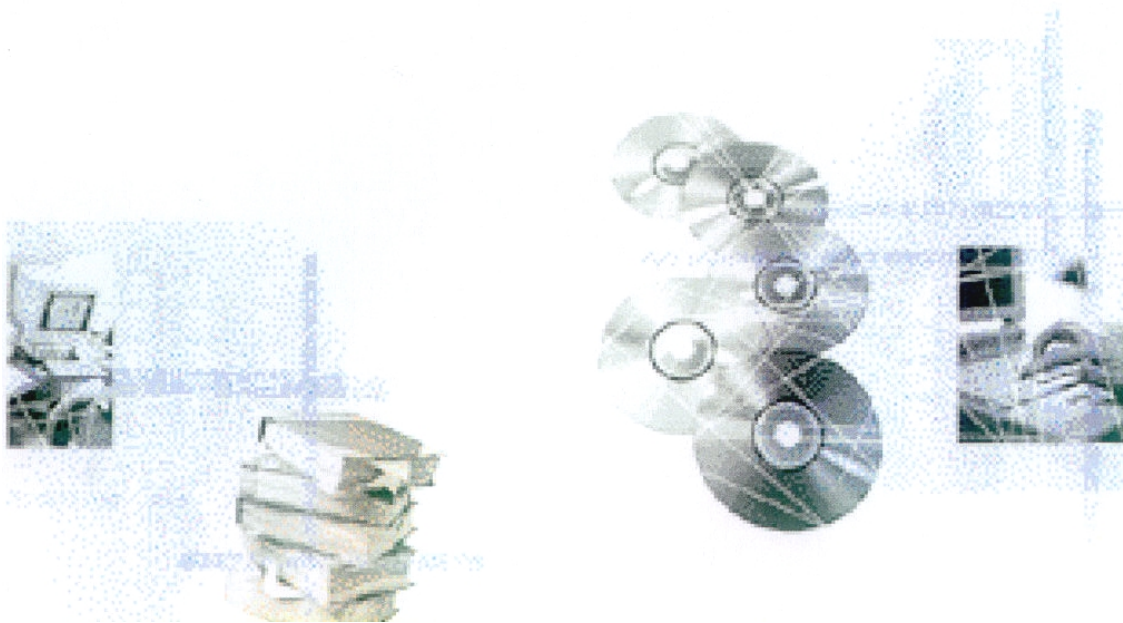


Archival Legislation

for Commonwealth Countries

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Project Background

The objective of the project was to provide Commonwealth countries with a report outlining modern best practice archival legislation principles which archivists could draw upon when modernizing records and archives legislation or introducing freedom of information and privacy legislation.

The project methodology involved the rapporteurs identifying present archival and information legislation for their areas of responsibility, forwarding electronic or paper copies of such legislation to the project co-ordinator for analysis and assessment. This report is based on the findings of that analysis.

A workshop on the findings of the project was run at the ICA Congress, Seville, September 2000.

1

Archival Legislation

1.1 Why have legislation?

No government can operate without records, because they document its actions. Additionally, government and civil servants must account for their actions to the citizens. It would be impossible to be accountable without records, if government records were non-existent or poorly managed. Government must also protect the rights of its citizens, the environment, land rights and territorial integrity. Past records must be used to plan for the future of the nation and serve as part of its heritage. Governments therefore, often protect their records more rigorously than private organizations or business entities do. Governments use legislation to ensure that its records and archives are appropriately managed and preserved over time for accountability and historical reasons.

1.2 What is the objective of legislation?

Records and archives legislation is an essential component of the wider legislative base of accountable and effective government. It provides the essential framework that enables a national records and archives service to operate with authority in its dealings with other agencies of the state.

The precise format and language of legislation is determined by legal draftsmen (such as the Parliamentary Counsel), but it is essential that senior managers in records and archives institutions be able to present a sound and professional case for what the legislation should cover.

1.3 Legislation and regulation

Records and archives legislation may be composed of both primary and secondary legislation. Primary legislation (such as acts, decrees, and ordinances) is enacted by parliament or some other supreme legislative authority. Secondary legislation (such as statutory instruments, rules, regulations) is promulgated, usually by a minister, under powers conferred by the primary legislation. Supporting the legislation will be other normative and international standards and procedural guidelines and instructions.

1.4 Approaches to legislation

Two approaches can be taken when framing national records and archives legislation:

- * detailed prescriptive primary legislation
- * a general framework established by primary legislation to which detail is added by secondary legislation and other normative documents.

In practice all archives legislation will be a combination of the two, however it is important to strike the right balance between the options. The procedures for issuing regulations and other forms of secondary legislation under the primary legislation are normally prescribed in secondary texts. When new primary legislation is being drafted, secondary legislation and normative documents essential for its implementation must be drafted concurrently so that they can be put in place as soon as the primary legislation has been enacted.

Present Archival Legislation

Archival legislation should reflect archival principles in establishing the purpose and objectives of the archives. 1 Often in the past the assumption has been that the primary responsibility of an archives was to ensure that historical records survived for research purposes and the regulatory powers conferred by legislation in most Commonwealth countries, often strongly influenced by the Public Records Act 1958 of the United Kingdom, should enable the archives to achieve that purpose. Archival legislation has generally aimed to:

- * prohibit destruction of records without prior approval
- * establish an archival authority to give or deny such approval
- * empower the authority to receive records not authorized for destruction
- * mandate transfer of records, generally after 25 to 30 years
- * confer right of public access.

Archival legislation however, did not always empower the archives to regulate records management, implying a wider responsibility or a concern for other purposes.

Archives legislation generally had a background of strong administrative law, and focused on issues involving the preservation of government records, public access and rights of appeal. How records were first created and managed was given scant regard. Legislation generally reflected the very passive role that record managers and archivists played.

Paper was the main medium for government records. Such records would pass from the care of record managers in agencies to storage at the archives - to be held for a certain period and then destroyed, or retained as archives. The archives often being merely the end player in a process over which it exercised little control.

In recent years however there has been a revolution in record-keeping and communications. The management of electronic records has emerged as a major issue for governments and record managers. Archive legislation needs to provide adequately for such records and outline how to deal with electronic records creation, accessibility and disposal.

Most modern agencies now deal with a mixture of paper and electronic formats and this will undoubtedly continue. Indeed in a number of countries, government is strongly pushing for agencies to transact business online. This will result in a proliferation of records in electronic format.

Government agencies need comprehensive assistance, in the form of standards and guidelines, if their records are to be used fully as a business information resource for government and to survive as future archives. A number of archives have such guidelines in place but do not have the legislative support and authority to ensure uptake and implementation of such standards. Such legislative support is needed.

Whilst an archives can implement best practice guidelines and non-mandatory requirements, they have their limitations. Just as there are legislative provisions supporting financial and personnel practices, an archives needs legislation that authorizes the role it has assumed in the broad spectrum of record-keeping.

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It is important that an archives, from both the short and long term perspective, has a clear legislative mandate to be involved with agencies at an early stage in establishing and prescribing record-keeping requirements. The efficient creation and management of an agency's records rests on the authoritative role an archives has in setting mandatory standards that ensure the necessary business records of all agencies are maintained and made accessible.

Previous studies

In 1985, UNESCO published a RAMP study on archival and records management legislation. 2 Prepared by Eric Ketellar, this study was intended to assist information policy and planning specialists and those involved in proposing, drafting and reviewing archives legislation and regulations. It was based upon an analysis of legislation and regulations current at that time in nearly 120 countries.

It listed 20 important guidelines for legislation and regulations. As Ketellar stated: "Comprehensive [archives] legislation...recognizes the fundamental nature of the relationship of government records as instruments of accountability by the government to the people, evidence of public and private rights and obligations, and information source on matters involving the continuous administration and management of government; preserves the patrimony of the state as evidenced in its records; and provides exclusive authority to carry out archives and records management functions on a government-wide basis."

The report indicated that legislation should:

1. Establish the archives institution
2. Set out its functions and powers, for example, it should provide for
 - * safe custody
 - * preservation
 - * arrangement and description of archives
 - * publication and copying
 - * buildings for storage
 - * the operation of record centres, search rooms, etc.
3. It should also define records in a comprehensive way, which does not merely consist of enumeration of record types current at the time the legislation is passed, which is bound to become out of date. The definition should also define what are public records and public archives, so as to determine the ambit of the legislation.
4. The legislation should also provide for an advisory or governing body. (In many cases an Advisory Council is preferred)
5. There should also be records management provisions, which include a right of entry and inspection of records, plus provisions to make standards, to establish procedures, guidelines and to provide training.
6. The legislation should also regulate disposal of records, including all aspects of appraisal, mandatory transfer, and destruction.
7. There should also be provision for the recovery of estray as public records should be both inalienable (that is, they cannot be given away) and imprescriptibility (that is, they cannot be taken away).
8. The legislation also needs to regulate access. This included providing a public right of access, setting an access period, providing for accelerated access, providing for exemptions in the case of sensitive records which must be restricted for longer than usual, and providing a mechanism to review the exemptions.
9. The legislation should also provide for regulations:
 - * for the production of certified copies for use in court
 - * for the return of records to agencies when required.

The guidance outlined within the RAMP report has assisted archivists in the development of archival legislation over the last fifteen years.

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Review of archives legislation

A number of archival issues have gained prominence since the 1985 RAMP report calling for review of legislation as it was drafted in the past. The primary reasons for reviewing and updating archival legislation has been to accommodate the changes brought about by:

- * electronic records management, which has emerged as a major issue and one that is usually not addressed in present acts
- * record-keeping principles and the record continuum model as articulated in Australia and the need for archivists to address record-keeping across the whole of that continuum
- * integration of FOI, privacy and archives legislation to accommodate the 'sharing' of information across organizations, people and countries that modern technology has allowed for
- * rapid administrative change resulting from modern management practice and the need for stricter accountability.

Present acts focus on preservation of archives, not the broader issues involving record-keeping. Present acts may delineate between the role of record-keeping and archives in a way which is inappropriate if no other act for record-keeping or body empowered to enact such legislation exists. Legislative change is required to give greater emphasis to record-keeping standards and the need for agency CEOs to assume responsibility for this. Legislative standards are recognized by a number of administrations as a necessary part of good record-keeping.

Further reasons for review or update of archival legislation have been to rectify inadequate arrangements in present legislation provisions and administrative arrangements due to:

- * change in legislature to accompany physical moves such as a move to a new building
- * change in political climate of the country or state
- * change in how government operates which impacts on record-keeping, e.g. in Australia the Commonwealth 3 government over the past five years has placed emphasis on devolution of authority, outsourcing, corporatisation and privatization
- * recognition of the archives as the country's record-keeping authority but lacking the necessary legislative basis
- * expiry of a pre-set review period.

4.1 Reviews underway

4.1.1 Australia

In Australia the Attorney General's Department asked the Australian Law Reform Commission (ALRC) to undertake a review of the Archives Act 1983. The Commission presented two interim reports and then a final report in 1998. That report, Australia's Federal Record: A review of the Archives Act 1983, contained 223 recommendations, one of which advocated that a new act be drafted. This process is now underway.

In Australia at State level New South Wales, Western Australia and Queensland, have all in recent years undertaken extensive reviews of their archive legislation. In the case of New South Wales new legislation has been passed (The State Records Act 1998) and both Western Australia and Queensland have the State Records Bill 1999 (WA) and the Public Records Bill 1999 (QLD) tabled in Parliament. The Australian Capital Territory (ACT) has initiated public consultation via an Issues and Options Paper, distributed in April 1999 following the government's 1998 announcement of a feasibility study into the establishment of an ACT Archive. From comments received to the Issues and Options Paper, a policy paper was prepared for the government and from that

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came a decision to draft legislation. The ACT has had no previous archive legislation so does not have to review existing legislation prior to or as part of the drafting process

4.1.2 New Zealand

The National Archives of New Zealand is making minor changes to the Archives Act 1957 so it can become a statutory authority from October 2000.

Originally the Bill was introduced into Parliament in 1984 but was overtaken by a General Election. Various attempts to modify or replace that Bill have been made, as late as 1996. The latest version does not make reference to the Archives authority setting record-keeping standards. After achieving statutory authority status NANZ intends to revisit legislative issues that need addressing.

4.1.3 Canada

The province of Saskatchewan hopes to amend its Archives Act, which has not been completely reviewed since its initial passage in 1945. Some minor amendments have been made to the Act as a result of passage of the Freedom of Information and Protection of Privacy Act. A thorough review of the Act is being recommended to the Saskatchewan Cabinet, with plans to confirm or seek amendments to areas of the present act relating to structure, reporting relationships, mandate, definitions, and management of government information.

In May 2000, the province of Manitoba announced a review of its archival legislation for a complete re-write, something that has not been undertaken since 1967.

5

Tomorrows archival legislation

Archival legislation reflects the decisions made about how a country or jurisdiction intends to manage its records. The decision-making process, prior to and during drafting, aims to arrive at legislation that:

- * reflects the needs of the country with respect to its records
- * safeguards the interests of the public with respect to records
- * reflects best practice
- * reflects and authorizes the role and responsibilities an archives will have, and
- * the services it will provide.

Legislation for the future must also reflect the impact emergent issues have on the business of the archives. Emergent issues that need to be taken into account include:

- * the electronic environment
- * convergent technologies
- * the web environment
- * web portals and gateways
- * government online initiatives
- * e-transactions, e-business
- * knowledge management
- * information management, etc.

The above emergent issues raise the issues of:

- * what is a 'record' in the new technology environments
- * management of electronic documents and records
- * management of virtual files
- * management of multimedia and compound documents.

This highlights the need for:

- * record-keeping principles that accommodate the complexities of the emergent issues
- * management of records from a 'record continuum' perspective.

The decisions made by each country regarding the preferred management of its records and archives will differ. The precise form that legislation will take in a country will be influenced by the country's formal constitution and constitutional conventions. The legislation will also be guided by the general political, economic, social, cultural and administrative environment; by existing records and archives legislation; and by the general level of records and archival development. These conditions will influence the decisions reached regarding the content of the archival legislation being drafted.

In developing legislation a series of important decisions must be made in key areas to ensure the product meets the needs of an individual organization or nation. The impact of decision options have to be understood and assessed and taken into consideration when formulating a solution. Developing legislation is not merely a case of following a set of 'best-practice' guidelines.

Archivists can learn from scientists' 'environment impact assessment' methodologies where the significance of impacts arising out of decision options are assessed prior to formulation of a final solution. Decisions are not made arbitrarily but are considered. If archivists were to adopt a similar methodology, the impact of decision options on:

- * the archives
- * the profession
- * the client community
- * the general community

- * stakeholders
- * the political environment
- * the cultural environment

would be carefully assessed and taken into account prior to development of the final legislative framework.

Examples of high level decisions that need to be considered as part of the process of developing best-fit, best-practice archival legislation are outlined in a series of decision impact assessment tables at Annex 1.

Archival Legislation Framework (section 5.1)

Given the above, new archival legislation should ensure the management and protection of all actual and potential archives (active records). This is achieved by legislating in a number of major areas.

Archival legislation should provide for and set up a framework so that public records can be managed. Inclusive in the framework are the issues of:

- * placement of the archives
- * governance of the archives
- * establishment of the post of chief executive officer (CEO)⁴ and a definition of the responsibilities and powers of its holder
- * ministerial responsibilities
- * internal structure and administration of the archives
- * roles and responsibilities it will undertake
- * reporting responsibilities.

Additionally the legislation needs:

- * a title
- * a commencement statement
- * definition of terms used
- * miscellaneous provisions.

The legislation drafted covering the above issues should strengthen accountability for the management of public records and have provisions for accountability.

Management and Standards (section 6)

This area outlines the functions and responsibilities associated with the ongoing management and preservation of potential and actual archives. This can include both active public records as well as inactive records of archival value. It can also cover non-governmental records in addition to public records.

- * Archival legislation should set standards for the management of public records covering all phases of the record continuum.
- * Archival legislation, in doing so, should be able to respond to challenges presented by a rapidly changing technological environment.

Impact of other legislation (section 7)

This area considers how other information and records-related legislation impacts on archival legislation.

Access (section 8)

This area outlines the functions and responsibilities associated in provision of access to public records both in the custody of the archives or held in a distributed custodial manner, and outlines also appeal provisions.

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- * Archival legislation should support equitable access and be able to cater for technology challenges.
- * Archival legislation should make access consistent with the country's Freedom of Information (FOI) legislation or other pertinent legislation.

5.1 Archival framework

Archival legislation specifying the framework under which an archives will operate should address the following issues, inherent in each of which will be options that can be taken regarding that issue:

- * objects clause
- * placement of archives
- * governance bodies & their powers
- * role of archives
- * role of the Archivist
- * powers of the Archivist
- * reporting requirements
- * internal structure for archives.

5.1.1 Objects clause

Archival legislation could include an 'objects clause' setting out an act's major objectives, and emphasizing that record-keeping is the responsibility of all agencies, not just the archives. The clause would in effect be a statement of the legislation's major objectives. Object clauses should state the intent of the legislation at the very beginning. This would help to reinforce the role of archives, not only through government agencies but the country's archival community as well. The objects clause would outline the fundamental nature of the relationship of government records as instruments of accountability by the government to the people.

In the review of the Australian Commonwealth Archives Act 1983, the Australian Law Reform Commission recommended that in the new Act the intent of the objects clause should be to "ensure that the Commonwealth administration creates records sufficient to:

- * manage current Commonwealth functions efficiently and accountably record and safeguard the rights, entitlements and obligations of individual citizens
- * document the history of the Commonwealth and the nation by maintaining a record of significant events, policies, movements and people
- * establish an accountable framework for the evaluation of Commonwealth records
- * ensure that records in the open access period are made available unless there are compelling and appealable grounds for justifying their non-disclosure
- * encourage the provision of access to records beyond minimum statutory obligations
- * encourage the greatest possible public use of Commonwealth records as a vital element in the history of the nation
- * establish an authority to ensure that the objectives of the Act are achieved." (r.4.19)

Overview Clause

Some legislation (the recent Administrative Review Tribunal Bill 2000 for the Commonwealth in Australia), in addition to an objects clause, is also including an overview clause. It provides a brief description of the contents of the legislation, approximately two or three lines for each major division or part, explaining in simple terms the content and intent of that section. An overview clause is likely to be added into the new Australian Commonwealth Archives Bill when it is drafted.

No examples of either an objects clause or an overview clause were found in any present Commonwealth-based archives legislation and it is yet to be seen if the Commonwealth of Australia includes it in its proposed Archives Bill.

Full Title

In some Commonwealth countries the inclusion of a full title in their archival legislation goes some way towards fulfilling the purpose of an objects clause, though usually in more general terms.

For example, the full title of the Zimbabwe National Archives Act, 1985 is “To provide for the storage and preservation of public archives and public records; for the declaration and preservation of protected historical records; for the repeal of the National Archives Act [Chapter 309]; and for matters incidental to or connected with the foregoing.”

Conclusions

Archival legislation can include an objects clause as a means of pertinently outlining the objectives of the legislation and providing a quick overview of the main divisions and parts of that legislation.

5.1.2 Placement of archives

It is critical that an archives be placed within the government hierarchy so that it can best achieve its objectives. There are two main areas within which archives are generally placed: an area with emphasis on heritage; or an area with a focus and emphasis on record-keeping or corporate management. An archives should be placed differently within government dependant on whether it wishes to have a heritage emphasis or a record-keeping one.

An archives can also be given different levels of autonomy. It can be set up as:

- * a section within a department
 - * a separate department in its own right reporting direct to a minister
 - * a statutory authority, an executive agency, or even a government corporation.
- Other variations may also be considered. There are advantages and disadvantages inherent in each choice. Decisions on placement may be guided by an archives’ need for autonomy, or need for support or protection. How an archives is established and administratively placed within government is strategically important. Each country must decide what best fits its needs.

The 1985 RAMP report gave the National Association of State Archives and Records Administrators (United States) as an example of an organizations whose guiding principle regarding the placement of an archives was “that an archives should have “Placement within the government that prevents the submission of competing interests of the agency below; eliminates blurring of functions with other professional agencies and disciplines; protects against interference with agency program responsibilities under the color of coordination authority; and eliminates hampering supervision and control by having little or no professional knowledge of its program responsibilities and operations” (r.196/III).

The 1985 RAMP report acknowledged that an archives’ placement within a bureaucracy and hence to a minister was of paramount importance. It advocated that the archives be aligned with the highest level of inter-ministerial or supra-ministerial authority. However the report also notes that such placements, even if favorable, cannot always be engineered by an archives or be guaranteed by legislation (r.198).

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Legislation does not normally nominate the placement of the archives within a bureaucracy or specify the responsible minister.

An interesting development in Australia is that the National Archives of Australia is planning to place itself, through legislation, in a position of autonomy. The report on the review of the Archives Act 1983, by the Law Reform Commission recommended that the Archives should be constituted as a statutory authority and that it should have a governing council, the latter having power to issue directions to the CEO of the Archives (r.7, r.9, r.12). It also recommended that the CEO of the Archives should be designated National Archivist and not Director-General (r.10).

However, contrary to the recommendation of the ARLC, the National Archives of Australia is keen to pursue executive agency status. It will provide it with a distinct identity within the Commonwealth and allow it to pursue its goals independently.

In Australia, executive agencies are established in accordance with Section 65 of the Public Services Act 1999. An executive agency is a non-statutory body established by the Governor-General and managed by an agency head who reports directly to the responsible minister. The minister appoints and may terminate the agency head and determines remuneration and conditions of employment, after consultation with the Remuneration Tribunal. The agency head is responsible to the government, Parliament and the public in the same way as the secretary of a department and is required to give an annual report to the minister for presentation to Parliament. Staff of the agency are public service employees.

Conclusions

Archival legislation generally says little about structure or placement of an archives within the bureaucracy but it should reflect and spell out clearly the degrees of autonomy and independence given to an archives as an entity, the CEO or any other governing entities. Independent of legislation, all should be done to place the archives strategically in an administrative structure that best serves the archives and its clients and supports the archives' achievement of its stated mission and objectives.

5.1.3 Governance

An archives can be governed by its chief executive office (CEO) or a council, or be advised by an advisory body. Decisions regarding governance need to address the advantages and disadvantages to the archives, the community and the government of such a choice. Different countries have chosen different solutions but whichever solution is chosen archival legislation should specify the relationship of a governing or advisory body to the CEO and the responsible minister, and outline the powers of such a body.

The 1985 RAMP report stated "In some countries there may be a preference to give the Archival Council, executive and/or supervisory powers, depending on the structure of the national system". This is still the case. However, in most archival legislation the archives council or board is simply an advisory body. The legislation should clearly determine and set out the function, the composition, and the responsibilities and reporting obligations of any archives governing or advisory body.

The advantages of having an advisory body, advising either the Minister or the CEO of the Archives, or both, is that the archives retains a fair degree of autonomy to the extent that it has ultimate control over its decisions.

The advantage of having a true governing body is that the decisions made by the body should reflect the community interests and concerns as represented by the members constituting the governing body.

Examples of legislation that sets up advisory bodies to advise the responsible minister but relegates the authority of managing the archives to the CEO include:

- * Belize Archives Act 1984
- * Bahamas Public Records Act 1997
- * Bermuda Archives Act 1974
- * National Archives of Guyana Act 1982
- * Brunei National Archives Act 1983.

In Canada, there are two main types of body established by archival legislation: advisory boards and public records committees. Advisory boards are generally directed to advise the head of the institution and/or the responsible minister about all matters related to the archives, while public records committees are focused on the disposition function. In Nova Scotia, Section 9 of the Public Archives Act of 1998 creates the board of Trustees of the Public Archives of Nova Scotia. Their roles include the need to “advise the Provincial Archivist on the general direction of the Public Archives and fulfill an oversight role{and} make recommendations to the Minister and public bodies as appropriate”. In Saskatchewan, the Saskatchewan Archives Board, created under Section (3) of the Archives Act, is “responsible for supervising the archives of Saskatchewan and the work of the provincial Archivist”.

The province of New Brunswick’s Public Records Committee, created under Section 6 of the New Brunswick Archives Act, is directed to “meet from time to time to advise the Provincial Archivist on matters relating to the retention and disposal of public records”. A similar body exists in the Northwest Territories, where the Public Records Committee is to “advise the Commissioner on matters relating to the destruction and preservation of public records and public access to public records”, as well as carrying out other duties imposed on it by the Archives Act.

The Malaysian National Archives Act 1999 is slightly different in that it sets up an Advisory Board to advise the Director General of the Archives in the performance of his functions and the exercise of his powers under the Act (Part III), rather than advising the Minister.

The Queensland Public Records Bill 1999, specifies that the Advisory Board advises both the Archivist and the Minister about issues affecting the administration or enforcement of the Act, amongst other duties and functions allocated (Division 3 - State Archives Board, s. 35 (a)).

There are also examples of where a council or authority is given executive or supervisory powers. They are:

- * the Saint Lucia National Archives Act of 1993 in establishment of the National Archives Authority (Part II, Establishment and Functions of the National Archives Authority of St. Lucia)
- * The Institute of Caymanian Heritage Law, 1991, in setting up an Institute of Caymanian Heritage which is a body corporate responsible for the control and maintenance of the National Archive in addition to other cultural bodies the Singapore National Heritage Board Act 1993 (Part II), which outlines the establishment, constitution, functions and powers of the Board.

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A different approach again is taken by the Western Australian State Records Bill 1999 in setting up of a State Records Commission (Part 8- State Records Commission). This model of governance is interesting in that the Commission does not report direct to the Minister or the CEO of the archives but reports to Parliament through the tabling of an annual report (s. 64). In fact the Bill specifies that the Commission is to be generally independent and its relationship with the governing Minister is specified (Division 2 - Relationship with the Minister). The Commission is given specific functions and duties plus wide ranging powers including investigative powers (Division 3) and the ability to request reports on record-keeping from government organizations (s. 68), and is given the powers of special inquirer under the Public Sector Management Act 1994 (s. 69).

Conclusions

Archival legislation should specify clearly the form of governing or advisory body to be set up, if there is to be one. The functions, duties, reporting requirements and powers of this body, including its governing powers should be laid out. The relationship of this body to the CEO of the archives and to the responsible minister should be clearly articulated. Appeal provisions should be specified.

5.1.4 Administration

Decisions need to be made regarding the overall administration of the archives and the extent to which such decisions will be reflected in legislation rather than in regulations or internal guidelines and instructions. Decisions such as the following need to be addressed:

- * What is the role of the public archives?
- * What is the role of the archivist or CEO?
- * What powers and responsibilities will be given to either?
- * What reporting requirements will be needed?
- * What internal structures will be set up within the archives?
- * What ministerial responsibilities and relationships will be specified?
- * How will the inalienability and imprescriptibility of public archives be legislated for?
- * How will the archives treat non-government records?
- * What relationship will the archives have to the records of corporatised and privatized agencies?

5.1.5 Role of public archives

In the past legislation has outlined the roles of an archives to be that it:

- * constitutes the memory of a society, and enables that society to make informed decisions based on the evidence of past experience
- * provides documentary evidence of the respective rights and obligations of government and individuals
- * constitute a source for a society's understanding and identification of itself.

Additional roles and functions assigned to an archives have been:

- * professional leadership of the country's records managers, archivists and information specialists
- * education within the professional field
- * government information specialist and primary advisor on information matters.

Ketellar saw the role of the archives reflected as its 'Institutional Identity' and in the 1985 RAMP report stated "The institutional character of the agency as the repository of the permanently valuable records of the government to provide sufficient autonomy for its protection against political interference, including tenure for the agency head, civil service protection for its personnel; and control of agency facilities, equipment and resources" (r.196/11).

The 1985 RAMP report indicated that in order to fulfill this role the following was required:

- * Through legislation, the archives should be given sufficient authority for the agency to define the record problems and needs of the country, to prescribe appropriate programmes, and to administer effectively those programmes (r.196/IV).
- * The legislation should give 'Exclusive Responsibility' to the archives outlining exclusive programme responsibilities that do not diffuse the primary responsibility of the agency for government records (r.196/V).
- * The legislation should grant appropriation and expenditure arrangements such as funding by direct appropriation to the agency by the legislation with authority to budget and expend such funds (r.196/VI).
- * The legislation should give the agency the right to determine the internal policies and professional needs of the agency as well as the power to prescribe and enforce rules, regulations and standards relating to government records administration (r.196/VII; r.196/VIII).

These principles are still generally reflected in recent archival legislation though archival legislation often does not outline the role of an archives. Rather the roles and powers outlined above are more often vested in the position of the CEO or of the governing body.

Some legislation, e.g. the Western Australian State Records Bill 1999, outlines what constitutes the collection (s. 35) rather than defining the role of the archives itself. If the legislation does specify the role and functions of the archives it is generally at a general level as in The Institute of Caymanian Heritage Law, 1991, which defines the functions of the National Archives in (s. 9) as:

- * To provide to the Government a Records Management Service as provided in section 10(1); and
- * To provide to the public all the services of a National Archive as described in section 13.

