

**Submission
No 29**

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

Name: Professor Lucy Taksa

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RE: Response to Review of the State Records Act 1998 Policy Paper - State Archives and Records Authority of New South Wales

Background information

I have been a user of State Archives since 1983 when I conducted research for my Honours thesis in history at the University of NSW (BA Hons First Class, 1983). In 1984 and 1985 I was employed by the NSW Public Works Department to review archival records held by that Department in storage to ensure compliance with the *NSW State Records Act*. I continued to be a user of State Archives from 1985 as a consultant historian on heritage studies conducted for Randwick and Kiama Municipal Councils, on the history/heritage of Observatory Hill for the NSW Department of Public Works and Services and subsequently as a sub-consultant with Godden Mackay Heritage Consultants in 1995-96 to undertake a Social and Oral History of the Eveleigh Railway Workshops for the City West Development Corporation, NSW Department of Urban Affairs and Planning, and State Rail Authority, which produced the *Eveleigh Workshops Management Plan for Moveable Items and Social History: Report* (1996). I also continued as a user of State Archives for my PhD research conducted between 1988-1994 and for three Australian Research Council funded research projects between 1998 and 2005. I continue to access available records in documentary and digital formats. In 2007 I was appointed by the NSW Governor as Chair of the Board of the NSW State Records for two 3-year terms permissible under the Act.

As Chair of the Board of State Records NSW (assets valued at \$980 million in 2012) I contributed to the improvement of retention and disposal assessment processes for all NSW public records, which has influenced records available for research purposes. In 2010-11, I worked with the then Director to obtain funding for a digital state archive pilot for digitally born records. Subsequently, the Hon. Greg Pearce MP stated that I “made a significant contribution to the preservation of the State's heritage” and I had used my ‘time on the board of State Records to seek a broader input into the board's decision-making’ by increasing engagement with “external experts to ensure ... accountability to end-users for appraisal outcomes not just in the present but also for future generations’ (23/2/2013, Hansard p. 27).

I make my submission based on the above experience and expertise.

Commendations

I commend:

1. the NSW Government's recognition that ‘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.’
2. the NSW Government's commitment ‘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.’

3. the NSW Government’s recognition of the need to review ‘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.’
4. the NSW Government’s consideration of two changes to encourage timely public access to records documenting the activities and decisions that shape NSW and the lives of its citizens:
 - (i) 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.
 - (ii) 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.

Serious Concerns

However, I have serious reservations about the proposed reforms contained in the Policy Document that aims to achieve the following 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.*

In this regard, I am particularly concerned that the greatest emphasis is being placed on Aim One.

I am of the view that the Policy Paper’s over-emphasis on memory and stories is being used to legitimate the merger of the two distinct entities of the State Archives and Records Authority (SARA) and Sydney Living Museums (SLM) and that this underestimates and undermines records management, accountability by government for the assessment of government records for all the authorities listed in the Regulations associated with the *State Records Act*, the preservation of those records and their accessibility for current and future generations.

I am particularly concerned about the conclusion in the Policy Paper at page 8 that:

'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.'

In the first instance, I take issue with the way the policy document reduces public records to documentary heritage. The Government has responsibility for all government records.

As is clearly noted on page 3, at 2.2 *The State Records Act provides for the creation, management, protection and use of records documenting the administration of NSW*, thus establishing the legal '*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 ... And the right of public access to records, established by the Act, ensures these records will ultimately be read, experienced and used by citizens.*'

Further as stated at 3.4 *Policy outcome: NSW public offices create, keep and protect records as evidence of their activities and decisions (p.7):*

'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.'

It is evident from the above that a distinction exists between **public records and their management**, on the one hand, and **heritage**, on the other, **and that government has a responsibility for both as they involve different albeit inter-related activities and outcomes.**

This distinction is particularly clear in the statement regarding the nature and purpose of the *The State Records Act* (1998) (<https://www.records.nsw.gov.au/node/647>) to:

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

The purpose of the Act is also 'to set out the records management responsibilities of public offices. The Act requires CEOs 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.

- ensure the safe custody and proper preservation of State records
- maintain accessibility to digital and other technology dependent records, and
- make arrangements with NSW State Archives and Records for monitoring and reporting on the implementation of the public office's records management program.'

Unfortunately, the Policy Paper fails to do just to these critical dimensions of record keeping, management and accountability. As a result, there is a **fundamental flaw** in the NSW Government's consideration of two changes to current administrative arrangements, notably:

1. setting up a single institution to 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 to 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.

These two proposals illustrate a failure to give serious consideration to the resourcing and administration needs associated with the responsibilities of public records management covered by the current State Records Act! They also fail to consider the very different issues and concerns to be overseen by the existing governing bodies and specifically the extensive decision making required by the Board of State Records regarding the disposal and retention of a large and growing body of public records.

Specific issues

First, the proposed merger of SARA and SLM conflates documentary (paper-based and digital) records with built heritage. While the two may be complementary and supplement each other in specific contexts they are of a fundamentally different nature, perform different functions and have different resource and infrastructure needs in the present and in the future.

