areas of professional interest to the recordkeeping professions who are also represented on Council. Advice, particularly from these groups, to the Director on issues of access could be an invaluable role for Council. It is impossible to think of any negative outcome from giving Council this additional role.

> ***Recommendation 16.***
> *that the Act be amended to include an additional function for the Territory Records Advisory Council of advising the Director about access to records which are open to public access.*

Section 43 Membership of council

Council members thought that the representative nature of Council membership worked well. There was however a view that the role of the Territory Records Office as an agent of accountability would be enhanced if an extra representational capacity was added to Section

44 by including a requirement for the Minister to appoint at least 1 person to represent organisations interested in public administration, governance or public accountability.

Accountability is listed in Section 3 as one of the main purposes of the Act. It was the point made most strongly by the Chief Minister in his media release about this review. Organisations from which people could be drawn to fill this proposed category include the Institute of Public Administration Australia, Civil Liberties Australia, public interest advocacy centres or similar.

If this was implemented it would bring the number of categories of required representation to 5, one more than the minimum number of appointed members. It may be sensible therefore also to increase the minimum number of appointed members to 5.

> ***Recommendation 17.***
> *that the Act be amended to provide that the minimum number of appointed members of the Territory Records Advisory Council be 5 and that a fifth representational category be added so that the Minister must appoint at least 1 person to represent organisations interested in public administration, governance or public accountability.*

Section 58 Review of Act

Several people consulted by the Review suggested that the Act should include a requirement for regular reviews of the Act. A review every five years was the most common suggestion.

The main reason in support of mandatory regular reviews was a view that recordkeeping is changing so quickly as a result of the continuing information revolution that it is necessary to ensure that the Territory's recordkeeping legislation keeps pace with that change. The question should be whether mandatory reviews are the best way to ensure this.

If regular reviews are mandated in the Act then such reviews must be undertaken even if the Director, the Chief Executive of the parent department, the Council and the Minister are all happy that there is no need for such a review. Such a requirement therefore may result in significant unnecessary costs in time, focus and resources.

The Director is charged with keeping a watch on changes in recordkeeping and advising on what is needed to deal with them. As things stand there is nothing to prevent the Territory Records Advisory Council advocating a review. There is nothing to prevent the Minister initiating a review. A statutory requirement for regular reviews seems a heavy-handed approach to a need to ensure that the recordkeeping regime in the Territory is kept up-to-date.

ISSUES NOT NECESSARILY RELATED TO SPECIFIC SECTIONS OF THE ACT

Dealing with electronic records

Dealing with electronic records was raised by many of the people, from all of the groups consulted, as an issue that must be addressed. It weighed particularly heavily with agency Records Managers and senior managers. It is an issue that has exercised the minds of the Director and Council for some considerable time. It was addressed by the Auditor-General in audit recommendations 6 and 11.

There are several related issues:

- Lack of electronic document and records management systems
- Use of business systems without recordkeeping functionality
- Use of shared drives as proxy recordkeeping systems
- Destruction of source records after copying
- General requirement to retain paper as the "official record".

Lack of electronic document and records management systems

There is a number of widely used electronic document and records management systems (EDRMS) available in Australia and used for government recordkeeping in many jurisdictions. These include HP TRIM, Objective, RecFind and others.

In the ACT, ACTPLA and some other agencies use Objective as an Integrated Document Management System. In general however there is a lack of electronic recordkeeping systems in ACT agencies. Many agencies make use of TRIM as a system to manage paper records but none use it as an EDRMS.

The Auditor-General considered that the Territory Records Office has an important role in ensuring that electronic recordkeeping systems used in the Territory meet recordkeeping requirements and recommended that the Territory Records Office should:

- assist agencies in assessing the suitability of electronic recordkeeping systems or tools (including those currently in use such as *Objective* or *TRIM*); and
- assess the suitability of electronic recordkeeping systems or tools for wider application across government[7].

This Review endorses that recommendation.

Use of business systems without recordkeeping functionality

Electronic business systems offer tailored solutions to document management and workflow for particular technical processes. Many of these lack adequate functionality to be able to comply with relevant recordkeeping standards. In many cases an electronic document and records management system could provide all, or most, of the functionality provided by

[7] Recommendation 6, ACT Auditor-General's Office, 3/2008, p.34

task-specific business systems while at the same time addressing all recordkeeping needs. Often the lack of an adequate EDRMS is the fillip for the acquisition of the business system. Many current business systems should be assessed against the *Territory Records Office Standard for Records Management No.6 – Digital Records*, to assess their suitability and compliance to manage digital records. If they do not meet the requirements of the standard the Director of Territory Records should advise on what is required to gain compliance.

