

INQUIRY INTO STATE RECORDS ACT 1998 AND THE POLICY PAPER ON ITS REVIEW

Organisation: Board of the NSW State Archives and Records Authority
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The Hon Shayne Mallard MLC
Chair, Legislative Council Standing
Committee on Social Issues
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Mallard,

REVIEW OF THE *STATE RECORDS ACT 1998* & *HISTORIC HOUSES ACT 1980*

Kindly find our enclosed submission on the policy outcomes currently under consideration as part of the review of the *State Records Act 1998* and *Historic Houses Act 1980*.

We make this submission in our collective capacity as the Board of the NSW State Archives and Records Authority (SARA), administered under Part 7 of the *State Records Act 1998*.

Overall, the Board is very supportive of the policy outcomes that have been proposed. Increased accessibility and better outcomes for the people of NSW underpin our assessment of the proposals, and we firmly believe that this will be achieved through this Act review.

The Board's detailed reflections on the proposed amendments are below.

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

Identified option for reform: 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.

Identified option for reform: The Authority will also have power to refer instances of poor recordkeeping to investigative agencies for further investigation and action.

The Board recognises the Authority's current lack of power to monitor and investigate compliance under the *State Records Act 1998* (the Act), and the ongoing issues this lack of authority has posed for the proper functioning of several aspects of the legislation. It is clear to the Board that there is a gap between public expectations placed on SARA to enforce proper standards of recordkeeping, and the lacking legislative authority for SARA to actually do so.

The creation of explicit powers under the Act for SARA to investigate and refer matters of poor recordkeeping will be a useful and necessary mechanism through which compliance with the Act can be compelled. The Board is highly supportive of the proposal to vest the new entity with these powers under the revised Act.

The Board also notes the ineffectual provisions under Section 21 of the current Act, which establishes financial penalties for public offices that fail to protect records. To our knowledge breaches of recordkeeping legislation have never been prosecuted, nor penalties enforced, in any Australian jurisdiction. This penalty has never been practically enforceable, and has potentially only served to facilitate the public's heightened expectations of SARA's abilities to investigate and prosecute breaches of the Act.

The Board recommends the removal of this clause, noting that the proposed powers of investigation and referral should provide practical and enforceable measures to ensure compliance under the Act.

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

Identified option for reform: Public offices will be required to make and implement plans to transfer records of enduring value that are no longer in active business use to the State Archives Collection.

As previously noted, the Board is highly supportive of any measures that will improve accessibility to the State's Archives. The proposed changes requiring public offices to formulate transfer plans and adopt a more proactive approach to public access directions will support this mandate.

To help facilitate these amendments the Board proposes that SARA is vested with the authority to create and issue guidelines around public access provisions for Government Records. Currently, Part 6 of the State Records Act vests similar powers with the Attorney General, who is required to issue guidelines to public offices on opening or closing records to public access. We note however, that this is the only section of the Act that currently vests these powers with a statutory body other than SARA, and understand that the Department of Justice have expressed in principle support of this power being returned to SARA.

We further recommend the implementation of a 12 month delay on the commencement of provisions relating to transfer plans and changes to the public access regime. This will allow SARA to properly consult with and educate all public offices to make them aware of the changed requirements under the new Act. This will also allow the impacted public offices to internally plan for and resource the implementation of these changes, particularly in relation to public access.

The Board also recommends the removal of Section 28 of the State Records Act which requires public offices to make a 'still in use determination' for any records more than 25 years old which are still in use for official purposes. We note the redundancy of this provision given the proposed requirement for public offices to make and implement plans to transfer records when no longer in use for official purposes, regardless of age.

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

Identified option for reform: 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.

The Board is supportive of the proposal for records in the open access period to default to open. This shift would reflect best practice nationally and internationally (see the *Archives Act 1983* (Cth) and the United States' National Archives Strategic Plan and would be in line with other jurisdictions for example Executive Orders 12958 and 13526 regarding automatic declassification in the United States.

The current default to 'closed to public access' limits accessibility of records that may be highly appropriate for public access, only due to a lack of access direction from the relevant public office. We have received overwhelming feedback from public offices around the administrative burden that is placed on them to make an open access directions for their records.

This proposal will limit the administrative burden placed on public offices, and ultimately increase public accessibility.

Identified option for reform: 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 and an implementation approach will be informed by consultation with Public Offices.