The National Archives of South Africa Act 1996 states the objects and functions of the National Archives as being to:

- * Preserve public and non-public records with enduring value for use by the public and the State
- * Make such records accessible and promote their use by the public
- * Ensure the proper management and care of all public records
- * Collect non public records with enduring value of national significance which cannot be more appropriately preserved by another institution, with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past
- * Maintain a national automated archival information retrieval system, in which all provincial archives services shall participate
- * Maintain national registers of non-public records with enduring value, and promote cooperation and co-ordination between institutions having custody of such records
- * Assist, support, set standards for and provide professional guidelines to provincial archives services

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- * Promote an awareness of archives and records management, and encourage archival and records management activities
- * Generally promote the preservation and use of a national archival heritage.

The Mpumalanga Archives Act 1998 in addition to setting archival and records management objectives also includes more social roles for the archives such as:

- * Promote an awareness of archives and records management and encourage archival and records management activities and organizations (s. 3(f)).
- * Promote the empowerment and upliftment through archival usage of previously disadvantaged people and groups (s. 3(g)).
- * Promote the preservation and use of the provincial archival heritage (s. 3(h)).

The National Archives of Canada Act clearly gives the institution a broad mandate in both the cultural and information management sectors. Section 4(1) states: 'The objects and functions of the National Archives of Canada are to conserve public and private records of national significance and facilitate access thereto, to be the permanent repository of records of government institutions and of ministerial records, to facilitate the management of records of government institutions and of ministerial records, and to encourage archival activities and the archival community.'

Conclusions

Archival legislation should outline the role and functions of the archives as an entity. It should state its *raison d'être*. If the archives, as an entity, does not hold responsibilities or powers and they are vested in an entity such as the CEO or governing body of the archives, the legislation should make that distinction clear.

Archival legislation should incorporate the principles articulated in the 1985 RAMP report and listed above.

5.1.6 Role of the Archivist

The 1985 RAMP report stated that "Legislation should outline the role and responsibilities of the CEO of an archives and the title of the archives CEO should reflect the function of the position and be titled 'National Archivist'. This is often the case though there is divergence in the title given. Some countries prefer the term 'Director General' or 'Keeper' such as in the 'Keeper of the Public Records'. In Australia the term 'Director of State Records' is also used in addition to 'State Archivist'. The choice of title for the CEO appears at first a minor decision but it is an important one. The concept that the title should reflect function and duty is as pertinent now as it was in 1985.

Inherent in the role of 'Archivist' are duties and responsibilities. Legislation varies in the level of detail in outlining the roles and duties of the Archivist or equivalent. Often the roles and duties of the Archivist as well as the powers of the Archivist are specified simultaneously. The archival legislation of the Cook Islands, Vanuatu and Fiji illustrate this. Further examples are the Pakistan National Archives Act 1993 and the Brunei National Archives Act 1983. Such legislation pronounces the duties and powers of the CEO at a very general level, namely responsibility for the overall management of the archival documents and the archival organization. In comparison, more recent legislation is specific in identifying the roles and responsibilities of the CEO.

This is a welcome trend that should be adopted in new legislation, as it gives a clear indication of the role and areas of influence of an organization and of its CEO and the following are examples of legislation detailing the duties and powers of the archivist.

The Queensland Public Records Bill 1999, states:

“The archivist has the following functions-

(a) to develop and promote efficient and effective methods, procedures and systems of making, managing, keeping, storing, disposing of, preserving and using public records;

(b) to identify public records of enduring value and require that they be retained in a useable form, whether or not the records are in the custody of the archives;

(c) to make decisions about the disposal of public records;

(d) to manage, keep and preserve records for public authorities and other entities;

(e) to provide public access to public records;

(f) to conduct research and give advice about the making, managing, keeping and preserving of public records;

(g) to perform another function given to the archivist under this or another Act;

(h) to do anything else-

**incidental, complementary or helpful to the archivist’s other functions; or*

**likely to enhance the effective and efficient performance of the archivist’s other functions.”*

The Western Australian State Records Bill 1999 also clearly sets out the functions of the Director giving the position similar duties as outlined above but additionally they have responsibility to:

* Advise government organizations on record keeping and on training their staff in record keeping and to assist in such matters (s. 73(1)(a)).

* To advise government organizations on the preparation of and compliance with record keeping plans (s. 73(1)(b)).

* Create and maintain a register of all State archives, including those that are not in the State archives collection (s. 73(1)(d)).

Similarly the Malaysian National Archives Bill 1999 sets out quite specifically the functions of the Director-General (s. 7), the power of review of that position (s.8), and the power to delegate (s. 9). The National Archives of South Africa Act 1996 also specifically sets out the functions of the National Archivist.

The New Brunswick Archives Act sets out the role of the Provincial Archivist in Section 5, under eight main categories. The primary one is that the Provincial Archivist is to have *“the care, custody and control of the Archives”*. Others include the preparation of records schedules governing the retention, destruction and transfer of public records to the Archives; the provision of economical storage facilities for public records; the discovery and collection of *“records having any bearing on the history of New Brunswick”*, and to classify, index and catalogue all records in his or her custody. These duties are similar to those outlined for the Provincial Archivist of Newfoundland under the Newfoundland Archives Act.

5.1.7 Powers of the Archivist

Archival legislation must reflect the decisions made regarding the powers granted to the Archivist or CEO.

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The Malaysian National Archives Bill 1999 sets out the powers of the Director-General in relation to:

- * review of records in the custody or control of the National Archives (s. 8(1)) and inspection of the contents of classified records and reclassification or declassification of such records (s. 8(2)), in accordance with the Official Secrets Act 1972 [Act 88]
- * delegation of powers (s. 9).

The Queensland Bill sets out the powers of the Archivist to be:

“(a) to establish and manage repositories and other facilities to store, preserve, exhibit and make available for use public records and other materials;

(b) to copy public records and other materials;

(c) to publish public records and other materials;

(d) to acquire records by purchase, gift, bequest or loan;

(e) to authorize the disposal of particular public records or classes of public records;

(f) to set policy and standards, and issue guidelines, about the making, keeping, preserving, managing and disposing of public records.

(2) This section does not limit the archivist’s powers as a part of the executive government of the State”.

The powers and duties of the National Archivist in South Africa, under the National Archives Act of South Africa 1996 are:

- * take such measures as are necessary to arrange, describe and retrieve records
- * provide information, consultation, research and other services related to records
- * with special emphasis on activities designed to reach out to less privileged sectors of society, make known information concerning records by means such as publications, exhibitions and the lending of records
- * require of a person who has made use of records in the custody of the National Archives while researching a publication or dissertation to furnish a copy of the publication or dissertation to the National Archives
- * generally, take such other steps and perform such other acts as may be necessary for or conducive to the achievement of the objects of the National Archives.
- * provide training in archival techniques and the management of records
- * co-operate with organizations interested in archival matters or the management of records
- * provide professional and technical support in aid of archival matters or the management of records
- * provide professional and technical support in aid of archival activities and the archival community
- * with the concurrence of the Minister and the Commission exempt a governmental body from any provision of this Act.

Likewise the Mpumalanga Archives Act 1998 specifies the functions and powers of the Archivist.

The powers of the National Archivist of Canada are set out in Section 4(2) of the National Archives of Canada Act: *“the Archivist may do such things as are incidental or conducive to the attainment of the objects and functions of the National Archives of Canada and, without limiting the generality of the foregoing, may:*

(a) acquire records or obtain the care, custody or control of records;

(b) take such measures as are necessary to classify, identify, preserve and restore records;

(c) subject to any lawful restriction that applies, provide access to records;

- (d) provide information, consultation, research and other services related to archives;
- (e) make known information concerning archives by means such as publications, exhibitions and the lending of records;
- (f) advise government institutions concerning standards and procedures pertaining to the management of records;
- (g) provide reproduction and other services to government institutions pertaining to the management of records;
- (h) provide a central service for the care and control of records pertaining to former personnel of any government institution;
- (i) provide record storage facilities to government institutions;
- (j) provide training in archival techniques and the management of records;
- (k) co-operate with and undertake activities in concert with organizations interested in archival matters or the management of records by means such as exchanges and joint projects;
- (l) provide professional, technical and financial support in aid of archival activities and the archival community; and
- (m) carry out such other functions as the governor in council may specify.”

A further key power of the National Archivist is set out in Section 5(1): “No record under the control of a government institution and no ministerial record, whether or not it is surplus property of a government institution, shall be destroyed or disposed of without the consent of the Archivist.”

Conclusions

Archival legislation should clearly set out the role and powers of the CEO of the archives, irrespective of the title given. Generally the roles and powers specified in legislation are ones that address:

- * responsibilities to officers of state
- * power to regulate and advise on record-keeping by public bodies
- * power of deposit
- * power to impose penalties
- * power to select, appraise and dispose of records
- * power to accept private papers
- * power of recovery
- * power to mount exhibitions, publish, lend records
- * power to administer and disburse funds
- * power to preserve and advise on preservation
- * obligation to provide access to public records
- * obligation to supply extracts and certified copies
- * obligation to produce records in court
- * obligation to produce records
- * obligation to report.

5.1.8 Reporting requirements

Decisions regarding reporting arrangements need to be reflected in legislation.

Reporting decisions include:

- * Will the governing body report to the archivist, the minister, or both, or to Parliament?
- * Will the archivist report to the governing body, the minister, or both, or to Parliament?
- * What reporting responsibilities will the minister have?

5.1.9 Structure and organization within the archives

The 1985 RAMP report stated that in most countries it is not the task of legislation to define the internal organization of archives or its staffing arrangement (s. 195). Details of internal structure and organization, which require some degree of flexibility to meet changing conditions, and the recruitment and qualifications of staff, are generally not set in legislation. This is still true of more modern archival legislation. Generally the decisions regarding internal structure and administration of an archives is the responsibility of the CEO and legislation reflects this.

If legislation makes reference to an archives internal organization and management, it is as expressed in the National Archives of South Africa Act 1996:

- * The National Archives shall be managed by a National Archivist appointed by the Minister on the basis of relevant professional experience and an appropriate archival qualification.
- * The National Archivist shall in the performance of his or her functions be assisted by officers and employees appointed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994).
- * The National Archivist may, subject to any conditions, delegate a power or assign a duty to a member of the staff and may at any time cancel such delegation or assignment.
- * A delegation or assignment shall not divest the National Archivist of the power delegated or duty assigned and he or she may at any time amend or set aside any decision made there under, or exercise the power or perform the duty concerned.

The National Archives of South Africa Act 1996 outlines the accountability and reporting requirements of the National Archivist and the Commission. An annual report is required amongst other accountability documents that are submitted to the Minister and tabled in Parliament.

Conclusions

Archival legislation should give the CEO exclusive right to determine the internal policies and professional needs of the agency.

5.1.10 Ministerial responsibilities and relationship

Archival legislation needs to detail the responsibilities the CEO or governing bodies have to the minister or their relationship with the minister. Equally the legislation needs to specify the role and responsibilities of the minister in regard to the archives

5.1.11 Inalienability and imprescriptibility of public archives

The RAMP 1985 report stated that public archives are public property, part of the public domain and so national archival legislation should include the right of the archives to replevin (or, at least, a right to make copies) of public archives which have gone astray (r.192). This is equally true today and applies to records irrespective of their format.

The following issues should therefore be addressed under the concept of inalienability and imprescriptibility:

- * recovery of records (estrays)
- * export of records.

It is in a country's interest to address these issues seriously.

A primary decision is whether proposed legislation will cover these issues. If it does, it needs to decide whether to impose penalties for noncompliance, the extent of the penalties and how to implement enforcement of such sections of the legislation.

Legislation should state that an archives has the power to recover records that have passed out of government custody without authority. Not all archives presently have this power under present legislation. This makes recovery difficult, if not impossible. In Australia, the Archives Act 1983 does not give the National Archives such recovery powers. While Section 24(1)(c) of the present Act prohibits the transfer of records out of Commonwealth custody, it provides no recourse to the National Archives for the recovery of such records after the event. The only option for the National Archives would be to instigate proceedings under the Crimes Act and the National Archives does not view the Crimes Act as an entirely satisfactory solution. While the introduction of a provenance-based definition for Commonwealth records will assist the process of identifying items that are Commonwealth records and should be retrieved, the National Archives still requires the means to ensure their retrieval. Resorting to the Crimes Act means that the National Archives has to rely on convincing external agencies that the matter should be pursued. It would be preferable for archival legislation to confer such powers directly on the CEO of the National Archives.

However there are a number of laws which are clear in addressing the recovery of public records and often they impose penalties. Examples are:

- * Queensland Public Records Bill 1999 allows for the recovery of public records in the unlawful possession of a person (Division 3, s. 46(1)), and penalties apply if the law is contravened including fines and imprisonment (Division 3, s. 47(1)).
- * Western Australian State Records Bill 1999 has similar arrangements but allows for compensation for recovered records. Both bills extend the recovery powers to cover reciprocal agreements between like entities in another state or the Commonwealth.
- * Singapore National Heritage Act 1993 empowers the Board to recover public records that have been illegally removed from official custody (s. 20) but does not impose penalties
- * Canada's cultural Property Export and Import Act places restrictions on the import and export of cultural properties, including documents and records, in order to preserve the national heritage of Canada. It does so through the creation of a 'control list'. Additional laws, specific in stopping the export of archives, include the following:
 - * The Pakistan Secretarial Instruction of the Cabinet Division, 1975 refers to the Archival Material (Preservation and Export Control) Act of 1975, which specifies that no person shall export any archival material except under the authority of a license granted by the Director for its temporary export for the purpose of exhibition, examination or treatment for preservation.
- Penalties under the Customs Act 1969 apply if the above is disregarded.
- * The Singapore National Heritage Board Act 1993 specifies that public records cannot be taken out, or sent out (s. 25(1)). Penalties applying are up to \$5,000 and/or a maximum year imprisonment.
- * The National Archive Authority of Saint Lucia Act 1993 has similar provisions and is almost as stringent.
- * Sri Lanka law prohibits export of historic documents over the age of 50-years old. The Director can issue a license of export, which if issue is refused is appealable.
- * The Brunei National Archives prohibits export of public records but does not impose penalties via legislation.
- * The Institute of Caymanian Heritage Law 1991 (s. 30(1)), and the Antigua and Barbuda Archives and Records Act 1982 (s. 30(1)), both impose restrictions on export, unless under issue of export licence, and include penalties clauses.

* The Barbados Archives Act 1988, Bahamas Public Records Act 1971 and the Belize Archives Act 1984 all legislate against export unless allowable by an export licence issued by the minister.

* The Institute of Caymanian Heritage Law 1991 charges the Archives to identify 'archives held overseas which are of relevance to the Islands, and to acquire them, or copies of them, in any appropriate medium (s. 13(f)).

Conclusions

Archival legislation should outline the powers conferred on the archives, its CEO or other governing body in relation to the recovery of estrays. It should also outline penalties and how they are to be applied in cases of noncompliance.

Archival legislation should also specify the prohibition of exporting public records, define which records cannot be exported, identify authorities responsible for setting of standards and rules associated with the prohibition of export, set grounds for appeal and outline penalties and their application in cases of non-compliance.

In both cases the legislation should allow for the fact that such records may be in any format that present and emergent technology allows for.

5.1.12 Non-governmental records

Archival legislation often only covers 'public records' and it may not make provision for the custody of records other than those so defined. In a number of jurisdictions though, government archives collect and preserve records of non-governmental bodies such as corporate bodies, trade unions, educational institutions and political organizations, and the private papers of certain individuals. The degree of responsibility an archives has over such records varies greatly.

Archival legislation would need to confer the power to accept such gifts or to actively seek out such records. Archival legislation could also require persons or organizations holding non-public records to notify the archives of the existence of such records. In addition, archival legislation could impose obligations upon the holders of such records to properly preserve them.

It needs to be noted though that the expansion of the functions of an archives to include the collection and preservation of certain non-public records may impinge upon the collection policies of other organizations such as libraries that collect manuscripts, etc., as part of their collection development.

The Law Reform Commission, in its review of the National Archives Act 1983, recommended that the National Archives of Australia should be entitled by law to acquire private archives (r.193). Export of such private archives should be forbidden or be subject to the approval of the competent archives authority (r.193).

The Sri Lanka National Archives Law no. 48 of 1973 addresses documents and manuscripts in private possession stating that "Any private individual or the chief executive officer of any institution in possession of any manuscripts or documents greater than 50 years old, being a manuscript or document of historical, cultural or literary value may notify the Director of the existence of such documents".

The Belize Archives Act 1984 gives the Archivist the additional authority to declare which documents are of historical, cultural or literary value (s. 13). The right of appeal against such declarations is available (s. 13(5)).

The National Archives of South Africa Act 1996 requires the archives to collect non-public records with enduring value of national significance which cannot be more appropriately preserved by another institution, with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past.

The Mpumalanga Archives Act 1998, in its objective clause states that it will:

- * preserve public and non-public records with enduring value for use by the public and the state, with special emphasis on documenting the lives and experiences of previously marginalized and disempowered people and communities (s. 3(a))
- * collect public records with enduring value of provincial significance which cannot be preserved more appropriately by another institution, with due regard to the need to document aspects of the province's experiences which have been neglected by archives in the past (s. 3(d))
- * promote co-operation and co-ordination between institutions having custody of non-public records with enduring value (s. 3(e)).

The Malaysia National Archives Bill 1999 allows the Director-General to acquire any records not being public records which in his opinion are or are likely to be of permanent and enduring national or historical value or both (s. 31).

The Institute of Caymanian Heritage Law 1991 charges the Archives *"to identify and, where possible, acquire archives from non-government sources in the Islands, or where appropriate, copies of such archives, owned by individuals, civic groups, commercial, ecclesiastical or other organizations; and to accept such archives on gift or deposit, at the discretion of the Director of the National Archive, on those terms and conditions which may be agreed between him and the donor or depositor, as the case may be"* (s. 13(e)).

The National Archives of Canada Act directs the institution *"to conserve public and private records of national significance and facilitate access thereto"*. Both the provinces of Saskatchewan and Manitoba have sections in their Archives Act that allow the archives to accept any records that have a bearing on the history of the province. In the Yukon Territory, the objects of the Act listed in Section 5 clearly outline the goals of collection and preservation of a wide variety of private records relating to the history of the territory, and the conducting of research. Chapter III of the province of Quebec's Archives Act is entitled 'Private Archives', and sets out the conditions for the preservation of private archives in the province.

The Public Records (Scotland) Act permits the Keeper of the Records of Scotland to acquire and safeguard records other than public records, as does the State Archives Law of Cyprus.

Corporatized and privatized agencies.

When government entities are privatized, the pre-sale records should be encompassed by legislation. Conversely, archives should be permitted to declare that certain records, being passed to newly privatized agencies, are no longer government records.

In such circumstances the legislation needs to point out the status of the government records prior to sale or privatization. Usually the pre-privatization government records remain under the control of the archives. Conversely, those records that should not remain within the archives control could be passed over to the new company. Unless this is incorporated into legislation, the Australian Commonwealth experience has been that this is difficult to achieve after the event.

Conclusions

Archives legislation should specify the responsibilities the archives, its CEO or other governing body has to non-governmental records. If an archive wishes to, or needs to be in possession of, or have custody of, or oversee the management of non-governmental records these requirements should be identified and addressed in the legislation.

5.1.13 Definitions

The 1985 RAMP report advised that archival legislation should clearly define public records to dispel any ambiguity regarding the role the archives had in relation to those records. The definition should include the notion that records are created, received and maintained by an institution or individual in the transaction of its business. The advice was not to restrict the definition to only public records but to leave it broader, because legislation will necessarily affect, to some extent, private records and archives.

It also stated that the definition of a record should be format independent as technology moves so quickly. Such a definition could be elaborated in regulations or a circular letter, in which examples of types and forms of documents and other materials, included in the definition, could be outlined.

It is equally important today that clear and precise definitions are included in legislation as they are the 'codewords' when interpreting archival legislation. The definitions included in archival legislation are important as they reflect decisions made about how an archives sees itself, its roles and responsibilities and its relationship to the records of a country.

The following are definitions presently in use and should form the basis of definitions included in legislation. It is not recommended though that inclusion of definitions into legislation be restricted to this list. Often archival legislation puts emphasis on archival terms but neglects records management terms. If the legislation is to cover the records continuum, then there is a case for including records management specific definitions in the legislation.

Archives

The word 'archives' may be used in three different ways. It means a body of records of continuing or permanent value, it applies to the place of deposit of those records or a building dedicated to their care and use, and also to the organization or agency responsible for administering the records.

Appraisal

The process of evaluating business activities to determine which records need to be captured and how long the records need to be kept to met business needs, the requirements of organizational accountability and community expectations.

(Australian Standard AS 4390- 1996, Records Management, Part 1: General, Clause 4.3)

Compliance

Ensuring that the requirements of laws, regulation, industry codes and organizational standard are met. (Australian Standard, AS 3806-1998, Compliance Programs)

Disposal

A range of processes associated with implementing appraisal decisions. These include the retention, deletion or destruction of records in or from record-keeping systems. They may also include the migration or transmission of records between record-keeping systems, and the transfer of custody or ownership of records. (Australian Standard AS 4390-1996, Records Management, Part 1: General, Clause 4.9).

Disposal authority

A legal document issued by the archives to authorize the disposal of public records. It specifies classes or records and the minimum length of time they should be kept. (Australian Archives, Handbook, 1996)

Full and accurate records

Full and accurate records must be:

- * Compliant - complying with the record-keeping requirements arising from the regulatory and accountability environment in which the organization operates
- * Adequate - for the purposes for which they are kept
- * Complete - containing not only the content, but also the structural and contextual information necessary to document a transaction
- * Meaningful - containing information and/or linkages that ensure the business context in which the record was created and used is apparent
- * Comprehensive - documenting the complete range of the organization's business for which evidence is required
- * Accurate - reflecting accurately the transactions that they document
- * Authentic - enabling proof that they are what they purport to be and that their purported creators did indeed create them
- * Inviolable - securely maintained to prevent unauthorized access, alteration or removal.

Intellectual control

The control established over the informational content of records and archives resulting from ascertaining and documenting their provenance, and from the processes of arrangement and description. (J Ellis (ed.), Keeping Archives, p.472).

Metadata

Data describing data and data system. In record-keeping, this means data that must be captured along with records to enable these records to be understood and to support their management and use by enabling intellectual control and structured access. (National Archives of Australia, DIRKS manual, Glossary of terms).

Preservation

A broad term covering the range of activities carried out to make sure that records can be retained and remain accessible for as long as they are needed. This includes environmental control, security, storage, handling, migration strategies and disaster preparedness. (Australian Archives, Handbook, 1996).

Record-keeping

Making and maintaining complete, accurate and reliable evidence of business transactions in the form of recorded information. Record-keeping includes the following:

- * The creation of records in the course of business activity and the means to ensure the creation of adequate records.

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* The design, establishment and operation of record-keeping systems; and The management of records used in business (traditionally regarded as the domain of records management) and as archives (traditionally regarded as the domain of archives administration). (Australian Standard AS 4390-1996, Records Management, Part 1: General, Clause 4.19; Part 3: Strategies, Foreword).

Record-keeping requirements

Identified needs for evidence arising from various internal and/or external sources that may be satisfied through appropriate record-keeping action (such as creation, capture, maintenance, preservation and access). The sources include legislative and other regulatory sources industry codes of best practice, broader government interests, external clients or stakeholders and the general public. An umbrella term that covers identified requirements and prioritized requirements. (National Archives of Australia, DIRKS manual, Glossary of terms).

Record-keeping systems

Information systems that capture, maintain and provide access to records over time. Record-keeping systems may be distinguished from other types of information systems by the fact they are organized to accomplish the specific functions of creating, storing and accessing records for evidential purposes. (Australian Standard AS 4390-1996, Records Management, Part 1: General, Clause 4.20).

Records

Recorded information, in any form, including data in computer systems, created or received and maintained by an organization or person in the transaction of business or the conduct of affairs and kept as evidence of such activity. Record means any document or other source of information compiled, or recorded or stored in written form or on film or by electronic process, or in any other manner or by any other means (Australian Standard AS 4390-1996, Records Management, Part 1: General, Clause 4.23; Part 1: General, Foreword).

[Any] correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof (National Archives of Canada Act).

Information or data that is recorded or stored by graphic, photographic, electronic, mechanical or other means and includes public archives vested in Her Majesty in right of the province. (Archives Act of Nova Scotia).

Most definitions and interpretations of the term 'record' will need to be re-addressed in new archival legislation to redress the present emphasis in the definitions from one of emphasis on property, i.e. records that are the property of a jurisdiction, to one that gives proper emphasis to electronic records; they need to take note also of records standards such as the Australian AS 4390.

A further point is that the definition of a 'record' should address the provenance of the record i.e. records that are made or received by a jurisdiction to enhance an archives' ability to recover records that have passed out of official custody without authority.

Usually legislation should include the term 'records of archival value' to identify those records justifying retention beyond current administrative needs and management as archival records. A precise definition of 'records of archival value' should be incorporated in standards and guidelines, not in the legislation, as what constitutes such records can change over time.

Active record

The Archives Act of the province of Quebec defines “active document” as “a document in current use for administrative or legal purposes”. The Act goes on to define a semi-active document as one “in occasional use for administrative or legal purposes”.

Inactive record

The Archives Act of Quebec defines inactive document as “a document no longer used for administrative or legal purposes”. The Act goes on to define a semi-active document as one in occasional use for administrative or legal purposes.

Records continuum

The whole extent of a record’s existence. Refers to a consistent and coherent regime of management processes from the time of the creation of records (and before creation, in the design of record-keeping systems), through to the preservation and use of records as archives. (Australian Standard AS 4390-1996, Records Management, Part 1: General, Clause 4.22).

Public record

Most legislation defines both the terms of ‘record’ and ‘public record’. Archival legislation commonly defines ‘public record’ so as to include recorded information regardless of its form or medium. Government decisions and actions are no longer achieved and evidenced by means of paper records. Records are created in both paper and electronic formats. Within these two broad categories are objects that are sound recordings, magnetic tapes or discs, microfilms, coded storage devices, photographs, maps, plans or models, paintings or other pictorial or graphic works etc.

The National Archives Bill of Malaysia 1999 is an example of where the definition of ‘public record’ and ‘record’ is format independent yet in the body of the Bill reference is made to electronic records so clearly the intent of the Act and the definition of ‘record’ covers electronic records.

A common approach is to make the definition of ‘public record’ format independent but then specify format, which specifically includes machine-readable format and electronic records, in the definition of ‘record’. The following have adopted this approach, the Pakistan National Archives Act 1993, the Singapore National Heritage Board Act 1993, the Belize Archives Act 1984 and the Barbados Archives Act 1988. A slight variation on this is the Western Australian State Records Bill 1999, which has a format independent definition of ‘public record’ and then in the definition of ‘record’ includes “(f) anything on which information has been stored or recorded, either mechanically, magnetically or electronically”.

Many Canadian provinces define ‘public record’ as well as records. In Newfoundland, public records are defined as: “records created by or received by a department in the conduct of its affairs except copies of records created only for convenience or reference and surplus copies of mimeographed, multilithed, printed or processed circulars of memoranda”. Saskatchewan and Prince Edward Island also specifically exclude convenience copies.

Other legislation is less specific regarding format, yet the intent of the legislation is to also cover electronic records. Examples are:

* National Archives Authority of Saint Lucia Act 1993 whose definition of ‘public record’ is format independent but then defines ‘record’ as inclusive of any medium on or on

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which information is recorded". The Mpumalanga Archives Act 1998 and the Free State Provincial Archives Act 1998 treat their definitions of 'public record' and 'record' in similar fashion.

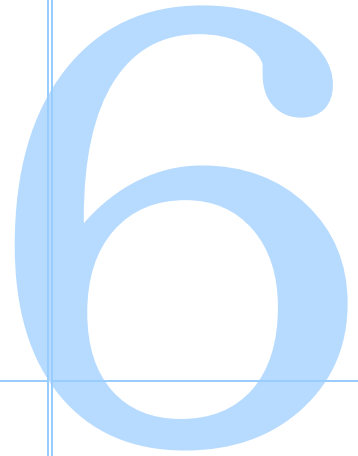
* The Bermuda Archives Act 1974, in its definition of 'public record' includes "not only written records but records conveying information by any means whatsoever". This broad definition allows for inclusion of all possible present and future formats including electronic formats.

* The Australian Queensland State Public Records Bill 1999 which has a format independent definition of 'public record' and then outlines the meaning of 'record' in 'Schedule 2 - Dictionary' to be inclusive of "(b) anything on which there are marks, figures, symbols or perforations having a meaning of persons qualified to interpret them; or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else". This appears to be the most liberal of attempts to cover all formats and interpretations that a 'record' can take without actually specifying them.

Standards

Records management and record-keeping standards are authoritative standards to which an organization is subject or which it chooses to adopt. Standards provide benchmarks for measuring performance and describe best practice in any or all aspects of record-keeping. Thus standards may function to specify minimum performance levels or describe best practice. (State Records Authority of NSW, Government Record-keeping Manual, Glossary).

