

# Issues Paper:

## Review of the State Records Act 1998

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### Overview

This *Issues Paper* is the first stage of a consultative process to review the *State Records Act 1998* (NSW). The paper gives background information on:

- the *State Records Act 1998* (the Act)
- why the Act is being reviewed, and
- the review process including consultation and opportunities for making submissions.

It also considers the policy objectives of the Act and their validity.

It then summarises each Part of the Act, exploring:

- its purpose
- its operation in practice, and
- key issues highlighted in the 5 years of operation and questions regarding how they might be addressed.

The issues and questions are raised in order to facilitate discussion with stakeholders and the community and are not exhaustive. Any interested parties are welcome to make written submissions to comment on these issues and questions, and/or raise further issues, needs and recommendations.

## **The State Records Act 1998 (NSW)**

### **Assent and commencement**

The [State Records Act 1998](#) was assented to on 2 June 1998 and commenced on 1 January 1999, with the exception of Part 4, which commenced in July 1999.[\[1\]](#)

### **Aims of the Act**

The Act is designed to:

- ensure the better management of Government records throughout their existence
- promote more efficient and accountable Government through improved recordkeeping, and
- provide better protection for an important part of the State's cultural heritage.

This legislation replaced the *Archives Act 1960* and established the State Records Authority of New South Wales, known as State Records.

### **Why the Act is being reviewed**

Section 82 of the *State Records Act 1998* provides that:

- the Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives
- the review is to be undertaken as soon as possible after the period of 5 years from the date of assent, and that
- a report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

It is now 5 years since the Act received assent. State Records will conduct the review and prepare a draft report on its outcomes for submission to the Premier, as Minister for the Arts.

### **The review process**

The following table summarises the review process:

<b>Tasks</b>	<b>Date</b>
Distribute issues paper after preliminary consultation and call for submissions	January 2004
Hold general public meetings (Sydney, Western Sydney, Armidale, Wagga Wagga, Orange) and meetings with key stakeholder groups	February/early March 2004
Deadline for submissions	Friday 26 March 2004
Consider submissions	April 2004
Final report presented to the Minister	May 2004
Final report presented to Parliament	June 2004

## **The *Issues Paper* – distribution and submissions**

### **Distribution of the Issues Paper**

Copies of this *Issues Paper* have been distributed to a range of known stakeholders. It is also available on State Records' website at:

[www.records.nsw.gov.au/about/issuespaper.htm](http://www.records.nsw.gov.au/about/issuespaper.htm)

Printed copies may be obtained from:

Executive Officer  
 State Records NSW  
 PO Box 516  
 Kingswood NSW 2747  
 Telephone: 02 8247 8650  
 Facsimile: 02 8247 8626  
 Email: [execofficer@records.nsw.gov.au](mailto:execofficer@records.nsw.gov.au)

or from the reading rooms at State Records:

Sydney Records Centre  
 2 Globe Street  
 The Rocks  
 Sydney

Western Sydney Records Centre

143 O'Connell Street  
Kingswood

## Written submissions

State Records welcomes written submissions (paper or electronic) by Friday, 26 March 2004. Any questions should be directed to the [Executive Officer](#).

## Policy objectives of the Act

State Records sees the Act as having three major policy objectives:

### To improve Government recordkeeping

Governments, public institutions and public officials are responsible to taxpayers and their decisions and actions impact on everyone in the community. Good recordkeeping helps to ensure that public offices have the necessary evidence to:

- support their business operations
- protect the rights and entitlements of the public office, individuals and the community and
- be fully accountable to the community for decisions made and actions taken.

The Act adopts a new approach to recordkeeping, providing a consistent and coherent regime for the management of State records from the time they are created (and before creation, in the design of recordkeeping systems), through to their disposal or preservation and use as archives.

### To ensure that State records are maintained appropriately and that there is protection for the State's cultural heritage

The Act seeks to ensure that State records are maintained for as long as they are required, to meet business needs, legal requirements and community expectations. For example, it provides that the Board of the State Records Authority is to authorise decisions regarding what State records should be retained as archives and what records should be destroyed.

