

## Background

On the basis of the international human rights instruments to which Australia is a signatory and relevant Australian law, Indigenous communities are globally recognised to have inherent rights to preserve their identity while participating to the fullest in the mainstream culture. Rights of self-determination in particular provide for the exercise of cultural rights as human rights.

Archives play a critical role in the recovery of Indigenous knowledge and language and providing evidence for establishing identity, family link-ups, community regeneration, land claims and redress of human rights abuse. They, therefore, underpin Indigenous human rights, self-determination and the exercise of cultural rights as human rights.

Policies and practice in archival institutions in Australia are currently not fully in line with international conventions relating to Indigenous human rights, particularly the right of self-determination, including the exercise of cultural rights as human rights, the right to know and the right of reply. This Position Statement provides details of Indigenous human rights and related archival requirements and recommends action by the Australian archival profession, archival institutions and records authorities to address them.

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* explicitly recognises Indigenous cultural rights as human rights, giving them a special mention in its preamble as well as a specific section. Given the "dialogue" model of the Victorian Charter, human rights must be taken into account when developing, interpreting and applying Victorian law and policy, and complying with Australia's international obligations. Consequently, the development, interpretation and application of Victorian archival law and policy need to address the requirements of the Charter.

A federal Bill of Rights has been proposed by the National Human Rights Consultation Committee. The implications for archival law, policy and practice of the new Victorian Charter for Human Rights and the proposed law need to be further researched, clarified and addressed.

# Recommendation to Archival Profession, Archival Institutions and Records Authorities

By far the largest obstacle to the realisation of Indigenous human rights related to the archival sources of their knowledge is that Australian legal and archival frameworks do not recognise Indigenous cultural rights as human rights, or provide for ownership rights for people who are considered to be the subject of records. Therefore the general effect of the laws of personal and intellectual property is that the organisations which create or receive and maintain records relating to Indigenous peoples exercise almost all control over them. In relation to government records, privacy, freedom of information and public records laws do give records subjects some rights over the collection, use and disclosure of information about themselves. However, these rights apply only to individual records subjects: they cannot be exercised by Indigenous peoples as a collective or by individuals in relation to deceased family members.

The legal and archival frameworks apply equally to anyone who is the subject of records in archives: Indigenous people are legally in exactly the same situation as everyone else. The *effect* of this framework, however, is not the same for everyone. The special claims of Indigenous people could be addressed by:

- Reforms to Australian archival legal frameworks to recognise Indigenous cultural rights in records, and consequent extension of existing international and national laws and protocols relating to Indigenous human rights and heritage to archival sources of Indigenous knowledge, e.g. United Nations *Joinet-Orentlicher Principles* (UN1999 & 2005), United Nations *Declaration of Indigenous Human Rights* (UN 2007), *Report on Australian Indigenous Cultural and Intellectual Property Rights* (ATSIC 1999).
- Australian archival institutions and records authorities should use a combination of information technology, legal and policy initiatives to extend the existing legal and moral rights of Indigenous individuals and communities relating to the control, disclosure, access and use of records.
- The adoption by the Australian archival profession and institutions of a participant model which involves repositioning record subjects as records agents - participants in the act of records creation. In a fully implemented participant model, every contributor, including the person who is the subject of the document, has legal and moral rights and responsibilities in relation to ownership, access and privacy.
- Expanding the definition of record creators in archival science to include everyone who has contributed to a record's creative process and has been affected by its action, thus supporting the enforcement of a broader spectrum of rights and obligations.

# Human Rights Principles and Related Archival Requirements

## Principle of Self-Determination and the Exercise of Cultural Rights as Human Rights

Self-determination is the right of peoples to a system that respects and facilitates their political, social and economic participation. Recognition of the right of self-determination would affect most profoundly (but not exclusively) the rights of indigenous peoples in Australia.) Recognition of a right to self-determination would constitute a significant stepping stone towards true reconciliation in Australia. It would signal that a Bill of Rights was truly meant to embrace rights for Indigenous peoples along with all others in Australia. (Castan Centre for Human Rights Law, Monash University, Submission to the National Human Rights Consultation, 2009, pp. 45-46)

The principle of self-determination relates to the right and duty of Indigenous peoples to maintain and develop their own cultures and knowledge systems and includes the right to be recognised as the primary guardians and interpreters of their cultures, supporting the exercise of cultural rights as human rights. Protecting Indigenous cultural and intellectual property is based on the principle of self-determination.

