

## STATE RECORDS NEW SOUTH WALES

# Report to the Parliament of New South Wales on the Review of the State Records Act 1998

May 2004

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### REVIEW REPORT

This review report is submitted to the Parliament in compliance with section 82 of the *State Records Act 1998* (the Act), which requires the Minister 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 report follows a comprehensive review process. An issues paper was prepared to generate discussion with stakeholders and the community.

Thirty-two submissions were received from a range of groups and individuals. Nearly two-thirds of the submissions were received from public offices covered by the Act. Public meetings were held in Sydney and regional centres.

On the basis of the review I have determined that the objectives of the Act remain valid and the terms of the Act remain appropriate. However, a number of issues raised in the review require further investigation and several amendments to the Act are now considered desirable in order to streamline operations related to the Act and update relevant provisions.

Bob Carr

Premier and Minister for the Arts  
May 2004

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### LIST OF RECOMMENDATIONS

## **Recommendation 1**

It is proposed to amend the Act to extend the limitation period on prosecutions for unauthorised disposal of State Records from the current 6-month period to up to 2 years.

## **Recommendation 2**

It is proposed to amend the Act to transfer the guidelines for normal administrative practice in Schedule 1 of the Act to the regulation.

## **Recommendation 3**

It is proposed to amend the Act to make explicit the presumption in favour of making records more than 30 years old open to public access.

## **Recommendation 4**

It is proposed to amend the Act so that a State record that is more than 30 years old, and not the subject of an access direction, is open to public access within 14 days of an initial application to access the record unless a decision is made by a public office to give a Closed to Public Access direction within this time.

## **Recommendation 5**

It is proposed to amend the Act to introduce an internal review mechanism for access directions that mirrors the review mechanism in section 28(4) for still in use determinations.

## **Recommendation 6**

It is proposed to amend the Act so that private records can be excluded from the operation of the Act without exempting State records that should remain covered.

## **Recommendation 7**

It is proposed to make a small number of minor amendments to clarify certain existing provisions and facilitate operations.

## 1 BACKGROUND

### 1.1 Need for the review

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
- 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.

### 1.2 Need for legislation

The *State Records Act 1998* replaced the *Archives Act 1960*. It has long been recognised that records are worth keeping for their regulatory, business and community value. Drivers for the passage of the 1998 Act included:

- a perception that governments and other public institutions should be accountable, coupled with a recognition by several royal commissions in New South Wales and interstate of the link between accountability and good recordkeeping and,
- the rapidly developing switch from paper-based to electronic business processes, with their ever-changing and generally transient technologies which require decisions on evidential value and preservation of records to be made at the point of record creation, instead of final disposal, as has been traditional.

### 1.3 The State Records Act

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. The *State Records Regulation 1999* deferred application of the Act to local government, the universities and the public hospital system, which had not previously been subject to public records legislation, until 1 January 2000, with the exception of Part 3 (*protection of State records*) and Part 5 (*recovery of estrays*).

The *State Records Act 1998* replaced the *Archives Act 1960*. The earlier Act had been reactive, focusing on the disposition of records after active business use had ceased. The *State Records Act 1998* has a more positive approach in

comparison to its predecessor; emphasising the importance of good records management from the moment records are created, as well as protecting archives.

## **1.4 Application of the Act**

The *State Records Act* applies to 'public offices' as defined in s.3(1). This definition is much wider than the previous Act and includes Parliament, courts and tribunals, local government bodies, State owned corporations, the universities and the public health system. The records of the Governor, Parliament and the courts are automatically covered only by the provisions of the Act relating to protection of State records and recovery of estrays and other State records. These jurisdictions can 'opt in' to be covered by the remaining parts of the Act by agreement.

## **1.5 Purpose and Objectives of the Act**

The main purpose of the Act, as explained in its long title, is to:

*Make provision for the creation, management and protection of the records of public offices of the State and to provide for public access to those records, [and] to establish the State Records Authority.*

The Explanatory Note for the State Records Bill 1998 defined its objectives as being:

- a) to set down the general obligations of public offices of the State with respect to the creation, management, protection and preservation of their records, and
- b) to establish special measures for the protection of the public records of the State against neglect and unauthorised loss, destruction, damage, alteration or transfer, and
- c) to establish the State Records Authority with broad functions in respect of State records, including the function of developing and promoting efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of State records, and
- d) to confer on the Authority rights and obligations with respect to the control of State records that are no longer in use in the public office responsible for them, and
- e) to provide for the recovery of State records owned by the State that are outside the control of the State without lawful authority, and
- f) to confer an entitlement to public access to those State records that are at least 30 years old and open to public access under the Act,

and

g) to provide for miscellaneous matters, including the establishment of a Board of the Authority.