Roles and responsibilities in respect of public records



Archival legislation outlines the roles and responsibilities an archives has to 'public records' but few acts specify the responsibility that a public authority has to the public records they create and hold. An exception is the Queensland Public Records Bill 1999 which states "A public authority is responsible for ensuring the safe custody and preservation of records in its possession" (s. 8(1)). It also states that "A public authority must - (a) make and keep full and accurate records of its activities; and (b) take all reasonable steps to comply with any relevant policy and standards set, or guidelines issued, by the archivist about the making and keeping of public records" (s. 7(1)(a)&(b)).

This is a welcome trend as it emphasizes the need for mutual obligation in regard to archives and records management, its need even more pertinent in an electronic environment.

6.1 Obligations to public records

The functions and obligations of archives to public records are generally stated as:

- * drawing up codes of practice and guidelines for the management of archives
- * authorizing disposal schedules
- * appraisal of records
- * transfer of records
- * determining custodial arrangements
- * arrangement and description of records
- * deposit of official publications
- * preservation of records
- * providing for public inspection of records
- * provision of reports.

The emphasis of the above functions usually is on records of 'archival value' and not on 'current' records, i.e. the emphasis is on archives management obligations not on records management obligations.

However an archives can be given the authority over public records that are 'active' and hence take on the responsibilities of:

- * drawing up codes of practice and guidelines for the records management
- * taking into custody 'active records' and managing them on behalf of agencies
- * providing records centres.

6.2 Archives or records management or both

A major decision that needs to be made and be reflected in legislation is the extent to which an archives will have influence over the management of records across the record continuum, i.e. whether:

- * The archives will be responsible for only those records deemed as having national archival value.
- * The archives will be responsible for records deemed to be of non-archival value, whether they be active or inactive, in addition to those deemed as being of national archival value.

Subsequent decisions required are:

- * Will the archives set standards and guidelines for the management of archives only?
- * Will the archives set standards and guidelines for both archives and records management?

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- * Will the archives take 'retain as national archives' records into custody and hence act as an archives repository?
- * Will the archives take non-archival value records into custody and hence act as a records centre?
- * Will the archives take in all records once they have reached a certain age, irrespective of disposal action?

The answer may be 'yes' to any one of these questions or to any combination of them. Some countries will only take into custody public records that have been deemed as having value against set appraisal criteria (see section 6.6 below). In doing so they set up an archives that deal only with public records of archival value. Other countries take custody of both archives and active and inactive records of non-archival value. Irrespective of which position is taken, archival legislation usually, but not always, determines when obligatory transfer of public records to the archive is to occur.

The Archives Act 1983 of the province of QuÉbec is an example of an act outlining the differing responsibilities that archives and government bodies will assume in respect to 'active' and 'inactive' records. Chapter II of the Act outlines management responsibilities to be undertaken in respect to 'active' and 'semi-active' documents. The Keeper of the Archives nationales du QuÉbec "shall coordinate the implementation and supervise the administration of policy, and advise the bodies mentioned in the first paragraph on matters related to the policy. He may also, at the request of the Conseil du TrÉsor, preserve the semi-active documents of those bodies" (Chapter II s. 4). In Chapter III, the Act then outlines responsibilities relating to 'inactive documents'.

Conclusion

It is imperative that archival legislation clearly designates the extent of the responsibilities an archives will assume regarding the management of records over the records continuum. If its management responsibilities include records management as well as archives management, legislation should clearly state that as well as outlining the specific responsibilities the archives will assume in either or both of those roles.

6.3 Ownership of public records

Generally ownership of the public record is vested in the government of the country or rests with the jurisdiction authorizing the legislation. Often legislation does not state this but it is assumed. However, some legislation specifies ownership such as the Queensland Public Records Bill 1999, which states "If a public record is a record of the State or a State instrumentality, ownership of the record vests in the State" (s. 9(1)). In the case of this Bill, 'State instrumentality' means a public authority other than a local government.

The Government Records Act of the province of Nova Scotia, Section 2, notes that "the purpose of this Act is to a) vest the records of public bodies in Her Majesty in right of the Province". The Newfoundland Archives Act notes under Section 3(5) that "Records in the archives are the property of the Crown". Finally, the province of New Brunswick's Archives Act, Section 3, states: "The Archives are to consist of all the records in the care, custody and control of the Provincial Archivist at the coming into force of this Act, all records that under this or any other Act are placed in the care, custody and control of the Provincial Archivist, and books, papers and records vested in Her Majesty under the Public Records Act".

Conclusion

It is valuable for archives legislation to include an ownership clause

6.4 Public records of a certain age

An archive can decide at which time public records are to enter into the physical custody of the archives irrespective of whether they are archives or 'active' records. Issues to consider include:

* Will the trigger date for determination of transfer into custody be based on 'age' of the record or file or cessation of 'function' of that file?

Present archival legislation presents a range of options. The Brunei Archives Act specifies that the archives will take custody of "any public records which are more than 55 years old and any non-current public records when in the opinion of the Director they are of sufficient value to warrant preservation". This Act draws a distinction between records that have reached an age, where irrespective of set judgments of what constitutes an archive, merely due to the age of the record, they will be deemed of value and come into the physical custody of the archives.

The Archives Act of the province of Ontario states that "subject to the regulations, all original documents, parchments, manuscripts, papers, records and other matters in the executive and administrative departments of the Government or of the Assembly, or of any commission, office or branch of the public service shall be delivered to the Archives for safekeeping and custody within twenty years from the date on which such matters cease to be in current use".

The Malaysian National Archive Bill proposes that "public records that have been concluded for a period of more than five years" (s. 28, 1.a) will come into the custody of the archives. It also states that "electronic produced records, as soon as they are no longer active" (s. 28, 2) will come into the custody of the archives.

In contrast the archival legislation of a number of the Pacific countries (Niue, Kiribati, Cook Island, Vanuatu, Fiji) state that public records that "in the opinion of the Archivist are of sufficient value to warrant their preservation", are to be transferred at 15 years of age or over. Such records however can be transferred before that date.

The National Archives of South Africa, under its Act, specifies that permanent value record must come into its custody by the age of 20 years.

England's Public Records Act 1958 states under Section 3 a number of requirements for the transfer of records to the Public Record Office. These include all records created before the year 1660, and public records selected for permanent preservation, not later than 30 years after their creation.

Generally most acts set the transfer time for records of archival value at 25 years.

With the increasing advent of electronic records designated as 'retain as national archive' the legislation must address the issue of transfer of records in electronic format. This should not be treated in isolation as a transfer issue but be part of a comprehensive set of guidelines issued regarding the management of electronic records.

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Conclusion

There is no set period at which archives should be transferred to the custody of an archives. It is a decision each country makes based on its individual needs. However it is important that archival legislation makes reference to such decisions and specifies required times of transfer.

6.5 Records management

The 1985 RAMP report noted “that in only a few countries does the National Archives have statutory responsibility for the whole range of records management functions or the task of formulating standards for record systems and providing an advisory service. Elsewhere, these functions may be allocated to another agency, like a General Services Administration, or the Ministry of the Interior, or the Central Secretariat of the State. More commonly, the pre-archival role of the national archives is limited to those areas of records management, which are more directly concerned with the exercise of some degree of control over appraisal. If the records management responsibility itself is regulated, it is mostly done through regulations, circular letters etc” (r.85).

The RAMP report stated further that “the degree of control exercised by archive services over current records varies widely from one country to another” (r.200). It also stated that “The involvement of the National Archives in records management should preferably extend to the formulating of standards, procedures and guidelines and training of agency records offices”. However, it hedged this statement with “Maximum involvement - statutory responsibility- for the whole range of records management functions will not be feasible in many countries”(r.200).

These days with the increasing creation and use in government of electronic records, an archives cannot deal only with ‘traditional archives’ but needs to influence the record-keeping process over the records continuum to ensure the preservation of archives over time. Modern archives management includes the management of the record over the records continuum and the setting of standards and guidelines that cover that continuum.

The concept of the records continuum has been taken up by archivists in Australia and refers to the whole extent of a record’s existence. It embraces a consistent and coherent regime of management processes from the time of the creation of records (and before creation, in the design of record-keeping systems), through to the preservation and use of records as archives.

It is in this area that the archives role and responsibility in relation to records management has changed the most dramatically since 1985. The professional literature reflects the perceived need of archivists to determine the fate of records and archives at creation, particularly in electronic environments. Archival legislation is increasingly reflecting the need for the archives to set standards and guidelines for current records as well as to administer the archives.

Examples of countries playing increasing emphasis on the need for record-keeping were reported on at the joint Records Management Association and Australian Society of Archives ‘Archives and records management seminar and career day’ held in Melbourne, Australia and reported in the ARM Week Newsletter 1999/2000. At the seminar a representative from the National Archives of Canada’s Office of Government Records said that the National Archives of Canada was charged by government to take a strong public stand on inappropriate records destruction, to

develop a records and information management infrastructure and a strategic plan for electronic records and record-keeping systems. The National Archives (which is charged within its enabling act to carry out several functions relating to records management) was meeting this challenge by developing an electronic work environment, which was a flexible, integrated approach with underpinning record-keeping and archival principles.

At the same seminar a speaker representing the United Kingdom spoke of government initiatives relating to freedom of information, data protection and the White Paper 'Modernizing Government', published in March 1999 (available at [Error! Bookmark not defined.]). Part of the modernizing policy and target for the 'Information Age Government' includes all-electronic services by 2008; all new public records in electronic form by 2004; a corporate IT strategy for government and a secure government intranet by 2000. These initiatives have highlighted the role of records management practices.

Similar government initiatives in getting government online are occurring in Australia through the Office of Government Online.

Drafters of archival legislation need to be aware of government information and online initiatives, register the impact such initiatives will have on archives and records management practice and prepare legislation accordingly.

6.5.1 Electronic records

Government agencies are increasingly reliant on the use of computers as a means of creating, storing, managing and distributing their documents, reports and records. Record-keeping standards should address the specific problems and issues associated with the long-term management of electronic records and the maintenance of the evidential integrity of electronic records over time. There was a period where specific reference was made to the management of electronic records in legislation, however more modern archival legislation does not distinguish management requirements according to record format, but ensures that its legislative instructions are inclusive of all record formats. With the advent of the information technology age it is crucial that archival legislation is so drafted that its instructions covers all formats of record including electronic ones.

The National Archives Act of South Africa 1996 includes instruction regarding the management of electronic public records (including active and inactive records). Generally though legislation, via its definitions of a public record, ensures that any subsequent instruction within the act, applies to records irrespective of format.

Recent legislative developments in Canada may soon have an impact on how archives in that country address the issues of the long-term management of electronic records. The National Archives of Canada Act, like many other definitions in Canadian archival laws, does not define electronic records specifically, but includes them within the broader definition of a record: "[Any] correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof". This broad definition and other provisions of the Act permit the National Archives to carry out several functions relating to the management of electronic records, including the appraisal and disposition of electronic records of government departments and the long-term preservation of those records of archival value.

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However, the new Canadian Personal Information Protection and Electronic Documents Act, enacted in April 2000, may well have an impact on all Canadian archives and their long-term management of electronic records. This Act is intended to support and promote electronic commerce and protect personal information collected, used or disclosed in certain circumstances, and to provide the electronic means to communicate or record information or transactions. Part II of this Act begins by defining an electronic document: “data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or to another similar device. It includes a display, printout or other output of that data”. The Act then goes on to specify a number of format, retention and contextual metadata requirements for electronic records to be recognized as alternatives to paper documents (Sections 32 to 51). A key clause is Section 37, which states: “A requirement under a provision of federal law to retain a document for a specified period is satisfied, with respect to an electronic document, by the retention of the electronic document if:

- * (a) the electronic document is retained for the specified period in the format in which it was made, sent or received, or in a format that does not change the information contained in the electronic document that was originally made, sent or received;
- * (b) information the electronic document will be readable or perceivable by any person who is entitled to have access to the electronic document or which is authorized to require the production of the electronic document; and
- * (c) if the electronic document was sent or received, any information that identifies the origin and destination of the electronic document and the date and time when it was sent or received is also retained.”

Conclusions

The role an archives adopts in relation to records management needs to be clearly articulated. Additionally archival legislation instructions regarding records management must be phrased in such a way that they encompass and are cognizant of the many formats that a record can take. They should recognise the impact that modern technologies has on documents and records management and so allow for an archives to set management requirements at and prior to record creation.

6.6 Records management plans

An excellent example of archival legislation outlining public authority responsibilities regarding records management is the Western Australian State Records Bill 1999 which specifies that parliamentary departments, the Archives Commission, the State Records Office and government organizations need to prepare record keeping plans (Part 2, Part 3, Divisions 2 and 3). The following outlines the requirement on government agencies regarding the content of a record keeping plan as set out in Part 3, Division 1, s. 16 of the Western Australian Bill.

“A record keeping plan in respect of a government organization is a record setting out:

The matters about which records are to be created by the organization; and
How the organization is to keep its government records.

“A government organization’s record keeping plan must:

Comply with principles and standards established by the Commission
Ensure that the government records kept by the organization properly and adequately record the performance of the organization’s functions; and
Be consistent with any written law to which the organization is subject when performing its functions.

“A record keeping plan must set out:

- Those government records that will be State archives;
- Those State archives that will be restricted access archives and the ages at which they will cease to be restricted access archives
- The retention period for those government records that are not State archives; and
- The systems to ensure the security of government records and compliance with the record keeping plan

“A record keeping plan may set out the manner in which records will be created. A record-keeping plan may provide:

- For a government record to be reproduced in another form
- For the destruction of a government record if a reproduction of it is being kept, even though the destruction occurs at a time when the record would otherwise not be able to be lawfully destroyed.

“A government organization’s record keeping plan may provide that some or all of the organization’s State archives:

- Are never to be transferred to the State Archives collection under section 32(1); or
- Are to be transferred at a time other than that prescribed by that section.”

The Bill sets out the authority such record-keeping plans will have: “A government organization’s record-keeping plan must be complied with by:

- The government organization; and
- Every government organization employee of the organization. The Bill also specifies that every government organization must have a record keeping plan that has been approved by the Commission” (s. 19).

The Bill allows for reviews of and periodic reports about such plans (Division 4), this is to ensure that such plans are up-to-date and reflect accurately the functions of the organization. Government organizations also have to report periodically against their record-keeping plans to the Commission. The Commission has the responsibility of reporting to Parliament on such plans (s. 30).

Conclusions

If an archives has responsibility for records management it may wish to legislate the need for information or records management plans.

6.7 Standards and guidelines

Traditionally archival legislation is deficient in its treatment of the creation and management of records and the records continuum. The National Archives of Australia along with many other institutions in Australia now use the concept of the continuum as the basis for a revised approach to record-keeping. The continuum model - which recognizes the record as part of a business process that begins with the record’s creation - is more suitable for modern record-keeping requirements. It allows record managers to work more efficiently with records - especially electronic records - according them treatment appropriate to their value, format and use at all stages of their existence. In the continuum model the system design actually determines what records are created and for how long they are to be kept. In the modern environment archives legislation should therefore incorporate legislative instruction regarding record-keeping along with legislative instruction pertinent to archiving, as both are aspects of the records continuum. A number of countries of the Commonwealth state that there is a poor to parlous state of record-keeping in many of their government agencies. To overcome these deficiencies there is a need for the development and issue of records management standards and guidelines for government agencies.

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The archives should be responsible for setting mandatory standards and guidelines for the creation, maintenance, evaluation, custody, storage, preservation and access to public records. Archival legislation should specify that such standards are binding on all government agencies and compliance should be the responsibility of each agency CEO. If records management and archival skills are utilized during all stages of the records management continuum, benefits will accrue to public administration.

Such standards would apply equally to records created by contractors providing functions or services on behalf of a government, as well as government associations and companies. Where a function is fully privatized, however, only pre-existing records would be subject to legislation. The standards would apply regardless of where the records were held, whether by the archives or by agencies.

In Australia, Commonwealth departments are adopting the continuum model and uptake of record-keeping standards as outlined by AS 4390 (Australian Standard AS 4390-1996, Records Management) and the National Archives of Australia record-keeping guidelines. Standards and guidelines advocated by the Archives are available at their web site <http://www.naa.gov.au>.

The National Archives of South Africa Act 1996 charges the National Archivist with the proper management and care of public records in the custody of governmental bodies. Under the 'management' of public records the Act covers disposal, transfer and custody of records but the intent of the Act appears to cover also active public records in the possession of government agencies. For example, the Act specifies that:

- * The National Archivist will determine the conditions subject to which electronic records systems should be managed (s. 13(2)(b)(iii)).
- * The National Archivist will issue directives and instructions which shall not be inconsistent with the regulations, as to the management and care of public records in the custody of governmental bodies (s. 13(4)).
- * The head of a governmental body shall, subject to any law governing the employment of personnel of the governmental body concerned and such requirements as may be prescribed, designate an official of the body to be the records manager of the body (s. 13(5)(a)).
- * The records manager shall be responsible to see to it that the governmental body complies with the requirements of this Act (s. 13(5)(b)).
- * Additional powers and functions may be prescribed to a records manager (s. 13(5)(c)).

However, achieving legislative control over records management via an archives act is not always easily achieved. In India the government has commissioned a number of reports relating to archival and records management issues over the years. In 1957 the Indian Historical Records Commission advocated the introduction of an 'Historical Records Bill'. In 1959 a Committee on Archival Legislation recommended that the Constitution be amended to enable the framing of a single Central law that would encompass both the Union and the State Archives. Several of the recommendations of that Committee were implemented over the years by the issue of appropriate administrative instructions, but the major recommendation in respect of archival law has not been implemented. In 1972 it was proposed that the Government of India adopt a Policy Resolution which would act as a model for the proposed Common Archival Law and have the same intent as such law.

The objectives at the heart of the Policy Resolution were:

- * to bring home to all concerned the importance of proper record management
- * to streamline the practices and machinery for record management in the National Archives as well as in the departmental record rooms*
- * to bring about uniformity of practice, as far as practicable, in regard to access to historical records
- * to provide for effective guidance to the Ministries' Departments concerned with the management of public records.

On December 1993 an all encompassing Public Records Act (Act 69 of 1993) received presidential assent. However, the Act appears to focus on the obligations and responsibilities associated with the management of records of archival value rather than outlining through legislation the responsibilities of all parties in relation to records management of active records.

6.8 Legislation for standards

While standards can be implemented administratively, it is necessary that they be underpinned by legislation to ensure their acceptance and compliance. Archival legislation should give an archives specific responsibility to issue, monitor or report on compliance against records management standards.

Best practice requires adherence to standards where they exist. In the current climate of modern management where varying forms of managerial strategies are being adopted within government, it is important for both the government and the people of a country to know there is a level of consistency in the way agencies manage public records. This is especially so with the complexities involved in managing electronic records. Standards help to ensure administrative accountability as well as the protection of corporate and societal memory.

This has been recognised by a number of governments. In Australia, both the New South Wales and South Australian Governments have passed State Record Acts and their respective archival authorities are authorised to issue standards for government agencies in those States. The Queensland and Western Australian Governments have introduced Public Record Bills in their Parliaments and these Bills ensure similar intentions.

6.9 Compliance with standards

CEOs should be responsible for ensuring their agencies' adherence to standards set through legislation. Information is an asset that, when structured, becomes records. Increasingly there is an appreciation that information, like any other asset, needs to be properly managed. Given the extent of current poor information management - as opposed to information technology management - it is vital that this be coordinated at the highest level, with the support of CEOs.

It is helpful if archives develop a range of record-keeping products outlining the need for and value of good record-keeping for all levels of staff within government. This form of marketing aims to elicit agency CEO awareness and support. Once staff understand the requirements for standards it is easier to ask for and check on compliance.

How agencies comply with the standards would be described in the standards themselves. This is the approach adopted by the State Records Authority of NSW, Australia. It has begun issuing standards, each of which has a series of principles and for each principle a set of minimum compliance requirements is given.

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6.10 Monitoring compliance with standards

In Australia, the National Archives of Australia supports the recommendation of the review into the Archives Act 1983, that an external body be responsible for auditing agencies' compliance with standards. Other archival authorities have been given the dual tasks of setting standards and then auditing agencies' compliance. It is the Archives' view that it would be inappropriate to undertake both the standard setting and compliance auditing roles. The Australian National Audit Office (ANAO) has been recommended as the compliancy agency, as it undertakes performance audits of agency practices and has, from time to time, included records management as part of these audits. In so doing, the ANAO has used the Archives' guidelines, together with Australian Standard AS 4390-1996, Records Management. 5 Hence, the Archives sees the ANAO as the logical agency for undertaking this task on a more standard and regular basis.

Conclusions

Archives legislation should deem that it is the responsibility of the archives to set and issue standards and guidelines for the management of records over the record continuum. It should also set specify compliance requirements with national and international professional standards such as ISAD(G) and ISAAR(CPF) as set by the ICA. The legislation should outline mutual obligations associated with the implementation and monitoring of such guidelines and standards within agencies.

6.11 Archives management

Archives legislation traditionally makes reference to the processes of:

- * appraisal
- * disposal
- * sentencing
- * transfer
- * destruction
- * custodial arrangements
- * arrangement and description
- * deposit
- * preservation
- * right of inspection
- * powers of enforcement.

Legislation varies in detail when outlining responsibilities associated with these processes. Often legislation only acknowledges that these processes are the responsibility of the archives and assumes that the detailed instructions regarding them will be issued by the archives in the form of guidelines, manuals, instructions, etc.

6.12 Appraisal

Appraisal these days is considered as being more than just the process of identifying values and retention periods to be applied to records once they exist. In newer appraisal models the need for records is considered in relation to stakeholders' interests and resources, including the need to make records and maintain them in accessible condition to meet business needs, the requirements of organizational accountability and community expectations. Appraisal is conducted within a framework of functional analysis and underpinned by business classification schemes.

The 1985 RAMP report advised that “the law should oblige all bodies producing public records not to destroy without account being taken of long-term research values, and the National Archives must have responsibility for ensuring that such values are identified and that records of research interest are preserved” (r.204).

The appraisal process determines the fate of records hence guidelines explaining the appraisal process and when it needs to occur are required. The legislation should set limits by which time appraisal must have occurred. If appraisal, earlier on in the life of the record, indeed appraisal and sentencing at creation, can be applied it will prevent unnecessary storage of unevaluated records and ensure that archival value records are brought into custody of an archives at the earliest possible opportunity. Indeed, with most electronic records appraisal decisions should be made at the time of systems design if at all possible.

6.13 Disposal

All archival legislation addresses the issue of disposal and generally gives the CEO of the archives or a delegated officer of the archives, powers to:

- * prohibit destruction of public records unless authorized to do so
- * authorize destruction of public records that do not have permanent value
- * approve disposal authorities.

The Queensland Public Records Bill 1999 typifies references made to disposal in legislation. It states “A person must not dispose of a public record unless the record is disposed of under - (a) an authority given by the archivist or the board; or (b) other legal authority, justification or excuse” (s. 13). It is interesting to note that this Bill intends to legislate for independence in relation to disposal decisions. It states: “the archivist, and the staff of the archives, are not subject to the control or direction of a Minister or a department in relation to making decisions about the disposal of public records” (s. 33(1)). The Bill allows for the right of review of the archivist’s decisions about disposal: “A public authority may make written application to the board for a review of a decision made by the archivist refusing to authorize the disposal of particular public records or classes of public record” (s. 36(1-3), s. 37, s. 38).

In Canada, the majority of archival legislation clearly prohibits the destruction or disposal of public records without the consent of the archives of the jurisdiction. The National Archives of Canada Act, Section 5(1), states that “No record under the control of a government institution and no ministerial record, whether or not it is surplus property of a government institution, shall be destroyed or disposed of without the consent of the Archivist”. Section 6 of the Archives Act of the province of Ontario states that “subject to the regulations, no official document, paper, pamphlet or report in the possession of any ministry or branch of the public service or of the Assembly shall be destroyed or permanently removed without the knowledge and concurrence of the Archivist”. Chapter II, Division I, Clause 13 of the province of Quebec’s Archives Act declares that “except as provided in the retention schedule, no person may alienate or dispose of an active or semi-active document of a public body”, a restriction which is repeated in Clause 17 for inactive documents.

Often legislation refers to a ‘records disposal schedule’, meaning a schedule identifying those records of archival value to be preserved, specifying the minimum length of time classes of record should be kept for and authorizing the destruction of remaining records after the lapse of specified retention periods.

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Little has changed in principle regarding disposal since the RAMP report. However, how disposal is applied has changed considerably. Disposal encompasses a range of processes associated with implementing appraisal decisions. These include the retention, deletion or destruction of records in or from record-keeping systems. They may also include the migration or transmission of records between record-keeping systems, and the transfer of custody or ownership of records.

The Bermuda Archives Act 1974 states “Public records and judicial records rejected as not required for permanent preservation may be destroyed only in accordance with the directions given by the Minister under section 6”. (s. 12).

The State Archives Law of Cyprus also contains a prohibition on the unauthorized disposal of public records: “No public record shall be destroyed, nor alienated or disposed of in any manner except as prescribed in section 6 and 9 of this Law.”

Where there have been dramatic changes has been in the application of the disposal process to electronic records. Few archives have had practical experience in applying the disposal process to electronic records, yet a number have legislated for the event.

6.14 Transfer

In the past transfer of records has been understood to involve a change in physical custody of records with or without a change of legal title. This usually meant that the records came under the jurisdiction of the archival administration.

These days custodial arrangements can vary and need to be considered and decided upon before transfer arrangement requirements can be specified. Decisions that impinge on transfer arrangements include:

* Will the archives assume physical custody of records or prefer a distributed custody arrangement or a combination of both?

* If physical transfer of records to the archives occurs, will the archives accept only records deemed to have permanent or historical value, i.e. be an archive repository?

* Or will the archives also take into custody records that are deemed to have shorter periods of life, i.e. act as a records centre for active or inactive records?

With the advent of electronic records the concept of distributed custody has arisen where the records that are deemed as ‘permanent’ need not be physically transferred to the archives but remain as ‘archives’ within the originating agency.

Commonly archival legislation has assumed that an archives will have physical custody of records deemed as archives and hence has made reference to the need for transfer arrangements.

The Bermuda Archives Act 1974 states “Public records which are in the custody of a Department, and judicial records which are in the custody of a court, and which have been selected for permanent preservation, shall be transferred to the Bermuda Archives” (s. 13).

Similarly, the National Archives of Canada Act 1985 assumes physical custody will accompany transfer of records “the records of government institutions and ministerial records that, in the opinion of the Archivist, are of historic or archival importance shall be transferred to the care and control of the Archivist in accordance with such schedules or other agreements for the transfer of records as may be agreed on

between the Archivist and the government institution or person responsible for the record” (s. 6(1)).

National Archives of South Africa Act 1996 allows for the transfer of public records that are and are not covered by disposal authorities

Legislation usually includes provisos relating to transfer directions. A common proviso approach is exemplified by the Bermuda Archives Act 1974 which states “Provided that any such records may be retained by the person responsible for them, if, in his opinion, they are required for administrative purposes or ought to be retained for any other special reason and, where that person is not the Minister, if the Minister has given his approval” (s. 13).

Archival legislation needs to specify if an agency can transfer its records to the archives prior to the fixed period of time for transfer if they are no longer needed by that agency.

6.15 Custodial arrangements

Archival legislation should stipulate the custodial arrangements for records coming under an act. An archives may choose to have all records come to it or it may opt for a more distributed form of custody.

In a distributed custody model the archives custodial arrangements would be confined to that portion of records that have archival value. All other records would be managed and stored - to archive standards - by agencies complying with the archive legislation. In this model it is not mandatory for non-archival records to be in the custody of the archives provided they are managed at all times according to archival standards.

The State Records Act 1998 of New South Wales, Australia allows for distributed custody i.e. a distributed management model. Under this State records still become State archives when ‘control’ passes to the State Records Office. Unlike ‘standard’ transfer arrangements, however, this does not involve the records coming into the custody of the State Records Office. Instead, the records are kept in the custody of another person. In most cases, this is either the responsible public office, or a repository (such as a regional repository) which stores and manages State archives on State Records Office behalf. Before this option can be exercised, though a distributed management agreement must be negotiated.

Often though, custody references in archives legislation make the assumption that custody equates to physical custody as in the Archives of Saskatchewan 1979 which states “The Saskatchewan Archives Board shall be the custodian of all public documents and court records transferred to the archives or hereafter transferred to the board pursuant to this Act” (s. 8(1)).

Custody is a component of good record-keeping, hence policies and practices within agencies must ensure that custodial arrangements are in place, are appropriate to the value of the records concerned and reflect the intent of archival legislation.

If an archives wishes to maintain physical custody of archives, then archival legislation could provide that public records, which are not required as archives, may be deposited elsewhere, in preference to destruction, on the condition that adequate safeguards for access and privacy be maintained. For example, in England and Wales the United Kingdom Public Records Act 1958 provides that “If it appears to the Lord

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Chancellor that a place outside the Public Record Office affords suitable facilities for the safe-keeping and preservation of records and their inspection by the public he may, with the agreement of the authority who will be responsible for records deposited in that place, appoint it as a place of deposit as respects any class of public records selected for permanent preservation under this Act" (s. 4(1)).

