

New South Wales

State Records Amendment Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *State Records Act 1998* as follows:

- (a) to provide that bodies that become State collecting institutions under the Act by being added by regulations will not be subject to the existing exclusion applicable to other State collecting institutions that disappplies various provisions of the Act to records that came into their collection before the commencement of the Act (but without affecting the blanket exclusion for private records held by State collecting institutions),
- (b) to remove any doubt that the State Records Authority (*the Authority*) has power to provide certain services (including commercial services) outside New South Wales,
- (c) to provide for guidelines as to what constitutes normal administrative practice in a public office (which are presently in Schedule 1 to the Act) to be prescribed by the regulations,

- (d) to explicitly state that there is a presumption in favour of public access to State records that are at least 30 years old and to require public offices to have regard to that presumption when considering whether State records are to be open or closed to public access,
- (e) to provide that State records that are at least 30 years old and not the subject of an access direction are to be made available for public access unless a closed to public access direction (*a CPA direction*) is given in relation to them within 14 days (rather than the current 1 month) after an application for an open to public access direction (*an OPA direction*) for the records is made,
- (f) to require public offices to provide reasons for giving CPA directions if such reasons are requested by the Authority or by a person whose application for an OPA direction has been refused,
- (g) to provide for Ministerial review of access directions,
- (h) to explicitly provide for public offices to authorise early public access to State records, so that the provision of access is covered by the provision of the Act that protects the State, access providers and certain other persons from certain liability when access is given to a record under the Act,
- (i) to provide that the name “State Records NSW” will have the same legal effect as the corporate name of the State Records Authority,
- (j) to extend from 6 months to 2 years the limitation period applicable to prosecutions for unauthorised abandonment, disposal, transfer, removal from the State, damage, alteration or neglect of State records.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *State Records Act 1998* set out in Schedule 1.

Schedule 1 Amendments

Application of Act to certain State collecting institutions

The *State Records Act 1998* (*the Act*) contains special provisions for State collecting institutions. Private records in the collections of such institutions are not subject to the Act. Other records that came into their collections before the commencement of the Act are excluded from the operation of the provisions of the Act concerned with records management, control of State records not currently in use and public access to State records.

Schedule 1 [2] and [3] provide that the exclusion for records that came into their collection before the commencement of the Act does not apply to bodies that become State collecting institutions by being added by regulation to the definition of that term.

Power of Authority to provide certain services outside New South Wales

Section 19 (1) of the Act gives the Authority the power to provide services in all areas of records management. The services can be provided on a commercial basis.

Schedule 1 [4] removes any doubt that those services can also be provided outside this State.

Guidelines for normal administrative practice

Section 21 (2) of the Act provides that a person does not commit an offence of unauthorised abandonment, disposal, transfer, removal from the State, damage, alteration or neglect of a State record by doing anything in accordance with “normal administrative practice in a public office” within the meaning of section 22. Section 22 describes what is considered to be done in accordance with normal administrative practice and refers to Schedule 1 to the Act, which contains guidelines on some aspects of normal administrative practice. The guidelines do not limit what constitutes normal administrative practice.

Schedule 1 [5] provides for those guidelines to be prescribed by the regulations rather than be in Schedule 1 to the Act.

Schedule 1 [21] repeals the guidelines in Schedule 1 to the Act.

Public access to State records after 30 years

A State record is in the open access period if the record is at least 30 years old (see section 50 of the Act). Public offices are currently required to give access directions for all of the records for which they are responsible that are over 30 years old (see section 51 (1)). An access direction must be either a direction that records are open to public access (*an OPA direction*) or a direction that records are closed to public access (*a CPA direction*). If a State record is in the open access period and is not the subject of an access direction any person can apply to the public office responsible for the record for an OPA direction for the record and thus for access to it (see section 54).

Schedule 1 [6] adds to a note as a consequence of the proposed amendments to Part 6 of the Act.

Schedule 1 [7] expressly provides that there is a presumption that State records in the open access period should be open to public access.

Schedule 1 [8] requires a public office to have regard to the presumption that State records in the open access period should be open to public access when deciding what type of access direction to give.

Schedule 1 [9] provides that State records that are at least 30 years old are to be made available for public access unless a CPA direction is given in relation to them within 14 days (rather than the current 1 month) after an application for an OPA direction for the records is made.

Schedule 1 [12] requires a public office that gives a CPA direction for a State record to give its reasons for giving the direction to the Authority on request or to any person who has had an application for an OPA direction refused and who requests those reasons.

Schedule 1 [13] provides for the Authority to request a review of an access direction by the Minister responsible for the public office that gave it.

Schedule 1 [10] and [11] make consequential amendments.

Public office may give earlier public access

Schedule 1 [14] provides for the public office responsible for a State record that is not in the open access period to authorise early public access to the record and to notify the Authority that it has authorised that early public access. The proposed amendment does not limit the power of a public office to give access to a State record independently of the Act (see section 57 (6)). However, if access is given in accordance with the proposed amendment, the public office, its officers and certain other persons will be protected from liability to the extent provided by section 62 of the Act (subject to section 57 (4)).