## **1.6 Key provisions of the Act**

Key provisions of the Act cover:

- obligations for public offices in relation to official recordkeeping and records management
- regulation of disposal and other actions in relation to State records
- mechanisms by which State records become State archives, and
- a statutory basis for public access to records more than 30 years old, while withholding records containing sensitive information.

## **1.7 The work of State Records**

In order to meet the objectives of the Act, the State Records Authority ('State Records') performs a number of functions. These include:

- setting and monitoring standards for the creation, management and disposal of records;
- providing advice, guidance and training to the public sector on records management;
- providing storage and retrieval services for non-current public sector records through State Records' off-Budget arm, the Government Records Repository;
- making decisions about which records should be kept as State archives and authorising the disposal of those records that should be kept for a finite period;
- documenting and cataloguing State archives so they can be understood and used;
- storing the archives in secure and special environments;
- working in partnership with regional archives repositories and other 'distributed' custodians of State archives;
- preserving the archives so they can continue to be accessible;
- providing public access and associated services, through State Records' own staff and facilities, community access points across NSW, and online;
- helping public offices to administer access to records they are responsible for; and
- exhibitions and other outreach activities to promote public awareness and use of the State archives collection.

## **2 REVIEW FINDINGS**

### **2.1 Introduction**

The review found strong support among both public and official stakeholders for the objectives of the State Records Act. Feedback received during the review confirmed the importance of sound and up-to-date public records legislation for efficient, accountable government in the digital age and for protecting the State's rich official archives, now and in the future. None of this feedback questioned the value of the Act's fundamental objectives.

The review also revealed general support for the effectiveness of the Act's provisions in securing these objectives. In particular, the improvements in records management across the NSW public sector, resulting from provisions that had not existed previously, were widely recognised. The review identified a number of issues that may require further investigation and considered several amendments to the Act to streamline operations and update relevant provisions.

The following sections examine the provisions of the Act that seek to support each objective and highlight issues raised in submissions.

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### **2.2 Objective: to set down the general obligations of public offices of the State with respect to the creation, management, protection and preservation of their records**

Governments, public institutions and public officials are responsible to taxpayers. 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 services and other operations
- protect the rights and entitlements of the public office, individuals and the community, and
- be fully accountable to government, Parliament and the community for decisions made and actions taken.

The Act adopted a new approach to recordkeeping, providing for 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.

## Operation of the Act

The Act places obligations on public offices to:

- make and keep full and accurate records
- establish and maintain a records management program
- ensure the safe custody and proper preservation of their records
- maintain accessibility to technology dependent records, and
- make arrangements with State Records for monitoring and reporting on the implementation of their records management program.

State Records has the power to set standards and codes of best practice to guide public offices in meeting these obligations. Six standards have been released to date. Guidance and training is also provided in how to meet the requirements of the standards. The requirements have been phased in over a number of years.

State Records has regularly surveyed public offices to determine their level of compliance for a number of years. In addition, State government agencies and State owned corporations were audited against the *Standard on Records Management Programs* and one principle of the *Standard on Recordkeeping in the Electronic Business Environment* in 2001-2. These monitoring exercises showed that while a significant number of public offices have yet to fully comply with the standards, considerable progress has been made since the Act was introduced. The Audit Office compliance review also found that the majority of agencies substantially complied with the Act.

Generally, there was very little comment on this objective in the consultation phase of the review. As this objective is the one that most directly impacts on public offices, it is worth noting that few public offices felt that any changes to the records management provisions of the Act were necessary. Nevertheless, the consultation process also revealed that some public offices and community groups desire a greater emphasis on monitoring and compliance with records management obligations. This can best be achieved through administrative means rather than legislative change.

Some submissions also expressed a desire for more explicit recognition of electronic records, email and the challenges of technology. However, the definition of records in the Act, which does not specify any particular format, together with the clear obligation to maintain accessibility to technology or equipment dependent records, is considered sufficient. In addition, the mandatory records management standards issued under the Act apply to records in all formats.

## Conclusion

This objective is valid and adequately supported by the current provisions of the State Records Act.

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### **2.3 Objective: to establish special measures for the protection of the public records of the State against neglect and unauthorised loss, destruction, damage, alteration or transfer**

In order for public offices and the community to realise the benefits of good recordkeeping, whether accountability, protection of rights and entitlements, or cultural enrichment, records must be protected from loss, damage or destruction for as long as they are required. The provisions in the Act in this regard are similar to the former *Archives Act*.