Archives legislation could even allow for the sale of public records, not otherwise required for retention as archives. If so, any restrictions a government may wish to impose upon the sale of such public records should be specified in the legislation.

Conclusions

Archival legislation should specify that if records are taken into the custody of the archives, safe custody should then be provided in suitable buildings and in suitable environmental conditions for all (national) archives, from whatever public or non-public source transferred, including archives in audio-visual, machine-readable and all other forms. If distributed custody is chosen, the archival legislation should specify the custodial responsibilities of the holders of the distributed archives.

6.16 Controlling agency status

Legislation should make explicit the relationship of the archives and its status in relation to records where the function cannot be linked to a current agency. The concept of 'controlling agency' is not always addressed in archival legislation. Regardless of their age, an archives does not have administrative (controlling) responsibility for records in its custody, in reality being their 'minder'. This has led to difficult and anomalous situations. First, when an agency is abolished or sold it is sometimes difficult to find a current agency to reattribute responsibility for the former agency's records. Second, with the passage of time and frequent administrative changes, agencies are unaware that they are now responsible for defunct agencies' records and sometimes do not want that responsibility. Lastly, the archives views the situation where agencies continue to have administrative responsibility for archival value records (even those of great age) as both archaic and detrimental to the effective management of the records. Taken to its logical conclusion, it means that an archives is resourcing an activity for something which is the responsibility of others. This notion does not fit modern administration well. Hence the need for archival legislation to address the relationship of 'controlling agency', 'custody' and the archives.

6.17 Arrangement and description

Archival legislation generally does not specify the descriptive standards to use or level of intellectual control required for management of archives or records. Intellectual control requirements are generally issued as an internal instruction or as a guideline for external bodies. However, some legislation does make reference to the need for arrangement and description, namely the Pakistan National Archives Act 1993, which includes reference for the need to describe and arrange all public records and other archival material acquired by the National Archives.

Conclusions

The arrangement and description of archives should be done according to accepted archival principles and methods, which are now embodied in the international standard ISAD(G). 6 Archival legislation can make reference to this requirement as part of the functions of the archives or make it a responsibility of the archivist.

6.18 Deposit of official publications

Generally legal deposit of books and other printed material is regulated outside archival legislation. However, countries need to clarify the role of their national archives versus the role of their national libraries in terms of legal deposit and particularly legal deposit of government publications. A national library may have right to legal deposit but the archives would consider such publications (in whatever format) as government records.

6.19 Preservation

The 1985 RAMP report stated “The first responsibility of the National Archives, and indeed of any archival institution, is the safe custody in suitable buildings and environmental conditions of all archives. Legislation should authorize the National Archives to provide for facilities for the repair and conservation of archival material. The regulations should lay down security measures” (r.207).

The intent of this recommendation is still as relevant today as in 1985 and legislation generally accommodates its intent.

6.20 Right of inspection

The RAMP 1985 report stated that “The legal link between records management and the Archives is formed by giving the latter a right of inspection, not only regarding the disposal of records, but, in principle, of all records management functions and operations involved with current and semi-current records. Inspection is useless without a provision for sanctions as an ultimate remedy”.

The intent of the above guideline is still very applicable today and generally included in legislation. Archives legislation generally vests in the Archivist or a delegate of the Archivist, a general right to inspect public records held by public authorities. Archival legislation must also address the general right of inspection of the records of the Parliament and of the courts. Many acts do address this, however the issue of right of inspection of electronic records held in the custody of agencies has not been fully addressed as yet.

6.21 Powers of enforcement

Archives legislation may explicitly provide that, in addition or as an alternative to the commission of a criminal offence, a public servant who fails to comply with a requirement of archival legislation commits a disciplinary offence.

6.22 Ministerial, parliamentary, court and royal commission records

Legislation should outline provisions for ministerial records as well as records of Parliament, the courts and royal commissions. For the most part these records should be treated in a similar fashion to other government records outlined in the legislation.

An act should make it sufficiently clear that records created by ministers in the course of official business are public records and hence subject to the disposal and access provisions of archival legislation.

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The records held in the office of a minister may be divided into four categories: departmental records, cabinet documents, personal or political records and ministerial records. Archive legislation needs to clarify which of these categories are covered by an archives act. In Australia records that fall within the first two of these categories would be collected and preserved under 'public record' based archival legislation. Yet the personal or political records of a minister, and other records produced by the minister but not under the control of a public authority ('ministerial record') would not come within the scope of the archival legislation.

The legislation needs to specify whether the personal records of a minister constitute records of a public authority or not.

Conclusions

It is important that the impact of decisions regarding the above points (6.18 - 6.22) be properly assessed prior to choosing final options for inclusion into legislation.



Impact of other legislation

7.1 Freedom of information

Given that freedom of information (FOI) legislation governs access to current public records, there should be a complementary right of access to non-current records, whether these non-current records are held by the archives or another body.

If right of access to the public record is provided under archival legislation, the question to answer is, should such rights of access apply

* to all records in the open access period regardless of whether they have been transferred to the archives or

* only to those records which have been transferred to archives by the time they reach the open access period, in which case those records which have not yet been transferred to the archives would be accessible under FOI legislation in Australia, the review report into the Archives Act 1983 made a number of recommendations concerning freedom of information legislation, the most notable being an extension of the coverage of the Freedom of Information Act 1982 in order to eliminate the gap between it and archival legislation (r.103). At present, access under the Freedom of Information Act applies in general to records created after 1977, whereas access under the Archives Act applies to records more than 30 years old, currently those created up to 1969. The resultant gap, although diminishing every year, will remain until 2007. This recommendation, while supported by the Archives, affects the Freedom of Information Act (administered by the Attorney-General's Department) and not the Archives Act.

In Canada, archival and freedom of information legislation are separate from each other, but complementary in many ways. In one case, that of the Yukon Territory, the Archivist administers both the Archives Act and the Access to Information and Protection of Privacy Act. Initial requests for information are assessed by the Territorial Archivist whether the information is in the archives or not; this is perceived as a strength of the legislation, as it ensures the consistency in application of the law, continuous liaison with the Information and Privacy Commissioners on reviews and inquiries, and the consideration of a full range of records in fulfilling requests.

7.2 Privacy

In Canada, the protection of privacy is often encompassed in the same law as Freedom of Information relating to the records of public bodies. There are also several examples of the protection of information in the private sector, notably the province of Quebec's Act Respecting the Protection of Personal Information in the Private Sector (R.S.Q., c. P-39.1), and the newly enacted federal Personal Information Protection and Electronic Documents Act (S.C.2000, c.5).

7.3 Evidence

The Amendments to the Canada Evidence Act 1998 specifies that good record-keeping must be in place in order to admit electronic evidence. These issues are not picked up or made reference to in the Canada Archives Act 1985. In Section 56 of the Amendment of the Canada Evidence Act, where the authentication of electronic documents and application of best evidence rule for electronic documents is addressed the following statement is included: "Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be" (s. 56; s. 31.1). Followed by "the best evidence rule in respect of an electronic document is satisfied:

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- * On proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
- * If an evidentiary presumption established under section 31.4 applies”.

7.4 Other acts

In Australia the Census Information Legislation Bill 1999 has passed both Houses of Parliament and is expected to receive Royal Assent. This legislation does two things:

- * It gives people the choice of determining whether their 2001 census return will be retained as a 'gift to the nation' and made publicly available after 99 years (the census will take place on Tuesday, 7 August 2001).
- * When passed it also formally changes the name of the Australian Archives to the National Archives of Australia.

Access to public records

The Australian Law Reform Commission report on the review of the Archives Act 1983 of the Commonwealth of Australia stated “The fundamental premise from which any consideration of access rights should flow is that the records of government are created and held in trust for the people. It necessarily follows that any limitation or qualification that the legislation places on the right of access by individuals to the records of their government must be justified on carefully and narrowly defined grounds that serve the interests of the nation as a whole” (s. 51.4). The report also felt that access is such an important issue that the right to access and the means by which it is to be enforced, need to be clearly established in primary legislation.

In addressing access to public records archival legislation can address the following:

- * provision of public access
- * open access period
- * tiered access
- * special access
- * accessibility within the distributed custody model
- * access to non-current records
- * access to non-public records
- * issues of ethics of public records disclosure
- * access exempt categories
- * discretionary release of closed period and exempt records
- * sunset clauses
- * permanent exemptions
- * security and intelligence records
- * appeal provisions
- * charging for services
- * provision of finding aids
- * recovery of records and acceptance of private papers.

The RAMP 1985 report outlined that the following functions in relation to access be statutory (r.194):

- * the provision of means of reference by whatever means are available and appropriate in order to facilitate access to archives and the retrieval of information in them
- * the provision of search or reference rooms in which suitable facilities are available for the inspection of archives which are lawfully open to the public, and the provision of other reference services (for dealing with postal inquiries, etc) which are necessary
- * the provision of facilities for making copies of archives by photographic or other reprographic processes, and for selling such copies
- * the provision of facilities for the repair and conservation of archival material of all kinds by appropriate methods
- * the publication of guides, texts, calendars, inventories, finding-aids and only other works suitable for publication prepared by staff of the archives or commissioned by the archives
- * the promotion of the educational value of archives in appropriate ways including the preparation of exhibitions and the loan of documents to exhibitions organized by other institutions.

The functions and obligations of an archives in relation to the access services it provides have changed little. The above list still characterizes the archival services listed in more modern legislation. However the electronic environment will require that archives consider access conditions to records and archives in digital form and that

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access clauses in newly drafted legislation reflect those decisions. The access regime therefore should apply to all records regardless of medium. Development of legislation and administrative procedures should take into consideration the need to encompass all record media.

8.1 Provision of public access

Archival legislation needs to spell out the right of access by the general public to government records and at what time such records will become available. If a distributed custodial regime is incorporated into legislation, then a distributed public access regime is needed to complement such arrangements.

The highest of record-keeping standards are of little value unless complemented by an effective and equitable public access regime. In addition, agencies must be assured that sensitive information can be protected where necessary.

Equitable public access and reliable protection of sensitive information derive from consistent, informed and soundly based decision making regarding access. This may be best achieved if access is centrally authorized by an archives with core responsibility for access clearance. It is appropriate that consultation with agencies over particularly sensitive access issues be in place but overall responsibility for access decisions should be with the archives.

Legislation should contain a clear statement outlining who has responsibility for access decisions. Many professionals feel that the responsibility best lies with the archives whilst acknowledging the vital role other stakeholders have in advising the archives on access matters. If this is the case, legislation should reflect this, as well as make provision that arrangements be made, at agency level, for agencies to provide advice to the archives on access issues involving records controlled by those agencies.

Some present legislation vests the power of restricting public access to public archives or public records to certain ministers of government rather than vesting it completely in the archivist, e.g. the Western Samoan Archives Bill 1997 (s. 25; s. 27).

Linking in to the distributed custody model, it would be reasonable that access applications, decisions and appeals to open period non-archival value records could be determined in accordance with the custodial arrangements for the records concerned. If the records are in agency custody, the agency would have responsibility for dealing with such requests in accordance with an archives' standards and guidelines. If they are in an archives' custody, then the archives would be responsible.

Most present legislation makes the general statement that all archives shall be made publicly available in accordance with the provisions contained within that act. Legislation then immediately qualifies that statement by outlining the exemptions to open access. A simple illustration of this is given in the National Library and Archives Act 1993 of Papua New Guinea: "Subject to this section and to any conditions or regulations relating to their transfer, deposit or use, all archives shall be made available at reasonable times to any person in accordance with the provisions of this Act. The director-General may refuse access to certain categories of archives by reason of

- (a) public policy; or
- (b) the personal nature of the archives; or

- (c) the fragility of the archives; or
- (d) the need for organization of the archives” (s. 34(1)&(2)).

Most acts assume access will be to paper records. Some acts are addressing the issue of provision of access to records of different format. The Public Records Bill 1999 of Queensland in Sections 14(1) and (2) under ‘Public authority must ensure particular records remain accessible’ states that “The public authority controlling the record must take all reasonable action to ensure the information remains able to be produced or made available”. This is further developed in Sections 19(1) to (6) to hear or view records in multimedia format as well as have access to electronic records.

Generally the access provisions and exemptions to archives and records are covered in a consolidated piece of legislation covering all aspects of archives. Canadian legislation is different in that it has the National Archives of Canada Act 1985, an act addressing the records of government institutions of Canada, and an Access to Information Act. The purpose of the Access to Information Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government. The intent of this act is to provide for access to records in the custody of government departments.

The Access to Information Act of Canada is a further example of legislation attempting to grips with access to electronic information and records over time (s.3).

8.2 Open access period

The archival period adopted in most Commonwealth countries, and many other countries, is one of closed access for 30 years in respect of public records (the ‘thirty-year rule’). Although an archival period of 30 years is the norm, it is not without exception. The National Archives of South Africa Act 1996, the Free State Provincial Archives Act 1999 and the Mpumalanga Archives Act 1998, make records publicly available after 20 years. The National Archives Bill 1999 of Malaysia makes records publicly available after 25 years.

Historic reasons for picking this archival period included:

- * protection of privacy of record creators
- * defence and political sensitivity reasons
- * administrative efficiency.

Reasons for longer archival periods are being challenged these days and shorter archival periods are being proposed within Australia, by the Australian Capital Territory.

Prior to the passage of the Access to Information Act in 1983, the Canadian federal government operated with the 30-year rule governing access to its records, both within and outside the National Archives. With the provisions of the ATI Act, which includes specified exemptions on release of information, the thirty-year rule is no longer applied. There are some specified access periods on certain records, such as those relating to the operations of government where the records have been created less than twenty years earlier (s. 21).

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8.2.1 Commencement of 'archival period'

The date of the archival period can be determined either from the date of 'last dealing' or be measured from the end of a calendar year during which a record came into existence.

The choice of an appropriate date determines the open access period and mandatory transfer to an archives of records if physical custody is required.

The Malaysian Archives Bill 1999 states: "public archives shall be made available to the public after twenty five years from the date of conclusion of the record or material forming the public archives or such a period as the Director General may prescribe". (s. 37(1)). An alternative is provided by the Public Records Act 1999 of the Isle of Man, which sets the 'archival period' at 30 years with the commencement period beginning with the 1st January in the year following that in which the records were created (s. 10(a)&(b)).

8.3 Tiered access

In Australia the Australian Law Reform Commission (ALRC), reviewed the Commonwealth's archives legislation, and in doing so considered a tiered system of access periods for records, where some of the categories of records would be released sooner after their creation than other. The ALRC concluded that such a system would be too resource intensive and confusing to be practicable. The difficulties the ALRC identified related to defining the difference between personal, administrative and other types of information that might be dealt with differently under a tiered access system.

8.4 Accelerated access

Archives legislation can allow for early or accelerated access in which a class of records can be made available for public access prior to that class reaching the open access period. Archival legislation must state that this is allowable and define under what circumstances such special rights of access should be available and under whose authority. This may mean that accelerated access can be given to records to the extent that the CEO of a public authority may have authorised immediate public access to specified records upon transfer.

8.5 Special access

Archival legislation can allow for exception be made to the general open access periods in the case of bona fide research conducted by a person authorized in writing by the CEO of the relevant public authority. Special access may be provided to records not yet available for open access or which would otherwise be withheld from access by virtue of exemption provisions contained in the legislation.

Where special access is granted, conditions may be imposed on that access, such as the requirement that a manuscript prepared on resource material gained through special access be submitted to the archives for clearance prior to publication. Generally the legislation specifies that conditions apply to special access and requires a person granted special access to observe such conditions.

In Canada, several FOI acts contain provisions that allow for the disclosure of personal information for the purposes of historical or statistical research. The federal Privacy Act, Section 8(2)(i) permits the disclosure of personal information to the National Archives, while Section 8(2)(j) permits the release of personal information to any person “for research or statistical purposes if the head of the government institution... is satisfied that that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and ...obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates”. This type of permitted disclosure is found in other jurisdictions, such as the provinces of Alberta (Sections 40 and 41 of the Freedom of Information and the Protection of Privacy Act) and British Columbia (Sections 35 and 36 of the Freedom of Information and the Protection of Privacy Act).

8.6 Access to non-current records

Subject to certain specific exemptions necessary to protect public and private interests, FOI legislation generally gives right of access to information relating to the personal affairs of an applicant contained in records of any age, and to non-personal affairs information contained in records created after a point in time which is no further back than 5 years before the commencement of the legislation.

Unlike FOI legislation, archives legislation does not generally give access to non-current records except where exemptions apply.

There are essential differences between FOI legislation, which essentially seeks to provide access to current public records, and archival legislation which reflects the public interest in the preservation of older records and in benefits in administrative efficiency and the accountability of public administration which accrue as a result of effective records management. Accordingly, it is necessary to determine whether it is more appropriate to provide access to non-current public records under FOI legislation or under separate archival legislation.

Archival legislation operates so as to allow the release of public records for general inspection by the public in advance of any request for access. Under FOI legislation a particular public record is not available for access or inspection until a request has been lodged and a decision made in relation to that record.

The selection of an appropriate model for the integration of rights of access under archival legislation and FOI legislation is critical. When drafting archival legislation it is important to know in relation to a general right of access in respect of all public records whether such a right should be conferred under archival legislation or FOI legislation.

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8.7 Access to non-public records

Some legislation is specific about access to non-governmental records, whereas others make general statements such as the National Archives of South Africa Act, 1996 which states: "A non-public record in the custody of the National Archives shall be available for public access subject to any conditions agreed upon at its acquisition in terms of section 14(1) of this Act" (s. 12(2)).

The Western Australian State Records Bill 1999 states that "If a record is not a State archive, any right that a person may have to be given access to it is to be determined under the FOI Act" (s. 44).

8.8 Access to exempt categories

Legislation which creates rights of access to public records commonly provides that records containing certain specified kinds of information may be exempt from mandatory access. Such exemption provisions attempt to balance the public interest in providing a right of access to information held by government against the need to protect certain other public and private interests.

Archival legislation can set the criteria for grounds for exemption or it can vest a general discretion in the CEO of a public authority to impose prohibitions, conditions or restrictions on access. Legislation can more specifically provide that the CEO may impose such prohibitions, conditions or restrictions if records contain information, the disclosure of which is legally prohibited or restricted, may be prejudicial to the public interest, or may adversely affect the privacy of any person. Accordingly, when the records of a public authority are transferred to an archives, the CEO of that authority stipulates which of those records should be withheld from access, and any conditions on which all other transferred records are to be made available for public access.

Archival legislation access exemptions apply both to records in the open access period and those in the closed period. Exemption categories vary between different countries, as example the Queensland State (Australia) Public Records Bill 1999 states: "the archivist may refuse to allow access to a public record if -

- (a) giving access to the record would be detrimental to its preservation; or
- (b) the record is reasonably available for purchase by members of the community under arrangements made by a public authority, or
- (c) information in the record can be produced or made available only with the use of particular equipment or information technology and the archives does not possess, and can not reasonably obtain access to, the equipment or information technology; or
- (d) giving access to the record is restricted under a regulation under subsection (4)".

It further states that "Access to a public record may be restricted under a regulation if-

- (a) the record is more than 100 years old; and
- (b) the record contains information concerning the personal affairs of a person; and
- (c) access to the record would not, on balance, be in the public interest" (s. 18(3) and (4)).

With the advent of FOI and the passage of time, exemption from access provisions held within the FOI legislation and those of archive legislation may be reconciled.

Examples of access exemption categories recommended by the Australian Law Reform Commission (ALRC) in its review of the Archives Act 1983 are:

* Inserting a provision to require consultation with a person to whom an obligation of confidence is owed in relation to both the current s. 33(1)(d) (information or matter the disclosure of which would constitute a breach of confidence), and the current s. 33(1)(b) (information supplied in confidence by a foreign government, an authority of a foreign government or an international organization) [r.157]. The National Archives is opposed to this requirement given the difficulty of contacting people after 30 or more years. In certain circumstances the Archives does of course consult, but imposing a legislative requirement to do so is impractical.

* A new sub-section to be added to the Act allowing for exemption from public access of confidential or restricted material about Indigenous people. While existing exemption categories have been used to protect sensitive material, a new category would give due recognition to the importance and sensitivity of such material and ensure restricted public access where appropriate.

* A legislative addition of a sunset clause whereby all exemptions, excluding those relating to Indigenous matters, lapse 100 years after the creation of the record [r.170]. The Archives supports this recommendation. At present, access exemptions remain in place indefinitely. There is no automatic process for their removal and they can only be reviewed by future public request. It is considered that 100 years is more than sufficient for any sensitivity to have been extinguished.

In Canada, the majority of freedom of information acts list exemptions for the disclosure of information covering subjects such as personal privacy, third party information, public safety, law enforcement, intergovernmental relations, national security, Cabinet documents, financial interests of government, and information which will be published shortly. Several jurisdictions, notably the federal government, British Columbia, Alberta, Saskatchewan, Manitoba and Ontario, have specific exemptions to permit the release of personal information for research purposes (some examples of these exemptions are given under section 8.5 above).

Non-disclosure Provisions in Archives and Other Legislation

The report of the Australian Law Reform Commission (ALRC) recommends that archival legislation should clearly state that non-disclosure provisions in other legislation should not override the public access provisions of the archives legislation unless expressly provided for in the legislation concerned [r.108]. On a number of occasions agencies have questioned whether the public access provisions of the Archives Act supersede secrecy provisions in other legislation. This has led to lengthy and costly delays while clarifying legal advice has been sought. A clear statement that the Archives Act overrides the secrecy provisions in other legislation, unless the latter states that the opposite is true, will end the confusion and delays.

Cabinet Notebooks

The report states that Cabinet notebooks, presently restricted from public access for 50 years, should be subject to public access after 30 years - the same as other records [r171]. The Archives supports this recommendation. Existing knowledge, gained from providing access to War Cabinet notebooks, has shown that there is little within the books likely to require restriction after 30 years.

Ministerial Certificates

The report makes a number of recommendations concerning ministerial certificates. Under Section 34 of the Act a minister may issue a certificate stating that certain records relating to defence, security or foreign relations matters are exempt from the

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access provisions of the Act. The report confirms these arrangements but recommends that a new category of ministerial certificate be included, i.e. information that, under Indigenous tradition, is confidential or subject to particular disclosure restrictions [r.172].

Currently, ministerial certificates remain in force indefinitely; there is no automatic process for their revocation. The report recommends that all certificates be renewable every five years and lapse where the records concerned are over 100 years old [r.173].

8.9 Discretionary release of closed period and exempt records

Archives legislation can confer on the archives right of discretionary release of records within the closed period or exempt records. This is to allow early access to certain types of record that do not have any sensitivity and should not have to wait until the fixed archival period has elapsed before their public release. In Australia the ALRC has made such a recommendation. As well as confirming public accessibility to records after 30 years, the report exhorts both the National Archives and controlling agencies to use their discretionary powers to release records at the earliest possible time (r.130-136).

At present, release of closed period records (or release of exempt open period records) can occur through Sections 56 and 58 of the Australian Commonwealth Archives Act 1983. Formal release of whole classes of records, e.g. royal commission records, occurs through Section 56(1) after approval by the Prime Minister. Less formal, special access can be given to former politicians and scholars by controlling agencies through Section 56(2). Agencies can also utilize Section 58 of the Act as this basically gives them the authority to release records whenever and to whomever they choose.

The ARLC report recommendations aim to streamline present arrangements so that agencies, not the Prime Minister, can facilitate ready access to significant groups of closed period records. The report also recommends that the Archives be given a statutory obligation to produce guidelines on such schemes. The Archives supports these recommendations, while noting that they will involve the organization in a new area of responsibility encompassing closed period activities. As the intent of these recommendations is to generally increase the volume of records becoming publicly available, the Archives would need to consult widely with agencies in order to develop the requisite guidelines.

The Public Records Bill 1999 of Queensland, Australia allows for access to records in the restricted access period under the following conditions: "if (a) access is obtained under the FOI Act; or (b) the responsible public authority classifies the record as a record to which unrestricted access is allowed".

A complementary issue to early release schemes is the matter of protection against defamation, breach of confidence and infringement of copyright. At present, persons authorizing the release of closed period records under Section 56 of the Act are protected through Section 57 provisions. Agencies using Section 58 of the Act are not similarly protected and the report recommends that this be remedied through an amendment to Section 57.

When legislation sets restricted access categories, it will generally outline access exemptions allowable to the restricted records. An example being access exemption outlined in the Western Australian State Records Bill 1999 to limited access medical records. The act states: “A person is not entitled under section 45(3), 47(2) or 48(5) person’s disability (as defined in the Disability Services Act 1993) unless –

- (a) the other person has consented to the person being given access; or to have access to a State archive that contains information about another person’s medical condition or about another
- (b) that information is in a form that does not (i) disclose the identity of the other person; or
- (c) enable the identity of the other person to be ascertained” (s.49.(1)(a) and (b)). A further exemption to the above is that “Subsection (1) does not apply to a State archive that is at least 100 years old” (s. 49(2)).

8.10 Sunset clauses

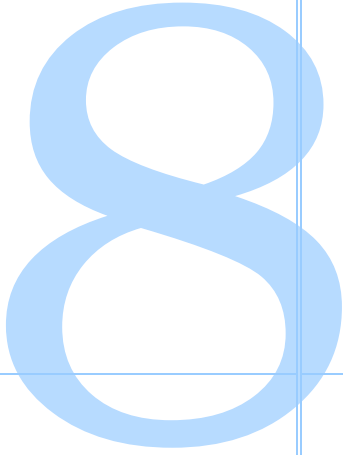
No document’s release should be delayed for more than a specified time under proposed legislation. The choice of a final date after which no document is withheld from public access needs to be a careful one, particularly where matters of inter-government relations or personal privacy may be involved. In Australia the ALRC recommended a 100-year sunset clause for the Australian Commonwealth records, and this is consistent with provisions in New South Wales and the United Kingdom.

8.11 Permanent exemptions

There is often public and professional opposition to permanent restriction on public access to any record. There would be very few subjects of such sensitivity to a government or individual that they would justify such records never being released. A number of jurisdictions have sunset clauses under which no record, however sensitive it may have originally been, may be withheld from public access . In Australia the ALRC identified Indigenous secret/sacred material as the only information, which should be exempted from the sunset clause, proposed for the Commonwealth’s archival legislation. The Commonwealth Standing Committee on Legal and Constitutional Affairs recently recommended that name identified census records be released after 100 years, despite a large degree of concern about privacy relating to these records.

The Western Australian State Records Bill 1999 has a section on archives containing exceptionally sensitive information in which it states: “If the Commission is satisfied on an application made under subsection (3) that a State archive that is not a parliamentary record contains information of such exceptional sensitivity that there should not be a right to be given access to it under section 47, the Commission may direct that it is an exceptionally sensitive archive. If the Commission makes such a direction it must set the age of the archive at which, or the event on the occurrence of which, it will cease to be an exceptionally sensitive archive’. (s. 48(1) and (2)).

Archives legislation generally allows the exemption from public access provisions of private information for as long as it remains sensitive, regardless of the nominal date of release and the nature of the record in which the information is found. It may be appropriate to make a permanent determination that a record is not subject to early release as an executive document where other mechanisms are in place to allow later release under other public records provisions. However, integrated and comprehensive archives legislation should make it easier to manage such distinctions



between sensitive and non-sensitive information without the need for permanent exemptions.

Access to government records needs to take place within agreed and transparent guidelines. While the exemption categories embodied in legislation need to be broad so as not to cause confusion or unnecessarily preclude some circumstance, more specific guidance needs to be provided for decision-makers. The term 'public interest' in particular is open to broad interpretation and possible misuse. Guidance on the application of exemption provisions needs to be flexible in order to accommodate evolving community standards and expectations with respect to release of public.

8.12 Security and intelligence records

The legislation should make reference to the status of archival value records of security or intelligence agencies. Generally records created by intelligence agencies come within the disposal and access provisions of the archival legislation.

Security and intelligence agencies must be assured that sensitive information will be protected where necessary and archival legislation should provide such protection including external reviews conducted by bodies such as the Administrative Appeals Tribunal in Australia.

8.13 Appeal provisions

Archival legislation should allow for rights of appeal in respect of a decision refusing or restricting access to a document in the open access period. FOI legislation would also have similar clauses.

This is the case with the majority of FOI legislation in Canada. Rights of appeal are laid out within each law, and usually involve an Information Commissioner, and potentially the courts. In the United Kingdom, the Freedom of Information Act 2000, part V, covers the appeal process.

The ability to appeal government decisions is fundamental to democratic accountability. An appeals provision also helps to overcome inconsistencies between decision-makers and provide equitable access to all records for all citizens.

Decisions need to be made regarding who will be the appeal body. It could be an internal reconsideration or the appeal consideration could be brought before an independent external body. If so, the legislation must specify whom that person or body is that holds right of external appeal. In Australia at Commonwealth level, the Administrative Appeals Tribunal is the appeal body under the Archives Act 1983.

8.14 Charging for services

If an archives intends charging for service provided to the public, archival legislation should extend that right to the CEO or the archives. It would be an internal matter for the archives, and not a legislative matter, to determine which services would incur a charge, when it was to be introduced, and what charges would be appropriate, and how charges would be collected.