### Related Archival Requirements

- Engage, on an ongoing basis, Indigenous communities in the capture, appraisal, management, preservation and access to records that contribute to their self-determination and cultural identity.
- Review and revise, using the language of human rights, the *ATSI Library and Information Resources Network Protocols*, updated version of 1995 *ATSI Protocols for Libraries, Archives and Information Services* (ASTILIRN 2005).
- Negotiate rights by creating a register of interested persons (descendants of the relevant community) for ongoing management of relevant sets of records.
- Under the Victorian *Charter of Human Rights and Responsibilities Act 2006* examine the Public Records Act (VIC) and the policies and actions of the Office in terms of compatibility with the Charter, the Human Rights Act s 19 and international conventions to ensure special provisions for Indigenous Victorian communities.

**NOTE:** These first three requirements may also be regarded as a consequence of the Principle of Non-discrimination.

### International Warrants

***The International Covenant on Civil and Political Rights (ICCPR)*** 1966  
***International Covenant on Economic, Social and Cultural Rights (ICESCR)*** 1966  
(Both ratified by Australia)

#### Article 1:

- All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

#### ***United Nations Declaration on the Rights of Indigenous Peoples 2007***

(Ratified by Australia)

#### Indigenous peoples:

- have the right of self-determination and can choose their political status and the way they want to develop (article 3)
- have the right to keep and develop their distinct characteristics and systems of law; they also have the right, if they want, to take part in the life of the rest of the country (article 4)
- shall be free from cultural genocide; governments shall prevent: actions which take away their distinct cultures and identities; the taking of their land and resources; their removal from their land; measures of assimilation; propaganda against them (article 7)
- have the right to their distinct identities; this includes the right to identify themselves as Indigenous (article 8).

#### ***The ILO Convention 169 Indigenous and Tribal Peoples in Independent Countries 1989***

(A legally binding convention on economic rights which has *not* been ratified by Australia)

#### Article 2:

- Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
- Such action shall include measures for:
  - ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

- promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.

## **Domestic Warrants**

### ***Charter of Human Rights and Responsibilities Act 2006 (VIC)***

Preamble: rights have special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

Section 19 Cultural Rights:

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community -

- to enjoy their identity and culture; and
- to maintain and use their language; and
- to maintain their kinship ties; and
- to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

## Principle of Non-Discrimination

Full realisation by Indigenous peoples of their human rights requires eliminating racism 'to promote [indigenous peoples'] full and equal enjoyment of civil, political, economic, social and cultural rights, as well as the benefits of sustainable development, while fully respecting their distinctive characteristics and their own initiatives'. (Tom Calma "Indigenous Issues in the Durban Review", Castan Centre Public Forum, *Can the UN Combat Racism? A preview of the Durban Review* Melbourne, 20 February 2009)

### Related Archival Requirements

1. The right of Indigenous communities to determine third party access to records held by archival organisations on the basis of redressing discrimination.

See also above [Principle of Self-determination](#)

### ***United Nations Declaration on the Rights of Indigenous Peoples 2007***

(Ratified by Australia)

Article 2:

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular, that based on their indigenous origin or identity.

### ***The International Covenant on Civil and Political Rights (ICCPR) 1966***

### ***International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966***

(Both ratified by Australia)

Article 2:

- Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.
- The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.

### ***The International Covenant on Civil and Political Rights (ICCPR) 1966***

Article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## ***Convention on the Elimination of Racial Discrimination ("CERD") 1965***

Ratified by Australia

Under CERD the Office of the United Nations High Commissioner for Human Rights,  
General Recommendation No. 23: Indigenous Peoples. 18/08/97.  
Gen. Rec. No. 23. (General Comments)

The Committee calls in particular upon States parties to:

- Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

## **Domestic Warrants**

***Racial Discrimination Act 1975 (Cth)***

***Equal Opportunity Act 1995 (Vic)***

# Principle of the Right to Know the Truth and the Right of Reply

The United Nations Commission on Human Rights (UNHRC) adopted the *Joinet-Orentlicher Principles* to guide member states in dealing with human rights violations. They deal amongst other things with the inalienable individual and collective right of individuals and communities to know the truth about past events, the duty of the state to preserve and make accessible archives of repression and abuse as part of the collective memory, and the entitlement of individuals to know that there is a record about them and to challenge its validity by exercising a right of reply.