Use of shared drives as proxy recordkeeping systems

There is almost universal use across the ACT government of shared computer drives as an electronic document management system. Shared computer drives are not recordkeeping systems. While they can store electronic documents and while they can, if structured appropriately, facilitate the retrieval of documents they are unable to guarantee the security and authenticity of records.

In the absence of suitable electronic recordkeeping, this widespread use of shared drives as de facto document management systems has been recognized as a fait accompli by the Territory Records Office which provides best practice advice in relation to naming conventions for folder and file titling and which for record security and authenticity requires records to be printed and maintained on paper files as well as being stored electronically. The paper copy is seen as the "record" and the electronic version, although the version consulted and used by most staff, is regarded as merely a convenience copy.

There is insufficient evidence to know the extent to which staff actually print all (or even the most important) records for addition to paper files or how many use only the shared drives as their document stores.

Destruction of source records after copying

The ACT appears to be the only jurisdiction where the routine scanning of paper documents is not also followed by the routine destruction of the source documents. It is therefore the only jurisdiction which is denied the business advantages of significant scanning programs and is encumbered with the resource cost of retaining original records when scanning does take place.

In the ACT paper records cannot be destroyed after they have been copied to digital media because of the following three interlinked reasons:

- there is no disposal schedule to allow for the legal destruction of source records once they have been copied
- there is uncertainty about whether the *Territory Records Office Standard for Records Management No.6 – Digital Records* is sufficient to ensure that scanned records are seen as sufficiently reliable and authentic to be accepted by ACT courts
- there are few electronic recordkeeping systems or compliant business systems into which scanned records can be maintained as authentic electronic records.

There is no records disposal schedule because there is doubt in agencies about whether digital copies are admissible in ACT courts. This reflects concern about the standard and also the lack of document systems that comply with recordkeeping requirements.

The Commonwealth and NSW Evidence Acts abolish the common law 'original document rule', which requires the production of the original document in writing, and permit evidence of the contents of a document to be given in one of a number of alternate ways including by the production of copies produced by machines. Despite this, as the National Archives' *Records in Evidence* points out,

> Nothing can guarantee the acceptance of records in evidence before relevant courts. The admissibility of evidence in any court case is subject to compliance with the rules of admissibility and the interpretation placed upon them by the presiding judge.[8]

Nevertheless both the National Archives of Australia and State Records NSW, as well as other jurisdictions, have approved disposal authorities permitting the destruction of source records after they have been copied. Both have standards for digital records which include standards for copying (or digitising) records and both support EDRMS with business rules that allow for the routine digitising of paper records with the subsequent destruction of the original.

General requirement to retain paper as the "official" record

Because of the issues outlined above, there is a general requirement throughout the ACT government for documents to be captured in paper as the "official" record. There is a double standard at work here.

The original of an email, for example, is an electronic document. The email's metadata are an important part of its context. Yet it is printed, probably without all contextual metadata, and the printed copy is placed on a file. It becomes for practical purposes the record. The original email is then expendable. It may remain only in the in-box of the recipient. It may be deleted by its recipient either accidently or deliberately and although in most cases it may be retrieved from backup systems this is often a difficult and time expensive task.

On the other hand, if, for example, an inwards letter is scanned and the scanned copy sent to an action officer via a business system or as an email attachment the "original-ness" of the letter is considered vital. It is kept on a file and destroyed only when a records disposal schedule authorises that destruction. The copy in this case is the expendable version.

This causes significant duplication throughout the government. Many, possibly most, records exist in both digital and paper copies. The digital copies are retained because they are the way most people work and for convenience of access and sharing. The paper copies are retained because they are considered the official record that can only be legally destroyed in accordance with approved records disposal schedules.

[8] National Archives of Australia, *Records in Evidence*, Canberra, revised 2005, p.6

As noted above however, general acceptance of electronic documents as authentic records requires the implementation of an adequate compliant digital recordkeeping infrastructure in which the original electronic document or the scanned copy can be maintained as authentic and reliable evidence of transactions.

What must be done

The solutions to these issues are long term ones and they are related. They were identified by the Auditor–General.