8.15 Provision of finding aids

Some archival legislation prescribes the type of finding aids an organization should prepare. Others do not. Generally it is sufficient for archival legislation to note that the archives should produce and promote finding aids appropriate to the collection they have management over. Generally the term 'finding aid' does not get defined in legislation as what constitutes a finding aid changes over time.

In Australia under the present Archives Act 1983, the National Archives is required to maintain three distinct finding aids: the Australian National Register of Records (s. 65), the Australian National Guide to Archival Material (s. 66), and the Australian National Register of Research involving Archives (s. 67). In the review of that legislation it is recommended that the new archival legislation should simply state that the Archives create and promote finding aids appropriate to the formats of the records, rather than specify what these finding aids should be [r.149].

9

Preservation

9.1 Preservation and record safety

Archival legislation endeavors to protect records from willful damage, when accessed, by imposition of penalties. The National Archives of South Africa Act 1996 outlines a series of such penalties in Sections 16 (1) to (3). The 1997 Regulation under the Act goes into detail, e.g. "When consulting records a user shall observe all instructions pertaining to the handling of records laid down by the head of an archives repository" (s. 18(1)) and "Without limiting the generality of sub-regulation (1) -

- (a) the greatest care in handling records shall at all times be exercised;
- (b) the order of the records shall not be disturbed;
- (c) any damage to a record or disturbance in the order of records found or discovered by a user shall be reported to the reading room supervisor;
- (d) writing or making of any mark on any record is prohibited
- (e) the use of fountain pens is prohibited
- (f) no bags, receptacles or containers of any kind may be retained in a reading room" (s.18(2)).

9.2 Reproduction of records

Some legislation outlines a country's stance on reproduction of public records and state copyright. The Malaysian Archives Bill 1999 states: "No person may reproduce or publish in whole or in part the contents of any public archives except-

- (a) with the prior written consent of the Director General;
- (b) in accordance with such terms and conditions as may be prescribed; and
- (c) upon payment of such fees as may be prescribed" (s. 39(1)).

Miscellaneous

10.1 Regulations

The authority to make regulations to augment an act needs to be set out in the proposed legislation. Most archival acts authorize the subsequent development of secondary legislation. The Bermuda Archives Act 1974 illustrates this in stating “The Minister may make regulations for any matter which may be prescribed under this Act and generally for the better carrying out of the objects and purposes of this Act” (s. 15(1)).

10.2 Admissibility of examined or certified copy of records

The Bermuda Archives Act 1974 states that “a copy or extract from any record, book or document in the custody of the Bermuda Archives and purporting to be examined and certified as true and authentic by the Archivist or other officer of the Bermuda Archives and to be sealed or stamped with the seal of the Bermuda Archives shall be admissible as evidence in any proceedings without any further or other proof thereof if the original record, book or document would have been admissible in evidence in those proceedings” (s. 14).

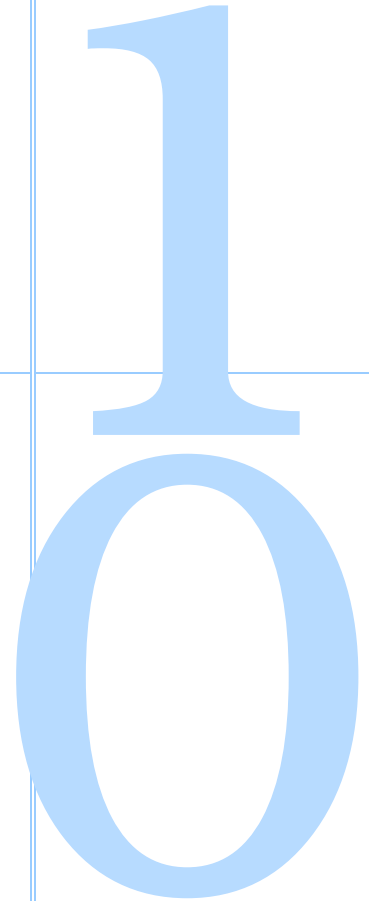
The Samoan Archives Bill 1997 has a similar intent.

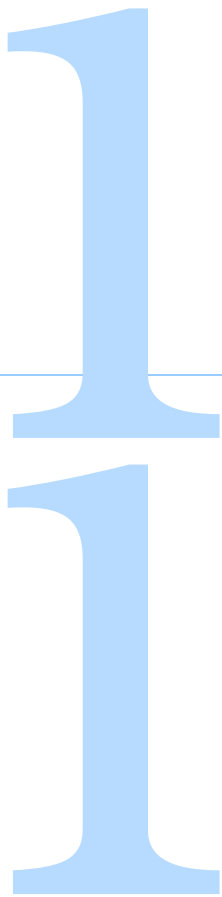
10.3 State copyright in unpublished open period records

Archival legislation should allow for administrative arrangement to be established to enable an archives to have primary responsibility for administering state or ‘Crown’ copyright in unpublished public records that are in the open period.

Generally, members of the public wanting copyright approval for such records have to consult with the agency that created the records or its successor, which then determines the outcome. Frequent administrative changes make it difficult to locate the relevant agency and even when this has been achieved the latter may not be aware of, or even interested in, the fact that certain records are its administrative responsibility.

This right could be restricted or limited to archival value records only. This right would greatly simplify copyright matters for the public, agencies and the archives itself.





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Annex 1

Archival Legislation Decision Impact Assessment Tables (See Section 1.12)

The following tables illustrate the decision process involved in deriving best-fit/best-practice archival legislation. They were used as slides at the ACARM Workshop on Archival Legislation, ICA Congress, Seville, 2000.

The graphics acknowledge the support given to this project by the National Archives of Australia.

The decisions made by each country regarding the preferred management of its records and archives will be different. The precise form that legislation will take in a country will be influenced by the country's formal constitution and constitutional conventions. The legislation will also be guided by the general political, economic, social, cultural and administrative environment; by existing records and archives legislation; and by the general level of records and archival development. These conditions will influence the decisions reached regarding the content of archival legislation being drafted.

In developing legislation a series of important decisions should be made in key areas to ensure the product meets the needs of an individual organization or nation. The impact of decision alternatives should be understood and assessed and taken into consideration when formulating a solution. Developing legislation is not merely a case of following a set of 'best-practice' guidelines.

Archivists can learn from scientists' 'environment impact assessment' methodologies, where the significance of impacts arising out of decision options are assessed prior to formulation of a final solution. Decisions are not made arbitrarily but are considered. If archivists were to adopt a similar methodology, the impact of decision options on:

- * the archives
- * the profession
- * the client community
- * the general community
- * stakeholders
- * the political environment
- * the cultural environment;

would be carefully assessed and taken into account prior to development of the final legislative framework.

The decision tables illustrate some of the high level decisions that need to be considered in the context of their impact on various audiences prior to the development of the final legislative framework.

[TABLES FOLLOW]

Archival legislation decision tables for archival best practice legislation

Decision making process involved in arriving at:

- *Best fit
- *Best practice

Legislation that:

- *identifies and legislates the role and responsibilities an archives will have to a countries records, and
- *the services it will provide

Emergent issues that impact on legislation

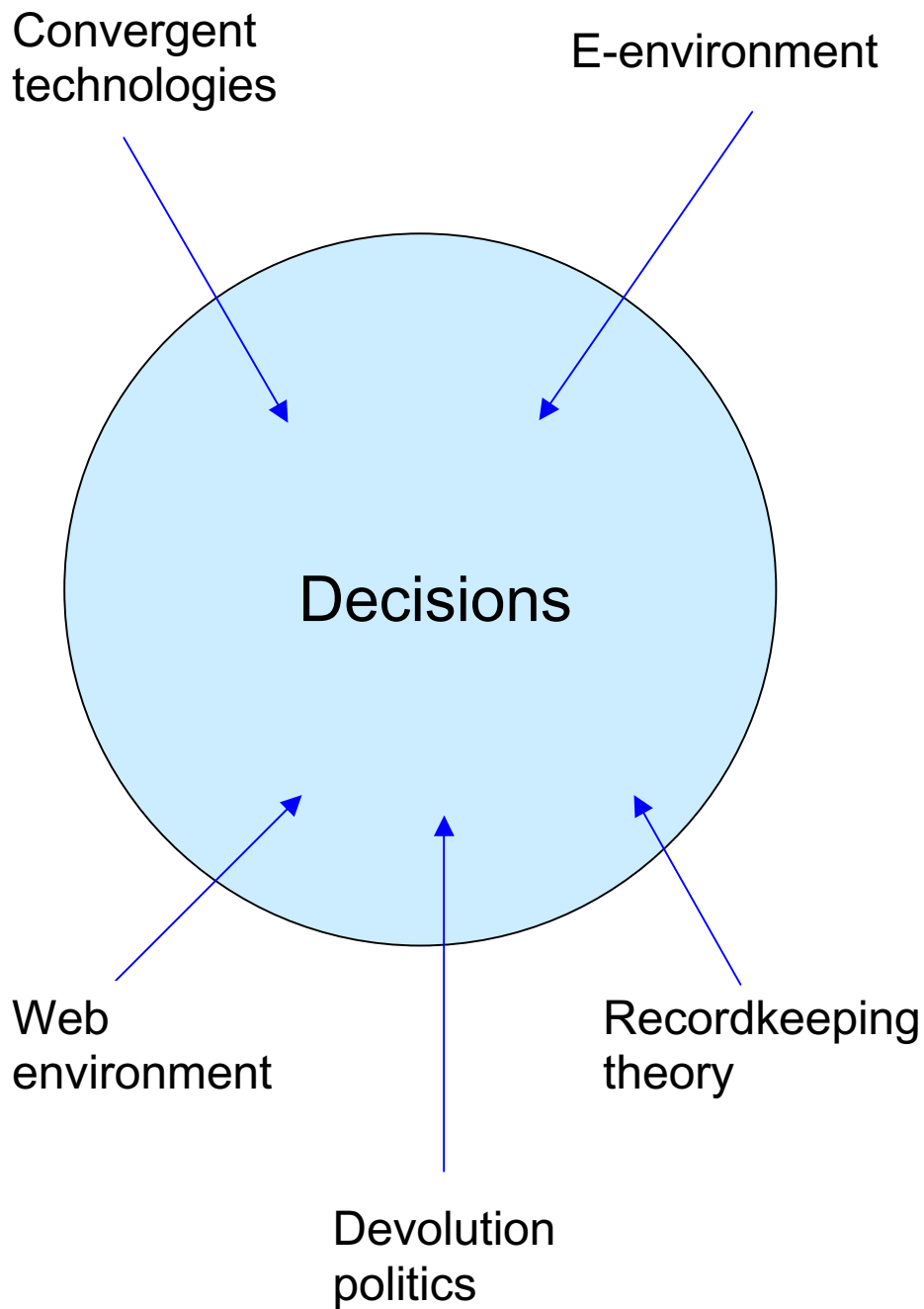
- * electronic environment
- * web environment
- * knowledge management
- * information management
- * record-keeping principles
- * developing standards

Archival legislation and the decision process

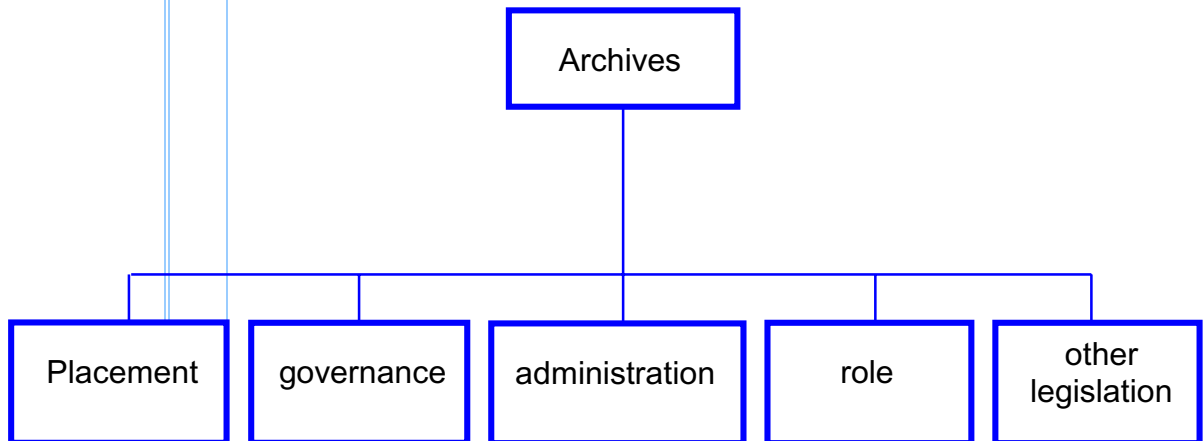
*Decisions

- * placement
- * governance
- * administration
- * roles & responsibilities
- * services
- * other legislation

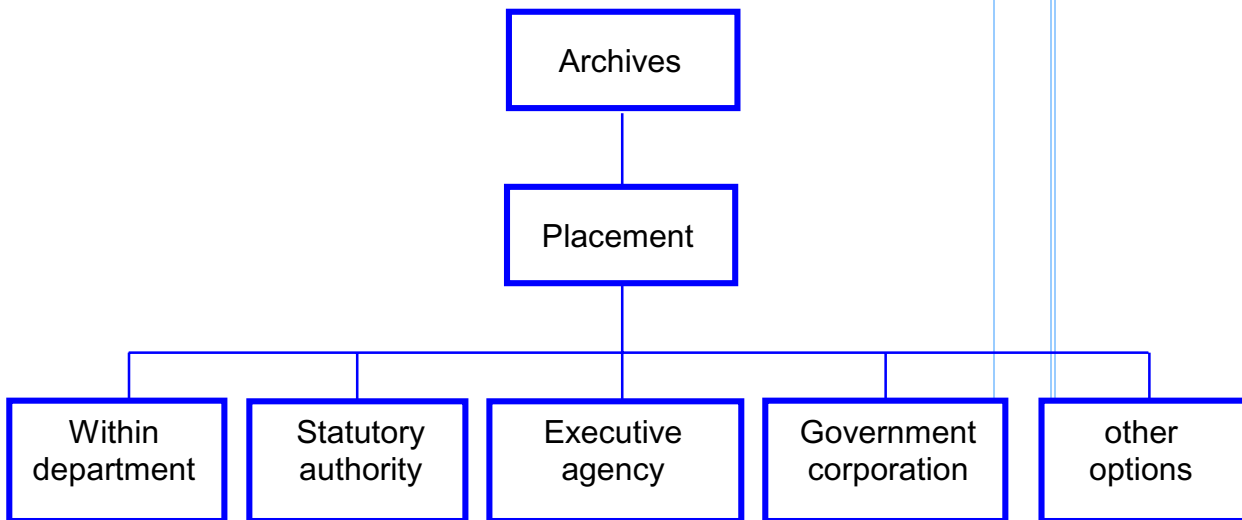
Emergent issues impact the decision process



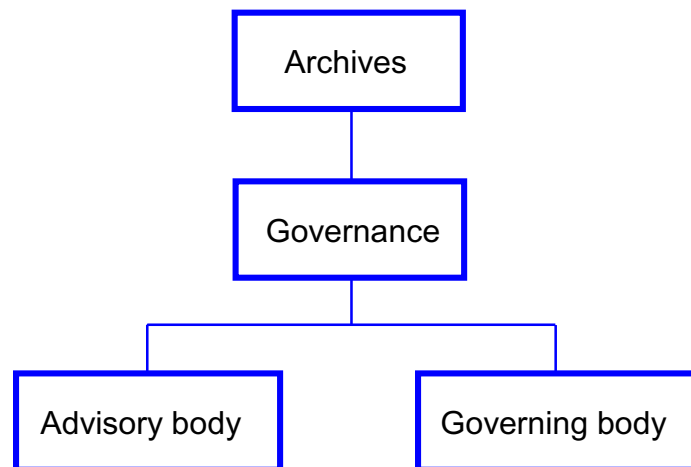
The decision process



Decisions about placement



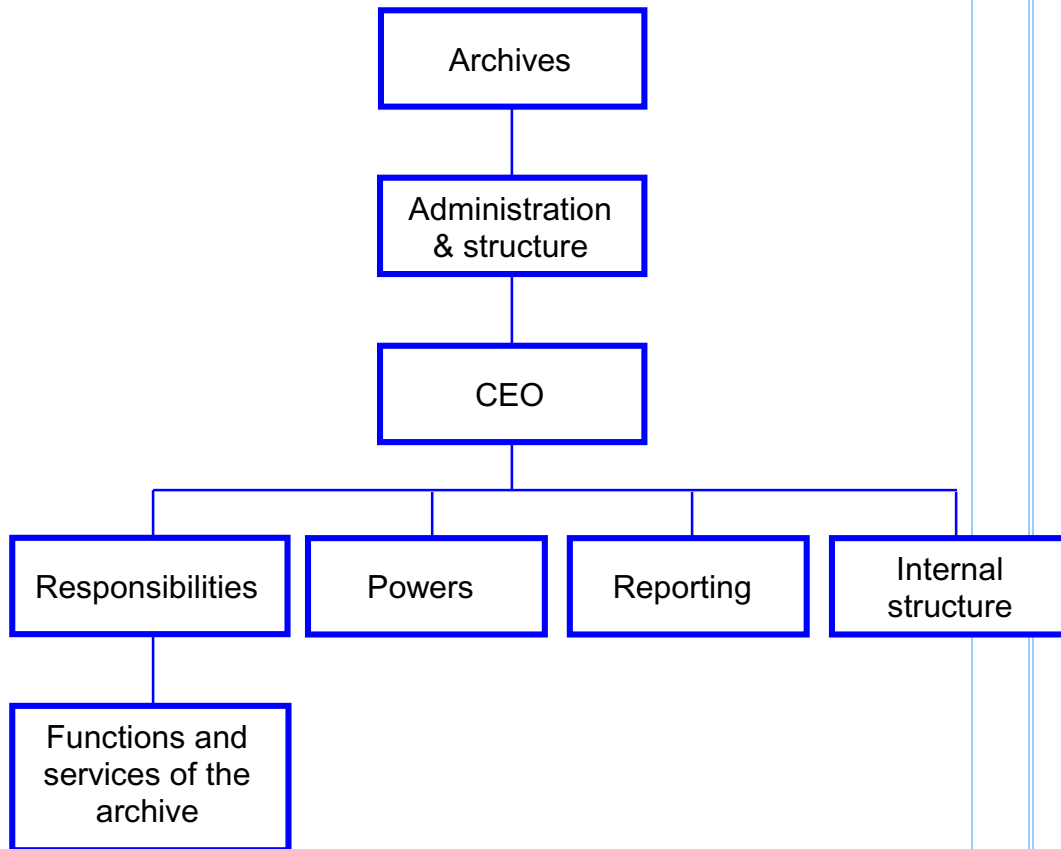
Decisions about governance



Decisions:

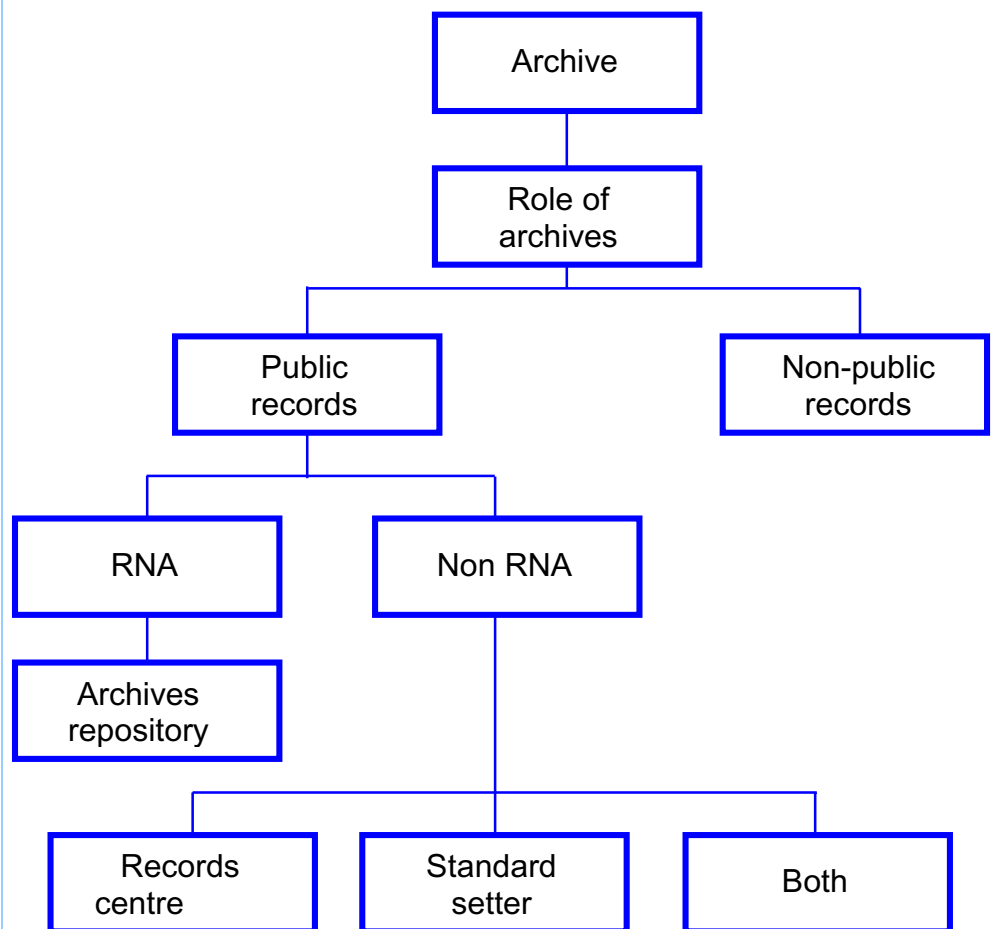
- * which form of body
- * structure of body
- * functions and responsibilities
- * powers
- * reporting

Decisions about administration



Decisions about roles and responsibilities

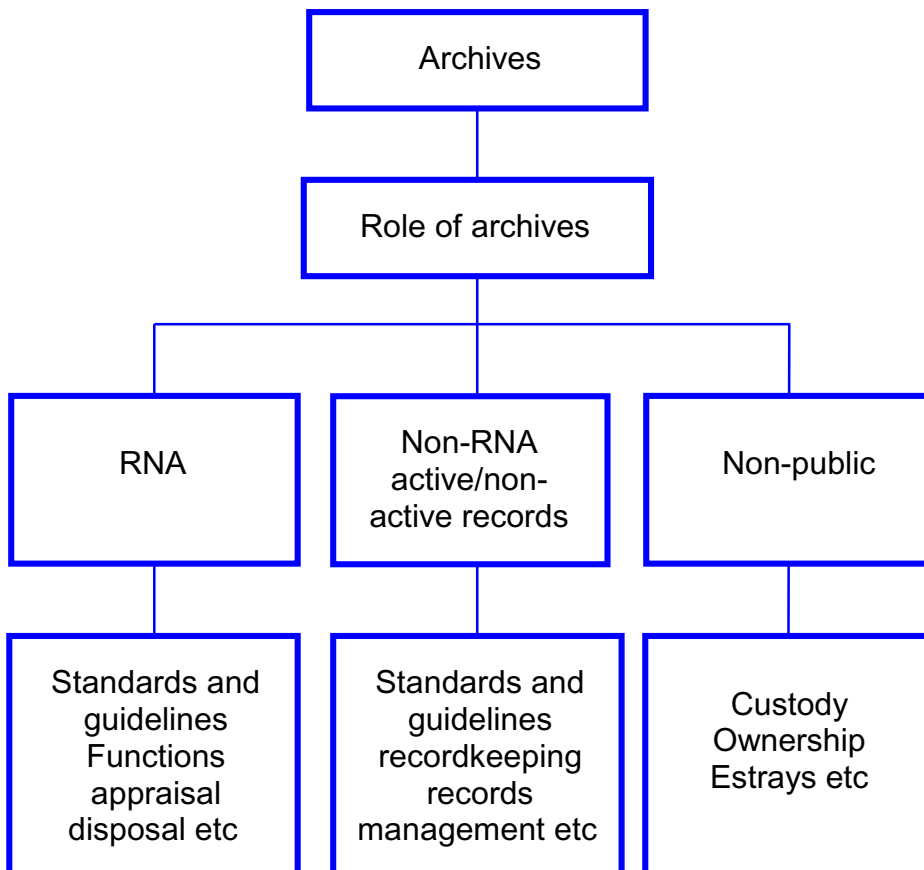
Decision about Archives Administration



Decisions

- * will archives manage over record continuum
- * if yes, will it be a record centre
- * if no, will it set standards
- * what functions and services

Further decisions about roles and responsibilities



Annex 2

Contributing Rapporteurs

The following people acted as regional rapporteurs and gathered the necessary information needed to prepare the overall report.

Caribbean (CARBICA):

Countries covered:

Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos Islands

Rapporteur: Mrs Margot Thomas,
St Lucia National Archives,
P O Box 3060, La Clery, Castries, Saint Lucia;
Tel: +1 758 452 1654;
E-mail: stlunatarch_mt@candw.lc

Eastern and Central Africa (ESARBICA):

Countries covered:

Botswana, Kenya, Lesotho, Malawi, Mauritius(?), Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania (including Zanzibar), Uganda, Zambia, Zimbabwe

Rapporteur: Mrs Ndiyoi Mutiti,
National Archives of Zambia,
P O Box 500 10, Lusaka, Zambia;
Tel: +260 1 254081; Fax: +260 1 254080;
E-mail: naz@zamnet.zm

Pacific (PARBICA):

Countries covered:

Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu

Rapporteur: Mr Setareki Tale
National Archives of Fiji
P O Box 2125
Government buildings, Suva, Fiji Islands
Tel: +679 304144
Fax: +679 307006
E-mail: stale@govnet.gov.fj

South East Asia (SARBICA):

Countries covered:

Brunei Darussalam, Malaysia, Singapore

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C/o National Archives of Malaysia
Jalan Duta
50568 KUALA LUMPUR
Malaysia
Tel: 03-2945284
Fax: 03-2945280

South West Asia (SWARBICA):

Countries covered

Bangladesh, India, Maldives, Pakistan, Sri Lanka
Rapporteur: Dr Garvin Wimalaratne,
National Archives of Sri Lanka,
P O Box 1414, Colombo 7, Sri Lanka; Tel & Fax: +94 1 694419;
E-mail: narchive@slt.lk

West Africa (WARBICA):

Countries covered:
Cameroon, Gambia, Ghana, Nigeria, Sierra Leone
Rapporteur: Mr J B Daramola,
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P M B 12897, Ikoyi Road, Lagos, Nigeria:
Tel: +234 1 686 469; Fax: +234 1 269 4642;
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Countries covered:
Canada, Cyprus, Malta, UK
Rapporteur: Catherine Bailey,
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E-mail: cbaily@archives.ca

- 1 In this Report 'archives' is used with three meanings: (1) documents which have been preserved because of their continuing value; (2) the building in which those documents are preserved and may be consulted; and (3) the agency or service responsible for managing archives in both the preceding senses. The specific meaning in each instance should be clear from the context.
- 2 E Ketelaar, Archival and Records Management Legislation and Regulations: a RAMP Study with Guidelines, UNESCO, Paris, 1985 (PGI-85/WS/10).
- 3 Here and elsewhere in this report the distinction between 'Commonwealth' in relation to Australia at the federal level and the wider Commonwealth should be borne in mind.
- 4 Because the title of the head of an archives varies so much from country to country (see section 5.1.6), the neutral title of chief executive officer (CEO) is used generally in this Report.
- 5 An International Standard, developed from this Australian Standard, is currently in preparation by the International Standards organization.
- 6 ISAD(G) General International Standard Archival Description (2nd edition, International Council on Archives, Madrid, 2000).

Section 2

Regional Reports

Introduction

Between March and October 2000, the Association of Commonwealth Archivists and Records Managers (ACARM) undertook a study of existing public records and archival legislation in Commonwealth countries. This study also included freedom of information, privacy, and other legislation which has an impact on archives and records.

Led by a project manager based in Australia (a location chosen because of the recent convergence of records and archives, freedom of information, and privacy legislation in that country), a team of seven “regional rapporteurs” conducted research into archival and related legislation in the various regions. This research, in many cases, began with a review of the significant amount of legislation that has been reviewed and published in seven volumes of *Archivum*, the journal of the International Council on Archives. It was supplemented by research by the rapporteurs to identify and obtain copies of legislation created later than or omitted from the *Archivum* volumes. The regional rapporteurs also consulted with archivists in the various regions to canvass views as to the strengths and weaknesses of the current legislation, and undertook preliminary analysis of the legislative texts to identify common features and special provisions. The project’s goal was to combine these regional reports into an overall report, written by the Project Leader and entitled “Modern Archival Legislation for the Commonwealth”, on the current state of legislation affecting archives and records throughout the Commonwealth. From this report would be developed practical guidelines and other tools to assist countries considering modernizing their legislation.

What follows are the “area update reports” prepared by the regional rapporteurs during the research phase of the project. There are seven sections, corresponding to the regional branch structure of the International Council on Archives: 1) Eastern and Southern Africa; 2) South East Asia; 3) the Caribbean; 4) Europe and North America; 5) South West Asia; 6) West Africa; and 7) the Pacific. Each section notes the countries covered in the report and the name of the regional rapporteur, lists the legislation reported in the region and summarises the research results.

