

**Submission
No 43**

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

Organisation: Recordkeeping Innovation Pty Ltd

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Mr Shayne Mallard
Chair, Standing Committee on Social Issues
Parliament of NSW

9 April 2020

**Submission to the Inquiry into the State Records Act 1998 and
the policy paper on its review.**

Dear Sir,

Please accept this submission on the policy paper 'Review of the
State Records Act 1998'.

Sincerely,

Barbara Reed

Director

1. About Recordkeeping Innovation

Recordkeeping Innovation is a consulting firm specialising in records, archives and information management. We work across multiple jurisdictions within Australia and in the Asia-Pacific Region. In the last 10 years we have undertaken more than 175 individual assignments with NSW government agencies and entities to advise on strategic and operational records, archives and information management.

Our services involve defining information governance frameworks, recordkeeping by design, design of key records control tools such as metadata, information structures and records retention rules. We assist organisations, private, public sector and NGOs, to identify compliance requirements, to establish systems to manage digital records and information assets and to enable retention of records beyond the system that created them. We assist agencies to identify those information assets requiring long term retention and assist in maintaining those information assets in contextualised forms and formats across software change.

2. Our position in summary:

- The State Records Act should not be amalgamated with legislation governing the Sydney Living Museum.
- State Records is the NSW Government's recordkeeping regulator, and the State Records Act is a critical part of the information governance and accountability framework of NSW. This framework is vital for ensuring evidence of government actions required to enable citizen trust in government and accountability.
- A strong information governance and information management framework is required for NSW government agencies.
- Agencies at all levels of government need standards and best practices against which to benchmark, assess and ensure their performance in ensuring evidence of accountable decisions is created and maintained.
- We support the recommendation of the Policy Paper reducing the closed period for government records to 20 years.
- The resources and capability of State Records NSW to appropriately identify, govern and safeguard the State's digital assets is currently undervalued and underresourced and should be redressed.
- State Records independence from political influence or ministerial direction in defining requirements to create records in business processes and to authorise disposal actions is an essential accountability mechanism.
- Self monitoring by agencies will always provide a rosy picture which may be belied by reality. The importance of routine, independent, regulatory-based oversight and reporting is vital to bettering information and records practices in state agencies.

- Agencies need clear assistance to address digital preservation issues to enable sustainability of key state information assets now held in digital form. At present funding levels and priorities State Records is failing to meet this role.
- Digitising older material already in State Records custody for exhibition and public access is desirable, but this largely focuses on the past, not on the realities of the digital data present and future. There will be no equivalent of the paper based holdings if the future is not proactively addressed.
- A mandatory transfer period between creating agencies and State Records is only one option for managing the State's digital resources. A governed, regulated, distributed approach is feasible and likely more pragmatic. If mandatory transfer is pursued, the 20 year period proposed in the policy paper is inappropriate to the realities of digital systems where neglect or failure to migrate/manage are high risk within a timeframe any longer than 10 years.
- State Records NSW has been systematically deprived of appropriate resourcing by successive governments. This funding shortfall affects the capability to make existing records public, to physically maintain the analogue records of the past and leaves the state woefully under resourced to manage the digital assets of today and tomorrow. This should be redressed.

This submission addresses the terms of reference of the Inquiry, and the recommendations included in the Policy Paper on the review of the State Records Act 1998.

3. Terms of Reference of the Inquiry

a) The role and purposes of the State Records Authority of NSW and Sydney Living Museums

Recordkeeping Innovation strongly opposes the proposition that these two organisations be merged. While there are superficial synergies concentrated on exhibition spaces and the display of material in the State Records holdings, this is only one aspect of the role of the archives.

Sydney Living Museums is but one of a number of cultural institutions of NSW. Others, who also have holdings suited to display in Sydney Living Museums include: Art Gallery of NSW, Australian Museum, State Library, Sydney Opera House, Museum of Applied Arts and Sciences. There is no particular logic in combining State Records with the Sydney Living Museums, other than the superficial component of exhibition. Managing physical buildings, furnishing and three dimensional objects is quite a different set of skills to managing the evidential record of the State.

State Records is NSW's recordkeeping regulator in addition to being a custodian of its currently largely analogue archives. The establishment and monitoring of a robust information management framework is essential for ensuring reliable and trustworthy records providing evidence of governmental actions and decisions. This critical role for State Records is largely ignored by the Policy Paper, which appears to place undue emphasis on analogue records of the past. Without robust information management standards and

guidance, the digital record of the present and the future is placed at severe risk. The equivalent of the existing analogue resource of State Records, for today and tomorrow, will not exist without clear requirements and directions established in Standards and Guidelines.

