Submission No 65

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

Organisation: NSW Trustee and Guardian

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Inquiry into State Records Act 1998

NSW Trustee and Guardian welcomes the opportunity to make a response to the Inquiry into the *State Records Act 1998*.

NSW Trustee and Guardian (NSWTG) affirms the NSW Government's commitment to putting citizens at the centre of everything it does. NSWTG is focused on creating a customer centred culture and customer centricity is at the core of its strategic plan. NSWTG appreciates the Government's manifold aims in reforming the *State Records Act 1998* (the Act).

The aim of this submission is to explain the legal framework under which NSWTG operates and its role, under the law as a fiduciary, which requires it to be exempted from the provisions of the SRA.

In all of its roles bestowed upon it by legislation, that is as a guardian, financial manager, executor, administrator, trustee, or attorney, NSWTG is in a fiduciary relationship with those people who are under guardianship, management or are principals or beneficiaries. As a fiduciary, it acts for, on behalf of, or in the interests of those people when making decisions that will affect their legal interests. This relationship gives rise to duties and liabilities, a breach of which may have serious consequences for NSWTG.

When acting in these roles, NSWTG's governing legislation gives it the same liabilities, rights and immunities as a private executor, administrator, trustee, and manager acting in the same capacity. It is also subject to the same control and orders of the Supreme Court.

History of NSW Trustee and Guardian

NSWTG formed in 2009 following a merger of the Public Trustee NSW and the Office of the Protective Commission & Public Guardian.

Historically the functions of the Public Trustee, Protective Commission and Public Guardian devolved from units within the Supreme Court of NSW being the Curator of Intestate Estates and Protective Division.

The Public Trustee

The office of the Curator of Intestate Estates was created *by An Act for the Better Preservation and Management of the Estates of Deceased persons in Certain Cases* (1 Vic No 24, 1847) in order to administer certain intestate estates or estates where there was a will but the executor had renounced, would not apply or was outside the jurisdiction or there was a concern about delay resulting in waste.

The office of the Curator of Intestate Estates was abolished by the *Public Trustee Act 1913* and the office of the Public Trustee was established. The functions of the Curator were taken over by the Public Trustee from 1 January 1914 and additional functions were added.

The Protective Commissioner & Public Guardian

In the early days of the colony of New South Wales responsibility for those with mental health problems resided with the Governor. The responsibility (for both the person and their estate) was taken over by the Supreme Court in 1823.

The enactment of the *Protected Estates Act 1983* created the Office of the Protective Commission outside of the Supreme Court. This instituted a formal division between the protection of estates and the protection of persons. The Protective Commissioner's role was to protect the estates of persons and until 1989 the Supreme Court retained jurisdiction over issues of 'guardianship of the person'.

In law the actions lawfully performed by the Protective Commissioner while managing an estate had, and continue to have, the same status as those undertaken by the protected person who is bound by or could benefit from these actions.

The Public Guardian

In 1987 the *Guardianship Act* was enacted. This Act provided that the Protective Commissioner shall be the Public Guardian.

The Supreme Court and NCAT

In relation to trusts, the Supreme Court's role is to protect and uphold: *Re Gaydon* [2001] NSWSC 473.

The Supreme Court continues to have a protective jurisdiction. Additionally, the NSW Civil and Administrative Tribunal also has authority to make orders appointing financial managers and guardians.

Status and role of NSWTG:

From 1 July 2009 the legal entity of NSW Trustee and Guardian formed.

Pursuant to s11(1) *NSW Trustee and Guardian Act 2009 (NSWTG Act)* NSWTG may be appointed to act in a number of roles but predominantly as:

- executor, administrator, trustee
- agent or attorney
- financial manager of the estate of a managed person
- maker of wills, powers of attorney, enduring guardianship

> appointments and may carry out professional services in connection with wills, probate and administration.

When acting in the above capacities, NSWTG has the same liabilities, rights and immunities as a private person acting in the same capacity. It is also subject to the same control and orders of any court: s11(4) of the NSWTG Act

Pursuant to s61 *Probate and Administration Act 1898* the property of a deceased person vests in NSWTG from the date of death and until probate or administration is granted to the executor or administrator

The Public Guardian continues as an independent officer under the *Guardianship Act 1987* with the same functions as prior to the merger of the Public Trustee and Protective Commissioner.

NSWTG and the State Records Act 1998

To date it has been presumed that NSWTG is a public office for the purposes of the *State Records Act 1998* (SRA) and the papers and documents that come into its hands are State records for the purposes of the SRA.

Section 3(1) of the SRA defines 'public office'. The section refers to bodies that exist for the general public good. An initial reading of this definition may appear to include NSWTG as a 'public office'. The NSWTG Act provides that NSWTG is a corporation created by statute and one that is expressly stated to be 'a NSW Government Agency'.