## Operation of the Act

The Act establishes special measures for the protection of State records against neglect, unauthorised loss, destruction, damage, alteration or transfer. Generally, public offices may not dispose of State records, transfer possession or ownership, take or send records out of New South Wales, or damage or alter records without the approval of State Records and its Board.

Approval for these actions is given through disposal authorities. Since the commencement of the Act in June 1998, 211 disposal authorities have been approved, including more than 50 that cover all the records of a public office and 10 general disposal authorities that cover records common to more than one public office, such as financial records.

The Act also permits actions done in accordance with normal administrative practice (NAP). Schedule 1 of the Act contains guidelines on some aspects of NAP.

The Act makes unauthorised disposal of State records an offence punishable by a fine of up to \$5,500.

As a summary offence, proceedings must be commenced within six months of the date that the offence is alleged to have occurred, by virtue of section 179 of the *Criminal Procedure Act 1986*. Submissions considered whether the current 6-month limitation period on prosecutions for unauthorised disposal should be extended and if the maximum fine associated with this offence should be

increased.

It was determined that extending the limitation period would better enable State Records to fulfil its relevant protective functions. However, the Review did not establish a clear need to increase the maximum fine.

The consultation process also gave rise to discussion as to whether an additional indictable offence was required to deal with more serious cases of malicious or deliberate destruction or damage. However, it is considered that existing provisions in the *Crimes Act*, which make it an offence to steal, destroy or maliciously alter a record belonging to any court or public office, are sufficient.

The State Records Authority, while supporting the NAP provisions, has experienced problems with the placement of guidelines in a schedule of the Act. As the guidelines form part of the legislation, they are not able to be readily updated as business practices change and new issues arise. A more flexible approach is considered desirable whereby guidelines would be included in the regulation and schedule 1 removed from the Act.

### **Recommendation 1**

It is proposed to amend the Act to extend the limitation period on prosecutions for unauthorised disposal from the current 6-month period to up to 2 years.

### **Recommendation 2**

It is proposed to amend the Act to transfer the guidelines for normal administrative practice in Schedule 1 of the Act to the regulation.

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**2.4 Objective: to establish the State Records Authority with broad functions in respect of State records, including the function of developing and promoting efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of State records**

As the State's archives and records management authority, State Records operates as the lead agency in NSW responsible for records management and archives.

### **Operation of the Act**

The Act established the State Records Authority of NSW as a continuation of the

former Archives Authority. The Act sets out the functions of the Authority.

No issues were raised in submissions regarding this objective or the relevant operation of the Act.

## Conclusion

This objective is valid and adequately supported by the provisions of the Act.

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### **2.5 Objective: to confer on the Authority rights and obligations with respect to the control of State records that are no longer in use in the public office responsible for them**

Arrangements for custody and control of State records kept as part of the State archives are an important way to ensure such records are protected for as long as they are required, whether for business, regulatory or research purposes.

#### **Operation of the Act**

This objective relates to provisions in the Act that establish a management framework to ensure 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' own archival repository.

Provisions of the Act give State Records the right to control records when they are no longer in use by the responsible public office. Records are deemed to be no longer in use when they are 25 years old, if not before, though the public offices can request an extension of this period. While State Records is entitled to the control of records that are no longer in use, this control does not necessarily involve taking custody of the records. Distributed management agreements allow State archives to remain with creating organisations or regional repositories while ensuring that they will be preserved, managed and made available to the public as appropriate.

With the increase in electronic records, distributed custody arrangements are particularly suitable for when it is more desirable to maintain electronic records in their native technological environments.

The consultation process revealed concerns among some archival user groups that other bodies with custody of State archives may charge for access. While the Act permits an access provider to charge a fee for giving access, distributed management agreements normally require organisations with custody of State

archives to provide basic access free of charge and to charge only for additional services, such as copying or research.

## **Conclusion**

This objective is valid and adequately supported by the provisions of the Act.

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### **2.6 Objective: to provide for the recovery of State records owned by the State that are outside the control of the State without lawful authority**

This objective supports the protection of records for the benefit of the State and its people.

## **Operation of the Act**

Part 5 provides for the recovery of records owned by the State that are outside its control without lawful authority. State Records is empowered to take action through the courts, and can also direct and assist public offices to recover estrays. In the five years since the commencement of the Act, more than 50 cases have been investigated, leading to the recovery of records in over 30 cases. Highlights include the recovery of records of:

- the administration of the Walhallow Aboriginal reserve
- telegrams about the Glenrowan siege and arrest of Ned Kelly
- Crown St Women's Hospital, and
- registers from the former Liverpool Asylum for the Infirm and Destitute.