The Act also establishes a management framework so that State archives of any format are stored and preserved appropriately in public offices or regional repositories (through distributed management agreements) or in State Records' archival repositories.

These protection measures are meant to protect the evidential nature of the records and ensure that the most valuable records will become a resource for the State's cultural heritage.

## **To strengthen the rights of the community to access State records while protecting sensitivities in the records**

The State's archives are an important part of our cultural heritage and access to them by the people of New South Wales is a fundamental right.

At the same time, there are community concerns about the protection of personal privacy and there are some Government records that should not be released to the public for other reasons, such as if their release would endanger public safety.

The Act seeks to strengthen the rights of the community to access State Records by providing legislated means of access to records that are over 30 years of age, and other methods of access such as 'special access' and 'accelerated access.' At the same time, it seeks to provide a more consistent and comprehensive basis for protecting privacy and confidentiality for as long as sensitivity in the records remains. The Act also establishes various means of facilitating access, through designated 'access providers.'

*Question:* Do you think the policy objectives of the Act described above are still valid? Do you think the terms of the Act are appropriate for securing those objectives?

## **The Parts of the Act: Purpose, operation and issues**

[Part 1 - Preliminary](#)

[Part 2 - Records management](#)

[Part 3 - Protection of State records](#)

[Part 4 - Control of State records](#)

[Part 5 - Recovery of State records](#)

[Part 6 - Access to State records](#)

[Part 7 - The State Records Authority of NSW](#)

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[Schedules](#)

### **Part 1 – Preliminary**

#### **Purpose of Part 1**

Part 1 of the Act sets out preliminary information including:

- the name of the Act
- date of commencement

- definitions and other interpretive provisions in this context, and
- application of the Act in particular circumstances such as for State collecting institutions or private successors of public records.

## Operation of Part 1

State Records considers this part of the Act to have operated smoothly. The main difficulty in implementation is explained in more detail below.

## Issues with Part 1

### 1.1 State collecting institutions

Section 5(1) excludes private records held by State collecting institutions from the substantive operation of the Act. Without this section, private records within the collections would be treated as State records. The Act lists these institutions and provides that any other public office can be prescribed by the regulations as a State collecting institution.

A number of other public offices, including university research libraries, council libraries, the Centennial Park and Moore Park Trust, the Sydney Cricket Ground and the Parliament, collect private records. Unless these organisations are prescribed as State collecting institutions, the private records they hold will be considered State records under the Act.

If these institutions were to be prescribed as State collecting institutions by regulation, section 5(2) would also apply to these bodies. This subsection provides that any State records in collections held by these institutions before the commencement of the Act would not be subject to the records management (Part 2), control (Part 4) and access (Part 6) provisions of the Act. As some of these institutions have collected State records, it is not desirable for those State records to be exempt from parts of the Act.

To avoid this unintended outcome, section 5(2) could be amended so that it does not apply to State collecting institutions prescribed as such by regulation. Public offices could still retain custody of the State records in their collections by signing a distributed management agreement with State Records.

*Question:* Should section 5(2) be amended so that it does not apply to State collecting institutions prescribed as such by regulation?

## Part 2 – Records management

### Purpose of Part 2

The purpose of this part of the Act is to set out the records management

responsibilities of public offices.

The Act requires Chief Executives of public offices to ensure compliance with the Act and public offices to:

- make and keep full and accurate records
- institute a records management program in accordance with standards and codes of best practice for records management. These are based on world best practice.
- ensure the safe custody and proper preservation of State records
- maintain accessibility to electronic records, and
- make arrangements with State Records for monitoring and reporting on the implementation of the public office's records management program.

