

Review of the *State Records Act 1998* Policy Paper

State Archives and Records Authority of New South Wales

8 January 2020

1. Executive Summary

The NSW Government is committed to increasing public knowledge and enjoyment of the stories that shape our social, historical and cultural identity. Public access to and use of the documentary and material heritage of NSW ensure diverse perspectives on the layers of our shared history and the contemporary issues that will shape our shared future.

Two institutions play a leading role in telling our stories and preserving our collective memory:

- The State Archives and Records Authority of NSW (the Authority) is one of Australia's pre-eminent archives and records authorities with a vast collection of historical records dating back to the European settlement of Australia. The Authority is committed to providing ready access to records which illuminate history, enrich the life of the community and support good governance and accountability.
- Sydney Living Museums (SLM) cares for some of the most important historic houses, gardens and museums in NSW for the education and enjoyment of the public. SLM's mission is to cherish, protect and share our places and stories.

Since 1 July 2019 a single Executive Director leads both the Authority and SLM, and the two organisations have begun working more collaboratively in telling the stories of NSW. At the same time, the NSW Government is reviewing the *State Records Act 1998* to assess the impacts of its operation and determine whether it continues to support contemporary government and meet community expectations.

The NSW Government is considering whether the Authority and SLM should remain separate entities and continue their partnership, or whether a single entity would be more effective in telling the stories that make us who we are, making our history widely known and enjoyed.

The NSW Government is also considering possible amendments to the *State Records Act* to ensure that records documenting our social, historical and cultural identity are created, preserved and accessed.

This policy paper presents proposed reforms aimed at achieving four policy outcomes:

1. Stories that shape the social, historical and cultural identity of NSW are widely shared and understood.
2. Records of enduring value to the citizens of NSW are managed, preserved and made accessible.
3. Citizens have timely access to records documenting the activities and decisions that shape NSW and the lives of its citizens.
4. NSW public offices create, keep and protect records as evidence of their activities and decisions.

2. Background

2.1 Two organisations work to tell our stories and preserve our collective memory

The Authority is the custodian of the nation's oldest archives collection and the largest collection of records documenting the history of NSW. The Authority was established to document, preserve and provide public access to this collection.

Measuring 85 linear kilometres, containing 14 million items and dating from 1787, the State Archives Collection has a financial value of around \$1 billion and a cultural worth beyond measure. However the Authority does not have a statutory mandate to deliver programs to activate the Collection and lacks a dedicated space in which to tell these stories.

In contrast, SLM is the custodian of multiple places and sites of local, national and international significance. Responsible for conserving, managing, interpreting and activating these spaces, SLM's exhibitions and public programs bring history to life.

Having two separate organisations fails to exploit potential synergies that would deliver richer, more heterogeneous stories about our social, historical and cultural identity.

2.2 The State Records Act provides for the creation, management, protection and use of records documenting the administration of NSW

Through establishing obligations for NSW public offices to create, keep and protect records of their activities, the Act is a foundation for government accountability, integrity, transparency and efficiency. The Act's requirements to create, protect and transfer to the Authority records of enduring value ensure that NSW's collective memory and cultural heritage continue to grow. And the right of public access to records, established by the Act, ensures these records will ultimately be read, experienced and used by citizens.

The Act has eight parts:

- Part 1 defines key terms and concepts.
- Part 2 sets out the records management responsibilities of public offices.
- Part 3 protects State records from unauthorised disposal by public offices and provides the foundation for identifying records of continuing value.
- Part 4 encourages the proper control and management of records of continuing value that are no longer in use by a public office.
- Part 5 protects official records which have left official hands by giving the Authority power to recover them, both within and outside of NSW.
- Part 6 provides a right of public access to State records that are at least 30 years old, unless a public office determines to close the records to public access.
- Part 7 defines the powers and responsibilities of the Authority, and the powers, responsibilities and composition of the Authority's Board.
- Part 8 comprises miscellaneous provisions.