Schedule 1 [15] requires a public office that authorises such access to first have regard to the principles established by section 52 of the Act.

Use of name “State Records NSW”

At present, section 63 (3) of the Act provides that the State Records Authority of New South Wales may also be called State Records and the use of that name has the same effect for all purposes as the use of its corporate name.

Schedule 1 [16] provides for the State Records Authority to also be called State Records NSW.

Limitation period on prosecutions for unauthorised disposal etc of records

Section 21 of the Act creates certain offences relating to the unauthorised abandonment, disposal, transfer, removal from the State, damage, alteration or neglect of a State record. As those offences are summary offences, there is a 6-month limitation period. That is, proceedings for an offence must be commenced no later than 6 months from the date the offence was alleged to have occurred (see section 179 of the *Criminal Procedure Act 1986*).

Schedule 1 [20] provides for a 2-year limitation period for offences under section 21 and retains the 6-month period for all other offences against the Act and for offences against the regulations.

Other amendments

Schedule 1 [1], [17] and [22] update references to a repealed Act.

Schedule 1 [18] clarifies the meaning of a term.

Schedule 1 [19] omits unnecessary words.

Schedule 1 [23] and [24] provide for the making of savings and transitional regulations consequent on the making of the proposed amendments.

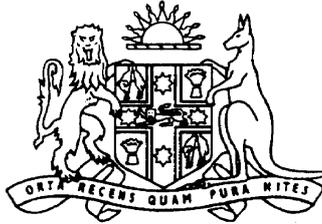
Schedule 1 [25] inserts savings and transitional provisions consequent on the making of the proposed amendments.

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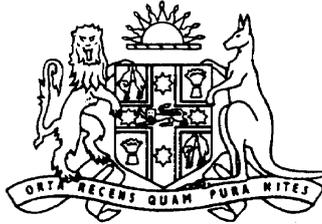
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No. , 2004

A Bill for

An Act to amend the *State Records Act 1998* to make further provision in relation to public access to State records, normal administrative practice, prosecutions and other matters; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *State Records Amendment Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of State Records Act 1998 No 17

The *State Records Act 1998* is amended as set out in Schedule 1.

Schedule 1	Amendments	1
	(Section 3)	2
[1]	Sections 3 (1), definition of “Director” and 68 and Schedule 2, clause 10 (1)	3 4
	Omit “Part 2 of the <i>Public Sector Management Act 1988</i> ” wherever occurring.	5
	Insert instead “Chapter 2 of the <i>Public Sector Employment and Management Act 2002</i> ”.	6 7
[2]	Section 3 Definitions	8
	Insert “(a <i>prescribed State collecting institution</i>)” after “institution” in paragraph (j) of the definition of <i>State collecting institution</i> in section 3 (1).	9 10
[3]	Section 5 Application of Act to State collecting institutions	11
	Insert “(other than a prescribed State collecting institution)” after “institution” where firstly occurring in section 5 (2).	12 13
[4]	Section 19 Records storage facilities and other services	14
	Insert at the end of section 19 (3) (c):	15
	, and	16
	(d) can be provided within and outside the State, including outside Australia.	17 18
[5]	Section 22 Normal administrative practice	19
	Omit “Schedule 1 contains guidelines on some aspects of” from section 22 (3).	20
	Insert instead “The regulations may prescribe guidelines on what constitutes”.	21
[6]	Section 50 Open access period for records	22
	Insert at the end of the note to the section:	23
	There is a presumption that a State record in the open access period should be open to public access but the public office responsible for the record can close the record to public access by giving a closed to public access direction (a CPA direction).	24 25 26 27
[7]	Section 51 Access direction must be given for records in the open access period	28 29
	Insert after section 51 (1):	30
	(1A) There is a presumption that State records in the open access period should be open to public access under this Act.	31 32

[8] Section 52 Deciding whether to open or close records to public access	1
Insert before section 52 (1):	2
(1A) When making an assessment as to whether records should be open or closed to public access under this Act, a public office must have regard to the presumption that State records in the open access period should be open to public access under this Act.	3 4 5 6 7
[9] Section 54 Application to open records to public access	8
Omit “1 month” from section 54 (3). Insert instead “14 days”.	9
[10] Section 55 Procedures for giving and revoking access directions	10
Omit “or” from section 55 (4) (a).	11
[11] Section 55 (4) (c)	12
Insert after section 55 (4) (b):	13
(c) in compliance with a direction of the responsible Minister under section 55A (3) (b).	14 15
[12] Section 55 (6)	16
Insert after section 55 (5):	17
(6) A public office that gives a CPA direction for a State record must give its reasons for giving the direction:	18 19
(a) to the Authority, if the Authority has requested that the public office give those reasons, and	20 21
(b) to any person who has had an application for an OPA direction for the record under section 54 refused by the giving of the CPA direction and who has requested that the public office give those reasons.	22 23 24 25
[13] Section 55A	26
Insert after section 55:	27
55A Review of access directions by responsible Minister	28
(1) The Authority may request the public office responsible for a State record that is the subject of an access direction to have the direction reviewed by the Minister responsible for the public office (<i>the responsible Minister</i>).	29 30 31 32
(2) Such a review is to be finalised within 3 months after the request is made by the Authority and may be carried out in consultation with the Authority.	33 34 35

- (3) The responsible Minister finalises the review by:
 - (a) confirming the access direction, or
 - (b) directing the public office to revoke the access direction and replace it with another access direction specified in the direction.

