

15 July 2020

Our Ref: 20/0207
Your Ref: D20/29092

The Hon Shayne Mallard MLC
Committee Chair
Standing Committee on Social Issues
Legislative Council
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Dear The Hon Shayne Mallard MLC

Submission from the NSW Trustee and Guardian (Submission No. 65)

Thank you for your letter of 3 July 2020 regarding the submission made by the NSW Trustee and Guardian. I note that the NSW Trustee and Guardian (NSWTG) submits that it is not a public office for the purposes of the *State Records Act 1998* and is therefore exempt from the Act's provisions.

I appreciate the opportunity to respond to issues and concerns raised in the submission. I note that the NSW Trustee and Guardian has not raised these issues and concerns directly with NSW State Archives and Records.

Application of the State Records Act 1998 to NSW Trustee and Guardian

NSW State Archives and Records has identified the NSW Trustee and Guardian as a 'public office', covered by the requirements of the *State Records Act 1998*, and that all records created, made and kept by NSWTG are State records.

The basis for determining that NSW Trustee and Guardian is a public office includes:

- Section 3(1)(a) and (b) of the State Records Act apply to the NSWTG: Section 3(1) (a) defines a public office as "*a department, office, commission, board, corporation, agency, service or instrumentality, exercising any function of any branch of the Government of the State*", while Section 3(1) (b) defines a public office as "*a body (whether or not incorporated) established for a public purpose*". The NSWTG is a government agency (as per section 6 of the *NSW Trustee and Guardian Act 2009* (NSW)) and responsible to the Attorney General, and Minister for the Prevention of Domestic Violence. The NSWTG undertakes a range of functions (see section 11 of the *NSW Trustee and Guardian Act 2009* (NSW)), many of these are services for the public.
- *Part 3: Protection of State records* of the State Records Act has been applied to all State records created by the NSWTG, and the agency negotiated refreshed disposal coverage of State records during 2015-2016. It was issued with a new functional retention and disposal authority in 2016. This functional retention and disposal authority covers the unique records created by NSWTG in its work involving estate and trust management, and guardianship services, and supersedes two earlier functional retention and disposal authorities dating from 2005 and 2007.
- The Public Trustee, predecessor of the NSWTG, has transferred significant quantities of State archives to the State Archives Collection.

In determining that NSWTG is a public office covered by the State Records Act, we also take into account the following which places the NSWTG within the NSW Public Sector:

- NSWTG is identified as a statutory body under Schedule 2 of the *Public Finance and Audit Act 1983* (NSW).
- While the NSWTG is predominately a self-funding organisation (fees for services provided), it also receives an annual grant from NSW Treasury. It receives public monies to enable it to operate its services as articulated in its annual report.
- Section 10(3) of the *NSW Trustee and Guardian Act 2009* (NSW), identifies that persons employed at the NSWTG are employed under the *Government Sector Employment Act 2013* (NSW).
- The *Government Information (Public Access) Act 2009* (NSW) applies to NSWTG, although functions exercised in the NSWTG's capacity as executor, administrator or trustee are excluded from the operations of the GIPA Act (likely due to the sensitive personal information contained in the records).

Application of the State Records Act to all records of all functions of the NSW Trustee and Guardian

Submission No. 65 raises a number of issues in relation to the application of the State Records Act to the records of the NSW Trustee and Guardian. These issues concern the client records where NSWTG acts as an executor, administrator, trustee, or legal provider for a member of the public and that these records were not considered in the development of the State Records Act. The Submission indicates that these types of records should not be covered by the operations of the Act, as the submission notes that in these instances NSWTG "acts for private individuals not for the public at large." Simply put, the Submission does not believe that these records are made for the public nor for a later use by members of the public.

NSW State Archives and Records' position is that the State Records Act should apply to all records created, managed and kept by the NSWTG, not just the administrative records of the agency. Good recordkeeping and access to records enables a public organisation to demonstrate transparency and accountability for decisions and actions, and how public monies have been spent. Ensuring all records created by NSWTG are covered by the Act also ensures that robust and 'fit for purpose' recordkeeping is applied to all aspects of the agency's business.

We do not support that records created for the management of services for clients should be removed from the operation of the Act and this statement is inconsistent with past dealings with NSWTG. In 2015-2016 the agency discussed with us the updating of disposal coverage for client records. A refreshed disposal authority was issued which explicitly covers client records for estate and trust management, and guardianship services.