State Records has been systematically starved of funding over many years, weakening its capability to proactively protect the rights of the NSW citizenry in ensuring appropriate records are created, maintained and kept accessible over time.

b) The adequacy of the Act in meeting citizens' needs

As devised in 1998 the Act provided both a rigorous standards setting role for government agencies in ensuring records were created, maintained and accessible over time. While arguably in need of modernisation to ensure digital assets of all kinds (data, datasets, AI algorithms etc) are explicitly noted as coming within its purview, the basic structure of the Act remains sound. In its time, it provided a model for archival legislation for other jurisdictions (notably New Zealand, Western Australia).

Citizens' needs are broader than access to records of the past, although that is an important component. There is an expectation that records providing evidence of accountability for decision making and policy direction are created and maintained. There is a community expectation that government agencies act in an ethical and accountable way in exercising their mandate. This is a protection against real or perceived corruption and good recordkeeping is one of the ways that this protection is enacted, a connection most recently made by the Queensland Crime and Corruption Commission (CCC) <https://www.ccc.qld.gov.au/publications/public-records-advice-all-employees-public-authority> (April 2020).

Records are central to personal and community identity. Consequences of failure to keep records which allow citizens rights to such records have been graphically demonstrated by the recent Royal Commission into Institutional Responses to Child Sexual Abuse. That Royal Commission found such strong connections between the rights of individuals and records that Volume 8 of their report was dedicated to Recordkeeping and Information Sharing (<https://www.childabuseroyalcommission.gov.au/recordkeeping-and-information-sharing>).

Citizens expectations of robust records to protect them, to enable them to prove actions and hold agencies to account is not restricted to the analogue past. The formats in which records are created are possibly not of immediate citizen concern, but the expectation that robust records will exist and will be traceable is clear. Recent high profile examples in the digital present and future are:

- the colour coded spreadsheet used to allocate sports grants by Senator Bridget Mackenzie (<https://www.abc.net.au/news/2020-03-03/govt-added-projects-to-sports-ports-list-after-calling-election/12019326>), and
- the role of authoritative recordkeeping in tracing Corona Virus epidemic, particularly clearly demonstrated in the current investigation of the events surrounding the Ruby Princess disembarkation (<https://www.theguardian.com/business/2020/apr/10/ruby->

[princess-battle-begins-to-hold-someone-accountable-for-cruise-ship-coronavirus-debacle](#)).

c) Factors constraining public access to and use of the documentary and material heritage of NSW

We support the recommendation of the Policy Paper reducing the closed period for government records to 20 years. This is not a radical recommendation, as similar provisions have been implemented in the UK from 2013 (recommended in 2010) and at the Commonwealth level from 2010.

Access to public records is not simply a matter of historical interest. Access frameworks need to be placed within a coherent information management framework for the State. The framework needs to operate in conjunction with the Government Information (Public Access) Act 2009. Similarly, the sensitivity framework must be considered, where records are subject to security classifications limiting public access. Sensitivity markings should be applied for a time limited period with automatic expiry or deliberate extension after review to avoid excessive secrecy applied long beyond operational need. This area forms a strong example of the need for sector wide standards and guidance. In the absence of such a framework and standards, individual agencies will always err on the side of restrictions as a risk aversion mechanism, to the detriment of the citizens of NSW.

The digital record is again a major risk to be identified, managed and where guidance is sorely required. Such guidance cannot be provided without an adequate legislative mandate. Digital records in all their complexity are difficult to maintain over time, as they are platform, technology and software dependent. The current level of attention to digital preservation is manifestly problematic. This is far more complex than the digitisation of analogue records which is arguably the proposed focus of the Policy Paper. Contextualisation and story telling are only possible if the records exist. Attention to techniques and mechanisms to ensure that digital records in complex data formats are made, maintained across infrastructure upgrades and administrative change is not appropriately addressed in the Policy Paper and its proposals. This is an issue of pressing concern in government agencies now.

Data sets issued now under the data.nsw.gov.au initiative should be clearly within the mandate of the State Records Authority. At present it is not clear that this is the case. They are not managed as accountable records of the state.

As digital data is increasingly seen as a valuable State asset, this needs to be brought under a coherent, accountable regime. The importance of the government data is indisputable, and clearly in high public profile in the current CoVid19 pandemic. The innovative work of the Data Analytics Centre in NSW is testament to the increasing importance of accountable and authoritative data. Data needs to be incorporated into any revised access and accountability frameworks.