AREA 1: EASTERN AND SOUTHERN AFRICA (ESARBICA)

Countries covered: Botswana, Kenya, Lesotho, Malawi, Mauritius (?), Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania (including Zanzibar), Uganda, Zambia and Zimbabwe

Regional Rapporteur: Mrs Ndiyoi Mutiti, National Archives of Zambia

COUNTRY

LEGISLATION

BOTSWANA	as in <i>Archivum</i> XX, 27, XXVIII, 73-82
KENYA	Kenya Records Disposal Act 1963, revised edition 1972
LESOTHO	as in <i>Archivum</i> XX, 69-73, XLI, 7
MALAWI	as in <i>Archivum</i> XX, 75, XXVIII, 248-258
MAURITIUS	as in <i>Archivum</i> XX, 83-91
MOZAMBIQUE	Facilities for Import of Materials 1994
NAMIBIA	Archives Act of Namibia 1992 National Library and Information Act Namibia 2000

SOUTH AFRICA	Legal Deposit Act and Regulations 1997 Promotion of Access to Information Act 2000 National Archives of South Africa Act and Regulations 1996
Free State	Free State Archives Act 1999
Mpumalanga	Mpumalanga Archives Act 1998
SWAZILAND	Archives Act 1971
TANZANIA	National Archives Act, 1965 (repeal and replacement under consideration)
Zanzibar	National Archives Act of Zanzibar 1988
UGANDA	as in Archivum XX, 105
ZAMBIA	as in Archivum XX, 145-154
ZIMBABWE	as in Archivum XXVIII, 435, XLI, 268-272

Botswana

The legislation is aimed at control of semi-current and non-current records. The National Archives Act, 1978 (cited in Archivum XXVIII) implies that the National Archives' involvement in records management is only as a custodian, as opposed to the government decision made in 1992 which bestowed upon the National Archives the responsibility of managing the entire life cycle of records. This implies that the current legislation and what exists in practice are not in tandem.

The use of the work "may" in the duties of the Director does not make it obligatory for record creators to allow the Director to discharge these duties.

Kenya

It is felt that a problem may arise in the interpretation of the Kenya Records Disposal Act 1963 and its enforcement, rather than a problem with its intrinsic adequacy, especially in interpretation of the Act in relation to electronic records.

Namibia the National Library and Information Service Act 2000 is an Act to "provide for the establishment of the Namibia Library and Information Service; the National Library and the Namibia Library and Information Council; to provide for the implementation of legal deposit; and for incidental matters."

South Africa and provinces

The Legal Deposit Act (1997) is legislation to "Provide for the preservation of the national documentary heritage through legal deposit of published documents; to ensure the preservation and cataloguing of, and access to, published documents emanating from, or adapted for South Africa: to provide for access to government information; to provide for a legal deposit committee; and to provide for matters connected therewith."

The Free State Archives Act (1999) is legislation intended to "Provide for a Provincial Archives; the proper management and care of the records of governmental bodies; and the preservation and use of a provincial archival heritage for all the people of the province; and for matters connected therewith."

The Mpumalanga Archives Act (1998) is written similarly to the Free State Archives Act though the wording varies slightly.

Tanzania and Zanzibar

Tanzania and Zanzibar have separate archival legislation despite belonging to the same union.

AREA 2: SOUTH EAST ASIA (SARBICA)

Countries covered: Brunei Darussalam, Malaysia, Singapore

Regional Rapporteur: Mrs Daresah Hj. Ismail, National Archives of Malaysia

COUNTRY	LEGISLATION
BRUNEI	Brunei National Archives Act 1981
MALAYSIA	National Archives Act 1966 (Archivum XX, 207-212) National Archives Bill 1999
SINGAPORE	National Heritage Board Act 1993

Malaysia

The National Archives Act was passed in 1966. For the past two years Malaysia has been studying the legislation to amend certain clauses as well as to include other matters. Among the clauses and matters to be amended are those pertaining to the establishment of the memorial archives, a records centre, and access to classified records. The new definition of 'records' shall include electronic records.

Singapore

The Singapore National Archives is now under the National Heritage Board together with the National Museum. The legislation pertaining to the National Archives is The National Heritage Board Act 1993.

AREA 3: THE CARIBBEAN (CARBICA)

Countries covered: Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, Turks and Caicos Islands.

Regional Rapporteur: Mrs Margot Thomas, St. Lucia National Archives

COUNTRY	LEGISLATION
ANGUILLA	Under Library Legislation
ANTIGUA & BARBUDA	The Archives and Records Act 1982
BAHAMAS	The Public Records Act No. 26 1971 The Public Records Regulations 1972
BARBADOS	Barbados Archives Act 1988
BELIZE	Belize Archives Act 1984 Belize Archives and Records Service Bill 2000 Belize Freedom of Information Act 1994
BERMUDA	Bermuda Archives Act 1974
BRITISH VIRGIN ISLANDS	Under Library Legislation

CAYMAN ISLAND	The Institute of Caymanian Heritage Law 1991
DOMINICA	Under Library Legislation
GRENADA	Under Library Legislation
GUYANA	National Archives of Guyana Act 1982
JAMAICA	Jamaica Archives Act 1988
SAINT LUCIA	The Archives (Official Records) Regulations 1988
ST KITTS AND NEVIS	National Archives Authority of Saint Lucia Act 1993
ST VINCENT	no archives legislation available
TOBAGO	no archives legislation available
TRINIDAD AND TOBAGO	no archives legislation available
TURKS & CAICOS	Under Library Legislation

Overview

Many countries of the Caribbean do not yet have legislation, since they do not have established archival repositories. In the majority of these instances, the nation's archives is part of the central or National Library and is not a separate entity. The Librarian acts as the custodian of the archival collection but scarcely ever performs the duties of an archivist as would be set out in archival legislation. Examples of such countries are Grenada, Dominica, Turks and Caicos, Montserrat, British Virgin Islands and Anguilla.

There are other countries which have functioning archives with an archivist and staff but no archival legislation that has been enacted. These countries include Trinidad & Tobago, St. Kitts & Nevis, and Saint Vincent. The other countries of Antigua and Barbuda (1982), Barbados (1988), Bahamas (1971), Belize (1984), Bermuda (1974), Cayman Island (1991), Guyana (1982), Jamaica (1982), and Saint Lucia (1993) all have archival legislation as indicated by the dates. The Barbados Archive Act is still to be proclaimed.

Establishment of the Archives

In the Cayman Islands, the law (the Institute of Caymanian Heritage Law 1991) covers the entire heritage and culture of the country. It established the National Archive as a department of the Institute, a charitable institution with a Council to administer its affairs. The department also includes the National Museum and National Library.

In Saint Lucia, the National Archive is set up as a statutory body with a National Archive Authority Board to administer the affairs of the Archives with the Archivist as the Chief Executive Officer.

All the other Archives are placed within the Government Civil Service Structure

Every archive falls under the jurisdiction of a Minister responsible for archives, but the specific portfolio of the Minister is not disclosed except for the Saint Lucia Archive Act which specifies the Prime Minister.

Title

The Bahamas Act uses the short title Public Records Act, an archaic title based on the United Kingdom's Public Records Act, 1958. All the other countries use the title Archive Act after the name of the country.

Definitions

In every act, the technical terms which are used in the act are defined in accordance with standard international terminology. However, countries may choose to differ in the application of terms. For example, in the Belize Archive Act, judicial records are included within public records, whereas the Bermuda Archive Act explicitly states that judicial records are not public records.

Advisory Board

The archives all make provision for an Archival Advisory Board. Although the powers of the body are defined, the composition of the membership is not stated. Examples of this include Belize, Bahamas, Saint Lucia, and the Cayman Islands.

Archivist

Every act provides for the appointment of someone to head the institution, but the title of the individual varies; e.g. Government Archivist, Chief Archivist, or Archivist. The duties and responsibilities of this individual are enumerated.

Functions

Generally, the various archival acts deal with areas pertaining to selection, preservation, inspection and transfer of public records to the Archives. Public access, which varies from fifty years to twenty-five years, is also covered.

Most of the legislation make no provision for the life-cycle management of records and archives. However, the Jamaica Regulations to the Jamaica Archives Act (1988) specifically mentions the need for records officers in every government department "to establish a system for the proper care and control of official records" and the Saint Lucia Archive Act states that one of the functions of the Archives is "to co-ordinate the management of public records."

Likewise, there is scarcely any mention of the co-operation between the heads of departments and the archivist for the effective and efficient management of records from creation to disposition.

Financial Considerations

Most of the acts are silent where the financial provisions of the institutions are concerned. Some acts (Bahamas, Barbados, Belize) propose the setting up of an archives fund but this is primarily for the purchase of historical documents and archives.

There are also no mentions of an annual financial audit of the institution and the tabling of a finished report in Parliament, nor is there any provision for the preparation and presentation of an annual report to the Minister responsible for archives.

Conclusion

All the pieces of legislation emphasize the need to preserve the archival heritage of each country. Much importance is attached to this heritage. There are provisions for the acquisition and purchase of historical records and archives, while some countries

impose heavy fines and penalties for the defacing or destruction of archival property (Barbados, Belize, and Saint Lucia). However, the laws should be amended to reflect modern best practice within the archival world. The growing trend of identifying and protecting potential archives from their creation, incorporating the life-cycle approach to records management within the ambit of archives administration and the need to determine how to deal with the proliferation of electronic and other technological records, are issues which should be addressed.

AREA 4: EUROPE AND NORTH AMERICA

Countries Covered: Cyprus, Malta, Canada, United Kingdom (England, Wales, Scotland and Northern Ireland)

Regional Rapporteur: Ms. Catherine Bailey, National Archives of Canada

COUNTRY	LEGISLATION
CANADA	
Federal Government	National Archives of Canada Act 1987 (R.S.C. 1985, c. 2.5) Access to Information Act 1983 (R.S.C. 1985, c. A-1) Privacy Act 1983 (R.S.C. 1985, c. P-21) Copyright Act 1997 (R.S., c. C-30, s. 1.) Personal Information Protection and Electronic Documents Act 2000 (S.C. 2000, C. 5.)
Alberta	Historical Resources Act (R.S.A. 1980, c. H-8) Freedom of Information and Protection of Privacy Act (R.S. A. 1989, c. F- 18.5)
British Columbia	Document Disposal Act (R.S.B. C. 1996, c. 99) Freedom of Information and Protection of Privacy Act (R.S.B.C. 1996, c. 165) Ministry of Provincial Secretary and Government Services Act (R.S.B.C. 1996, c. 99)
Manitoba	Legislative Library Act (R.S.M. 1987, c. L120) Freedom of Information and Protection of Privacy Act (S.M. 1997, c.50) New Brunswick Archives Act (R.S.N.B. 1973, c. A-11.1) Protection of Personal Information Act (S.N.B. 1998, c. P-19.1)
Newfoundland	Right to Information Act (R.S.N.B. 1973, c. R. 10-3) Public Records Act (R.S.N.B. 1973, c. P-24) Archives Act (R.S.N. 1990, c. A-16)
Northwest Territories	Freedom of Information Act (R.S.N 1990, c. F-25) Archives Act (R.S.N.W.T. 1988, c. A-6) Access to Information and Protection of Privacy Act (S.N.W.T. 1994, c. 20)
Nova Scotia	Public Archives Act (S.N.S. 1998, c.24) Freedom of Information and Protection of Privacy Act (S.N.S. 1993, c. 5) Government Records Act (S.N.S. 1995-96, c. 7) Municipal Government Act (S.N.S. 1998, c. 18)

Ontario	Archives Act (R.S.O. 1990, c. F-31) Freedom of Information and Protection of Privacy Act (R.S.O. 1990, c. F-31) Municipal Freedom of Information and Protection of Privacy Act (R.S.O. 1990, C. M.56)
Prince Edward Island QuÉbec	Archives Act (R.S.P.E.I. 1988, c. A-19) Archives Act (R.S.Q., c. A-21.1)/ Loi sur les archives An Act respecting access to documents held by public bodies and the protection of personal information (R.S.Q., c. A-2.1)/ Loi sur l'accÈs aux documents des organismes publics et sur la protection des renseignements personnel An Act respecting the protection of personal information in the private sector (R.S.Q., c. P-39.1)/ Loi sur la protection des renseignements personnels dans le secteur privÈ.
Saskatchewan	Archives Act (R.S.S. 1998, c. A-26) Freedom of Information and Protection of Privacy Act (R.S.S. 1998, c. F- 22.01) Privacy Act (R.S.S. 1988, c. P-24)
Yukon	Archives Act (R.S.Y. 1990, c. 8) Access to Information and Protection of Privacy Act (R.S.Y. 1990, c. 1)
CYPRUS	State Archives Law (No. 208 of 1991) Copyright Law (59 of 1976 and 63 of 1977)
MALTA	National Archives Act 1990 (Act. No. IV of 1990) Malta Communications Authority Act 2000
UNITED KINGDOM England	Public Records Act 1958 and 1967 Parochial Registers and Measures 1978 Church of England (Miscellaneous Provisions) Measure 1992 Local Government Act 1972, 1985 Local Government (Records Act) 1962
Wales	Local Government (Wales) Act 1994 Local Government (Wales) Act 1998
Scotland	Public Records Act (Scotland) Act 1937, are proposing new National Archive Legislation Public Registers and Records (Scotland) Act 1948 Register of Sasines Act 1987 Local Government (Scotland) Act 1994 Local Government (Scotland) Act 1998
Northern Ireland	Public Records Act (Northern Ireland) 1923 Disposal of Documents (Northern Ireland) Rules 1925

Canada

Introduction

Information on Canadian archival legislation has appeared in *Archivum XXI* (1971), *XXVIII* (1982), and most recently, *XL* (1995), pages 88-100. Much of the information for the latter entry was based on passages from Carol Couture and Marcel Lajeunesse, *L'Égislation et politiques archivistiques dans le monde* (1993), which contained a review of the archival legislation at the federal level, as well as in the provinces of New Brunswick, Ontario, Quebec, and Saskatchewan. The information in

this present report is based upon a review of the published statutes of the Canadian federal, provincial and territorial governments, and focuses on legislation introduced or modified since 1995, or not included in the Archivum XL entry. 2 This review also included consultations with the heads of federal, provincial and territorial archives conducted in August-September 2000.

Overview of Archival Legislation in Canada

In addition to the legislation at the federal level which governs the National Archives of Canada, twelve of the thirteen provincial and territorial jurisdictions in Canada have legislation governing archives. The sole exception at this time is the newly created territory of Nunavut, which came into existence on 1 April 1999. The territory encompasses the eastern portion of what was the Northwest Territories and has its capital at Iqaluit. The government of Nunavut has just recently hired its first Territorial Archivist; at this time, it is not known what specific plans, if any, the territorial government has to enact archival legislation.

There are many common elements between the various archival laws across Canada. Definitions of records, where they exist, are often similar in wording (if not identical), and extensive in nature. Newfoundland, Saskatchewan and Prince Edward Island specifically exclude convenience copies made for reference purposes from their definitions. Many of the acts specifically protect government records, and provide penalties for the contravention of the act (fines and/or jail sentences). Many of the provincial acts also create public document committees which oversee the disposal of provincial government records.

Other Legislation Affecting Archives

The largest body of other legislation which affects archives in Canada is freedom of information (FOI) and privacy legislation. Almost all jurisdictions in Canada have freedom of information and/or protection of privacy legislation. Nova Scotia was the first Canadian province (in fact, the first Commonwealth legislature) to enact freedom of information legislation on 1 November 1977. 3 New Brunswick followed suit in June 1978 (with the law being proclaimed in January 1980), and Newfoundland and Labrador in June 1981 (with the law coming into effect in January 1982). In 1993, Quebec was the first province to enact legislation to protect privacy in the private sector. 4 At present, almost all jurisdictions have FOI/privacy legislation; the exceptions are the province of Prince Edward Island 5 and the territory of Nunavut. Since 1982, new freedom of information legislation has been introduced in Ontario (1988 and 1991), Manitoba (1988 and 1998), Saskatchewan (1991), British Columbia (1993), Nova Scotia (1993), Alberta (1995), Yukon Territory (1996), and the Northwest Territories (1997).

A broad review of these provincial laws reveals that they are generally parallel in structure and/or content to the federal Access to Information Act, often employing similar wording. The majority of acts list exemptions for release of information covering subjects such as personal privacy, third party information, public safety, law enforcement, intergovernmental relations, national security, Cabinet documents, financial interests of government, and information which will be published shortly. Many jurisdictions (notably the federal government, British Columbia, Alberta, Saskatchewan, Manitoba and Ontario) have specific exemptions to permit the release of personal information for research purposes.

Processes for obtaining access to government records are also similar. They require an application to the head of an institution, who must reply within a stated time frame. There are possibilities for the extension of that time frame, and for the transfer of the request to another body which may hold the information. In the Yukon Territory, the Territorial Archivist administers the legislation, handling the initial request regardless of whether the information is held in the territorial archives or not. This is perceived as a strength of the Act, as it ensures consistency in application, continuous liaison with the Information and Privacy Commissioner on reviews and inquiries, and the consideration of a full range of records in responding to the applicant. There are various rights of appeals laid out in the laws, usually involving an Information Commissioner and/or the courts. Finally, many of the acts state specifically that they do not apply to private records held within provincial/territorial archives.

Several jurisdictions, most notably the federal government, British Columbia, Manitoba, Ontario and Saskatchewan, have recently introduced bills relating to electronic commerce, electronic signatures, and the protection of privacy in electronic data in the private sector. These seem to be based on the Uniform Electronic Commerce Act adopted by the Uniform Law Conference of Canada in 1999 (this was specifically noted in the text of Ontario's Bill 88). This "common" law is consistent in principle with the United Nations Model Law on Electronic Commerce. ⁶ While this type of legislation does not necessarily directly affect records presently held by archives, such laws will undoubtedly have an impact on the form of electronic records which will be created and preserved by archives in the future. The laws often set the parameters of when and how an electronic document is considered to be sent and received, and the conditions under which such records are considered to be reliable and authentic evidence of interactions. In reviewing the texts, the rapporteur noted that there is a strong similarity between some of the language used in these laws and the terminology used in diplomatics.

During the review of the published statutes, it was noted that there are other types of laws which may affect archives, albeit indirectly, through the definition of records and directions for their creation and use. These other laws are often concerned with the presentation of evidence in a court of law, the registration of legal title to lands, the financial administration of government, the gathering and preservation of statistical information, the operational management of hospital and health records, and the form of public documents. Furthermore, it may be argued that all laws passed within a jurisdiction may affect its archives and records, as they touch in some way on the creation and management of information as a corporate asset for long term usage. Some of these other laws affecting archives have been noted in the entries for the various jurisdictions; however, no further analysis has been conducted for this phase of the ACARM project.

Specific Information by Canadian Jurisdiction – Federal

The governing legislation in the Canadian federal jurisdiction remains the National Archives of Canada Act as noted in Archivum XL. The Act was most recently amended in 1995, when Section 9 (detailing the establishment and functions of the National Archives Advisory Board) was repealed.

Changes to existing federal legislation since 1995

Access to Information: In the past two years, attempts have been made to revise the Access to Information Act of 1983 through the introduction of a private member's bill proposed by John Bryden, M.P. Bill C-206, which had the support of all parties within

the House of Commons, was introduced and received its first reading on 14 October 1999. The new legislation, to be known as the Open Government Act, would define more precisely what records held by government are to be disclosed and provide more severe penalties for those who intentionally circumvent the intent of the legislation. It would also require government records over 30 years old to be opened automatically except where specifically exempted for reasons of national security, public safety or international agreements; establish the principle that records be provided without unreasonable barriers; make the deliberate failure to keep required records or to destroy or conceal them deliberately an indictable offense punishable by a jail term of up to 2 years and/or a fine of 10,000 dollars; make records of the House of Commons and the Senate subject to the Act; specify which Cabinet documents may be disclosed/not disclosed; give the Prime Minister discretion to release records of previous Cabinets if it is in the public interest; and improve public access to third party contracts, public opinion polls, and Crown corporations. ⁷ As of May 2000, proposed changes to the bill have resulted in the halting of the bill's progress through Parliament.

The existing Access to Information Act was modified on 25 March 1999 to add penalties for the destruction, falsification, concealment or mutilation of documents with the intent to deny a right of access. Persons who contravene the act are now guilty of an indictable offense, punishable by imprisonment for a term of between six months and two years, and/or a fine of between 5,000 and 10,000 dollars.

On 22 August 2000, the Minister of Justice announced the formation of a federal task force to examine measures to make the ATI Act more effective. The task force, which will report to the Treasury Board and the Deputy Minister of Justice regularly, will be assisted by an advisory committee composed of academics, journalists, historians and other users of the act. A report is expected to be presented to the government in the fall of 2001.

Copyright: In 1997, Parliament enacted major changes to the Copyright Act as part of Phase II of the ongoing process of copyright review. The new act, the provisions of which came into force between 1997 and 1999, is much more complex than its predecessor, and has had a major impact on archives. A booklet, *The New Copyright Law and Archives*, prepared by the Bureau of Canadian Archivists in 1999, outlines the impact that this law has on Canadian archives, and is the basis for this section of the report. ⁸ From an archivist's perspective, the most notable features of the new Copyright Act include exceptions for archives, libraries and museums regarding the maintenance and management of holdings and their use by researchers. As the booklet notes, "An 'exception' permits the use of a work without the consent of its creator and without payment of royalties. Archives can make preservation copies of works, copy records from one format to another, and make copies of records in their holdings for research purposes. In the latter case, the rules for research copying are complex and based upon: 1) when the creator of the work died, 2) the conditions under which the record was deposited in the archives, 3) the date on which the record was deposited in the archives, 4) the purpose of the copy, and 5) whether the work has been published or not. The law also contains a new provision for the use of self-service copying machines in archives (based on the factors of copy price, the availability of a collective licensing system, and the posting of appropriate copyright warnings near the machines).

New federal legislation since 1995

The Personal Information Protection and Electronic Documents Act (formerly Bill C-6), received Royal Assent on 13 April 2000. Its full title is “An Act to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act, and the Statute Revision Act.” This law was originally introduced to Parliament as Bill C-54 in the fall of 1998. At that time, the Canadian archival community noted that there were many aspects of the bill which they supported. They argued, however, that there remained a number of aspects which, if not amended, would have profound adverse and negative effects on Canadian archives and the historical community. These concerns are outlined in a brief to the House of Commons Industry Committee prepared by Dr. Terry Cook for the Association of Canadian Archivists in March 1999.⁹ Some of the issues addressed in the ACA brief included:

- * the passage of time clause for unconditional disclosure (section 7.3.h);
- * the definition of “personal information” (section 2.1);
- * the requirement for conditional disclosure of personal information for statistical, scholarly, and other research purposes which requires an institution to notify the Privacy Commissioner prior to use of the information;
- * the need for an explicit exclusion, similar to that noted in the 1983 Access to Information legislation for federal records, which would prevent the retroactive application of the legislation to any private-sector records already under the custody and control of an archival institution; and
- * the use of secure electronic signatures and data encryption and its impact on archival documents.

Given the newness of the legislation, it is unclear at this time what impact the law will have on Canadian archives. It is important to note, however, that legislation does not stand by itself; regulations, interpretations by the courts, interpretation of specialized definitions and their application by the relevant agencies, and internal references of the law may all play a role in the effects that a law has on the community. It should also be noted that this federal legislation will initially apply to privacy in the federally regulated private sector (e.g., banking and telecommunications) and to cross-border commercial flows of information. Beginning in 2004, however, it will apply to all commercial transactions in provinces that have not enacted similar legislation.

Other federal legislation potentially affecting archives

The Criminal Records Act defines who has what access to records of criminal activity. The Public Documents Act defines the form of public documents. The Canada Evidence Act defines what documentation is considered acceptable evidence in Canadian court proceedings; it is often mirrored by a provincial evidence law which defines the requirements for provincial courts. The Cultural Property Export and Import Act (1974), which was cited in *Archivum XXVIII*, page 94, places restrictions on the importation/exportation of cultural properties, including documents and records, in order to preserve the national heritage of Canada. Protection is given in part through the establishment of a control list (Section 4(1)).

Specific Information by Jurisdiction - Provinces

Province of Alberta

The governing legislation in the province of Alberta is the Historical Resources Act, which has remained unchanged since 1995. There are no revisions planned at this time. The Minister of Community Development oversees the activities of the Provincial Archives of Alberta, the operation, maintenance and development of which are outlined in Sections 9 (h) (i) and (ii). The Act does not contain a definition of "record," but the term "historical object" includes documents. There is no specific protection of government records. Offenses and penalties for the contravention of the Act (which seem to be designed more for the protection of historical sites) are found in Section 48.

New legislation since 1995

The Alberta Freedom of Information and Protection of Privacy Act was implemented in phases between 1 December 1994 and 1 October 1995. The Act is reviewed every three years; the last review was in 1998. The Act defines record as a "record of information in any form and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records"; this definition appears to be a variation of the definition found in the Alberta Evidence Act. Offenses and penalties for the contravention of the Act are found in Section 86.

It was noted that archives will be involved in the legislative process as Alberta responds to the implementation of the Personal Information Protection and Electronic Documents Act.

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the Alberta Evidence Act, the Financial Administration Act, the Land Titles Act, the Hospitals Act, the Health Information Act, and the Vital Statistics Act.

Province of British Columbia

The governing legislation in the province of British Columbia is the Document Disposal Act. The last amendment to this act was made in 1997, and affected Section 4, which states that "A document deposited in a records office must not be destroyed without the approval of the Attorney General ..." It was to include francophone educational centres to the list of townships etc. that can ask the Provincial Archives to preserve its records. There are no plans at present to amend this Act.

In the Document Disposal Act, a document includes a record as defined in the Interpretation Act: " 'Record' includes books, documents, maps, drawings, plans, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise." There are no penalties noted for the contravention of the Act.

The Ministry of Provincial Secretary and Government Services Act states in Section 2 (4) that “The minister must keep all registers and archives of British Columbia and of any government that has had jurisdiction over the territory or any part of the territory constituting British Columbia.”

New legislation since 1995

The Freedom of Information and Protection of Privacy Act was enacted in October 1993. It contains a definition of record similar to that in the Interpretation Act: “books, documents, maps, drawings, plans, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism which produces records.” Offenses and penalties for the contravention of the act are found in Section 74. The act requires the Parliament of British Columbia to undertake a review of the statute and make revisions after five years. A Special Committee has been appointed to review the act and report on its findings; a copy of their report can be found at: http://www.legis.gov.bc.ca/cmt/foi/1999/review_act.htm.

The Electronic Transactions Act (Bill 32) received its first reading in the Legislature on 5 July.

The Electronic Transactions Act (Bill 32) received its first reading in the Legislature on 5 July 2000. This bill seeks to allow various legal instruments to be created in electronic form. There are exceptions (including wills, trusts, powers of attorney, land transfer documents, or other provisions, requirements, information or records prescribed in regulations). It notes that the requirement under law for a person to produce an original record is satisfied by the provision of an electronic document if there is a reliable assurance of the integrity of the document and that it is accessible. The bill further defines when a document is considered to be created, sent and/or received. The B.C. Archives was consulted, and although the bill may not affect archives directly, like the federal Personal Information Protection and Electronic Documents Act, it signals the beginning of electronic government in the province and may therefore change the nature of the records sent to the archives for preservation.

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the Evidence Act, the Financial Administration Act, the Land Titles Act, and the Hospitals Act.

Province of Manitoba

The governing legislation in the province of Manitoba is the Legislative Library Act. The Act defines “public records” to include “letters, copies of letters, documents, parchments, manuscripts, records, books, magazines, periodicals, maps, plans, photographs, and papers of all kinds, regardless of the physical form or characteristics, received or created, or deposited, on file, or held with or in any department or agency.” Part II of the Act (Public Records and Archives) establishes the Archives and Public Records Branch and outlines its objectives. Section 12(1) prohibits the destruction or removal of documents, except as authorized within the Act; Section 13(2) allows the Minister to authorize the destruction of public records. Section 15.1 gives the offense and penalty for the contravention of this Act. This Act is now under review for its first re-write since 1967.

New legislation since 1995

The Manitoba Freedom of Information and Protection of Privacy Act was given royal assent on 28 June 1997 and came into force in May 1998. It replaced an earlier act from 1988. The FOIP Act defines a record to mean “a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, on any storage medium or by any means including by graphic, electronic or mechanical means, but does not include electronic software or any mechanism that produces records.” Offences and penalties for the contravention of the Act are found in Section 85.