## Operation of Part 2

State Records believes that Part 2 of the Act is a suitable framework for improving recordkeeping and accountability in public offices. The following standards have been approved under section 13 of the Act and are available as part of the [Government Recordkeeping Manual](#):

- [Standard on Full and Accurate Records](#) – issued under Premier's Memoranda in June 1998 and again under the Act in 1999
- [Standard on Records Management Programs](#) – issued under Premier's Memoranda in June 1998 and again under the Act in 1999
- [Standard on the Physical Storage of State Records](#) – issued April 2000
- [Standard on Recordkeeping in the Electronic Business Environment](#) – issued December 2000
- [NSW Recordkeeping Metadata Standard](#) – issued June 2001
- [Standard on Counter Disaster Strategies for Records and Recordkeeping Systems](#) – issued June 2002

Public offices were required to implement the majority of these standards gradually according to a [Compliance Timetable](#) established by State Records. The first two standards are now under revision.

A range of guidance designed to assist public offices in meeting the requirements under the legislation and these standards has been provided. These form part of the *Government Recordkeeping Manual*. Training courses have also been developed and are offered as part of State Records' [Training Calendar](#).

The arrangements for monitoring and reporting to date have included:

- surveys distributed to the major client groups within the sector which

collected information on their progress in complying with the legislation and standards and issues faced. State Records collated the results and produced [reports](#)

- a [compliance review](#) of NSW Government agencies and State owned corporations conducted by the Audit Office of NSW in 2001-2002 which measured compliance with the principles in the *Standard on Records Management Programs* and the first principle in the *Standard on Recordkeeping in the Electronic Business Environment*. The [NSW Auditor-General's Report on the Compliance Review on Aspects of the State Records Act 1998](#) was tabled in Parliament on the 12 December 2002.

The surveys and compliance review have shown that the majority of the 167 agencies subject to the compliance review were 'substantially compliant' with the records management standards being assessed. However, the surveys and compliance review have also shown a need for improvement, especially among some of the larger agencies. A large number of public offices have made considerable progress since the introduction of the standards, and the compliance review provided an added impetus for NSW State government agencies and State owned corporations. The results of monitoring activities inform and underpin some of State Records' key strategies.

Progress has been made on establishing agreements with Parliament and the Courts under section 9(2) to apply Part 2 to them. It has been agreed that the Governor's office will be exempt from the provisions of Part 2.

## Issues with Part 2

State Records has identified no major issues with Part 2.

Question: Is any legislative change to Part 2 required in order to secure the policy objectives of the Act?
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## Part 3 – Protection of State records

### Purpose of Part 3

The purpose of this part of the Act is to protect State records from unauthorised destruction and disposal and to put into place a more systematic means of identifying those records that are of continuing value (the State archives).

Under the Act the disposal of public records is permitted mainly by the following means:

- permission or authorisation by State Records (requires prior approval by

State Records' Board)

- certain pieces of legislation under which a public office operates, or
- through 'normal administrative practice' as defined in the Act.

## Operation of Part 3

Permission has been given by State Records for disposal of many State records through the issue of retention and disposal authorities. Such permission has only been given following approval of the Board. State Records has prepared [general retention and disposal authorities](#) covering administrative records common to most NSW public offices, such as personnel and financial and accounting records, as well as covering records of public health services, universities and local councils. [Functional retention and disposal authorities](#) have been prepared by public offices for approval by State Records. There are still many public offices without current disposal coverage for their core records.

State Records revised its disposal authorisation regime in 1998/99, moving to a functional approach and seeking whole-of-agency retention and disposal coverage. [Procedures for Disposal Authorisation](#) were issued in February 2000 and these procedures, along with other guidance on disposal, form part of the [Government Recordkeeping Manual](#). Training courses have been developed and are offered as part of State Records' [Training Calendar](#).

In June 2001, State Records released [Building the Archives: Policy on Records Appraisal and the Identification of State Archives](#), which outlines the main categories for records required as State archives.

State Records has contacted several public offices following reports of inappropriate disposal of records and offered assistance to improve disposal practices. No public offices have been prosecuted.

The [State Records Regulation 1999](#) was amended to allow certain statutory disposal provisions under other Acts to continue to operate despite Part 3.