We note that the State Archives Collection already holds a number of different types of records from the former Public Trustee including deceased estate files, un-administered wills, financial information about trust accounts etc. Many of these State archives are closed to public access for lengthy periods of time (e.g. 100 years) in order to protect sensitive personal information.

While the issues in the Submission have not been directly raised with us, we would be pleased to discuss the concerns raised in the letter further with NSWTG. In cases such as this, NSW State Archives and Records manages questions of legislative administration first through discussion with the public office concerned to seek understanding from all parties. Matters of disagreement can often be resolved through operational mechanisms. Legal advice may be required on matters of legislative inter-operability such as whether the NSWTG would be in breach of its fiduciary duty if trust and estate records were managed under the requirements of the State Records Act and passed to the control and management of the NSW State Archives Collection.

Legal Professional Privilege and Confidential Information

The Submission raises issues pertaining to the operation of the State Records Act, legal professional privilege and confidential information.

Any State records over 30 years old, or those State records which are required as State archives, need to have an Access Direction. The Access Direction is made under section 51 of the State Records Act. Access Directions must be made with regard to the *Attorney General's Guidelines: Making Access Directions under the State Records Act 1998*.

We note that the Attorney General's Guidelines make particular reference to making a *closed to public access* direction if "information [is] provided under an expectation of confidentiality, or to which a legal obligation of confidentiality still applies".

A *closed to public access* direction to records held in the State Archives Collection is administered by NSW State Archives and Records. All State archives with such a direction are kept closed and unavailable to public access.

NSW State Archives and Records has multiple examples of public offices who have transferred State archives to the State Archives Collection with *closed to public access* directions due to the information contained in the records. Information in the archives could pertain to client matters, be of sensitive personal information, legal professional privilege, or of a confidential nature. A *closed to public access* direction means that the archives are not made accessible to the public. Following are some specific examples pertaining to the types of records pertinent to NSW TG:

- *protective case records* from the Supreme Court of NSW (these are closed to public access for 75 years due to sensitive personal information contained within the records).
- *estate files* from the Public Trustee (these are closed to public access for 100 years due to sensitive personal information and information given in confidence).
- *wills (un-administered)* from the Public Trustee (these are closed to public access for 110 years due to sensitive personal information and information given in confidence).

Property in Documents

The Submission raises an issue in relation to the operation of the State Records Act and property in documents.

This requires specific expertise in order to properly respond. Accordingly, we may wish to seek the NSW Crown Solicitor's advice on this issue and if the NSW TG would be in breach of its fiduciary duty if trust and estate records were managed under the requirements of the State Records Act and passed to the control and management of the NSW State Archives Collection.

Other Anomalies

The Submission raises two further issues:

- how wills can be revoked without breaching section 21(1) of the State Records Act
- the operation of section 28 of the State Records Act.

In response:

1. The *State Records Regulation 2015* (NSW) has been regularly amended to allow for the management and destruction of specific records as required by other NSW legislation or regulation. Schedule 1 of the State Records Regulation contains a listing of all specific legislation that has been exempted from the requirements of section 21 of the State Records Act. Section 11 of the *Succession Act 2006* and the destruction of revoked wills could be easily added to the Regulation.

2. Section 28 of the State Records Act presumes that State records that are more than 25 years old are no longer in use. However, we appreciate that due to particular business activities, some State records are still required for official use after 25 years. In these cases, the public office needs to make a 'still in use determination' with NSW State Archives and Records, to indicate that the public office still has a need for the records and wants to keep the records in their care and control. If NSW TG has State records which are older than 25 years, we would encourage NSW TG to make 'still in use determinations'. If the State records are 30 years old, we would also encourage NSW TG to make Access Directions for these records so that it is clear whether they are open or closed to public access. 'Still in use determinations' should be made about a series of records (i.e. types of records) rather than individual documents.

Thank you for the opportunity to respond to issues raised in Submission No. 65 from the NSW Trustee and Guardian. As noted above, NSW State Archives and Records will take this matter forward in consultation with NSW TG.

Yours sincerely

Adam Lindsay
Executive Director
NSW State Archives & Sydney Living Museums