Bill 31, The Electronic Commerce and Information Consumer Protection Amendment and Manitoba Evidence Amendment Act, received its first reading in the Legislature on 5 June 2000, the second reading on 24 July 2000, and was referred to committee on 31 July 2000. The summary of the bill notes that it provides a set of rules designed to give legal recognition to electronic documents and communication. Part 1 contains definitions (“electronic,” “electronic document,” “electronic signature”) and application rules. Part 2 enables but does not require the use of electronic means to comply with a number of other legal requirements under law, such as the requirement to provide information in writing. Part 3 gives legal recognition to contracts formed using electronic documents. Part 4 makes special provisions for contracts relating to the carriage of goods. Part 5 allows the regulatory requirements for business entities to be streamlined by the use of common business identifiers, combined forms, integrated information systems, and integrated filing and payment procedures. Part 6 amends the Consumer Protection Act, and Part 7 amends the Evidence Act to parallel the recent amendments to the Canada Evidence Act. Should this bill pass, it is not expected to have a direct impact on archives, but may move the provincial government more towards electronic record-keeping standards.

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the Health Care Information Act, the Registry Act, the Statistics Act, and the Vital Statistics Act.

Province of New Brunswick

The governing legislation in the province of New Brunswick remains the Archives Act, as cited in Archivum XXVIII (1982). The definitions of “public records,” “records,” and “records schedules” are unchanged from the version of the Act cited in 1982. Since the Archivum XXVIII entry was made, the Archives Act has been augmented in the detail under Section 10, which outlines the circumstances under which records transferred to the Archives may be made available to the public; the consolidated text of the legislation (to September 1996) shows a number of amendments made in 1986. These changes reflect changes made in the Right to Information Act with respect to categories of records. Offences and penalties for the contravention of the Act are found in Section 12. The Public Records Act (which outlines the care and custody of public records in provincial or municipal offices) is also important to archives because of its embracing definition of public records.

The Right to Information Act was assented to on 28 June 1978. It defines a document as “any record of information, however recorded or stored, whether in printed form, on film, by electronic means or otherwise.” There do not appear to be any penalties for contravention of the Act.

There are no immediate plans to amend either of these two acts.

New legislation since 1995

On 26 February 1998, the Protection of Personal Information Act received royal assent, but the act has not yet been proclaimed. It applies to the same bodies covered by the Right to Information Act. It is similar in structure to the federal Privacy Act, but also includes a Schedule A, "Statutory Code of Practice," and Schedule B, "Interpretation and Application of the Statutory Code of Practice." The Act does not define record. Offenses and penalties for the contravention of the Act are found in Section 6. Revisions to the Archives Act will be necessary to ensure consistency in the definition of personal records in both acts.

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the Statistics Act, the Sound Recordings Act, the Registry Act, the Elections Act, the Family Services Act (regarding adoptions), and the Vital Statistics Act.

Province of Newfoundland

The governing legislation in the province of Newfoundland is the Archives Act. It defines "public records" as "records created by or received by a department in the conduct of its affairs except copies of records created only for convenience of reference and surplus copies of mimeographed, multilithed, printed or processed circulars or memoranda." "Records" includes "correspondence, memoranda, forms, papers, parchments, manuscripts, books, maps, plans, drawings, paintings, prints, photographs, magnetic tapes, microforms and all other documentary materials regardless of physical form or characteristics." Offenses and penalties for the contravention of the Act are found in Section 16. There are no immediate plans for revision, but the act has been reviewed and will be revised at a future date.

Newfoundland's Freedom of Information Act was enacted in 1982. While it does not define a record or document, it defines information as "information in any form including information that is written, photographed, recorded or stored by other means and on file or in the possession or under the control of a department." There do not appear to be any penalties for the contravention of the Act.

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the Evidence Act, the Protection of Personal Privacy Act (which protects an individual's privacy in situations, but does cover the violation of privacy through "the use of letters, diaries or other personal documents of an individual without the consent, expressed or implied ..."), the Statistics Agency Act, and the Vital Statistics Act.

Northwest Territories

The governing legislation in the territory is the Archives Act, amended in 1999. These amendments included the definition of the Public Records Committee, the inclusion of review of destruction recommendations by the Committee (Section 5 (6)) and changes to Section 10 (penalties for contravening the Act.) The Act defines "public record" as "any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or

graphic work, photograph, film, microfilm, sound recording, video tape, machine-readable record, manuscript, inventory, pamphlet, periodical, photographic slide, micrographic, electronic data print-out, and any other documentary material, regardless of its physical form or characteristics, held by or under the control of a government body.” Offenses and penalties for the contravention of the Act are found in Section 10.

Efforts in the NWT are now focused on the development of regulations to accompany the Act, which will: explicitly assign responsibility for the disposal of public records to the creating agency, provided they have approval of the Public Records Committee (PRC); establish standards for records schedules submitted by departments to the PRC; and outline the criteria used by the PRC to approve records schedules.

[New legislation since 1995](#)

The Access to Information and Protection of Privacy Act was enacted in 1994, and came into force on 31 December 1996. It defines a record as a “record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or other mechanism that produces records.” Offenses and penalties for the contravention of the Act are found in Section 59.

[Other legislation potentially affecting archives](#)

Other territorial acts which may affect archives and records include the Document Registry Act, the Evidence Act, the Historical Resources Act (which protects historical resources including sites, artifacts, and documents of historic, artistic, cultural, economic, social or archeological value), and the Vital Statistics Act.

[Province of Nova Scotia](#)

The governing legislation in the province of Nova Scotia is the Public Archives Act of 1998, which received royal assent on 3 December. The Act defines records as “information or data that is recorded or stored by graphic, photographic, electronic, mechanical or other means and includes public archives vested in Her Majesty in right of the Province.” The Act establishes the Public Archives of Nova Scotia (Section 4), whose duties are outlined under Section 15. Destruction of government records is not permitted under Section 16. There do not appear to be any penalties for contravention of the Act.

The Freedom of Information and Protection of Privacy Act was passed in 1993. It was amended in 1999 to extend coverage to universities, community colleges, school boards, and hospitals. It defines record to include “books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records.” It does not appear to include penalties for contravention. Part XX of the Municipal Government Act (S.N.S. 1998, c. 18) also deals with freedom of information and protection of privacy.

The Government Records Act is designed to “ensure comprehensive and accurate description and classification of records in the custody or under the control of a public body; and authorize the retention and disposition of the records of public bodies.” This Act includes a definition of records (“information or data that is recorded or

stored by graphic, photographic, electronic, mechanical or other means and includes public archives vested in Her Majesty in right of the Province.”), a prohibition on the destruction of the records of a public body (Section 8), the creation of a Government Records Committee (Section 6), and requires public bodies to have records schedules (Section 9). There do not appear to be penalties for contravention of the Act.

Province of Ontario

The governing legislation in the province of Ontario is the Archives Act, which has remained virtually unchanged since its passage in 1923. Established by Order-in-Council in 1903, the mandate of the Archives of Ontario is to identify, acquire, preserve and make accessible Ontario government records of enduring value. It does this within the context of the Archives Act, which does not define records or documents, but notes that “all original documents, parchments, manuscripts, papers, records and other matters in the executive and administrative departments of the Government or of the Assembly, or of any commission, office or branch of the public service shall be delivered to the Archives for safekeeping and custody within twenty years from the date on which such matters cease to be in current use.” Section 6 of the Act prevents the destruction of government records without the concurrence of the Archivist; there are no penalties for the contravention of the Act.

The Freedom of Information and Protection of Privacy Act was enacted in October 1988, and the Municipal Freedom of Information and Protection of Privacy Act in 1991. Both laws are extensive and have had amendments made to them every year since 1992. Both Acts define record as “any record of information however recorded, whether in printed form, on film, by electronic means or otherwise ...[including] correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof.” A key principle of both acts is that personal information should only be used for the purpose for which it was collected. Penalties for contravention of the FOIP Act are found in Section 61; for contravention of the MFOIP Act, Section 48.

New legislation since 1995

Ontario is one of the jurisdictions which has introduced legislation relating to electronic commerce. Bill 70, the E-Commerce Act, 2000 (“An Act with respect to Electronic Information, Documents and Payments”) received its first reading in the Ontario Legislature on 26 April 2000. On 11 May 2000, it was referred to the Standing Committee on General Government for discussion. Similar to British Columbia’s Bill 32 and Manitoba’s Bill 31, Ontario’s Bill 70 is designed to permit the legal effect and enforceability of documents in electronic form in transactions.

Bill 70, which was a private member’s bill, appears to have been superseded by the government Bill 88, the Electronic Commerce Act, (“An Act to promote the use of information technology in commercial and other transactions by resolving legal uncertainties and removing statutory barriers that affect electronic communications”), which received its first reading on 13 June 2000; its second reading was debated on 19 June 2000. The Bill removes barriers to legally effective use of electronic communications by governments and by the private sector. Based upon the Uniform Electronic Commerce Act adopted by the Uniform Law Conference of Canada in 1999, it is consistent in principle with the United Nations Model Law on Electronic

Commerce. 10 Section 1 provides definitions. Section 2 ensures the provincial government is bound by the new law. Section 3 provides that the Act does not require persons to use electronic communications if they do not wish to. Section 4 states the basic principle of the Act: the use of electronic communication rather than paper documents does not in itself affect the legal validity of the communication. Sections 5-13 provide a series of "Functional equivalency rules" noting what conditions must apply if an electronic communication is to meet legal requirements. Sections 14-18 deal with public bodies. Sections 19-22 deal with electronic contracts. Section 23 relates to carriage of goods. Sections 24 and 25 cover electronic forms. Section 26 to 31 cover application of the new Act. Section 32 is the power to make regulations.

As part of its response to the passage of the federal Personal Information Protection and Electronic Documents Act (which by 2004 will apply to provinces that have not enacted similar legislation), the Ontario Ministry of Consumer and Commercial Relations is presently proposing to develop an Ontario Privacy Act that will cover a broader public sector (i.e., universities and hospitals) and the private sector. A consultation paper on this draft legislation was circulated to the public for comment before 15 September 2000. 11 The Archives of Ontario will be commenting on a proposed exemption for archival/historical records. In addition, the Ministry of Health and Long-Term care will also be consulting the public on the issues of access to health information and privacy.

[Other legislation potentially affecting archives](#)

Other provincial acts which may affect archives and records include the Registry Act, the Statistics Act, and the Vital Statistics Act.

[Prince Edward Island](#)

The governing legislation in the province of Prince Edward Island is the Archives Act. No revisions to this act have been made since 1995. The Act defines "public records" to include "certificates under the Great Seal of the Province, legal documents, vouchers, cheques, accounting records, correspondence, magnetic tapes, discs, microforms and all other documents and machine-readable records, created, kept by or in the custody of any provincial officer in pursuance of his duty in the administration of the public affairs of Prince Edward Island, except copies of documents created only for convenience of reference and surplus copies of mimeographed, multilithed, printed or processed circulars and memoranda." "Records" are defined as "books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise." The PEI Public Archives and Records Office is created under Section 2, public records are protected under Section 5, and there do not appear to be penalties for contravention of the Act.

It also appears that there are no freedom of information or privacy acts within the province; however, in 1997, the government tabled a proposal regarding freedom of information legislation. It is unclear what became of this proposal.

[Other legislation potentially affecting archives](#)

Other provincial acts which may affect archives and records include the Evidence Act, the Heritage Places Protection Act, and the Vital Statistics Act.

Province of QuÈbec

The governing legislation of QuÈbec continues to be the Archives Act, which was cited in Archivum XXVIII (1982). There have been no major changes to the law since 1995, although it underwent slight modifications resulting from the passage of the two acts relating to access. 12

The Act defines “archives” as “the body of documents of all kinds, regardless of date, created or received by a person or body in meeting requirements or carrying on activities, preserved for their general information value.” It further defines a “document” (“any medium of information, including the data on it, legible directly or by machine, except documents referred to in the Act respecting the BibliothÈque nationale du QuÈbec (chapter B-2.1)”), an “active document” (“a document in current use for administrative or legal purposes”), an “inactive document” (“a document no longer used for administrative or legal purposes”), and a “semi-active document” (“a document in occasional use for administrative or legal purposes”). The Minister of Culture and Communications is responsible for the Archives. Under the Archives Act, all public bodies are required to establish and keep up to date a retention schedule which is submitted to the Minister for approval (Sections 7 and 8). Records may not be alienated, disposed of, or altered under Section 18. The preservation of private archives is covered in Chapter III (Sections 21-28). Offenses and penalties for the contravention of the Act are found in Chapter V (Sections 40-45). 13

As noted in the section “other legislation affecting archives” above, QuÈbec was the first Canadian province to legislate to protect privacy in the private sector by passing an Act respecting the protection of personal information in the private sector in 1993. The Act did contain provisions for research purposes (Section 17) which would allow for the use of personal information for “study, research or statistical purposes, without the consent of the persons concerned, if it [the Commission d’accÈs à l’information] is of the opinion that (1) the intended use is not frivolous and the ends contemplated cannot be achieved unless the information is communicated in a form allowing the persons to be identified; (2) the information will be used in a manner that will ensure its confidentiality.” Offenses and penalties for the contravention of the Act are found in Sections 91 to 93.

The Act respecting access to documents held by public bodies and the protection of personal information, does not define records or documents, but notes that the act applies “whether the documents are recorded in writing or print, on sound tape or film, in computerized form, or otherwise.” Offenses and penalties are found in Sections 158 to 164.

There were revisions to the QuÈbec Civil Code in 1994 that further strengthened protection of privacy in the private sector by regulating the behaviour of individuals and organizations not subject to existing legislation. The government has also recently studied in a parliamentary commission a bill which will modify the definition of “document” and govern the preservation of documents in paper or electronic format. 14

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the QuÈbec Civil Code, An Act respecting the Bureau de la statistique, and An Act respecting registry offices.

Province of Saskatchewan

The governing legislation of the province of Saskatchewan continues to be the Archives Act, first passed in 1945, which was cited in Archivum XXVIII (1982). There have been a number of minor amendments to the Act between 1983 and 1997, including changes to Section 3(3) (outlining the membership of the Saskatchewan Archives Board), Section 11 (transfer or destruction of public documents and court records), Section 13 (restricted records and documents), and Section 17 (Audits). The Act defines a "public document" as "certificates under the Great Seal of the Province, legal documents, securities issued by the province under any Saskatchewan Loans Act, vouchers, cheques, accounting records, correspondence, maps, photographs and all other documents created in the administration of the public affairs of Saskatchewan except copies of documents created only for convenience of reference and surplus copies of mimeographed, multilithed, printed or processed circulars and memoranda." Government records are protected under Section 7, with the destruction process outlined in Section 11. There are no penalties for contravention of the Act.

Saskatchewan hopes to amend its Archives Act, which has not been completely reviewed since its initial passage. The minor or "housekeeping" amendments that have been passed were in part to clarify issues related to the passage of the Freedom of Information and Protection of Privacy Act. A thorough review of the Act is being recommended to Cabinet, with plans to confirm or seek amendments to parts of the present act in areas such as structure, reporting relationships, mandate, definitions, and management of government information.

The Freedom of Information and Protection of Privacy Act was enacted in 1991, and amended in 1992 and 1994. The Act defines a "record" as "a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records." Offenses and penalties for the contravention of the Act are found in Section 68.

New legislation since 1995

On 11 June 1998, An Act respecting the Electronic Filing and Transmission of Documents and Information (R.S.S. 1998, c. E-7.21) received royal assent. The purpose of this act is similar to that stated in parts of the bills proposed in British Columbia, Manitoba and Ontario relating to the filing of information in electronic format with government agencies: "to permit persons who are required or permitted to file a document or information with a department pursuant to a designated Act to do one or both of the following, where authorized pursuant to the designated Act:

- (a) file the document or information in an electronic format that may be prescribed in the regulations made pursuant to the designated Act;
- (b) directly transmit the document or information to an electronic database maintained for the purposes of the designated Act."

Other legislation potentially affecting archives

Other provincial acts which may affect archives and records include the Saskatchewan Evidence Act.

Yukon Territory

The governing legislation in the Yukon Territory is the Archives Act. It defines "public records" to be "all original documents, parchments, manuscripts, records, books, pamphlets, magazines, periodicals, maps, plans, photographs, letters, copies of letters, papers of all kinds or other documentary materials regardless of physical form or characteristic, deposited, on file, or held with or in any department or agency of the Government of the Yukon or any municipal or other public office in the Yukon, and includes such documentary materials that were formerly part of the records or files of any such department, agency, or office." Government documents are protected under Section 6, which allows for the repatriation of records. There do not appear to be any penalties for the contravention of the Act.

The Access to Information and Protection of Privacy Act was assented to on 3 May 1995. It replaced the earlier Access to Information Act and Part III of the Public Government Act which had formerly covered access to government records. The Act defines a "record" as "the form in which information is kept." There do not appear to be penalties for the contravention of the Act. The administration of this act differs somewhat from similar acts in other jurisdictions, in that the Territorial Archivist is responsible for the initial administration of access requests, regardless of whether the information is held within the Territorial Archives or not. Once the request is received (Section 6), it is then passed to the appropriate government department for action under Section 8.

Other legislation potentially affecting archives

Other territorial acts which may affect archives and records include the Recording of Evidence Act, the Historic Resources Act, the Evidence Act, and the Vital Statistics Act.

Cyprus

The governing federal legislation in Cyprus is the State Archives Law (No. 208 of 1991), which repealed the Public Record Law of 1972, and renamed the Cyprus Public Records Office the State Archives. This act is partly reproduced in Archivum Volume XL, pages 152-156. The Archivum entry also makes mention of the Copyright Law (59 of 1976 and 63 of 1977), which are noted under Section 16 of the State Archives Law: "The copyright on any public record shall be regulated in accordance with the Copyright Law in force for the time being." There have been no changes to the State Archives Law since 1991.

No further legislation affecting archives has been passed. Mrs Efrosyni Parparinou, State Archivist of Cyprus, noted that draft laws concerning data protection, return of cultural objects and export of cultural goods are currently in preparation, in conformity to European Directives.

Malta

The governing archival legislation in Malta is the National Archives Act (1990) (Act No. IV of 1990, dated 30 January 1990), which is reproduced in part in Archivum XLI, pages 22-24. A review of the Maltese government website (www.magnet.mt) did not reveal any new legislation passed since 1996 to supplant or alter the provisions of this act. However, there have been several recent draft bills and laws, listed on the

website as of 17 July 2000 as being introduced and passed since 1997, which may affect archives and records management. Unfortunately, the text of these bills and laws were not all available to the rapporteur for further examination.

These acts and bills include:

1. Draft Bill 36 of 1997 titled Duty on Documents and Transfers (Amendment) Act, 1997.
2. ACT NO. X OF 1999 - An Act to make provisions for the deposit of Notarial Acts at the Archives before they are inspected in terms of section 117 of the Notarial Profession and Notarial Archives Act, Cap. 55. (Government Gazette of Malta No. 16,813 – 9th July, 1999)
3. ACT NO. VIII OF 2000 - An Act to establish measures relating to the importation into Malta, and the exportation and re-exportation from Malta, of goods in contravention of Intellectual Property rights. (Government Gazette of Malta No. 16,915 - 29th February, 2000).
4. ACT NO. XIII OF 2000 - An Act to make new provisions in respect of copyright and neighbouring rights and certain sui generis intellectual property rights in substitution of the provisions of the Copyright Act, Cap. 196. (Government Gazette of Malta No. 16,938 - 25th April, 2000). 15

A new draft bill, No. 71 entitled the Malta Communications Authority Act, 2000, has also been introduced. It includes provisions for regulatory functions in the areas of data protection and electronic commerce. A review of the text of this bill (available through the website) shows that although there are no specific mentions of archives or records, the Malta Communications Authority is required under Article 4(1) to ensure the freedom of communication, subject to the limits of the protection of privacy, state security, or the prevention of disclosure of information received in confidence. It appears that these provisions are in keeping with Articles 8 and 10 of the National Archives Act which define the conditions under which the Minister responsible for Education may limit public access to documents.

United Kingdom

Introduction

Information on United Kingdom archival legislation has appeared in Archivum XI (1961), XVII (1967), XXVIII (1982), and most recently, XLI (1995), pages 234-239. The information in this present report is based upon the very detailed entry prepared by Mr. David A. Leitch (Liaison Officer, Public Record Office, and Assistant Editor of Archivum) in May 1995 for Archivum XLI, and a review of the published statutes of the United Kingdom that focused on legislation introduced or modified since 1995. Additional information was received from Ms. Susan Healy of the Public Record Office in November 2000. Many of the statutes enacted since 1995, or recent bills, are available in electronic format on the websites of the Houses of Parliament, or Her Majesty's Stationery Office (HMSO). A listing of these web sites may be found in Appendix A of this report.

Information by jurisdiction: England and Wales.

Archival Legislation

The entry in Archivum XLI noted that the archival legislation in force for England and Wales was the Public Records Act 1958, as amended by the Public Records Act 1967. It noted that the PRO became an Executive Agency on 1 April 1992, with delegated powers conferred by the Lord Chancellor onto the Keeper of Public Records. These delegated powers included approval of disposal of records not required for permanent preservation; the appointment of places of deposit of public records, and the giving of approval for the transfer of records between the PRO and places of deposit. The Keeper also now has the power to alter the number and grades of all but the most senior posts in the PRO, and to finance service improvements from revenues generated by photocopies, books, and fees for services.

Some minor amendments have been made to the Public Records Act 1958 as a result of the passage of new legislation; further amendments will be forthcoming as a result of the passage of new laws, such as the Freedom of Information Act. The PRO is also considering possible revisions to the Public Records Act in light of the passage of the Data Protection Act (see below).

The records of the Church of England were noted as being subject to the Parochial Registers and Measure 1978 (cited in Archivum XXVIII, pages 393-398), as amended by section 4 and Schedule 1 of the Church of England (Miscellaneous Provisions) Measure 1992, which came into force on 1 January 1993. It does not appear that there have been any subsequent amendments to these measures.

Local authority records offices are noted as being subject to the Local Government Act 1972 sections 224-229. The 1985 Local Government Act (partly cited in Archivum XLI, p. 236) abolished the Greater London Council and six metropolitan county councils. Each of these entities has the power to run an archive service under the provisions of the Local Government (Records) Act 1962. Section 2 (6) of this latter act gives the Secretary of State for the Environment the power to sanction the setting up of an archive service by a lower tier (district) local authority.

The Archivum XLI entry observed that “the likely outcome of the Local Government Commission, set up in 1992 with the remit of examining the case for the replacement of the current two-tier structure by new unitary authorities, is that unitary authorities will be set up in some mainly urban areas and the two-tier structure will survive in many predominantly rural areas.” Several local government acts have been passed since 1995; they are discussed below.

Local government records in Wales were affected by the passage of the Local Government (Wales) Act 1994, which created twenty-two unitary authorities as of 1 April 1996. Section 60 of this Act (reproduced in Archivum XLI, page 236) requires each new authority to “submit a scheme for the care of their records to the Secretary of State for Wales and have a regard to any advice he may give.” These provisions may also be affected by the passage of the Government of Wales Act 1998 (“An act to establish and make provision about the National Assembly for Wales and the offices of the Auditor General for Wales and Welsh Administration Ombudsman; to reform certain Welsh public bodies and abolish certain other Welsh bodies; and for connected purposes”), which was passed on 31 July 1998.

There are several elements in this extensive 1998 law which may affect archives and records in Wales, either directly or indirectly. Section 28 (Reform of Other Public Bodies) gives the Welsh Assembly the power to transfer functions amongst public bodies listed in the schedules, or to a county, borough, or community council. The provisions for transfer of functions may also include provision for the transfer of staff, property, rights and liabilities. Section 32 notes that "The Assembly may do anything it considers appropriate to support (a) museums, art galleries or libraries in Wales, (b) buildings of historical or architectural interest, or other places of historical interest, in Wales, (c) the Welsh language, or (d) the arts, crafts, sport or other cultural or recreational activities in Wales." Section 70 establishes the principles of the openness of the Welsh Assembly, which has led to the creation of the Code of Practice on Public Access to Information. 16 Relations between the Assembly and local government are covered under Section 113.

Of most interest to archivists are Sections 116-118 of this Act, which deal with "Welsh Public Records." Section 116, while noting the Welsh public records are not public records for the meaning of the Public Records Act 1958, states that they will remain treated as such until an order is made under Section 117, which gives to the Lord Chancellor the power to make an order imposing the preservation of Welsh public records. The meaning of "Welsh public records" is outlined in Section 118. Furthermore, Schedule 18, Part II "Welsh Public Records" notes that there are several repeals of parts in the Schedule of the Public Records Act 1958 relating to Welsh public bodies.

In addition to archival legislation, archives in England and Wales may be affected by the National Lottery etc. Act (1993), which directed that the net proceeds of the National Lottery are to be divided amongst five sectors (sports, arts, the national heritage, charities and projects to mark the year 2000). The funds were administered by the National Heritage Memorial Fund, established by the National Heritage Act 1980 (cited in Archivum XXVIII, pages 388, 398-399). Some funds were provided to projects of an archival nature.

The United Kingdom issues "Notices to Exporters" of antiques, which include works of art, archaeological material, documents and photographs. The latest such notice, drawn up in 1991, was to be phased out from 1 January 1993, and replaced with a new notice which includes European Community harmonization. A copy of the latest notice has not yet been obtained.

The Archivum XLI entry also noted several other pieces of legislation which affect archives. The Data Protection Act 1984 has subsequently been repealed and replaced with the Data Protection Act 1998 (see below). The Copyright, Designs and Patents Act 1988 (c. 48) was also cited; this act remains in force, although a new Copyright and Trademarks Bill that was introduced in the House of Lords on 20 January 2000 and subsequently withdrawn after second reading, may have an impact on this legislation. The Official Secrets Act 1989 appears to be unmodified since 1995.

[New legislation and bills](#)

The Local Government Act 1999 was passed on 27 July 1999, and has as its long title "An Act to make provision imposing on local and certain other authorities requirements relating to economy, efficiency and effectiveness; and to make provision for the regulation of council tax and precepts." A review of the text of this act does not show any specific clauses affecting archives and records; the act is most

concerned with financial and taxation matters. A further local government bill was passed by the House of Lords on 20 June 2000, and received Royal Assent on 28 July 2000 as the Local Government Act 2000. At this time, it is unclear how this legislation may affect local authorities and their archives services.

The Data Protection Act 1998 replaced the Data Protection Act 1984 on 16 July 1998, and is more fully described as “An Act to make new provisions for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information.” Schedule 15 of this Act makes specific minor and consequential amendments to the Public Records Act 1958, that consist of changing the titles of the former “Data Protection Registrar” and adding “records of the Data Protection Tribunal” to paragraph 4(1)(n). The Act also includes definitions of “data,” “personal data,” “relevant filing system,” and “accessible public record.” Part I gives the basic information on definitions and the data principles on which the act is based. Part II covers Rights of Data Subjects and Others; Part III is Notification by Data Controllers; Part IV is Exemptions; Part V is Enforcement; Part VI is Miscellaneous and General, including functions of the Commissioner, unlawful obtaining of personal data, records obtained under data subject’s right of access, and other general provisions. Under Part II, Section 14, a court may order the rectification, blocking, erasing or destruction of inaccurate personal data; it is not clear how this might affect archival institutions.

In the Act, the key definition of “special purposes” is “any one or more of the following - a) the purposes of journalism, b) artistic purposes, and c) literary purposes;” these form the basis for exemptions for release under Part IV, Section 32. The following Section 33 (Research, history and statistics) defines “research purposes” and permits the processing of personal information for such purposes, stating that it is “not to be regarded as incompatible with the purposes for which they were obtained.” Penalties for the contravention of the Act are found in Part VI, Sections 60-61. Schedule 1, parts II and III are composed of “Data Protection Principles” and their interpretations. Finally, Schedule 8, Part IV is entitled “Exemptions after 23rd October 2001 for Historical Research;” it notes various exemptions for the processing of both manual and automated data.

The Data Protection Act applies to all government departments, and is expected to have a considerable effect on records managers, requiring effective data management to ensure the fair treatment of personal information (i.e., the creation of disposal schedules, the provision of secure storage facilities, and the prevention of unauthorized access and use). It is also expected to affect archivists, since the research use of personal data relating to identifiable living individuals must be granted within the bounds of the legislation. Finding aids and other research tools which contain personal information will also need to be constructed with attention to the law’s provisions. The PRO has produced “Guidelines for Records Managers and Archivists,” which explains the new definitions which occur in the Act, summarises the data subject’s rights and the data protection principles, the exemptions for processing for historical, or research purposes, and the complex transitional provisions. 17 The Society of Archivists and the Records Management Society are also currently drafting a Code of Practice for records managers and archivists under Section 51 of the Act.