[Guidelines on Normal Administrative Practice](#), to supplement Schedule 1 of the Act, were issued in February 1999.

## Issues with Part 3

### 3.1 Limitation period on prosecution for unauthorised disposal

Section 21 provides for a maximum penalty of 50 penalty units for the unauthorised abandonment, disposal, transfer, removal from the State, damage or alteration or neglect of a State record. Currently a penalty unit is \$110.

As this is a summary offence, there is a 6-month limitation period (from the date the crime was alleged to have occurred) under section 56 of the *Justices Act 1902*. However, the limitation period for many summary offences may be extended up to a period of 2 years (for example, under the *National Parks and Wildlife Act 1974* and the *Poisons and Therapeutic Goods Act 1966*).

There have been a number of cases where State Records might have considered prosecution. However, these cases did not come to light until well after the 6-month limitation period. This has rendered the penalty provision entirely ineffective.

*Question:* Should section 21 be amended to extend the limitation period for the summary offence, and if so, for how long?

### 3.2 Serious criminal conduct involving State records

Some of the cases that have been brought to State Records' attention have involved serious criminal conduct involving the loss or destruction of, or damage to, valuable State records. For example, in one case there was an attempt to steal nineteenth century maps for resale at a profit. Although some of this conduct may be covered by existing criminal offences (such as theft or fraudulent misappropriation) it is considered that, in light of the importance of securing the integrity of State records, and the need to discourage their malicious destruction or damage, it may be beneficial to have a specific criminal offence to cover serious criminal conduct relating to State records.

This new offence would be restricted to cases where a person engages in deliberate behaviour with criminal intent. One possibility is to make it an offence to damage, alter or destroy a State record with intent to obtain a financial advantage. This offence would be an indictable offence (which means there would be no statutory limitation period and it could be prosecuted at any time) with a maximum penalty of a sentence of imprisonment (for example, for a period of five years).

*Question:* Should there be a new indictable offence carrying a sentence of imprisonment to cover more serious criminal behaviour involving the loss, destruction, alteration or damage of State records? If so, what should be the coverage and/or consequences of this new offence?

### 3.3 Normal administrative practice

Section 22 refers to Schedule 1, which contains guidelines on normal administrative practice as an exception to the general prohibition on the disposal of State records.

The guidelines do not limit what constitutes normal administrative practice nor

affect the operation of section 22. Section 22 provides for a practice to be declared unacceptable by regulation or by State Records notifying a public office.

It is desirable to be able to review and revise such guidelines periodically. The inclusion of the guidelines as a schedule to the Act, however, means that they cannot be altered without a legislative change.

*Question:* Should the guidelines in Schedule 1 be removed from the Act? Should they be replaced with a requirement to publish the guidelines, or a notice of their availability, in the Government Gazette?

## **Part 4 – Control of State records**

### **Purpose of Part 4**

The purpose of this part of the Act is to ensure that records of continuing value and no longer in use by the public office that generated them are properly managed as State archives.

State Records is entitled to the control of records no longer in use for official purposes. In public offices, records are deemed to be no longer in use when 25 years old. However, records can cease to be of use prior to that time. If the public office is still using records that are over 25 years old, they can make a 'still in use determination.'

Archives that are no longer in use can be transferred to State Records. Alternatively, public offices can enter into an agreement with the Authority, under section 30(1) if they wish to manage their own archives. Alternatively they can make an agreement with the Authority to give possession or custody of their archives to 'some other person' such as a regional repository.

This part of the Act will become increasingly important as more records are created electronically and it becomes less practical or desirable to transfer physical custody of records to State Records.

### **Operation of Part 4**

State Records believes that Part 4 has been operating efficiently in terms of transfer of control and custody of non-electronic records, and the management of State archives. Guidelines under section 29 have been released indicating how State records are to be made available to the authority and these form part of the [Procedures for Transferring Custody of Records as State Archives](#), issued August 1999. Training courses have also been developed and are offered as part of State Records' [Training Calendar](#).

