

[Act 1998 No 17]



New South Wales

## State Records Bill 1998

### Explanatory note

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

#### Overview of Bill

The objects of this Bill are as follows:

- (a) to set down the general obligations of public offices of the State with respect to the creation, management, protection and preservation of their records, and
  - (b) to establish special measures for the protection of the public records of the State against neglect and unauthorised loss, destruction, damage, alteration or transfer, and
  - (c) to establish the State Records Authority with broad functions in respect of State records, including the function of developing and promoting efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of State records, and
  - (d) to confer on the Authority rights and obligations with respect to the control of State records that are no longer in use in the public office responsible for them, and
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- (e) to provide for the recovery of State records owned by the State that are outside the control of the State without lawful authority, and
- (f) to confer an entitlement to public access to those State records that are at least 30 years old and open to public access under the Act, and
- (g) to provide for miscellaneous matters, including the establishment of a Board of the Authority.

The Bill also repeals the *Archives Act 1960* and makes consequential amendments to various Acts, and contains provisions of a savings and transitional nature.

## Outline of provisions

### Part 1 Preliminary

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

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

**Clause 3** contains definitions and other interpretative provisions. Important definitions include:

***public office*** which is given a wide meaning that includes the following:

- (a) Government departments and like bodies including bodies established for a public purpose by Act,
- (b) local councils and county councils,
- (c) the Cabinet and the Executive Council,
- (d) the office and official establishment of the Governor,
- (e) the Houses of Parliament,
- (f) courts and tribunals,
- (g) State collecting institutions (the State Library and the *Art Gallery*, for example),
- (h) Royal Commissions and Commissions of Inquiry,
- (i) State owned corporations.

***State record*** which means 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.

*State archive* which means a State record that the Authority has control of under the Act.

**Clause 4** excludes Aboriginal relics from the operation of the Act.

**Clause 5** provides that the Act does not apply to private records in the collection of a State collecting institution and, except to the extent that the institution and the Authority otherwise agree, does not apply retrospectively to the existing collection of a State collecting institution.

**Clause 6** details what is meant by “control” of State records in the context of the Act.

**Clause 7** explains what is meant by the public office that is “responsible” for a State record.

**Clause 8** provides for a private body that is a successor to a public office to be regarded as a public office in respect of State records of the public office that come under its control.

## **Part 2      Records management responsibilities of public offices**

**Clause 9** provides that the Part does not apply to the Governor, the Houses of Parliament or courts and tribunals, except to the extent that they may agree with the Authority.

**Clause 10** imposes a duty on the CEOs of public offices to ensure compliance with the Act and the regulations.

**Clause 11** imposes general duties on public offices to ensure the safe custody and proper preservation of State records.

**Clause 12** requires public offices to make and keep records and institute a records management program in accordance with standards and codes of best practice under clause 13.

**Clause 13** provides for the approval by the Authority of standards and codes of best practice for records management by public offices.

**Clause 14** requires public offices to maintain accessibility to records that are dependent for their accessibility on particular equipment or technology.

**Clause 15** entitles the Authority to access to State records so that the Authority can monitor compliance with the Act and the regulations.

**Clause 16** provides for the Director-General of The Cabinet Office to be the CEO of certain public offices, such as the Cabinet, and enables the regulations to specify who the CEO is in certain other cases.

**Clause 17** provides a mechanism for the resolution of disputes that might occur between a public office and the Authority, including a review by the responsible Ministers and ultimately referral to the Premier.

**Clause 18** authorises the Authority to make special arrangements by agreement with a public office exercising inter-government functions.

**Clause 19** authorises the Authority to provide services in all aspects of records management.

**Clause 20** provides for the Authority to report any failure by a public office to comply with the Act or regulations.

### **Part 3 Protection of State records**

**Clause 21** prohibits certain actions with respect to State records, such as abandoning, disposing, selling, damaging, altering or neglecting a State record. The Authority can give permission for action that would otherwise be an offence under the provision. The section contains an exception for acts done in the course of normal administrative practice.

**Clause 22** provides for what is meant by “normal administrative practice”.

**Clause 23** prevents the Authority refusing permission for the sale of a State record in private ownership unless the Authority has first offered to buy the record at market value.

**Clause 24** requires the consent of the responsible public office before the Authority can consent to the disposal of a State record that is not yet a State archive (that is, a record that the Authority has taken control of because it is no longer in use in a public office).

**Clause 25** requires the Authority to consult with the Director-General of National Parks and Wildlife before permitting the disposal of a record concerning Aboriginal heritage.

### **Part 4 Authority entitled to control of State records not currently in use**

**Clause 26** provides that the Part does not apply to the Governor, the Houses of Parliament or courts and tribunals, except to the extent that they may agree with the Authority.

**Clause 27** entitles the Authority to control of any State record that is no longer in use for official purposes in the responsible public office.

**Clause 28** creates a presumption that once a State record is 25 years old it is no longer in use for official purposes unless the public office has made a *still in use determination* for the record.

**Clause 29** requires State records to be made available to the Authority when the Authority becomes entitled to control of them.

**Clause 30** explains how the Authority takes control of a record.

**Clause 31** provides that the Authority is not required to take control of a record just because it is entitled to do so.

**Clause 32** provides a mechanism by which a public office can require the Authority to take control of a record once it is 25 years old.

**Clause 33** provides that the Authority's entitlement to control a State record does not affect any other right or interest of some other person in the record.

**Clause 34** provides that a duty of secrecy or confidentiality does not prevent compliance with the requirements of the Part.

