

**Submission
No 64**

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

Organisation: NSW Health

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NSW Health submission

*Inquiry into the
State Records Act
1998 and the Policy
Paper on its Review*



Health

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Outcomes of the Policy Paper

The Ministry of Health has developed this submission in consultation with public health organisations.

The Ministry recognises the benefits of the four policy outcomes canvassed in the Policy Paper, namely:

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

Good recordkeeping supports efficiency and accountability through the creation, management, and retention of meaningful, accurate, reliable, accessible and durable records. A significant public policy issue is the delicate balance between access to public records to achieve the four policy outcomes outlined above, and the protection of personal information and health information. The policy outcomes regarding improved accessibility must be balanced with the private, sensitive and confidential nature of health information and personal information.

Analysis of Recommendations

Recommendation 1-2

Nil comment

Recommendation 3

Recommendation 3 would require public offices to make and implement plans to transfer control of records of enduring value that are no longer in active business use to the State Archives and Records Authority of NSW (the Authority). The paper indicates that these plans could involve the immediate or postponed transfer of custody. One concern for some operators will be to ensure consideration is given to how a record of enduring value is defined and how to ensure there is no excessive administrative burden involved in the requirements for the preparation and implementation of the relevant plans.

Recommendation 4

Part 6 of the *State Records Act 1998* 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. However, as noted in the Policy Paper, 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' direction.

Recommendation 4 would require records in the open access period to be open by default, unless the public office that is responsible for the records makes a 'closed to public access' direction. This would subvert the existing framework, under which a record in the open access

period does not automatically become open to the public unless it is subject to an open to public access direction.

Health records, by definition, contain sensitive personal information, including about mental and psychological health, personal trauma and choices in relation to treatment. The Ministry of Health therefore considers existing 'closed to public' access directions should continue for the protection of NSW Health records. For example, existing Access Direction 7 closes all patient identifying records for 110 years and should be continued under any amendments to the Act to ensure protection of personal and health information. Similarly, any amendment should maintain existing protections of personal information and health information under the *Health Records and Information Privacy Act 2002* and *Privacy and Personal Information Protection Act 1998*.

Consideration will also need to be given to revised guidelines to inform implementation of any changes to the current framework. There are again some concerns from a practical perspective about the administrative burden of the proposed amendments, should a closed public access direction be required in respect of each individual patient record or classes of patient records held by health services, if the Act is amended so that records are 'open by default'.

Recommendation 5

Recommendation 5 would require the open access period to be reduced from 30 years to 20 years. The Policy Paper notes that this change could be phased in over a period of time. Any amendment to the *State Records Act 1998* should not seek to change existing protections of personal information and health information under the *Health Records and Information Privacy Act 2002* and *Privacy and Personal Information Protection Act 1998*. Both Acts create restrictions around the use and disclosure of personal information and health information which apply for a period of 30 years after a patient has died, unless the health information is contained in a State record under the control of the Authority and is available for public inspection under the Authority.

The proposal to reduce the open access period from 30 years to 20 years creates an inconsistency with the Acts, in that records containing sensitive health information will potentially be available for public inspection after 20 years. We note this would be a substantial change and would also impact on times provided for in privacy law. Therefore, we would be interested to ensure widespread public consultation on the change and consultation with the Ministry of Health if it was to progress.

Recommendation 6

Recommendation 6 would provide the Authority with a 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.

The Ministry of Health supports Recommendation 6 to the extent that it relates to good recordkeeping practices and transparency of an agency's record keeping practices to support public confidence in NSW Health. However, clarity is required as to the scope of this power, the process of issuing a notice, and how and when this power would be used.

Additional comments

With the rapid growth and pace of technological change, recordkeeping has moved from managing records which have a largely lineal progression, to a system involving multiple

business processes and multiple data inputs in creating a record. This is evident in the increasing use of information repositories (whether local or in the cloud) that offer IT collaboration workspaces. In this context, any change to the *State Records Act 1998* and its supporting processes should consider:

- **Simplifying retention and disposal classification requirements** – Disposal of records is usually authorised through retention and Disposal Authorities. There is a large volume of different Disposal Authorities created by the Authority. For example, there are currently over 1,500 different retention classifications that apply to HealthShare NSW. This creates a significant administrative burden and increases the risk of misclassification. A more streamlined approach would reflect the increasing volumes of information that are now created.
- **Reducing end user burden in identifying, classifying and storing records** – New technology allows the creation of a ‘golden index’ of created content such as documents, emails and tasks. This index then enables the application of retention periods to the content without the end user having to manually assign classifications. If this approach were adopted, it would create greater consistency, compliance and efficiency to record classification.
- **Increasing information repositories** – New services such as Microsoft Teams do not create files but rather, store information in tasks or posts. This information is difficult to extract without high level user licensing. With the increasing use of these systems, guidance from the Authority for agencies across NSW Government would assist to ensure the legislative requirements are applied consistently in relation to this content.