[Procedures for Making Still in Use Determinations](#) have been published but so far no determinations have been issued. Progress is being made on establishing guidelines for the recall of records under section 35.

State Records has been liaising with NSW public offices interested in making agreements under section 30(1) (called distributed management agreements). Guidance on general expectations is given in the Recordkeeping in Brief leaflet, [Distributed Management of State archives](#), which forms part of the [Government Recordkeeping Manual](#).

Progress has been made on establishing agreements with the Governor, Parliament and the Courts under section 26(2) to extend coverage of the Act to them.

## Issues with Part 4

State Records has identified no major issues for Part 4.

*Question:* Is any legislative change to Part 4 required in order to secure the policy objectives of the Act?

## Part 5 – Recovery of State records

### Purpose of Part 5

The purpose of this part of the Act is to protect estrays (those official records which have been taken out of official hands) and State records of archival significance.

It does this by giving State Records power to recover estrays and State records of archival significance both within and outside of New South Wales. The Act also allows interstate Government archives to recover similar interstate material within New South Wales.

### Operation of Part 5

Several important estrays and State records of archival significance have been recovered in the last five years through the various recovery mechanisms provided for in this Part. In particular, State Records has required antiquarian booksellers and auction houses to withdraw estrays from sale and has acquired some State records of archival significance through purchase. Some estrays have been received as gifts. No court action has been taken to recover estrays or State records of archival significance.

The most notable State records that were recovered were telegrams reporting the capture of Ned Kelly and his gang and an early map of settlements in NSW prepared by Surveyor General John Oxley.

## Issues with Part 5

State Records has identified no major issues for Part 5.

*Question:* Is any legislative change to Part 5 required in order to secure the policy objectives of the Act?

## Part 6 – Public access to State records

### Purpose of Part 6

The purpose of this part of the Act is to ensure a balance between protection of the sensitivity in records for as long as necessary on the one hand and the rights of the people of New South Wales to access State records on the other.

It provides that State records are open for access when they are in the open access period (at least 30 years old) *and* are declared open by the responsible public office. Any confidential or sensitive personal information in records can be closed by a direction from the public office responsible.

This part of the Act also requires public offices to give an access direction (whether the records are open or closed) for all their records that are in the open access period and provides support for such decision making by means of guidelines drafted by the Attorney General.

Part 6 also provides for other means of access, including early access, special access (where records are closed to public access) and access independent of the State Records Act. Part 6 also provides the means of giving access.

### Operation of Part 6

The Attorney General issued [Guidelines on Making Access Directions under Part 6 of the State Records Act](#) under section 52(3) in May 1999. In addition, State Records produced [Procedures for Making Access Directions](#) in August 1999 to assist NSW public offices in making directions. Training courses have also been developed and are offered as part of State Records' [Training Calendar](#). Despite these initiatives, only a small proportion of State records in the open access period have been subject to an access direction.

Progress has been made on establishing agreements with the Governor, Parliament and the Courts under section 49(2) to extend coverage of the Act to them.

Part 6 is not the only regime governing access to State records in NSW. Other Acts that govern access to information held by public offices include:

- [Freedom of Information Act \(FOI\) 1989](#)
- [Privacy and Personal Information Protection Act 1998](#)
- [Local Government Act 1993](#) (for councils), and
- [Health Records and Information Privacy Act 2002](#) (for patient records).

Generally, Part 6 does not affect the operation of these other access regimes. Accordingly, a 'closed to public access' (CPA) direction does not prevent a person from making an FOI application (except in relation to a record that State Records has withheld from public access to ensure the safe custody and proper preservation of the record). Similarly, public access under the State Records Act to State records containing personal information is specifically permitted under the Privacy and Personal Information Protection Act. If the personal information is sensitive, a CPA direction should apply to the record.

## Issues with Part 6

### 6.1 Applications to open records to public access

Access directions to open or close records have not been made for a large proportion of open period records. Under section 54, any person, public office, or body can apply for an 'open to public access' (OPA) direction for a record that is not the subject of an access direction.