**Clause 35** entitles a public office to the return of a State record that is required for use. The right of return is usually a right to temporary custody of a copy of the record.

**Clause 36** imposes requirements on agreements and arrangements under which the Authority allows some other person to have possession or custody of a State archive, so that the archive is protected and still available for public access under the Act.

## **Part 5 Recovery of estrays and other State records**

**Clause 37** provides a definition of *estrays*, which means a State record that is owned by the State but is unlawfully outside the control of the responsible public office.

**Clause 38** creates a general presumption that a State record is owned by the State. The presumption is rebutted in certain circumstances.

**Clause 39** gives the Authority power to inspect a record that the Authority believes to be an estray.

**Clause 40** gives the Authority power to issue a direction to a person who has possession or custody of a record that the Authority believes is an estray, preventing the person from selling, disposing of or exporting the record.

**Clause 41** provides for the Authority to give directions to public offices for the recovery of estrays and to assist public offices to recover estrays.

**Clause 42** authorises the Authority to commence court proceedings for the recovery of an estray and to direct that possession of a record be given to the Authority pending the outcome of any such proceedings.

**Clause 43** provides that no limitation period is a bar to recovery of an estray.

**Clause 44** authorises the Authority to enter into an agreement with a person who has possession of an estray, for the purpose of ensuring the preservation, security and confidentiality of and public access to the record.

**Clause 45** provides for a court on the application of the Authority to order the transfer to the Authority of a State record that is in private hands and that the Authority considers to be of archival significance. The clause provides for the Authority to pay compensation to a person who suffers loss as a result of the transfer.

**Clause 46** authorises the Authority to issue directions for the protection of a record that is or is proposed to be the subject of an application under clause 45.

**Clause 47** authorises the Authority to acquire State records by purchase and otherwise.

**Clause 48** provides for the application of the Part outside New South Wales and for the application in New South Wales of the corresponding provisions of the laws of other Australian jurisdictions.

## **Part 6 Public access to State records after 30 years**

**Clause 49** provides that the Part does not apply to the Governor, the Houses of Parliament or courts and tribunals, except to the extent that they may agree with the Authority.

**Clause 50** provides that State records are *in the open access period* when they are at least 30 years old.

**Clause 51** requires public offices to give an access direction for all their records that are in the open access period. The direction can either be an open to public access direction or a closed to public access direction.

**Clause 52** provides for the basis on which public offices are to decide whether records in the open access period should be open or closed to public access.

**Clause 53** provides that a secrecy provision in another Act does not apply to prevent the giving of access to records in the open access period.

**Clause 54** provides a mechanism for a person to apply for an OPA direction for a record that is not the subject of any access direction.

**Clause 55** sets out the procedures for the giving and revoking of access directions.

**Clause 56** makes it clear that the fact that a State record is the subject of a closed to public access direction does not affect any entitlement to access under the *Freedom of Information Act*.

**Clause 57** authorises a public office to make State records available for public access under the Act even though they are not yet in the open access period.

**Clause 58** provides for the giving of special access, in accordance with arrangements approved by the Premier, to State records that are not otherwise open to public access under the Act.

**Clause 59** authorises the Authority to withhold State archives from public access under the Act if necessary for ensuring the safe custody and proper preservation of the record.

**Clause 60** provides for the procedures for the giving of access in accordance with the Act, including the means by which access will be given and the person responsible for giving the access.

**Clause 61** requires the Authority to keep a register of access directions in force under the Act.

**Clause 62** confers protections from liability in connection with the giving of access under the Act.

## **Part 7 The Authority and the Board**

**Clause 63** establishes the Authority as a body corporate with the full name of State Records Authority of New South Wales.

**Clause 64** provides that the Authority is subject to the direction and control of the Minister, except in respect of its functions under clause 21 (Protection measures).

**Clause 65** provides for the Authority to be managed and controlled by the Director in accordance with policies determined by the Board of the Authority.

**Clause 66** sets out a general statement of the principal functions of the Authority.

**Clause 67** allows the Authority to delegate its functions to certain approved persons.

**Clause 68** authorises the employment of public servants to staff the Authority.

**Clause 69** establishes a 9 member Board of the Authority.

**Clause 70** provides for the functions of the Board.

**Clause 71** provides that the Director is entitled to attend and participate (but not vote) at meetings of the Board.

## **Part 8      Miscellaneous**

**Clause 72** empowers the Authority to apply for an injunction to prevent a contravention of the Act.

**Clause 73** imposes a duty of confidentiality on persons who acquire information in the course of exercising functions under the Act.

**Clause 74** protects persons engaged in the administration of the Act from personal liability for acts and omissions in good faith.

**Clause 75** confers certain functions on the Authority with respect to the copying and publishing of State archives.

**Clause 76** allows the Attorney General to authorise the Authority to exercise Crown copyright in a State archive.

**Clause 77** authorises the Authority to issue a conclusive certificate as to the loss or destruction of a State record.

**Clause 78** provides for proceedings for offences to be taken in a Local Court.

**Clause 79** gives effect to the Schedule of savings and transitional provisions (Schedule 3).

**Clause 80** repeals the *Archives Act 1960* and gives effect to the Schedule of consequential amendments to other Acts (Schedule 4).

**Clause 81** provides a general regulation making power.

**Clause 82** provides for a review of the Act by the Minister after 5 years.



## **Schedules**

**Schedule 1** contains guidelines on some aspects of normal administrative practice.

**Schedule 2** provides for the constitution and procedure of the Board.

**Schedule 3** contains savings and transitional provisions.

**Schedule 4** makes consequential amendments to various Acts.