The NSW Government introduced the Act because it identified the need for public offices to be more accountable and acknowledged the link between accountability and good recordkeeping. At the same time, the Government recognised that the movement from paper-based to electronic business processes required public offices to make decisions on evidential value and preservation of records at the point of record creation, instead of final disposal, as had been traditional.¹

The Act was landmark legislation: by moving the focus of public records legislation in NSW from the archival legacy to the contemporary business environment, it aimed to ensure that public offices continued to make, keep and use records to support government accountability, and ongoing business and community use. By mandating the creation and keeping of records of the activities of public offices, the Act underpins NSW's open government and digital government initiatives.

2.3 Citizen expectations about government accountability and access to the documentary heritage of NSW are evolving

The State Records Act commenced on 1 January 1999. The government business environment has changed dramatically in the last 20 years. At the same time, citizen expectations about government accountability and public access to the documentary heritage of NSW have increased.

In 2018 the NSW Government commenced a review of the State Records Act. An interagency steering committee, comprising senior executives across government, is tasked with overseeing the review.²

In the first quarter of 2019 the review met with representatives from a range of stakeholders who have an interest in the operation of the Act, including:

- staff from across the Authority's range of operations
- recordkeeping professionals, such as records and information managers, from a representative range of NSW public offices
- data managers from selected NSW government agencies
- investigation and accountability agencies, including the Independent Commission Against Corruption (ICAC), Audit Office of NSW, the NSW Ombudsman and the Information and Privacy Commission (IPC)
- selected archives users and representatives of relevant peak bodies, such as historical societies and genealogical societies.

The review also conducted research and comparative assessments of public records legislation in other jurisdictions.

¹ The Hon Bob Debus MP, Second Reading Speech to the State Records Bill 1998, Hansard 6 May 1998 at 4503

² The steering committee comprises representatives from Department of Premier and Cabinet, Department of Customer Service, Information and Privacy Commission, State Archives and Records Authority of NSW, and State Library of NSW. It is supported by an advisory group comprising representatives from Department of Communities and Justice, Office of Local Government, Sydney Living Museums and National Archives of Australia.

This paper is the product of this consultation and research.

The Act last underwent a statutory review in 2004 to comply with section 82 of the Act.³ This review found strong support for the policy objectives of the Act, and recommended minor amendments to improve its operation. Amendments to the Act sought to strengthen the provisions supporting public access to records more than 30 years old and the protection of State records against neglect and unauthorised loss, destruction, damage, alteration or transfer.

3. Options for reform

The NSW Government is considering reforms to achieve four policy outcomes:

1. Stories that shape the social, historical and cultural identity of NSW are widely shared and understood.
2. Records of enduring value to the citizens of NSW are managed, preserved and made accessible
3. Citizens have timely access to records documenting the activities and decisions that shape NSW and the lives of its citizens.
4. NSW public offices create, keep and protect records as evidence of their activities and decisions.

3.1 Policy outcome: Stories that shape the social, historical and cultural identity of NSW are widely shared and understood

The Authority is responsible for preserving and providing access to the State Archives Collection, comprising 14 million documents, volumes, images, maps, plans and other items. SLM maintains and opens to the public 12 museums, all of which are listed on the NSW State Heritage Register.

While the two organisations could continue operating as separate entities, combining them would optimise the delivery of rich, heterogeneous stories about our social, historical and cultural identity to enliven current and future generations.

The documentary heritage cared for by the Authority complements the built heritage and collections under the custodianship of SLM, providing boundless opportunities for collaboration in telling the important stories of our past, and how they connect with our present and future. Closer working arrangements also offer synergies in the preservation of the collections and the production of content, exhibitions and programs.

The NSW Government is considering two changes to current administrative arrangements:

³ Section 82 required the Minister to review the 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 as soon as possible after the period of five years from the date of assent to the Act.

1. A single institution will be responsible for collecting, managing, preserving and providing public access to government records, objects, buildings and places of historic, social, cultural or architectural interest to the people of NSW. This institution would replace the existing Authority and SLM and consideration would be given to conferring it with Executive Agency status, in line with the State's other Cultural Institutions.
2. A single governing body will be responsible for the strategic direction and policies of the new institution. Committees will have statutory responsibility for advising on and approving recordkeeping standards, the retention and disposal of records and the acquisition and management of buildings or places.