However, it is worth noting the Second Reading speech in the Legislative Assembly of the State Records Bill on 6 May 1998 when the Minister stated:

> The purpose of this bill is to make provision for the creation, management and protection of the records of public offices in the State…
>
> The impetus for change comes mainly from two sources: first, a perception that governments and other public institutions should be made more accountable, coupled with a recognition that several royal commissions in New South Wales and interstate…of the link between accountability and good record keeping…

indicates the Minister's emphasis on the accountability of 'governments and other public institutions' is significant. It appears the Minister was directing his remark to those instruments of government serving the public at large. NSWTG's functions are as legal adviser to individuals (in relation to estate planning), or as an executor / administrator of a deceased estate, or as a trustee of a trust, or as guardian of an incapacitated person or manager of the latter's estate.

It is accountable, therefore, not to the public at large, but, rather, only accountable to, respectively, the client, the beneficiaries of the estate or trust, or the incapacitated person.

The SRA focuses on 'State records' and this expression is defined to mean any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office. NSWTG in carrying out its function acts for private individuals not for the public at large.

If there remains any concern that NSWTG is a public office for the purposes of the SRA and that records made and kept by NSWTG in the course of its functions is a State record so that the information contained in any such record passes into the public domain as envisaged by the SRA there are three matters that attach to NSWTG's duties and obligations to a client/beneficiary/disabled person that are relevant in this respect and they are set out below.

If the SRA is applied to NSWTG when exercising its functions for individual clients and access to client documents was required by the SRA, NSWTG would be in breach of its fiduciary duty to the client to hand over the records. In relation to each request by SRA for each client NSWTG would have no option but to apply to the Supreme Court of NSW for a determination as to whether the record is privileged or the subject of confidentiality. This would be a very time consuming and costly exercise not only for NSWTG but for the client and beneficiaries and one it is envisaged never entertained by those who drafted the SRA.

It is to the Supreme Court that NSWTG would need to apply due to both:

1. s11(4) of the NSWTG Act:

> (4) The NSW Trustee, if appointed to act in a trust or protective capacity—
> (a) has the same liabilities, and
> (b) is entitled to the same rights and immunities, and
> (c) is subject to the same control and orders of any court, as a private person acting in the same capacity.

and

2. In NSW the legal position on trustee disclosure rules has recently been stated by Justice Hallen in *Wright v Stevens* [2018] NSWSC 548:

> *"... the trustee must administer the estate/trust in accordance with the terms of the Will/Trust Deed. The right to seek disclosure of trust documents is one aspect of the Supreme Court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of the estate/trust. The power to order inspection of trust documents is discretionary in the sense that it involves assessment and*

judgment. The Court exercises its jurisdiction as a court of equity, exercising its own judgment as to whether disclosure ought to be made at all, and, if so, to what extent and on what conditions...":

1 Legal Professional Privilege

Legal professional privilege attaches to documents which would reveal communications between a client and his/her legal adviser made for the dominant purpose of giving or obtaining legal advice or assistance or the provision of legal services including with respect to litigation that is being conducted or which is within the contemplation of that client.

In its various roles NSWTG is called on to give legal advice; and if a document or communication is prepared, or comes into existence, with the dominant purpose of NSWTG giving a client that legal advice, such will be afforded legal professional privilege - unless that privilege has been waived by the client or has otherwise lost its confidentiality.

It is noted that ss34 and 53 of the SRA appear to override any duty of confidence.

However legal professional privilege is an important common law right or immunity, one which is not abrogated by statute as confirmed in the case of *The Daniels Corporation International Pry Ltd & Anor v Australian Competition and Consumer Commission* (2002) 213 CLR 543 where it is said:

> 'It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary to that effect…It is an elementary rule of statutory construction that courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law clarifies as fundamental unless the content or subject matter of the statute points irresistibly to that conclusion .'

2. Confidential Information

It is a matter of incontrovertible principle that NSWTG will stand in a fiduciary relationship as regards its clients, as regards the beneficiary of a trust or of a deceased estate, or as regards protected persons when it is engaged in the various capacities pursuant to s.11 of the NSWTG Act. As Mason J noted in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96:

> ‘The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.’

The fiduciary is, therefore, accountable to the beneficiary or client and to no one else.

One of the obligations of a fiduciary involves a duty of confidentiality. While a fiduciary has a duty, in appropriate cases, to provide information to beneficiaries that duty does not extend to persons who are strangers to the trust or who are not beneficiaries under a will or who are not entitled to take on an intestacy. The editors of *Underhill and Hayton: Law of Trusts and Trustees* (18th Ed.) point out at 56.31 that '(a)s a general proposition, trustees must keep the affairs of the trust confidential, as well as personal information relating to the beneficiaries, as part of the law relating to breach of confidence.'

Therefore, where a document or information has been acquired in circumstances that it would be a breach of confidence to disclose it to another person, equity will restrain its transmission to another in breach of that confidence. Given the various capacities in which NSWTG is called on to act, it would be a breach for NSWTG to transmit that information to a stranger.

