



# GENERAL PRINCIPLES FOR GOVERNMENT ARCHIVES LEGISLATION

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COUNCIL OF AUSTRALASIAN ARCHIVES  
AND RECORDS AUTHORITIES

OFFICIAL

# GENERAL PRINCIPLES FOR GOVERNMENT ARCHIVES LEGISLATION IN AUSTRALIA AND NEW ZEALAND

## Executive Summary

Government transparency and accountability are profoundly aligned with effective recordkeeping and archival management. To best capture the activities of government, the Council of Australasian Archives and Records Authorities (CAARA) have identified core principles that should be reflected in government archives legislation.

We note that across our jurisdictions there are varied legislative models and we recognise that there are jurisdictional differences in our approaches. However, we believe there are core **functional elements** that should be present for archives legislation to meet the needs and expectations of both government and citizens.

The core principle is that the activities and functions that are funded and controlled by government should be documented, and those records should be available in the future to ensure government accountability and meet citizen needs.

## Definition of a record

A record should be defined as widely as possible. It should include information in all formats including data, recordings, social media posts, text messages and other modern forms of documenting and recording government communications and decisions. Where possible it is recommended that the definition of record be linked to a widely used standard definition such as that in *ISO 15489 Records management* or a definition in other legislation<sup>1</sup> that is frequently updated to ensure it remains current.

A mechanism should be in place to ensure that the definition remains up to date and covers recent technology as it arises. Consideration should also be given to the relationship with other relevant legislation.

## Definition of a public record

The definition of a public record should capture any record made or received by a person employed by a public office, court, or judicial body. It should include records created by contractors, consultants and people working in organisations contracted to provide government services. Consideration should also be given to including records that are created by algorithms or artificial intelligence.

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<sup>1</sup> For example in Victoria the *Public Records Act 1973* links the definition of record to the definition of document in the Victorian *Evidence Act 2008*. As the Evidence Act is frequently updated to ensure that evidence in all of its forms can be presented in courts this mean the definition of record is also up to date.

## Definition of a public office

The definition of a public office should include the broadest possible understanding of government. Coverage should include but not be limited to departments, agencies, local government (where applicable), statutory authorities, state owned corporations, unincorporated bodies created by government, courts, judicial bodies, Royal Commissions, Commissions of Inquiry, and ministerial offices. Omission of any of these bodies should be carefully considered as each omission has the potential to reduce government accountability and memory.

## Duties and powers of head of archives

The duties and powers of a head of archives should be specified in archives legislation. These should include the ability to set mandatory standards applicable to all government offices and to report on both the activities of the archives and on the state of government recordkeeping in their jurisdiction. The head of archives should also be able to determine which records must be kept and how long they need to be kept for. Where applicable the head of archives should also be able to determine

- custody requirements,
- storage arrangements for archives and records,
- access provisions,
- transfer requirements, and
- preservation requirements.

## Independence of decision making

Consideration should be given to ensuring that decisions with regard to records and archives matters, can be made without political interference or the perception of political interference. These decisions may include access, disposal and transfer of records and archives, standard setting, compliance and reporting.

This may be achieved through defined powers for the head of archives and/or an independent Commission that reports directly to Parliament.

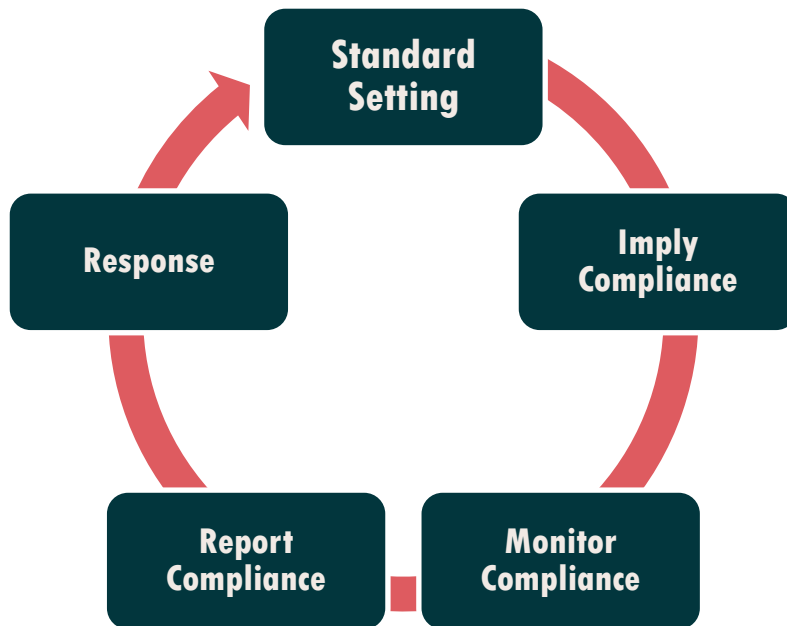
## Duties of a person in charge of the public office

Archives legislation should specify the duties of the head of the public office. The person in charge of a public office should be responsible for compliance with mandatory recordkeeping standards and provide information about their office's compliance on a regular basis.