Note. For example, the responsible Minister’s direction could require that a CPA direction be replaced with an OPA direction, or with another CPA direction of a different duration.
 - (4) A public office must comply with a direction of the responsible Minister within 14 days. An access direction given in compliance with such a direction cannot be revoked except with the permission of the responsible Minister or the Authority.

Note. OPA directions remain in force until revoked. CPA directions remain in force for the period specified in the direction unless revoked or renewed sooner. The prohibition on revocation in subsection (4) does not prevent a CPA direction being renewed, or being given again after it has lapsed.
 - (5) If the review is not finalised within 3 months after the review was requested, or the responsible public office does not comply with a direction of the responsible Minister within 14 days after it is given, the access direction under review is revoked (with the result that there is no access direction for the records concerned). An access direction of the same kind as the revoked access direction cannot be given again for the records concerned without the permission of the Authority.

Note. The 2 *kinds* of access direction are an OPA direction and a CPA direction.
- [14] Section 57 Public office may authorise earlier public access**
- Omit “authorising the Authority to make the record available for public access” from section 57 (1).
- Insert instead “authorising early public access to the record under this Act and notifying the Authority that it has authorised that access”.
- [15] Section 57 (2A)**
- Insert after section 57 (2):
- (2A) In assessing whether to authorise early public access to State records under this Act, a public office is to apply the principles established by section 52 for an assessment under that section. The power conferred by subsection (1) is exercisable at the absolute discretion of the public office concerned and this subsection does not limit the exercise of that discretion.

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Schedule 1 Amendments

[16] Section 63 Establishment of the Authority	1
Omit “and the use of that name” from section 63 (3).	2
Insert instead “or State Records NSW and the use of either of those names”.	3
[17] Section 69 Establishment of Board	4
Omit “ <i>Public Sector Management Act 1988</i> ” wherever occurring from section 69 (2) (b) and (4).	5 6
Insert instead “ <i>Public Sector Employment and Management Act 2002</i> ”.	7
[18] Section 69 (4) (b)	8
Insert “to which Part 6.4 of that Act applies” after “authorities”.	9
[19] Section 78 Proceedings for offences	10
Omit “constituted by a Magistrate sitting alone”.	11
[20] Section 78 (2)	12
Insert at the end of section 78:	13
(2) Despite anything in the <i>Criminal Procedure Act 1986</i> , proceedings for an offence against section 21 may be commenced not later than 2 years from when the offence was alleged to have been committed.	14 15 16 17
Note. Section 179 of the <i>Criminal Procedure Act 1986</i> has the effect that proceedings for an offence against a section of this Act other than section 21, or for an offence against the regulations, may be commenced not later than 6 months from when the offence was alleged to have been committed.	18 19 20 21 22
[21] Schedule 1 Guidelines on some aspects of normal administrative practice	23 24
Omit the Schedule.	25
[22] Schedule 2 Provisions relating to constitution and procedure of the Board	26 27
Omit “Part 8 of the <i>Public Sector Management Act 1988</i> ” from clause 5 (1) (d).	28 29
Insert instead “Chapter 5 of the <i>Public Sector Employment and Management Act 2002</i> ”.	30 31

[23] Schedule 3 Savings and transitional provisions	1
Insert before clause 1:	2
Part 1 Savings and transitional regulations	3
1A Regulations	4
(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:	5
this Act	6
<i>State Records Amendment Act 2004</i>	7
(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.	8
(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:	9
(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or	10
(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.	11
Part 2 Provisions consequent on enactment of this Act	12
[24] Schedule 3, clause 10	13
Omit the clause.	14
[25] Schedule 3, Part 3	15
Insert in appropriate order:	16
Part 3 Provisions consequent on enactment of State Records Amendment Act 2004	17
11 Meaning of “amending Act”	18
In this Part, <i>amending Act</i> means the <i>State Records Amendment Act 2004</i> .	19
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12	Operation of amendment concerning provision of services	1
	The amendment of section 19 (3) by the amending Act is for the avoidance of doubt and accordingly is taken to have had effect from the commencement of section 19.	2 3 4
13	Application of amendment to existing applications to open records to public access	5 6
	The amendment of section 54 (3) by the amending Act does not apply to an application made under section 54 before the commencement of that amendment.	7 8 9
14	Validation concerning corporate name of Authority	10
	The use of the corporate name State Records NSW before the commencement of the amendment of section 63 made by the amending Act is as valid and effectual as it would have been had the amendment been in force at the time of use.	11 12 13 14
15	Limitation period for existing offences not affected	15
	Section 78 (2), as inserted by the amending Act, does not apply in relation to an offence that was committed or is alleged to have been committed before the commencement of that subsection.	16 17 18