Artificial intelligence and algorithmic decision making are areas of public concern and may have extraordinarily personal impacts on individuals (for example, the impact of the so called

RoboDebt algorithms in the Commonwealth sphere). Regulation and appropriate management of algorithmic decision making is required to ensure ethical and accountable deployment and traceability in the use of such techniques.

Trends towards outsourcing or privatising functions previously undertaken by Government have been dominant for the past 20 years. Ensuring that citizens can access records of actions undertaken by third parties acting on behalf of government is another area that needs attention in the information management framework.

d) The operation and effect of the proposed reforms in the attached Policy Paper

Our position is that the Policy Paper fails significantly to address the necessary information management framework needed for the state of NSW. If the proposed direction is adopted, State Records will languish into a custodian for analogue records.

The Policy Paper recommends a single governing body for an amalgamated organisation comprising State Records and Sydney Living Museum. As indicated, we are strongly opposed to the amalgamation of the two institutions. Quite different skill sets and resources are required to serve both different outcomes of the two organisations. An independent entity is needed to approve and issue information management standards and authorise appropriate records retention. It is critical that political interference and ministerial discretion is removed from both the standard setting role and the determination of records retention and destruction.

The Policy Paper's absence of an effective regulatory framework, complementing those other key regulatory frameworks provided by the Information and Privacy Commissioner, the State's Auditor General will enable the State's government agencies at all levels to escape accountability for creating, maintaining and enabling access to and retention of critical state information assets. And this is proposed at a time when the digital record is already fragile and agencies are in need of strong direction on how to meet recordkeeping requirements in multiple, complex technologies. Without a strong regulatory presence, it is likely that government agencies will consider recordkeeping too complex, too difficult and expendable. In our practice in government agencies we have already seen critical digital records abandoned in unreadable technologies – 'kept' but not accessible or usable. We see the rollout of new technologies to promote information sharing, that are complex environments. These technologies are often deployed to Agency staff with no protocols around the management of the high value, high risk records of the Agency. A strong information governance and information management framework is required for NSW government agencies to protect and manage their information assets.

Digital government is not served by the recommendations of the Policy Paper. The absence of a forward focussed digital strategy for the state's accountable information assets will undermine public trust in its institutions of government. In times of social transition to digital working, buy in to digital reform and participation by citizens is a key component. Without the capacity to hold agencies to account through evidence of decision making this trust is severely compromised to the detriment of digital transformation. Accountability and government integrity is at risk. Digital information assets are a core commodity of

government. Agencies need clear assistance and guidance to address digital preservation issues to enable sustainability of key state information assets now held in digital form.

The Policy Paper recommends transfer of records to the State Records organisation that are no longer active at some time. This reflects a custodial analogue model, where physical transfer of physical material is possible. The Policy Paper fails to recommend a mandatory period of transfer. The current act mandates 25 years. Where digital records are concerned, 25 years is far too long to be able to assume legibility and accessibility. Even 10 years is arguably too long. This custodial model reflects a paper mind set. New mechanisms for managing records in distributed digital stores with strong guidance to ensure that digital records survive upgrade of technological infrastructure and transfer of responsibility with administrative restructure. A distributed, digital model of archives under joint agency/archives responsibility with transfer of responsibility (rather than custody) at a mandated period is more practical and more achievable than the paper based model proposed by the Policy Paper.

Delegation of compliance monitoring to individual agencies is the equivalent of no compliance at all. The Australian National Audit Office's recent report on the National Archives of Australia's management of the Digital Continuity strategy, which includes both a self monitoring by agencies and a centralised oversight component, concluded:

The Archives has achieved high participation rates for the survey, however the absence of any processes in 2017 and 2018 to verify the accuracy of entity self-assessments means that there is minimal assurance regarding the accuracy of these results. (<https://www.anao.gov.au/work/performance-audit/implementation-digital-continuity-2020-policy>)

Compliance monitoring is time and resource consuming. However, in our consulting practice, it is clear that the recommendations of compliance reports is critical to driving attention to good records and information management practice. Resourcing of the monitoring role is required. Alternatives may be to delegate this responsibility to the Audit Office of NSW – along with appropriate resourcing, upskilling and expertise. An independent agency such as the Audit Office would need clear standards and guidelines against which to monitor compliance. The implicit under valuing of the current regulatory role for State Records and the underfunding of its government recordkeeping arm at present make the recommendations in this area proposed by the Policy Paper feel superficial.