Electronic document and records management systems and/or business systems with compliant recordkeeping functionality need to be identified and as resources allow introduced. As they are introduced, training and support is required to ensure the cessation of the use of shared drives as document stores. Hand in hand with this the Territory Records Office should ensure that its standards and guidelines reflect all legal requirements for the evidential validity of electronic records. When this is done, a records disposal schedule for the destruction of source records after copying should be approved and any general requirement for the maintenance of an "official" paper record dispensed with

> ***Recommendation 18.***
> *that the Territory Records Office ensure that its standards and guidelines reflect all legal requirements for the evidential validity of electronic records.*

> ***Recommendation 19.***
> *that the Territory Records Office assist agencies by assessing electronic document and records management systems and/or business systems against the Territory Records Office Standard for Records Management No.6 – Digital Records or any replacement standard(s).*

Custody of records in the open access period

The ACT, unlike other Australian jurisdictions, leaves custody of records as forever the responsibility of the controlling agency. As discussed above under Section 25, this can result in agencies being responsible for records for which they have no current functional responsibility and no business interest. Archival management and access becomes, perforce, a function of every agency and perforce a distraction from what the agency would see as its primary tasks as well as an internal competitor in budget allocations.

The alternative, applied in other jurisdictions, is to transfer custody to the State archives, in this case the Territory Records Office, so that management of and access to the Territory's archival records is the responsibility of the agency with the business interest and the specialist skills to undertake that task.

While the current arrangement for devolved custody does not appear to have caused any problems in the Territory to date, over the coming decades it will almost certainly become a

source of growing irritation to both chief executives and to other managers charged with the day to day responsibility of caring for a growing body of legacy records. It will have to be addressed at some stage.

There is another reason to consider the issue of custody of archival records. The current access regime was developed when Part 3 of the Act commenced in July 2008. It provides a central location and access facility managed by the Territory Records Office through ArchivesACT and in concert with the ACT Heritage Library which addresses researchers' access needs in the absence of a single archival custodian. All those present at the public consultation session, and particularly the representatives of historical and genealogical organisations, argued that this may not be the best solution in years to come as more and more records come into the open access period. They argued that a single custodian would not only be administratively more efficient and would optimize the protection of records but also would maximize the benefit to them in locating and accessing relevant documents of interest for their research and for other heritage purposes.

The related issue of the custody and control of "orphan" records was discussed above.

While seemingly a straightforward answer to the issues, transfer of custody from controlling agencies to the Territory Records Office is not a simple matter. The Office is not equipped to handle this role which would require both the acquisition, or construction, of an archival repository and annual funding to run it and pay for archival staff. In the long run this would be cheaper for the Territory[9] as well as providing a better service to users of Territory archives but it is not something to be introduced without examination, thought and planning.

> ***Recommendation 20.***
> *that the benefits and costs of eventually transferring custody of Territory archives to the Territory Records Office and an associated archival repository be examined.*

OTHER ISSUES

Implementation of Act in agencies

Perhaps the most important issue identified by the Auditor-General in the audit of records management was poor implementation of record management programs in agencies. This is reflected in audit recommendations 1, 2, 8, 9, 10 and 11. The report identified the lack of adequate training and communication in agencies as the greatest barriers to good recordkeeping.

[9] See e.g. E K Brumm 'Records management program in the State of Texas: Cost/benefit analysis, 1993', *Records Management Quarterly*,27(2) 1997 at http://www.tsl.state.tx.us/slrm/recordspubs/costbenefitanalysis.pdf

This assessment was also apparent in this Review and was raised by many agency participants and professional recordkeepers.

In the absence of well-trained staff imbued with a recordkeeping culture, recordkeeping at the workface can seem unimportant make-work that militates against a can-do approach to getting the job done. Typically it is only after poor recordkeeping leads to problems that the benefits of doing it correctly from the start are recognized[10].

There is no legislative solution to this problem. It is an issue for Principal Officers and senior managers and for the oversight, advice and compliance role of the Director. Clearly it is not enough to have adequate records management programs, they must be fully implemented.

CONCLUSIONS

The Territory Records Act is operating well. It is supported by the community of the Territory and by those with more detailed knowledge of its operations. It is in general fulfilling the aims set out for it in the explanatory memorandum presented with the Bill in 2002.

The main area of concern with the ACT Government's recordkeeping regime is in relation to the management of electronic records. This area of concern is not the result of any major shortcoming in the legislation, but rather of a failure of agency recordkeeping infrastructure to keep pace with the technological changes in information creation and use. The Territory Records Office has standards and guidelines in place to support the optimal introduction of compliant electronic recordkeeping as and when infrastructure can be upgraded.