The Board is equally supportive of the proposal to decrease the open access period from 30 years to 20 years. The measure is again consistent with federal legislation and other international jurisdictions, including the UK.

The Board acknowledges that such a measure will have a huge impact on both SARA and public offices due to the increased volume of work it will create over the first several years of implementation. The Board notes that it will be important for the proper implementation of any changes to the Act, that SARA is properly resourced to ensure success.

Similar to our previous recommendation to defer full implementation for a period of 12 months after the assent of the Act, we would recommend that a staged approach to implementation of the decrease from a 30 year to 20 year open access period to support the capacity of all relevant public offices, including SARA.

Policy Outcome Four: A single institution will act as custodian of the documentary and built history of NSW

Identified option for reform: A single Executive Agency will be responsible for collecting, managing, preserving and providing public access to government records, objects, buildings and places of historic, social, cultural and architectural interest and/or significance to the people of NSW. This institution will replace the existing Authority and Sydney Living Museums.

There is a distinct gap in the cultural landscape of the State when it comes to history. We are supportive and incredibly excited by the prospect of the creation of a new Cultural Institution to lead in this space, to make the History of the State accessible, educational and relevant to the people of Australia.

The Board has experienced firsthand the successes and positive impacts of the joint leadership of SARA and Sydney Living Museums (SLM), which has been underway since July 2019, and welcomes the proposal to have this partnership reflected in the revised legislation.

The benefits so far have been far ranging, from the creation of financial and administrative efficiencies created through shared IT, HR, Finance and WHS delivery, through to the increased opportunities for career development and opportunities for capability and expertise sharing across the two institutions.

The current capacity of SARA to make the significant \$1b Collection physically accessible is highly limited, and means we are unable to do justice to our mandate to keep this incredible collection accessible and relevant to the public. SLM, as the custodian of 12 venues, and with the internal capability to manage public facing museums, is the ideal partner with which a new history focussed Cultural Institution should be created.

Although we are highly supportive of this proposed new entity, the Board cannot overstate the importance of adequately resourcing and financing both the implementation of the proposed recordkeeping changes and the creation of a new cultural institution.

This legislative reform and creation of a new entity provides the perfect opportunity to align policy outcomes with funding to ensure both the successful transformation and to guarantee that the new institution is resourced to deliver the modified policy objectives and statutory mandates. There is also an investment opportunity to increase the already substantial revenue generating capability of this institution. SARA currently generates approximately 80-85% of own its operating expenses and this could be increased with further investment.

Identified option for reform: A single governing body will be responsible for the strategic direction of the new institution. Sub-committees will be responsible for advising on and approving arrangements for recordkeeping and the acquisition and management of significant buildings or places.

The Board is generally supportive of the proposal to form a Group A 'Governance Board' as set out in the PSC guidelines that will govern and guide the strategic direction of the new institution. We note that this structure, along with the powers of the Board to create sub-committees to provide expert advice as required, is reflective of the current administrative arrangements under the *Historic Houses Act 1980* and is in line with other State Cultural Institutions.

We are strongly supportive of a Group C committee 'responsible for advising on and approving arrangements for recordkeeping' being reflected in the revised Act. There are two primary elements that necessitate the need for this committee derived from sections of the current State Records Act that we believe should be carried across to any new legislation; firstly to ensure that there is not a loss of recordkeeping expertise as is mandated under s69 of the current Act which enables subject matter expertise to be applied to the fulfilment and approval of obligations under

s13; and secondly to ensure that the administration of s21 of the Act, which relates to protection measures, remains independent and impartial.

The committee should have the independence to determine and approve retention and disposal of records created by Public Offices, issue certain standards related to recordkeeping, access and storage and to guide the activity related to the proposed compliance powers. All strategic policies that relate to long-term planning for the Collection, such as the 'Building the Archives Policy', should be determined by the committee and would require endorsement by the Governance Board given their impact on the strategy and operations of the entity.

In addition, the committee should be obliged to respond to any request for advice or consideration referred to it by the Strategic Board. Finally, to ensure connectivity, the committee should be Chaired by a member of the Governance Board (with the appropriate expertise).

The Board appreciates the opportunity to provide this submission. Please do not hesitate to make contact should you wish to discuss this submission further.

Yours sincerely

Brian Lindsay
Chair, State Archives and Records Authority of NSW Board