It is not known to what extent this section of the Act has been used as public offices, while required to notify State Records of all access directions made, are not obliged to advise State Records whether or not the direction was made pursuant to an application under section 54.

A requirement for public offices to notify State Records of applications under section 54 would enable State Records to monitor the circumstances in which members of the public request an OPA direction, and the outcome of the application.

*Question:* Should section 54 be amended to require public offices to notify State Records about applications under section 54?

### 6.2 Ways to ensure a greater proportion of open period records are available for public access

The current provisions relating to the making of access directions seek to achieve two fundamental policy objectives:

- (a) to give the people of NSW access to the greatest proportion of open period records possible
- (b) to ensure that open period records that contain sensitive information should stay closed while the sensitivity remains.

The tension between these two objectives can only be resolved in practice by some form of assessment. An issue is what is the best method of such an assessment.

The current provisions are aimed at ensuring that records in the open access period are open to public access unless specifically closed by a public office. However, their practical effect is that records in the open access period are closed to public access unless they are the subject of an OPA direction.

Consideration has been given to ways to ensure that a greater proportion of open period records that do not contain sensitive information are available for public access. These options are discussed below.

Another consideration is the relative costs and benefits of methods of assessing records for public access. Where there is public demand for access, the expenditure of public resources on examining State records for their suitability for public release is justified. However, some State records may hold little interest to the public and it may be more difficult to justify the expenditure of limited public resources on assessing these records. There is unlikely to be any public benefit in imposing such costs on public offices if there is no demand for access, particularly if it has an adverse impact on the exercise of other Government functions.

The efficacy of these options in improving public access to records might be further enhanced if combined with a mechanism for the review of access directions (see 6.3 below).

**(a) Make all records open to public access after 30 years, unless a closed to public access (CPA) direction is made by the public office that is responsible for the record**

This proposal addresses the issue noted earlier that most State records in the open access period are not subject to an access direction. It would remove the legislative obligation on public offices to make OPA directions. Instead, public access to all State records after 30 years would be permitted, unless the public office that is responsible for the records makes a CPA direction. The assessment would be based on a risk assessment, as is the case under the current provisions.

There are three areas of risk associated with this proposal. Firstly, some public offices may fail to make assessments and CPA directions for sensitive records for which they are responsible. This could lead to the inadvertent disclosure of sensitive records. In extreme cases this could cause unacceptable risk to public safety and security (for example, if critical infrastructure plans were to be improperly released).

Secondly, the proposal may provide an incentive for some public offices to make wide-ranging CPA directions. This may inappropriately prevent the release of records.

Thirdly, public offices might divert substantial resources toward determining whether particular State records warrant a CPA direction, possibly interfering with the delivery of other services.

These risks could be reduced by combining:

- an intensive education and training program run by State Records, and
- a 'grace period' (for example 2 years) before the changes to the legislation come into effect,

although neither of these measures would necessarily address the risk of diversion of resources. A review mechanism (see 6.3 below) may also assist in the management of these risks.

**(b) Introduce an access regime similar to the Commonwealth where records in the open access period should be open for public access unless closed according to pre-determined criteria**

This would introduce an access regime similar to that currently operating in the Commonwealth (outlined in the *Archives Act 1983*, sections 34 and 35). Under this arrangement staff of the archival authority, or from the responsible public office, must examine the records to determine whether they contain information that should not be publicly available, before the records can be released.

Groups of records may be examined in bulk in advance of requests for access or an individual record may be examined in response to a request.

This relieves public offices of the obligation to make access directions. However, item-by-item clearance is very labour intensive and neither State Records nor public offices are resourced for it. Unless the records have high public interest, the costs involved in assessing the records by such labour intensive means may not be justifiable in terms of the benefits gained. The Commonwealth experience has shown that members of the public could experience significant delays in obtaining access to information under this kind of arrangement.

To ensure a consistent basis for determining whether records should remain closed, pre-determined criteria would be required. In the Commonwealth these are set out in the *Archives Act 1983*.