Because agencies are responsible under the Act for the maintenance of and access to all records relating to the functions that they are responsible for, eventually most agencies will have control of a substantial stock of archival records in which they have no continuing business interest, probably no desire to keep but which they are obliged to manage and pay for. This is not a scenario for the best protection and care of the Territory's archival record. At some stage it will seem sensible to all involved to transfer custody and responsibility, if not necessarily ownership, of these records to the Territory Records Office as the ACT's archival authority. This will at that stage require some adjustment of resourcing.

The Act exempts some classes of records created and managed by Territory agencies from the operations of the Act. These are:

- health records
- records of the Human Rights Commission in relation to a complaint or the exercise of a function in relation to a complaint
- records of the Legal Aid Commission that relate to the exercise of a function of a solicitor.

[10] See e.g. the list of recordkeeping disasters at http://www.synercon.com.au/resources/Lest_We_Forget/lestweforget.htm

These are exempt because they have significant privacy and security requirements and different access regimes from most Territory records. As a result of being exempt from the Act however they are not subject to an appropriate recordkeeping regime and they do not have adequate coverage of records disposal. This can be corrected by bringing them under the Territory Records Act for records management purposes while keeping their special status in regards to access. Certain records created and managed by DCHS may also require exemption from the access provisions of the Act.

An issue requiring sooner rather than later action is the need for an amendment to the Act to allow the inter-jurisdictional transfer of Territory records to allow proper recordkeeping for agencies established as a result of COAG agreements.

A number of minor issues were identified during the Review. These are discussed in the main body of the report and recommendations are made for small amendments to the Act to assist in addressing these.

SUMMARY OF RECOMMENDATIONS

Recommendation 1.
that consideration be given to renaming the Act the Territory Records and Archives Act.

Recommendation 2.
that a fourth purpose, that of supporting the management and operation of Territory agencies, be added to the Act.

Recommendation 3.
that the Act be amended so that Part 2 applies to the health records, the legal practice records of the Legal Aid Commission and , records of complaints to the Human Rights Commission currently totally exempted from the Act under Section 6.

Recommendation 4.
that the exemption of Legal Aid records in Section 6(3) be amended to include records that relate to the affairs of any person who has sought legal services under parts 5 or 5A of the *Legal Aid Act.*

Recommendation 5.
that consideration should be given to bringing Executive Documents under the Territory Records Act.

Recommendation 6.
that new definitions be provided in the Act, or in another act if more appropriate, of:

- Record
- Territory record
- record of an agency
- Territory archive.

Recommendation 7.
that the definition of health record in the Health Records (Privacy and Access) Act be examined and, as appropriate, amended to ensure that it does not inadvertently remove significant quantities of records from the coverage of the Territory Records Act.

Recommendation 8.
that the Act be amended to ensure that the Director of Territory Records may amend records disposal schedules as well as approve them and that such suspensions are notifiable instruments.

Recommendation 9.
that Guideline no 1 issued under the Act be amended to include best practice advice relating to the publication of Records Management Programs on agency websites.

Recommendation 10.
that the Act be amended to allow the transfer of Territory records to other jurisdictions, but that this be done as part of a unified approach with all State and Territory record authorities.

Recommendation 11.
that the Act be amended to provide that records come into the open access period from the end of the year (ending on a specified date) 20 years after the year in which the record came into existence.

Recommendation 12.
that the appropriateness of the application of the exemption categories of the Freedom of Information Act to the Territory Records Act be kept in mind if the FOI Act is amended.

Recommendation 13.
that consideration be given as to how best to protect “sensitive information” in care and protection records from inappropriate public access under the Act and if considered appropriate to amend the Territory Records Act to allow for the closure of classes of records.

Recommendation 14.
that the Act be amended to include as a specific function of the Director of Territory Records the function of monitoring the disposal of records by agencies.

Recommendation 15.
that the Act be amended to include a specific function for the Director of Territory Records of suspending records disposal schedules.

Recommendation 16.
that the Act be amended to include an additional function for Council of advising the Director about access to records which are open to public access.

Recommendation 17.
that the Act be amended to provide that the minimum number of appointed members of the Territory Records Advisory Council be 5 and that a fifth representational category be

added so that the Minister must appoint at least 1 person to represent organisations interested in public administration, governance or public accountability.

Recommendation 18.
that the Territory Records Office ensure that its standards and guidelines reflect all legal requirements for the evidential validity of electronic records.

Recommendation 19.
that the Territory Records Office assist agencies by assessing electronic document and records management systems and/or business systems against the Territory Records Office *Standard for Records Management No.6 – Digital Records or any replacement standard(s)*.

Recommendation 20.
that the benefits and costs of eventually transferring custody of Territory archives to the Territory Records Office be examined.