It is the view of NSWTG that neither s.34 nor s53 of the SRA abrogate this principle of confidence. There is a distinction to be drawn between a confidential communication passed, for example, where the communication is expressed or passed in confidence to ensure executive efficiency, and the duty of confidence that arises in the course of a fiduciary relationship. As in the case of legal professional privilege, such a fundamental right can only be overridden by express words or necessary implication and neither s.34 nor s53 do so.

As in the case of legal professional privilege, the SRA appears to take no account of the right of, for example, a client or beneficiary to whom NSWTG stands in a fiduciary relationship so as to ensure the latter maintains the duty of confidence in relation to the information communicated to it.

3. Property in Documents

The SRA assumes that State records may be the subject of a claim of ownership by a person other than a public office. Section 33 provides that the Authority's entitlement to control of a State record does not extinguish, limit or otherwise affect any right or interest of any other person in the State record. Section 38 provides that there is a presumption (albeit rebuttable) that State records are owned by the State.

Where a solicitor is engaged by a client to prepare a will or a deed for which the client has paid, the will or the deed, belongs to the client so that the property in that will or deed vests in the client and not the solicitor. Wills and deeds drafted by NSWTG for their clients are the property of the client, not NSWTG.

Trust and estate documents including documents containing or evidencing the terms of the trust, documents relating to the trust or estate property as well as the accounts of the trust or estate (including primary vouchers and receipts) are the property of the trust or estates.

While a trust is on foot, a beneficiary will be entitled to a right of access to documents evidencing the trust, that relate to trust property and the accounts of the trust, but not necessarily, for example, to documents subject to a duty of confidence owed by the trustees to a third party or to documents private to the trustees which may evidence the reasons why the trustees have made their decisions and which are not the property of a trust since they will have been prepared for the trustees for their own purposes.

Upon the winding up of the trust, the beneficiaries can require the trustees to deliver to them all documents that are trust property, the reason being that trustees hold only the legal title to those documents during the administration of the trust. Where a trustee retires or is removed from office, that trustee may not only be required to deliver trust documents to the incoming trustee but also to hand over documents involving trustee deliberations and communications to beneficiaries: *Hancock v Rinehart* [2018] NSWSC 1684.

It follows that, if the SRA applies to NSWTG, NSWTG would be unable to comply with its fiduciary obligation to deliver trust records to a beneficiary upon the winding up of a trust or to hand over those records to an incoming trustee were it to retire as trustee on the one hand, with the stated requirement in s.21(1) of the SRA that forbids a public office from transferring the possession or ownership of a record on the other. Again NSWTG would be obliged in compliance with its fiduciary duty, to make an application to the Supreme Court of NSW which would impose an unnecessary burden and cost not only to NSWTG but to the beneficiaries of an estate or a trust if an application were to be made every time the issue arose.

4. Other Anomalies

Assuming NSWTG to be a public office and all records made and kept, or received or kept, by a person in the course of its official functions other anomalies will arise:

1. S.21(1) of the SRA provides that a person shall not damage or alter a State record. Section 11 of the *Succession Act 2006* provides that a will may be revoked 'by a testator, or by some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it.'

2. The second example concerns the premise that records more than 25 years old are presumed to be no longer in use for official purposes: s.28 of the SRA. While most estates will be administered within this time; this will not be the case where a will makes provision for successive interests that extend beyond this time or, in the case of trusts, where the perpetuity period will be up to 80 years. Apart from the making of a *still in use determination*, NSWTG might avoid the problem by using a closed public access determinations pursuant to Part 6 of the SRA. All these actions will involve time, inconvenience and expense.

Conclusion:

NSWTG respectfully submits that NSWTG is not a public office for the purposes of the SRA given the nature of its activities as defined and set out in the NSWTG Act. Its functions are quite different from the other branches of government identified in s.3(1) of the SRA as constituting a public office.

If there is any concern that NSWTG is caught by the SRA there is the further question whether its records can be regarded as State records.

Records that relate solely to individuals who take under the estate of a deceased person or who have an interest in a trust, or to persons who seek the legal services of NSWTG, or relate to the management of the estate of a person under a disability, are not for the benefit of the public as a whole and it is submitted are not State records for the purposes of the SRA. In this regard a distinction may be drawn between records kept and maintained by NSWTG relating to, for example, the appointment of staff, inter office communications relating to policy, publicity statements and the like. It appears this distinction may have passed unnoticed during the drafting and debate of the Bill that became the SRA since no account is taken of the relationship between solicitor and client or of fiduciary relationships, legal professional privilege and the duty of confidence.

Furthermore, s.11(4) of the NSWTG Act expressly states that where NSWTG is appointed to act in a trust or protective capacity, it has the same liabilities and is entitled to the same rights and immunities as any other person acting in that capacity and which obligations do not sit easily with the objects of the SRA.

In relation to client records (as distinct from its 'corporate' records) NSWTG is of the view that it may be in breach of its fiduciary duty if it failed to seek an exemption to the application of the SRA in its current or amended state.