### **(c) Improve compliance with the obligation to make access directions**

This option would involve using administrative or educational means to ensure that public offices meet their existing obligation to make access directions for the open period records for which they are responsible.

One method is for State Records to conduct more intensive education about the need for access directions and the relationship with other access legislation such as FOI and privacy.

Another method might be to conduct reviews to measure compliance with this obligation.

State Records could also make applications to public offices under section 54 for directions to be made, particularly to records of high public interest. No legislative change would be required to implement this option. However, this is not the original intention of section 54, and the short time frame for making decisions under this section may cause public offices to close records unnecessarily, or to make decisions without considering the full implications.

*Questions:* Are any amendments to Part 6 required to ensure a greater proportion of records are covered by access directions? If not what non-legislative means might effectively bring about the same outcome? If there are additional costs associated with any administrative or legislative changes, can these be justified by the benefits obtained?

## **6.3 Review mechanism for access decisions**

Part 6 does not allow for a specific mechanism for review or appeal if a public office decides to close a record or a class of records. This means that neither a member of the public or State Records can prompt a review of a direction.

The FOI Act functions as a kind of review mechanism by virtue of section 56 of the State Records Act, which provides that the fact that a record is not open to public access does not affect any entitlement to access to the record under the FOI Act. A successful application under the FOI Act, however, would not reverse a CPA direction.

The Act does not prevent other means of seeking review of a CPA direction, such as a complaint to the Ombudsman or lobbying of the Minister or political representatives.

Possible means of providing an appeal mechanism could include adding an entitlement to:

- internal review of a CPA direction
- review by the Ombudsman and/or
- review by the Administrative Decisions Tribunal.

State Records can direct that a State archive be withheld from public access if it is necessary to do so to ensure the safe custody and proper preservation of the record. This decision is appealable to the Minister. There are no other mechanisms for the review of OPA directions.

*Question:* Should there be a specific provision for a member of the public or State Records to seek review of access directions? If so, should the review mechanism be restricted to CPA directions?

## 6.4 Authorisation of earlier public access

Section 57(1) of the Act provides that a public office responsible for a record that is not in the open access period (over 30 years of age) can permit public access to the record under this Act 'by authorising the Authority to make the record available for public access.' This authorisation is taken to be an open to public access direction, that is, it entitles any person to access the record.

This provision is easily administered if the records in question are in the custody of State Records. However, the records can be in the custody of the public office or 'some other person' such as a regional repository. As a result, the public office or 'other person' could only provide early public access outside of the State Records Act, and therefore would be ineligible for protection under the liability provisions of the Act (section 62). Such an anomaly is inconsistent with the arrangements in the Act for distributed management and for regional repositories.

*Question:* Should section 57(1) be altered to ensure that earlier public access can be granted by any access provider (as defined in section 60)?

## Part 7 – The State Records Authority of NSW

### Purpose of Part 7

Part 7 defines the powers and responsibilities of the statutory body, the State Records Authority of New South Wales, which administers the Act. This body, to be known as State Records, replaced the Archives Authority of New South Wales.

The Director of the Authority is responsible to a Board, which consists of nine members representing the public sector, the private sector, the history profession, Parliament, State owned corporations and the judicial system. The main functions of the Board are to:

- approve the records management standards and codes of best practice developed by State Records according to world best practice
- authorise the disposal of State records, and
- determine the policies and strategic plans of State Records.

## Operation of Part 7

State Records believes that Part 7 has operated effectively, apart from the issues raised in this paper. The Board of the State Records Authority, in particular, has been of considerable assistance to State Records in its operations.

## Issues with Part 7

### 7.1 Short name of the Authority

Section 63(3) allows 'State Records' to be used with the same legal effect as the corporate name of the State Records Authority of New South Wales.

A number of other archival institutions have been renamed 'State Records' or similar, so confusion may arise. State Records uses 'State Records NSW' when there is a possibility of such confusion.