The proposals fail to recognise that government records and documentary archives are far greater in scale and scope than the relatively few sites in the custody of Sydney Living Museums and that accordingly the merger of State Archives and Records Authority with Sydney Living Museums will invariably compromise the duties of government and public officials to manage government records throughout their existence, reduce the financial and administrative resources needed to ensure the broader requirements of government record keeping and archives management and therefore government accountability, as well as accessibility for record users. Second, and relatedly, points raised under 3.2 *Policy outcome: Records of enduring value to the citizens of NSW are managed, preserved and made accessible*, **suggest to me that the underlying intention of the reforms is cost reduction and shift of responsibility for record keeping** particularly in those cases "*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.*"

Currently the Government Records Repository (GRR) manages records storage services for semi-active records created by NSW public sector bodies, including Government agencies, local councils, public hospitals and universities under the auspices of SARA. With 50 years' experience, the GRR provides world-class levels of high-quality records storage services. It is economical, secure, professionally managed and reliable. It provides an excellent service and a cost recovery model that can be used to cross-subsidise the costs associated with archival management (<https://www.records.nsw.gov.au/records-repository>)

I fear that the proposed reforms seek to legitimate and authorise the privatisation of this very essential public service that ensures the highest level of records management for public records prior to assessment for disposal or retention as state archives, ensuring that what is preserved is of the highest quality.

Third, I raise some critical issues relating to points raised under *3.4 Policy outcome: NSW public offices create, keep and protect records as evidence of their activities and decisions*, notably:

1. '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';
2. 'the Act contains no specific complaint-handling or referral process to ensure the relevant regulator follows up.'
3. 'the financial penalties for breaches of recordkeeping requirements are not practically enforceable'.

As a result of the above, the Policy Paper (at page 8) notes that '*The NSW Government is considering a change to encourage public offices to take greater responsibility for the day to day management of records' by giving the Authority '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.'*

I question the assumptions made above in points 1-3 and ask the NSW Government to seriously consider addressing the limitations outlined in these points by introducing, as part of the reform of this legislation:

- **a mandatory mechanism to audit or monitor compliance with the provisions or standards of the Act;**
- **a specific complaint-handling or referral process to ensure the relevant regulator follows up**
- **financial penalties for breaches of recordkeeping requirements.**

I draw attention to the need for any policy and legal reforms to align with international standards. In this regard it is important to take note of:

The Universal Declaration on Archives, adopted by the International Council on Archives (ICA) on 17 September 2010 and by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in November 2011.

'Archives record decisions, actions and memories. Archives are a unique and irreplaceable heritage passed from one generation to another. Archives are managed from creation to preserve their value and meaning. They are authoritative sources of information underpinning accountable and transparent administrative actions. They play an essential role in the development of societies by safeguarding and contributing to individual and community memory. Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens' rights and enhances the quality of life.'

The International Council on Archives (ICA) was created in 1948. Now over 70 years old it recognises that effective records and archives management is an essential precondition for good governance, the rule of law, administrative transparency, the preservation of humanity's collective memory, and access to information by citizens (My emphasis).

As Chris Hurley pointed out in his 'The Evolving Role of Government Archives in Democratic Societies' paper (2001:2):

'In a democracy, the government recordkeeper operates in an environment in which the needs and interests of the state, the majority, and the individual conflict as much as they coalesce. We can no more avoid the challenges of being a recordkeeper in this environment, than we could be morally indifferent to the uses which might be made of our professional skills in a totalitarian regime. Such challenges can be no less difficult to deal with and some of us seek to avoid the dilemma altogether.'

It is critically important for the NSW Government to recognize the importance of Archives for our information society and specifically the following resolutions from the XXXVIth International Council of the Round Table on Archives held in Marseille in 2002:

2.2: Recommend that authorities place archives and records services in a strategic position within their organisational structure to ensure they have sufficient authority and capacity to intervene efficiently across the organisation, to the benefit of records' creators;

2.3: Encourage public administrations and national archives to ensure that appropriate training is given to administrators and creators of records at all levels of responsibility, in order to promote sound records management in the public sector.

Submissions

Accordingly, I submit that the *State Records Act* does need amendment to ensure greater monitoring and compliance of public record keeping requirements, the introduction of complaint-handling mechanisms and financial penalties for all bodies responsible for public records including private organisations responsible for public records following any privatisations, such as occurred with the Land Titles Office.

Moreover, I submit that the Act needs updating particularly regarding representation on its Board, which as currently constituted privileges depositors of records and gives minimal representation to the users of records and experts in archival record keeping and management. As outlined at <https://www.records.nsw.gov.au/about-state-records/who-we-are/state-records-board>:

The current constitution of the Board under Section 69 of the *State Records Act 1998* provides for a nine-member Board of whom:

- four are to be persons nominated by the Minister who administers the *State Records Act 1998*, to represent state law enforcement agencies, local government, the private sector, and the history profession
 - two are to be nominated by the Minister who administers the *Government Sector Employment Act 2013*, to represent Public Service agencies
 - one is to be nominated by the Minister who administers the *State Owned Corporations Act 1989*, to represent State owned corporations
 - one is to be a member or officer of either House of Parliament nominated jointly by the President of the Legislative Council and the Speaker of the Legislative Assembly
 - one is to be a judge of a court of the State nominated by the Chief Justice of New South Wales.

It is my view that this membership does not provide adequate expertise in the long-term significance and use-value of records. I therefore submit that there need to be more user representatives and archival experts to ensure appropriate expertise to facilitate high quality decision-making. I also submit that in light of the number of Local Government Areas in the State of NSW and the fact that the majority are in regional areas, the local government representative on the Board should be amended to regional local government representative.

Finally, I submit that the proposed merger of SARA and SLM and their governing bodies is misconceived and should not proceed. Such a move threatens the Government's record-keeping, management and preservation responsibilities and will invariably reduce resources for records management and archival preservation.

Yours sincerely,

Professor Lucy Taksa, PhD.