3.2 Policy outcome: Records of enduring value to the citizens of NSW are managed, preserved and made accessible

Records of enduring value are a valuable asset to the citizens of NSW. In most cases they should be transferred to the Authority's custody so it may document, preserve, contextualise and ultimately provide public access to the records. Transferring custody also benefits public offices by reducing their records storage and maintenance costs.

Where public offices have a desire to retain custody of their records for a period of time for operational reasons, they must have the capacity to appropriately store, maintain and provide public access to them.

The NSW Government is considering one change to encourage the strategic management, protection and accessibility of records of enduring value:

3. Public offices will be required to make and implement plans to transfer control of records of enduring value that are no longer in active business use to the Authority. These plans may involve the immediate or postponed transfer of custody.

3.3 Policy outcome: Citizens have timely access to records documenting the activities and decisions that shape NSW and the lives of its citizens

Records created and kept by NSW public offices provide vital evidence of the activities and decisions that shape NSW and the lives of its citizens. Public access to these records is a fundamental right for citizens in a democratic society.

Part 6 of the Act establishes a framework for regulating public access to State records which have been in existence for at least 30 years (the 'open access period'). There is a presumption in the Act that most State records in the open access period will be open to public access. This is based on the understanding that most records no longer affect significant interests or are considered sensitive after this time has passed.

However, the effect of the Act is that records in the open access period are closed to public access *unless* they are the subject of an 'open to public access' (OPA) direction. As a result, there are many records in the State Archives Collection that are in the open access period yet closed to public access, including records containing information that is or was publicly available. This outcome is at odds with the intention of the Act.

In addition, online access to documentary heritage materials, including records, has vastly changed citizens' expectations about accessing information. The ease with which users may discover historical materials that document the same matters as State records, and the extent to which they are digitised and available in full online, means that a closed to public access period of at least 30 years is increasingly anachronistic.⁴

The NSW Government is considering two changes to encourage timely public access to records documenting the activities and decisions that shape NSW and the lives of its citizens:

4. Records in the open access period will be open by default, *unless* the public office that is responsible for the records makes a 'closed to public access' (CPA) direction. The assessment could be based on a risk assessment, as is the case under the current provisions.
5. The open access period will be reduced to 20 years in line with other jurisdictions and citizen expectations. This change could be phased in over a period of time.

3.4 Policy outcome: NSW public offices create, keep and protect records as evidence of their activities and decisions

The importance of good recordkeeping cannot be overstated and is essential to democracy. Failure to create, keep, protect or give appropriate access to records can have significant implications for individuals and agencies. It can also erode public confidence in government.

By requiring public offices to create, keep, protect and lawfully dispose of records, Parts 2 and 3 of the Act enable the scrutiny and accountability of public institutions in NSW, both now and in the future. The recordkeeping obligations in the Act also ensure that the State Archives Collection will continue to grow.

However, the ability for the Authority to monitor and enforce compliance with the Act is limited, with the Act itself containing no mandatory mechanism to audit or monitor compliance with its provisions or standards. The Authority's existing monitoring activities rely on the cooperation of the public office under scrutiny, and the extent of this cooperation impacts compliance verification and the quality of the Authority's responses to complainants.

Recordkeeping failures may also be identified during integrity agency audits and investigations. However, the Act contains no specific complaint-handling or referral process to ensure the relevant regulator follows up.

In addition, the financial penalties for breaches of recordkeeping requirements are not practically enforceable.

⁴ Other jurisdictions, including the Commonwealth and the Australian Capital Territory (ACT), have or are working towards achieving an open access period of 20 years.

The NSW Government is considering a change to encourage public offices to take greater responsibility for the day to day management of records:

6. The Authority will have power to issue a notice to require a public office to investigate its recordkeeping practices (whether generally or specifically) and report back on its findings to the Authority.

4. Conclusion

The NSW Government is committed to putting citizens at the centre of everything it does. Government records, as evidence and as documentary heritage, underpin delivery of services to citizens and the social, historical and cultural identity of NSW.

The proposed reforms will enhance public access to and use of our documentary and material heritage, and ensure that our collective memory and cultural heritage are protected and continue to grow. The result will be increased knowledge and enjoyment of the rich, multi-layered stories that speak to who we are.