*Question:* Should section 63(3) be amended to give 'State Records NSW' the same legal effect as its corporate name, and in addition to 'State Records'?

### 7.2 Establishment of a foundation/trust fund

A number of other cultural institutions have established trust funds or foundations to support the relevant institution's objects and functions. Such an arrangement would provide a transparent mechanism for administering donations and bequests, seeking sponsorship and providing for the purchase of State records in private ownership.

*Question:* Should the Act be amended to provide for the establishment of a trust fund or foundation to support the objects and functions of the State Records Authority?

### 7.3 Community representation on the Board

Section 69 specifies the interests to be represented by members appointed to the Board and the persons responsible for their nomination. These are shown in the following table:

<b>Who nominated by:</b>	<b>Interests member represents:</b>
<i>The Minister who administers this [the State Records] Act</i>	State law enforcement agency Local government Private sector History profession
<i>The Minister who administers the Public Sector Management Act 1988 [now the Public Sector Employment and Management Act 2002]</i>	Departments Declared authorities
<i>The Minister who administers the State Owned Corporations Act 1989</i>	State owned corporations
<i>Jointly by the President of the Legislative Council and the Speaker of the Legislative Assembly</i>	Member or officer of either House of Parliament
<i>The Chief Justice of New South Wales</i>	Judge of a court of the State

The focus of interests represented is with the broad public sector. The present arrangement appears to reflect a strong desire, when the legislation was being developed, among a range of interests in the public sector to be represented and a concern at the possible use by State Records of its regulatory powers under the proposed legislation.

*Questions:* Should section 69 be amended to provide increased direct representation of the general community? If so, how? Alternatively, should section 69 be amended so that it is less (or not) prescriptive in defining the interests that should be represented?

## **Part 8 – Miscellaneous**

### **Purpose of Part 8**

Part 8 contains miscellaneous provisions including the ability for the Supreme Court to grant an injunction if a person contravenes the Act, State Records' duty of confidentiality and personal liability, powers to copy and publish State archives and exercise copyright, power to grant certificates of loss or destruction of State records. Proceedings for offences come before the Local Court.

This Part also introduces the savings and transitional provisions in Schedule 3,

repeals the Archives Act of 1960, allows the Governor to make regulations regarding the Act and creates the review mechanism for the Act.

## Operation of Part 8

State Records believes that Part 8 has been operating smoothly.

## Issues with Part 8

State Records has identified no major issues identified for Part 8.

*Question:* Is any legislative change to Part 8 required in order to secure the policy objectives of the Act?

## Schedules

### Purpose of the schedules

There are 4 schedules in the Act:

- Schedule 1 provides guidance on normal administrative practice in a public office. It supports section 22 of the Act
- Schedule 2 comprises provisions relating to constitution and procedure of the Board
- Schedule 3 contains the savings and transitional provisions that allow the continuation of business of the Authority and State Records from their former incarnations
- Schedule 4 details the amendment required to other Acts.

### Operation of the schedules

State Records believes that the schedules have operated effectively apart from the issues raised below.

### Issues with the schedules

#### Schedule 1

See comments on Part 3, section 22 at [3.2 Normal Administrative Practice](#).

#### Schedule 2

## 2 Terms of office of members

Clause 2 of Schedule 2 limits Board members to two consecutive terms. Most of the other NSW cultural institutions provide for three terms.

This appears also to be the result of a large number of interests seeking representation when the legislation was being prepared. Two terms would produce a quicker turnover of members, allowing all interests to be represented in a short period of time. The downside is the earlier loss of the valuable experience and expertise of members, once they have 'learned the ropes'.

*Question:* Should clause 2 of Schedule 2 be amended to permit a maximum of three consecutive terms?

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[1] The *State Records Regulation 1999* deferred the application of the Act to local government, the universities and the public hospital system until 1 January 2000, with the exception of Part 3 (protection of State records) and Part 5 (recovery of estrays). This was to enable these sectors, which have not previously been subject to records legislation, to prepare for their responsibilities under the new Act.

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