No concerns have been raised with this objective or the provisions that support it.

## **Conclusion**

This objective is valid and adequately supported by the provisions of the Act.

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### **2.7 Objective: to confer an entitlement to public access to those State records that are at least 30 years old and open to public access under the Act**

The State's archives, i.e. those records of enduring value, are an important part of our cultural heritage and access to them by the public is a fundamental right of citizens, as recognised by this objective. The intent of the Act is to ensure that there is an open access period providing for public access to State records which are more than 30 years old with the exception of records that have to be closed, for example for reasons of privacy.

## **Operation of the Act**

The Act provides that State records are open for access when they are in the open access period (i.e. at least 30 years old) and are declared open by the responsible public office. At the same time, the Act makes provision for records containing sensitive information to be closed for a further period by a direction from the public office responsible.

While no grounds for closure are included in the Act, the Act provides for the Attorney General to issue guidelines to support such decision-making. These guidelines are to be taken into account by public offices when considering whether records should be open or closed to public access. However, the guidelines do not limit the grounds on which a public office can open or close records to public access.

Provisions of the Act also provide 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. The Act establishes various means of facilitating access, through designated 'access providers'.

The consultation process, and the State Records Authority's own experience in implementing the legislation, raised concern about the operation of the Act in providing for appropriate public access. Public offices are required to make access directions for all of the records for which they are responsible that are over 30 years old. These can be open to public access (OPA) or closed to public access (CPA) directions. Where a public office has not complied with this requirement, the records remain unavailable to the public. Any person can, however, make an application to a public office for an OPA direction to be made in relation to a record.

A majority of submissions suggested that the Act should be changed to reflect the principle that open period records should be open to public access unless specifically closed. However, some submissions raised concerns that changes to the process could increase the risk of inappropriate release of records.

It was concluded that in order to better reflect the intent of the Act, the presumption in favour of making a record open to public access should be made

explicit in the legislation. In addition, to further streamline the process, it was also concluded that access to any record more than 30 years old, but not yet the subject of an access direction, should be provided within 14 days of an initial request for access, unless the public office responsible for the record makes a CPA direction within this time.

The existing safeguards to protect records from disclosure where information contained is still sensitive after 30 years will be retained.

Currently access directions made by public offices are not subject to review. The review of the Act found widespread support for the introduction of some form of review mechanism. It is considered that the most appropriate means of doing so would be to provide for an internal review mechanism for access directions that mirrors the review mechanism in section 28(4) for still in use determinations.

### **Recommendation 3**

It is proposed to amend the Act to make explicit the presumption in favour of making records more than 30 years old open to public access.

### **Recommendation 4**

It is proposed to amend the Act so that a State record that is more than 30 years old, and not the subject of an access direction, is open to public access within 14 days of an initial application to access the record unless a decision is made by a public office to give a Closed to Public Access direction within this time.

### **Recommendation 5**

It is proposed to amend the Act to introduce a review mechanism for access directions that mirrors the review mechanism in section 28(4) for still in use determinations.

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## **2.8 Objective: to provide for miscellaneous matters, including the establishment of a Board of the Authority**

The Act established a Board to oversee the State Records Authority. It also contains a range of definitions and other miscellaneous provisions.

### **Operation of the Act**

The Board consists of nine members. Its functions are to determine the policies and strategic plans of the Authority, and to approve records management standards and disposal authorities.

The focus of the Act is on official records. State Records has found difficulties in the relationship of the Act to collections of private records held by certain public offices. To prevent these records from being treated as State records, the Act exempts private records held by State collecting institutions. The Act lists these institutions and provides that any other public office can be prescribed by regulation as a State collecting institution.

However, where a public office is prescribed as a State collecting institution by regulation, section 5(2) of the Act also applies. This provides that State records held in the collection of State collecting institutions before the commencement of the Act are exempt from provisions of the Act relating to records management, control and access. It is not considered desirable for those State records to be exempt from the Act.

The review identified the need for a number of minor clarifications and other changes to facilitate the operation of the Act.

### **Recommendation 6**

It is proposed to amend the Act so that private records can be excluded from the operation of the Act without exempting State records that should remain covered.

### **Recommendation 7**

It is proposed to make a small number of minor amendments to clarify certain existing provisions and facilitate operations.

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