

DIGITAL IDENTITY LEGISLATION

Comments in response to DTA

Consultation Paper and Background Paper – 21 December 2020

The National Archives of Australia is pleased to provide the following initial comments on the proposed digital identity legislation. We have identified five key areas of interest, each of which is discussed briefly below. We look forward to providing further comment as the legislation is developed and to this end we plan to expand on this initial response as applicable early in 2021 as discussed.

Key matters

With respect to its legislated role in providing stewardship of Australian Government (Cwth) information assets (records, information and data), the National Archives has identified the below areas for initial comment in relation to the proposed legislation. It should be noted that they are interrelated.

- Definition of information
- Ownership and responsibility for records and information
- Inclusion of parties external to the Commonwealth
- Recordkeeping
- Disposal of information

Definition of information

The proposed legislation will set out the information involved in, or excluded from, the system. The Consultation Paper poses the question of whether the legislation needs to include a definition of Digital Identity information or is it preferable to rely on definitions in existing Commonwealth Acts.

While noting existing definitions within relevant Commonwealth legislation, National Archives considers it would be useful for clarity and context to define what is meant by 'Digital Identity information'. The key issue for the National Archives is to ensure that all information, whether included or excluded from the system, that is created, maintained or shared by Australian Government (Cwth) agencies remains Commonwealth records for the purposes of the Archives Act.

There is further discussion below regarding arrangements for information that might fall outside of Commonwealth control.

Ownership and responsibility for records and Information

We note it is proposed that the Digital Identity system will consist of four types of Accredited Participants, as well as 'relying parties' that provide services to people with a Digital Identity (DI). None of these are restricted to Commonwealth agencies and may include other States and Territories and the private sector.

From our initial analysis it is unclear who will have responsibility for the management of records relating to the system. These could include records relating to:

- Establishment of the DI system

- Contractual and other arrangements between parties to participate
- Operation of the DI system
- Specific data collected/generated/shared by participants in the DI system
- The actual Digital Identities
- Use of Digital Identities by relying parties

The proposed legislation envisages the establishment of an Oversight Authority, but it is not clear whether this Oversight Authority be responsible for all records associated with the DI system.

Inclusion of parties external to the Commonwealth

The extension of the system beyond the Commonwealth to include States and Territories as well as private sector parties raises questions around the ownership of information and data used within the system. Is it intended that the Commonwealth, through the Oversight Authority (for example) maintains control of all information within the system? The National Archives notes that if States and Territories extract data into their own systems, their own records and information laws will apply over the Archives Act. While the application of the Privacy Act would provide authority for the protection and destruction of some personal information, all other information, as Commonwealth records, would be subject to the Archives Act.

If private enterprise becomes a provider on behalf of the Commonwealth for the system, with respect to the management of Commonwealth records outsourcing arrangements would apply as outlined in National Archives' advice: <https://www.naa.gov.au/information-management/storing-and-preserving-information/storing-information/outsourcing-digital-storage> and <https://www.naa.gov.au/information-management/records-authorities/types-records-authorities/general-records-authority-40> . National Archives is happy to discuss specifics further in this regard.

Recordkeeping

The Consultation Paper asks if recordkeeping requirements should be included in the legislation. *Prima facie* it would seem that a duplication of recordkeeping requirements already within the Archives Act would not be desirable.

We note the existing recordkeeping requirement in the paper which references obligations under the Archives Act for the retention of records described under AFDA Express Version 2. This may not be the case for all DI system data. Broader retention and disposal related requirements should be considered by DTA in consultation with the National Archives in the context of development of the legislation. Disposal coverage for all Commonwealth information and data within the system should be considered collectively, noting the most appropriate form of records authority coverage will vary based on the specific activity.

As discussed above, recordkeeping obligations for Commonwealth information held outside of a Commonwealth authority would also need to be considered.

It is important to note that records authorities, which govern retention and disposal of Commonwealth information, are not the only source of recordkeeping obligations for Commonwealth agencies. The National Archives, under the authority of the *Archives Act 1983*, is empowered to set standards for information management more broadly, including through issuing policies. Within this context we note the current paper is silent about metadata requirements for supporting the system and facilitating the prescribed exchange of information and data. We would

be interested in further understanding this aspect of the work to best determine where National Archives may be able to contribute its expertise in accordance with its legislated powers and responsibilities.

Disposal of information

We note the proposal to authorise disposal of records after seven years. No Commonwealth information can be destroyed without a permission from the National Archives (unless otherwise authorised, eg through other legislation). Retention periods before destruction of information are determined by the National Archives in consultation with the agency that creates or maintains this information. At this stage the seven years period is not confirmed by the National Archives.