The Electronic Communications Act 2000 received Royal Assent on 25 May 2000, and is designed to “help build confidence in electronic commerce and the technology underlying it by providing for:

an approval scheme for businesses and other organisations providing cryptography services, such as electronic signature services and confidentiality services;

the legal recognition of electronic signatures and the process under which they are verified, generated or communicated; and

the removal of obstacles in other legislation to the use of electronic communication and storage in place of paper.” 18

The impetus for this Act is the UK government’s policy of facilitating electronic commerce. They have set for themselves the targets of making 100% of all government services available on-line by 2005. All schools and libraries are to be connected to the internet by 2002, and 90% of all routine government procurement of goods should be done electronically by 2001. There are strong parallels here with the situation in Canada, where the government is also making a push to have its services available by 2005. 19

The explanatory notes also indicate that this Act “is consistent with, and seeks to implement, certain provisions of the EU Electronic Signatures Directive (1999/93/EC), which was adopted on 13 December 1999.” It is also compatible with the Organisation for Economic Cooperation and Development (OECD)’s Cryptography Guidelines published on 19 March 1997, and the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law on Electronic Commerce. 20

The Electronic Communications Act 2000 is divided into four parts. Part I (Cryptography Service Providers) covers the registration of providers, restrictions on the disclosure of information, and provision of cryptography support services. It would appear that the restrictions on the disclosure of information in Section 4 applies more to the initial service providers rather than archival institutions. Part II (Facilitation of Electronic Commerce, Data Storage, etc.) includes electronic signatures and related certificates, the power to modify legislation, and modifications for Welsh matters. There are many provisions in existing statutes which require the use of paper in transactions, or might be interpreted to require paper. This act enables Statutory Instruments to amend legislation to allow transactions to be carried out using electronic records.

Part III (Miscellaneous and Supplemental) covers telecommunications licenses, appeals, and general interpretation. This latter information is of interest to archives, as Section 15 (1) defines “document,” “communication,” “electronic communication,” and “record” (which includes an electronic record). Section 15 (2) provides details on references in the act to “authenticity” and “integrity,” which may affect the creation of electronic records which archives will be required to preserve in future. Finally, Section 15 (3) notes that “References in this Act to something’s being put into an intelligible form include reference to its being restored to the condition in which it was before any encryption or similar process was applied to it.” This will undoubtedly affect archives and their acquisition activities in the future. 21

The Freedom of Information Act 22 received Royal Assent on 30 November 2000. It is expected to come into operation in 2002. The Act is a result of the government’s December 1997 white paper “Your Right to Know” (CM3818) on its proposals for a freedom of information act. Following consultation, a draft bill was published as part of a consultation paper (CM 4355) on 24 May 1999, followed by “pre-legislative scrutiny” by committees in both Houses of Parliament and a further period of public consultation.

This Act is intended to supersede the existing Code of Practice on Access to Government Records, which is “a non-statutory scheme which requires Government Departments and other public authorities under the jurisdiction of the Parliamentary Commissioner for Administration to make certain information available to the public and to release information in response to specific requests.”²³ This new Act creates a statutory right of access to government records, provides for a more extensive scheme for making information publicly available, and covers a wider range of public authorities, including local authorities archives offices. There will be effects from this new law both on records management, and on the duties of the archives themselves. The rights to be told if information is held and to obtain that information applies irrespective of the date of the records, meaning that the Act has full retrospectivity. The FOI Act will also amend both the Data Protection Act 1998 and the Public Records Act 1958.²⁴ In the Explanatory Notes, the Home Office notes that “The Public Records Act 1958 reorganized the arrangements for the preservation of public records. It places a duty on the Keeper of the Public Record Office to provide reasonable facilities for inspecting and obtaining copies of such records. The statutory rights under the Bill and the Information Commissioner’s regulatory powers will be extended to information contained in these records.”²⁵

The Freedom of Information Act is divided into eight parts. Part I is Access to Information Held by Public Bodies. Part II is Exempt Information. Part III is General Functions of Secretary of State, Lord Chancellor, and Information Commissioner. Part IV is Enforcement. Part V is Appeals. Part VI is Historical Records and Records in Public Record Office or Public Record Office of Northern Ireland. Part VII is Amendments of the Data Protection Act 1998. Part VIII is Miscellaneous and Supplemental. There are seven schedules, of which Schedule 5 covers amendments to the Public Records Act 1958 and the Public Records Act (Northern Ireland) 1923.

Of note for their impact on archives are the following. Part I, Section 3 (Public Authorities), subsection 2 defines what information is “held” by a public body. The explanatory notes indicate that information from a public body held elsewhere, for example, in a private repository, would be subject to the act. Part VI, Sections 62-67, cover the records held in the Public Record Office, or the Public Record Office of Northern Ireland. The clauses include: an interpretation of a record becoming an “historical record” at the end of thirty years after its creation; the general removal of exemptions on release for historical records (Clauses 63 and 64), consultation with the Lord Chancellor, the Minister responsible for public records in Northern Ireland, or with the public authority prior to the exercising of a refusal of discretionary disclosure for an historical record in the PRO or PRONI (Clauses 65-66); and effecting the amendments of the Public Records Act 1958 and the Public Records Act (Northern Ireland) 1923 contained in Schedule 5. The amendments insert information on the functions of the Advisory Council on Public Records, amend the existing paragraphs in those acts related to access to public records, and grant the power to extend the meaning of public records.

Schedule 5, Part I of the Act amends the Public Records Act in two other ways. The Advisory Council is empowered to advise the Lord Chancellor on matters relating to the application of the FOI Act to information in public records that are historical records (i.e. public records over 30 years old). It will also be easier make new bodies public record bodies, unless they are the categories of body not covered by the Ombudsman.

In addition to the Freedom of Information Act, the Public Record Office has made available the draft version of the Code of Practice called for in Clause 46 of the new Act. It sets out “the practices which public authorities and other bodies subject to the

Public Records Act 1958 and the Public Records Act (Northern Ireland) 1923 should follow in managing their records; and the arrangement which public record bodies should follow in the review and transfer of public records to the Public Record Office, places of deposit or the Public Record Office of Northern Ireland.” The Code of Practice is available on the PRO web site. 26

Also of note in the Act is the Secretary of State’s code outlined in the previous clause (45). The Code makes explicit reference to finding aids (using the terms “catalogues” and “indexes”) as a means of providing assistance to applicants. It represents an attempt to bring together archives practice and the requirements of FOI. The Code, as well as the statutory deadline of 20 days will no doubt transform the way in which written inquiries for information are handled.

Information by Jurisdiction - Scotland

Archival legislation

The governing archival legislation in Scotland continues to be the Public Records (Scotland) Act 1937, and the Public Registers and Records (Scotland) Act 1948 (cited in Archivum XVII, p. 204-208). The former act was amended in 1985 under the National Heritage (Scotland) Act 1985, section 19, to change the Chairman of the Scottish Records Advisory Council, permit the Keeper of the Records of Scotland to acquire and safeguard records other than public records, and alter the limitation date for the disposal of records from 1800 to 1707. Both acts have also been amended as a result of the passage of the Scotland Act 1998. Statutory instrument 1999 No. 1820 (Constitutional Law Devolution, Scotland) of 24 June 1999 notes that Public Records (Scotland) Act 1937 is amended in Section 5(3) to include reference to “any part of the Scottish Administration,” and omit reference to “the consent of the Treasury” in Section 11. Section 1 of the Public Registers and Records (Scotland) Act 1948 (substitution of a Keeper of the Registers and a Keeper of the Records for the Keeper of Registers and Records for Scotland) is also amended to omit subsections 4 and 5, and substitute the words “Scottish Ministers” for “Secretary of State” in subsection 6.

The Register of Sasines Act 1987, as noted in Archivum XLI, “prompted proposals for the conversion of existing volumes of the Register to microform and for the transfer of responsibility for the registers from 1869 to the Department of Registers of Scotland from the Scottish Records Office.” There do not appear to have been any amendments to this act since 1995.

The structure of local government in Scotland has also changed since 1995, with the passage of the Local Government etc. (Scotland) Act 1994. Section 53 of this act (cited in Archivum XLI, pages 237-238) requires new local authorities to consult the Keeper of the Records of Scotland and take note of any comments he may have.

The passage of the Scotland Act 1998 on 19 November 1998 (“An act to provide for the establishment of a Scottish Parliament and Administration and other changes in the government of Scotland; to provide for changes in the constitution and functions of certain public authorities; to provide for the variation of the basic rate of income tax in relation to income of Scottish taxpayers in accordance with a resolution of the Scottish Parliament; to amend the law about parliamentary constituencies in Scotland; and for connected purposes”) may also have effects on archives and records in Scotland. Section 38 of this Act gives instructions to the Keeper of the Registers of Scotland regarding the Register of the Great Seal (for letters patent and proclamations). The structure and functions of the Scottish Executive are outlined in

Part II, Sections 44 to 63. Section 126 provides definitions of “document” and “public body.” Finally, Schedule 8 (Modifications of Enactments) notes changes to the Public Registers and Records (Scotland) Act 1948, c.57.

New legislation and bills

On 23 June 1999, the Deputy First Minister and Minister for Justice announced the intention of the Scottish Executive to implement a Scottish Freedom of Information bill. At the same time, he also announced the publication of the Executive’s new “Code of Practice on Access to Scottish Executive Information.” Closely modeled on the United Kingdom’s similar code, the Scottish code states:

The code is not intended to override existing statutory provisions on access to government records. In Scotland, there is no general rule on access comparable to the 30 year rule fixed by the Public Records Act 1967, which does not apply to the records of any government body which is wholly or mainly concerned with Scottish affairs, or which carries on its activities wholly or mainly in Scotland. However, current practice applied to these records follows the 1967 Act, as modified by the White Paper on Open Government (CM 2290), and will continue to do so. 27

The Scottish Executive invited views on proposals for the legislation as set out in the document “An Open Scotland,” which is available on their website; 28 after such views are received, the Executive intends to proceed with a draft bill and pre-legislative scrutiny. The Deputy First Minister announced the publication of a summary of those responses on 25 May 2000. 29

Of interest to archives, the introduction to “An Open Scotland,” noted the following about public records:

1.15 There are close links between the subjects of Freedom of Information and public records. Separate consideration is being given to the need for Scottish national archives legislation. Although there are no plans to introduce this in the same timeframe as the Freedom of Information legislation, it is important nonetheless to ensure compatibility between the latter and the system for managing our public records. The links with public records are considered in Chapter 7.30.

Information by jurisdiction - Northern Ireland

The relevant archival legislation in Northern Ireland is the Public Records Act (Northern Ireland) 1923 and the Disposal of Documents (Northern Ireland) Rules 1925, both of which were cited in Archivum XVII, pages 199-203). It was noted that “in the absence of local archives services, PRONI also holds many local authority records.”

While there do not appear to have been any amendments to these two specific pieces of legislation since 1995, it is not immediately clear what impact new legislation on Northern Ireland government will have on archives and records in that country. Parliament has passed both the Northern Ireland Act 1998 (“An act to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multiparty talks on Northern Ireland set out in Command Paper 3883”), assented to 19 November 1998 and the Northern Ireland Act 2000 (“An act to make provision for the suspension of devolved government in Northern Ireland and the exercise of certain functions conferred by or under Part V of the Northern Ireland Act 1998; and for connected purposes”), passed on 10 February 2000. The 1998 Act included minor amendments to the Copyright, Designs and Patents Act 1988, the Data

Protection Act 1998, and the Official Secrets Act 1989. The 2000 Act notes under Section 4(6) that “Any act which was effective, immediately before section 1 [suspension of devolved government in Northern Ireland] came into force, as an act of a Minister, continues to have effect as the act of the substituted authority.”

AREA 5: SOUTH WEST ASIA (SWARBICA)

Countries covered: Bangladesh, India, Maldives, Pakistan, Sri Lanka

Regional Rapporteur: Dr. Gavin Wimalaratne, National Archives of Sri Lanka

COUNTRY	LEGISLATION
INDIA	Public Records Act, No 69 of 1993
MALDIVES	No archives legislation in place, drafting of legislation proposed
PAKISTAN	National Archives Act 1993
SRI LANKA	National Archives Law, No. 48 of 1973 National Archives law, No. 48 of 1973, Regulations under Section 16(d)

No detailed report is available for this region.

AREA 6: WEST AFRICA (WARBICA)

Countries Covered: Cameroon, Gambia, Ghana, Nigeria, Sierra Leone

Regional Rapporteur: Mr. J.B. Daramola, National Archives Department, Nigeria

COUNTRY	LEGISLATION
CAMEROON	as in Archivum XX, 29-35, XXVIII, 90-94
GAMBIA	Public Records Act 1967 replaced by Gambia National Archives Act No. 15 1986, replaced by the National Records Service Act 1993
GHANA	Public Ordinance Act No. 35 1955 replaced by Public Archives Regulations 1958 replaced by Ghana Archives Act 1995
NIGERIA	The Archives Ordinance No.. 43, 1957 replaced by the National Archives Decree No. 30, 1992
SIERRA LEONE	Sierra Leone Archives Act 1965

Gambia

Gambia’s first Public Records Act was enacted on 15 April 1967. It was replaced by a second archives act known as the Gambia National Archives Act No. 15, enacted on 25 August 1986. This act changed the name of the Public Record Office, to the Gambia National Archives and the title of Keeper of Public Record Office to the Chief Archivist. The new law saw the inclusion of depository rights to the Gambia National Archives. This law has since been replaced by the National Records Service Act of 1993.

Ghana

The first archival legislation in the English speaking West African sub-region was that of Ghana in 1955: the Public Ordinance Act no .35, 1955. This act had a minor amendment in 1958, (i.e., the creation of the Public Archives Regulations). The Regulations reduced the closed period of records from 50 years to 30 years. The latest archive law in Ghana was enacted in 1995. 31

Nigeria

The National Archives of Nigeria was established in 1954. The law governing its operations, known as the Archive Ordinance No. 43, 1957, was enacted on 1 November 1957. The law was deficient in many respects. For instance, it failed to accord the Director of National Archives compulsive powers over public records. It also failed to address the problems of records management in the country. Consequently, deep and concerted efforts were made by the National Archives to redress the shortfalls in the Archive Ordinance. In 1992, a new Archives Decree known as the National Archives Decree No. 30, July 1992 was enacted (Archivum XLI, pages 51-61). This decree has largely addressed the issues that were left out in the now moribund Act of Parliament of 1957.

The new National Archives Decree is divided into four sections:

- Part I - Establishment of the National Archives of Nigeria;
- Part II - Preservation and management of public records;
- Part III - Preservation and management of records of private bodies, individuals and companies;
- Part IV - Miscellaneous - Provisions for the appointment of the National Archives Advisory Council.

Sierra Leone

The Sierra Leone National Archives was established in 1950 but the Act governing its operations was not enacted until 1965. The Act did not accord the Director or his representative the compulsory power over the acquisition of government and private records. The Director does not have authority under the law to address the problems of active records or to inspect registries. There are, however, intentions to amend the Act so as to put emphasis on final disposition. When amended, the Act is expected to give the Director powers to inspect and examine public records and provide advice on maintenance and preservation.

AREA 7: THE PACIFIC (PARBICA)

Countries Covered: Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu

Regional Rapporteur: Mr. Serareki Tale, National Archives of Fiji

COUNTRY

LEGISLATION

AUSTRALIA

Commonwealth

Archives Act 1983

Freedom of Information Act 1982

Census Information Legislation Amendment Act 2000

	<p>Copyright Amendment (Digital Agenda) Bill 1999 Copyright Amendment Act 1980 Copyright Act 1968 Privacy Amendment and (Private Sector) Bill 2000 Privacy Act 1988 Evidence Act 1995 Human Rights Legislation Amendment Bill (No 2) 1999 Data-Matching Program (Assistance and Tax) Act 1990 Public Service Act 1999 Telecommunications (Interception) Amendments Act 1987 Australian Security Intelligence Organisation Amendment Act 1986 Administrative Decisions (Judicial Review) Act 1977</p>
Australian Capital Territory	<p>Freedom of Information Act (ACT) 1989 Freedom of Information (Amendment) Bill 1998 The Executive Documents Release Bill 2000</p>
New South Wales	<p>State Records Act 1998 replacing the Archives Act 1960 Freedom of Information Act (NSW) 1989 Privacy and Personal Information Protection Act (NSW) 1998</p>
Northern Territory	<p>Evidence Act (NT) 1999</p>
Queensland	<p>Public Records Bill (Q'ld) 1999 Libraries and Archives Act (Q'ld) 1988 Freedom of Information Act (Q'ld) 1992 Evidence Act (Q'ld) 1997</p>
South Australia	<p>Invasion of Privacy Act (Q'ld) 1971 State Records Act (SA) 1997 Evidence Act (SA) 1929</p>
Tasmania	<p>Freedom of Information Act 1991 Archives Act (Tas) 1983</p>
Victoria	<p>Freedom of Information Act 1991 Public Records Act (Vic) 1973 Freedom of Information Act 1982 Evidence Act (Vic) 1958</p>
Western Australia	<p>State Records Bill (WA) 1999 Library Board of WA Act 1951 Freedom of Information Act 1992</p>
COOK ISLANDS	<p>Cook Island Public Records Act 1984</p>
FIJI	<p>Laws of Fiji, Chapter 108, Public Records Act 1970 Freedom of Information Bill 2000</p>
KIRIBATI	<p>Public Records Act 1981</p>
NEW ZEALAND	<p>Archives Act 1957 Archives, Culture, and Heritage Reform Bill 2000 Local Government Act 1974 Official Information Act 1982 Privacy Act 1993</p>
NIUE	<p>Niue Archives Act 1992</p>
PAPUA NEW GUINEA	<p>National Library and Archives Act 1993</p>
SAMOA	<p>Western Samoa Archives Bill 1997</p>
SOLOMON ISLANDS	<p>Solomon Islands Archives Act 1994</p>

TUVALU Laws of Tuvalu, revised edition 1982, Chapter 99: Public Records
VANUATU Archives Act Vanuatu No. 13 1992

Australia

Australian Capital Territory (ACT)

The ACT Government will be introducing legislation to establish an archives regime in the ACT. Recordkeeping is an evolving discipline, and it will remain important for the community to debate and examine the issues surrounding government record-keeping, as the legislation for this initiative is drafted and beyond. Several papers on this subject were delivered at seminar presented by the Australian Society of Archivists (ASA), ACT Branch in May 1999. The papers are available through the Association of Australian Archivists' web site, at <http://www.archivists.org.au/sem/actarchives/>.

An Executive Documents Release Bill 2000 has just been released by the Standing Committee on Justice and Community Safety. The ASA congratulated the ACT Government on its decision to enact legislation to establish an archives regime in the Territory, as this represents a comprehensive, whole-of-government approach to gaining efficient, transparent and accountable response to the need for public access to government information.

The ASA would encourage this comprehensive approach and urge the ACT Government to deal with Cabinet and other executive documents as part of broader archives and records legislation, rather than as a separate instrument. It is also preferable that a single body be responsible for decisions to release public records in order to ensure a consistent and equitable access regime. The ASA believes that an independent ACT Government Archivist should have overall responsibility for making access decisions for all records, while recognizing that the archivist may in some cases need to consult with creating agencies, including the Legislative Assembly and its Committees, on some issues.

Submissions to the ACT Government included the Executive Documents Release Bill 2000, and the Freedom of Information (Amendment) Bill 1998.

Kiribati

The nation of Kiribati was formed in 1979. The National Archives dates from that time and received its legal base with the passage of the Public Records Act in 1981. The Act is modeled closely on Fijian legislation. It gives the Archivist powers and responsibilities; however, the Public Service structure is such that it does not provide the Archivist with the resources or political clout to implement much of the rights and obligations that the legislation specifies. The Kiribati National Archives reports to the Kiribati National Library, and there could arise a conflict of interest if the CEO holds responsibilities both for Chief Librarian and Archivist. 32

New Zealand

While New Zealand has in form a full array of archives and records legislation, its principal statute, the Archives Act 1957, has long been out of date. In particular it is not properly harmonized with more recent freedom of information of information and privacy legislation, does not allow for electronic records, and does not deal adequately with the issue of records of corporatised and privatised government agencies. The

New Zealand Archives Act 1957 is having minor changes made to it so that the National Archives of New Zealand can become a statutory authority. Revised legislation of varying character has been in the wings since at least 1984, when a bill failed shortly after introduction. Various attempts to modify or replace that bill have been made, as recently as 1996. A new principal act was to receive priority from the new Labour government (elected November 1999).

On 17 August 2000, a media release was issued by the Hon. Marian Hobbs, Minister responsible for the National Library and National Archives, to accompany the introduction of the Archives, Culture and Heritage Reform Bill in Parliament. Under this Bill, the present archives will be an independent department named the Archives New Zealand as of 1 October 2000.

The Bill does not address the issues of record-keeping standards or issues related to electronic records and the government intends to overhaul the Bill just introduced, which is to become the governing legislation for Archives New Zealand. The Minister has said "We want to ensure it (Archives New Zealand) has a role, functions and powers and the ability to exercise those in support of government and accountability, as appropriate for an information-based organisation in the twenty-first century."

Vanuatu

There is presently no system of control for government records in Vanuatu; Australian archivists Bruce Burne and Peter Orlovich have been contributing to the development of such a system.

There is little knowledge within the Vanuatu of the importance of archives and archival systems. The most sought after records are those relating to the courts or land. The joint colonial administration meant that colonial period records may be in French or English. Following independence, many records were removed to London or Noumea; the records taken to London mainly comprise those of the British South West Pacific Commission. Many Pacific countries with a British colonial past are keen to have these records returned.

Other Countries

Niue, Nauru, Samoa and Tonga do not have archives legislation in place, nor does Tuvalu.

It appears very unlikely that any of the Pacific States, excluding Australia and New Zealand, have in place Freedom of Information and Privacy Acts or any other Acts impacting on archives.

Appendix A

List of Legislation websites

AREA 4: Canada

Government of Canada 33: http://canada.justice.gc.ca/loireg/index_en.html

Province of Alberta: <http://www.gov.ab.ca/qp/>

Province of British Columbia: [http:// www.legis.gov.bc.ca/legislation/index.htm](http://www.legis.gov.bc.ca/legislation/index.htm)

Province of Saskatchewan: statutes available electronically through a paid subscription service

Province of Manitoba: <http://www.gov.mb.ca/chc/statpub/>

Province of Ontario: <http://209.195.107.57/en/index.html>

Province of Quebec: <http://doc.gouv.qc.ca/fr/frame/index.html> (French)
http://doc.gouv.qc.ca/en/loisreglements/html/tele_mots_cles.dbml (English)

Province of New Brunswick: <http://www.gov.nb.ca/justice/asrlste.htm>

Province of Nova Scotia: <http://www.gov.ns.ca/legi/legc/>

Province of Prince Edward Island: [http:// www.gov.pe.ca/law/index.php3](http://www.gov.pe.ca/law/index.php3)

Province of Newfoundland: <http://www.gov.nf.ca/just/>

Yukon Territory: http://legis.acjnet.org/Yukon/index_en.html

Northwest Territories: <http://www.assembly.gov.nt.ca/Legislation/index.html>

AREA 4: United Kingdom

United Kingdom Parliament World Wide Web Service: <http://www.parliament.the-stationeryoffice.co.uk/>

Acts of the UK Parliament: <http://www.hmso.gov.uk/acts.htm>

Wales Legislation: <http://www.wales-legislation.hmso.gov.uk/>

Scotland Legislation: <http://www.scotland-legislation.hmso.gov.uk/>

Northern Ireland Legislation: <http://www.northernireland-legislation.hmso.gov.uk/>

Scottish Executive: <http://www.scotland.gov.uk/default.asp>

National Assembly for Wales: http://www.wales.gov.uk/index_e.html

Public Record Office of the United Kingdom: <http://www.pro.gov.uk/> (includes information about the Public Records Act: <http://www.pro.gov.uk/about/publicrecordsacts.htm>)

- 1 This revision was made to incorporate new and additional information from the Public Record Office for England and Wales under Area 4 (United Kingdom).
- 2 It should be noted that many of the governments have made their statutes available in electronic format on their official websites; the sites often also include information on the introduction and progress of bills through the legislature. A listing of these web sites may be found in Appendix A of this report.
- 3 Maureen A. Mancuso, "Nova Scotia's Freedom of Information Act of 1977," in *Canada's New Access Laws: Public and Personal Access to Governmental Documents*. Donald C. Rowat, ed. (Ottawa: Carleton University, 1983), p. 58.
- 4 Canadian Historical Association, "The Right to Privacy in the Private Sector: What is at Stake for Historians and Historical Research," from the CHA web site (www.yorku.ca/research/cha/html/english/burgess_bull_e.html as of 20 July 2000).
- 5 Initial research indicated that PEI did not yet have FOI legislation. Further research revealed that in 1997, a proposal for such legislation was tabled and awaited second reading. The status of this proposal remains unclear at this time.
- 6 The United Kingdom has also recently passed a new Electronic Communications Act 2000 which is based upon this model law; see below for details.
- 7 Information taken from the summary included with the text of Bill C-206.
- 8 "The New Copyright Law and archives," prepared by Wanda Noel and Elizabeth Hawkins under the direction of the Bureau of Canadian Archivists. Ottawa: Bureau of Canadian Archivists, 1999.
- 9 The full brief and supporting correspondence is available through the ACA Website at www.aca.archives.ca/official.com/c-54/brief.htm (current as of 14 August 2000).
- 10 The United Kingdom's newly-enacted Electronic Communications Act 2000 is also based on the UN Model law (see above for details).
- 11 A copy of this paper is available from the Ministry of Consumer and Commercial Relations web site (http://www.ccr.gov.on.ca/mccr/english/2766_b1a.htm) (Current as of 31 October 2000).
- 12 These changes were a result of *Projet de loi 122, Loi modifiant la loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnel, la Loi sur la protection des renseignements personnel dans le secteur privé le Code des professions et d'autres dispositions législatives*, the text of which is found at www.assnat.qc.ca/fra/publications/projets-loi/publics/00-f122.htm (current as of 31 October 2000).
- 13 A more detailed review of Québec archival legislation is found in Carol Couture and Marcel Lajeunesse, *L'Égislation et politiques archivistiques dans le monde* (Québec: Documentor, 1993), pages 316-329.
- 14 *Avant project de loi, Loi sur la normalization juridique des nouvelle technologies de l'information*, at www.assnat.qc.ca/fra/publications/av-projets/00-fap01/htm (current as of 31 October 2000).
- 15 The electronic text of this act is available on the Maltese Government Website as of 17 July 2000.
- 16 The introduction to the Code (available on the Government of Wales website at http://www.wales.gov.uk/works/public_access_info/codeofpracticecover_e.htm as of 6 September 2000) notes that it "reinforces the principles of open government, extending access to information and ensuring that the National Assembly's decisions are open to scrutiny by the public. The Code is in two parts: part I describes the general provisions under which the National Assembly will operate; and part II outlines the categories of information which it may withhold."
- 17 The Guidelines are available on the PRO web site at <http://www.pro.gov.uk/recordsmanagement/dp/default.htm> (current as of 4 December 2000).

18 Much of the information on this Act is taken from the “Explanatory Notes” produced by the Department of Trade and Industry in order to assist readers in understanding the Act. They may be found at www.hmso.gov.uk/acts/en/2000en07.htm as of 9 August 2000.

19 See Area 4, Part 3 (Canada) of this report, under “Changes to existing federal legislation since 1995”, for information on the newly-enacted Canadian Personal Information Protection and Electronic Documents Act.

20 The Province of Ontario, Canada’s Bill 88, the Electronic Commerce Act, cited in Area 4, Part 3 of this report, is also noted as being based upon the UN model law.

21 The Civil Evidence Act of 1995 may also affect the requirements to keep original records as evidence, since it permits courts to give weight to evidence formerly considered inadmissible, such as copies.

22 Much of the information on the FOI Act is taken from the “Explanatory Notes” produced by the Home Office in order to assist readers in understanding the Bill when it was introduced to Parliament. They may be found at www.parliament.the-stationery-office.../pa/ld199900/ldbills/055/en/00055x-.htm as of 9 August 2000.

23 Freedom of Information Bill “Explanatory Notes,” pages 1-2.

24 Schedule 5, Part I will repeal the provisions under the Public Records Act for access to records.

25 This will include: local government, National Health Service bodies, schools and colleges, the police and other public bodies and offices. (“Explanatory notes,” page 2.)

26 www.pro.gov.uk/recordsmangement/FreedomofInformation.htm as of 9 August 2000.

27 “Code of Practice on Access to Scottish Executive Information.” (<http://www.scotland.gov.uk/library2/doc01/code.pdf> (as of 9 August 2000), Part I, Section 9).

28 www.scotland.gov.uk/library2/doc07/opsc-02.htm (as of 29 August 2000).

29 The responses are noted as being available at www.scotland.gov.uk/publications/recent.asp and also on www.scotland.gov.uk/pubappt/foi.asp (as of 29 August 2000).

30 www.scotland.gov.uk/library2/doc07/opsc-02.htm (as of 29 August 2000).

Unfortunately, the electronic version of Chapter 7 was unavailable on the web site, despite several attempts to gain access.

31 The entry for Ghana in Archivum XL, pages 280-281 noted that the National Records Administration Law, 1992 was under discussion before Parliament.

32 Pat Jackson, Archives in Kiribati, paper given at the Australian Society of Archivists 1999 conference. <http://www.archivists.org.au/events/conf99/ackson.html> (current as of 31 October 2000).

33 The Infobase presented on the Government of Canada, Department of Justice website (www.canada.justice.gc.ca) contains the consolidated Acts of the Canadian Parliament, updated to 31 December 1999, that were included in the Revised Statutes of Canada, 1985, as well as Acts of public general application that have been enacted since the 1985 revision. ACARM Legislation Project - Regional Reports (Revised 4/12/00)