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## Compliance monitoring and reporting

Compliance with standards should be monitored by the archives and should be reported as part of annual reporting. This ensures a continuous improvement in government recordkeeping and allows both public offices and the archives to target and prioritise their activities to those areas that require more attention.



## Review of decisions made by head of archives or other decision maker

The decisions made in regard to government recordkeeping by the head of archives (or other decision makers as outlined in the archives legislation) should be able to be reviewed by an independent body or other arbiter. This could be the advisory body, the minister responsible for the archives, an administrative tribunal or other appropriate person.

## Advisory body

An advisory body representing stakeholder groups should be created to assist the archival authority and decision makers in undertaking the archival authority's functions. The ability to formally engage with stakeholder representatives enables greater rigour and oversight of performance and decision making by those groups who are directly affected by the carrying out of archival functions.

Consideration should be given in identifying the level of decision making (if any) the advisory body is empowered to undertake. Various models exist across jurisdictions in Australia and New Zealand. These range from purely advisory, to having a review and approval function. Consideration should also be given as to whether the advisory body has the ability to independently raise issues with the minister responsible for the archival authority.

Stakeholders on the advisory body should represent the widest possible scope. Advisory body members should represent users of records as well as records creators and those affected by standards and policies set by the archival authority. It is especially recommended that the advisory body include a First Nations representative. Examples of stakeholder representatives and areas of interest include but are not limited to academic historians, public historians, family historians, ministers, specialists in public administration, specialists in government information law, First Nations, government agencies including where applicable, local government.

## Offences and penalties

Offences and penalties differ across jurisdictions. Offences and penalties, while they are not often applied, are valuable to signal those behaviours and actions that are most important.

While there are a range of offences that may be considered, there should be a recognised offence for destruction of public records without permission. Other identified offences for consideration include:

- unauthorised alteration of a record in archival custody,
- inappropriate disclosure of information from a record closed to public access,
- government organisation not keeping records in accordance with standards prescribed.

## Access determinations for records in custody

Records in the custody of archives should be open access by default. There is considerable variation between jurisdictions on where decision-making powers rest to open or restrict access to archival records. Regardless of where decision-making powers rest, there should be specific criteria for closing records that an act can define. Similarly, the period for which records must remain closed varies across jurisdictions. We believe archives laws should maintain the shortest closed period that is reasonable, noting that the complexities of decision making on public access to records are greater for more recently created records. While a fixed 'closed period' is common across jurisdictions, other more flexible approaches should be considered to allow for the earliest possible release of information that is not sensitive. Defined closed periods can, however, be useful in cases where the records are not in archival custody.

Common grounds for restriction of access relate to sensitive personal information, public safety, law enforcement, commercial sensitivity, proprietary information, or cabinet in confidence. It is recommended that instruments governing access to information allow for as few exemptions as possible, again noting the balance that must be achieved between the early release of records and the reduction of permissible restrictions. Flexibility is also required around renewing or removing existing exemptions to allow for changes in community expectations. Sufficient justification should be provided for any decision to restrict or alter the restriction of access to public records.

## Estrays

We recognise that sometimes public records leave government hands and there should be a mechanism for recovery of those records. Clear parameters on what the archives can or cannot do to

return public records to government custody and ownership is important. Careful consideration, and flexibility, is needed regarding questions such as powers and decision-making regarding compulsory acquisition or purchase of estrays.

## Rights in records

The concept of rights in records is an emerging issue in records and archives discourse. The practical methods of giving effect to some of the rights of records subjects and others are yet to be settled. We support the protection of rights to amend incorrect information in records, and the right to augment records to provide alternative opinions and points of view. We also support consideration of how to give effect to rights of records subjects to influence decisions about access to records.

We particularly recommend that archives and records legislation provide mechanisms to allow First Nations people to exercise control over their cultural knowledge, and for archives and records institutions to have the ability to restrict access to secret-sacred and other materials that are sensitive for First Nations communities. The International Council on Archives' Tandanya-Adelaide Declaration can provide additional guidance on First Nations rights and interests in records.

## Alignment with other information regulation

Archives legislation should be considered in the context of other elements of a jurisdiction's information management regulatory framework. This is likely to include consideration of intersections with Freedom of Information/Right to Information, privacy, open government, and open data policy and legislation.