## Related Archival Requirements

1. Identify Indigenous communities or individuals in records, contact them via appropriate representative bodies; and
2. Disclose that there are records relating to them; and
3. Develop procedures to enable them to exercise a right of reply - i.e. to set the record straight; make comments upon the inaccuracies or limitations of institutional records, to contribute family narratives which expand upon or give context to institutional records and to present alternative versions of events. An example would be a system that enabled the use of annotations as a right of reply, and the extension of this right to descendants, which also enabled annotators to retain ownership of the annotations.

## International Warrants

United Nations, Economic and Social Council, Commission on Human Rights, (2005) ***Promotion and Protection of Human Rights: Impunity Report of the Independent Expert to update the Set of Principles to Combat Impunity***, Diane Orentlicher, E/CN.4/2005/102/Add.1 8 February 2005

All persons shall be entitled to know whether their name appears in State archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply. The challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested. (Principle 17 (b))

## Domestic Warrants

Individual rights relating to correction are included in domestic ***FOI and health records legislation***, for example, *Freedom of Information Act 1982* (Cth) Part V Amendment and Annotation of Personal Records; *Freedom of Information Act 1982* (VIC) Part V Amendment of Personal Records, *Health Records Act 2001* (VIC) Schedule 1.6. However, they do not extend to collective rights.

# Rights of Indigenous Peoples as a Collective

The *United Nations Declaration on the Rights of Indigenous Peoples 2007* establishes the right of Indigenous peoples **as a collective or as individuals** to the full enjoyment of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

## Related Archival Requirements

- Moral rights of the collective author to be recognised in archival documentation
- Rights of Indigenous peoples and communities as a collective to be taken into account on an ongoing basis, in the capture, appraisal, management, preservation and access to records that form part of their cultural knowledge.

## International Warrant

### ***United Nations Declaration on the Rights of Indigenous Peoples 2007***

(Ratified by Australia)

Article 1:

Indigenous peoples have the right to the full enjoyment, as a *collective* or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 31:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

## Implications for Principle of Privacy: Extension to Indigenous Family, Community and Deceased Person's Community as a Human Right

Note: While a deceased person's right to privacy cannot be violated, living members of the deceased's family, and for Indigenous peoples, their kin and communities' privacy may be violated, if access is given to and use is made of personal information about a deceased person without the consent of the family or community.

Related International and domestic privacy warrants do not as yet include provisions for a communal right of privacy, e.g.

### ***United Nations Universal Declaration of Human Rights, 1948***

(Ratified by Australia)

Article 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The ***International Covenant on Civil and Political Rights 1966*** gives legal effect to the Declaration of Human Rights. Article 17 (1) states that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

In Australia, there are Privacy Acts at the Commonwealth level and in most states but none include communal privacy rights. Similarly, the ***Charter of Human Rights and Responsibilities Act 2006*** (Vic) S 13 provides for an individual but not communal rights to privacy: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'

# Records as Social Entities

Research and theory building in archival science has cleared the way for a refiguration of recordkeeping structures and values, and subsequently for developing, testing and implementing methods and tools for new recordkeeping and archival policies and practices which accord to modern societal needs and expectations. This may be summarized by citing Tom Nesmith's formulation of the new concept of provenance: "The social and technical processes of the records' inscription, transmission, contextualization, and interpretation which account for the record's existence, characteristics, and continuing history."

The paradigm shift in archival theory, methodology and practise is to a large extent due to new technologies and their adoption and adaptation in society. Social software, including annotation systems, wikis, blogs, social networks, social recommender systems and a host of other Web 2.0 based applications are drastically changing cultural practices of record creation and record keeping.

Government 2.0 implies that records are created in an interactive dialogue between the government organization and the citizen, requiring the customer or citizen to become a party to the business function which created the record, a co-creator. In our digital world interactive and hyperlinked 'Texts become "hypertexts" which are reconstructed in the act of reading, rendering the reader an author<sup>1</sup>.

This social and cultural phenomenon of co-creatorship entails a shift of the traditional paradigm that locates the agency of a record solely in its author. This is not to say that records subjects participating in the creation of records should be given ownership rights: there are other ways by which archival policies and practices in a Government 2.0 environment can accommodate the phenomenon of co-creatorship. However, it may involve an extension of existing rights to be involved in decision-making about the management of records, their access and use. And, in some circumstances, might warrant inclusion of ownership rights for all parties to the transaction documented in the records.

1. Mark Poster, *What's the matter with the Internet?* (University of Minnesota Press, Minneapolis 2001) 188.

## Sources

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